

# The application of the EU Charter of Fundamental Rights to asylum procedural law





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## Foreword

With the entry into force of the Treaty of Lisbon in December 2009, the Charter of Fundamental Rights of the European Union (“the Charter”) became a legally binding instrument. The Charter’s most important role is that it reinforces the necessity of interpreting secondary EU law in light of fundamental rights. The Charter, like general principles of law, now serves as an aid to interpret secondary EU law; similarly national law falling within the scope of EU law must also be read in light of the Charter.

Given the binding character of the Charter, asylum practitioners can use its standards to enhance the protection afforded to those who are seeking international protection. It can also help achieve a proper interpretation of the relevant EU asylum Regulations and Directives.

This booklet came about after realising that more practical guidance was needed on how to effectively utilise the standards of the Charter in the area of asylum. Our ultimate aim is to increase the understanding and use of the Charter in asylum procedural law. This booklet is published as part of the FRAME project, which seeks to increase the use of the Charter in asylum and migration cases.

It is designed to assist legal practitioners supporting those who are in need of international protection, NGO’s, immigration officials and those working with national authorities as well as the judiciary. The booklet seeks to provide an overview of secondary legislation relevant in the context of the asylum procedure and explain how the Charter can be used to interpret these provisions. As the Court of Justice of the European Union (CJEU) is engaged in interpreting secondary EU legislation, its case law is also discussed. The meaning and scope of Charter rights are the same as those set out in the ECHR, but it shall not prevent the Charter from providing a more extensive protection. Therefore the case law of the European Court of Human Rights (ECtHR) is also covered.

Improving the understanding as to how the standards of the Charter can be used in asylum proceedings is essential for the proper implementation of the EU asylum *acquis* and ultimately to ensure that the rights of those seeking international protection are respected. It is hoped that this Booklet will contribute towards ensuring these objectives. We would like to thank Sannah Hubel (trainee Judge at the District Court of Amsterdam), Steve Peers (Professor of the University of Essex, school of law) and Flip Schüller (lawyer at Prakken d'Oliveira Human Rights Lawyers) as well as many staff members of the ECRE Secretariat for their comments on earlier drafts of the Booklet.

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<b>Foreword</b> .....	<b>2</b>
<b>How to use this booklet</b> .....	<b>10</b>
<b>1. The EU Charter of Fundamental Rights – An overview</b> .....	<b>13</b>
1.1 Introduction.....	13
1.2 Relevance of the Explanations to the Charter of Fundamental Rights and case law from the Court of Justice of the European Union and the European Court of Human Rights .....	13
1.3 The content of the Charter of Fundamental Rights of the European Union.	14
1.4 Fundamental rights and general principles of EU law .....	15
1.5 Other principles in EU law .....	15
1.6 The function of fundamental rights and general principles.....	16
1.7 The scope of the Charter of Fundamental Rights of the European Union..	17
1.8 The legal effect of the Charter of Fundamental Rights .....	18
1.9 Protocol (No. 30) on the application of the Charter to Poland and the United Kingdom .....	18
1.10 Protocols No. 21 and No. 22 .....	19
1.11 The relationship with the European Convention on Human Rights.....	20
1.12 Relevance of the views of UNHCR .....	21
1.13 Example of case law (relevant to asylum and refugee law) in which the CJEU extended fundamental rights protection with reference to the EU Charter of Fundamental Rights.....	21
<b>2. The role of the national court and the Court of Justice of the European Union</b> .....	<b>23</b>
2.1 Introduction.....	23
2.2 The preliminary reference procedure .....	24
2.2.1. Final courts of appeal and other national courts.....	24
2.2.2 Acte éclairé .....	25
2.2.3 Acte clair .....	25
2.2.4 The principle of national procedural autonomy .....	25
2.2.5 Effective legal protection .....	26
2.2.6 The right to effective judicial protection and national procedural rules.....	29
<b>3. Access to the territory and to the asylum procedure</b> .....	<b>31</b>
3.1 Access to the territory .....	31
3.1.1. EU legislation .....	32
3.1.2. Relevant EU fundamental rights and principles.....	35
3.1.3. Case law .....	38
3.2. Access to the asylum procedure .....	39
3.2.1. EU legislation.....	39
3.2.2. Relevant EU fundamental rights and principles .....	41
3.2.3. Case law.....	42
<b>4. The right to remain on the territory of an EU Member State</b> .....	<b>45</b>
4.1 The right to remain during the examination of the asylum claim.....	45
4.1.1 EU legislation .....	45

4.1.2	Relevant EU fundamental rights and principles .....	46
4.1.3	Case law .....	47
4.1.4	Other relevant sources .....	48
4.1.5	Conclusion .....	48
4.2	The right to remain during the time necessary to lodge the appeal .....	49
4.2.1	EU legislation .....	49
4.2.2	Relevant EU fundamental rights and principles .....	49
4.2.3	Case law .....	49
4.2.4	Other relevant sources .....	50
4.2.5	Conclusion .....	50
4.3	The right to remain during the appeal phase .....	51
4.3.1	EU legislation .....	51
4.3.2	Relevant EU fundamental rights and principles .....	52
4.3.3	Case law .....	52
4.3.4	Other relevant sources .....	54
4.3.5	Conclusion .....	54
<b>5.</b>	<b>The right to legal assistance, legal representation and legal aid .....</b>	<b>55</b>
5.1	The right to legal assistance, legal representation and legal aid .....	55
5.1.1	EU legislation .....	56
5.1.2	Relevant EU fundamental rights and principles .....	60
5.1.3	Case law .....	61
5.1.4	Conclusion .....	66
<b>6.</b>	<b>The right to a personal interview .....</b>	<b>69</b>
6.1	The right to a personal interview .....	70
6.1.1	EU legislation .....	70
6.1.2	Relevant EU fundamental rights and principles .....	72
6.1.3	Case law .....	73
6.1.4	Other relevant sources .....	74
6.1.5	Conclusion .....	75
6.2	Language of the interview and the right to a free and competent interpreter .....	75
6.2.1	EU legislation .....	75
6.2.2	Relevant EU fundamental rights and principles .....	76
6.2.3	Case law .....	76
6.2.4	Other relevant sources .....	77
6.2.5	Conclusion .....	77
6.3	The right to (comment on) a written report of the interview .....	77
6.3.1	EU legislation .....	77
6.3.2	Relevant EU fundamental rights and principles .....	79
6.3.3	Case law .....	80
6.3.4	Other relevant sources .....	80
6.3.5	Conclusion .....	81
6.4	The right to an oral hearing before the court or tribunal .....	81
6.4.1	EU legislation .....	81

6.4.2. Relevant EU fundamental rights and principles .....	81
6.4.3 Case law .....	82
6.4.4 Other relevant sources .....	83
6.4.5 Conclusion .....	83
<b>7. Time-limits in the asylum procedure .....</b>	<b>85</b>
7.1. Short time-limits in first instance asylum procedures .....	85
7.1.1 EU legislation .....	86
7.1.2 Relevant EU fundamental rights and principles .....	88
7.1.3 Case law .....	88
7.1.4 Other relevant sources .....	94
7.1.5 Conclusion .....	94
7.2 Short time-limits in appeal procedures .....	94
7.2.1 EU legislation .....	94
7.2.2 Relevant EU fundamental rights and principles .....	95
7.2.3 Case law .....	95
7.2.4 Other relevant sources .....	97
7.2.5 Conclusion .....	97
7.3 Lengthy asylum procedures .....	97
7.3.1 EU legislation .....	97
7.3.2 Relevant EU fundamental rights and principles .....	99
7.3.3 Case law .....	99
7.3.4 Conclusion .....	101
<b>8. The standard and burden of proof .....</b>	<b>103</b>
8.1 The standard of proof .....	103
8.1.1 EU legislation .....	104
8.1.2 Relevant EU fundamental rights and principles .....	104
8.1.3 Case law .....	104
8.1.4 Other relevant sources .....	106
8.1.5 Conclusion .....	106
8.2 Burden of proof .....	107
8.2.1 EU legislation .....	107
8.2.2 Relevant EU fundamental rights and principles .....	107
8.2.3 Case law .....	108
8.2.4 Other relevant sources .....	111
8.2.5 Conclusion .....	111
8.3 The burden of proof: duty to produce evidence/the duty to investigate .....	112
8.3.1 The duty to cooperate .....	113
8.3.2 Duty to gather country of origin information .....	114
8.3.3 Duty to ask for an expert medical report .....	116
8.3.4 Duty to gather evidence which is accessible to the State but not to the applicant .....	119
8.4 The use of presumptions .....	120
8.4.1 EU legislation .....	121
8.4.2 Relevant EU fundamental rights and principles .....	121



8.4.3 Case law.....	121
8.4.4 Other relevant sources.....	123
8.4.5 Conclusion.....	124
<b>9. Evidentiary assessment: what evidence needs to be taken into account? .</b>	<b>125</b>
9.1 Evidentiary assessment.....	125
9.1.1 EU legislation.....	125
9.1.2 Relevant EU fundamental rights and principles.....	126
9.1.3 Case law.....	126
9.1.4 Other relevant sources.....	129
9.1.5 Conclusion.....	129
9.2 Country of origin information.....	129
9.2.1. EU legislation.....	130
9.2.2 Relevant EU fundamental rights and principles.....	130
9.2.3 Case law.....	130
9.2.4 Other relevant sources.....	133
9.2.5 Conclusion.....	134
9.3 Medical reports.....	134
9.3.1 EU legislation.....	134
9.3.2 Relevant EU fundamental rights and principles.....	135
9.3.3 Case law.....	135
9.3.4 Other relevant sources.....	137
9.3.5 Conclusion.....	137
<b>10. The right to an appeal of an asylum decision.....</b>	<b>139</b>
10.1 The right of access to an effective remedy.....	140
10.1.1. EU legislation.....	140
10.1.2 Relevant EU fundamental rights and principles.....	141
10.1.3 Case law.....	142
10.1.4 Other relevant sources.....	145
10.1.5 Conclusion.....	145
10.2 The right to an appeal before a court or tribunal.....	146
10.2.1. EU legislation.....	146
10.2.2 Relevant EU fundamental rights and principles.....	146
10.2.3 Case law.....	146
10.2.4 Other relevant sources.....	151
10.2.5 Conclusion.....	151
10.3 The scope and intensity of review.....	152
10.3.1 EU Legislation.....	152
10.3.2 Relevant EU fundamental rights and principles.....	152
10.3.3 Case law.....	153
10.3.4 Other relevant sources.....	158
10.3.5 Conclusion.....	158
10.4 Ex nunc judicial review by national courts or tribunals?.....	159
10.4.1 EU legislation.....	159
10.4.2 Relevant EU fundamental rights and principles.....	160

10.4.3 Case law.....	160
10.4.4 Other relevant sources.....	162
10.4.5 Conclusion.....	162
10.5 The use of secret information.....	163
10.5.1 EU Legislation.....	163
10.5.2 Relevant EU fundamental rights and principles.....	164
10.5.3 Case law.....	165
10.5.4 Other relevant sources.....	170
10.5.5 Conclusion.....	170
10.6 The right to a reasoned judgment.....	171
10.6.1 EU Legislation.....	171
10.6.2 Relevant EU fundamental rights and principles.....	172
10.6.3 Case law.....	172
10.6.4 Other relevant sources.....	173
10.6.5 Conclusion.....	173
<b>11. The examination of new elements and findings in appeal proceedings and subsequent asylum applications.....</b>	<b>175</b>
11.1. Assessment by the determining authority of a subsequent application.....	175
11.1.1 EU legislation.....	176
11.1.2 Relevant EU fundamental rights and principles.....	180
11.1.3 Case law.....	180
11.1.4 Conclusion.....	184
<b>Annex I Table of EU legislation.....</b>	<b>185</b>



## How to use this booklet

The focus of the booklet is on asylum procedural guarantees and how the Charter can be applied to asylum procedural law. One of the reasons for this limited focus is that many of the rights and principles contained in the Charter that are applicable to asylum procedural law have been applied to other areas of law for many years. As a result, there is a wealth of CJEU and ECtHR case law that would not ordinarily be relied upon to draw from. As a result, other substantive issues such as detention and reception conditions are not covered.

A thorough understanding of procedural guarantees is essential for ensuring the full respect of EU asylum law. One of the most crucial Charter provisions in this regard is Article 47 which deals with the right to an effective remedy and to a fair trial and therefore this provision is examined to a large extent throughout the booklet.

The booklet is drafted by three experts on European and asylum law, Dr. Gunnar Beck (EU lawyer and legal theorist at the University of London), Nuala Mole (founder of the AIRE Centre) and Dr. Marcelle Reneman (Assistant Professor at the VU University Amsterdam).

The booklet includes two introductory sections that set out the content, scope and legal effects of the Charter and other relevant fundamental rights and principles. It then goes on to explain the role of the CJEU and national courts in the application and interpretation of EU law. Following from this there are nine sections covering the following issues:

- Access to the territory and to the asylum procedure
- The right to remain on the territory
- Legal assistance, representation and legal aid
- The right to a personal interview
- Time-limits in the asylum procedure
- The standard and burden of proof
- Evidentiary assessment
- The right to an appeal of an asylum decision
- The examination of new elements and findings in subsequent applications

Each section begins with an explanation of the relevance of the issue for the asylum procedure and presents the applicable secondary EU legislation. This is then assessed in light of the relevant fundamental rights and principles as well as the case law of both the CJEU and the ECtHR. Where there are other relevant sources, such as UNHCR guidelines, these are also cited. When applicable, there is a conclusion which brings together the content of the relevant rights, principles and case law and what this means for the topic at hand.

This booklet does not intend to provide an exhaustive analysis of any of the issues discussed. It is intended to be a first point of reference when framing argumentation on the basis of the Charter and general principles of EU law. As a result, relevant further readings are listed at the end of most sections.



# 1 The EU Charter of Fundamental Rights – An overview

*Gunnar Beck*

## 1.1 Introduction

With the entry into force of the Treaty of Lisbon in December 2009, the Charter of Fundamental Rights of the EU was pronounced as a binding bill of rights for the European Union.<sup>1</sup> When it was first drawn up in 1999-2000, its original objective was to consolidate fundamental rights that are applicable at the EU level into a single text.<sup>2</sup> Article 6 TEU (Treaty on European Union) now grants it the same legal status as the Treaties themselves.<sup>3</sup> This means that, within the framework of EU law, it has a higher normative status than all EU legislation adopted under the Treaties and all national laws implementing Union law.<sup>4</sup> As a result, a provision of EU legislation or national law is invalid if it breaches the Charter. Given that the Charter is now primary law, it reinforces the necessity of interpreting EU law in light of fundamental rights.

## 1.2 Relevance of the Explanations to the Charter of Fundamental Rights and case law from the Court of Justice of the European Union and the European Court of Human Rights

The Charter is a self-standing document; however, it should be read together with the *Explanations to the Charter of Fundamental Rights*.<sup>5</sup> The Explanations refer to the source of the rights contained in the Charter and serve as an aid to their interpretation.<sup>5</sup> In addition, reference has to be made to the evolving

1 European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1.

2 Presidency Conclusions of the Cologne European Council, June 1999, para. 44.

3 Article 6(1) of the Treaty on European Union (TEU), European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01

4 See Article 6 TEU.

5 Official Journal of the European Union (OJEU). 14.12.2007, No C 303. [s.l.]. ISSN 1725-2423.

“Explanations relating to the Charter of Fundamental Rights”, p. 17-35,  
url:<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?>

6 See Article 52 para 7.

case law of the Court of the Justice of the EU (CJEU).<sup>7</sup> As mentioned in the Charter Explanations, Article 52 (3) of the Charter is intended to ensure consistency between the Charter and the European Convention on Human Rights (ECHR). It provides that where Charter rights correspond to rights guaranteed by the ECHR, the meaning and scope of Charter rights are the same as those laid out in the ECHR. The explanations to the Charter provide that this includes the case law of the European Court of Human Rights (ECtHR). According to the explanations the derogations and limitations clauses should also be interpreted in the same way.

### 1.3 The content of the Charter of Fundamental Rights of the European Union

The Charter contains 54 Articles grouped into seven Chapters. The first six Chapters enumerate the substantive rights under the headings: dignity, freedoms, equality, solidarity, citizens' rights and justice, while the last Chapter contains four horizontal clauses which govern the interpretation and application of the Charter. Most of the content of the Charter is based on the ECHR, the European Social Charter, the case-law of the CJEU and pre-existing provisions of European Union law.

The first Chapter, 'dignity', guarantees the right to life and prohibits torture, slavery, the death penalty, eugenic practices and human cloning.

The second Chapter, 'freedom', covers amongst others: the right to: liberty and security, respect for private and family life, freedom of thought, conscience and religion, freedom of expression and information and personal integrity, privacy and the right to asylum.

The third Chapter, 'equality', contains the right to equality before the law, the prohibition of all discrimination, including on the basis of sex, race, ethnic or social origin and political or any other opinion. This title also includes the rights of the child and the rights of the elderly.

The fourth Chapter, 'solidarity' covers social and workers' rights including the right to fair working conditions, protection against unjustified dismissal, and access to health care, social and housing assistance.

The fifth Chapter, 'citizens rights' includes several administrative rights such as the right to good administration and the right of access to documents.

The sixth Chapter, 'justice', includes the right to an effective remedy and to a fair trial, the presumption of innocence and right of defence as well as the principles of legality, and proportionality of criminal offences and penalties.

The seventh Chapter contains the articles which refer to the interpretation and application of the Charter.

<sup>7</sup> There is no formal doctrine of precedent in EU law. The Court of Justice of the EU nevertheless rarely openly departs from its previous decisions where these are clear and sufficiently fact-specific. This means that in practice the doctrine of precedent applies.



## 1.4 Fundamental rights and general principles of EU law

The Charter codifies the fundamental rights that have already been established. Article 6 TEU, however, suggests that it is open to the CJEU to recognise other fundamental rights that are not mentioned in the EU Treaties, the Charter or the ECHR as general principles of European Union Law.

General principles of EU law remain largely judge-made although some are mentioned in the Treaties. The source of general principles can be found in Article 6(3) TEU. General principles were originally developed by the CJEU as the main source of human rights protection in EU law, until the Charter came into being. Some of the most important general principles relevant to refugee law are proportionality, legal certainty, legitimate expectations, non-discrimination and procedural justice. The CJEU may from time to time recognise new general principles, although in practice this is only likely if it either has become widely accepted in international law or in the constitutions of the Member States.

## 1.5 Other principles in EU law

It is important to note that, in addition to 'general principles', there are other 'principles' in EU law. Such principles include the principle of conferral, the principle of subsidiarity, and the principle of sincere cooperation. These principles primarily serve as grounds for review of Union legislation or, in case of the principle of sincere cooperation, as a ground for the review of national legislation alleged to be in breach of Union law. These principles differ from the general principles of Union law in so far as they primarily concern litigation involving competence disputes between the EU and its Member States and/or issues concerning the conformity of national legislation implementing EU law with EU secondary legislation.

The EU and national courts may also use the principle of sincere cooperation as an aid to interpret EU and national legislation within the scope of Union law. In asylum cases, for instance, the principle of sincere cooperation may be relied upon to ensure a harmonious interpretation of provisions of EU law throughout the Member States or to advance an expansive interpretation of the scope of Union law provisions in the event of conflicting national provisions. A harmonious interpretation of Union law is one where national legislation is interpreted in a way which is compatible with the meaning of the underlying EU legislation or with Treaty or Charter Articles even when that meaning is not the most obvious or natural in the light of the wording of the national implementing law. In cases where the underlying Union legislation appears to offer greater protection than national implementing measures, practitioners may plead the principle of sincere cooperation in support of the proposition that any ambiguities in the national implementing legislation should be construed so as to conform to that standard of protection intended by Union law.

## 1.6 The function of fundamental rights and general principles

Fundamental rights and general principles of EU law share two key functions in the EU legal order: firstly, the interpretation of EU law and the national implementing legislation must comply with fundamental rights and the general principles of the EU legal order.<sup>8</sup> Secondly, a breach of a fundamental right and/or a general principle of EU law can be a ground for a judicial review by the EU courts in accordance with Article 263 TFEU (Treaty on the Functioning of the EU)<sup>9</sup> if the applicant is privileged, i.e. an EU institution, a Member State or directly and individually concerned by a measure adopted at EU level. Alternatively, in the vast majority of cases involving a possible breach of a fundamental right or principle, the validity of a legal act may initially be challenged in the national courts under Article 267 TFEU, although only the CJEU has authority to declare a Union act invalid. This means that the CJEU alone can review, and invalidate, EU secondary legislation for non-compliance with Charter rights. In the *Test Achats* case,<sup>10</sup> for example, the CJEU annulled a provision of Directive 2004/113/EC of the European Union which permitted sexual discrimination in the provision of insurance services provided that it was based on 'relevant and accurate actuarial and statistical data'. The ruling was based on the incompatibility of the relevant provision with Article 21 (Non-discrimination) and Article 23 (Equality between men and women) of the Charter.<sup>11</sup>

In cases involving a possible breach of the Charter, asylum practitioners should plead that a provision of EU asylum legislation, or a national measure implementing EU law, is invalid because it is incompatible with the Charter and ask the national court to make a reference to the CJEU unless the answer is clear and the breach of the Charter is obvious. In such cases, any national court has the power to set aside national law and should be asked to do so. Alternatively, where the answer is not clear and the provision is capable of being read in more than one way and only one of which complies with the Charter, practitioners should remind the national court of its obligation wherever possible, to interpret secondary legislation in a manner that is compatible with EU primary law, including the Charter. The power of national courts to refer questions involving the interpretation of the Union law including the Charter is unaffected by any obligation under national law to refer such questions to the national constitutional court where the questions also raise issues involving national constitutional law.<sup>12</sup> That power to refer questions which simultaneously engage Union and

8 See e.g. CJEU (joined cases) C-402/05 P and C- 415/05 *Yassin Abdullah Kadi v. Council of the European Union P, Al Barakaat International Foundation v Council of the European Union*, 3 September 2008, para's 281-286 and 302-308.

9 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

10 CJEU, Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL and Others*, 1 March 2011, para 32.

11 The practical result of the decision was the prohibition of sexual discrimination in insurance policies.

12 CJEU Case C-112/13 *A v B and Others*, 11 September 2014, para 28 -46, paras. 37-39.

national constitutional law becomes an obligation in situations where there lies no further appeal against the national court.

### 1.7 The scope of the Charter of Fundamental Rights of the European Union

Article 51 (1) of the Charter provides that the Charter applies to the institutions and bodies of the Union and to Member States only when they are implementing EU law. Article 52 (1) of the Charter further provides that '[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

The Charter does not apply to national law which is not implementing Union law or extend the Union's legislative competences into areas of law outside the scope of the powers conferred by national governments on the EU in the EU Treaties. As most of asylum law is an area of EU competence, national asylum legislation will commonly be regarded as implementing Union law, and the Charter consequently applies.

In *Akerberg Fransson*, the CJEU equated 'implementation' of EU law to 'falling within the scope of' EU law. To state it differently, the Charter is only applicable in instances where EU law is applicable.<sup>13</sup> The CJEU also looked at this issue in *N.S. v UK and Ireland*.<sup>14</sup> One of the questions posed to the CJEU was whether a Member State's decision to examine a claim for asylum which is not its responsibility on the basis of Article 3 (2) Dublin Regulation falls within the scope of EU law for the purposes of Article 6 TEU and/or Article 51 of the Charter. The CJEU found that the discretionary element of Article 3 (2) formed part of the Dublin II Regulation and in turn, part of the the Common European Asylum System (CEAS). Therefore, a Member State that exercises that discretionary power must be considered to be implementing EU law within the meaning of Article 51 of the Charter.

The following categories can be said to fall within the scope of European Union law:

- Measures implementing EU law
- Any national measure that negatively affects any of the individual rights guaranteed by EU law;<sup>15</sup>

13 CJEU, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013 and see CJEU, case C-300/11 (Grand Chamber), *ZZ v. Secretary of State for the Home Department*, 4 June 2013, para 51.

14 CJEU (Joined Cases) Case C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department, and M. E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, para 68.

15 CJEU, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimitiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 18 June 1991, CJEU, Case C-390/12, *Robert Pflieger, Autoart as, Mladen Vucicevic, Maroxx Software GmbH, Hans-Jörg Zehetner*, 30 April 2014.

It covers national measures, which Member States may seek to justify on the basis of a specific derogation clause under the Treaty<sup>16</sup> or EU legislation.

When a Member State derogates from a substantive provision of EU law, it is still implementing EU law given that the derogations must always meet the provisions imposed by EU law. In *ERT v. DEP*, the CJEU held that national law must respect fundamental rights where it derogates from EU law.<sup>17</sup>

In asylum law, national legislation will seldom overlap with areas that fall outside the scope of EU law so issues arising from the scope of the Charter may have limited application in asylum cases. At the same time, the CJEU's expansive interpretation of the phrase 'implementing Union law' serves as a powerful reminder of its basic integrationist presupposition, i.e. its tendency, in cases of doubt, to take an expansive rather than a restrictive view of the scope of Union law.

### 1.8 The legal effect of the Charter of Fundamental Rights

Where a national law violates the Charter, the national court is obliged *either* to set aside the offending provision of its own initiative because the answer is clear or has already been clarified by the CJEU, *or* to refer the issue to the CJEU. In the event of a breach the Member State concerned will be obliged to bring national legislation into line with Union law including CJEU judgments. Alternatively, if an act of Union law infringes the Charter, the CJEU is obliged to annul the offending provision and should be asked to do so. The national court which has no power to annul Union acts should be asked to refer the case to the CJEU. Where a Union act or a national provision is capable of bearing two or several interpretations, the national court must interpret national legislation in a way which complies with the Charter, and the CJEU will do the same unless it decides to annul the Union act. Where the CJEU annuls a Union act or a particular provision thereof, it may allow the annulment to take effect only after expiry of an appropriate transition period to allow Member States to amend national implementing legislation.<sup>18</sup>

### 1.9 Protocol (No. 30) on the application of the Charter to Poland and the United Kingdom

Protocol No. 30 explicitly preserves the legal position of Poland and the United Kingdom in so far that no rights may be derived from the Charter which may

16 See for example, Article 52 (1) TFEU: 'The provisions of this Chapter [on the right of establishment] and measure taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.

17 CJEU Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 18 June 1991.

18 CJEU Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL v Council*, 11 March 2011, paras 32-34.

then be construed as self-standing provisions applicable in any areas of law (whether falling under EU Law or not).<sup>19</sup> The CJEU interpreted the meaning of Protocol No 30 in the *N.S. and M.E* case.<sup>20</sup> The CJEU confirmed that the Charter:

‘does not create new rights or principles and that ‘Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol.’ In the CJEU’s view ‘Article 1 (1) of Protocol (No. 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the UK and Poland from their obligation to comply with the provisions of the Charter or to prevent a court of one of the Member States from ensuring compliance with those provisions’.<sup>21</sup>

### 1.10 Protocols No. 21 and No. 22

Protocol No. 21 exempts the UK and Ireland from measures adopted in the area of freedom, justice and security. They may, however, participate on an opt-in basis considering each measure on its merits.

Protocol No. 22 states that Denmark shall not take part in Union measures in the area of freedom, justice and security, but Articles 3 and 4 of the Annex to the Protocol allows Denmark to opt-in should they so choose.

The general position in Union law is that the Charter only applies to Member States when they implement or apply EU Law. Member States are deemed to implement Union law and to be acting within its scope even when they are derogating from EU measures, but an opt-out is not a derogation. Article 2 of both Protocols suggests that measures in the area of freedom, justice and security, unless opted into, as provided for by Protocol 21 for both the UK and Ireland, shall ‘not form part of Union law’ as they apply to the UK, Ireland or Denmark. The Charter will not therefore apply to Denmark’s own national legislation on asylum.

Article 2 in both Protocols also states that the opt-outs shall not affect the ‘Union *acquis*’. In relation to Ireland and the UK, this means that both countries are still bound by EU asylum legislation which they opted into before the entry into force of the Treaty of Lisbon and that the Charter continues to apply to pre-Lisbon asylum legislation opted into until they expire or are repealed. As Denmark did not participate in most Common European Asylum System before

19 CJEU (joined cases), opinion of Advocate General *Trstenjak*, Case Case C-411/10, *N. S. v. Secretary of State for the Home Department, Case C-493/10 and M. E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 22 September 2011, para 169.

20 CJEU, (Joined Cases) C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011

21 *Ibid*, paras 119 and 120.

2009, the Charter does not apply to pre-2009 Danish legislation just as it does not apply to most post-2009 Danish asylum law.<sup>22</sup>

### 1.11 The relationship with the European Convention on Human Rights

Most of the rights contained in the Charter have their origin in the ECHR. Articles 52 and 53 of the Charter lay down the general provision for the interpretation of the rights contained in the Charter. The central provision is Article 52 (3) which is designed to ensure consistency in the interpretation of the Charter and the ECHR. It states:

'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

Article 52 (3) provides that the level of protection granted by a Charter right can never be lower than that guaranteed by the ECHR, at the same time it does not prevent the Charter from offering more extensive protection.

Some Charter Articles simply replicate ECHR Articles, sometimes with minor modifications. For example, the text of Article 3 ECHR (Prohibition of torture) is replicated in Article 4 of the Charter whilst Article 7 (Respect for private and family life) of the Charter reproduces Article 8 (1) ECHR except that 'correspondence' is replaced with 'communications'. It is too early to evaluate the legal effect of discrepancies in the language between the Charter and ECHR Articles. In practice, lawyers will argue in favour of a corresponding, or, where appropriate, expansive interpretation of the Charter rights with due regard both to the ECHR and the Charter as 'living instruments' which must be construed in the light of changing technological possibilities, new factual scenarios and changing social mores.

Other Charter Articles are drafted more broadly than their ECHR equivalents and thus potentially offer wider protection. Article 21 of the Charter (Non-discrimination) goes further than Article 14 ECHR (Prohibition of discrimination) because of the Union prohibition on discrimination on the grounds of nationality. EU citizens cannot therefore be treated as third country nationals by other Member States. In addition, Article 14 ECHR only applies to ECHR rights, whereas Article 21 Charter applies to all EU law. The right to a fair trial under Article 47 of the Charter is not limited, as under Article 6 ECHR, to disputes concerning civil rights and obligations or criminal charges. This means that rights derived from the case law of Article 6 ECHR also apply to asylum cases.<sup>23</sup> Some of the more broadly drafted Charter rights also specifically extend the protection afforded, for example the prohibition on slavery and forced labour derived from Article 4

<sup>22</sup> Except for the Dublin II Regulation and the Eurodac rules.

<sup>23</sup> For further information see Section 2.2.6

ECHR expressly prohibits trafficking in human beings in Article 5 of the Charter. The Explanations clarify that it is not only the rights as set down by the ECHR that are to correspond to the equivalent Charter provision, but that the CJEU must give due regard to the jurisprudence of the ECtHR. Therefore, it is insufficient to simply refer to the ECHR, and as a result, the CJEU is more likely to refer to Strasbourg jurisprudence when interpreting corresponding rights.<sup>24</sup> Where the Charter replicates the wording of the corresponding ECHR Article exactly or with minor modifications, Article 52 (3) EU Charter suggests that the CJEU should follow the jurisprudence of the ECtHR to the extent that it must offer at least the same level of protection.

### 1.12 Relevance of the views of UNHCR

According to the recital 4 of the recast Qualification Directive,<sup>25</sup> the 1951 Refugee Convention, together with its Protocol provides the cornerstone of the international legal regime that offers protection to refugees. In accordance with Article 35 (1) of the 1951 Refugee Convention, the United Nations High Commissioner for Refugees (UNHCR) is charged with the task of supervising international conventions providing for the protection of refugees. Therefore, the views of UNHCR when interpreting the Refugee Convention are highly relevant. In accordance with Article 35 (1) of the Refugee Convention, States, who are party to the Convention, must cooperate with UNHCR in the exercise of its function, and shall, in particular, facilitate its duty of supervising the application of the provisions contained therein. UNHCR also has a direct interest in and competence to interpret EU law.<sup>26</sup> For example, recital 22 of the recast Qualification Directive states ‘consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention’. Given their important role, reference is also made in the Booklet to the views expressed by UNHCR. Some of the Advocate General opinions extensively refer to UNHCR materials.<sup>27</sup>

### 1.13 Example of case law (relevant to asylum and refugee law) in which the CJEU extended fundamental rights protection with reference to the EU Charter of Fundamental Rights

In *MA and others*,<sup>28</sup> the CJEU held that Member States, when examining minors’ asylum applications, have to take into account the best interests of a child under

24 CJEU, Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013, para 50; Case C-256/11, *Murat Dereci and others, v. Bundesministerium für Inneres*, 15 November 2011, para. 70; CJEU, Case C-199/11, *Europese Gemeenschap v Otis NV and others*, 6 November 2012, para. 76.

25 The equivalent provision in the Qualification Directive is recital 3.

26 Pursuant to Article 78 (1) of the Treaty of the Functioning of the European Union which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention, UNHCR’s supervisory role is reflected in EU law.

27 See for example, CJEU (joined cases), C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi, Dler Jamal*, opinion of Advocate General Mazák, 15 September 2009 and (Joined Cases), C-57/09 and C-101/09, *Federal Republic of Germany v. B. and D.*, opinion of Advocate General Mengozi, 1 June 2010.

28 CJEU (joined Case) C-648/11, *MA, BT, DA v. Secretary of State of the Home Department*, 6 June 2013.

Article 24 of the Charter. In *O, S and L*,<sup>29</sup> the CJEU emphasised the fundamental importance of the right to respect for family and private life (Article 7 of the Charter). The CJEU, whilst appreciating Member States margin of appreciation when deciding on family reunification applications, provided that they must make a balanced and reasoned decision in light of Articles 7 (respect for family and private life) and 24 (2) and (3) of the Charter taking into account the best interests of the child concerned with a view to promoting family life.<sup>30</sup> In this regard the CJEU held that Article 7 of the Charter contains rights which correspond with those contained in Article 8 ECHR but that Article 7 of the Charter must be read in conjunction with Article 24 of the Charter.<sup>31</sup> This means that the protection contained in Article 8 ECHR can be extended with reference to that Article. The CJEU has so far resisted any attempt to rely on the right to human dignity under Article 1 of the Charter as a self-standing ground to extend the protection and rights afforded to asylum seekers beyond the specific provisions of relevant EU legislation.<sup>32</sup> However in *Cimade*, the CJEU held that further to the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, persons seeking protection, cannot be deprived of the protection of the standards laid down in the Reception Conditions Directive, even for a temporary period of time.<sup>33</sup>

#### 1.14 Suggested further reading:

- Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, Oxford (Hart Publishing), 2013.
- K.P.E. Lasok & Timothy Millett, *Judicial Control in the EU: procedures and principles*, Richmond (Richmond Law & Tax Ltd), 2004, paragraphs 582-720.
- Koen Lenaerts (2012). "Exploring the Limits of the EU Charter of Fundamental Rights". *European Constitutional Law Review*, 8, pp 375-403.
- Takis Tridimas, *The General Principles of EU law*, Oxford, 2006.
- Peers, Hervey, Kenner and Ward (eds,) *The EU Charter of Fundamental Rights*, Oxford (Hart Publishing), 2014.

29 CJEU (Joined Cases), C-356/11 and C-357/11, *O, S v. Maahanmuuttovirasto, L v. Maahanmuuttovirasto*, 6 December 2012, paras 76 -82. See also CJEU, Case C - 40/11, *Yoshikazu Iida v Stadt Ulm*, 8 November 2012.

30 CJEU (Joined Cases), C-356/11 and C-357/11, *O, S v. Maahanmuuttovirasto, L v. Maahanmuuttovirasto*, 6 December 2012, paras 76 -82. See also CJEU, Case C - 40/11, *Yoshikazu Iida v Stadt Ulm*, 8 November 2012, para 79-80.

31 CJEU (Joined Cases), C-356/11 and C-357/11, *O, S v. Maahanmuuttovirasto, L v. Maahanmuuttovirasto*, 6 December 2012, paras 76. See also CJEU, Case C - 40/11, *Yoshikazu Iida v Stadt Ulm*, 8 November 2012.

32 CJEU, Case C-364/11, *Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal*, 19 December 2012.

33 CJEU, Case C-179/11, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012, para 56.



# 2 The role of the national court and the Court of Justice of the European Union

*Gunnar Beck*

## 2.1 Introduction

Union law is enforced by two sets of courts; those of the Member States, and the EU courts, notably the Court of Justice of the European Union (CJEU). Apart from ruling on the validity of Union legislation and acts of the Union institutions, Article 267 TFEU provides that the function of the CJEU is to interpret the EU Treaties and all legislation and acts adopted by the Union institutions. The national courts have the primary responsibility to provide effective judicial protection of EU law rights. Their task consists of the application of EU law and after a reference has been made to the CJEU, the application of the interpretation of the CJEU to the facts. National courts also assess whether national law is in conformity with EU law.

## 2.2 The preliminary reference procedure

Of all the rulings by the CJEU by far the largest number are decisions arising under the preliminary reference procedure (Article 267 TFEU). In preliminary reference cases, proceedings are initially brought in the national court which refers any decisive interpretative questions of EU law to the CJEU and then applies that answer to the case at hand. In addition, there are a number of different types of direct actions (Article 263 TFEU) which only involve the CJEU. In asylum cases no direct actions before the General Court or CJEU are possible; they must be brought in the domestic sphere, which, depending on the Member State, may either be a branch of the regular civil or, more likely, the administrative court system or specialist asylum and immigration tribunals at first and second instance.

The preliminary reference procedure functions as follows:

Individuals who wish to challenge a Union act or national law or acts implementing, or originating in, Union law, are not normally able to do so directly

before the CJEU, but can only do so before a national court. According to Article 267 TFEU, the national court may (and in certain circumstances, must,) refer a question concerning the interpretation of Union law to the CJEU. This is limited to circumstances in which the answer to that question is necessary to decide a case that is currently before the national court. The CJEU considers and decides on the legal question(s), but does not determine matters of fact, nor does it, in principle, apply the law to the facts which is left exclusively to the national referring court. With the jurisdiction of the CJEU limited to the interpretation of provisions of Union law, the referring national court finally decides the case and issues the judgment.

### 2.2.1. Final courts of appeal and other national courts

All national courts can refer cases to the CJEU. Article 267 TFEU provides that only 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' must refer a relevant question of Union law to the CJEU under the preliminary reference procedure, if it considers that a decision on the question is necessary to enable it to give judgment. Courts, the judgments of which may be subject to appeal, may refer such a question, but are under no duty to do so. In most Member States this means that the national constitutional courts and the highest civil, administrative, tax, labour and criminal courts of appeal are obliged to refer questions involving the interpretation of Union law; the lower courts and tribunals at any level of the judicial hierarchy have the right, but no duty, to do so. Where leave to appeal is not granted by a court of final instance, that court is under an obligation to refer a question to the CJEU if there is a question regarding the interpretation of Union law. In the event that an appeal is not an automatic right, and can be refused by the court in which proceedings are conducted or in the potential appeal court, practitioners are under a duty to alert the court of proceeding of its duty to refer in the event leave to appeal is not granted.

Practitioners should bear in mind that the CJEU has made clear that the terms 'court' or 'tribunal' are given an autonomous meaning in Union law. This means that the designation of an adjudication panel according to national law is not conclusive. Whenever a body exercises quasi-judicial functions based on adversarial proceedings, the CJEU is likely to regard it as a court or tribunal for the purposes of the preliminary reference procedure.<sup>34</sup> In *H.I.D.* the CJEU held that the Refugee Appeals Tribunal could be regarded as a tribunal for the purposes of Article 39 of the Procedures Directive as it is established by law, permanent, applies the rules of law, its decisions in favour of the asylum seeker are binding on the national authorities and its decisions can be appealed.<sup>35</sup>

34 See Section 10.1 on the right of access to a Court for more information on what characteristics are needed to be deemed a Court or Tribunal

35 CJEU, case C-175/11, *H.I.D and others v. Refugee Application Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 31 January 2013.

### 2.2.2 Acte éclairé

Since the foundation of what is now the European Union, the CJEU has developed a large body of Union case law. Where a point of Union law arises before a national court, which is materially identical with a preliminary ruling given by the CJEU in a materially similar case, no reference to the CJEU is required. Indeed, the national court may and should in these circumstances decide the case itself by reference to the relevant case in which the CJEU previously decided the point of law.<sup>36</sup> Uncertainty in the precise meaning, scope and application of precedents gives practitioners and judges flexibility in the application of previous decisions to new circumstances and facts. Precedents therefore tend to evolve in conjunction with the case law to which they apply.

### 2.2.3 Acte clair

National courts are not required to submit a reference to the Court of Justice if the application of Union law is 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised needs to be resolved'.<sup>37</sup> In *Intermodal Transports*,<sup>38</sup> the CJEU pointed out that a contrary interpretation by a national non-judicial authority, such as for example, national authorities, does not necessarily create 'reasonable doubt' where the national court is certain that its own interpretation is correct. However, the national court must be certain that, in the light of the characteristic features of Union law, 'the matter in question would be equally obvious to the courts of the other Member States and to the CJEU'. Where there are conflicting judgments between national courts in one Member State or between national courts across two or more Member States, the national court should normally refer the question to the CJEU for clarification.

Together with the application of precedents, the acte clair, doctrine gives the national courts a significant degree of discretion over when to refer a point of law and when to decide the issue without submitting a reference. This may explain why, even on a proportionate basis, the judiciary in some Member States make far fewer references to the CJEU than in others.<sup>39</sup>

### 2.2.4 The principle of national procedural autonomy

EU law is, as a very general rule, enforced according to the procedures and rules established by national law. However, the principle of national procedural autonomy<sup>40</sup> is limited by the EU asylum *acquis* which affords vital procedural safeguards. Some of these rights include the right to a personal hearing, the

36 CJEU, Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, 6 October 1982, para 13.

37 CJEU, Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, 6 October 1982, para 16.

38 CJEU, Case C-495/03, *Intermodal Transports BV v Staatssecretaris van Financiën*, 15 September 2005.

39 Beck, IJEU, Craig and de Burca, 5th ed, p. 459.

40 CJEU, Case C-201/02 *The Queen on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, 7 January 2004, para 67 and Case C-212/04 *Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG)*, 4 July 2006, para 95.

right to legal representation and access to legal aid, as well as the right to access the asylum procedure. EU law does not, however, lay down a comprehensive set of procedural rules governing the enforcement of Union law in national courts, nor does it prescribe the remedies available to litigants beyond the exceptions listed below. Furthermore national procedural autonomy is subject to three further principles of exceptions:

- The principle of *equivalence* which requires that the remedies and rights of action available to ensure the observance of national law must be made available in the same way to ensure the observance of EU law;<sup>41</sup>
- The principle of effectiveness (also commonly referred to as ‘practical possibility’) requires that national rules and procedures should not render the exercise of EU rights impossible in practice; and;<sup>42</sup>
- The principle of *sincere cooperation* (Article 4 (3) TEU) which requires national governments and public bodies including courts to apply Union law in good faith and to ensure the fulfilment of their Treaty obligations.

In the early days of what is now the European Union, the CJEU was sometimes reluctant to interfere with national procedural rules including limitation periods, rules of evidence and adequate administrative review of procedures, or to create new remedies for the adequate enforcement of Union law.<sup>43</sup> However, based on reference to the above principles, the CJEU in the 1990’s developed a more prescriptive approach and in the *Factortame*<sup>44</sup> and *Francoovich*<sup>45</sup> cases, the CJEU provided for interim injunctions to safeguard interests protected under Union law and the creation of a specific form of remedy, the principle of state liability to provide compensation for breaches of EU law.

## 2.2.5 Effective legal protection

Article 4 (3) (b) and (c) TEU impose an obligation on Member States to take any appropriate measures to ensure the fulfilment of obligations arising from the treaties or acts of the Union’s institutions and to facilitate the achievement of the Unions’ tasks. Article 51 (1) of the Charter makes clear that its provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with

41 CJEU, Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 16 December 1976, para 5, CJEU Case C-13/01, *Safalero Srl v. Prefetto di Genova*, 11 September 2003, para 49.

42 CJEU Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 16 December 1976, para 5, CJEU Case C-13/01, *Safalero Srl v. Prefetto di Genova*, 11 September 2003, para 49.

43 Craig and de Burca, *EU law – Text, Cases, and Materials*, 5th edition, Oxford (OUP 2005), pp. 218-220.

44 CJEU, (Joined Cases), C- 46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany, The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, 5 March 1996.

45 CJEU (Joined Cases), C- 6/90 and C-9/90 *Andrea Francoovich and Danila Bonifaci v. Italian Republic, and, others v. Italian Republic*, 19 November 1991.

their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

As the CJEU has clearly held, if EU law applies the Charter applies.<sup>46</sup>

The right to good administration set out in Article 41 of the Charter, with its working partner the right to an effective remedy set out in Article 47, ensures that the rule of law is at the heart of the EU, both in theory and in practice. The principle was clearly set out in the *Marks and Spencer* case<sup>47</sup> where the CJEU held:

‘Member States remain bound actually to ensure full application of the directive even after the adoption of those [implementing] measures. Individuals are therefore entitled to rely before national courts, against the State [...] not only where the Directive has not been implemented or has been implemented incorrectly, *but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it*’ (emphasis added).

Article 41 of the Charter was intended, as is clear from the Explanations to the Charter,<sup>48</sup> to codify in the Charter the pre-existing general principle that every provision of EU law must be given “effective legal protection”. This general principle is referred to elsewhere in this Booklet and discussed extensively both judicially and in academic literature. It includes the requirement that the EU provisions must not only be adequately set out in national law but, more importantly, that national law further ensures that those provisions are given full effect, so as to achieve the result sought by the directive, by good administrative practice. Article 47 thus generally requires a distinct remedy if administrative practice and procedure do not comply with this requirement, whatever the merits of a substantive decision may be.

In the field of asylum, and in relation to Article 41 of the Charter, this was made clear by the CJEU in two judgments, the *MM* Case and the *HN* Case.<sup>49</sup> In *HN* the CJEU held, ‘as regards the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law’.

46 See CJEU, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013 and see CJEU case C-300/11 [GC], *ZZ v. Secretary of State for the Home Department*, 4 June 2013.

47 CJEU, Case C-62/00 *Marks & Spencer plc v. Commissioners of Customs & Excise*, 11 July 2002, para 27

48 Article 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined inter alia good administration as a general principle of law see e.g. CJEU, Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, 15 October 1987, para 15. Paragraph 3 reproduces the right now guaranteed by Article 340 of the Treaty on the Functioning of the European Union. Paragraph 4 reproduces the right now guaranteed by Article 20(2)(d) and Article 25 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties. The right to an effective remedy, which is an important aspect of this question, is guaranteed in Article 47 of this Charter.

49 CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, paras 82-89. See for a similar position, Case, C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 8 May 2014, para 50.

Accordingly, where, in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities.<sup>50</sup>

In both *MM* and *HN* the Opinions of the Advocates General and the CJEU's judgments make clear that the right to good administration contained in Article 41 is 'a right of general application'.<sup>51</sup> The CJEU emphasised both the very broad scope of that right and the place that its content has long held in the EU legal order. Both cases referred to allegations of breaches of Article 41 of the Charter by national administrations.

In the *Cicala* case,<sup>52</sup> which does not relate to asylum, the CJEU noted that Article 41 was addressed only to EU bodies. Although both *MM* and *HN* were decided after *Cicala*, in neither case did either the AG's opinions nor the CJEU's judgments suggest that Article 41 was inapplicable. The *MM* judgment was delivered in November 2012 and the *HN* judgment in May 2014, just two months before the judgment in *YS*, but after the AG's Opinion.

The case of *YS*<sup>53</sup> was decided on 17 July 2014 and seems to make a backwards leap over *MM* and *HN* to *Cicala*. In *YS*, both the Advocate General and the CJEU upheld the CJEU's consistent jurisprudence that the right to 'effective legal protection', including the right to good administration, was a general principle of EU law on which everyone can rely. However they noted (as the CJEU had in *Cicala*) that its specific inclusion in the Charter in Article 41 was restricted to the right to good administration by the 'institutions, bodies, offices and agencies of the Union' to whom that Article is addressed. The CJEU found in *YS* that the referring Dutch court was not asking for an interpretation of the general principle of EU law, the general principle of effective legal protection which Article 41 reflects, but was specifically asking whether Article 41 of the Charter may, in itself, apply to the Member States of the Union. The CJEU concluded that it did not, it stated:

'It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union. Consequently, *an applicant for a resident*

50 Case, C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 8 May 2014, paras 49-50.

51 *M.M.* paras 82-89, *H.N.* paras 49 – 50.

52 CJEU, Case C- 482/10, *Teresa Cicala v. Regione Siciliana*, 21 December 2011 para 28.

53 CJEU (Joined Cases), C-141/12 and C-372/12, *YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. M. S.* 17 July 2014, paras 66-69.

*permit cannot derive from Article 41(2) (b) of the Charter a right to access the national file relating to his application'* (emphasis added).<sup>54</sup>

YS now indicates that individuals have to rely on the general principle of EU law of 'effective legal protection' when examining the conduct of national authorities rather than relying on the express recognition of this principle in Article 41 of the Charter. The end result is nevertheless as it was before YS. EU law requires states to observe the level of good administration necessary to ensure the effective legal implementation and protection of EU rights so as to achieve the result sought by the Directives. It is simply that YS indicates that one is required to arrive at this result by the more cumbersome vehicle of observing a general principle of EU law rather than the express train of the Charter provision.<sup>55</sup>

### 2.2.6 The right to effective judicial protection and national procedural rules

Articles 47 of the Charter and 19 (1) TEU codify the general principle of effective judicial protection.<sup>56</sup> Article 47 of the Charter provides for the right to an effective remedy against any violation of rights under Union law. It reads as follows:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice'.

Article 6 and 13 ECHR are of relevance for the interpretation of Article 47 of the Charter. According to the explanations of the Charter '[...] In all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union'.

The reference to the scope is an important one. Article 6 ECHR is limited to cases concerning civil rights and obligations and criminal charges, in addition Article 13 ECHR can only be invoked when there is an arguable claim that a right contained in the ECHR has or will be violated. These limitations do not apply to the application of Article 47 of the Charter. The fact that the interpretation

<sup>54</sup> Para 68.

<sup>55</sup> See CJEU (joined cases) C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, opinion of Advocate General Melchior Wathelet, 25 June 2014.

<sup>56</sup> A.M. Reneman (2014), *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford/Portland Oregon: Hart Publishing, p. 86.

of Article 47 is to be inspired by Article 6 ECHR arguably entails that important guarantees contained in the ECtHR's case law on Article 6 must now also be ensured in asylum cases.

Article 19 (1) TEU obliges Member States to provide remedies that are sufficient to ensure effective legal protection in the fields covered by Union law. Moreover, in accordance with the principle of sincere cooperation laid down in Article 4 (3) TEU, national courts are required, as far as possible, to interpret and apply national procedural rules governing the exercise of rights in a way which achieves that result. When Member States are implementing and applying Union law, the evolving case law of the CJEU on Article 47 will further reinforce the role of the CJEU in ensuring national procedural rules give adequate effect to Union law. If there is an issue regarding a potentially restrictive provision, national courts will be required to conduct a case-specific evaluation under national law to ensure its compliance with Article 47 of the Charter, which complements and extends the CJEU's jurisprudence on the application of the principles of equivalence, effectiveness, of sincere cooperation and of proportionality in the field of national procedural law and remedies for breaches of Union law. To ensure compliance with the Charter and these established principles, Member States and national courts will, as the case requires, either have to submit a reference to the CJEU or, with reference to previous decisions of the CJEU cease applying overly restrictive national procedural rules.

### 2.3 Suggested further reading

- Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, Oxford (Hart), 2013.
- Gunnar Beck, "The English Courts and the Application of Community Law", in *Irish Journal of European Law*, vol. 12 number 2 (2005), pp. 184-216.
- K.P.E. Lasok & Timothy Millett, *Judicial Control in the EU: procedures and principles*, Richmond (Richmond Law & Tax Ltd), 2004, paragraphs 308-362.
- Paul Craig and Grainne de Burca, *EU Law – Text, Cases, and Materials*, (5 ed.) Oxford 2011, pp. 442-48.



# 3 Access to the territory and to the asylum procedure

*Nuala Mole*

33

In order to access the asylum procedure within the EU, an applicant for international protection first needs to be able to access the territory of a Member State. This section will examine what Member States rights and obligations are in terms of allowing an applicant access to their territory. It will then examine what safeguards are necessary in order for the applicant to have effective access to the asylum procedure.

## 3.1 Access to the territory

Most persons in need of international protection require visas to [travel to and] enter the territory of a Member State. There is no explicit EU protection visa which would allow a person in need of international protection entry to the territory. As a result, they may have to reach or cross the border in an irregular manner in order to be in a position to apply for protection. If those in need of international protection are unable to obtain access to a Member State's territory, its territorial waters or transit zones, they will normally be unable to access the asylum determination procedures contained in the EU asylum *acquis*.

Furthermore, as a general rule, States have a sovereign right to determine the entitlement of foreign nationals to enter and remain on their territory. However, State sovereignty is limited by States obligations under international law. For example, refusing entry to persons in a Member State's territorial waters or at their borders who are at risk of persecution or other serious harm is prohibited by the 1951 Geneva Convention on Refugees (principle of *non-refoulement*), by the ECtHR<sup>57</sup> and by EU law, in particular, the EU Charter of Fundamental Rights.

57 ECtHR *Ahmed v. Austria*, Appl. no. 25964/94, 17 December 1996.

The section below will look at Member States' obligations and what rights and principles exist to ensure that those in need of international protection obtain access to the territory in order to access the asylum procedure.

### 3.1.1. EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

The Procedures Directive does not provide for a general right of access to the territory of Member States for those in need of international protection. However, a specific right of entry is provided for in respect of an application made at a border, where no decision has been made within four weeks of its lodgement.<sup>58</sup> In this context, granting 'entry to the territory' denotes the granting of lawful entry and not just physical entry (as the individual may well already be physically on the territory).

Article 3 (1) of the Procedures Directive defines the scope of the Directive's application. Pursuant to that Article, the procedural safeguards provided for in the Directive apply exclusively to claims made on the territory of EU Member States including at the border or in transit zones. Article 35 contains special provisions relating to border procedures which limit the scope of the procedural guarantees imposed by the Directive. Thus, for example, applicants subject to Article 35 (2) do not benefit from the guarantee that they will not be detained for the sole reason that they are applicants for asylum, or that detention will be subject to a judicial review.<sup>59</sup>

Article 7 of the Directive provides that applicants shall be allowed to remain in the Member State until a decision has been taken on their first instance decision. However, this is restricted by Paragraph 2, which allows Member States to make an exception in cases of subsequent applications, which are not subject to further examination in accordance with Article 32 and 34. Article 7 (2) also allows for a derogation from the right to remain where the applicant is subject to extradition to another Member State or a third country, or international criminal courts or tribunals.<sup>60</sup>

#### *Directive 20013/32/EU (Recast Procedures Directive)*

The recast Procedures Directive has extended the scope of the Directive to include the territorial waters of the Member States who have opted into the Directive (Article 3). When applications are made in the territorial waters, when read in light of recital 26, they should be disembarked on land and have their applications examined in accordance with this Directive. Whilst the ECtHR has held on numerous occasions<sup>61</sup> that individuals may fall within its jurisdiction when

58 Article 35(4) of the Directive.

59 Article 18 Procedures Directive.

60 See section 4 for more on the right to remain during the examination of the asylum claim.

61 ECtHR [GC], *Medvedyev and others v. France*, Appl. no. 3394/03, 29 March 2010.

a State exercises control over them on the high seas, the recast Procedures Directive, does not expressly extend its application to those in the air or on the high seas<sup>62</sup> who are intercepted by a Member State, or to a group of Member States acting together, or during a Frontex operation.

Article 43 of the recast Directive permits the processing of asylum applications at a Member States border or transit zones on the admissibility of an application and on the substance of the application. It also confirms that entry onto the territory must be granted to an asylum seeker in case no decision is taken within 4 weeks. Where an applicant who has been identified as needing special procedural guarantees, as per Article 24 (3), Member States shall refrain from or cease to use border procedures where adequate support cannot be provided at the border.

Article 9 also contains as a general rule that States must allow asylum applicants to remain on their territory for the sole purpose of the asylum procedure, until the determining authority has made a decision on the asylum application, This is, again, subject to a number of exceptions including where the applicant delays or frustrates the enforcement of a decision which would result in his imminent removal, when a person lodges a subsequent application or, when an applicant is surrendered or extradited to another Member State, to a third country or to international criminal courts or tribunals.<sup>63</sup> When read with Article 46 of the Directive, it establishes in principle, an obligation to ensure a right to remain until a final decision has been taken at the appeal stage.<sup>64</sup>

### *Regulation relating to External Sea Border Surveillance in the context of Frontex Operations*

In May 2014, a new Regulation was adopted that establishes rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by (Frontex).<sup>65</sup> This replaces the 2010 Council Decision which was annulled by the CJEU.<sup>66</sup> The Regulation is similar in scope and content to the 2010 Decision, but reflects legal and judicial developments, such as the judgment in *Hirsi Jamaa and Others v. Italy*.<sup>67</sup> Unlike the 2010 Decision, the Regulation is binding in its entirety on those participating in Frontex-coordinated operations, and rules for search and rescue situations and disembarkation must be

62 ECtHR [GC], *Medvedyev and others v. France*, Appl. No. 3394/03, 29 March 2010.

63 Article 9 (2) recast Procedures Directive, see also section 4.

64 See Section 4 for more detail.

65 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

66 The original Decision was annulled by the CJEU in September 2012 as the wrong legislative procedure was used when it was adopted (CJEU, Case C-355/10, *European Parliament v. Council of the European Union and the European Commission*, 5 December 2012).

67 ECtHR [GC], *Hirsi Jamaa and Others v. Italy*, Appl. no. 27765/09, 23 February 2012.

laid out in the operational plans accordingly. However, it still leaves some issues unresolved, such as the activities of Member States carried out outside the context of a Frontex operation.

Article 4 of the Regulation provides for the protection of fundamental rights and the principle of *non-refoulement*. Article 4 (1) states that no-one can be 'disembarked in, forced to enter, conducted to or otherwise handed over to' an unsafe country as further defined in the Regulation. Article 4 (2) states that when considering disembarking migrants in a third country, the host Member State must 'take into account the general situation in that third country', and cannot disembark or otherwise force to enter, conduct to or hand over if the host Member State or other participating Member States 'are aware or ought to be aware' that such a State presents such a risk. Article 4 (3), provides that intercepted or rescued persons are to be informed of the proposed place of disembarkation (which may be a non-EU country) and given the opportunity to express any reasons for believing that disembarkation there would violate the principle of *non-refoulement*.

Article 10 deals with disembarkations. If migrants are intercepted in the territorial sea or contiguous zone of a Member State, then they must be disembarked in a coastal Member State, but a vessel which is on route may still be ordered to alter course towards another destination.<sup>68</sup> If migrants are intercepted in the high seas, they may be disembarked in the country from which the vessel is assumed to have departed, subject to the *non-refoulement* rules in the Regulation. If that is not possible, disembarkation shall take place in the host Member State. In search and rescue situations the migrants shall be disembarked in a place of safety. If that is not possible, then they shall be disembarked in the host Member State.

### *The Schengen Borders Code*

The Schengen Borders Code sets down the rules governing the movement of persons across Schengen borders. Article 3 makes clear that all border management by Member States including maritime border management or checks carried out in a third country must respect the principle of *non-refoulement*. The Regulation also provides for the border checks to be carried out in full respect of human dignity.

Regulation 610/2013 of 26 June 2013 amending the Schengen Borders Code creates an obligation for border guards from Member States present in a third country with which there is a bilateral agreement establishing shared border crossing points, to provide access to the asylum procedure in the Member States concerned to any third country national asking the border guards for international protection while still on the territory of that third country.

68 Article 10 (1) (a) and Article 6 (2) (b).

*Regulation 810/2009 (EU Visa Code)*

Article 25 of the EU Visa Code requires Member States to issue a visa with limited territorial validity when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interests or because of international obligations to *inter alia* derogate from the entry conditions laid down in the Schengen Borders Code.

**3.1.2. Relevant EU fundamental rights and principles***Scope of application of the Charter*

Pursuant to Article 51, the Charter is only applicable in situations which are governed by EU law. The recast Procedures Directive clearly and expressly extends the geophysical scope of the previous Directive but only to Member States' territorial waters. The conduct of a Member State in the contiguous zone or on the high seas still appears to fall outside the ambit of the recast Procedures Directive and its express requirements do not apply there. However, the implementation of the Schengen Borders Code (SBC), and the conduct of any Frontex operation, falls within the scope of EU law for the purposes of Article 51 of the Charter. Any operation carried out by Frontex or by Member States in the implementation of the Schengen Borders Code attracts the protection of the Charter, in particular Article 18 of the Charter which provides for the right to asylum, Article 4 which prohibits torture and inhuman or degrading treatment or punishment and Article 19 which prohibits *refoulement*.

*The right to asylum (Article 18 of the Charter)*

When Member States are deciding on whether to admit someone onto their territory and when EU agencies are carrying out rescue operations, they must do so in a way that complies with the right to asylum. Whilst a key component to this right is to ensure respect with the principle of *non-refoulement*, Article 18 is broader than this. According to the Explanations, Article 18 is based on Article 78 TFEU which provides that the EU's policy on asylum must be based on the 1951 Geneva Convention for Refugees and its Protocol.<sup>69</sup>

The Regulation relating to External Sea Border Surveillance in the context of Frontex Operations allows for the disembarkation of persons who were intercepted or rescued to third countries. Before this occurs, they must be informed of the place of disembarkation and be given the opportunity to express any reasons for believing that disembarkation there would violate the principle of *non-refoulement*. In order to ensure that any operation carried out under this Regulation respects Article 18, Member States would not only need to safeguard the principle of *non-refoulement*, should a protection need become apparent, they also need to guarantee the right to an assessment of an asylum

<sup>69</sup> Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, see also (joined cases) C-411/10 and C-439/10, *N.S. And M.E and case C-175/11 HID, BA*.

claim in accordance with fair and efficient asylum processes and the right to an effective remedy.<sup>70</sup> Consequently, if someone is rescued on the high seas, it is difficult to see how it would be possible to carry out this assessment without it being done on the territory of a Member State.

*The prohibition of collective expulsions (Article 19 (1) of the Charter)*

Article 19 (1) provides that collective expulsions are prohibited.<sup>71</sup> In *Čonka v Belgium*, the ECtHR found that collective expulsions mean any measure compelling persons as a group to leave the country, unless the measures are taken on the basis of a reasonable and objective examination of the case of each individual in the group.<sup>72</sup> In *Hirsi*, the ECtHR held States are bound by their ECHR obligations on the high seas, in this instance when carrying out an interception to prevent migrants from reaching their shores to when pushing them back to another State.<sup>73</sup> In order to ensure that Member States or Frontex are not breaching Article 19 (1) in the context of any mission at sea, there needs to be an individualised assessment of the risk of *refoulement*, and that each individual is given the opportunity to put forward arguments against their expulsion. This also includes access to legal assistance and representation.<sup>74</sup>

*The prohibition of refoulement and the prohibition of torture and inhuman or degrading treatment or punishment (Article 19 (2) and Article 4 of the Charter)*

These Articles essentially prohibit Member States from returning an individual to a situation where he would be at risk of torture, inhuman or degrading treatment or punishment. This includes rejection at the frontier, interception and indirect *refoulement*. Member States obligations under these Articles apply, regardless of whether the person intercepted has explicitly applied for asylum, implying that there exists an obligation on Member States to proactively assess the risk of *refoulement*.<sup>75</sup>

In addition, certain safeguards need to be complied with when a Member State is taking a decision that would significantly affect an individual, the principle of

70 UNHCR has expressed that the right to asylum contains a number of different elements, see Executive Committee Conclusion No. 82 (XLVIII), 1997, para (d) and UN High Commissioner for Refugees (UNHCR), *UNHCR public statement in relation to Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees pending before the Court of Justice of the European Union*, August 2012, C-528/11, para 2.2.9. and Executive Committee Conclusion No. 82 (XLVIII), 1997, para (d) and UN High Commissioner for Refugees.

71 According to the Explanations to the Charter, this Article has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR concerning collective expulsion.

72 ECtHR *Conka v. Belgium*, Appl. no. 51564/99, 5 February 2002.

73 ECtHR [GC] *Hirsi Jamaa and Others v. Italy*, Appl. no. 27765/09, 23 February 2012, para 180.

74 Under the recast FRONTEX Regulation, Article 4 (3) provides for the availability of shore-based interpreters, legal advisors and other relevant experts.

75 ECtHR [GC], *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012, para 157.

the right to good administration.<sup>76</sup> Member States and EU Agencies must ensure that they comply with these obligations before deciding on disembarking individuals in a third country.

### *The right to good administration*

Persons intercepted or rescued at the high seas in the context of a Frontex operation or persons wishing to enter the territory of a Member State need to be given an opportunity to express the reasons, in a reasonable period of time, as to why disembarkation in a third country or why their refusal to enter into the territory would violate the principle of *non-refoulement*. In order to comply with the right to good administration, which is of very broad scope and applies even if there is no specific procedure in place,<sup>77</sup> persons facing decisions ‘which significantly affect their interests should be placed in a position in which they may effectively make known their views’.<sup>78</sup> It is difficult to see how this can be done in a way that respects this principle unless persons are brought to the territory of a Member State to ensure that applicants can effectively make known their views and to allow Member States to carry out a proper assessment.

### *The EU right to an effective remedy and to a fair trial (Article 47 of the Charter)*

Article 47 of the Charter expressly requires an effective remedy to be available where it is engaged. As a consequence Articles 18 and 19 of the Charter must be applied by Member States implementing the Schengen Borders Code or joining in a Frontex operation – or by Frontex itself - in order to ensure that they are able to make an effective claim for international protection with the necessary procedural safeguards. Even when they do not benefit from the express procedural safeguards provided for in the Procedures Directive, they must be able to access the minimum procedural safeguards necessary to make their claims effectively. Article Art 4 (3) of the Regulation relating to External Sea Border Surveillance in the context of Frontex Operations provides that intercepted or rescued persons are to be informed of the place of disembarkation (which may be a non EU country) and be given the opportunity to express any reasons for believing that disembarkation there would violate the principle of *non-refoulement*. It is doubtful whether this provision is sufficiently rigorous or practically effective to ensure compliance with the principle of the right to good administration and Article 47 of the Charter especially when read together with Articles 18 and 19 of the Charter.

76 CJEU, Case C-28/05, *Dokter and Others v Minister van Landbouw, Natuur en Voedselkwaliteit*, 15 June 2006, para 74.

77 CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, para 85.

78 CJEU, Case C-32/95P, *Commission v. Lisestal and others*, 1996, para 21.

### 3.1.3. Case law

#### *The Court of Justice of the European Union*

In *Koushkaki* the CJEU examined the procedures and conditions for issuing uniform Schengen visas under the EU Visa Code. It found that Article 32 (1) read in conjunction with Article 21 means that the competent authorities must refuse the visa on the basis of the existence of a reasonable doubt regarding the applicant's intention to leave the country before the date of the expiry of the visa sought. The obligation to issue the visa is thus subject to the condition that there is no reasonable doubt as to the visa applicant's intention to leave before its expiry. The Court also held that once the entry conditions are fulfilled and if none of the refusal grounds listed in the Visa Code apply, States cannot refuse to issue a visa. However, Member States have a wide discretion in the way in which they examine applications and assess compliance with the conditions stipulated since this involves complex evaluations predicting the foreseeable conduct of the applicant, 'including the general situation in the country of origin and his individual characteristics'.<sup>79</sup> Article 21 (1) of the Visa Code states that particular consideration must be given to the risk of 'illegal immigration' (although asylum seekers who duly present their requests for international protection to the authorities cannot be considered as illegal migrants) and to whether the applicant intends to leave the territory of the State before the expiry of the visa.

It is however arguable that there may be an obligation on Member States to issue a visa under the Visa Code to would be asylum seekers if a refusal would totally negate their ability to access an EU asylum determination procedure. Article 25 of the Visa Code provides that visas with limited territorial validity shall be issued exceptionally, 'when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations' to derogate from the general rules. The ECtHR judgments in *MSS v. Belgium and Greece* and *Hirsi v. Italy* made it clear that there is an international obligation to enable would be asylum seekers (who bring themselves within the jurisdiction of a Member State, for example, by presenting themselves to an embassy) to access the asylum determination procedure. However, Art 3 (2) of the recast Procedures Directive appears to exclude requests made to the diplomatic representations of Member States from the scope of the Directive.

#### *The European Court of Human Rights*

Under Article 1 of the ECHR (obligation to respect human rights), States which are party to the ECHR undertake to secure the rights contained within it to everyone 'within their jurisdiction', and not just to those on their territory or in their territorial waters. The ECtHR has ruled that States can be held responsible

<sup>79</sup> CJEU, Case C- 84/12, *Rahmanian Koushkaki v. Bundesrepublik Deutschland*, 19 December 2013, para 69.



if they keep those seeking international protection in orbit by refusing the possibility of landing the aircraft carrying them,<sup>80</sup> as well as for their treatment of people on the high seas.<sup>81</sup>

In *Amuur v. France* the ECtHR made clear that the ECHR applies in transit zones of airports.<sup>82</sup>

*Hirsi* concerned a group of migrants who were intercepted on the high seas including some who wished to apply for asylum in Italy but were returned to Libya. The ECtHR held that they fell within the jurisdiction of Italy and their return to Libya, without giving them the opportunity to seek international protection or recording their names or nationalities or ascertaining that Libya would offer them the necessary protection, constituted a violation of Article 3 of the ECHR both in respect of their risk of return to their countries of origin and the risks to which they would be exposed in Libya. It also found a violation of Article 4 of Protocol 4 (the prohibition of collective expulsions of aliens) and of Article 13 in that the applicants had no access to remedies for any of these matters.

### 3.2. Access to the asylum procedure

Once on the territory of a Member State, a person in need of international protection should be able to access the asylum procedure. However, applicants may face difficulties in effectively accessing the asylum procedure, such as, for example, not being able to lodge an asylum claim or experience significant delays which frustrate the processing of their claim. This section will examine what Member States need to comply with in order to enable applicants to effectively access the asylum procedure.

#### 3.2.1. EU legislation

##### *Directive 2005/85/EC (Procedures Directive)*

The Procedures Directive not only regulates the procedures for examining claims but also makes clear that asylum seekers must be given appropriate information so as to enable them to make those claims. Article 6 of the Procedures Directive regulates access to the procedure, providing details as to whom and under what circumstances an application may be made. In particular, Article 6 (1) requires States to register an application within three working days or, within six working days, when an application is submitted to authorities other than those responsible for its registration.

80 European Commission of Human Rights, *3 East African Asians (British Protected Persons) v. UK*, Appl. no. 4715/70, 4783/71 and 4827/71, 6 March 1978.

81 ECtHR *Xhavara and others v Italy and Albania* Appl. no. 39473/98, 11 January 2011; ECtHR [GC] *Medvedev v. France*, Appl. no. 3394/03 29 March 2010, and ECtHR [GC], *Hirsi Jamaa and Others v. Italy*, Appl. no. 27765/09, 23 February 2012.

82 ECtHR, *Amuur v. France*, Appl. no. 19776/92, 26 June 1996.

*Directive 2013/32/EU (Recast Procedures Directive)*

In the recast Procedures Directive, Article 6 distinguishes between making an application, registering an application and lodging an application.<sup>83</sup> Article 6 (1) specifies that when an application is 'made' to the competent authority it shall be 'registered' within three working days. Article 6 (2) obliges States to ensure that individuals have an effective opportunity to lodge an application as soon as possible and a failure to 'lodge' an application may be treated as an implicit withdrawal. Article 6 (2) and (3) of the recast Directive states that Member States may require that an application for asylum be lodged, in person and/or at a designated place.

Problems have arisen in some jurisdictions where those in need of international protection were unable to make their claims, the recast addresses this. Article 6 (1) provides that Member States shall ensure that other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and training to inform applicants as to where and how applications for international protection may be lodged.

Article 7 stipulates who and under what circumstances an application for international protection can be made, including on behalf of dependants or children. Article 8 specifies certain prerequisites for the examination of applications at the very outset. It provides that where there are 'indications' that an individual may wish to make an application for international protection, who are in detention, at border crossing points including transit zones or at external borders, Member States shall provide this person with 'information about the possibility' to do so. Member States shall also provide for interpretation to facilitate access to the asylum procedure. Article 8 (2) further provides that persons providing advice and counselling to applicants should have effective access to applicants subject to certain conditions.

*Regulation 604/2013 (Dublin III Regulation)*

The Dublin III Regulation sets out the criteria for determining which Member State is responsible for processing an asylum application within the EU. It sets out the procedural safeguards which must be applied by a Member State including if an individual asylum seeker is being denied legal access to the procedure because it is alleged that another Member State is responsible for determining the claim for protection.

Article 3 (1) requires that one Member State is responsible for examining an asylum application. Where a transfer cannot be affected as a result of substan-

<sup>83</sup> Whilst Article 2 (b) of the 2013 recast Procedures Directive defines what an 'application' is there is no definition or explanation given to the difference between registering and lodging an application.

tial grounds for believing there are systematic flaws in the asylum procedure and in the reception conditions in the proposed transfer State, the Regulation provides for the possibility that a transfer to another State (or even several other States) should be tried. Article 17 (1), allows for the possibility for any Member State to decide to examine an asylum application instead of transferring the asylum seeker under the normal provisions of the Regulation.

Article 29 (3) provides that if an individual was transferred to another Member State in error or if an appeal against a Dublin transfer is successful, the individual concerned must be accepted back in order to ensure that they have access to the asylum determination procedure in one State.

### 3.2.2. Relevant EU fundamental rights and principles

#### *Principle of effectiveness*

The principle of effective legal protection applies to the right to asylum and the prohibition of *refoulement*. In order for the right to asylum to be effective, access to the asylum procedure itself must be effectively protected in EU and national law and in practice. This applies when accessing the normal asylum procedures (including accelerated procedures) and to those whose situation falls within the scope of the Dublin III Regulation. Article 18 guarantees the right to asylum including the right to access the asylum determination procedure. The way in which the Dublin III Regulation operates can cause considerable delays for an applicant to access a substantive examination of their asylum claim.

#### *The right to good administration*

Member States are under an obligation to ensure that their administrative procedures guarantee prompt effective access to their asylum procedures. They must guarantee their compliance with the right to good administration when adopting any decisions regarding an applicant accessing the asylum procedure. Member States must ensure that applicants have an effective opportunity to access the procedure itself, including the right to be heard.

Under Article 6 (2) of the recast Procedures Directive, an application for asylum can be seen as implicitly withdrawn if the applicant fails to 'lodge' an application. The right to good administration is also applicable in instances whereby an applicant, who was acting in good faith, and who wishes to access the procedure but has their application withdrawn by virtue of the fact that they did not comply with the procedural rules 'when this non-compliance arises from the behaviour or the administration itself'.<sup>84</sup>

84 CJEU, Case C-428/05, *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v Hauptzollamt Hamburg-Jonas*, 21 June 2007, para 25.

### 3.2.3. Case law

#### *The Court of Justice of the European Union*

In the case of *M.M.* the CJEU found that an applicant must have access to a procedure in which he is able to make known his views before the adoption of any decision that does not grant the protection requested.<sup>85</sup> The fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection.

Member States must ensure that an applicant has an effective opportunity to lodge an application as soon as possible. This means that the national procedural rules should not make it impossible or excessively difficult to exercise rights conferred by EU law. It must not impose rules which may jeopardise the effectiveness of a Directive.<sup>86</sup> Any rule implemented as a result of EU law needs to ensure the effectiveness of EU law, in particular those relating to fundamental freedoms.<sup>87</sup>

An application for international protection can be deemed to have been lodged when a form or report is submitted to the competent Member State authorities as per Article 6 (4) of the recast Procedures Directive. In such instances, Member States where appropriate, must provide the necessary assistance to fill out such forms. The CJEU examined a similar procedure in *Panayotova* where the procedure concerning residence permits was discussed. It found that 'a procedural system for exercising a right to residence permits provided for in Community law should be easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time'.<sup>88</sup>

Where an applicant does not 'lodge' an application and it is implicitly withdrawn due to the ineffectiveness of the relevant Member State to ensure that the application can be lodged, there could be a breach of the right to good administration. It follows from the *Laub* case that the application of this principle precludes a national administration from penalising a party who was acting in good faith for non-compliance with the procedural rules, when this non-compliance arises from the behaviour of the administration itself.<sup>89</sup>

85 CJEU, C-277/11 [2012], *M. M. v. Minster for Justice, Equality and Law Reform, Ireland and Attorney General*, 22 November 2012.

86 CJEU, C-104/10, *Patrick Kelly v. National University of Ireland (University College, Dublin)*, 21 July 2011, para 33.

87 CJEU, Case, C-157/99, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*, 12 July 2001, para 90, Case C-205/99, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Anafir) and Others v Administración General del Estado*, 20 February 2002, para 37.

88 CJEU, Case C-327/02, *Panayotova v. Minister voor Vreemdelingenzaken en Integratie*, 16 November 2004, para 27.

89 CJEU, Case C-428/05, *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v. Hauptzollamt Hamburg-Jonas*, para 25.

An asylum seeker cannot gain access to the asylum determination procedure until the State responsible for this examination has been identified according to the criteria set out in the Dublin III Regulation. There have been a number of decisions of the CJEU on the application of the Dublin III Regulation.

The joined cases of *N.S. and M.E.* concerned the compatibility of proposed transfers to Greece under the Dublin II Regulation with the Charter, specifically Article 4 of the Charter.<sup>90</sup> The CJEU found that transfers would be prohibited to the responsible Member State if they were to give rise to a real risk of a violation of Article 4. Where a transfer is impossible, the Member State should attempt to establish whether any other Member State is responsible. However, the CJEU held that the Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining which Member State is responsible that takes an unreasonable length of time. If necessary, the Member State in which the asylum seeker is present may have to ensure the timely access to an asylum determination by examining the application itself in accordance with the procedure laid down in Article 3 (2) of the Dublin II Regulation.<sup>91</sup>

In *Puid* the CJEU once again found that where a transfer cannot be carried out due to systematic deficiencies in the responsible Member State, the determining Member State can exercise its right to examine the application itself, if not it should continue to successively apply the Dublin criteria. The CJEU also reiterated that the Member State should not worsen the applicant's situation by using a procedure for determining the Member State responsible which takes an unreasonable length of time. In such instances the first mentioned Member State must itself examine the application.<sup>92</sup>

In *MA and others* the CJEU held that in accordance with Article 24 (2) of the Charter the best interests of the child should be a primary consideration, as such, Member States are obliged to ensure that unaccompanied minors are granted access to the procedure as soon as possible. This means that their application for international protection should be dealt with in the Member State in which the unaccompanied minor is present after having lodged an application there.<sup>93</sup>

90 CJEU, (Joined cases) C-411/10 and C-493/10, *NS v. SSHD and M.E. and Others v. Refugee Applications Commissioner*, 21 December 2011.

91 CJEU, (Joined cases) C-411/10 and C-493/10, *NS v. SSHD and M.E. and Others v. Refugee Applications Commissioner*, 21 December 2011 paras 95 -98

92 CJEU, case C-4/11, *Bundesrepublik Deutschland v. Kaveh Puid*, 14 November 2013, paras 35-36.

93 CJEU C- 648/11, *M.A and others v. Secretary of State for the Home department* para 55-60.

### *The European Court of Human Rights*

The ECHR does not contain a specific provision that expressly provides for a right to asylum corresponding to Article 18 of the Charter.<sup>94</sup> Consequently, the ECHR does not provide for any specific procedures that must be followed in processing claims for international protection, (as it does for example in cases of deprivation of liberty or of fair trial). However, the ECtHR has always found that there must be an independent and rigorous scrutiny of any claim that an individual would face a real risk of torture or inhuman or degrading treatment if removed.

In the case of *Jabari v Turkey*, the applicant failed to lodge her application for asylum with the authorities within five days as required by law. This resulted in the applicant being denied a proper assessment of the factual basis of her claim for protection, effectively denying her access to the procedure. The ECtHR held that such a short time limit was at variance with the ECHR, specifically Article 3 if the applicant's deportation to Iran had been executed.<sup>95</sup>

The case of *M. S. S. v Belgium and Greece*<sup>96</sup> was decided by the ECtHR some 11 months before the CJEU considered the cases of *N.S. and M. E.* referred to above. In *M. S. S.*, in respect of Greece the ECtHR found that Greece's failure to implement the EU asylum *acquis* led to major structural deficiencies in accessing any asylum procedures including a lack of information and that there were no effective guarantees protecting the applicants from onward arbitrary removal to Afghanistan where they risked ill treatment. In respect of Belgium, the ECtHR found that the Belgian authorities knew or ought to have known, in light of the material that was available to the authorities, that the applicant had no guarantee that his asylum application would be seriously examined by the Greek authorities. As a result there was a violation of Article 3.<sup>97</sup>

### 3.3 Suggested further reading

- FRA/ECtHR handbook on European Law relating to asylum, borders and immigration 2013.
- Various Comments of the Meijers Committee on aspects of border controls.
- ICJ Practitioner Guide No. 6 on Migration and International Human Rights Law, 2012.

94 See e.g. *ECtHR Ahmed v. Austria*, Appl. no. 25964/94, 17 December 1996 and *ECtHR Vilvarajah and Others v. the United Kingdom*, 30 October 1991.

95 *ECtHR, Jabari v Turkey*, Appl. no. 40035/98 11 July 2000 para 40.

96 *ECtHR [GC], M. S. S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011.

97 *ECtHR [GC], M. S. S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, Para 359.

# 4 The right to remain on the territory of an EU Member State

Marcelle Reneman\*

47

It is essential that asylum applicants are allowed to stay on the territory of the concerned Member State during their asylum proceedings. Expulsion of an asylum applicant while the determining authorities and/or the court or tribunal have not yet decided on the risk of *refoulement* may lead to irreparable harm (persecution or serious harm) in the country of origin or a third country. As a result, the EU right to an effective remedy (Article 47 of the Charter) as well as the effectiveness of the EU prohibition of *refoulement* (Article 19 of the Charter) may be undermined. Furthermore, the effective remedy required by Article 47 of the Charter may be rendered inaccessible where expulsion takes place swiftly after the rejection of an asylum claim in first instance. This section will address the right to remain during the first instance and appeal proceedings.

## 4.1 The right to remain during the examination of the asylum claim

### 4.1.1 EU legislation

*Directive 2005/85/EC (Procedures Directive)*

According to Article 7 (1) of the Procedures Directive, States must allow asylum applicants to remain on their territory for the sole purpose of the asylum procedure, until the determining authority has made a decision on the asylum application. According to Article 7 (2) of the Directive an exception to this rule may only be made in two situations:

- where a subsequent application will not be examined further in accordance with Articles 32-34 of the Procedures Directive. (see section 11 for more information);
- where the Member State will surrender or extradite a person either to another Member State, to a third country or to international criminal courts or tribunals.

\* This section is based on Marcelle Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, Oxford/ Portland Oregon, Hart Publishing, Chapter 6.

### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 9 of recast Procedures Directive also contains as a general rule that States must allow asylum applicants to remain on their territory for the sole purpose of the asylum procedure, until the determining authority has made a decision on the asylum application. An exception can be made only where:

- a person makes a first subsequent (thus a second) application, merely in order to delay or frustrate the enforcement of a decision which would result in his imminent removal from that Member State and this application is not further examined pursuant to Article 40(5) of the Directive, (Article 9 (2) read in conjunction with Article 41 (1) (a));
- a person makes a third or further asylum application in the same Member State, following a final decision to consider a first subsequent application inadmissible pursuant to Article 40 (5) or after a final decision to reject that application as unfounded (Article 9 (2) read in conjunction with Article 41 (1) (b));
- the Member State will surrender or extradite a person either to another Member State, to a third country or to international criminal courts or tribunals (Article 9 (2)).

It is important to stress that such exceptions may only be made where the authorities are satisfied that this will not lead to direct or indirect *refoulement* (Article 9 (3) and 41 (1)).

### *Regulation 604/2013 (Dublin III Regulation)*

Article 28 of the Dublin III Regulation provides that when the requested Member State accepts to take charge of or to take back an applicant, the requesting Member State shall notify the person concerned of the decision to transfer him/her to the Member State responsible and, where applicable, of not examining his application for international protection.

## **4.1.2 Relevant EU fundamental rights and principles**

### *The EU right to an effective remedy (Article 47 of the Charter)*

The EU right to an effective remedy as laid down in Article 47 of the Charter requires that an applicant is able to appeal the outcome of the assessment of the risk of *refoulement* and the decision to expel, extradite or transfer him/her, before a court or tribunal. Such a right to appeal implies a right to remain in the territory pending the appeal since the expulsion, transfer or extradition of an applicant during first instance asylum proceedings, is liable to obstruct his access to a remedy and/or render the court's judgment ineffective.

### *The principle of effectiveness*

The principle of effectiveness requires that the EU prohibition of *refoulement* as laid down in Article 19 of the Charter and Article 21 of the recast Qualification Directive is effectively protected. When a person is expelled or extradited to



the country of origin or a third country where he/she claims to be at risk of persecution or serious harm before their claim has been rigorously assessed, this may undermine the effectiveness of the EU prohibition of *refoulement*.

### 4.1.3 Case law

#### *The Court of Justice of the European Union*

The CJEU has ruled in *N.S. and M.E. and others* that Member States should refrain from transferring an applicant to another Member State where there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.<sup>98</sup> The CJEU thus accepted that the transfer of an applicant to another Member State under the Dublin II Regulation may violate the EU prohibition of *refoulement*. This means that the transfer of an applicant to another Member State before the risk of (direct and indirect) *refoulement* has been assessed may prevent the effective exercise of the EU prohibition of *refoulement*.

The CJEU ruled in *Cimade and GISTI* that the right to remain guaranteed by Article 7 of the Procedures Directive also applies to proceedings where it is established which Member State is responsible for the examination of the asylum application in accordance with the Dublin II Regulation.<sup>99</sup> The Court has not yet addressed the possibilities to derogate from the applicants' right to remain during first instance proceedings. However, the CJEU has ruled in *Samba Diouf* that the EU right to an effective remedy implies that an asylum applicant has the right to a thorough review by the national court of the legality of the asylum decision issued by the determining authority and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded.<sup>100</sup>

#### *The European Court of Human Rights*

It follows from the ECtHR's case law that a person may not be expelled or extradited to his country of origin or a third country before his claim that he will be subjected to treatment contrary to Article 3 ECHR (the prohibition of torture and ill-treatment) has been scrutinized closely and rigorously by the national authorities.<sup>101</sup> The fact that an applicant is at risk of being expelled to a third State which would in turn expel him to his country of origin in violation of the

98 CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011.

99 CJEU, Case C-179/11, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012, paras 46-50

100 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 56.

101 ECtHR [GC], *Hirsi Jamaa and others v. Italy*, Appl. no. 27765/09, 23 February 2012, para 205

prohibition of *refoulement* (indirect *refoulement*) may lead to violation of Article 13 ECHR (the right to an effective remedy).<sup>102</sup>

In *Mohammed v. Austria* the ECtHR found a violation of Article 13 ECHR because Austrian law did not afford the applicant protection from a forced transfer to Hungary during a subsequent asylum procedure. The applicant in this case travelled to Austria via Greece and Hungary. The Austrian authorities denied his asylum application on the basis of the Dublin II Regulation because Hungary should be held responsible for the assessment of the asylum application. The applicant did not appeal this decision, but hid from the authorities in order to avoid transfer. When he was apprehended, he lodged a second asylum application. He argued on the basis of recent reports by UNHCR and the Helsinki Committee, as well as a judgment of an Austrian court, that his transfer to Hungary would violate Article 3 ECHR. He started several proceedings in order to avoid being transferred during the asylum procedure, but to no avail. An interim measure by the ECtHR finally prevented his transfer. The ECtHR held that Austrian law 'thus deprived him of a meaningful substantive examination of both the changed situation and his arguable claim under Article 3 concerning the situation of asylum-seekers in Hungary'. Therefore, the law denied the applicant access to an effective remedy against the enforcement of the order for his forced transfer. The ECtHR in this case pointed at the specific circumstances of the case, namely the fact that almost a year elapsed between the transfer order and its enforcement and the change of circumstances (concerning reception conditions and access to asylum proceedings in Hungary) manifesting itself during that time.<sup>103</sup> Therefore, according to the ECtHR, the second application could not *prima facie* be considered abusive, repetitive or entirely manifestly ill-founded.

#### 4.1.4 Other relevant sources

According to UNHCR the asylum applicant's right to remain in the country pending a decision on his initial request for a refugee status is a 'basic requirement' of an asylum procedure.<sup>104</sup> The Committee against Torture expressed its concerns with regard to the Austrian asylum procedure, which did not grant the right to remain to applicants who lodged a subsequent asylum claim within two days prior to the date set for deportation.<sup>105</sup>

#### 4.1.5 Conclusion

The EU right to an effective remedy as guaranteed by Article 47 of the Charter and the principle of effectiveness limit Member States' possibilities to make use of the exceptions to the right to remain on the territory of the Member State

102 ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 315

103 ECtHR, *Mohammed v. Austria*, Appl. no. 2283/12, 6 June 2013, para 81.

104 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para 192, EXCOM Conclusion no. 8 (XXVIII), 1977, para (e).

105 Committee against Torture, Concluding Observations on Austria, 20 May 2010, CAT/C/AUT/CO/4-5.

as laid down in Article 7 of the Procedures Directive and Article 9 of the recast Directive. The effective protection of the EU prohibition of *refoulement* requires that all asylum applicants be allowed to remain on the territory of the Member States until their claim of a risk of (direct or indirect) *refoulement* in the country to which the Member State intends to expel him has been closely and rigorously assessed by the determining authority. The EU right to an effective remedy requires that an applicant is able to appeal the outcome of the assessment of the risk of *refoulement* and the decision to expel, extradite or transfer the applicant, before this decision is enforced.

## 4.2 The right to remain during the time necessary to lodge the appeal

### 4.2.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

The Procedures Directive does not regulate the right to remain in the Member State in order to exercise the right to an effective remedy.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 46 (5) of the recast Directive provides that Member States shall allow applicants to remain in the territory until the time-limit within which to exercise their right to an effective remedy has expired.

#### *Regulation 604/2013 (Dublin III Regulation)*

Article 27 (2) of the Dublin III Regulation obliges Member States to provide for a reasonable period of time within which the person concerned may exercise his right to an effective remedy against the transfer decision.

### 4.2.2 Relevant EU fundamental rights and principles

#### *The EU right to an effective remedy (Article 47 of the Charter)*

The EU right to an effective remedy includes the right of *access* to an effective remedy.<sup>106</sup> Swift expulsion, extradition or transfer after the asylum decision or the fact that the applicant is not informed of the imminent expulsion may block access to a remedy. As a result, the applicant may not be able to lodge an appeal. Furthermore, the fact that the expulsion is imminent may force him to submit the appeal immediately and prevent him from properly preparing the appeal, and where necessary, with the help of a legal representative.

### 4.2.3 Case law

#### *The Court of Justice of the European Union*

The CJEU has not ruled on whether asylum applicants should be allowed to re-

<sup>106</sup> CJEU, Case C-199/11, *Europese Gemeenschap v. Otis NV*, 6 November 2012, para 49 and CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, para 60.

main on the territory in order for them to lodge an appeal against the negative asylum decision. It did consider in *Pecastaing* that the expulsion of EU citizens may take place immediately after an expulsion order has been issued ‘subject always to the right of this person to stay on the territory for the time necessary to avail himself of the remedies accorded to him’.<sup>107</sup> This may imply that in asylum cases, the applicant should be allowed to remain on the territory of the Member State for the necessary period of time in order for the applicant to lodge an appeal against a negative asylum decision.

### *The European Court of Human Rights*

The ECtHR ruled in several cases that Article 13 ECHR had been violated because the person claiming that their expulsion or extradition would violate Article 3 ECHR did not have the time and opportunity to appeal the expulsion or extradition decision before this decision was enforced. In *Shamayev and others v. Georgia and Russia* the ECtHR considered that:

‘Where the authorities of a State hasten to hand over an individual to another State two days after the date on which the order was issued, they have a duty to act with all the more promptness and expedition to enable the person concerned to have his or her complaint under Articles 2 and 3 submitted to independent and rigorous scrutiny and to have enforcement of the impugned measure suspended. The ECtHR finds it unacceptable for a person to learn that he is to be extradited only moments before being taken to the airport, when his reason for fleeing the receiving country has been his fear of treatment contrary to Article 2 or Article 3 of the Convention’.<sup>108</sup>

#### 4.2.4 Other relevant sources

The Committee against Torture and the Human Rights Committee also ruled in a number of cases that the expulsion of an individual before they could avail of an effective remedy violated the right to an effective remedy.<sup>109</sup>

#### 4.2.5 Conclusion

The right of access to an effective remedy as laid down in Article 47 of the Charter read in the light of the *Pecastaing* judgment and the ECtHR’s case law requires that the asylum applicant be allowed to stay on the territory of a Member State for the time necessary in order to avail of the right to an effective remedy. Furthermore, the asylum applicant or their lawyer should be informed in a timely manner of the imminent expulsion. If the authorities fail to do so, it will make it impossible for the applicant to lodge an appeal against an expulsion decision and therefore it will render the remedy inaccessible.

107 CJEC, Case 98/79, *Pecastaing v. Belgian State*, 5 March 1980, para 18.

108 ECtHR, *Shamayev and others v. Georgia and Russia*, Appl. no. 36378/02, 12 April 2005, para 460.

109 Committee against Torture, *Josu Arkauz Arana v. France*, no. 631997, 5 June 2005, para 11.5 and Human Rights Committee, *Alzery v. Sweden*, no. 1416/2005, 10 November 2006, para 11.

## 4.3 The right to remain during the appeal phase

### 4.3.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

The Procedures Directive does not prescribe that the asylum appeal procedure automatically suspends the expulsion of the asylum applicant. Article 39 (3) of the Directive provides that the Member States shall, where appropriate, provide for rules *in accordance with their international obligations* dealing with the question of whether applicants shall be allowed to remain in the Member State concerned pending its outcome. If the rules do not have suspensive effect, the Member States shall provide for the availability of a legal remedy or protective measures against *refoulement*.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 46 (5) of the recast Procedures Directive provides that Member States shall allow applicants to remain in the territory pending the outcome of the remedy, when the right to an effective remedy has been exercised within the time-limit. It follows from Article 46 (6) and (7) of the Directive that an exception to this rule may be made in cases considered manifestly unfounded or inadmissible, border procedures and decisions taken in accelerated proceedings. In such a situation a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the applicant concerned or acting on its own motion.

According to Article 46 (8) of the Directive, Member States must allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory. Article 46 (7) of the Directive states that where in border procedures an exception is made to the right to a remedy with automatic suspensive effect two further conditions apply:

- the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting him the right to remain on the territory pending the outcome of the remedy;
- in the framework of the examination of the request for interim relief the court or tribunal examines the negative decision of the determining authority in terms of fact and law.

#### *Regulation 604/2013 (Dublin III Regulation)*

Article 27 (3) and (4) of the Dublin III Regulation states that Member States shall provide in their national law rules concerning the suspensive effective of an appeal, these include:

- that an appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review;

- that the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review;
- that the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken;
- that the competent authorities decide, acting *ex officio*, to suspend the implementation of the transfer decision pending the outcome of the appeal or review.

### 4.3.2 Relevant EU fundamental rights and principles

#### *The EU right to an effective remedy (Article 47 of the Charter)*

The expulsion, extradition or transfer of an applicant to his country of origin or a third country may lead to irreparable harm (persecution or serious harm). By expelling an applicant before a court or tribunal has decided on an appeal against a negative asylum decision or on the transfer of an applicant to another Member State, may render the judgment ineffective, as the national court would no longer be in a position to offer proper redress for such harm.

#### *The principle of effectiveness*

The effective protection of the EU prohibition of *refoulement* as laid down in Articles 19 of the Charter and 21 of both the Qualification Directive and its recast may be undermined where an applicant is expelled before a court or tribunal has thoroughly assessed the risk of *refoulement* upon expulsion, extradition or transfer to the country of origin or a third country.

### 4.3.3 Case law

#### *The Court of Justice of the European Union*

The CJEU has not yet ruled on the right to remain during the asylum appeal proceedings. However it has made clear in *Factortame* and *Unibet* that the national court must be able to provide interim protection where this is necessary to ensure the effectiveness of EU law.<sup>110</sup> Furthermore, the CJEU held in *Samba Diouf* that Article 47 of the Charter requires a thorough review by the national court of the legality of the asylum decision issued by the determining authority. Arguably such a thorough judicial review should take place before the applicant is expelled.<sup>111</sup>

110 CJEC, Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, 19 June 1990, para 20 and CJEC, Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, 13 March 2007.

111 CJEU, Case C-619/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 56.

### *The European Court of Human Rights*

The ECtHR in asylum cases, including Dublin cases, only considers a remedy effective if it has automatic suspensive effect.<sup>112</sup> Automatic suspensive effect should be provided for by law or other clear and binding rules. Practical arrangements with regard to interim protection are not sufficient in asylum cases.<sup>113</sup> In *Čonka*, the ECtHR held that the extremely urgent procedure before the *Conseil d'Etat*, which existed in Belgium before 2006 did not comply with Article 13 ECHR, because it was not guaranteed in fact and in law that an application for interim relief would suspend the enforcement of the expulsion measure. A few factors led to this conclusion. First of all the authorities were not required to stay the deportation while an application under the extremely urgent procedure was pending, not even for a minimum period of time to enable the Council of State to decide on the application. Further, in practice it was up to the Council of State to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly. However, the Council of State did not appear to be obliged to do so. Lastly, it was merely on the basis of internal directions that the registrar of the Council of State, acting on the instructions of a judge, contacted the authorities for that purpose, and there was no indication of what the consequences might be should he omit to do so. Ultimately, the alien had no guarantee that the Council of State and the authorities would comply in every case with that practice, that the Council of State would deliver its decision, or even hear the case, before his expulsion, or that the authorities would allow a minimum reasonable period of grace.<sup>114</sup>

It may be derived from the ECtHR's case law that the appeal itself or the request for interim protection should have automatic suspensive effect. In both situations a close and rigorous scrutiny should take place. This means that in a procedure in which the applicant should request a court or tribunal to grant interim protection, the following procedural guarantees must be put in place:<sup>115</sup>

- sufficient time is offered to the applicant to prepare the request for interim relief, if necessary with the help of a lawyer and/or interpreter;<sup>116</sup>
- The legal system should not force the applicant to apply for interim relief at the very last moment before the expulsion or transfer is going to be enforced;<sup>117</sup>
- the procedure for applying for interim relief should not be too complex;<sup>118</sup>
- the burden to prove the need to suspend the expulsion decision is not set too high;

112 ECtHR, *Gebremedhin v. France*, Appl. no. 25389/05, 26 April 2007, para 66, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, paras 387-388 and *Jabari v. Turkey*, Appl. no. 40035/98 40035/98, 11 July 2000, para 49-50.

113 ECtHR, *R.U. v. Greece*, Appl. No. 2237/08, 7 June 2011, para 77.

114 ECtHR, *Čonka v. Belgium*, Appl. No. 51564/99, 5 February 2002, para 83.

115 *M.S.S. v. Belgium and Greece*, paras 388-390.

116 See also ECtHR, *A.C. and others v Spain*, Appl. No. 6528/11, 22 April 2014, para 100.

117 ECtHR, *Josef v. Belgium*, Appl. No. 70055/10, 27 February 2014, para 104.

118 ECtHR, *Josef v. Belgium*, Appl. No. 70055/10, 27 February 2014, para 103.

- the judge deciding on the request performs close and rigorous scrutiny of the risk of *refoulement*.

#### 4.3.4 Other relevant sources

Both the Committee against Torture<sup>119</sup> and the Human Rights Committee<sup>120</sup> are of the opinion that remedies against expulsion orders should have (automatic) suspensive effect. UNHCR has stated that an applicant for refugee status should in principle be permitted to remain in the territory while an appeal to a higher administrative authority or to the court is pending.<sup>121</sup>

#### 4.3.5 Conclusion

The expulsion of an applicant during the appeal proceedings will render the judgment of the national court or tribunal concerning the existence of a risk of a violation of the EU right to be protected against *refoulement* ineffective. Therefore, Article 39 of the Procedures Directive and Article 46 (5)-(8) of the recast Directive as well as Article 27 (3) and (4) of the Dublin III Regulation, interpreted in the light of Article 47 of the Charter require that either the appeal against the expulsion, extradition or transfer of the applicant or his request for interim protection, have automatic suspensive effect. In both situations similar procedural guarantees should be put in place. In particular, a judicial review of a negative asylum decision should be subject to close and rigorous scrutiny, which precludes that the request for interim relief be assessed in a summarized procedure in which the procedural rights of the applicant are reduced to a minimum. It should be noted, however, that the special guarantees mentioned in Article 46 (7) of the recast Directive which apply to border procedures in which an exception is made to the right to a remedy with automatic suspensive effect should also apply to all the exceptions to this right mentioned in Article 46 (6) of Directive 2013/32/EU (manifestly unfounded or inadmissible cases and cases rejected in accelerated proceedings).

#### 4.4 Suggested further reading

- Marcelle Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford/Portland Oregon: Hart Publishing 2014, Chapter 6.
- A.M. Reneman, 'An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?', 12 *European Journal of Migration and Law* (2010), pp. 407-434.

119 Committee against Torture, Concluding Observations regarding Austria, 20 May 2010, CAT/C/AUT/CO/4-5 and Finland, 29 June 2011, CAT/C/FIN/CO/5-6

120 Human Rights Committee, *Alzery v. Sweden*, no. 1416/2005, 10 November 2006, para 11.8

121 UNHCR EXCOM Conclusion no. 8 (XXVIII), 1977, para (e) and UNHCR Handbook para 192.



# 5 The right to legal assistance, legal representation and legal aid

*Nuala Mole*

57

Asylum seekers generally encounter the asylum determination process for the first (and normally the only) time when they make a claim for international protection. The whole system is new to them. Those in need of international protection must be able to present all the relevant elements of their asylum claim effectively if correct decisions are to be taken in accordance with the provisions of the EU asylum *acquis*. Asylum seekers must also be aware of the procedural rights to which they are entitled to if they are to be able to assert them.

## 5.1 The right to legal assistance, legal representation and legal aid

The principle of effective legal protection means that national rules must not make it “impossible or excessively difficult”, in practice, to exercise Community law rights. Effective legal protection requires that national measures implementing a Directive are to be applied in such a way as to achieve the result sought by it.<sup>122</sup> In the case of asylum, that is to ensure that protection is granted to those who are entitled to protection.<sup>123</sup>

In order to navigate their way through the procedures and to present their claims effectively (and thus achieve the result sought by the Directives) asylum seekers generally need access to information, advice and assistance. The provision of such advice and assistance obviously leads to better quality initial decision making which can prevent subsequent time consuming and costly appeals. This is in the interest of both the asylum seeker and the State.<sup>124</sup>

122 CJEU, Case C- 62/00, *Marks and Spencer plc and Commissioners of Customs and excise*, 11 July 2002.

123 See Article 18 of the Charter.

124 See for example the results of the Solihull pilot, *Asylum Aid, Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission*, October 2008,

Legal assistance and representation and legal aid are different. The right to legal assistance is the right to legal information about an individual's rights and obligations and, the right to be permitted to consult with a legal advisor or counsellor. The right to legal representation is the right for a legal advisor or counsellor to represent individuals in their dealings with the relevant authorities. Even in situations where there is a right to legal assistance and representation the individual may not be entitled to be provided with them free of cost. The right to legal aid means that legal assistance and representation is to be provided free of charge if an individual cannot afford to pay for assistance which is necessary for the effective protection of their rights.

The EU asylum *acquis* contains several provisions relating to the right to legal assistance. It also provides for the right to legal aid under certain conditions.<sup>125</sup> The level of legal assistance required by the provisions of the asylum *acquis* depends on the stage applicants for international protection are at in the asylum procedure. Nearly all of the instruments that make up the EU asylum *acquis* make some provision for legal assistance and legal representation as well as for means testing and legal aid.<sup>126</sup> However, these fall short of effectively ensuring that asylum seekers have access to legal assistance and representation when it is most needed; at the time either of making a request for international protection or of formally lodging such a request or of being subjected to a Dublin III procedure. Legal assistance and representation has long been considered as a necessary feature of ensuring better decision making within the asylum procedure.<sup>127</sup> The recast Directives have improved this situation but the provision is still far from ideal.

### 5.1.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

The Procedures Directive sets out detailed provisions on legal assistance, legal representation and legal aid.

#### Legal information

Article 10 of the Procedures Directive stipulates that asylum seekers shall be provided in a timely manner in a language which they may reasonably be considered to understand with information about their rights and obligations

125 See CJEU, Case C-75/08, *Christopher Mellor v. Secretary of State for Communities and Local Government*, Opinion of AG Kokott, 22 January 2009, para 33: "So Article 41 of the Charter of Fundamental Rights does not just contain rules of good administration by the institutions but documents a general principle of law, which authorities of the Member States too must observe when applying Community law."

126 The Procedures Directive and the recast Procedures Directive as well as the Reception Conditions Directive the recast Reception Conditions Directive and the Dublin III Regulation all have provisions on legal aid detailed below.

127 See Asylum Aid, *Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission*, October 2008,

whilst in the asylum procedure.<sup>128</sup> The applicants or their legal representative shall also be given reasonable notice of the decision by the determining authority.<sup>129</sup> They shall also be given information on how to challenge a negative decision.<sup>130</sup>

### Legal assistance and representation

Article 15 of the Procedures Directive governs the right to legal assistance and representation. It requires Member States to allow applicants for international protection the opportunity to consult a legal adviser or counsellor *at their own cost*. Article 16 governs the scope of legal assistance and representation. It provides that legal advisers must be able to have access to the file unless this would jeopardise national security or otherwise raise security concerns and that those advisers have access to closed areas.<sup>131</sup> Member States may also provide that advisors or counsellors are present at interviews.

### Legal aid

As stipulated in Article 15 (2) where a negative decision is administered at first instance, Member States shall ensure that free legal assistance and/or legal representation is granted upon request subject to a number of conditions. Member States may provide in their national legislation that free legal assistance and/or representation is restricted in the following instances;

- only to for procedures before a court or tribunal;
- only to those who do not have sufficient resources;
- only when it is provided by specialised legal advisers;
- only if the appeal or review is likely to succeed. However Member States shall ensure that it is not arbitrarily restricted.<sup>132</sup>

Member States may also impose time limits and/or monetary limits on the provision of free legal assistance and/or representation and provide that applicants should not be treated less favourably than nationals.<sup>133</sup> A Member State can also request a reimbursement if the applicant's financial situation improves.<sup>134</sup>

### Legal assistance and representation in border procedures

Where Member States have procedures in place to examine asylum applications at border or transit zones, Article 35 of the Procedures Directive provides that persons who are claiming international protection can consult with a legal

128 Article 10 (1) (a) Procedures Directive.

129 Article 10 (1) (d) Procedures Directive.

130 Article 10 (1) (e) Procedures Directive.

131 Article 16 (1) and (2) Procedures Directive.

132 Article 15, 3 (b), (c) and (d) Procedures Directive.

133 Article 15 (5) (a) and (b) Procedures Directive.

134 Article 15 (6) Procedures Directive .

advisor or counsellor in accordance with the same procedure as those who make an application on the territory.<sup>135</sup>

### *Directive 2013/32/EU (Recast Procedures Directive)*

The recast Procedures Directive has more detailed provisions on legal aid and assistance than its predecessor.

#### Legal information

Under Article 12 of the recast, Member States are under an *obligation* to ensure that applicants for international protection are informed of their rights and obligations during the asylum procedure.<sup>136</sup> Applicants are also not to be denied the opportunity to communicate with organisations that are able to provide legal advice or counselling.<sup>137</sup> Article 19 introduces the right to free legal and procedural *information* at first instance, but does not extend to ensuring access to legal representation. Article 19 (1) provides that applicants or their legal advisors should be given reasonable notice of any decision by a determining authority and informed of the result of that decision in a language they are able to understand, as well as how to challenge a negative decision. The provision of legal and procedural information free of charge is subject to the conditions set out in Article 21.

#### Legal assistance and representation

In accordance with the principle of effective legal protection, Article 20 underlines that Member States *may* also provide free legal assistance and/or representation in the procedures at first instance. Article 22 and Article 23 deal with the right to, and scope of free legal assistance and representation. Article 22 (1) ensures that access to a legal advisor or other counsellor at the applicant's cost is expressly available at all stages of the procedure and introduces a provision stating that a Member State 'may allow' non-governmental organisations to provide legal assistance and/or representation to applicants.<sup>138</sup> Article 23 (3) of the recast Directive now unambiguously asserts the right of an asylum seeker to bring a legal advisor or other counsellor to the personal interview. Article 23 (1) assures that the legal advisor or counsellor has access to the information on the file before a decision is made. This is also subject to a number of exceptions, specifically where it would jeopardise national security or the security of persons to whom the information relates. Unlike the Procedures Directive, the recast Procedures Directive explicitly provides that legal advisors or counsellors can have access to information such as Country of Origin information that

135 Article 35 (e) Procedures Directive, it permits them to consult a legal advisor or counsellor described in Article 15 (1) of the Asylum Procedures Directive.

136 Article 12 (1) (a) recast Procedures Directive.

137 Article 12 (c) recast Procedures Directive.

138 Article 22 (2) recast Procedures Directive.

was used for the purpose of making a decision.<sup>139</sup> Similarly, the legal advisor or counsellor will have access to any expert advice that has been sought by the decision maker in the applicant's case. Article 17 provides that applicants and their legal advisers or other counsellors, shall have access to the report or the transcript of their personal interview and where applicable, the recording, before the determining authority takes a decision.

### Legal aid

Article 20 and Article 21 of the recast Directive deal with the procedures for providing or obtaining free legal assistance and representation in appeals. Article 20 (1) maintains the principle that Member States only have an obligation to provide free legal assistance and representation in appeals procedures, but also provides at Article 20 (2) that Member States *may* provide such free legal assistance and representation in first instance procedures. Article 20 ensures that free legal assistance and representation is granted on request in appeals procedures and should at least cover the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant, but this is still subject to Article 21.

The recast has similar restrictions to the Procedures Directive as to who can receive legal assistance and representation, with the addition of a new optional exception whereby legal assistance and representation may not be granted where the person is not allowed to remain on the territory following a subsequent application.<sup>140</sup> If a court or "other competent authority" considers that the case has no tangible prospect of success legal aid can be refused. However such a refusal must be subject to an effective remedy before a court which requires access to legal assistance and representation.<sup>141</sup> In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

### Legal assistance and representation in border procedures

Article 8 regulates access to legal assistance in detention facilities and at border crossing points. Article 8 (2) provides that Member States shall ensure that organisations and persons providing advice and counselling have effective access to applicants in border or transit zones. It allows for limitations, but only in instances where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned. Access must not thereby be severely restricted or rendered impossible.

139 Article 12 (d) recast Procedures Directive.

140 Article 21 (2) recast Procedures Directive

141 Article 20 (3) recast Procedures Directive.

*Regulation No. 604/2013 (Dublin III Regulation)*

Articles 27 (5) and (6) of the Dublin III Regulation provides for the right for legal assistance to challenge a transfer decision. According to para 6 this legal assistance and where appropriate free legal aid are to be accorded no less favourably than legal aid is accorded to nationals' general entitlement to legal aid. It may be denied in cases that have no tangible prospect of success.

**5.1.2 Relevant EU fundamental rights and principles***The EU right to an effective remedy (Article 47 of the Charter)*

Article 47 of the Charter provides that 'everyone shall have the possibility of being advised, defended and represented' and that 'legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'. Under EU law, the right to an effective remedy includes actual access to a court (or tribunal) and to judicial proceedings.<sup>142</sup> Whilst this is not absolute, any limitation imposed must pursue a legitimate aim and must not involve 'a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.<sup>143</sup>

In order to utilize the right to effective remedy effectively, there must be effective access to a lawyer. Article 47 of the Charter also applies when challenging a refusal to grant legal aid if it is arguably necessary to access an effective remedy. In order for the EU law right to an effective remedy to enjoy effective judicial protection, legal aid should logically be available to mount that challenge.<sup>144</sup>

*The principle of effective judicial protection*

The right to effective judicial protection is a general principle of EU law.<sup>145</sup> It is now also enshrined in Article 47 of the Charter as an essential element of the rule of law. *Legal assistance and representation* (emphasis added) must be available in order to comply with effective judicial protection.<sup>146</sup> *Legal aid* is consequently required by EU law if the person lacks sufficient financial resources to secure the legal assistance necessary to ensure effective access to justice. In addition, in accordance with the principle of effective judicial protection, national remedies must ensure that substantive rights provided by EU law are upheld.<sup>147</sup> If a national rule or restriction makes it excessively difficult for an applicant to obtain a remedy as a result of difficulties in accessing legal assis-

142 CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010.

143 CJEU, Case C-418/11, *Texdata Software GmbH*, 26 September 2013, para 84.

144 CJEU, Case C-418/11, *Texdata Software GmbH*, 26 September 2013, para 84.

145 See amongst many others CJEU Case C- 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, 9 March 1978.

146 CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, paras 50 - 60.

147 CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010.

tance and representation, the principle of effective judicial protection may be breached.<sup>148</sup>

### *The EU right to a fair trial (Article 47 of the Charter)*

Whilst the guarantees of Article 6 ECHR, including the right of access to the Court, are not applicable to asylum and immigration cases as a matter of ECHR law, they are applicable under Article 47 of the Charter, which extends the provisions of Art 6 ECHR to matters governed by EU law.

### 5.1.3. Case law

#### *The Court of Justice of the European Union*

The CJEU has consistently held that national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals. “The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible”.<sup>149</sup>

It is perhaps indicative of the nature of most proceedings before the CEU that there is virtually no case law on legal aid as an aspect of effective legal or judicial protection. *Deutsche Energiehandels und Beratungsgesellschaft*<sup>150</sup> concerned the provision of legal aid for a [legal] person who was seeking to bring a *Francovich* damages claim<sup>151</sup> against Germany for the failure to transpose a Directive. The relevant German rules did not permit legal aid to be granted to the company or the court fees to be waived. The CJEU noted that the principle of effectiveness meant that procedural rules should not inhibit the exercise of a person’s rights derived from EU law. The CJEU was concerned that the exercise of those rights should not be rendered impossible in practice in a situation where a person did not qualify for legal aid but was also unable to afford the costs of taking a case to court. This could nullify the right to effective access to justice and therefore also to effective judicial protection, a general principle of EU law. The CJEU relied on Article 47 of the Charter in reaching its decision. It found that it was up to the national court to ascertain whether the conditions for granting legal aid amounted to a limitation on the right of access to court which undermined the very core of that right. When making that assessment, it held that the national court must take into consideration the subject-matter

148 See e.g (Joined Cases) C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen*, 14 December 1995.

149 CJEU, (Joined Case) C-6/90 and C-9/90, *Andrea Francovich and Others v. Italian Republic*, 19 November 1991, para 33.

150 CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010

151 CJEU, Case C-6/90 and C-9/90, *Andrea Francovich and Others v. Italian Republic*, 1991. A *Francovich* claim refers to a cause of action in damages against a government for failure to implement EU law.

of the litigation, whether the applicant had a reasonable prospect of success, the importance of what was at stake for the applicant in the proceedings, the complexity of the applicable law and procedure and the applicant's capacity to represent himself effectively.<sup>152</sup>

Under the Procedures Directive and its recast, Member States are entitled to impose monetary and/or time limits on the provision of free legal assistance and representation provided these are not arbitrarily applied. These limitations should be applied in accordance with the case law of the CJEU regarding the right to access to court.

The CJEU has taken into account the disadvantaged position of vulnerable persons in a number of instances. In *Pontin*, it considered that given an applicant's vulnerability, procedural rules such as time limits could make it excessively difficult to obtain the legal advice necessary for the effective exercise of the right to access justice.<sup>153</sup> A provision restricting legal assistance or legal aid might meet the general requirements of reasonableness and proportionately and not in itself significantly impact on the right of access to the court. However, when applied to a particularly vulnerable applicant and combined with other factors (such as the language in which the relevant information is provided), it might breach Article 47 of the Charter.<sup>154</sup> This reflects the approach taken by the ECtHR, see below.

### *The European Court of Human Rights*

The failure to provide access, or the existence of any other obstacles which may obstruct access to a lawyer are taken into consideration by the ECtHR when examining the accessibility of a remedy.<sup>155</sup> Under the ECHR, the right of access to court and the accompanying right to legal assistance and representation are generally considered under Article 6 ECHR. Sometimes, however, the ECtHR chooses to view them as an aspect of the procedural safeguards which it finds are inherent in other protected rights<sup>156</sup> or that Article 13 in a given case may require that a remedy must be judicial to be effective.<sup>157</sup> Legal assistance (and if necessary legal aid) in civil cases is otherwise normally regulated by

152 CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, para 61.

153 CJEU, Case C-63/08, *Virginie Pontin v. T-Comalux SA*, 29 October 2009, para 65. In this case the CJEU found that given the vulnerable position of a dismissed pregnant lady, it could warrant special procedural guarantees such as extended time-limits.

154 See e.g. a decision of the UK courts in relation to legal aid for a victim of trafficking under the EU Trafficking Directive, *Gudanaviciene v. Director LAC*, June 2014.

155 ECtHR, *Čonka v. Belgium*, Appl. no. 51564/99, 5 February 2002, para 44 and ECtHR, *I.M v France*, Appl.no. 9152/09, 02 February 2012.

156 See e.g. ECtHR, *A.K. and L. v. Croatia*, Appl. No. 37956/11, 8 January 2013 and *P., C. and S. v. the United Kingdom*, Appl. no. 56547/00, 16 July 2002 where the lack of legal assistance violated both Article 8 and Article 6 ECHR.

157 ECtHR, *Z and others v. the United Kingdom*, Appl. No 29392/95, 10 May 2001.



Article 6 (1). Article 6 (3) (c) regulates the provision of legal aid in criminal cases. Unlike the case law of the CJEU, there are dozens of judgments and decisions of the Convention organs on this question, only a selection of which are noted here.

The right to a fair trial does not require that legal aid must be granted in order to pursue every claim 'but in some circumstances it may compel the State to provide for the assistance of a lawyer when such assistance has been deemed to be indispensable for an effective access to court'.<sup>158</sup>

Article 6 only applies to civil or criminal matters. The rule was settled in *Maaouia v France*<sup>159</sup> that as immigration and asylum proceedings are neither civil nor criminal, those proceedings will not, as a matter of ECHR law attract the benefit of the fair trial guarantees found in Article 6 ECHR. Article 51 of the Charter makes clear that the Charter applies to all EU law matters and Article 47 of the Charter expressly extends the substantive benefits of Article 6 ECHR to all matters falling within the scope of EU law. This may cause the ECtHR to rethink the approach taken in *Maaouia*.<sup>160</sup> When Member States are applying Article 47 of the Charter at the national level, the Article 6 ECtHR case law relating to legal assistance and legal aid is applicable to asylum cases as a matter of EU law even if not as a matter of ECHR law.

### Access to legal assistance under Article 6 in criminal cases and its analogous application to asylum

Free legal assistance is required in criminal cases under Article 6 ECHR for impecunious defendants if the charge is a serious one and/ or if the accused has language or comprehension difficulties.<sup>161</sup> The right to legal assistance also incorporates the right to have the time and facilities to prepare the defence guaranteed in Article 6 (3) (b). A violation was found of Article 6 in the case of *Sakhnovskiy v. Russia*<sup>162</sup> when the defendant met his lawyer for the first time by video link 15 minutes before the hearing. Given the seriousness and complexities of the case, this brief time meant that the applicant did not have access to effective legal assistance.

In criminal cases the ECtHR has emphasised the importance of being able to access legal assistance from the first interrogation<sup>163</sup> and given the expanded scope of Article 47 of the Charter, this may be a principle that should be ap-

158 ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, 19 October 1979, Para 26.

159 ECtHR [GC], *Maaouia v. France*, Appl. no. 39652/98, 5 October 2000.

160 The case of *N v. United Kingdom* raised this point but was declared inadmissible on other grounds. The Case of *F.G. v Sweden*, Appl. no. 43611/11, 16 January 2014 currently pending before the grand Chamber also considers the role of Article 6 ECHR.

161 ECtHR, *Twalib v. Greece*, 42/1997/826/1032, 9 June 1998.

162 ECtHR, *Sakhnovskiy v Russia*, Appl. no. 21272/03, 2 November 2010, para 103.

163 ECtHR, [GC] *Salduz v. Turkey*, Appl. no. 36391/02, 27 November 2008.

plied, by analogy, in asylum cases. In *Murray v. UK* the ECtHR stated that where national laws attach consequences to the attitude of an accused at the initial stage of police interrogation, Article 6 ECHR 'will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stage of police interrogation'.<sup>164</sup> Given the importance placed on credibility findings in a first instance hearing, this could be very relevant for asylum cases. In *Salduz v. Turkey* the Grand Chamber of the ECtHR stressed the importance of early access to a lawyer particularly where serious charges are involved.<sup>165</sup> It stated, that 'in order for the right to a fair trial to remain sufficiently 'practical and effective' Article 6 (1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of the suspect by the police'.<sup>166</sup>

*Artico v. Italy* was the first ECtHR case that dealt with the effectiveness of rights, and found that they must be 'practical and effective and not theoretical and illusory'.<sup>167</sup> The case concerned a situation where an ex officio lawyer was appointed to a criminal defendant but did not provide effective assistance. The Court found that there was not just a formal duty to appoint a lawyer but also a practical duty to ensure the provision of *effective* legal assistance.<sup>168</sup>

#### Access to legal aid under Article 6 ECHR in civil cases

The case of *Airey v. Ireland*<sup>169</sup> concerned the lack of legal aid for marital separation proceedings. The ECtHR held that there was a right to legal assistance and representation if it was indispensable for effective exercise of the right of access to court. It found that the applicant had been unable to represent herself effectively owing, amongst other things, to the complexity of the issues and of the procedures before the national court. The case of *Steel and Morris*<sup>170</sup> concerned defendants in a civil libel action brought by McDonalds. The ECtHR found a violation of Article 6 as no legal aid was available to *Steel and Morris* to defend themselves in extremely complex proceedings brought against them. Although an important element of *Steel and Morris* was that the proceedings had been initiated against them, rather than them initiating the proceedings, it was the complexity of the cases, something which often characterises asylum cases, which was a determining factor for the ECtHR.

164 ECtHR [GC], *Salduz v. Turkey*, Appl. no. 36391/02, 27 November 2008, para 63.

165 ECtHR [GC], *Salduz v. Turkey*, Appl. no. 36391/02, 27 November 2008, para 54.

166 ECtHR [GC], *Salduz v. Turkey*, Appl. no. 36391/02, 27 November 2008, para 55.

167 ECtHR, *Artico v. Italy*, Appl. no. 6694/74, 13 May 1980 para 33.

168 ECtHR, *Artico v Italy*, Appl. no. 6694/74, 13 May 1980 paras 36 & 37.

169 ECtHR, *Airey v. Ireland*, Appl.no. 6289/73, 9 October 1979.

170 ECtHR, *Steel and Morris v. The United Kingdom*, Appl. no. 68416/01, 15 February 2005.

*Anakomba Yula v. Belgium* concerned a woman who needed to bring proceedings in Belgium to establish the paternity of her child.<sup>171</sup> The proceedings would, if successful, have led to the regularisation of her immigration situation. She was unable to bring the proceedings because she was refused legal aid on the ground of unlawful residence in Belgium. The ECtHR found a violation of Article 6 as a result of her being refused legal aid for an action to assert the child's paternity (a civil right falling within the scope of Article 6 – the immigration consequences were ancillary).

The ECtHR has also found that the procedure for being granted legal aid must not be so complex that it puts a disproportionate burden on the applicant's ability to access a court. In addition, although the ECtHR allows for legal aid to be limited to cases that have a reasonable prospect of success, the authority that decides who is granted legal aid cannot substitute itself for the court that would adjudicate the case. Moreover, the decision making process relating to whether or not to grant legal aid must not be arbitrary and the refusal of legal aid should be subject to appeal.<sup>172</sup>

#### Access to legal assistance under Article 13 ECHR

The ECtHR has accepted in a number of cases that the lack of legal aid and assistance can render a remedy under Article 13 ECHR inaccessible. In *M.S.S v. Belgium and Greece*, which concerned a Dublin II transfer back to Greece from Belgium, the ECtHR noted that the applicant had no practical means of paying a lawyer and received no information on the organisations offering legal advice and assistance in Greece. This, coupled with the shortage of legal aid practitioners meant he was unable to access the asylum procedure or to access a remedy for this defect. The ECtHR found that there was a violation of Article 13 taken in conjunction with Article 3.<sup>173</sup> In *IM v. France* the ECtHR found a violation of Article 13 ECHR because the applicant only had the opportunity to speak to the duty lawyer about his case for a few moments before it was presented.<sup>174</sup> As a consequence, the lawyer only had the opportunity to present the substance of the application made in Arabic and not to adduce any evidence to support that claim. Although not an effective remedies case, in *Ammur v. France*, the ECtHR found a violation of Article 5 when asylum seekers were detained in the transit zone of the airport.<sup>175</sup> The lack of access to legal assistance was one factor leading to the finding a violation.

171 ECtHR, *Anakomba Yula v. Belgium*, Appl. no. 45413/07, 10 March 2009.

172 ECtHR, *Bakan v. Turkey*, Appl. no. 50939/99, 12 June 2007, para 76.

173 ECtHR [GC], *M.S.S v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 319.

174 ECtHR, *IM v. France*, Appl. no. 91521/09, 2 Feb 2012, paras 26 and 151.

175 ECtHR, *Ammur v. France*, Appl. no. 19776/92, 25 June 1996, para 45.

Similarly, accessing legal assistance cannot be made so arduous for the applicant that the effectiveness of the legal assistance is undermined.<sup>176</sup> In *Čonka v. Belgium*, the ECtHR found that the information given to applicants prevented detainees from being able to contact a lawyer, the lawyer was informed too late of the order to deport the applicant to be able to react and no legal assistance was offered by the authorities. As a result the ECtHR found there was a violation of Article 5 (1) ECHR.<sup>177</sup>

#### 5.1.4 Conclusion

In order for applicants to enjoy the requisite legal assistance and representation as provided for under the Procedures Directive, its recast and the Dublin III Regulation, it must be accessible and effective. Under the case law of both the CJEU and ECtHR, and in the light of Article 47 of the Charter, national procedural rules must not place an unreasonable burden on applicants in order to ensure they are able to obtain the requisite legal advice. If an applicant is particularly vulnerable, procedural rules that would ordinarily comply with the Charter, when applied to the applicant's particular circumstances, may make it excessively difficult for them to obtain the requisite legal advice in the time period required,<sup>178</sup> for example, consulting with a legal adviser and lodging an asylum appeal with all the necessary documents in the time period required under national law.

Under the recast Procedures Directive, Member States may provide free legal advice from the first stage of the proceedings, but they are under no obligation to do so.<sup>179</sup> The ECtHR has found, when examining criminal law cases under Article 6 ECHR, that free legal assistance is required if the charge is serious. The ECtHR has also found that in civil law proceedings, legal aid should be granted in cases that are particularly complex. Article 6 case law is now applicable when examining fair trial guarantees under Article 47, and Article 47 is applicable to asylum cases. Given the seriousness of the issues involved when an applicant submits an asylum application, and given the level of complexity of such cases, this case law could be used to explore whether there is an obligation under Article 47 to provide free legal assistance for impecunious applicants for first instance hearings.

The lack of effective access to legal assistance and legal aid can result in a violation of the rights to an effective remedy. This means an applicant must be able to access a lawyer but also have the requisite time necessary to prepare a proper appeal. Under the Procedures Directive and its recast, Member States

176 See e.g. ECtHR, *Çakici v. Turkey*, Appl. No. 23657/94, 8 July 1999.

177 ECtHR, *Čonka v. Belgium*, Appl. no. 51564/99, 5 February 2002 para 44.

178 CJEC, Case C-63/08, *Pontin v. T-Comalux SA*, 29 October 2009, para 65.

179 Article 20 (2) recast Procedures Directive.

can apply the merits test to asylum appeals, 'particularly if it is considered that there is no tangible prospect of success'.<sup>180</sup> Given the disadvantaged position of persons claiming asylum, and the irreversible harm that this can cause, it should be applied with caution. If it is applied, there must be effective access to a court to challenge this refusal, which must take into account the relevant jurisprudence from the CJEU and ECtHR on legal aid which is now applicable to asylum cases. *Airey v. Ireland* makes clear when assessing whether legal aid is necessary for a fair trial, that it must be determined on the basis of the particular facts of each case and depends on what is at stake for the applicant, the complexity of the relevant law and procedure and the capacity of the applicant to represent himself.<sup>181</sup> These factors are often characteristics of an asylum hearing. Given that the criteria as set out by the CJEU in *DEB* and by the ECtHR in *Airey* and later cases also need to be considered, the reasonable prospect of success test is only one element that needs to be taken into account and cannot be the sole reason for denying a person's access to legal aid.

## 5.2 Suggested further reading

- Dana Baldinger (2013), *Rigorous Scrutiny versus Marginal Review*, Wolf Chapter 6.
- Reneman, A.M. (2011). *Access to an Effective Remedy before a Court or Tribunal in Asylum Cases*. In E Guild & P Minderhoud (Eds.), *The First Decade of EU Migration and Asylum Law* (pp. 401-436). Leiden/Boston: Martinus Nijhoff Publishers.
- Karen Reid (2012) *A practitioner's Guide to the European Convention on Human Rights* 4th Edition, Sweet and Maxwell, Section A Chapters 14 legal aid in civil cases and 15 legal representation in criminal proceedings.

180 Article 15 3 (d) Procedures Directive and Article 20 (3) recast Procedures Directive.

181 ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, 9 October 1979, para 46.



# 6 The right to a personal interview

Marcelle Reneman\*

It is generally recognised that asylum applicants should have the right to a personal interview. The European Commission has stated, for example, that since the right to a personal interview is a basic procedural safeguard, the very possibility of taking a decision without interviewing an applicant makes procedures vulnerable to error and consequent *refoulement*.<sup>182</sup> Statements made by an applicant during the personal interview often play an essential role in the assessment of the risk of *refoulement*. Therefore, it is important that the applicant and the interviewer are able to communicate effectively during the interview. This section will address the right to a personal interview, the language of the interview and the right to a free and competent interpreter and the right to (comment on) a written report of the interview. It will be argued that the EU right to be heard, the right of the child (Article 24 of the Charter) as well as the effective protection of the EU right to asylum (Article 18 of the Charter) and the EU prohibition of *refoulement* (Article 19 of the Charter) limit Member States' discretion to omit a personal interview. Moreover, they may set extra requirements as to the language of the interview and the right to a free and competent interpreter. Furthermore, it is contended that the EU right to be heard requires a written report of the personal interview. This report should be made available to the applicant before the asylum decision is taken and in time in order to enable the applicant to make comments. Finally the right to an oral hearing before a court or tribunal is also addressed in this section. It is concluded that Article 47 of the Charter generally requires an oral hearing before the (first instance) court or tribunal assessing the appeal against the rejection of the asylum claim.

182 Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM(2009) 554, SEC(2009) 1377, of 21 October 2009, p. 13.

\* This section is based on Marcelle Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, Oxford/ Portland Oregon, Hart Publishing, Chapter 7.

## 6.1 The right to a personal interview

### 6.1.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

Articles 12 and 35 (3) (d) of the Procedures Directive as a general rule provides for a right to a personal interview in all asylum cases including those assessed in border procedures. However, a personal interview may be omitted on the following grounds:

- the determining authority is able to take a positive decision on the basis of the evidence available (Article 12 (2) (a));
- the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his application and submitting the essential information regarding the application (Article 12 (2) (b));
- the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded where the following circumstances apply which may also be reason to accelerate the procedure (Article 12(2)(c) read in conjunction with Article 23 (4) (a), (c), (g), (h) and (j)).

An interview can also be omitted if the applicant:

- only raised issues that are not relevant or of minimal relevance to the examination of whether he qualifies as a refugee;
  - is considered to be from a safe country of origin;
  - can be returned to a safe third country;
  - has made inconsistent, contradictory, improbable or insufficient representations;
  - has submitted a subsequent application which does not raise any relevant new elements or;
  - is making an application merely in order to delay or frustrate his removal (Article 12 (2) (c));
- 
- the interview can also be omitted if is not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his control (Article 12 (3));
  - it can also be omitted if a subsequent asylum application is subject to a preliminary examination, in which it is assessed whether new elements or findings have arisen or have been presented by the applicant (Article 34 (2) (c)).

Article 12 (3) provides that where the interview is omitted because it is not 'reasonably practical' reasonable efforts shall be made to allow the applicant or the dependent to submit further information.



Article 12 (4) of the Procedures Directive states that the absence of a personal interview in accordance with the reasons detailed above shall not prevent the determining authority from taking a decision on an application for asylum. Some applicants may, therefore, only get the opportunity to submit written information to substantiate their asylum claim.

### Dependent adults

According to Article 12 (1) of the Procedures Directive, Member States are not obliged to offer the opportunity of a personal interview to dependent adults on whose behalf an asylum application has been made.

### Accompanied and unaccompanied minors

Article 12 (1) of the Procedures Directive leaves it to the Member States to determine in which cases a minor shall be given the opportunity of a personal interview.

### *Directive 2013/32/EU (Recast Procedures Directive)*

According to Article 14 of the recast Procedures Directive, the general rule is that the asylum applicant is also given the opportunity of a personal interview before the decision is taken. A personal interview may only be omitted in the following circumstances:

- when the determining authority is able to take a positive decision with regard to *refugee status* on the basis of evidence available (Article 14 (2) (a));
- when the determining competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his control. When in doubt, the determining authority shall consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is temporary or of enduring nature (Article 14 (2) (b));
- when a subsequent asylum application is subject to a preliminary examination, in which it is assessed whether new elements or findings have arisen or have been presented by the applicant (Article 42 (2) (b)). This exception does not apply to first asylum applications of dependent adults or minors lodged after an asylum application had been made on their behalf (Article 42 (2) (b) read in conjunction with Article 40 (6)).

Article 14 (2) (b) states that where a personal interview is not conducted because the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his control, reasonable efforts shall be made to allow the applicant or the dependent to submit further information. According to Article 14 (3) of the recast Procedures Directive the absence of a personal interview in accordance with Article 14 shall not prevent the determining authority from taking a decision on an asylum application.

### Dependent adults

According to Article 14 (1) of the recast Procedures Directive dependent adults shall be given the opportunity of a personal interview.

### Accompanied and unaccompanied minors

Article 14 (1) of the recast Procedure Directive leaves it to the Member States to determine in which cases a minor shall be given the opportunity of a personal interview.

### *Regulation 604/2013 (Dublin III Regulation)*

A personal interview with an applicant for international protection is also foreseen under Article 5 of the Dublin III Regulation in order to facilitate the process of determining which Member State is responsible for processing an application for asylum. According to Article 5(2) of the Regulation the personal interview may be omitted if:

- the applicant has absconded;
- after having received the information referred to in Article 4 of the Regulation (e.g. the objectives and consequences of the Regulation), the applicant has already provided the information relevant to determine the Member State responsible by other means. The Member State omitting the interview shall give the applicant the opportunity to present all further information which is relevant to correctly determine the Member State responsible before a decision is taken to transfer the applicant to the Member State responsible.

## 6.1.2 Relevant EU fundamental rights and principles

### *The EU right to be heard*

The EU right to be heard which is recognised by the Court of Justice as a general principle of EU law guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to adversely affect his interests.<sup>183</sup>

### *The principle of effectiveness*

The principle of effectiveness requires that the EU prohibition of *refoulement*, as laid down in Article 19 of the Charter and Article 21 of the recast Qualification Directive and the right to asylum, as laid down in Article 18 of the Charter and Articles 13 and 18 of the recast Qualification Directive are effectively protected. Arguably the absence of a personal interview may undermine the effectiveness of the right to asylum and the prohibition of *refoulement*, as it may render it impossible or very difficult for an applicant to present his motivation for seeking international protection.

183 CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, paras 85-89.

### *Rights of the child (Article 24 of the Charter)*

According to Article 24 of the Charter children may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. This provision is based on Article 12 of the Convention on the Rights of the Child (CRC). Article 24 of the Charter may have implications for the right to a personal interview of minors who are asylum applicants as well as the guarantees which should be offered during such an interview.

### **6.1.3 Case law**

#### *The Court of Justice of the European Union*

The Court of Justice has not yet interpreted the right to a personal interview guaranteed in Article 12 of the Procedures Directive. However, it did recognise in *M.M.* that the EU right to be heard must be fully guaranteed in asylum procedures. The CJEU considered in *M.M.* that this right ‘must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System’.<sup>184</sup> This case concerned the Irish asylum system in which applications for refugee status and for subsidiary protection status are assessed in two separate procedures.<sup>185</sup> According to the Court, an applicant must be able to make his views known before the adoption of any decision liable to adversely affect his interests. The fact that an applicant has already been duly heard when his application for refugee status was examined does not mean that this procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection.

#### Accompanied and unaccompanied minors

The Court of Justice made clear in *Aguirre Zarraga* that Article 24 of the Charter requires in principle that a child is able to express his or her views in legal proceedings. However, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24 (2) of the Charter. The fact that an interview may be harmful to the psychological health of the child should be taken into account.<sup>186</sup>

#### *The European Court of Human Rights*

The ECtHR has stressed the importance of a personal interview in several asylum cases. The ECtHR holds as a general principle that national authorities are best placed to assess not just the facts, but, more particularly, the credibility of

184 CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, paras 87-89.

185 CJEU, Case C-277/11, *M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, paras 90-91, 95.

186 CJEU, Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010, para 64.

witnesses 'since it is they who have had an opportunity to see, hear and assess the demeanour of the person concerned'.<sup>187</sup> In some cases in which the national authorities failed to conduct a personal interview, the ECtHR relied heavily on the opinion of UNHCR. It stressed that UNHCR interviewed the person concerned and thus had the opportunity to test the credibility of his fears and the veracity of his account of the circumstances in his home country.<sup>188</sup> When assessing the quality of the national decision-making process, the ECtHR takes into account whether the applicant was interviewed by the national authorities.<sup>189</sup> In *I.M. v. France* when assessing the quality of the French accelerated procedure, the ECtHR took into account that the personal interview with the applicant only lasted half an hour. The ECtHR noted in this context that it concerned a first asylum application.<sup>190</sup>

### 6.1.4 Other relevant sources

According to UNHCR, even in cases deemed manifestly unfounded or abusive, a complete personal interview by a fully qualified official is required.<sup>191</sup> Furthermore, UNHCR state that basic information frequently given in the first instance by completing a standard questionnaire, will normally not be sufficient to enable the examiner to reach a decision, and that one or more personal interviews will be required.<sup>192</sup>

#### Dependent adults

UNHCR is of the opinion that the determining authority should meet with each dependant adult individually to ensure that they understand the grounds for protection and their procedural rights. In order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process, female asylum seekers should be interviewed without the presence of male family members in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right.<sup>193</sup>

#### Accompanied and unaccompanied minors

The Committee on the Rights of the Child is of the opinion that Article 12 CRC requires that in the case of an asylum claim, 'the child must [...] have the oppor-

187 ECtHR, *R.C. v. Sweden*, Appl. no. 41827/07, 9 March 2010, para 52.

188 ECtHR, *Abdolkhani and Karimnia v. Turkey*, Appl. no. 30471/08, 22 September 2009, para 82.

189 ECtHR, *Nasimi v. Sweden*, Appl. no. 38865/02, 16 March 2004, ECtHR, *Charahili v. Turkey*, Appl. no. 46605/07, 13 April 2010, para 57.

190 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, para 155.

191 EXCOM Conclusion no. 30 (XXXIV), 1983.

192 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para 199. See also Committee against Torture, Concluding Observations regarding France, 3 April 2006, CAT/C/FRA/CO/3, para 6.

193 UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para 36.

tunity to present her or his reasons leading to the asylum claim'.<sup>194</sup> It has also stated with regard to unaccompanied and separated children that 'where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made'.<sup>195</sup>

### 6.1.5 Conclusion

Article 12 of the Procedures Directive and Article 14 of the recast Procedures Directive, read in the light of the EU right to be heard as well as the principle of effectiveness, require in principle that a personal interview is held in the first asylum procedure. The absence of a personal interview is only justified in exceptional cases, where it is established that this absence does not make it impossible for the claimant to substantiate his case and for the examining authorities to appropriately examine the asylum claim as required by Article 8 (2) of the Procedures Directive and Article 10 (3) of the recast Procedures Directive. Where the interview is omitted, the determining authorities should ensure that sufficient information is gathered to accurately assess the risk of *refoulement*, in particular when the person concerned is not able to be interviewed because of his psychological situation. The determining authorities must show in their decision that they fulfilled this requirement. Also, in cases falling within the scope of the Dublin III Regulation, an applicant should be able to substantiate his position that a transfer to another Member State will lead to (in)direct *refoulement*. In that context, the principle of effectiveness and the EU right to be heard may require for an applicant to be interviewed before a decision on the responsibility for the examination of the asylum claim is taken if he claims that the transfer will violate the principle of *refoulement*. This may be the case even if one of the grounds for making an exception to the right to a personal interview mentioned in Article 5 of the Dublin III Regulation applies.

## 6.2 Language of the interview and the right to a free and competent interpreter

### 6.2.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

Article 13 (3) (b) of the Procedures Directive states that communication during the personal interview need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he *may reasonably be supposed to understand* and in which he is able to communicate. It follows from Article 10 (1) (b) of the Directive that an asylum applicant shall receive the services of an interpreter free of charge for the purpose of

194 Committee on the Rights of the Child, General Comment No. 12 (2009), CRC/C/GC/12, para 123. See also paras 32 and 67.

195 Committee on the Rights of the Child, General Comment No. 6 (2005), CRC/GC/2005/6, para 71.

the personal interview where appropriate communication cannot be ensured without the services of the interpreter. Article 13 (3) (b) of the Directive requires Member States to select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 13 (3) (c) of the recast Procedures Directive states that the communication during the personal interview shall take place in the language preferred by the applicant unless there is another language which he understands and in which he is able to communicate clearly. It follows from Article 12 (1) (b) of the recast Directive that an asylum applicant shall receive the services of an interpreter free of charge for the purpose of the personal interview where appropriate communication cannot be ensured without the services of the interpreter. Article 13 (3) (c) of the recast Procedures Directive requires Member States to select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview.

#### *Regulation 604/2013 (Dublin III Regulation)*

According to Article 5 (4) of the Dublin III Regulation, the personal interview must be conducted in a language that the applicant understands or is reasonably supposed to understand and in a language in which he is able to communicate. Where necessary, Member States are obliged to make use of an interpreter who is able to ensure appropriate communication between the applicant and the person conducting the personal interview.

### **6.2.2 Relevant EU fundamental rights and principles**

#### *The EU right to be heard*

The EU right to be heard, which is recognised by the Court of Justice as a general principle of EU law, requires that the asylum applicant has an opportunity to effectively make known his views during the first instance procedure.<sup>196</sup> This is not possible if the applicant is not able to communicate effectively during the personal interview.

#### *The principle of effectiveness*

The effectiveness of the right to a personal interview and as a result, the EU prohibition of *refoulement* and the EU right to asylum will be undermined if effective communication during the personal interview is not ensured.

### **6.2.3 Case law**

#### *The Court of Justice of the European Union*

No relevant case law of the Court of Justice was found.

<sup>196</sup> CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, paras 85-89.

### *The European Court of Human Rights*

In *M.S.S. v. Belgium and Greece* the shortage of interpreters was one of the deficiencies in the Greek asylum procedure which led to a violation of Article 13 ECHR.<sup>197</sup> In *I.M. v. France*, the ECtHR recognised that a lack of linguistic aid may affect the asylum applicant's ability to present his asylum claim.<sup>198</sup> In the context of criminal cases, the ECtHR has recognised that in order for the right of every defendant to the free assistance of an interpreter as provided for in Article 6 (3) (e) ECHR 'to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided'.<sup>199</sup>

#### **6.2.4 Other relevant sources**

The Committee against Torture in its recommendations to the French government has held that asylum applications should be subject to a more thorough risk assessment including by systematically holding individual interviews to better assess the personal risk to the applicant, and by providing free interpretation services.<sup>200</sup>

#### **6.2.5 Conclusion**

The EU right to be heard and the principle of effectiveness requires Member States to ascertain that the person concerned is actually able to understand the language chosen for the interview and that he can express himself effectively in this language. If the claimant does not understand the interviewer or cannot make himself understood clearly, an interpreter should be used to facilitate communication. The Member State should provide an interpreter free of charge and should ensure the quality of the interpreter.

### **6.3 The right to (comment on) a written report of the interview**

#### **6.3.1 EU legislation**

##### *Directive 2005/85/EC (Procedures Directive)*

Article 14 (1) of the Procedures Directive requires Member States to ensure that a written report of the personal interview is made 'containing at least the essential information regarding the application, as presented by the applicant'. In this context the provision refers to Article 4 (2) of the Qualification Directive which mentions the elements needed to substantiate the asylum claim. In many cases this report forms, together with the evidence submitted by the asylum appli-

197 ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 301.

198 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, para 145.

199 ECtHR [GC], *Hermi v. Italy*, Appl. no. 18114/02, 18 October 2006, para 70.

200 Committee against Torture, Concluding Observations regarding France, 3 April 2006, CAT/C/FRA/CO/3.

cant and the determining authorities and country of origin information, the basis of the decision on the asylum claim.

The Directive does not give the applicant the right to comment on the contents of the report of the interview.<sup>201</sup> Article 14 (3) of the Directive only provides that Member States may request the applicant's approval of the contents of the report of the personal interview. Where an applicant refuses to approve the content of the report, the reasons for this refusal shall be entered into the applicant's file. Article 14 (2) of the Directive requires Member States to ensure that applicants have timely access to the report of the personal interview. However, access to the report may only be granted after a decision is taken on the application. In such instances, access must be given as soon as necessary in order to allow an appeal to be prepared and lodged in due time.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 17 (1) of recast Procedures Directive obliges Member States to draft a thorough and factual report containing all substantial elements or a transcript of every personal interview. Member States may choose to make an audio or audio-visual recording of the interview. According to Article 17 (3) of the recast Directive, an applicant shall be granted an opportunity to make comments and/or to provide clarifications with regard to any mistranslations or misconceptions appearing in the report or the transcript. Such an opportunity should be given at the end of the personal interview or within a specified time-limit before the asylum decision is made. To that end the applicant must be 'fully informed of the content of the report or the substantial elements of the transcript with the assistance of an interpreter if necessary'. No opportunity to provide comments or clarifications needs to be offered if the Member State provides for both a transcript and a recording of the interview. Member States must, unless the audio (visual) recording is admissible as evidence, request the applicant to confirm that the content of the report or the transcript correctly reflects the interview. Article 17(4) of the Directive provides that where the applicant refuses to do so, the reasons for this should be entered into the applicant's file.

Article 17 (5) of the recast Procedures Directive requires in principle that the applicant and his legal advisor or other counsellor have access to the report, the transcript and/or the recording of the interview before the asylum decision is taken. However, in accelerated proceedings the Member State may provide access to the report, transcript or recording at the same time as the decision is made. Furthermore, recordings of the interview may only be made available during the appeal proceedings if the applicant has been provided with a transcript of the interview.

201 Commission Staff Working Document ,COM(2009) 554, SEC(2009) 1377, 21 October 2009, p 13.



### *Regulation 604/2013 (Dublin III Regulation)*

Article 5 (6) of the Dublin III Regulation requires that the Member State conducting the personal interview shall make a written summary thereof which shall contain at least the main information supplied by the applicant at the interview. This summary may either take the form of a report or a standard form.

The Member State shall ensure that the applicant and/or the legal advisor or other counsellor who is representing the applicant have timely access to the summary. The Regulation does not address the applicant's right to comment on the content of the written summary.

### **6.3.2 Relevant EU fundamental rights and principles**

#### *The EU right to be heard and the right of access to the file*

The EU right to be heard requires that 'the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views on the evidence on which the contested decision is based'.<sup>202</sup> This implies that the addressee of the decision should be informed of the evidence on which the decision is based.<sup>203</sup> Arguably the EU right to be heard requires that an applicant is granted the opportunity to comment effectively on the report or summary of his personal interview.

Furthermore it may be contended that the EU right to be heard requires that the report or summary of the personal interview is made available to the applicant in a timely manner. This applies in particular when the determining authority intends to reject the asylum application on the basis of the information included in the report. If, for example, the determining authority finds the statements of the applicant as written down in the report inconsistent, contradictory, vague or incomplete and thus not credible, the applicant should be able to respond to those allegations. It should be noted that the statements of the asylum applicant play a crucial role as evidence in the asylum procedure. Therefore, it is of utmost importance for the quality of the decision that the written report or summary of the personal interview is complete and that the information contained therein is accurate. In order to ensure an adequate examination of the case within the meaning of Article 8 of the Procedures Directive and Article 10 (3) of the recast Procedures Directive, it may be considered necessary that the person concerned or his representative is able to examine this report and to correct mistakes and/or fill in gaps. Also for cases falling within the scope of the Dublin III Regulation, it is important that the risk of *refoulement* upon transfer to another Member State is based on complete and correct information.

202 CJEU, Case C-28/05, *G. J. Dokter, Maatschap Van den Top en W. Boekhout tegen Minister van Landbouw, Natuur en Voedselkwaliteit*, 15 June 2006, para 74.

203 CFI, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, 12 December 2006, para 93.

### 6.3.3 Case law

#### *The Court of Justice of the European Union*

The CJEU considered in *M.M.* that ‘the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and *before the adoption of any decision* liable to affect his interests adversely’ (emphasis added).<sup>204</sup> The right to be heard can only be exercised effectively if the person concerned is granted access to the file.<sup>205</sup> The right to be heard also requires the authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision.<sup>206</sup> Advocate General Sharpston, stated in her opinion in *A, B and C* that dealt with credibility assessment in sexual orientation cases, that the national authorities must ensure that the asylum applicant ‘has been informed of the points where elements to substantiate his account were deemed lacking and that he has been afforded the opportunity to address such concerns’.<sup>207</sup>

#### *The European Court of Human Rights*

In *I.M. v. France*, the applicant’s asylum application was rejected in essence because his statements during the interview were very imprecise and incorrect with regard to his ethnic origin as well as his family’s origin from the Darfur region. According to the French determining authority the applicant’s origin could, therefore, not be established. Furthermore, it was stated in the decision that the applicant’s statements regarding the applicant’s involvement in a student movement, the circumstances of his arrest, the conditions of his detention, and the reasons for his release were not sufficiently precise and credible. The fact that the applicant was not granted the opportunity to dispute these allegations was one of the factors leading to a violation of Article 13 ECHR in this case. The ECtHR considered that the accelerated nature of the procedure did not permit the applicant to put forward clarifications on these points in writing or during a second interview, even though the applicant could have explained any alleged inconsistencies and produced any missing documents.<sup>208</sup>

### 6.3.4 Other relevant sources

No relevant other sources were found.

204 CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, para 87.

205 See eg Court of First Instance, Case T-170/06, *Alrosa v. Commission*, 11 juli 2007, para 197.

206 CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, para 88.

207 CJEU, Joined Cases C-148/13, C-149/13 and C-150/13, Conclusion of 17 July 2014, paras 90-91.

208 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, para 147.

### 6.3.5 Conclusion

Arguably the EU right to be heard and the right of access to the file which are recognised as principles of EU law require that:

- a written report of the personal interview is drafted by the determining authority;
- the applicant has access to this report in time, in order to exercise his right to be heard effectively *before the decision on the asylum application* is taken. The right to be heard is arguably infringed where the report of the interview is made available at the same time as the asylum decision (as allowed in accelerated procedures by Article 17 (5) of the recast Procedures Directive) or after the asylum decision has been taken (as allowed by Article 14 (2) of the Procedures Directive);
- the applicant has an opportunity to comment on the report of the interview. This applies in particular where the determining authority intends to reject the asylum application on the basis of information contained in the written report.

## 6.4 The right to an oral hearing before the court or tribunal

### 6.4.1 EU legislation

*Directive 2005/85/EC (Procedures Directive)*

Article 39 of the Procedures Directive provides for the right to an effective remedy. This provision does not provide for a right to an oral hearing before a court or tribunal.

*Directive 2013/32/EU (Recast Procedures Directive)*

Article 46 (3) of recast Directive provides that an effective remedy within the meaning of Article 46 (1) of that Directive provides for a full and *ex nunc* examination of both facts and points of law. This provision does not include a right to an oral hearing before a court or tribunal.

*Regulation 604/2013 (Dublin III Regulation)*

Article 27 (1) of the Dublin III Regulation states that an applicant has the right to an effective remedy against a negative decision, in the form of an appeal or a review, in fact and in law against a transfer decision, before a court or tribunal. This provision does not provide for a right to an oral hearing before a court or tribunal.

### 6.4.2. Relevant EU fundamental rights and principles

*The EU right to an effective remedy and fair trial (Article 47 of the Charter)*

Article 47 of the Charter states that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'.

### 6.4.3 Case law

#### *The Court of Justice of the European Union*

No relevant case law of the Court of Justice was found.

#### *The European Court of Human Rights*

As set out in the second section, the interpretation of Article 47 of the Charter is, also in asylum cases, inspired by Article 6 ECHR. Article 6 ECHR provides for a right to a 'fair and public hearing'. According to the standing case law of the ECtHR, the right to a public hearing includes the right to an oral hearing before a court or tribunal.<sup>209</sup> An oral hearing may be dispensed with if a party unequivocally waives his right thereto and there are no questions of public interest making a hearing necessary.<sup>210</sup> The complete absence of an oral hearing before a court or tribunal in a procedure can only be justified in exceptional circumstances.<sup>211</sup> The ECtHR has allowed the omission of an oral hearing before a court or tribunal in the following situations:

- Proceedings in second or third instance, in which the appellate or cassation court is only competent to review questions of law;<sup>212</sup>
- Cases which raise 'no questions of fact or law which can be adequately resolved on the basis of the case-file and the parties' written observations',<sup>213</sup> It concerns for example cases 'where there are no issues of credibility or contested facts';<sup>214</sup>
- An oral hearing can be omitted because of demands of efficiency and economy. The ECtHR for example recognised that systematically holding hearings could be an obstacle to the particular diligence required in social-security cases.<sup>215</sup>

If questions concerning facts or credibility are at issue in the first instance or second instance appeal procedure, the ECtHR is generally of the opinion that an oral hearing should be held.<sup>216</sup> The ECtHR, for example, deemed an oral hearing necessary in several cases in which the applicant had claimed compensation before the national court for damage suffered as a result of alleged unlawful detention. The ECtHR considered that an oral hearing could not be dispensed with in these cases because of 'the essentially personal nature of the applicant's experience, and the determination of the appropriate level of compensation'.<sup>217</sup>

209 ECtHR [GC], *Jussila v. Finland*, Appl. no. 73053/01, 23 November 2006, para 40.

210 ECtHR, *Döry v. Sweden*, Appl. no. 28394/95, 12 November 2002, para 37.

211 ECtHR, *Döry v. Sweden*, Appl. no. 28394/95, 12 November 2002, para 39.

212 ECtHR [GC], *Meftah et al v. France*, Appl. nos 32911/96, 35237/97 and 34595/97, 26 July 2002, para 41.

213 ECtHR, *Döry v. Sweden*, Appl. no. 28394/95, 12 November 2002, para 37.

214 ECtHR [GC], *Jussila v. Finland*, Appl. no. 73053/01, 23 November 2006, para 41.

215 ECtHR, *Döry v. Sweden*, Appl. no. 28394/95, 12 November 2002, para 41.

216 ECtHR [GC], *Malhous v. the Czech Republic*, Appl. no. 33071/96, 12 July 2001, para 60.

217 ECtHR [GC], *Göç v. Turkey*, Appl. no. 36590/97, 11 July 2002, para 51.

The ECtHR has ruled in criminal cases that Article 6 ECHR also includes the right of the person concerned to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them.<sup>218</sup>

#### 6.4.4 Other relevant sources

The Committee against Torture expressed its concerns regarding the fact that in France the administrative judge may reject an appeal against a decision refusing entry for the purposes of asylum by court order, thereby depriving the applicant of a hearing at which he may defend his case, and of procedural guarantees such as the right to an interpreter and a lawyer. The Committee recommended that any appeal relating to an asylum application submitted at the border is subject to a hearing at which the applicant threatened with removal can present his case effectively, and that the appeal is subject to all basic procedural guarantees, including the right to an interpreter and counsel.<sup>219</sup>

#### 6.4.5 Conclusion

The ECtHR's case law concerning the right to a fair trial guaranteed by Article 6 ECHR provides an important basis for the CJEU's interpretation of Article 47 of the Charter. In particular it may be argued on the basis of the ECtHR's case law that the right to a public hearing within the meaning of Article 47 of the Charter includes a right to an oral hearing. It follows from this case law that the absence of an oral hearing, particularly in first instance appeal proceedings is only allowed in exceptional cases. The ECtHR's case law indicates that an oral hearing is necessary in cases in which a court or tribunal needs to decide on factual issues, in which the credibility of the person concerned is disputed or where the personal experiences of the person concerned play an important role. Asylum cases often hinge on the credibility of the applicant's asylum account. Furthermore the personal experiences of the asylum applicant in the country of origin or transit in the past are important for the assessment of his individual risk of *refoulement* upon return or transfer to another Member State. It should be derived from the ECtHR's case law that a court which reviews the asylum decision on factual grounds should in principle hold an oral hearing. The fact that in asylum cases the fundamental nature of the EU right to asylum and the prohibition of *refoulement* are at stake adds to the need for an oral hearing. An oral hearing is less crucial if the disputed facts do not concern an applicant's credibility, but for example, only the seriousness of the general human rights situation in his country of origin. The court may include in its decision whether to hold an oral hearing, in the interest of both the Member State and the applicant for asylum, in order to decide on an application as soon as possible.

218 ECtHR, *Stanford v. the United Kingdom*, Appl. no. 16757/90, 23 February 1994, para 26.

219 Committee against Torture, Concluding Observations regarding France, 20 May 2010, CAT/C/FRA/CO/4-6, para 15.

Thus, there are strong arguments to argue that Article 39 of the Procedures Directive, Article 46 of the recast Procedures Directive, and Article 27 of the Dublin III Regulation, read in the light of Article 47 of the Charter, generally require an oral hearing before a (first instance) court or tribunal assessing the appeal against the rejection of the asylum claim.

Furthermore, it should be derived from the ECtHR's case law under Article 6 ECHR that the right to an oral hearing can only be effectively exercised if the person concerned is able to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them. Therefore, arguably Article 47 of the Charter requires that in asylum cases, for example, free interpretation is made available for asylum applicants who do not understand the language spoken in the court.

### 6.5 Suggested further reading

- Marcelle Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford/Portland Oregon: Hart Publishing 2014, Chapter 7.

# 7 Time-limits in the asylum procedure

Marcelle Reneman\*

Asylum procedures rendering a prompt decision are generally considered to be in the interest of the asylum applicant, as lengthy procedures result in a long period of uncertainty for applicants concerning their legal position. Member States often use fast asylum procedures to examine asylum claims considered manifestly unfounded or abusive. Both the CJEU and the ECtHR recognise that accelerated asylum procedures may be necessary to deal with such asylum claims.<sup>220</sup> However, short time-limits in asylum procedures may undermine an applicant's ability to substantiate his asylum claim and, therefore, the effective protection of the EU right to asylum (Article 18 of the Charter) and the EU prohibition of *refoulement* (Article 19 of the Charter). Moreover, short time-limits may prevent asylum applicants from making effective use of the procedural guarantees provided for in the Procedures Directive and the Dublin Regulation. Finally short time-limits for lodging an appeal against a negative asylum decision may render access to an effective remedy very difficult or impossible. This may lead to a violation of the EU right to an effective remedy guaranteed by Article 47 of the Charter. At the same time lengthy asylum procedures may infringe on a person's right to have his affairs handled within a 'reasonable' time, which is guaranteed by the EU principle to good administration<sup>221</sup> and/or the right to a fair and public hearing within a reasonable time, as guaranteed by Article 47 of the Charter. These issues are expanded upon below.

## 7.1. Short time-limits in first instance asylum procedures

Short time-limits often, but not only, occur in accelerated procedures. The

220 See for example CJEU, Case C-175/11, H.I.D. and *B.A v. Refugee Applications Commissioner and Others*, 13 January 2013 and ECtHR, *M.E. v. France*, Appl. no. 50094/10, 6 June 2013.

221 CJEU, Case C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform*, 8 May 2014, para 56.

\* This section is based on A.M. Reneman, 'Speedy asylum procedures in the EU', 25 *International Journal of Refugee Law*, 2013, issue 4, p.717-748

Procedures Directive and recast Procedures Directive do not define the term ‘accelerated’ procedure. However, it may be assumed that an accelerated procedure is a procedure in which the time-scale for taking the asylum decision is shorter than in another, ‘regular’, procedure. The Directives do not provide for minimum time-limits for specific phases of any (accelerated) asylum procedure. It is argued in this sub-section that the EU right to an effective remedy laid down in Article 47 of the Charter and the principle of effectiveness set limits on Member States’ discretion to apply very short time-limits in asylum procedures.

### 7.1.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

Article 23 of the Procedures Directive provides that the asylum procedure should be concluded as soon as possible, without prejudice to an adequate and complete examination of the asylum claim. According to recital 11 of the Preamble and Article 23 (3) of the Directive, Member States enjoy full discretion as to when accelerated procedures are used. Article 23 (4) includes a (non-exhaustive) list of situations in which a procedure may be accelerated. Accelerated procedures within the meaning of Article 23 (3) and (4) of the Directive must comply with the basic principles and guarantees laid down in Chapter II of the Directive, such as the right to information (Article 10 (1) (a)) the right to a personal interview (Article 12) and the right to legal assistance and representation (Articles 15 and 16).

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 31 of the recast Directive also provides that the asylum procedure should be concluded as soon as possible, without prejudice to an adequate and complete examination of the asylum claim. Accelerated asylum procedures may be applied in an *exhaustive* number of situations listed in Article 31 (8) of the Directive. The provision of Article 23 (3) of the Procedures Directive which stated that Member States may prioritise or accelerate *any examination* has disappeared. Furthermore the text of Article 31 (8) indicates that the procedure may only be accelerated where the applicant:<sup>222</sup>

- has only raised issues that are not relevant for the examination of the asylum claim;
- originates from a safe country of origin;
- has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision;

222 See also p. 7 of the original proposal for the recast of the Procedures Directive COM(2009) 554 final, which states that the proposal provides for ‘a limited and exhaustive list of grounds for an accelerated examination of manifestly unfounded applications’. The amended proposal of the recast Procedures Directive added grounds to the exhaustive list. See COM(2011) 319 final, p. 5.



- has in bad faith, destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality;
- has made clearly inconsistent and contradictory, clearly false or obviously improbable representations, which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing;
- has lodged a subsequent application that is not inadmissible;
- has lodged a subsequent asylum application or an application which is intended to delay or frustrate his removal;
- entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his entry;
- refuses to comply with the obligation to have his finger prints taken;
- may for serious reasons be considered to be a danger to the national security or public order of the Member State.

Accelerated asylum procedures in the meaning of Article 31 (8) must comply with the basic principles and guarantees laid down in Chapter II of the Directive, such as the right to information (Article 12 (1) (a) and 19) the right to a personal interview (Article 14) and the right to legal assistance and representation (Articles 20-22).

Article 24 (3) of the recast Directive provides that accelerated procedures may not be applied to applicants who are in need of special procedural guarantees as a result of serious forms of psychological, physical or sexual violence, if adequate support in order to allow them to benefit from the rights and comply with the obligations of the Directive cannot be provided within the framework of the accelerated procedure.

According to Article 25 (6) of the recast Directive, Member States may only apply an accelerated procedure to the case of an unaccompanied minor if he:

- comes from a safe country of origin;
- has introduced a subsequent application;
- may for serious reasons be considered a danger to the national security or public order of the Member State.

Article 31 (9) of the recast Directive states that time-limits for the adoption of a decision in an accelerated procedure shall be reasonable. Member States may exceed those time-limits where it is necessary in order to ensure an adequate and complete examination of the asylum application. In the case of a third or further application or a subsequent asylum application which is intended to frustrate removal, Member States may derogate from time-limits normally applicable in accelerated asylum procedures or admissibility procedures (Article 41 (2) of the Directive).

*Regulation 604/2013 (Dublin III Regulation)*

The Dublin III Regulation does not contain any (minimum) time-limits within which the asylum applicant is granted the opportunity to substantiate his claim that his transfer would violate the prohibition of *refoulement*.

**7.1.2 Relevant EU fundamental rights and principles***The EU right to an effective remedy (Article 47 of the Charter)*

Short time-limits during first instance asylum proceedings, in particular where combined with short time-limits for appeal proceedings, may violate the right to an effective remedy as guaranteed in Article 47 of the Charter. Short time-limits may impede the applicant to substantiate his asylum claim and the authorities to conduct an appropriate examination of this claim.

*Principle of effectiveness*

The effectiveness of the EU right to asylum (Article 18 of the Charter and Articles 13 and 18 of the Qualification Directive and its recast) and the EU prohibition of *refoulement* (Article 19 of the Charter and Article 21 of the Qualification Directive and its recast) is undermined where the applicant is granted insufficient time to substantiate his asylum claim in an asylum or Dublin procedure.

Furthermore short time-limits for exercising procedural rights guaranteed by EU legislation, such as the right to legal assistance or the right to a personal interview may render the exercise of those rights impossible or excessively difficult.

**7.1.3 Case law**General considerations*The Court of Justice of the European Union*

The CJEU accepts that it is necessary and appropriate to set time-limits in administrative proceedings. Such time-limits also serve to promote the principle of equal treatment.<sup>223</sup> On the other hand, the CJEU has made clear in its case law that the principle of effectiveness requires time-limits to be reasonable and proportionate to the rights and interests at stake. The reasonableness and proportionality of time-limits should be assessed in the abstract as well as in the individual circumstances of the case by the national court.<sup>224</sup> The CJEU has shown in its case law that it will interfere with national time-limits if necessary to ensure the effectiveness of EU law.<sup>225</sup>

223 CJEC, Case C-349/07, *Sopropé – Organizações de Calçado Lda v. Fazenda Pública*, 18 December 2008, para 40.

224 CJEC, Case C-327/00, *Santex SpA v. Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA*, 27 February 2003, para 57.

225 See for example CJEC, Case C-208/90, *Emmott v. Minister for Social Welfare and Attorney General*, 25 July 1991 and CJEC, Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, 14 December 1995.

### *The European Court of Human Rights*

The ECtHR accepts that time-limits should be set for administrative proceedings. It has considered, however, that the speed of the procedure should not undermine the effectiveness of the procedural guarantees which aims to protect the applicant against arbitrary *refoulement*.<sup>226</sup>

#### Time to gather evidence

Asylum applicants in principle bear the burden of proof according to Article 4 (1) of the recast Qualification Directive. Article 4 (1) of the recast Qualification Directive provides that the asylum applicant may be expected to submit all the relevant elements *as soon as possible*. It may be inferred from this provision that Member States may not require asylum applicants to submit all relevant elements immediately at the start of the asylum procedure. In order to be able to substantiate the asylum claim, time is an essential resource.

### *The Court of Justice of the European Union*

In *H.I.D.* the CJEU considered that asylum applicants ‘must enjoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin’.<sup>227</sup> In *Laub*, which concerned the recovery of export refunds unduly paid by national authorities, the CJEU also found that a reasonable period of time must be granted to a party to produce the necessary evidence.<sup>228</sup> In this case, the authorities had not given *Laub* the opportunity to produce evidence in support of its right to export refunds before it decided to recover these refunds. The CJEU held that ‘to deny exporters the opportunity to produce the necessary documentation to prove its right to the refund would constitute an infringement of the principle of good administration, insofar as this principle precludes a public administration from penalising an economic operator acting in good faith for noncompliance with the procedural rules, when this non-compliance arises from the behaviour of the administration itself’.<sup>229</sup>

### *The European Court of Human Rights*

In *I.M. v. France*, the ECtHR concluded that Article 13 ECHR (the right to an effective remedy) had been violated in the case of an asylum applicant whose asylum claim was rejected in the French accelerated border procedure. One of

226 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, para 147, ECtHR, *A.C. and others v Spain*, Appl. No. 6528/11, 22 April 2014, para 100

227 CJEU, Case C-175/11, *H.I.D. and B.A. v. Refugee Applications Commissioner and Others*, 31 January 2013, para 75.

228 CJEU, Case C-428/05, *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v. Hauptzollamt Hamburg-Jonas*, 21 June 2007, para 27.

229 CJEU, Case C-428/05, *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v. Hauptzollamt Hamburg-Jonas*, 21 June 2007, paras 24-25.

the main reasons for this conclusion was that the applicant was provided with an insufficient opportunity to substantiate his claim of a risk of *refoulement*. The applicant had five days to present his asylum claim, instead of the twenty-one days available in the regular asylum procedure. The ECtHR underlined the fact that the applicant was detained during the procedure, which did not permit him, within such a short period of time, to gather via external contacts all the elements which could substantiate and document his asylum application.<sup>230</sup> The ECtHR had already recognised in its earlier judgment in *Bahaddar v. the Netherlands* that 'in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if (...) such evidence must be obtained from the country from which he or she claims to have fled.' For that reason 'time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim'.<sup>231</sup>

In the cases of *M.E. v. France* and *K.K. v. France*, the ECtHR did not find a violation of Article 13 ECHR even though the applicant had an arguable claim of a risk of *refoulement* and was rejected in the same border procedure as was applied in *I.M. v. France*.<sup>232</sup> The ECtHR took into account that the applicants had stayed in France for a long time (almost three years in *M.E.* and ten months in *K.K.*) before lodging an asylum claim, which was the reason for the referral of his application to the accelerated procedure. According to the ECtHR the applicants, therefore, had sufficient time to gather documentation in support of the asylum claim before the start of the asylum procedure.<sup>233</sup> In *K.K. v. France*, the ECtHR also took into account that the applicant had also applied for asylum in Greece and the United Kingdom and, therefore, knew how to formulate an asylum application and realised the necessity to support such an application with relevant documentation.<sup>234</sup>

## Exercising procedural rights

### *The Court of Justice of the European Union*

The CJEU has recognised in its case law that short time-limits may impede the effective exercise of EU procedural rights, such as the right to be heard. The CJEU has held that addressees of decisions must be given sufficient time to enable them to effectively make known their views as regards the information on which the authorities intend to base their decision.<sup>235</sup> The CJEU has also recognised that

230 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012 paras 144,146, 148.

231 ECtHR, *Bahaddar v. the Netherlands*, Appl. no. 25894/94, 19 February 1998, para 45.

232 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012.

233 ECtHR, *M.E. v. France*, Appl. no. 50094/10, 6 June 2013, paras 68-69.

234 ECtHR *K.K. v. France*, Appl. no. 18913/11, 10 October 2013 para 69-70.

235 CJEC, Case C-349/07, *Sopropé – Organizações de Calçado Lda v. Fazenda Pública*, 18 December 2008 and CJEC, Case C-462/98P, *Mediocurso - Estabelecimento de Ensino Particular Ld.ª v. Commission*, 21 September 2000, para 38.

short national time-limits for bringing proceedings<sup>236</sup> or for raising new pleas in appeal proceedings<sup>237</sup> may undermine the effectiveness of a right granted by EU law. According to the CJEU, the sufficiency of the time-limit should be examined in general as well as in the individual circumstances of the case.<sup>238</sup> It should be remembered that asylum procedures, including accelerated asylum procedures, should comply with the procedural guarantees of Chapter II of the Procedures Directive.

### *The European Court of Human Rights*

In *I.M. v. France*, the ECtHR took into account in its assessment of the effectiveness of the remedy available, that very little time was available for the applicant to speak to his legal representative and that the personal interview only lasted for half an hour. It also found that the short time-limits prevented *I.M.* from responding to the alleged vagueness and inconsistencies in his asylum application.<sup>239</sup> In *Jabari v Turkey*, the ECtHR found a violation of Article 13 ECHR because the asylum application had been rejected without an examination of the merits of the case because it had been submitted outside the set time limits. According to Turkish legislation the applicant should have lodged her asylum application within five days of her arrival in Turkey.<sup>240</sup>

### Assessing time-limits in an individual case

It may be derived from the CJEU's and the ECtHR's case law that circumstances, which should be taken into account when assessing whether the application of a fast asylum procedure lead to a violation of the right to an effective remedy, include:

- **Whether the applicant is detained**

According to the ECtHR, it is more difficult to obtain proof in support of the asylum claim where the applicant is detained, as contact with the outside world is limited. Short time-limits may have more serious consequences for applicants held in detention than for applicants who are free and may contact, for example, legal assistants and persons in the country of origin.<sup>241</sup>

- **Whether it concerns a first or a subsequent asylum application**

In *I.M. v. France*, the ECtHR stressed several times that the case concerned the accelerated processing of a *first* asylum application.<sup>242</sup> The ECtHR has in a

236 CJEC, Case C-327/00, *Santex SpA v. Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mólnlycke SpA, Artsana SpA and Fater SpA*, 27 February 2003.

237 CJEC, Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, 14 December 1995.

238 CJEC, Case C-349/07, *Sopropé – Organizações de Calçado Lda v. Fazenda Pública*, 18 December 2008, para 44.

239 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, paras 147, 152, 155.

240 ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, 11 July 2000, para 49-50.

241 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, para 146.

242 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, paras 143, 146, 148, and 155.

few cases accepted that the rejection of a *subsequent* asylum application in a (very speedy) accelerated procedure could be permissible, if the first application was carefully examined in a regular asylum procedure.<sup>243</sup> The fact that all the arguments of an applicant against expulsion to his country of origin have been examined, in the context of a regular procedure, may, according to the ECtHR, justify the determining authorities adopting a subsequent asylum procedure with very short time limits to verify the existence of new grounds which should lead to the modification of their previous negative decision.

- **The complexity of the case and automatic reference to the accelerated procedure**

The CJEU accepted that it may be permissible according to the Procedures Directive to process certain categories of asylum applications on the basis of the nationality or country of origin of the applicant, in accelerated proceedings.<sup>244</sup> Following Article 31(8) (b) of the recast Procedures Directive, the nationality or country or origin of an asylum applicant can only be used as a reason to accelerate the proceedings if the country of nationality or origin can be considered a 'safe country of origin'.

The ECtHR on the other hand has been critical of automatically referring applicants to the accelerated procedure. In *I.M. v. France*, the Court found the automatic character of the referral of the applicant's asylum claim to the accelerated procedure to be one of the important factors which contributed to the establishment of a violation of Article 13 ECHR. The only reason for processing the case in the accelerated procedure was that (according to the French authorities) the asylum claim had been lodged after an expulsion measure had been issued. The decision to process the asylum claim in the accelerated procedure was, therefore, not related to the merits of the asylum claim. The ECtHR also stressed several times in this case, that the case was complex.<sup>245</sup> The automatic referrals of cases to the accelerated procedure without having regard to the merits or complexity of the case may thus be problematic in the light of Article 13 ECHR and potentially in the light of Article 47 of the Charter.

- **The procedural steps which should be taken during the procedure**

It may be argued that it follows from the CJEU's case law that the national court should assess whether the time-limits provided for in domestic law afford sufficient time to follow all the necessary procedural steps in the asylum procedure. In *Samba Diouf* the CJEU considered that the time-limits for

243 ECtHR, *Sultani v. France*, Appl. no. 45223/05, 20 September 2007, para 64-65, ECtHR, *H.R. v. France*, Appl. no. 64780/09, 22 September 2011, para 67-68.

244 CJEU, Case C-175/11, *H.I.D and B.A. v. Refugee Applications Commissioner and Others*, 31 January 2013, paras 59-77.

245 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, paras 141, 154, 155.

lodging the appeal against the negative asylum decision should be sufficient in practical terms to enable the applicant to *prepare and bring an effective action*.<sup>246</sup> In *Pontin* the CJEU held that it would be very difficult for a female worker dismissed during her pregnancy to *obtain proper advice and, if appropriate, prepare and bring an action* within a 15-day period. (emphasis added)<sup>247</sup>

The ECtHR seems to take into account what needs to be done within the time-limits of the asylum procedure. In *I.M. v. France* the ECtHR observed that the asylum applications of persons detained at the border were subject to the same requirements as applications submitted outside detention, even though the time-limit for submitting the application was much shorter.<sup>248</sup> Much less time was thus available for the same procedural steps, while the cases concerned were not necessarily less complex than those processed in the regular procedure.

- **Whether the asylum procedure taken as a whole (first instance and appeal) provides for an effective remedy**

It follows from the case law of the CJEU and the ECtHR that the fairness of the asylum *procedure as a whole* should be assessed by the national court and the CJEU and ECHR itself.<sup>249</sup> A thorough judicial review during the appeal phase may, for example, compensate for insufficiencies resulting from short time-limits in first instance. In *I.M. v. France* the ECtHR found that the appeal phase did not compensate for the lack of rigorous scrutiny resulting from the short time-limits in the administrative phase. In this case, the applicant had access to two procedures: an appeal against the expulsion measure before the administrative tribunal and an accelerated asylum procedure followed by an appeal before the *Cour nationale du droit d'asile* (CNDA). The ECtHR concluded in this case that both procedures taken together did not constitute an effective remedy. The procedure before the CDNA did not have automatic suspensive effect. Furthermore, the time-limits for lodging the appeal before the administrative tribunal were too short to effectively prepare the appeal and the applicant had insufficient assistance from a lawyer. These factors, taken together, limited the accessibility of the remedy.<sup>250</sup>

246 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 66.

247 CJEC, Case C-63/08, *Pontin v. T-Comalux SA*, 29 October 2009, para 65.

248 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, para 144.

249 See for the CJEU eg CJEU, Case C-175/11, *H.I.D and B.A. v. Refugee Applications Commissioner and Others*, 31 January 2013, para 102-104.

250 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, paras 154-156.

### 7.1.4 Other relevant sources

The Committee against Torture and the Human Rights Committee in their Concluding Observations with regard to several Member States have both expressed their concerns with regard to the speed of the asylum procedure.<sup>251</sup> They pointed out that because of the short time-limits in asylum procedures asylum applicants face difficulties in substantiating their asylum claim. They stated that as a result, the *non-refoulement* principle provided for in Article 3 CAT and Article 7 ICCPR could be violated.

### 7.1.5 Conclusion

Even though the Procedures Directive and its recast and the Dublin III Regulation do not provide for minimum time-limits for asylum procedures, the EU right to an effective remedy guaranteed by Article 47 of the Charter and the principle of effectiveness do set some limits with regard to the speed of such procedures. National courts should examine in the light of this right and principle whether the time-limits applied are reasonable and proportionate in the abstract as well as in the individual case. Short time-limits may not:

- render it virtually impossible or excessively difficult to substantiate the asylum claim;
- impede the effective exercise of procedural rights granted for example by Chapter II of the Procedures Directive.

## 7.2 Short time-limits in appeal procedures

In this sub-section it will be argued that Article 47 of the Charter requires that reasonable time-limits are set for lodging an appeal in asylum cases.

### 7.2.1 EU legislation

*Directive 2005/85/EC (Procedures Directive)*

According to Article 39 (1) of the Procedures Directive, asylum applicants have the right to an effective remedy against all asylum decisions, including those taken in an accelerated procedure. Article 39 (2) and (4) grant Member States discretion as regards the time-limits for lodging an appeal and with regard to other time-limits that apply to the appeal procedure.

251 See with regard to Belgium (ComAT Concluding Observations 19 January 2009, CAT/C/BEL/CO/2, para 9), Finland (ComAT Concluding Observations 21 June 2005, CAT/C/CR/34/FIN, para 4 and CAT/C/FIN/CO/5-6, para 10) France (ComAT Concluding Observations 20 May 2010, CAT/C/FRA/CO/4-6, para 16, HRC Concluding Observations 31 July 2008, CCPR/C/FRA/CO/4, para 20), Latvia (ComAT Concluding Observations 19 February 2008, CAT/C/LVA/CO/2, para 8, HRC Concluding Observations 6 November 2003, CCPR/CO/79/LVA, para 9) and the Netherlands (ComAT Concluding Observations 3 August 2007, CAT/C/NET/CO/4, para 7 and HRC Concluding Observations 25 August 2009, CCPR/C/NLD/CO/4, para 9).



*Directive 2013/32/EU (Recast Procedures Directive)*

Article 46 (1) of the recast Procedures Directive provides for the right to an effective remedy. This right also applies when claims are rejected in an accelerated procedure. Article 46 (4) of the Directive requires Member States to provide for reasonable time-limits for the applicant to exercise his right to an effective remedy pursuant to Article 46 (1) of the Directive. Furthermore, it states that the time-limits shall not render an applicant's ability to access an effective remedy impossible or excessively difficult. According to Article 46 (9) of the Directive, Member States may lay down time-limits for the court or tribunal to examine the appeal.

*Regulation 604/2013 (Dublin III Regulation)*

Article 27 (1) of the Dublin III Regulation provides for the right to an effective remedy. Article 27 (2) states that Member States shall provide for a reasonable period of time within which the person concerned may exercise this right.

**7.2.2 Relevant EU fundamental rights and principles***The EU right to an effective remedy (Article 47 of the Charter)*

The EU right to an effective remedy includes a right of *access* to an effective remedy.<sup>252</sup> Short time-limits for lodging an appeal may render the appeal inaccessible.<sup>253</sup>

**7.2.3 Case law***The Court of Justice of the European Union*

The CJEU considered in *Samba Diouf* that the time-limit for lodging an appeal against a negative asylum decision 'must be sufficient in practical terms to enable the applicant to prepare and bring an effective action'. It ruled that a time-limit of fifteen days to bring an appeal against the rejection of the asylum application in the accelerated procedure (as opposed to a time-limit of a month in the regular procedure) 'does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved'. It considered, however, that the national court should determine whether this time-limit is sufficient in light of the individual circumstances of the case. If the national courts deem the time-limit insufficient, they should order that the application is examined under the ordinary procedure.<sup>254</sup> These considerations are in line with the CJEU's standing case law concerning time-limits for bringing pro-

252 CJEU, Case C-199/11, *Europese Gemeenschap v. Otis NV*, 6 November 2012, para 49 and CJEU, Case C-279/09, *DEB* 22 December 2010, para 60.

253 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 66.

254 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, paras 66-68.

ceedings, which entails that such time-limits must be reasonable and proportionate.<sup>255</sup> In this context, the reasonableness test does not only apply to the time-limit as such, but also to the application of the time-limit to an individual case.<sup>256</sup> In *Pontin*, the CJEU considered a fifteen day time-limit for a dismissed pregnant women to bring an action for reinstatement. In this case, one of the main factors that the CJEU took into account was the particular situation in which pregnant women find themselves. It also took into account that some of the days included in that fifteen day period could expire before the applicant was even notified of her dismissal.<sup>257</sup>

### *The European Court of Human Rights*

In *I.M. v. France*, one of the remedies available to an asylum applicant was an appeal against the expulsion measure before the French administrative tribunal. According to the ECtHR, this remedy could not be considered effective, because of the extreme short time-limit (48 hours) within which the appeal had to be prepared. The Court noted that the applicant was held in detention and did not have access to legal assistance and interpretation services. Having regard to these circumstances, the ECtHR had serious doubts as to whether the applicant was able to effectively present his claim of a risk of *refoulement* before the administrative tribunal.<sup>258</sup> In *A.C. and others v. Spain*, the ECtHR found a violation of Article 13 ECHR because of the very short period of time in which the Spanish *Audiencia Nacional* decided on the appeals against the negative asylum decisions of thirty asylum applicants from Western Sahara. Thirteen of these applicants lodged an appeal before the *Audiencia Nacional* on 21 January 2011. On 27 January 2011 the *Audiencia Nacional* sent the cases to another authority (*l'Administration de surseoir provisoirement aux expulsions or suspensión cautelarísima*) in order to assess the requests for interim relief. Nevertheless the *Audiencia Nacional* rejected the appeals on 28 January 2011 because the applicants failed to substantiate the existence of an emergency situation justifying a suspension of the expulsion from the Spanish territory and the loss of the object of the action on the merits in case of expulsion. The ECtHR considered that the accelerated nature of the procedure did not permit the applicants to submit clarifications on the need to suspend the expulsion in the context of the only chance to obtain such suspension.<sup>259</sup>

255 See eg CJEC, *Pfücke v. Bundesanstalt für Arbeit*, Case C-125/01, 18 September 2003.

256 CJEC, Case C-327/00, *Santex SpA v. Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA*, 27 February 2003, para 57.

257 CJEC, Case C-63/08, *Pontin v. T-Comalux SA*, 29 October 2009.

258 ECtHR, *I.M. v. France*, Appl. no. 9152/09, 2 February 2012, paras 149-153.

259 ECtHR, *A.C. and others v Spain*, Appl. No. 6528/11, 22 April 2014, para 100.

### 7.2.4 Other relevant sources

It is the view of the Human Rights Committee<sup>260</sup> and the Committee against Torture,<sup>261</sup> that in asylum cases, very short time-limits for filing an appeal or a request for interim protection should generally be considered unreasonable.

### 7.2.5 Conclusion

Short time-limits may infringe the right of *access* to an effective remedy which is guaranteed by Article 47 of the Charter and the effectiveness of such a remedy. The national court should examine whether the time-limit in general, as well as in the individual circumstances of the case, is reasonable and proportionate. The circumstances which should be taken into account when assessing time-limits in an individual case mentioned under 10.1.3 are also relevant when examining the reasonableness of time-limits in appeal proceedings.

## 7.3 Lengthy asylum procedures

Not only are very short time-limits in asylum procedures problematic, very lengthy procedures may also be problematic as they may result in a long period of uncertainty for applicants in relation to their legal position. This sub-section looks at whether a lengthy asylum procedure could violate the EU principle of good administration and the right to a hearing within a reasonable time as guaranteed by Article 47 of the Charter.

### 7.3.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

The Procedures Directive does not lay down maximum time-limits for first instance asylum proceedings. Article 23 (2) of the Directive only states that, where a decision cannot be taken within six months, the applicant concerned shall either be informed of the delay or receive, upon his request, information on the time-frame within which the decision on his application is to be expected. However, such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 31 (2) of the recast Procedures Directive provides that an asylum decision should, in principle, be taken within six months. Member States may extend that time-limit in three situations. In all asylum cases, the maximum time-limit

<sup>260</sup> HRC Concluding Observations regarding France, 31 July 2008, CCPR/C/FRA/CO/4 (48-hours to lodge an appeal) and Latvia, 6 November 2003, CCPR/CO/79/LVA.

<sup>261</sup> ComAT Concluding Observations regarding Belgium, 19 January 2009, CAT/C/BEL/CO/2 (24-hours for the registering of an emergency appeal), France, 20 May 2010, CAT/C/FRA/CO/4-6 (48 hours for filing a request for suspensive effect), Latvia, 19 February 2008, CAT/C/LVA/CO/2 and Liechtenstein, 25 May 2010, CAT/C/LIE/CO/3 (24 hours for submitting a request for restoration of suspensive effect).

for concluding the procedure is twenty-one months from when an asylum application is lodged (see Article 31 (5)).

The six month time-limit may be extended for a period not exceeding a further nine months, where:

- complex issues of fact and/or law are involved;
- a large number of third country nationals or stateless persons simultaneously request international protection, which makes it very difficult in practice to conclude the procedure within the six-month time-limit;
- where the delay can clearly be attributed to the failure of the applicant to comply with his obligations under Article 13 of the Directive (the duty to report to the authorities, to hand over documents, to inform the authorities of his address, to allow the authorities to take finger prints and photographs and to search his belongings).

In exceptional and duly justified circumstances, Member States may exceed these time-limits by a maximum of three months where it is necessary in order to ensure an adequate and complete examination of the application for international protection.

Member States may further postpone concluding the procedure where the determining authority cannot reasonably be expected to decide within the time-limits mentioned above due to an uncertain situation in the country of origin which is expected to be temporary. In such a case, Member States shall:

- conduct reviews of the situation in that country of origin at least every 6 months;
- inform within a reasonable time the applicants concerned of the reasons of the postponement;
- inform within a reasonable time the European Commission of the postponement of procedures for that country of origin.

Article 31 (4) provides that where a decision cannot be taken within six months, the applicant concerned shall either be informed of the delay and/or receive, upon his request, information on the reasons for the delay and the time-frame within which the decision on his application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

#### *Regulation 604/2013 (Dublin III Regulation)*

Under the Dublin Procedure, a Member State should request another Member State to take charge of an asylum applicant within three months of the date on which the application was lodged or within two months of this date if the claim was based on a Eurodac hit (Article 21 (1) of the Regulation). The requested Member State should respond within a period of two months (Article 22 (1)

of the Regulation). After the acceptance of the claim, the applicant should in principle be transferred within six months (Article 19 (4) of the Regulation). A take-back request shall be made within two months of receiving a notification of the Eurodac hit, within three months of the date on which the asylum application was lodged or within three months of the date on which the requesting Member State becomes aware that another Member State may be responsible for the person concerned (Articles 23 (1) and 24 (2) of the Regulation). The requested Member State shall respond to the request within one month or within two weeks where the request was based on data obtained from the Eurodac system (Article 25 (1)). Transfers should in principle be carried out within six months from the acceptance of the request to transfer (Article 29 (1) of the Regulation).

### 7.3.2 Relevant EU fundamental rights and principles

#### *The right to good administration*

According to the Court of Justice, the EU right to good administration ensures 'that the entire procedure for considering an application for international protection does not exceed a reasonable period of time, which is a matter to be determined by the referring court'.<sup>262</sup>

#### *The EU right to an effective remedy (Article 47 of the Charter)*

Article 47 of the Charter contains the right to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal.

### 7.3.3 Case law

#### *The Court of Justice of the European Union*

The CJEU has referred to recital 11 of the Procedures of Directive, which states that it is in the interest of the asylum applicant as well as the State that asylum procedures are concluded within a reasonable time.<sup>263</sup> In the context of the Dublin Regulation, the CJEU has stressed that a decision on the responsibility for an asylum application should be taken within a reasonable time. In *N.S. and M.E.*, the CJEU considered that where Article 4 of the Charter (the prohibition of torture and ill-treatment) precludes the transfer of an applicant to the responsible Member State, the Member State in which the applicant finds himself must establish on the basis of the criteria of the Dublin Regulation whether another Member State can be identified as responsible for the examination of the asylum application (see also Article 3(2) of the Dublin III Regulation). However the Court states that 'the Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining

<sup>262</sup> CJEU Case C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform*, 8 May 2014, para 56.

<sup>263</sup> CJEU, Case C-175/11, *H.I.D and B.A. v. Refugee Applications Commissioner and Others*, 31 January 2013, para 60, CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 30.

the Member State responsible which takes an unreasonable length of time'. If necessary, that Member State must itself examine the asylum application.<sup>264</sup> In *M.A. and others* the Court stated that 'in the interest of unaccompanied minors, it is important (...) not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status'.<sup>265</sup>

### *The European Court of Human Rights*

The ECtHR has taken into account the length of an asylum procedure in the context of its assessment of the effectiveness of the available remedies under Article 13 ECHR. In *M.S.S. v. Belgium and Greece*, the ECtHR found a number of deficiencies in the first instance asylum procedure in Greece. With regard to the length of the appeal proceedings before the Greek Supreme Administrative Court, the ECtHR considered that 'swift action is all the more necessary where (...) the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3'. It stated that the information supplied by the Council of Europe Commissioner for Human Rights concerning the length of proceedings illustrated that an appeal to the Supreme Administrative Court did not offset the lack of guarantees surrounding the examination of asylum applications on the merits.<sup>266</sup>

In *Ahmade v. Greece* the ECtHR noted that the applicant requested interim relief against the expulsion measure on 10 February 2010. The hearing in the context of this request took place on 26 January 2012 and the request was refused on 7 February 2012. The appeal against the rejection of the asylum claim was still pending at the time the ECtHR gave its judgment on 25 September 2012. The ECtHR found such time-limits unreasonable when examining appeals with regard to questions of expulsion. It noted that the request for interim relief was intended to obtain a quick decision before the decision in the main proceedings.<sup>267</sup> In both *M.S.S.* and *Ahmade* the ECtHR found a violation of Article 13 ECHR.

264 CJEU, Joined Cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M. E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, para 98.

265 CJEU, *M.A. and others*, Case C-648/11, 6 June 2013, para 61.

266 ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 320. See also ECtHR, *A.C and others. v Spain*, Appl. No. 6528/11, 22 April 2014, para 103.

267 ECtHR, *Ahmade v. Greece*, Appl. no. 50520/09, 25 September 2012, para 115.

Article 6 ECHR (the right to a fair trial), like Article 47 of the Charter, requires a fair and public hearing within a reasonable time. According to the ECtHR the reasonableness of the length of proceedings depends on the particular circumstances of the case. Factors which need to be taken into account are the complexity of the case, the conduct of the applicant, the conduct of the competent administrative and judicial authorities and what is at stake for the applicant.<sup>268</sup>

### 7.3.4 Conclusion

Lengthy asylum procedures may violate the EU right to good administration and the right to a fair hearing within a reasonable time as laid down in Article 47 of the Charter. The Dublin III Regulation provides for maximum time-limits for most stages of the Dublin procedure. Pursuant to both Article 23 of the Procedures Directive and Article 31 of the recast Procedures Directive, first instance asylum decisions should, in principle, be taken within six months. Only specific circumstances mentioned in Article 31 of the recast Procedures Directive may justify an extension of this time-limit. Arguably pursuant to the ECtHR's case law under Article 6 ECHR, the complexity of the case, the conduct of the applicant, the conduct of the competent administrative and judicial authorities and what is at stake for the applicant (the prohibition of *refoulement*, the right to asylum) should be taken into account when examining the reasonableness of the duration of asylum proceedings.

### 7.4 Suggested further reading

- Marcelle Reneman, 'Speedy asylum procedures in the EU', 25 *International Journal of Refugee Law*, 2013, issue 4, p.717-748.

268 ECtHR [GC], *Sürmeli v. Germany*, Appl. no. 75529/01, 8 June 2006, para 128.





# 8

# The standard and burden of proof

Marcelle Reneman\*

EU Member States are afforded extensive discretion when laying down the rules for asylum procedures with regard to the burden and standard of proof. The Procedures Directive and the recast Procedures Directive barely address evidentiary issues. Article 4 of the Qualification Directive and its recast includes several elements to be assessed in determining whether an application for international protection is to be regarded as substantiated. However, it does not provide standards on other important evidentiary issues such as the standard of proof.

This chapter investigates whether the principle of effectiveness and the right to an effective remedy (Article 47 of the Charter) set limits on Member States' discretion with regard to the scope and application of evidentiary rules on the basis of the case law of the CJEU and the ECHR and other sources. Evidentiary rules or practices which make unreasonable demands on the asylum applicant can undermine the effective exercise of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter). Examples of such rules or practices include a standard of proof which is set too high, the authorities' refusal to apply the benefit of the doubt, their unwillingness to share the burden of proof as well as the use of presumptions which are (practically) impossible for the applicant to rebut. All these issues will be addressed in this section.

## 8.1 The standard of proof

When addressing evidentiary issues, it is first of all relevant to know what needs to be proved during the asylum procedure and to what extent it needs to be proved. In asylum cases, the extent to which the risk of *refoulement* must be proved is a particularly important issue.

\* This section is based on Marcelle Reneman, EU Asylum Procedures and the Rights to an Effective Remedy, Oxford/ Portland Oregon, Hart Publishing, Chapter 8.

### 8.1.1 EU legislation

#### *Directive 2011/95/EC (Recast Qualification Directive)*

Article 2 (d) of the recast Qualification Directive defines a refugee as a person who has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group'.

According to Article 2 (e) of the recast Qualification Directive, a person is eligible for subsidiary protection when 'substantial grounds have been shown' for believing that he, if returned to his country of origin 'would face a real risk of suffering serious harm'. Article 15 of the recast Qualification Directive defines the term serious harm.

### 8.1.2 Relevant EU fundamental rights and principles

#### *Principle of effectiveness*

Article 18 of the Charter requires that the right to asylum is guaranteed with due respect for the Refugee Convention and its Protocol and in accordance with the TFEU. Article 19 (2) of the Charter provides that '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'. It follows from Article 52 (3) of the Charter as well as the explanations with Article 19 of the Charter that Article 19 (2) does not set a higher standard of proof than that applied by the ECtHR in cases concerning Article 3 ECHR. Article 52(3) of the Charter provides that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. The explanations of the Charter state that Article 19(2) corresponds to Article 3 ECHR and that Article 19 (2) incorporates the relevant case law from the ECtHR regarding Article 3 ECHR.<sup>269</sup>

### 8.1.3 Case law

#### *The Court of Justice of the European Union*

The definition of a refugee as laid down in Article 2 of the Qualification Directive is directly based on the refugee definition in the Refugee Convention. The CJEU has held that the provisions of the Qualification Directive must be interpreted while respecting the Geneva Convention.<sup>270</sup> Article 2 (e) read in conjunction with Article 15 (b) of the Qualification Directive reflects the case law of the

269 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/24, explanations with Articles 19 and 52(3).

270 See for example CJEU, (Joined cases) C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla et al*, 2 March 2010, paras 52-53 and CJEU Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, 17 June 2010, paras 37-38 and CJEU (Joined Cases) C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v X and Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013, para 40.

ECtHR.<sup>271</sup> In *Elgafaji* the CJEU held that the fundamental right that no one shall be subjected to torture or to inhuman or degrading treatment or punishment as guaranteed by Article 3 ECHR forms part of the general principles of EU law. Its observance by the CJEU and the ECtHR through its case law, should be taken into consideration when interpreting the scope of that right in the EU legal order.<sup>272</sup> The provisions of the Qualification Directive and its recast should be interpreted in conformity with the Charter; therefore it may be assumed that the standard of proof required under EU law may not be set higher than the standard of proof flowing from the Refugee Convention and the ECtHR.

### *The European Court of Human Rights*

Article 3 ECHR prohibits an expulsion by a Contracting State where substantial grounds have been shown for believing that the person in question, if deported, would face treatment contrary to this provision in the receiving country.<sup>273</sup> This standard of proof also applies in cases in which national security issues play a role.<sup>274</sup> The applicant is not expected to prove that he will be treated in violation of the prohibition of *refoulement*. The ECtHR has held that 'requesting an applicant to produce "indisputable" evidence of a risk of ill-treatment [...] would be tantamount to asking him to prove a future event, which is impossible, and would place a clearly disproportionate burden on him'.<sup>275</sup> It considers that a claim of a risk of *refoulement* 'always concerns an eventuality, something which may or may not occur in the future. Consequently, such allegations cannot be proven in the same way as past events. The applicant must only be required to show, with reference to specific facts relevant to him and to the class of people he belonged to, that there is a high likelihood that he would be ill-treated'.<sup>276</sup>

In *M.S.S. v. Belgium and Greece*, the ECtHR held that persons engaged in an extremely urgent procedure before the Belgian Aliens Appeals Board were prevented from establishing the arguable nature of their complaints under Article 3 ECHR because they were required to produce 'concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3'. According to the ECtHR, the Aliens Appeal Board thereby increased the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation.<sup>277</sup> Article 3 ECHR requires the decision-maker to focus on the 'foreseeable consequences of removal' for each individual appli-

271 CJEU, Case C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, 17 February 2009, para 28, where the Court held that 'Article 15(b) of the Directive which corresponds, in essence, to Article 3 ECHR'.

272 CJEU, Case C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, 17 February 2009, para 28.

273 See, eg ECtHR [GC] 28 February 2008, *Saadi v. Italy*, Appl. no. 37201/06, para 125.

274 ECtHR [GC], *Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008, para 122.

275 ECtHR, *Rustamov v. Russia*, Appl. no. 11209/10, 3 July 2012, para 117.

276 ECtHR, *Azimov v. Russia*, Appl. no. 67474/11, 18 April 2013, para 128.

277 ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 389.

cant'.<sup>278</sup> The mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3.<sup>279</sup>

#### 8.1.4 Other relevant sources

##### *Standard of proof refugee status*

According to the UNHCR Handbook an applicant's fear of persecution 'should be considered well-founded if he can establish, *to a reasonable degree*, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the [refugee] definition, or would for the same reasons be intolerable if he returned there' (emphasis added).<sup>280</sup> In its 'Note on Burden and Standard of Proof in Refugee Claims' UNHCR states that a substantial body of jurisprudence 'largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not'.<sup>281</sup>

##### *Standard of proof subsidiary protection*

Articles 6 and 7 ICCPR and Article 3 CAT prohibit an individual's expulsion by a Contracting State where *substantial grounds* have been shown for believing that the person in question, if deported, would face treatment contrary to these provisions in the receiving country.<sup>282</sup> The Committee against Torture is of the opinion that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The risk of torture must be foreseeable, real and personal. However, the risk does not have to meet the test of being highly probable.<sup>283</sup>

#### 8.1.5 Conclusion

The effectiveness of the EU right to asylum and the EU prohibition of *refoulement* would be undermined if Member States require applicants to *prove* a well-founded fear of persecution or real risk of suffering serious harm. It may be expected that the applicant show that there is a 'reasonable possibility' of future persecution or that there are substantial grounds for believing that he/she faces a real risk of serious harm. This also applies when examining whether an applicant, who poses a risk to the national security of the Member State, is in need of subsidiary protection.

278 ECtHR, *Sufi and Elmi v United Kingdom*, Appl. nos 8319/07 and 11449/07, 28 June 2011, para 249. The ECtHR often assesses itself whether the 'foreseeable consequences' of extradition or expulsion are such as to bring Art 3 ECHR into play. ECtHR, *Khodzayev v. Russia*, Appl. no. 52466/08, 12 May 2010, para 91, ECtHR 20 July 2010, *N. v Sweden*, no 23505/09, para 54.

279 See, eg ECtHR, *Dzhaksybergenov v. Ukraine*, Appl. no. 12343/10, 10 February 2011, para 35.

280 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992), para 42.

281 UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 17.

282 See Art 3 CAT and HRC General Comment No 31 (2004), CCPR/C/21/Rev1/Add.13, para 12.

283 ComAT General Comment No 1 (1997), A/53/44, paras 6-7 and ComAT, *Z.K. v. Sweden*, no 301/2006, 16 May 2008, para 8.3.

## 8.2 Burden of proof

Usually in asylum cases the burden of proof is placed on the asylum applicant. This means that the applicant is required to demonstrate that he is entitled to be granted international protection. In this sub-section it is argued that a shift of the burden of proof from the asylum applicant to the State may be necessary in order to ensure the effectiveness of the right to asylum (Article 18 of the Charter) and the EU prohibition of *refoulement* (Article 19 of the Charter). It is also argued that to set an unreasonable burden of proof on the asylum applicant violates the right to good administration.

### 8.2.1 EU legislation

#### *Directive 2011/95/EU (Recast Qualification Directive)*

Article 4 of the recast Qualification Directive does not explicitly mention that it falls on the asylum applicant to establish, to the extent required, that he is entitled to be granted international protection in the host State. However, it may be assumed in particular on the basis of the Court of Justice's case law, State practice and principles of international law that the starting point is that the burden of proof lies with the applicant.<sup>284</sup>

Article 4 (4) of the recast Qualification Directive states that the fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. This would suggest that in case of past persecution or serious harm the burden of proof shifts to the State.

### 8.2.2 Relevant EU fundamental rights and principles

#### *The right to good administration*

The General Court has considered in anti-dumping cases that it follows from the principle of proper administration, which is set out in Article 41 of the Charter, that the burden of proof imposed by the EU institutions may not be 'unreasonable'.<sup>285</sup> The right to good administration also applies to national asylum procedures.<sup>286</sup> It may therefore be contended that imposing an unreasonable burden of proof on the asylum applicant violates the right to good administration.

284 See, eg CJEU, Case C-381/99, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG*, 26 June 2001, para 52, CJEU, Case C-127/92, *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, 27 October 1993, para 13, ECtHR (GC), *Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008, para 129 and UNHCR Handbook, para 196.

285 GC, Case T-221/05, *Huvis Corp v. Council*, 8 July 2008, para 77 and Case T-170/09, *Shanghai Biaowu High-Tensile Fasteners et al*, 10 October 2012, paras 105-106.

286 CJEU, Case C- 277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, 22 November 2012, para 84 and C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 8 May 2014, para 50.

### *Principle of effectiveness*

Where an unreasonable burden of proof is placed on the asylum applicant, this would make it virtually impossible or excessively difficult to substantiate his asylum claim and thus undermine the effectiveness of the EU right to asylum (Article 18 of the Charter) and the EU prohibition of *refoulement* (Article 19 of the Charter).

It will be argued in this section on the basis of the case law of the CJEU and the ECtHR that it may be necessary to shift the burden of proof from the asylum applicant to the State in order to ensure the effectiveness of the EU right to asylum (Article 18 of the Charter) and the EU prohibition of *refoulement* (Article 19 of the Charter).

### 8.2.3 Case law

#### *The Court of Justice of the European Union*

The CJEU has held that Member States may be obliged to apply and interpret their national rules on the burden of proof in light of the purpose of the applicable EU legislation.<sup>287</sup> In equal treatment cases, the CJEU has held that once a *prima facie* case of discrimination has been established, the burden of proof shifts from the applicant (the worker) to the defending party (the employer) in order to ensure that the full effectiveness of the right to equal treatment.<sup>288</sup> The employer then has to show that there are objective reasons for the difference in pay. There is a *prima facie* case of discrimination, for example, when significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men.<sup>289</sup> When establishing whether a *prima facie* case of discrimination has been made, the CJEU takes into account difficulties encountered by the applicant in adducing evidence of discrimination. In *Danfoss*, for example, the employer applied a system of pay, which was wholly lacking in transparency, which made it very difficult for female employees to prove that they were paid less than their male colleagues, who were doing the same work and the applicant argued that this was at variance with the Equal Pay Directive.<sup>290</sup> The CJEU, therefore, required a shift of the burden of proof to the employer if a female worker established, in relation to a relatively large number of employees, that the average pay for women was less than that for men. The

287 CJEU Joined Cases C-253/96 to C-258/96, *Helmut Kampelmann and Others v. Landschaftsverband Westfalen-Lippe et al*, 4 December 1997, paras 32-34 and CJEU Case C-350/99, *Wolfgang Lange v. Georg Schünemann GmbH*, 8 February 2001, paras 31-32.

288 CJEU, Case C-127/92, *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health*, 27 October 1993, para 18, CJEU Case C-381/99, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG*, 26 June 2001, para 58. In CJEU Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, 10 July 2008, para 31.

289 CJEU, Case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, 27 October 1993, para 19.

290 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L045/19.

employer had to prove that the differentiation in pay between men and women was not the result of discrimination.<sup>291</sup> The CJEU considered that the concern for effectiveness which underlies the Equal Pay Directive ‘means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality’.<sup>292</sup>

It follows from this case law that EU law may require a shift of the burden of proof in order to ensure the effectiveness of rights granted by EU law.<sup>293</sup> This is also relevant for asylum cases. It is contended on the basis of the ECtHR’s case law that such a shift of the burden of proof is necessary if the applicant has adduced evidence capable of proving that he has a well-founded fear of persecution or that there are substantial grounds for believing that he faces a real risk of suffering serious harm. The situations in which there is such a *prima facie* case will be examined below.

### *The European Court of Human Rights*

According to the ECtHR ‘it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 [...]’. Where such evidence is adduced, it is for the Government to dispel any doubts about it.<sup>294</sup> The ECtHR thus considers that the burden of proof should shift from the asylum applicant to the determining authority when the applicant has made out a *prima facie* case of a risk of *refoulement*.<sup>295</sup> The burden of proof shifts back to the applicant if these authorities have sufficiently disputed the evidence or arguments submitted by the applicant. In the following situations such a *prima facie* case of *refoulement* is arguably made out.

The burden of proof shifts to the determining authority if the applicant has substantiated that there is a future risk of *refoulement* by submitting credible statements and/or documents (‘evidence capable of proving’) in support of their asylum account. In *S.H. v. the United Kingdom*, for example, the applicant had ad-

291 See also CJEU, Case C-196/02, *Vasiliki Nikoloudi v. Organismos Tilepikoinonion Ellados AE*, 10 March 2005, para 74 and CJEU, Case C-400/93 *Specialarbejderforbundet i Danmark v. Dansk Industri*, 31 May 1995, paras 24-27.

292 CJEU, Case C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, 17 October 1989, para 14. Art 6 of the Equal Pay Directive provides that Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed.

293 According to recital 8 Preamble Directive 2005/85/EC, recital 60 Preamble Directive 2013/32/EU and recital 16 Preamble Directive 2011/95/EC, these directives aim to ensure the right to asylum and the prohibition of *refoulement* laid down in the Charter. See also ch 2, section 2.1.2 in this volume.

294 See, eg ECtHR [GC], *Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008, para 129.

295 See also Spijkerboer 2009-II, pp 61-62.

duced several expert reports (from Amnesty International, the Human Rights Council of Bhutan, Human Rights Watch and two individual experts), which supported his claim that he would be at risk of imprisonment and ill-treatment upon return to Bhutan. Furthermore, human rights reports indicated that the ethnic Nepalese in Bhutan were afforded discriminatory treatment on account of their ethnicity. The ECtHR was satisfied that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to ill-treatment contrary to Article 3 if returned to Bhutan. It noted that the Government had not adduced any evidence capable of dispelling the Court's concerns.

When reports of human rights organisations submitted by the applicant or taken into account by the ECtHR of its own motion, show the existence of serious human rights violations in the country of origin or another country to which the applicant will be expelled, it is up to the determining authority to dispute that information. The burden of proof with regard to the risks emanating from the general situation in the country of origin thus shifts to the State. In *Garayev v. Azerbaijan* for example, the applicant claimed that he would be tortured in prison upon extradition to Uzbekistan. The ECtHR considered that the Government had not adduced any evidence or reports capable of rebutting the credible reports by human rights organisations of torture, routine beatings and use of force against criminal suspects or prisoners by the Uzbek law-enforcement authorities. No evidence had been produced of any fundamental improvement in the protection against torture in Uzbekistan in recent years.<sup>296</sup>

It follows from *Sufi and Elmi v. the United Kingdom* that the determining authority should prove that an individual is not at risk, where it is established on the basis of human rights reports that the violence in a country or region of origin is of such a level of intensity that in principle anyone in that region or country would be at real risk of treatment prohibited by Article 3 of the Convention. In this case the ECtHR concluded that such a situation occurred in Mogadishu. It accepted that some persons who were exceptionally well-connected to "powerful actors" could find protection in Mogadishu. However, it was for the Government to show that a person could find protection for such reasons.<sup>297</sup> On the basis of this judgment it is conceivable that, if it is established that a person belongs to a group systematically exposed to a practice of ill-treatment, it is up to the determining authority to prove that this person can find protection against persecution or serious harm.

296 ECtHR, *Garayev v. Azerbaijan*, Appl. no. 53688/08, 10 June 2010, para 73. See also ECtHR, *Kaboulou v Ukraine*, Appl. no. 41015/04, 19 November 2009, para 111. ECtHR, *Khodzayev v. Russia*, Appl. no. 52466/08, 12 May 2010, para 98.

297 ECtHR, *Sufi and Elmi v. United Kingdom*, Appl. nos. 8319/07 and 11449/07, 28 June 2011, paras 249-250. See similarly ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 359.



Finally the burden of proof should shift in cases where the applicant has made a plausible case that he was tortured or ill-treated in the past. In *R.C. v. Sweden* the ECtHR considered:

'Having regard to its finding that the applicant has discharged the burden of proving that he has already been tortured, the Court considers that the onus rests with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeds'.<sup>298</sup>

In *I. v. Sweden*, the fact that the applicant was tortured in the past almost in itself led to the conclusion that there was a risk of *refoulement*.<sup>299</sup> In the ECtHR's judgment in *D.N.W. v. Sweden*, however, the burden of proof did not shift to the State even though the ECtHR accepted that the applicant had been detained and subjected to ill-treatment in the past. The ECtHR in this judgment did not give reasons for this and did not refer to its considerations in *R.C. v. Sweden*. It simply considered that it had not been substantiated that the applicant would be at risk of being subjected to ill-treatment in the future. The ECtHR pointed to the fact that the applicant had been travelling around and preaching in public in his country of origin, Ethiopia, after he had escaped from prison and before leaving the country, without the Ethiopian authorities showing any adverse interest in him. Furthermore, it referred to some credibility issues. Two judges dissented in this case and argued that the burden of proof should have shifted to the State.<sup>300</sup>

#### 8.2.4 Other relevant sources

In *Chedli Ben Ahmed Karoui v. Sweden* the Committee against Torture found it impossible to verify the authenticity of some of the documents provided by the complainant. 'However, in view of the substantive reliable documentation he has provided, including medical records, a support letter from Amnesty International Sweden, and an attestation from the Al-Nahdha chairman, the complainant [...] has provided sufficient reliable information for the burden of proof to shift'.<sup>301</sup>

#### 8.2.5 Conclusion

It can be derived from the CJEU's case law in equal treatment cases that the principle of effectiveness requires a shift of the burden of proof from the applicant to the State if this is necessary to ensure the purpose of the Procedures

298 ECtHR, *R.C. v. Sweden*, Appl. no. 41827/07, 9 March 2010, para 55. See also ECtHR, *R.J. v. France*, Appl. no. 10466/11, 19 September 2013, paras 41-43 and ECtHR, *Koktysh v Ukraine*, Appl. no. 43707/07, 10 December 2009, para 64.

299 ECtHR, *I. v. Sweden*, Appl. no. 61204/09, 5 September 2013 para 67-68.

300 ECtHR, *D.N.W. v. Sweden*, Appl. no. 29946/10, 6 December 2012.

301 ComAT, *Chedli Ben Ahmed Karoui v. Sweden*, no. 185/2001, 25 May 2002, para 10, See also ComAT, *A.S. v. Sweden*, no. 149/1999, 15 February 2001, para 8.6 and HRC, *Jonny Rubin Byahuranga v. Denmark*, no. 1222/2003, 9 December 2004, paras 11.2-11.4.

Directive and Qualification Directive and their recasts, namely respect for the right to asylum and the prohibition of *refoulement* and the full and inclusive application of the Refugee Convention. It can be argued on the basis of the ECtHR's case law that such a shift of the burden of proof is necessary if the applicant adduced evidence capable of proving that he/she has a well-founded fear of persecution or that there are substantial grounds for believing that he/she faces a real risk of suffering serious harm. It can be derived from the ECtHR's case law that this condition is met in the following situations:

- if the applicant has substantiated that there is a future risk of *refoulement* by submitting credible statements and/or other evidence ('evidence capable of proving' in support of the asylum account; e.g. human rights organisations report the existence of serious human rights violations in the applicant's country of origin). In this situation the burden of proof shifts to the State authorities *with regard to the risk emanating from the general situation in the country of origin*;
- if it is established that in the applicant's country or region of origin the violence is of such intensity that anyone is at risk of torture or ill-treatment or that the applicant belongs to a special vulnerable group;
- if it is established that the applicant was subjected to torture or ill-treatment in the past.

### 8.3 The burden of proof: duty to produce evidence/the duty to investigate

Usually Member States expect asylum applicants to adduce evidence in order to substantiate their asylum claim. For many asylum applicants, it is often difficult to obtain evidentiary proof in support of their claim. The question arises as to the extent to which the determining authority is allowed to remain passive during the asylum procedure, or whether they are obliged to actively investigate the asylum claim. This sub-section will address Member States' duty to cooperate with the asylum applicant as laid down in Article 4 (1) of the recast Qualification Directive. More specifically, this sub-section contends that Member States are obliged under EU law to gather reliable country of origin information from different sources (8.3.2). Furthermore, the State is required to request a medical report by an expert, if the applicant makes out a *prima facie* case that the scars on his body or other medical problems suffered by him are caused by ill-treatment in his country of origin (8.3.3). Finally it is asserted that the determining authority should gather evidence which is only accessible to this authority, rather than the asylum applicant (8.3.4). The authority examining the asylum claim is thus not allowed to remain passive and limit itself to the assessment of the statements and evidence adduced by the applicant.

### 8.3.1 The duty to cooperate

This sub-section examines whether the determining authority is required to assist the asylum applicant in gathering evidence in support of their asylum claim.

#### 8.3.1.1 EU legislation

*Directive 2011/95/EU (Recast Qualification Directive)*

Article 4 (1) of the recast Qualification Directive provides that 'Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection'. However, it also states that 'in cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application'.

#### 8.3.1.2 Case law

*The Court of Justice of the European Union*

The CJEU considered in its judgment in *M.M.* that the duty to cooperate 'means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up-to-date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled'.<sup>302</sup> This seems to imply that the determining authorities have a duty to the applicant in gathering evidence.

*The European Court of Human Rights*

According to the ECtHR, Article 3 ECHR entails an obligation for the State to carry out a meaningful or adequate assessment of an applicant's claim of a risk of *refoulement*.<sup>303</sup> It follows from this obligation that the State authorities must address the applicant's allegations of past torture and the future risk of *refoulement*.<sup>304</sup>

#### 8.3.1.3 Other relevant sources

According to the UNHCR Handbook it is a general legal principle that the burden of proof lies on the person submitting a claim. However, it points out the fact that most asylum applicants have difficulties obtaining evidence in support of their claim. UNHCR states, therefore, that 'the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application'.<sup>305</sup>

302 CJEU Case C-277/11, *M. M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, 22 November 2012, para 66.

303 ECtHR, *Gaforov v. Russia*, Appl. no. 25404/09, 21 October 2010, para 122, ECtHR, *Ahmadpour v. Turkey*, Appl. no. 12717/08, 15 June 2010, para 38, ECtHR, *Z.N.S. v. Turkey*, Appl. No. 21896/08, 19 January 2001.

304 ECtHR, *Gaforov v. Russia*, Appl. no. 25404/09, 21 October 2010, para 123.

305 UNHCR Handbook, para 196.

### 8.3.1.4 Conclusion

On the basis of the CJEU's judgment in *M.M.* and the ECtHR's case law, it can be argued that the duty to produce evidence in support of the asylum applicant is shared between the applicant and the determining authority. In the following sections it will be contended that the determining authority is, in particular, obliged to gather country of origin information, to ask for an expert medical report in some situations and to gather evidence which is accessible to the determining authority but not to the asylum applicant.

### 8.3.2 Duty to gather country of origin information

Country of origin information plays an important role in most asylum cases. This subsection assesses whether the determining authority has a duty to gather country of origin information.

#### 8.3.2.1 EU legislation

*Directive 2005/85/EC (Procedures Directive)*

Article 8 (2) of the Procedures Directive provides that Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure amongst others that precise and up-to-date information is obtained from various sources, such as UNHCR, as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited.

*Directive 20013/32/EU (Recast Procedures Directive)*

Article 10 (3) of the recast Asylum Procedures Directive is almost identical to Article 8 (2) of the Procedures Directive. It additionally mentions the European Asylum Support Office (EASO) and relevant international human rights organisations as sources of country information, which should be taken into account by Member States.

#### 8.3.2.2 Case law

*The Court of Justice of the European Union*

In the case of *N.S. and M.E.* the CJEU answered the question as to whether a Member State, which should transfer an asylum seeker to another Member State that is deemed responsible for assessing the applicant's asylum claim under the Dublin Regulation, is obliged to assess whether the second Member State complies with EU fundamental rights and the EU asylum *acquis*. The CJEU considered that:

'to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of the Dublin Regulation *where they cannot be unaware* that systemic deficien-

cies in the asylum procedure and in the reception conditions of asylum seekers in that Member State 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 (emphasis added).<sup>306</sup>

The CJEU indicated that information such as that cited by the ECtHR (country of origin information reports and reports of UN bodies and Council of Europe Institutions) enable Member States to assess the risk of a violation of Article 4 of the Charter in the receiving Member State. The CJEU also noted the relevance of reports and proposals for amendment of the Dublin Regulation emanating from the Commission. '[T]hese must be known to the Member State, which has to carry out the transfer, given its participation in the work of the Council of the European Union, which is one of the addressees of those documents.' This implies that the transferring Member State has a duty to investigate the situation in the receiving Member State on the basis of country of origin information and information issued by the Commission.<sup>307</sup>

In its judgment in *X, Y and Z*, the CJEU considered that 'where an applicant for asylum relies [...] on the existence in his country of origin of legislation criminalising homosexual acts, it is for the national authorities to undertake, in the course of their assessments of the facts and circumstances under Article 4 of the Directive, an examination of all the relevant facts concerning that country of origin, including its laws and regulations and the manner in which they are applied, as provided for in Article 4 (3) (a) of the Directive. In undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant's country of origin, the term of imprisonment provided for by such legislation is applied in practice'.

Thus, the fact that an applicant states that homosexual conduct is a criminal act in his country of origin, activates a duty to investigate for the determining authorities.<sup>308</sup>

306 CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, para 94.

307 CJEU Joined Cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M.E. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, paras 91-92.

308 CJEU Joined Cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013, para 58-59.

### *The European Court of Human Rights*

It follows from the ECtHR's case law that the determining authority should carry out an adequate assessment of the situation in the country of origin, which is sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources.<sup>309</sup> The ECtHR has reproached Governments because they failed to include any country of origin information in the assessment of the asylum claim or to refer to such information in their asylum decision.<sup>310</sup> In *M.S.S. v. Belgium and Greece* the ECtHR considered that the Belgian Government should have been aware of the general situation in Greece and, therefore, of the applicant's fears in the event of his transfer back to this country, although the applicant failed to voice those fears at his interview. According to the ECtHR the reports concerning the general situation in Greece should have prompted the Belgian authorities to verify how the Greek authorities applied their legislation on asylum in practice. They could not assume that the applicant would be treated in conformity with the ECHR's standards.<sup>311</sup> The ECtHR concluded that the Belgian authorities knew or ought to have known that the applicant had no guarantee that his asylum application would be seriously examined by the Greek authorities.<sup>312</sup>

#### 8.3.2.3 Conclusion

It should be concluded that it follows from Article 8 (2) (b) of the Procedures Directive and Article 10 (3) (b) of the recast Procedures Directive read in the light of the ECtHR's case law that the determining authority should gather and assess of its own motion reports concerning the general situation in the country of origin (or transit).

#### 8.3.3 Duty to ask for an expert medical report

The fact that a person has been tortured or ill-treated in his country of origin is, according to Article 4 (4) of the recast Qualification Directive 'a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm'. Furthermore, if a person has scars on his body as a result of past torture, this may be an important risk factor which should be taken into account in the assessment of the risk of *refoulement*.<sup>313</sup> In both situations an expert medical report in which the (potential) sequence of torture or ill-treatment are examined and related to the applicant's asylum account should be

309 See ECtHR, *Salah Sheekh v. the Netherlands*, Appl. no. 1948/04, 11 January 2007, para 136 and ECtHR, *Umirov v. Russia*, Appl. no. 17455/11, 18 September 2012, para 120.

310 See, eg ECtHR, *Makhmudzhan Ergashev v. Russia*, Appl. no. 49747/11, 16 October 2012, para 70 and ECtHR, *Y.P. and L.P. v. France*, Appl. no. 32476/06, 2 September 2010, para 70.

311 ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 359.

312 ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 358. See also ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. no. 27765/09, 23 February 2012, paras 131-133 and 156-157 and ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, Appl. no 39630/09, 13 December 2012, para 218.

313 ECtHR, *I.v. Sweden*, Appl. No.61204/09, 5 September 2013, para 68.

considered a significant element substantiating the asylum claim, which should be taken into account in accordance with Article 4 (2) and (3) of the recast Qualification Directive. This sub-section explores whether the State has a duty to ask for an expert medical report, if an applicant has scars or other medical problems, which may relate to past torture or ill-treatment in the country of origin.

### 8.3.3.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

The Procedures Directive does not address medical reports.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 18 (1) of the recast Procedures Directive provides that Member States shall arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm, where the determining authority deems it relevant for the assessment of an application for international protection. Member States may also provide that the applicant arranges for such a medical examination. In both situations the medical examination shall be paid for out of public funds. The examination shall only take place with the consent of the applicant. If the applicant refuses to undergo the examination, this does not prevent the determining authority from taking a decision on the asylum claim.

### 8.3.3.2 Case law

#### *The Court of Justice of the European Union*

There is no relevant case law of the CJEU.

#### *The European Court of Human Rights*

The ECtHR has attributed significant or even decisive weight to medical reports submitted by the applicant in several cases.<sup>314</sup> In *R.C. v. Sweden* it held that State authorities have a duty to direct that an expert opinion is obtained as to the probable cause of the applicant's scars, if the applicant submitted a medical certificate, which makes out a *prima facie* case as to the origin of scars on the body of the applicant (namely torture or ill-treatment). In this case, the applicant had submitted a medical certificate, which according to the ECtHR 'gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture'.<sup>315</sup> This certificate was not written by an expert specialising in the assessment of torture injuries. Furthermore, the ECtHR made clear in its judgment in *Yoh-Ekale Mwanje v. Belgium*

314 ECtHR, *I. v. Sweden*, Appl. No. . No.61204/09, 5 September 2013, para 68, *RU v. Greece*, Appl. no 2237/08, 7 June 2011, paras 81–82, *YP and LP v. France*, Appl. No. 32476/06, 2 September 2010, para 68, *Hilal v. the United Kingdom*, Appl. No. 45276/99, 6 March 2001, para 64 and ECtHR (Adm), *TI v. the United Kingdom*, Appl. no 43844/98, 7 March 2000.

315 ECtHR, *R.C. v. Sweden*, Appl. no 41827/07, 9 March 2010, para 53.

that the State should also arrange for a thorough medical examination if the applicant claims that their expulsion will violate the prohibition of *refoulement* because of their state of health and the lack of appropriate treatment in his country of origin.<sup>316</sup>

In *R.J. v France* the applicant submitted a medical report in support of his claim that he had been tortured by the Sri Lankan authorities. This medical report described in a precise manner fourteen burn wounds, which dated back several weeks and, which caused significant pain necessitating local treatment and the use of oral drugs. The ECtHR considered that this report, even though it did not address the cause of the wounds found on the applicant, established a presumption of past ill-treatment. The Government could not rebut this presumption by only referring to the lacunas in the applicant's asylum claim. This implies that the Government should have asked an expert to conduct a medical examination of the applicant in which the link between the wounds and the applicant's account of past ill-treatment were assessed.<sup>317</sup>

In *I. v. Sweden* the ECtHR considered that the Swedish authorities failed to assess the risk caused by the significant and visible scars on the applicant's body, including a cross burned into his chest. It referred to the medical reports submitted by the applicant, which stated 'that his wounds could be consistent with his explanation both as to the timing [...] and the extent of the torture to which he maintained he had been subjected'.<sup>318</sup>

### 8.3.3.3 Conclusion

In light of *R.C. v. Sweden* and *R.J. v. France*, it can be argued that the duty to conduct an adequate examination of the asylum claim laid down in Article 8(2) of the Procedures Directive and Article 10 (3) of the recast Procedures Directive includes a duty to request an expert medical report in two situations. The first situation is when an applicant makes out a *prima facie* case that his scars are the result of torture or ill-treatment, or secondly, when the (recent) scars or wounds on the applicant's body have been precisely documented in a medical report which establishes a presumption of ill-treatment. It also follows from this case law that the determining authority should deem a medical report relevant for the assessment of an asylum claim within the meaning of Article 18 (1) of the recast Procedures Directive, where the applicant makes out such a *prima facie* case or establishes such a presumption of ill-treatment.

316 ECtHR, *Yoh-Ekale Mwanje v Belgium*, Appl. no. 10486/10, 20 December 2011, para 106.

317 ECtHR, *R.J. v. France*, Appl. no. 10466/11, 19 September 2013, paras 41-43.

318 ECtHR, *I v. Sweden*, Appl. No.61204/09, 5 September 2013, para 67-68.



### 8.3.4 Duty to gather evidence which is accessible to the State but not to the applicant

Sometimes evidence substantiating an asylum claim may be available to the State, but not or to the applicant. For example, State authorities are better placed than the applicant to produce information on the fate of returnees to the applicant's country of origin who have been monitored by the State authorities. This sub-section explores whether there is a duty for the State to produce such evidence.

#### 8.3.4.1 EU legislation

*Directive 2011/95/EU (Recast Qualification Directive)*

Article 4 (1) states that 'in cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application'.

#### 8.3.4.2 Case law

*The Court of Justice of the European Union*

The CJEU suggested in *M.M.* that Member States should, in particular, cooperate actively with the applicant in order to assemble all the elements needed to substantiate an application where the Member State is 'better placed than an applicant to gain access to certain types of documents'.<sup>319</sup> Furthermore, the Court has accepted in its case law with regard to other fields of EU law that requiring a party to produce evidence, which it cannot obtain, is contrary to the principle of effectiveness.<sup>320</sup> In the case of *Laboratoires Boiron*, for example, a pharmaceutical laboratory claimed the reimbursement of taxes, arguing that its direct competitors were not liable to pay those taxes. It was of the opinion that this constituted State aid. According to national law it was *Laboratoires Boiron's* duty to prove this claim. At the same time, the national courts had wide (discretionary) powers to order of its own motion all measures of inquiry permissible in law. The question before the CJEU was whether these rules of evidence were in compliance with the principle of effectiveness. The CJEU considered that the national court had to assess whether the burden placed on *Laboratoires Boiron* to prove that his competitors were overcompensated was likely to 'make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have'. In such instances, the national court had to use its powers of investigation under national law, for example to order one of the parties or a third party to produce a particular document.<sup>321</sup>

319 CJEU Case C-277/11, *M. M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, 22 November 2012, para 66.

320 CJEU, Case C-310/09, *Ministre du Budget, des Comptes publics et de la Fonction publique v. Accor SA*, 15 September 2011, para 100.

321 CJEU, Case CJEU C-526/04, *Laboratoires Boiron SA v. Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon*, 7 September 2006, paras 55 and 57. See also Case C-264/08, *Belgische Staat v. Direct Parcel Distribution Belgium NV*, 28 January 2010, paras 31-37.

### *The European Court of Human Rights*

The ECtHR has not explicitly considered that the burden of producing evidence should rest with the authorities of the State when they are better placed to obtain certain relevant information in an asylum claim. However, in *Singh v Belgium* the ECtHR pointed to the fact that it was easy for the State authorities to verify with the UNHCR office in New Delhi whether the UNHCR documents submitted by the applicants were authentic. In doing so the State authorities could have taken away any doubts as to the existence of a risk of *refoulement*.<sup>322</sup> Furthermore in *Bader*, the ECtHR found it surprising that the applicant's first defence lawyer in Syria was not contacted by the Swedish embassy during their investigation into the case, even though the applicant had furnished the Swedish authorities with his name and address and he could, in all probability, have provided useful information about the case. In this case the applicant had submitted an original judgment from a Syrian Court in which he was sentenced to death in absentia on account of murder.<sup>323</sup>

#### 8.3.4.3 Other relevant sources

The UNHCR Handbook states that, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.<sup>324</sup>

#### 8.3.4.4 Conclusion

Even though Member States may expect asylum applicants to produce evidence in support of their asylum claim, the determining authority is not entitled to remain entirely passive. The determining authority is required under Article 4(1) of the Qualification Directive to actively cooperate with the asylum applicant and assist him so that all the elements needed to substantiate the application may be assembled. It is obliged to gather evidence to which it has access but which may not be readily accessible to the asylum applicant. Unreasonable evidentiary demands on the applicant will undermine the effectiveness of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter).

## 8.4 The use of presumptions

In asylum cases Member States sometimes use certain (negative) presumptions for groups of asylum applicants. Examples of such presumption include:

- persons originating from a safe country of origin or a safe third country do not have protection needs. This presumption is allowed by Articles 27, 30-31 and 36 of the Procedures Directive Articles 36-39 of the recast Procedures Directive;

322 ECtHR, *Singh v. Belgium*, Appl. no. 33210/11, 2 October 2012, para 104.

323 ECtHR, *Bader v. Sweden*, Appl. no. 13284/04, 8 November 2005, para 45.

324 UNHCR Handbook, para 196.

- all Member States operate equivalent protection systems which comply with human rights standards (the presumption underpinning the Dublin III Regulation);
- all members of a certain organisation are individually responsible for actions giving rise to exclusion from an asylum status according to Articles 12 and 17 recast Qualification Directive or all persons convicted to a certain sentence for a particular offence are a danger to the security or community of the Member State.

Asylum applicants may in practice find it (almost) impossible to prove that a presumption, such as those mentioned above, does not apply in their particular case. The use of a presumption, which is impossible or excessively difficult to rebut, should be considered contrary to the principle of effectiveness.

#### 8.4.1 EU legislation

##### *Duty to examine the asylum application on an individual basis*

According to Article 4(3) of the recast Qualification Directive, Article 8 (2) (a) of the Procedures Directive and Article 10 (3) (a) of the recast of the Procedures Directive, the assessment of an application for international protection is to be carried out on an individual basis.

#### 8.4.2 Relevant EU fundamental rights and principles

##### *The right to an effective remedy*

The use of irrefutable presumptions may violate the right to an effective remedy, as the applicant is not able to challenge the presumption (before the national court).

##### *The principle of effectiveness*

The use of presumptions, which are irrefutable, may make it virtually impossible or excessively difficult for the asylum applicant to exercise his right to asylum (Article 18 of the Charter) or make use of the prohibition of *refoulement* (Article 19 of the Charter).

#### 8.4.3 Case law

##### *The Court of Justice of the European Union*

The CJEU's case law shows that using presumptions does not constitute an infringement on the principle that asylum claims should be assessed on an individual basis. However, the use of irrefutable presumptions violates this requirement as well as the principle of effective judicial protection. With regard to asylum cases, the CJEU held in *Samba Diouf* that in order for the right to an effective remedy to be exercised effectively, 'the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrefutable presumption as to the legality

of those reasons'.<sup>325</sup> In this case the Luxembourg authorities and the CJEU disagreed on the extent to which the reasons for rejecting an asylum claim in an accelerated procedure could be reviewed by the national court in the context of the appeal against the final rejection of the claim.

In *N.S. and M.E. and others* the CJEU recognised the importance of the presumption of compliance by Member States with EU law and, in particular, fundamental rights in the context of the European Union as well as CEAS. However, it considered that a transfer carried out under the Dublin II Regulation on the basis of a conclusive presumption that the fundamental rights of an asylum seeker will be observed in the Member State primarily responsible for his application to be incompatible with the duty of a Member State to interpret and apply the Dublin Regulation in a manner consistent with fundamental rights. The asylum applicant must, therefore, according to the CJEU, be able to submit evidence in order to rebut this presumption.<sup>326</sup>

In *B and D*, the CJEU addressed the use of a presumption of responsibility for certain crimes which can result in the application of the exclusion clause as per Article 12 of the recast Qualification Directive. The Court established that the application of an exclusion clause to a person who was a member of a terrorist organisation is conditional on an individual assessment of the specific facts. The CJEU accepted that any authority which finds in the course of this assessment that the person concerned has occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period. Nevertheless, the CJEU deems it necessary that all the relevant circumstances be examined before a decision is taken to exclude that person from international protection.<sup>327</sup> It should thus be derived from this judgment that the requirement of an individual assessment laid down in Article 4 (3) of the recast Qualification Directive, Article 8 (2) (a) of the Procedures Directive and Article 10 (3) (a) of the recast Procedures Directive does not preclude the use of presumptions. However, such presumption may not prevent the determining authority to assess the specific circumstances of the case. This implies that the individual must be able to rebut the presumption while referring to his individual circumstances.

Finally in several cases concerning the repayment of charges levied by a Member State contrary to EU law, the CJEU reached the conclusion that a presumption

325 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 61.

326 CJEU Joined Cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M.E. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, paras 99-105. See also the opinion of AG Trstenjak with this case.

327 CJEU Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*, 9 November 2010, paras 94 and 98. See also the opinion of AG Mengozzi with this case, para 77.

used by State authorities violated the principle of effectiveness because this presumption could in practice not be rebutted by an individual party.<sup>328</sup>

### *The European Court of Human Rights*

The ECtHR has accepted in its case law that certain rebuttable presumptions may be used in asylum cases. The ECtHR held that it needs to be presumed that States comply with their obligations under international treaties.<sup>329</sup> However, according to several cases of the ECtHR there is no irrefutable presumption that a State who is party to the ECHR complies with its obligations under this Convention. The most important example of such a case is *M.S.S. v Belgium and Greece*. In this case the ECtHR based its judgment on numerous reports issued by human rights organisations which pointed to the human rights violations by Greece.<sup>330</sup> Furthermore, the ECtHR has held in the context of the assessment of the reliability of diplomatic assurances that ‘the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where [...] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention’.<sup>331</sup> Thus, it may not be presumed that a country complies with national law and human rights treaties where reliable sources point to the contrary.

#### **8.4.4 Other relevant sources**

Both the Committee against Torture and UNHCR have criticised the use of presumptions concerning the safety of countries in asylum procedures. They stressed the need for an effective opportunity to rebut this presumption and for an individual assessment of the case.<sup>332</sup> UNCHR stated that:

‘given the need for an individual assessment of the specific circumstances of the case and the complexities of such a decision, best State practice does not apply any designation of safety in a rigid manner or use it to deny access to procedures. Rather, it bases any presumption of safety on precise, impartial and up-to-date information and admits the applicant to the regular asylum procedure, so that he has an effective opportunity to rebut any general presumption of safety based on his particular circumstances.’<sup>333</sup>

328 See for judgments with regard to other fields of EU law in which the Court of Justice considered that presumptions must be rebuttable eg Case C-508/11 P, *ENI SpA v. European Commission*, 8 May 2013, Case C-137/11, *Partena ASBL v. Les Tartes de Chaumont-Gistoux SA*, 27 September 2012.

329 ECtHR, (Adm), *Harutioenyan et al v. the Netherlands*, Appl. no. 43700/07, 1 September 2009.

330 ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011. See also ECtHR 12 April 2005, *Shamayev et al v. Russia*, no 36378/02 and ECtHR, *R.U. v. Greece*, Appl. no. 2237/08, 7 June 2011, para 82.

331 ECtHR, *O. v. Italy*, Appl. no. 37257/06, 24 March 2009, para 40 and ECtHR, *Khodzayev v. Russia*, Appl. no. 52466/08, 12 May 2010, para 98.

332 See ComAT Concluding Observations on Estonia (19 February 2008, CAT/C/EST/CO/4, p 3) and France (3 April 2006, CAT/C/FRA/CO/3, p 4).

333 UNHCR Global Consultations on international protection Asylum Processes (Fair and efficient asylum procedures), 31 May 2001, paras 39-40.

### 8.4.5 Conclusion

It follows from the CJEU's as well as the ECtHR's case law that presumptions, for example presumptions relating to the safety of countries of origin or transit, may be used. However, asylum applicants must have an effective opportunity to rebut such presumptions. If this is not provided, this practice violates the EU right to an effective remedy (Article 47 of the Charter) and undermines the effectiveness of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter).

# 9

## Evidentiary assessment: what evidence needs to be taken into account?

Marcelle Reneman\*

Asylum applicants may submit documents and other evidence in order to support their asylum claim. Article 4 of both the Qualification Directive and its recast mentions in general terms, what elements are relevant for the examination of the asylum claim. However, it leaves some discretion to the Member States as to the specific types of evidence that should be taken into account and the weight which should be given to them. The determining authority of the Member States may regard certain types of evidence as irrelevant or attach very limited weight to them. Arguably the (automatic) exclusion of specific types or forms of evidence or the fact that very little weight is attributed to them, may violate the duty to conduct an appropriate examination of the asylum claim as well as undermine the effectiveness of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter).

This section first addresses the question of which types of evidence should be taken into account in the assessment of an applicant's asylum claim. Sub-sections two and three examine specific types of evidence, in particular country of origin information and medical reports.

### 9.1 Evidentiary assessment

#### 9.1.1 EU legislation

*Directive 2011/95/EU (Recast Qualification Directive)*

Article 4 (2) of the recast Qualification Directive provides that the relevant elements of the asylum application are the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), coun-

\* This section is based on Marcelle Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, Oxford/Portland Oregon, Hart Publishing, Chapter 8.

try(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

Article 4 (3) of the recast Qualification Directive states that the assessment of the asylum claim should take into account:

- 'all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
- the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
- the individual position and personal circumstances of the applicant;
- whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection; whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship'.

It may be derived from Article 4 (4) of the recast Qualification Directive that (medical) evidence substantiating that the applicant was persecuted or subjected to serious harm in the past should be taken into account.

### 9.1.2 Relevant EU fundamental rights and principles

#### *Principle of effectiveness*

The (automatic) exclusion of specific types or forms of evidence or the fact that very little weight is attributed to them may undermine the effectiveness of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter).

### 9.1.3 Case law

#### *The Court of Justice of the European Union*

In *Bolbol* the CJEU held that in order to prove that a person availed himself of the assistance of UNRWA, registration with UNRWA is sufficient proof. However, as such assistance can be provided even in the absence of such registration, the beneficiary must be permitted to adduce evidence of that assistance by other means.<sup>334</sup> Advocate General Sharpston in her opinion in this case stated that 'the State is entitled to insist on some evidence, but not on the best evidence that might be produced in an ideal world'.<sup>335</sup>

In *SpA San Giorgio*, a case concerning tax law, the CJEU considered that requirements of proof having the effect of making it virtually impossible or excessively

334 CJEU, Case C-31/09, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, 17 June 2010, para 52. See also the opinion of AG Sharpston with this case, para 98.

335 CJEU, Case C-31/09, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, 17 June 2010, Opinion of AG Sharpston, para 102.



difficult to exercise a Community right may include ‘special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence’.<sup>336</sup> In *Meilicke*, also a tax law case, the Court of Justice held under the principle of sound administration and the principle of proportionality that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation applicable to the case at issue have been met and, consequently, whether or not to grant that advantage. However, according to the CJEU such assessment must not be conducted too formalistically. The tax authorities of the Member State should accept documentary evidence, which enables them to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage are met. Evidence should be taken into account even if it lacks the degree of detail and is not presented in the form of a corporation tax certificate, which is usually required. Only if no such evidence is produced may the relevant tax authorities refuse the tax advantage sought.<sup>337</sup>

### *The European Court of Human Rights*

The ECtHR takes into account all evidence, which can be relevant for assessing the risk of *refoulement*. Documents, which it has considered particularly relevant, are for example: police summons,<sup>338</sup> judgments entailing a criminal conviction of the applicant,<sup>339</sup> death certificates of family members<sup>340</sup> and UNHCR documents, which state that the applicant has been recognised as a refugee by UNHCR.<sup>341</sup> Statements by human rights organisations,<sup>342</sup> (expert) witnesses<sup>343</sup> or relatives<sup>344</sup> regarding the position of the applicant are also taken into account. In *Klein v. Russia* important weight was attached to a statement of the Vice-President of Colombia printed in a Russian newspaper, even though the source of the information was unknown.<sup>345</sup> In *Hilal v. the United Kingdom* and *N. v. Finland* the ECtHR took into account the statements of the applicant’s wife.<sup>346</sup>

336 CJEU, Case C-199/82, *Amministrazione delle Finanze dello Stato v. SpA San Giorgio*, 9 November 1983, para 14. See also CJEU, Case C-228/98, *Charalamos Dounias v. Ypourgio Oikonomikon*, 3 February 2000, paras 71-72.

337 CJEU, Case C-262/09, *Wienand Meilicke and Others v. Finanzamt Bonn-Innenstadt*, 30 June 2011, paras 43-47. See also CJEU, Case C-310/09, *Ministre du Budget, des Comptes publics et de la Fonction publique v. Accor SA*, 15 September 2011, paras 99-101.

338 ECtHR, *Hilal v. the United Kingdom*, Appl. no. 45276/99, 6 March 2001, para 65.

339 ECtHR, *Bader v. Sweden*, Appl. no. 13284/04, 8 November 2005, para 44, ECtHR, *D et al v. Turkey*, Appl. no. 24245/03, 22 June 2006, para 48.

340 ECtHR, *Hilal v. the United Kingdom*, Appl. no. 45276/99, 6 March 2001, para 64.

341 ECtHR, *Singh v. Belgium*, Appl. no. 33210/11, 2 October 2012.

342 ECtHR, *Y.P. and L.P. v. France*, Appl. no. 32476/06, 2 September 2010, para 68, ECtHR [GC], *Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008, para 71 and 144.

343 ECtHR, *Abdulkhakov v. Russia*, Appl. no. 14743/11, 2 October 2012, para 148.

344 ECtHR, *Gafarov v. Russia*, Appl. no. 25404/09, 21 October 2010, para 135.

345 ECtHR, *Klein v. Russia*, Appl. no. 24268/08, 1 April 2010, para 54.

346 ECtHR, *Hilal v. the United Kingdom*, Appl. no. 45276/99, 6 March 2001, para 66. See also ECtHR, *I.K. v. Austria*, Appl. no. 2964/12, 28 March 2013.

Like the CJEU, the ECtHR seems to be of the opinion that Member States should not expect the ideal evidence in asylum cases. In *F.N. v. Sweden* the Swedish authorities found that the applicants had not established their identities even though they had submitted original employment books and a birth certificate, of which the authenticity was not questioned by the Swedish authorities. The ECtHR considered: 'Although the Court agrees that the best way for asylum seekers to prove their identity is by submitting a passport in original, this is not always possible due to the circumstances in which they may find themselves and for which reason other documents might be used to make their identity probable.'<sup>347</sup> The ECtHR considered that the employment books, the birth certificate as well as copies of a driver's licence could not be ignored as evidence because some of them contained photographs of the applicants and the information included in the documents was consistent. The ECtHR seems to consider copies of documents less valuable than original documents.<sup>348</sup> However, it has taken copies into account.<sup>349</sup> The fact that there is no official translation of a document may also work to the applicant's detriment.<sup>350</sup>

The point in time as to when the documents are submitted in the procedure and the way the documents were obtained by the applicant may raise questions as to the authenticity of those documents. The fact that documents are submitted at a late stage in the asylum procedure without a valid explanation generally reduces their value as evidence.<sup>351</sup> At the same time, in *A.A. and others v. Sweden* the ECtHR considered that there were reasons to question the authenticity of a court record submitted by the applicants since the applicants had not presented any information about how they obtained the document within a few weeks of its issuance.<sup>352</sup> In *D.N.W. v. Sweden* the ECtHR found it improbable that the Ethiopian authorities would hand over an arrest warrant to members of the applicant's church in Sweden who were visiting Ethiopia. It noted that the applicant did not submit any documents or particulars in support of the claim that the authorities would hand over an arrest warrant.<sup>353</sup>

When the authorities question the authenticity or evidentiary value of documents or other evidence submitted by the applicant, the applicant must get the opportunity to contest the authorities' findings. Where these findings are not addressed by the asylum applicants, this will usually be considered to undermine the reliability of the evidence concerned.<sup>354</sup>

347 ECtHR, *F.N. v. Sweden*, Appl. No. 28774/09, 18 December 2012, para 72.

348 ECtHR (Adm), *S.M. v. Sweden*, Appl. No. 47683/08, 10 February 2009, para 34.

349 ECtHR, *F.N. v. Sweden*, no 28774/09, 18 December 2012, para 72.

350 ECtHR (Adm), *A.M. v France*, Appl. No. 20341/08, 12 October 2010.

351 See ECtHR (Adm), *M. v. Sweden*, Appl. no. 22556/05, 6 September 2007, para 92 and ECtHR, *B v Sweden*, Appl. no. 16578/03, 26 October 2004.

352 ECtHR, *A.A et al v. Sweden*, Appl. no. 1499/09, 28 June 2012, para 81.

353 ECtHR, *D.N.W. v. Sweden*, Appl. no. 29946/10, 6 December 2012, para 43.

354 See ECtHR (Adm), *Matsiukhina and Matsiukhin v. Sweden*, Appl. no 31260/04, 21 June 2005.

### 9.1.4 Other relevant sources

The Committee against Torture's General Comment No 1 states that all pertinent information may be introduced by either party in order to establish whether the applicant would be in danger of being tortured.<sup>355</sup>

### 9.1.5 Conclusion

It should be concluded that Articles 8 (2) of the Procedures Directive, 10 (3) of the recast Procedures Directive and 4 of the recast Qualification Directive, read in the light of the principle of effectiveness require that the determining authority of the Member State take into account all documents or other evidence which concern:

- the position and personal circumstances of the applicant;
- the reasons for applying for asylum, including previous persecution;
- the situation in the country of origin;
- the applicant's activities in the country of refuge, which may lead to a risk of *refoulement*;
- the availability of safe third countries.

It follows from the CJEU's case law that the principle of effectiveness precludes that the assessment of the evidence submitted in an asylum case be conducted in a formalistic manner. The (automatic) exclusion of (certain types of) relevant and reliable evidence or the fact that they are only given very limited weight should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*. National authorities are not allowed to accept only the best possible evidence in support of an asylum claim, such as a passport to prove the applicant's identity. They must take into account other evidence substantiating the claim. A wide variety of documents and (witness) statements should be considered capable of substantiating an applicant's claim of a risk of *refoulement*, given their recognised special position in international case law. Only those documents, which according to an expert report submitted by the State authorities, are considered forgeries, and where such findings are not sufficiently contested by the applicant, can be excluded from the assessment of the asylum claim. The late submission of documents may undermine their credibility, but may never lead to their automatic exclusion.

## 9.2 Country of origin information

Asylum applicants often submit reports of (inter)national human rights organisations and UN bodies concerning the general situation in their country of origin in support of their asylum claim. With these reports they sometimes seek to refute the conclusions made in general country of origin reports produced by the State itself. This sub-section examines the weight which should be attached to country of origin information from various sources.

355 ComAT General Comment No 1 (1997), A/53/44.

### 9.2.1. EU legislation

#### *Directive 2011/95/EU (Recast Qualification Directive)*

According to Article 4 (3) of the recast Qualification Directive, the assessment of the asylum claim must take into account all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied.

#### *Directive 2005/85/EU (Procedures Directive)*

According to Article 8 (2) of the Procedures Directive, Member States should ensure that precise and up-to-date information is obtained from various sources, such as UNHCR, as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 10 (3) of the recast Procedures Directive is almost identical to Article 8(2) of the Procedures Directive. It adds EASO and relevant international human rights organisations as sources of country information which should be taken into account by the Member States.

### 9.2.2 Relevant EU fundamental rights and principles

#### *Principle of effectiveness*

Country of origin information is crucial for the assessment of the asylum claim. Therefore, the fact that the determining authority does not take into account all the relevant country of origin information or bases its assessment on country of origin information which is of insufficient quality may undermine the effectiveness of the right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter).

### 9.2.3 Case law

#### *The Court of Justice of the European Union*

Country of origin information reports may be considered expert reports. In the case of Pfizer, which concerned the withdrawal of authorisation of an additive in feeding stuffs, the Court of First Instance (CFI, now called the General Court) provided standards for reviewing the quality of scientific advice. Arguably, it may be derived from this judgment that all expert reports (also those submitted in asylum procedures) should comply with the principles of excellence, independence and transparency.<sup>356</sup> Expert reports should be of sufficient quality in order to ensure that the decision is taken on the basis of reliable information and to prevent arbitrariness.<sup>357</sup> In this context it does not matter whether these

356 CFI, Case T-13/99 *Pfizer* [2002], paras 158-159.

357 CFI, Case T-13/99, *Pfizer Animal Health SA v. Council*, 11 September 2002, para 172.

reports are requested by the examining authority or submitted by the asylum applicant. If the examining authorities request an expert opinion, it must ask the expert the right questions and ascertain whether the expert report is of a sufficient quality.<sup>358</sup> If the determining authority decides to disregard information in the expert report they have to provide extensive reasoning for this decision.<sup>359</sup>

In *N.S. and M.E* the CJEU considered that information such as that cited by the ECtHR (country of origin information reports and reports of UN bodies and Council of Europe Institutions) enables Member States to assess the risk of a violation of Article 4 of the Charter in the receiving Member State. The CJEU also noted the relevance of European Commission's reports and proposals to amend the Dublin Regulation II which were known by the sending Member State.<sup>360</sup>

The significance of UNHCR information regarding the situation in countries of origin or transit may be derived from the CJEU's judgment in *Halaf*. In this case the CJEU considered that UNHCR documents are among the instruments likely to enable Member States to assess the functioning of the asylum system in the Member State indicated as responsible by the Dublin II Regulation, and therefore to evaluate the risks to which the asylum seeker would actually be exposed should they be transferred to that Member State. 'Those documents are particularly relevant in that assessment in the light of the role conferred on the UNHCR by the Geneva Convention, in consistency with which the rules of European Union law dealing with asylum must be interpreted [...]'.<sup>361</sup> Furthermore, the case of *X, Y and Z* implies an obligation for the determining authority to gather and assess country of origin information concerning the penalisation of homosexual conduct in the country of origin of the applicant.<sup>362</sup>

### *The European Court of Human Rights*

The ECtHR has reproached responding Governments for not including relevant human rights reports when carrying out an individual assessment as to whether there is a risk of *refoulement*.<sup>363</sup> States cannot solely rely on reports issued by their own Ministry of Foreign Affairs.<sup>364</sup> They need to include other sources of

358 CFI, Case T-13/99, *Pfizer Animal Health SA v. Council*, 11 September 2002, para 198.

359 CFI, Case T-13/99, *Pfizer Animal Health SA v. Council*, 11 September 2002, para 199.

360 CJEU (Joined Cases) C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M.E. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, paras 91-92.

361 CJEU Case C-528/11, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, 30 May 2013, para 44.

362 CJEU (Joined Cases) C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v. X and Y and Z*, 7 November 2013, paras 58-59.

363 ECtHR, *Gaforov v. Russia*, Appl. no. 25404/09, 21 October 2010, para 125, ECtHR, *Klein v. Russia*, Appl. no. 24268/08, 1 April 2010, para 56.

364 ECtHR, 3 July 2012, *Rustamov v. Russia*, Appl no 11209/10, para 119.

country of origin information such as reports by human rights organisations in their assessments. The ECtHR considered in *Salah Sheekh v. the Netherlands* that 'given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources'.<sup>365</sup>

The ECtHR has addressed the requirements as to the quality of country of origin information in *NA v. the United Kingdom*. '[C]onsideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.<sup>366</sup> When assessing the reliability of certain country of origin information reports, the ECtHR takes into account whether their conclusions are consistent with each other, whether those conclusions are corroborated in substance by other sources<sup>367</sup> and whether the information has been refuted by the Government of the State party.<sup>368</sup> The consistency of a report with information supplied by other sources is particularly important where this report is based on anonymous sources.<sup>369</sup> Furthermore, consideration must be given to the presence and reporting capacities of the author of the material in the country in question. The ECtHR observed in this respect that States 'through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it'. It finds that the same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do.

The ECtHR held in *Sufi and Elmi v. the United Kingdom* that given the difficulties governments and NGOs face gathering information in dangerous and volatile situations, it will not 'disregard a report simply on account of the fact that its author did not visit the area in question and instead relied on information provided by sources'.<sup>370</sup> The ECtHR attaches foremost importance to reports which consider the human rights situation in the country of destination and directly address the grounds for the alleged real risk of ill-treatment in the case before

365 ECtHR, *Salah Sheekh v. the Netherlands*, Appl. no. 1948/04, 11 January 2007, para 136.

366 ECtHR, *NA v the United Kingdom*, Appl. no. 25904/07, 17 July 2008, para 120.

367 See, eg ECtHR, *Soldatenko v. Ukraine*, Appl. no. 24440/07, 23 October 2008, para 71 and ECtHR [GC], *Saadi v Italy*, Appl. no. 37201/06, 28 February 2008, para 143.

368 See, eg ECtHR, *S.H. v. the United Kingdom*, Appl. no. 19956/06, 15 June 2010, para 71.

369 ECtHR, *Sufi and Elmi v. United Kingdom*, Appl. nos 8319/07 and 11449/07, 28 June 2011, paras 233-234.

370 ECtHR, *Sufi and Elmi v. United Kingdom*, Appl. nos 8319/07 and 11449/07, 28 June 2011, para 232.

the ECtHR. It has, therefore, given due weight to the UNHCR's own assessment of an applicant's claims when it determined the merits of a complaint under Article 3.<sup>371</sup>

The ECtHR has in its case law taken into account information provided by several human rights organisations,<sup>372</sup> most importantly Amnesty International<sup>373</sup> and Human Rights Watch,<sup>374</sup> UNHCR<sup>375</sup> and other UN agencies.<sup>376</sup> Finally, it has referred to governmental sources<sup>377</sup> including the US State Department,<sup>378</sup> the Immigration and Refugee Board of Canada<sup>379</sup> and the United Kingdom Border Agency.<sup>380</sup> Sometimes the ECtHR also attaches important weight to individual experts.<sup>381</sup>

### 9.2.4 Other relevant sources

The Committee against Torture has recognised the importance of good quality country of origin information for the assessment of an asylum claim.<sup>382</sup> UNHCR has also stressed the essential role of country of origin information.<sup>383</sup>

371 ECtHR, *NA v. the United Kingdom*, Appl. no. 25904/07, 17 July 2008, para 122, ECtHR, *Jabari v. Turkey*, Appl. no. 40035/98, 11 July 2000, para 41. See also ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. no. 30471/08, 22 September 2009, para 82.

372 The ECtHR has also referred to reports issued by other human rights organisations, such as the Norwegian Organisation for Asylum Seekers, the Norwegian Helsinki Committee, Greek Helsinki Monitor (ECtHR (Adm), *K.R.S. v the United Kingdom*, Appl. no. 32733/08, 2 December 2008 and Helsinki Federation for Human Rights (ECtHR, *Kaboulov v. Ukraine*, Appl. no. 41015/04, 19 November 2009, para 111).

373 ECtHR [GC], *Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008, para 143 and ECtHR, *Said v the Netherlands*, no 2345/02, 5 July 2005, paras 51 and 54.

374 ECtHR [GC], *Saadi v Italy*, Appl. no. 37201/06, 28 February 2008, para 143 and ECtHR, *NA v. the United Kingdom*, Appl. no. 25904/07, 17 July 2008, para 127.

375 ECtHR, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 September 2009, paras 80-81 and 85-86.

376 The UN Secretary General (ECtHR, *Ismoilov v. Russia*, Appl. no. 2947/06, 24 April 2008, para 121), the UN High Commissioner for Human Rights and the the UN Special Rapporteur on Torture (ECtHR, *NA v the United Kingdom*, Appl. no. 25904/07, 17 July 2008, paras 124 and 132), and the UN Independent Expert on Minority Issues (ECtHR (Adm), *Haililova et al v Sweden*, Appl. no. 20283/09, 13 October 2009).

377 These are sources other than the State party in the case lying before the ECtHR and may be Contracting or non-Contracting States. ECtHR, *Ismoilov v. Russia*, Appl. no. 2947/06, 24 April 2008, para 120.

378 ECtHR, *Ryabikin v. Russia*, Appl. no. 8320/04, 19 June 2008, para 113 and ECtHR, *Khodzayev v. Russia*, Appl. no. 52466/08, 12 May 2010, para 93.

379 ECtHR, *NA v the United Kingdom*, Appl. no. 25904/07, 17 July 2008 para 135, ECtHR, *Nnyanzi v. the United Kingdom*, Appl no 21878/06, 8 April 2008, para 64.

380 ECtHR, *Abdolkhani and Karimnia* (n 114), para 79.

381 See, eg ECtHR, *S.H. v. the United Kingdom*, Appl. No. 19956/06, 15 June 2010, paras 69-71.

382 Committee Against Torture, General Comment No 1 (1997), A/53/44, para 8, Concluding Observations on Hungary, 6 February 2007, CAT/C/HUN/CO/4, para 10.

383 See eg UNHCR Guidelines on international protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, para 36, Guidelines on international protection No.4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 23 July 2003, HCR/GIP/03/04, para 37.

### 9.2.5 Conclusion

Articles 8 (2) (b) of the Procedures Directive and 10 (3) (b) of the recast Procedures Directive and Article 4 (3) of the recast Qualification Directive read in the light of the ECtHR's case law require that Member States do not only rely on the information provided by their own Ministries but also take into account reports issued by reputable human rights organisations, UN agencies and the authorities of other States. Country of origin information reports that are taken into account by the determining authority should meet certain quality standards. Article 8 (2) (b) of the Procedures Directive and 10 (3) (b) of the recast explicitly require such reports to be precise and up-to-date. Further useful standards for the examination of the quality and relevance of country of origin information reports may be derived from the CJEU's judgment in *Pfizer* as well as the ECtHR's case law. Such reports should be independent, reliable and objective. The weight which should be attached to a country of origin information report depends on the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources. Reports which specifically address potential violations of Article 3 ECHR should be considered most relevant. On the basis of the ECtHR's case law, where Member States do not comply with these standards this may undermine the effectiveness of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter).

## 9.3 Medical reports

Asylum applicants often submit medical reports to support their allegations of past torture or ill-treatment. Past persecution or serious harm is according to Article 4 (4) of the recast Qualification Directive a strong indication of a future risk of persecution or serious harm. However, some Member States refuse to admit such reports as evidence in asylum procedures or attach limited weight to them. They argue for example that no causal link can be established between scars or medical problems and past torture. Such practice may undermine the effectiveness of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter).

### 9.3.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

The Procedures Directive does not include any provisions on medical examinations or the evidentiary value of medical evidence.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Recital 31 of the recast Procedures Directive provides that national measures dealing with the identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence, including



acts of sexual violence in asylum procedures may, *inter alia*, be based on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

Article 18 of the recast Procedures Directive provides that Member States shall arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm, where the determining authority deems it relevant for the assessment of the asylum claim in accordance with Article 4 of the recast Qualification Directive. Such medical examinations 'shall be carried out by qualified medical professionals'. When no medical examination is carried out by the Member State, applicants should be offered the opportunity to arrange for a medical examination concerning signs that might indicate past persecution or serious harm on their own initiative and at their own cost. Article 18 (3) of the Directive requires the determining authority to take into account the results of both kinds of medical examinations.

### 9.3.2 Relevant EU fundamental rights and principles

#### *Principle of effectiveness*

Where the determining authority fails to take into account medical reports substantiating the applicant's claims of past torture or attaches limited weight to them, this may undermine the effectiveness of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter). In this respect it should be noted that past persecution or serious harm constitutes according to Article 4 (4) of the recast Qualification Directive a strong indication that the applicant will be persecuted or subjected to serious harm in the future.

### 9.3.3 Case law

#### *The Court of Justice of the European Union*

Arguably the standards set out by the Court of First Instance in *Pfizer* with regard to scientific reports are relevant for the assessment of (the quality of) medical reports submitted in the context of asylum procedures.

#### *The European Court of Human Rights*

In several cases the ECtHR has attributed important or even decisive weight to medical reports submitted by the applicant, which substantiated their claim that they were the victim of torture.<sup>384</sup> Medical reports should be sufficiently detailed and conclusive as to the origin of the injuries found on the applicant's body in order to support the claim of past torture.<sup>385</sup> In *R.C. v. Sweden* the ECtHR

384 ECtHR, *I. v. Sweden*, Appl. no. 61204/09, 5 September 2013, paras 67-68, ECtHR, *RU v. Greece*, Appl. no. 2237/08, 7 June 2011, paras 81-82, ECtHR, *Y.P. and L.P. v France*, Appl. no. 32476/06, 2 September 2010, para 68, ECtHR, *Hilal v. the United Kingdom*, Appl. no. 45276/99, 6 March 2001, para 64 and ECtHR (Adm), *T.I. v. the United Kingdom*, Appl. no. 43844/98, 7 March 2000.

385 ECtHR, *Elmuratov v. Russia*, Appl. no. 66317/09, 3 March 2011, paras 71 and 86.

held that the State is obliged to direct that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where the applicant has made out a *prima facie* case as to their origin (see section 8.3.3.2). In this case the applicant submitted a medical certificate, which according to the Court 'gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture'.<sup>386</sup> The ECtHR in this case requested the applicant to submit a forensic medical report. This report documented numerous scars on the applicant's body. The ECtHR recognised that some injuries may have been caused by means other than by torture. However, it accepted the report's general conclusion that the injuries, to a large extent, were consistent with having been inflicted on the applicant by other persons and in the manner in which he described, thereby strongly indicating that he had been a victim of torture. The medical evidence thus corroborated the applicant's story. According to the ECtHR the applicant's account was also consistent with the information available from independent sources concerning Iran. The ECtHR considered, therefore, that the applicant had substantiated his claim that he was detained and tortured by the Iranian authorities.<sup>387</sup>

In *R.J. v. France* the applicant submitted a medical report in support of his claim that he had been tortured by the Sri Lankan authorities. This medical report was not written by a specialist but by a doctor from the medical unit of the international zone of Roissy airport, where the applicant was staying. The report described in a precise manner fourteen burn wounds, which dated back several weeks and which caused severe pain necessitating local treatment and the use of oral drugs. The ECtHR found that the report constituted a very important part of the case-file. The seriousness and recent character of the wounds constituted a strong presumption that the applicant had been subjected to ill-treatment. Nevertheless, none of the national decision making bodies investigated what caused the wounds and what risks they revealed. The ECtHR did not accept the French Court's reasoning that the report did not justify the existence of a link between the findings identified during the applicant's medical examination and the abuse he claimed to have suffered during his detention in his country of origin. The ECtHR held that the Government could not refute the strong suspicions with regard to the origin of the applicant's wounds simply by referring to the lacunas in the applicant's asylum claim. The ECtHR concluded that the applicant had established a risk of *refoulement*, which had not been contradicted by the Government.<sup>388</sup>

386 ECtHR, *R.C. v. Sweden*, Appl. no 41827/07, 9 March 2010, para 53.

387 ECtHR, *R.C. v. Sweden*, Appl. no 41827/07, 9 March 2010, paras 53-54, ECtHR, *MO.M v. France*, Appl. no. 18372/10, 18 April 2013, para 40.

388 ECtHR, *R.J. v. France*, Appl. no. 10466/11, 19 September 2013, paras 41-43.

### 9.3.4 Other relevant sources

The Committee against Torture has recognised the importance of medical evidence when assessing claims of *refoulement* in its General Comment no 1,<sup>389</sup> in its Concluding Observations<sup>390</sup> as well as in its views in individual cases.<sup>391</sup> It is of the opinion that State parties should take into account medical reports in their assessment of a claim under Article 3 CAT. The Committee against Torture has held that past torture cannot be made plausible on the basis of a medical report, which lacks detail or conclusiveness alone. However, in several cases the Committee did not exclude such reports as evidence of past torture.<sup>392</sup>

The Istanbul Protocol provides guidelines for the impartial and objective documentation of torture and is applicable to asylum procedures.<sup>393</sup> It states that a medical evaluation for legal purposes should be conducted with objectivity and impartiality and that the evaluation should be based on the physician's clinical expertise and professional experience. The clinicians who conduct an evaluation must be properly trained. The medical report needs to be factual and carefully worded, jargon should be avoided and all medical terminology should be defined so that it is understandable to lay persons. Furthermore, it is the physician's responsibility to discover and report upon any material findings that he or she considers relevant, even if they may be considered irrelevant or adverse to the case by the party requesting the medical examination.<sup>394</sup> Both the ECtHR (in non-asylum cases under Article 3 ECHR)<sup>395</sup> and the Committee against Torture<sup>396</sup> have indicated that the Istanbul Protocol could be used as a tool to examine the quality of a medical report.<sup>397</sup>

### 9.3.5 Conclusion

Past experiences of torture or ill-treatment are a serious indication of an applicant's well-founded fear of persecution or real risk of suffering serious harm. It follows from Article 18 of the recast Procedures Directive as well as the ECtHR's

389 ComAT General Comment No 1 (1997), A/53/44, para 8(c).

390 ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8.

391 ComAT, *Enrique Falcon Rios v. Canada*, no 133/99, 17 December 2004, para 8.4, ComAT, *I.A.O. v. Sweden*, no 65/1997, 21 March 1997, para 14.3, ComAT, *Halil Haydin v. Sweden*, no 101/97, 16 December 1998, ComAT, *Chedli Ben Ahmed Karoui v. Sweden*, no 185/2001, 25 May 2002, ComAT, *Ayas v Sweden*, no 97/1997, 12 November 1998.

392 ComAT, *Z.K. v. Sweden*, no 301/2006, 16 May 2008, ComAT, *R.K. v. Sweden*, no 309/2006, 19 May 2008.

393 The introduction to the Protocol states that documentation methods contained in the manual are applicable to amongst others 'political asylum evaluations'.

394 Paragraph 162 of the Istanbul Protocol.

395 See, eg ECtHR, *Desde v. Turkey*, Appl. no. 23909/03, 1 February 2011, para 98, ECtHR, *Mehmet Eren v. Turkey*, Appl. no. 32347/02, 14 October 2008, para 41 and ECtHR, *Bati v. Turkey*, Appl. no. 33097/96 and 57834/00, 3 June 2004, para 133.

396 ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8 and ComAT Concluding Observations on the Netherlands, 20 June 2013, CAT/C/NLD/5-6, para 12.

397 The Protocol was adopted by the UN General Assembly (UNGA Resolution 55/89 of 4 December 2004) and the UN High Commissioner for Human Rights (Resolution 200/43 of 25 January 2001, E/CN.4/2001/66).

case law and the views of the Committee against Torture that medical reports which assess the degree of consistency between a physical or psychological after-effect and the applicant's asylum account should be regarded as important evidence in support of a claim of past torture or ill-treatment. It should, therefore, be concluded that the requirement of an appropriate assessment of the asylum application under Article 8 (2) of the Procedures Directive, Article 10 (3) of the recast Procedures Directive and Article 4 (4) of the recast Qualification Directive also require that Member States take such medical reports into account. The refusal to take medical reports supporting an account of past torture into consideration or to attach little importance to them undermines the effectiveness of the EU right to asylum (Article 18 of the Charter) and the principle of *non-refoulement* (Article 19 of the Charter). The weight which should be accorded to a medical report depends on its quality and conclusiveness. It may be derived from *R.C. v. Sweden* that even medical reports issued by a physician who is not an expert specialising in the assessment of torture injuries can determine the origin of applicant's scars. Furthermore, the case of *R.J. v France* shows that medical reports which only document recent scars or wounds can activate a duty of the State to investigate the origin of these scars or wounds. In such *prima facie* cases, EU law requires State authorities to request an expert report.

# 10 The right to an appeal of an asylum decision

*Marcelle Reneman*

Under both international and European law, persons who are in need of international protection have the right to an effective remedy against the rejection of an asylum claim. Article 47 of the Charter recognises the right to a remedy and a fair trial before a court or tribunal as a fundamental right. In the context of asylum it guarantees that an independent and impartial court or tribunal assesses the risk of *refoulement* and the right to an asylum status in fair proceedings.

In order for a remedy to be effective and the proceedings to be fair, a number of requirements need to be fulfilled. Some of these requirements have been or will be discussed in other sections:

- Suspensive effect of an appeal (section 4)
- Free legal aid ensuring access to an effective remedy (section 5)
- The right to an oral hearing before a court or tribunal (section 6)
- Short time-limits for lodging the appeal (section 7)

This section will address the following aspects of the right to an appeal against the negative asylum decision:

- The right of effective *access* to an appeal (9.1)
- The right to an appeal before *a court or tribunal* (9.2)
- The requirements with regard to the scope and intensity of the review applied by this court or tribunal (9.3)
- *Ex nunc* judicial review (9.4)
- The use of secret information during appeal proceedings (9.5)
- The obligation of the court or tribunal to give reasons for its judgment (9.6)

## 10.1 The right of access to an effective remedy <sup>398</sup>

The right to an effective remedy and fair trial includes a right of *access* to a court or tribunal. This implies that access to the appeal should not be made impossible or very difficult as a result of national procedural rules. This sub-section addresses the right of access to a court or tribunal generally, whilst specifically focusing on the right to be informed of the negative decision on the asylum application and the available remedies. Also, other factors such as the expulsion of an applicant shortly after the notification of the asylum decision or very short time-limits for lodging the appeal and a lack of free legal aid may render a remedy inaccessible. These aspects were addressed respectively in sections 4 (the right to remain), 7 (time-limits in the asylum procedure) and 5 (legal assistance and representation).

### 10.1.1. EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

Article 39 (2) affirms that Member States shall provide 'for necessary rules for the applicant to exercise his right to an effective remedy'. It follows from Article 9 (1) and (2) and Article 10 (1) of the Procedures Directive that:

- Asylum applicants 'shall be given notice in reasonable time of the decision by the determining authority on their application for asylum'. However, if a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant for asylum (Article 10 (1) (d));
- Decisions on applications for asylum shall be given in writing (Article 9 (1));
- The decision to reject the asylum application must state the reasons in fact and in law (Article 9 (2));
- Information on how to challenge a negative decision must be given in writing. 'Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant.' (Article 9 (2)); and
- Asylum applicants shall be informed of the result of the decision and on how to challenge a negative decision 'in a language that they may reasonably be supposed to understand' when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available (Article 10 (1) (e)).

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 46 (4) states that Member States shall provide for 'necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to

398 This sub-section is partly based on Marcelle Reneman, 'Access to an Effective Remedy before a Court or Tribunal in Asylum Cases', in: E. Guild and Paul Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law*, Leiden/Boston: Martinus Nijhoff Publishers 2011, pp. 401-436

paragraph 1'. Articles 11 (1) and (2) and 12 (1) (e) and (f) of the recast Procedures Directive provide for the same rules with regard to the notification of the decision and providing information on available remedies as those included in Articles 9 and 10 of the Procedures Directive. The only difference is that Article 12 (1) (f) states that asylum applicants 'shall be informed of the result of the decision by the determining authority in a language *that they understand or are reasonably supposed to understand* when they are not assisted or represented by a legal adviser or other counsellor' (emphasis added).

#### *Regulation 604/2013 (Dublin III Regulation)*

It follows from the Dublin III Regulation that:

- Member States should notify the applicant of the decision to transfer him to the Member State responsible and, where applicable, of not examining his application for international protection. If a legal advisor or other counsellor is representing the person concerned, Member States may choose to notify the decision to such legal advisor or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned (Article 26 (1)).
- The applicants must be informed of 'the possibility to challenge a transfer decision and, where applicable, to apply for a suspension of the transfer as soon as an application for international protection is lodged (Article 4 (1) (d)) and in the decision to transfer (Article 26 (2)).
- When the person concerned is not assisted or represented by a legal advisor or other counsellor, Member States shall inform him or her of the main elements of the decision, which shall always include information on the legal remedies available and the time limits applicable for seeking such remedies, in a language that the person concerned understands or is reasonably supposed to understand (Article 26 (3)).

### **10.1.2 Relevant EU fundamental rights and principles**

#### *The EU right to an effective remedy and a fair trial (Article 47 of the Charter)*

It follows from Article 47 of the Charter that the EU right to an effective remedy includes a right of *access* to such a remedy. Article 47 requires that free legal aid be provided when necessary to ensure effective access to justice.<sup>399</sup> This implies that the remedy required by Article 47 should be accessible. Furthermore, the CJEU has considered that Article 47 comprises the right of access to a court or tribunal.<sup>400</sup>

<sup>399</sup> See also CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, para 29.

<sup>400</sup> CJEU, Case C-199/11, *Europese Gemeenschap v. Otis NV*, 6 November 2012, para 49 and CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, para 60.

The ECtHR has accepted that the remedy required by Article 13 ECHR must be accessible for the individual.<sup>401</sup> It also held that the right to a fair trial laid down in Article 6 (1) includes the right of *access* to a court.<sup>402</sup>

### 10.1.3 Case law

#### *The Court of Justice of the European Union*

The CJEU has ruled in several cases that national procedural rules limiting access to a remedy were contrary to the principle of effectiveness as they rendered the right to an effective remedy virtually impossible or excessively difficult.<sup>403</sup> In *MRAX* the CJEU ruled on a Belgian administrative practice which denied third country nationals who were married to Member State nationals and were not in possession of a visa or whose visa had expired, the right to make an application for review of the appropriateness of a decision refusing them a residence permit or ordering their expulsion. Such review was required by Article 9 of Directive 64/221.<sup>404</sup> The CJEU held that ‘any foreign national married to a Member State national claiming to meet the conditions necessary to qualify for the protection afforded by Directive 64/221 benefits from the minimum procedural guarantees laid down in Article 9 of the Directive, even if he is not in possession of an identity document or, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry’. Furthermore, it considered that ‘those procedural guarantees would be rendered largely ineffective if entitlement to them were excluded in the absence of an identity document or visa or where one of those documents has expired’.<sup>405</sup>

#### Notification of the decision

It is a general principle of EU law that national authorities have an obligation to state the reasons of a decision which falls within the scope of EU law.<sup>406</sup> The duty to state reasons is closely connected to the right to an effective remedy. This right can only be effectively exercised if the person concerned knows the reasons underlying the negative decision. The duty to state reasons must ensure that the party concerned can defend an EU right under the best possible conditions and that this person has the possibility to decide with a full knowledge of the relevant facts whether there is any point in his applying to

401 ECtHR, *Shamayev and others v. Georgia and Russia*, Appl. no. 36378/02, 12 April 2005, para. 447, ECtHR, *Čonka v. Belgium*, Appl. no. 51564/99, 5 February 2002, para. 46.

402 ECtHR, *Golder v. the United Kingdom*, Appl. no. 4451/70, 21 February 1975.

403 See, eg CJEU Case C-459/99, *MRAX*, 25 July 2002, paras 102-103, Case C-78/98, *Preston and Fletcher* 16 May 2000 and Case C-255/00, *Grundig Italiana SpA v Ministero delle Finanze*, 24 September 2002.

404 Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ L 56/850.

405 CJEU, Case C-459/99, *MRAX*, 25 July 2002, paras 102-103.

406 CJEU, Case 222/86, *UNECTEF v. Heylens*, 15 October 1987.



the court.<sup>407</sup> This also implies that the decision must be notified to the parties concerned.

#### Information on available remedies

No relevant case law of the EU courts has been found on the duty to provide information on available remedies.

#### *The European Court of Human Rights*

According to the ECtHR the exercise of the remedy in the meaning of Article 13 ECHR must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.<sup>408</sup> In *Čonka* the ECtHR stated in the context of Article 35 ECHR that 'the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy'.<sup>409</sup> This follows from the fact that the remedy required by Article 13 must be effective in practice as well as in law. This does not mean that asylum applicants do not need to comply with the procedural rules governing access to a remedy. The ECtHR considered in *Bahaddar* in the context of Article 35 ECHR that even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner. There may however be special circumstances which absolve an applicant from the obligation to comply with such rules. Those special circumstances will depend on the facts of each case.<sup>410</sup>

The ECtHR held under Article 6 (1) ECHR that the right of access to court may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 (1).<sup>411</sup> The right of access to the courts must be practical and effective in view of the prominent place held in a democratic society by the right to a fair trial.<sup>412</sup> For the right of access to be effective, 'an individual must have a clear, practical opportunity to challenge an act that is an interference with his or her rights'.<sup>413</sup> A restrictive interpretation of the right of access to a court guaranteed by Article 6 (1) would not be consonant with the object and purpose of the provision.<sup>414</sup>

407 CJEU, Case 222/86, *UNECTEF v. Heylens*, 15 October 1987, para 15 and Case C-70/95, *Sodemare SA and others v. Regione Lombardia*, 17 June 1997, para 19.

408 ECtHR, *Shamayev and others v. Georgia and Russia*, Appl. no. 36378/02, 12 April 2005, para. 447.

409 ECtHR, *Čonka v. Belgium*, Appl. no. 51564/99, 5 February 2002, para. 46.

410 ECtHR, *Bahaddar v. the Netherlands*, Appl. no. 25894/94, 19 February 1998.

411 ECtHR, *Ashingdane v. the United Kingdom*, Appl. no. 8225/78, 28 May 1985, para.55.

412 ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, 9 October 1979.

413 ECtHR, *Beneficio Cappella Paolini v. San Marino*, Appl. no. 40786/98, 13 July 2004, para. 28.

414 ECtHR, *Siałowska v. Poland*, Appl. no. 8932/05, 22 March 2007.

Limitations of the right of access to court are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation, which may vary in time and in place according to the needs and resources of the community and of individuals'.<sup>415</sup> The State enjoys a certain margin of appreciation in laying down such regulation. Limitations to the right of access to court 'must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired'.<sup>416</sup> Furthermore, a limitation will not be compatible with Article 6 (1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>417</sup>

### The right to be informed of the negative decision

In several cases before the ECtHR the fact that a deportation order was not notified to the persons concerned or their lawyers contributed to a violation of Article 13 ECHR. In *Abdolkhani and Karimnia* for example, the ECtHR noted that 'the applicants could not apply to the administrative and judicial authorities for annulment of the decision to deport them to Iraq or Iran as they were never served with the deportation orders made in their respect. Nor were they notified of the reasons for their threatened removal from Turkey'.<sup>418</sup> In *Shamayev* the ECtHR considered that, in order to challenge an extradition order under national law, 'the applicants or their lawyers would have had to have sufficient information, served officially and in good time by the competent authorities'.<sup>419</sup>

### The right to be informed of the available remedies

The ECtHR's judgment in *Čonka* shows that a lack of adequate information on the available remedies in a language the person concerned understands may render access to these remedies ineffective. In this case the ECtHR identified a number of factors which affected the accessibility of the remedy which the Government claimed was not exercised. These included the fact that the information on the available remedies handed to the applicants on their arrival at the police station was printed in tiny characters and in a language they did not understand. Furthermore, the ECtHR took into account that there were not sufficient interpreters available. According to the ECtHR in those circumstances, the applicants undoubtedly had little prospect of being able to contact a lawyer from the police station.<sup>420</sup> Also in *M.S.S.* the ECtHR found that 'the lack of access

415 ECtHR, *Ashingdane v. the United Kingdom*, Appl. no. 8225/78, 28 May 1985, para. 57.

416 ECtHR, *Ashingdane v. the United Kingdom*, Appl. no. 8225/78, 28 May 1985, para. 57.

417 ECtHR, *Ashingdane v. the United Kingdom*, Appl. no. 8225/78, 28 May 1985, para. 57.

418 ECtHR, *Abdolkhani and Karimnia v. Turkey*, Appl. no. 30471/08, 22 September 2009, para. 116, see also ECtHR, *Dbouba v. Turkey*, Appl. no. 15916/09, 13 July 2010, para. 44, ECtHR, *M.B. and others v. Turkey*, Appl. no. 36009/08, 15 June 2010, para. 25 and 40 and ECtHR, *Baysakov and others v. Ukraine*, Appl. no. 54131/08, 18 February 2010, para. 74.

419 ECtHR, *Shamayev and others v. Georgia and Russia*, Appl. no. 36378/02, 12 April 2005, para. 130.

420 ECHR, *Čonka v. Belgium*, Appl. no. 51564/99, 5 February 2002, para. 44.

to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures'.<sup>421</sup>

#### 10.1.4 Other relevant sources

The Human Rights Committee has accepted that the remedy required by Article 2 (3) ICCPR must be accessible for the individual.<sup>422</sup> It also recognised that the right to a fair trial laid down in Article 14 (1) ICCPR includes the right of access to a court.<sup>423</sup>

The Twenty Guidelines on Forced Return of the Council of Europe state that: 'a removal order should be addressed in writing to the individual concerned either directly or through his authorised representative. If necessary, the addressee should be provided with an explanation of the order in a language he/she understands. The removal order shall indicate the legal and factual grounds on which it is based and the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised'.<sup>424</sup>

The Twenty Guidelines on Forced Return<sup>425</sup> and several views of the Committee against Torture<sup>426</sup> mention that information on the available remedies should be provided. The Council resolution on minimum guarantees for asylum procedures states that 'the asylum-seeker must have the opportunity, inasmuch as national law so provides, to acquaint himself with or be informed of the main purport of the decision and any possibility of appeal, *in a language which he understands*' (emphasis added).<sup>427</sup>

#### 10.1.5 Conclusion

It should be concluded that the right of access to an effective remedy before a court or tribunal requires that the asylum applicant is notified of the decision rejecting his asylum claim and the reasons for that decision. Furthermore, he should be informed of the remedies available to him in order to challenge that decision. Arguably the national authorities should ensure that the applicant is able to understand this information, in particular if he is not assisted by a legal assistant, legal representative or other counsellor. This implies that the information should be provided in a language the applicant understands.

421 ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011 para 304.

422 HRC, *Kimouche v. Algeria*, nr. 1328/2004, 16 August 2007, para. 7.10 and HRC, *George Kazantzis v. Cyprus*, nr. 972/2001, 19 September 2003, para. 6.6.

423 HRC, *Oló Bahamonde v. Equatorial Guinea*, nr. 468/1991, 10 November 1993, para. 9.4.

424 Committee of Ministers of the Council of Europe, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 4.

425 Committee of Ministers of the Council of Europe, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 4.

426 ComAT, *S.H. v. Norway*, nr. 121/1998, 19 November 1999, para. 7.4, ComAT, *Z.T. v. Norway*, nr. 127/1999, 19 November 1999, para. 7.4.

427 See also Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ C 274, 19/09/1996, p.13-17, para. 15.

## 10.2 The right to an appeal before a court or tribunal

The asylum applicant has the right to an appeal before a court or tribunal. This sub-section discusses the requirement which an institution must meet in order to be considered a court or tribunal. In particular, it focuses on the requirements of independence and impartiality.

### 10.2.1. EU legislation

*Directive 2005/85/EC (Procedures Directive)*

Article 39 (1) states that 'Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal'.

*Directive 2013/32/EU (Recast Procedures Directive)*

Article 46 (1) provides that 'Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal'.

*Regulation 604/2013 (Dublin III Regulation)*

Article 27 (1) of the Dublin III Regulation provides that the applicant 'shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal'.

### 10.2.2 Relevant EU fundamental rights and principles

*The right to an effective remedy and a fair trial*

Article 47 of the Charter provides that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal ...' Furthermore, it states that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. Article 6 (1) ECHR requires a fair and public hearing within a reasonable time 'by an independent and impartial tribunal established by law'.

### 10.2.3 Case law

*The Court of Justice of the European Union*

The CJEU has developed the definition of 'a court or tribunal' in the context of the determination of whether a body making a reference for a preliminary ruling is 'a court or tribunal' for the purposes of Article 267 TFEU (former Article 234 EC-Treaty). According to the CJEU this is a question governed by European Union law alone. In its assessment the CJEU takes account of a number of factors, such as 'whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'<sup>428</sup>

428 CJEU, Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg*, 19 September 2006, para 48.

In *H.I.D.*, the applicant disputed whether the Irish asylum appeals body, the Refugee Appeals Tribunal (RAT), met the criteria of an independent court or tribunal.<sup>429</sup> The applicants in that case argued that the RAT could not be considered a 'court or tribunal' because:

- its jurisdiction is not compulsory since the decision by the Refugee Applications Commissioner (ORAC) may also be judicially reviewed for legal validity by the High Court;
- that jurisdiction is not exercised on an *inter partes* basis because the ORAC need not be represented at the appeal in order to defend its decision at first instance; and
- the RAT is not independent.

The CJEU in its judgment referred to the criteria for a 'court or tribunal' set out in amongst others the *Wilson* case.<sup>430</sup> The CJEU first established that it was common ground that the RAT meets the criteria of establishment by law, permanence and application of rules of law. It noted with regard to the applicant's first argument that according to Irish law the RAT is the competent tribunal to examine and rule on appeals brought against the recommendations of the ORAC which are the decisions at first instance on asylum applications. Furthermore, in the event that the appeal before the RAT is upheld, the Minister is obliged, in accordance with Irish law to grant refugee status. 'It is only in the case where the Refugee Appeals Tribunal does not uphold the appeal brought by the applicant for asylum that refugee status may nonetheless be granted to him by the Minister. The Minister therefore has no discretion where the Refugee Appeals Tribunal has taken a decision favourable to the applicant for asylum. Positive decisions of the Refugee Appeals Tribunal have, to that effect, binding force and are binding on the State authorities.'<sup>431</sup>

With regard to the second argument, the CJEU considered that the requirement that procedure be *inter partes* is not absolute and that ORAC's participation as a party to the appeal proceedings before the RAT to defend its first instance decision is not an absolute requirement. Instead, it noted a few characteristics of the procedure before the RAT which guaranteed that the RAT exercised its jurisdiction on an *inter partes* basis:

- The ORAC has to provide to the RAT copies of all reports, documents or representations available to it and a written indication of the nature and source of any other information concerning the application of which he has become aware in the course of his investigation;<sup>432</sup>

429 CJEU, Case C-175/11, *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013.

430 CJEU Case C-175/11, *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, paras 95-97.

431 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, paras 86-87.

432 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, para 90.

- The RAT provides the applicant and his solicitor, as well as UNHCR, at its request, with copies of those documents;<sup>433</sup>
- The RAT may 'hold a hearing during which it may direct any person whose evidence is required to attend, and hear both the applicant and the [ORAC] present their case in person or through a legal representative. As a consequence, each party has the opportunity to make the [RAT] aware of any information necessary to the success of the application for asylum or to the defence'.<sup>434</sup>
- Before deciding an appeal, the [RAT] must consider, among other things, the report of the [ORAC], any observations made by the latter or by the [UNHCR], the evidence adduced and any representations made at an oral hearing, and any documents, representations in writing or other information furnished to the [ORAC].<sup>435</sup>

The CJEU concluded that RAT has a broad discretion, 'since it takes cognisance of both questions of fact and questions of law and rules on the evidence submitted to it, in relation to which it enjoys a discretion'.<sup>436</sup>

### Independent and impartial

The CJEU considered in *Wilson* that 'the concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision'.<sup>437</sup> The CJEU mentions two other aspects of the concept of 'independence'.

'The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law'.<sup>438</sup>

433 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform*, Ireland, 31 January 2013, para 90.

434 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform*, Ireland, 31 January 2013, para 91.

435 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform*, Ireland, 31 January 2013, para 92.

436 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform*, Ireland, 31 January 2013, paras 88-92.

437 CJEU Case C-506/04, *Wilson v. Ordre des avocats du barreau de Luxembourg*, 19 September 2006, para 49.

438 CJEU Case C-506/04, *Wilson v. Ordre des avocats du barreau de Luxembourg*, 19 September 2006, paras 50-52.

Furthermore, the CJEU considered that the guarantees of independence and impartiality 'require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it [...]'<sup>439</sup>

In the case of *H.I.D* which was mentioned above, the applicants argued that the RAT could not be considered independent because organisational links exist between the RAT, the ORAC and the Minister for Justice and its members are subject to outside pressure. In particular, they argued that the rules governing the appointment, length of service and cancellation of the appointments of the members of the RAT and other aspects of its members' terms of office deprived that tribunal of its independence. The CJEU considered that Irish law provided that the RAT is independent in the performance of its functions and that the Minister is bound by the decision of that tribunal in favour of the applicant and is therefore not empowered to review it. With regard to the rules governing the appointment of members of the RAT, the CJEU considered that 'these are not capable of calling into question the independence of that tribunal. The members of the Tribunal are appointed for a specific term from among persons with at least five years' experience as a practising barrister or a practising solicitor, and the circumstances of their appointment by the Minister do not differ substantially from the practice in many other Member States.'<sup>440</sup>

The CJEU did notice with regard to the removal of members of the RAT that the ordinary members of that tribunal may be removed from office by the Minister. The Minister's decision must state the reasons for such removal. The law does not define the cases in which RAT members could be removed from office or specify whether the removal decision could be subjected to judicial review. However, the CJEU examined the effectiveness of the remedy on the basis of the Irish administrative and judicial system considered as a whole. It took into account that asylum applicants may appeal the decisions of the RAT before the High Court and subsequently before the Supreme Court. 'The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members.'<sup>441</sup> The CJEU concluded that the 'criterion of independence is satis-

439 CJEU, Case C-506/04, *Wilson v. Ordre des avocats du barreau de Luxembourg*, 19 September 2006, para 54.

440 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, para 99.

441 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, para 103.

fied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy'.<sup>442</sup>

### *The European Court of Human Rights*

The factors used by the ECtHR in order to establish whether a national body should be considered a court or tribunal within the meaning of Article 6 (1) ECHR are similar to those used by the CJEU. The ECtHR held in *Belilos* that 'a tribunal'

'is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner .... It must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure - several of which appear in the text of Article 6 § 1 ... itself'.<sup>443</sup>

In *Rolf Gustafson v. Sweden*, the ECtHR found that for the purposes of Article 6 (1), a tribunal needs not be a court of law integrated within the standard judicial machinery of the country concerned, it may be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system. To ensure compliance with Article 6 (1) sufficient substantive and procedural guarantees need to be in place.<sup>444</sup> Article 6 (1) ECHR requires that the court or tribunal have 'full jurisdiction'. This requirement will be further discussed in sub-section 10.3.

### Independent and impartial

In its assessment under Article 6 (1) ECHR whether a court or tribunal can be considered 'independent', the ECtHR has regard 'to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence'.<sup>445</sup> According to the ECtHR the requirement of impartiality has two aspects: the court or tribunal must be subjectively free of personal prejudice or bias and it must be impartial from an objective viewpoint. That means that it must offer sufficient guarantees to exclude any legitimate doubt in this respect. 'Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts

442 CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, para 104.

443 ECtHR, *Belilos v Switzerland*, Appl. no. 10328/83, 29 April 1988, para 64.

444 ECtHR, *Rolf Gustafson v. Sweden*, Appl. no. 23196/94, 1 July 1997, para 45.

445 ECtHR [GC] 6 May 2003, *Kleyn and others v. the Netherlands*, nos 39343/98, 39651/98, 43147/98 and 46664/99, para 190.



as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings.<sup>446</sup>

#### 10.2.4 Other relevant sources

The Human Rights Committee set out the requirements which must be met by a court or tribunal under Article 14 ICCPR (the right to equality before courts and tribunals and to a fair trial) in its General Comment no 32.<sup>447</sup> It defines a ‘tribunal’ as a body, regardless of its denomination, which is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.<sup>448</sup> With regard to independency and impartiality it applies similar criteria as those applied by the ECtHR under Article 6 ECHR.<sup>449</sup>

#### 10.2.5 Conclusion

Articles 39 of the Procedures Directive, 46 of the recast Procedures Directive and Article 27 of the Dublin III Regulation read in the light of Article 47 of the Charter require that asylum applicants have a remedy before an independent and impartial court or tribunal against the rejection of their asylum claim or the transfer decision. It follows from the judgment in *H.I.D.* that the CJEU in its assessment whether the applicant has access to such remedy considers the national procedure as a whole.<sup>450</sup> A court or tribunal can be considered independent if it acts as a third party in relation to the authority which adopted the contested decision.<sup>451</sup> It must be protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. A court or tribunal should be considered impartial if it is objective and does not have any interest in the outcome of the proceedings apart from the strict application of the rule of law.<sup>452</sup> It follows from the case law of the CJEU under Articles 267 TFEU (former Article 234 EC-Treaty) and 47 of the Charter and of the ECtHR under Article 6 ECHR that amongst others, rules concerning the appointment and removal of the members of a court or tribunal and safeguards against outside pressures should be taken into account when examining the independence and impartiality of a court or tribunal.

446 ECtHR [GC] 6 May 2003, *Kleyn and others v. the Netherlands*, nos 39343/98, 39651/98, 43147/98 and 46664/99, paras 191.

447 HRC, General Comment No 32 (2007, CCPR/C/GC/32).

448 HRC, General Comment No 32 (2007, CCPR/C/GC/32) under III.

449 HRC, General Comment No 32 (2007, CCPR/C/GC/32) under III.

450 CJEU, Case C-175/11, *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, para 102.

451 CJEU, Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg*, 19 September 2006, para 49.

452 CJEU, Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg*, 19 September 2006.

### 10.3 The scope and intensity of review<sup>453</sup>

This section addresses the question whether EU legislation read in the light of Article 47 of the Charter sets requirements as regards the scope and intensity of the review which must be applied by the court or tribunal. It is argued that Article 47 of the Charter obliges a court or tribunal to review points of facts and points of law. Furthermore, it is contended that the court or tribunal should apply an intensive ('full', 'thorough' or 'rigorous') review of the risk of *refoulement*. This implies that the national court or tribunal should as a minimum assesses the claim of a risk of *refoulement* on its merits. It should carefully examine the facts and evidence underlying the asylum claim. A reasonableness test in which wide discretion is afforded to the determining authority's fact-finding, including the assessment of the applicant's credibility, is not allowed.

#### 10.3.1 EU Legislation

##### *Directive 2005/85/EC (Procedures Directive)*

Article 39 of the Procedures Directive provides that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a number of asylum decisions mentioned in Article 39 (1). This provision does not address the scope or intensity of the review which needs to be applied by this court or tribunal.

##### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 46 (3) of the Directive requires 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to the recast Qualification Directive, at least in appeals procedures before a court or tribunal of first instance'.

##### *Regulation 604/2013 (Dublin III Regulation)*

Article 27 states that the applicant 'shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.'

#### 10.3.2 Relevant EU fundamental rights and principles

In this sub-section it is argued that the EU right to an effective remedy and a fair trial (Article 47 of the Charter) requires that the court or tribunal which assesses the appeal against a negative asylum decision applies an intensive review of points of fact and points of law.

453 This sub-section is based on Marcelle Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford/Portland Oregon: Hart Publishing 2014, Chapter 9.

### 10.3.3 Case law

#### *The Court of Justice of the European Union*

##### Points of fact and points of law

It follows from the CJEU's judgment in *Wilson* that under EU law a 'court of tribunal' should be able to review both fact and law. In *Wilson* the Court was asked by a national court to interpret Article 9 of Directive 98/5<sup>454</sup>, which requires 'a remedy before a court or tribunal in accordance with the provisions of domestic law'.<sup>455</sup> In the *Wilson* case the facts were reviewed in first and second instance by non-judicial bodies, which could, according to the CJEU not be considered impartial. Therefore, they did not fulfil the requirements for a court or tribunal as defined by Community law.<sup>456</sup> The CJEU established that the jurisdiction of the *Cour de Cassation*, deciding in last instance, was limited to questions of law, so that it did not have full jurisdiction. The CJEU ruled that the *Cour de Cassation* could not be considered a court or tribunal as required by Article 9 of the said Directive.<sup>457</sup> The CJEU here referred to the 'full jurisdiction test' applied by the ECtHR in cases concerning Article 6 ECHR, which will be discussed below.

In its judgment in *Samba Diouf* the CJEU held that the national court within the meaning of Article 39 of Procedures Directive should be able 'to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith'.<sup>458</sup> In *Samba Diouf* the national court was potentially prevented from reviewing the reasons underlying the decision to process an asylum claim in an accelerated procedure, in the context of the appeal against the decision to reject the asylum application.<sup>459</sup> In that case the reasons for processing the asylum claim in accelerated procedure were identical to the reasons for rejecting the asylum claim. As a result the national court was potentially not allowed to review the reasons underlying the rejection of the asylum claim. According to the CJEU such a situation 'would render review of the legality of the asylum decision impossible, as regards both the facts and the law'.<sup>460</sup> It should be concluded from this consideration that in asylum cases the national court or tribunal is expected to review factual issues. This may also be concluded from the fact that the CJEU in *Samba Diouf* referred to its judgment in *Wilson*.<sup>461</sup>

454 Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998], OJ L 77/36.

455 CJEU, Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg*, 19 September 2006, para 60.

456 In this case: the Disciplinary and Administrative Committee in first instance the Disciplinary and Administrative Appeals Committee in appeal.

457 CJEU, Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg*, 19 September 2006, paras 61-62.

458 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 61.

459 The referring court and the representative of the Luxembourg Government disagreed on this point.

460 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 57.

461 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 57.

### Intensity of the review

The CJEU considered in *Samba Diouf* that Article 39 of the Procedures Directive read in the light of the EU right to an effective remedy requires that the reasons which led the competent authority to reject the asylum application as unfounded, should be the subject of a 'thorough review' by the national court.<sup>462</sup> The intensity of review is thus a matter which is governed by EU law. The CJEU did not explain what a 'thorough review' means.

Some indications for the requirements regarding the intensity of judicial review which follow from the EU right to an effective remedy may be derived from the case law concerning appeals against decisions of the EU Institutions before the EU Courts. In such cases the General Court (like the former Court of First Instance) has exclusive jurisdiction to find the facts, the CJEU only assesses points of law and examines whether the clear sense of the evidence is distorted.<sup>463</sup> Arguably, the General Court and the CJEU in this case law show the level of intensity of judicial review which is required in order to guarantee effective judicial protection. A method of judicial review applied by a national court which is less intensive than the method applied by the General Court in similar cases may lead to a violation of the EU right to an effective remedy.<sup>464</sup>

In particular the case law of the EU Courts with regard to complex assessments (medical, economic or other) seems to be relevant. Asylum cases and EU decisions involving complex assessments are similar in that it is difficult to find the facts objectively.<sup>465</sup> In both cases it is argued that because of the difficulties in establishing the facts, determining authorities should enjoy discretion and that judicial review should be limited. The determining authorities are considered to be better placed to establish and evaluate the facts than the court, because they have the specific expertise necessary for this task. The CJEU's settled case law entails that, where an EU authority is required to make complex assessments, it has wide discretion which also applies, to some extent, to the establishment of the factual basis of its action.<sup>466</sup> The EU judicature must 'restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the boundaries of its discretion'.<sup>467</sup> This implies a margin-

462 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para 56.

463 Y. Schuurmans, 'Review of Facts in Administrative Law Procedures; A European Community Law Perspective', *Review of European Administrative Law* (2008), p 16. See for the jurisdiction of the General Court Art 256 TFEU.

464 See also. Y. Schuurmans, 'Review of Facts in Administrative Law Procedures; A European Community Law Perspective', *Review of European Administrative Law* (2008), p 34.

465 Y. Schuurmans, 'Review of Facts in Administrative Law Procedures; A European Community Law Perspective', *Review of European Administrative Law* (2008), p 27.

466 See eg CFI, Case T-13/99, *Pfizer Animal Health SA v Council*, 11 September 2002, para 168.

467 CJEU, Case C-120/97 *Upjohn Ltd*, 21 January 1999, para 34.

al judicial review. However, the EU Courts' case law concerning cases involving complex assessments shows that in practice this limited form of judicial review is rather rigorous.<sup>468</sup>

In *Tetra Laval*, a merger case, the CJEU considered that the fact that a decision must be subject to a limited form of judicial review, does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information. Not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.<sup>469</sup> Furthermore, the CJEU indicated that in case of a prospective analysis, judicial review of the evidentiary assessment performed by the EU Institution is all the more necessary.<sup>470</sup> The CJEU considered that:

'a prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events — for which often many items of evidence are available which make it possible to understand the causes — or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted'.<sup>471</sup>

In asylum cases a prospective analysis of the risk of *refoulement* takes place. Therefore this consideration of the CJEU in *Tetra Laval* may also be relevant in the asylum context.

The EU Courts also test the EU Institutions' decisions involving complex assessments against procedural safeguards, such as the right to be heard and the right to know the reasons for the decision. In *Technische Universität München*, the CFI held that in cases entailing complex technical evaluations, where the Commission has a power of appraisal in order to be able to fulfil its tasks:

'[R]espect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately

468 Y. Schuurmans, 'Review of Facts in Administrative Law Procedures: A European Community Law Perspective', *Review of European Administrative Law* (2008), p 25.

469 CJEU, Case C-12/03 P, *Commission v Tetra Laval*, 15 February 2005, para 39. See also C Costello, 'The European asylum procedures directive in legal context, New Issues in Refugee Research, Research Paper No 134', Geneva: UNHCR 2006, p 31.

470 CJEU, Case C-12/03 P, *Commission v Tetra Laval*, 15 February 2005, para 39.

471 CJEU, Case C-12/03 P, *Commission v Tetra Laval*, 15 February 2005, para 42.

reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present'.<sup>472</sup>

It may be argued that a thorough review as required by Article 47 of the Charter in asylum cases cannot be less intensive than what the EU Courts consider to be a limited judicial review in cases concerning complex assessments. That would mean that a thorough review at least entails an assessment whether the evidence relied on by the determining authority in an asylum case is factually accurate, reliable and consistent, and whether that evidence contains all the information, which must be taken into account in order to assess the asylum claim and whether it is capable of substantiating the conclusions drawn from it. Furthermore, the national court or tribunal should test the asylum decision against procedural safeguards such as the right to be heard and the right to a reasoned decision and the duty to carefully and impartially examine the asylum claim.

### *The European Court of Human Rights*

#### Points of fact and points of law

Article 13 ECHR requires 'independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3'.<sup>473</sup> It is hard to imagine that 'rigorous scrutiny' can be provided by an authority, which is only competent to rule on points of law.

Article 6(1) ECHR requires a court or tribunal to have 'full jurisdiction', which means that it must address both questions of fact and questions of law.<sup>474</sup> In *Le Compte, Van Leuven and De Meyere* the ECtHR considered that questions of fact and questions of law 'are equally crucial for the outcome of proceedings relating to 'civil rights and obligations'. Hence 'the right to a court' and the right to a judicial determination of the dispute cover questions of fact just as much as questions of law'.<sup>475</sup> The ECtHR found violations of Article 6 ECHR in cases where the domestic courts or tribunals were precluded from determining a central issue in dispute and had considered themselves bound by the prior findings of administrative bodies.<sup>476</sup>

472 CJEU, Case C-269/90 *Technische Universität München*, 21 November 1991, para 14.

473 See, eg ECtHR, *Jabari v. Turkey*, Appl. no. 40035/98, 11 July 2000, para 50.

474 ECtHR, *Veeber v. Estonia*, Appl. no. 37571/97, 7 November 2002, para 70.

475 ECtHR, *Le Compte, Van Leuven, De Meyere v. Belgium*, Appl. No. 6878/75, 23 June 1981, para 51.

476 See eg ECtHR, *Sigma Radio Television v. Cyprus*, Appl. nos. 32181/04 and 35122/05, 21 July 2011, para 157, ECtHR, *Družstevní Záložna Pria and others v. the Czech Republic*, Appl. no. 72034/01, 31 July 2008, para 111, ECtHR, *Terra Woningen v. the Netherlands*, Appl. no. 20641/92, 28 November 1998, paras 52-55, ECtHR, *Chevroil v. France*, Appl. No. 49636/99, 13 February 2003, para 82.

### Intensity of the review

According to the ECtHR Article 13 ECHR imperatively requires 'close scrutiny by a national authority and independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3'.<sup>477</sup> These requirements follow from the importance which the ECtHR attaches to Article 3 ECHR and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises.

In *M.S.S* the ECtHR concluded that the standard of judicial review applied by a national court did not comply with the requirements of close and rigorous scrutiny. The judgment concerned the extremely urgent procedure before the Belgian Aliens Appeal Board, in which the execution of an expulsion measure could be stayed. In this procedure the Aliens Appeal Board verified that the administrative authority's decision relied on facts contained in the administrative file, that in the substantive and formal reasons given for its decision it did not, in its interpretation of the facts, make a manifest error of appreciation, and that it did not fail to comply with essential procedural requirements or with statutory formalities required on pain of nullity, or exceed or abuse its powers.<sup>478</sup> According to the ECHR the extremely urgent procedure did not comply with the requirement of rigorous scrutiny for several reasons. First of all, as was also recognised by the Belgian Government, this procedure reduced the rights of the defence and the examination of the case to a minimum. The examination of the complaints under Article 3 by the Aliens Appeal Board could, according to the ECtHR, not be considered 'thorough'. The examination was limited to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3. Thereby the burden of proof was increased to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore, the Aliens Appeals Board did not always take into account new material submitted by the applicant.<sup>479</sup> In the case of *Abdulkhakov* the ECtHR had doubts that the risk of *refoulement* had been subject to rigorous scrutiny. It considered that it was 'struck by the summary reasoning adduced by the domestic courts and their refusal to assess materials origination from reliable sources'.<sup>480</sup>

According to the ECtHR's standing case law, the ECtHR itself applies a 'rigorous scrutiny' to claims of a risk of *refoulement*. 'The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 ... at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic

477 See, eg ECtHR [GC] 21 January 2011, *M.S.S v Belgium and Greece*, no 30696/09, para 293 and ECtHR, *Jabari v. Turkey*, Appl. no. 40035/98, 11 July 2000, para 50.

478 ECtHR [GC], *M.S.S v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, para 141.

479 ECtHR [GC], *M.S.S v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, paras 389-390.

480 ECtHR, *Abdulkhakov v. Russia*, Appl. no. 14743/11, 2 October 2012, para 148.

societies making up the Council of Europe'.<sup>481</sup> In *Salah Sheekh* the ECtHR considered that in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, 'a full and *ex nunc* assessment is called for'.<sup>482</sup> In several cases the ECtHR conducted its own assessment of the facts and evidence of the case including the credibility of the applicant's asylum account.<sup>483</sup> It may be argued that the review applied by national courts or tribunals may not be less intensive than the 'rigorous scrutiny' performed by the ECtHR, because that would endanger the subsidiary role of the ECtHR.<sup>484</sup> Applicants would, consequently, be obliged to complain before the ECtHR to receive a rigorous scrutiny of their claim under Article 3 ECHR.

### 10.3.4 Other relevant sources

The view of the Committee against Torture with regard to the required intensity of review of asylum decision has not been consistent. In several cases against Canada the Committee accepted a very limited form of judicial review.<sup>485</sup> However in its more recent view in *Singh* and in its Concluding Observations regarding Canada, the Committee held that a State party 'should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture'.<sup>486</sup>

### 10.3.5 Conclusion

Article 46 of the recast Procedures Directive requires national courts to perform 'a full and *ex nunc* examination of both facts and points of law' of an asylum decision. Article 39 of the Procedures Directive and 27 of the Dublin III Regulation do not provide any rules regarding the scope and intensity of the review which must be applied by the court or tribunal referred to in these provisions. It follows from the CJEU's judgments in *Samba Diouf*<sup>487</sup> and *Wilson*<sup>488</sup> and the ECtHR's case law with respect to the 'full jurisdiction' requirement<sup>489</sup> referred to in these cases, that these provisions also require a review of the asylum decision on points of fact and points of law. Furthermore, the CJEU held in *Samba Diouf* that Article 47 of the Charter requires a 'thorough' review of the asylum decision.

481 ECtHR [GC], *Saadi v. Italy*, Appl. no. 37201/06, 28 February 2008, para 142.

482 ECtHR, *Salah Sheekh v the Netherlands*, Appl. No. 1948/04, 11 January 2007, para 136.

483 See eg ECtHR, *F.N. v. Sweden*, Appl. no. 28774/09, 18 December 2012, ECtHR, *Said v. the Netherlands*, Appl. no. 2345/02, 5 July 2005 and ECtHR, *N v. Finland*, Appl. no. 38885/02, 26 July 2005.

484 T.P. Spijkerboer, 'Subsidiarity and 'Arguability': the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases', 21 *International Journal of Refugee Law* (2009), p 68-69.

485 See, eg ComAT, *S.P.A. v Canada*, no. 282/2005, 6 December 2006, para 7.4 and ComAT, *L.Z.B. v. Canada*, no. 304/2006, 15 November 2007, para 6.6.

486 ComAT, *Nirmal Singh v Canada*, no. 319/2007, 8 July 2011, para 8.9. See also ComAT Concluding Observations on Canada, 7 July 2005, CAT/C/CR/34/CAN, para 5(c).

487 CJEU, Case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011.

488 CJEU, Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg*, 19 September 2006.

489 ECtHR, *Le Compte, Van Leuven, De Meyere v. Belgium*, Appl. No. 6878/75, 23 June 1981.



On the basis of the EU court's case law in cases concerning complex assessments it may be argued that a 'full' or 'thorough' review as required by Article 47 of the Charter in asylum cases entails at least an assessment whether the evidence relied on by the determining authority in an asylum case is factually accurate, reliable and consistent, and whether that evidence contains all the information, which must be taken into account in order to assess the asylum claim and whether it is capable of substantiating the conclusions drawn from it.<sup>490</sup> Furthermore, the national court or tribunal should test the asylum decision against procedural safeguards such as the right to be heard and the right to a reasoned decision and the duty to carefully and impartially examine the asylum claim.<sup>491</sup> Such requirement also follows from the ECtHR's case law under Article 13 ECHR, which obliges national authorities to perform a 'rigorous scrutiny' of a claim under Article 3 ECHR.<sup>492</sup> This means that Articles 39 of the Procedures Directive, 46 (3) of the recast Procedures Directive and Article 27 of the Dublin III Regulation read in the light of Article 47 of the Charter do not allow a reasonableness test of the risk of *refoulement* in which wide discretion is afforded to the determining authority's fact-finding, including the assessment of the applicant's credibility.

#### 10.4 Ex nunc judicial review by national courts or tribunals?

New elements or findings may be raised by the applicant during the appeal against the rejection of the first asylum claim. National courts may be unable or unwilling to take into account such new elements or findings. Also the scope of judicial review by national courts in subsequent asylum procedures may be limited (for example, to the question whether new elements or findings have been raised). In this sub-section it is argued that the EU right to an effective remedy (Article 47 of the Charter) requires that national courts perform an *ex nunc* judicial review at least at one stage of the procedure taking into account all relevant elements and findings, including those submitted in a later stage or during subsequent asylum proceedings.

##### 10.4.1 EU legislation

###### *Directive 2005/85/EC (Procedures Directive)*

Article 39 of the Procedures Directive guarantees the right to an effective remedy before a court or tribunal. This right also applies in case of a rejection of a subsequent application. This provision does not state whether national courts should be able to take into account new elements and findings. Article 32 (1) seems to allow two options if an applicant makes further representations after the rejection of the (first) asylum application:

490 CJEU, Case C-12/03 P, *Commission v Tetra Laval*, 15 February 2005.

491 CJEU, Case C-12/03 P, *Commission v Tetra Laval*, 15 February 2005, para 42. CJEU, Case C-269/90 *Technische Universität München*, 21 November 1991.

492 ECtHR, *Jabari v. Turkey*, Appl. no. 40035/98, 11 July 2000, para 50.

- these representations are taken into account by the national court during the appeal phase. The national court takes into account and considers all the elements underlying the further representations;
- the further representations are considered during a subsequent asylum procedure.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 46 of the recast Procedures Directive guarantees the right to an effective remedy before a court or tribunal. This right also applies to decisions concerning the admissibility of an asylum application (Article 46 (1) (a) (i)). Article 46 (3) states that an effective remedy provides for a 'full and *ex nunc*' examination of both facts and points of law including, where applicable, an examination of the international protection needs pursuant to the recast Qualification Directive, at least in appeals procedures before a court or tribunal of first instance. Article 40 (1) of the recast Procedures Directive allows for the two options mentioned above under the Procedures Directive, namely: further representations are considered during the appeal against the negative asylum decision or during a subsequent asylum procedure. It is unclear how this provision relates to the requirement of an *ex nunc* judicial review required by Article 46 (3) of the Directive.

#### *Regulation 604/2013 (Dublin III Regulation)*

Article 27 provides for the right to an effective remedy in Dublin cases. This provision does not mention whether judicial review should be *ex nunc*.

### **10.4.2 Relevant EU fundamental rights and principles**

#### *The EU right to an effective remedy (Article 47 of the Charter)*

In this sub-section it is argued that the EU right to an effective remedy (Article 47 of the Charter) requires that national courts perform at least at one stage of the procedure an *ex nunc* judicial review taking into account all relevant elements and findings and addressing all reasons underlying the rejection of the asylum claim, including those submitted in a later stage or during subsequent asylum proceedings.

### **10.4.3 Case law**

#### *The Court of Justice of the European Union*

The judgment in *Orfanopoulos and Oliveiri* mentioned earlier is also relevant for the scope of judicial review by national courts in asylum cases. In *Orfanopoulos*, the CJEU held that the national court which is reviewing the lawfulness of the expulsion of an EU citizen should be able to take into account factual matters, which occurred after the final decision of the competent authorities and which may point to the cessation or the substantial diminution of the present threat to public policy. The principle of effectiveness requires national courts to perform an *ex nunc* review of the threat to public policy posed by an EU citizen

against whom an expulsion measure was taken.<sup>493</sup> Asylum cases and cases in which an EU citizen will be expelled for reasons of public policy have two important things in common. First of all, it needs to be established at the time of expulsion whether there is a *present* threat: in asylum cases it concerns a present threat of *refoulement*, in cases of EU citizens a present threat of a person to the requirements of public policy. Furthermore, in both sorts of cases fundamental EU rights are at stake (the freedom of movement of EU citizens and the EU right to asylum/prohibition of *refoulement*). Therefore, it may be argued on the basis of the judgment in *Orfanopoulos and Oliveri* that in asylum cases EU law also requires an *ex nunc* assessment by the national court of the present threat (the real risk) of *refoulement*. This would imply that any developments, which took place after the rejection of the asylum claim by the determining authority, should be taken into account by the national court or tribunal within the meaning of Article 39 of Procedures Directive as well as Article 46(3) of the recast Procedures Directive.

In addition, it may be derived from the judgment in *Samba Diouf* that Article 47 of the Charter requires that the national court examining the appeal against the rejection of a first or subsequent asylum claim is able to review the reasons underlying this rejection.<sup>494</sup> This implies that in appeals against a negative decision on a subsequent asylum application, the national court must review the entire decision taken by the decision-making authority and not only, for example, limit the review to the question whether new elements or findings have arisen or have been submitted by the applicant.<sup>495</sup>

### *The European Court of Human Rights*

In *Salah Sheekh v. the Netherlands*, the ECtHR considered that in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change over the course of time.<sup>496</sup> The ECtHR has not explicitly considered that national courts should, like the ECtHR itself include new facts or circumstances in their review of an asylum or expulsion decision. However, in *M.S.S. v. Belgium and Greece*, the ECtHR did take into account in its assessment of the effectiveness of the extremely urgent procedure before the Aliens Appeals Board that the Aliens Appeal Board did not always take into account materials submitted by applicants after their interviews with the Aliens Office.<sup>497</sup> According to the ECtHR this was one of the reasons why these appli-

493 The Court of Justice refers to the principle of effectiveness in para 80 of the judgment.

494 CJEU, case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'immigration*, 28 July 2011.

495 CJEU, case C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'immigration*, 28 July 2011, paras 57-58.

496 ECtHR, 11 January 2007, *Salah Sheekh v. the Netherlands*, no 1948/04, para 136. See also ECtHR 17 July 2008, *NA v. the United Kingdom*, no 25904/07, para 112 and ECtHR 10 February 2011, *Dzhaksybergenov v. Ukraine*, no 12343/10, para 36.

497 ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011.

cants were prevented from establishing the arguable nature of their complaints under Article 3 ECHR. In this case, the applicant could be transferred to Greece right after the Alien Appeal Board's decision. There was, thus, no opportunity to submit new evidence in a later stage.<sup>498</sup>

Furthermore, it may be asserted in light of the subsidiary role of the ECtHR that the fact that the ECtHR assesses claims under Article 3 ECHR *ex nunc* obliges national courts in turn to do the same. Otherwise applicants would be obliged to lodge a complaint before the ECtHR in order to have the new evidence or facts assessed and judicially reviewed for the first time. The ECtHR's case law does not exclude, however, that States may choose to oblige an applicant to submit a new application on the basis of the new facts, while the decision on this application including the assessment of the new facts and circumstances will be tested by the national court.<sup>499</sup>

#### 10.4.4 Other relevant sources

The Committee against Torture takes into account changes in the situation in the country of origin, which occurred after the complaint had been lodged.<sup>500</sup> The Committee against Torture in its Concluding Observations with regard to the Netherlands expressed its concerns that the opportunity to submit additional documentation and information during the appeal proceedings was restricted. It recommended that 'the appeal procedures [...] permit asylum-seekers to present facts and documentation, which could not be made available, with reasonable diligence, at the time of the first submission.'<sup>501</sup>

#### 10.4.5 Conclusion

Article 46 (3) of the recast Procedures Directive explicitly provides that an *ex nunc* judicial review must be applied by the national court deciding on the appeal against the asylum application. It may be argued on the basis of Article 4 (2) of the recast Qualification Directive that such *ex nunc* judicial review must include new statements by the applicant, new documentation and new asylum grounds. On the basis of the CJEU's judgments in *Orfanopoulos and Oliveri* and *Samba Diouf*, it may be contended that the EU right to an effective remedy requires that in first and subsequent asylum procedures an *ex nunc* review and a review of all the reasons underlying the rejection of the asylum application must be applied. The requirement of a full and *ex nunc* review by an independent and impartial body may also be derived from the ECtHR's case law under Article 3 ECHR, in particular *Salah Sheekh v. the Netherlands* and *M.S.S v Belgium*

498 ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para 389.

499 Note that the ECtHR took into account in *Bahaddar* that the applicant could lodge a fresh application to remedy the violation of Art 3 ECHR and therefore did have an effective remedy at his disposal. ECtHR, *Bahaddar v the Netherlands*, Appl no 25894/94, 19 February 1998

500 See for example ComAT, *Chahin v. Sweden*, no 310/2007, 8 July 2011, paras 9.4 and 9.6 and ComAT, *Jahani v. Switzerland*, no 357/2008, 1 July 2011, para 9.4

501 ComAT Concluding Observations the Netherlands, 3 August 2007, CAT/C/NET/CO/4.

and Greece. Therefore, it can be argued that both Article 39 of the Procedures Directive and Article 27 of the Dublin III Regulation read in the light of the EU right to an effective remedy laid down in Article 47 of the Charter also require an *ex nunc* judicial review of the risk of *refoulement*.

### 10.5 The use of secret information <sup>502</sup>

Sometimes asylum decision may be based on information which is not disclosed to the applicant. The risk of *refoulement* may be assessed on the basis of country of origin information or information concerning diplomatic assurances which is kept secret. The decision to refuse an asylum status on the basis that the applicant poses a threat to national security (see Articles 14 (4) (a) and 17 (1) (d) of the recast Qualification Directive) may be supported by information provided by the intelligence services of the Member States. This sub-section discusses which limits are imposed by Article 47 of the Charter on the use of secret information during the appeal proceedings before a court or tribunal referred to in Article 39 of the Procedures Directive, Article 46 of the recast Procedures Directive and Article 27 of the Dublin III Regulation.

#### 10.5.1 EU Legislation

##### *Directive 2005/85/EC (Procedures Directive)*

Article 16 (1) provides that Member States 'shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, and who assists or represents an applicant for asylum under the terms of national law, shall enjoy access to such information in the applicant's file as is liable to be examined (by the court or tribunal which provides an effective remedy in accordance with Article 39 of the Directive), insofar as the information is relevant to the examination of the application'. Member States may make an exception to this rule in order to protect:

- national security;
- the security of the organisations or person(s) providing the information;
- the security of the person(s) to whom the information relates;
- the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States; or
- the international relations of the Member States.

In these cases, access to the information or sources in question shall be available to the court or tribunal which provides an effective remedy in accordance with Article 39 of the Directive. However where such access is precluded in cases of national security also the court or tribunal may be refused access to the file.

502 This sub-section is based on Marcelle Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford/Portland Oregon: Hart Publishing 2014, Chapter 10 and Marcelle Reneman, 'Expulsion of EU Citizens on the Basis of Secret Information: Article 47 of the EU Charter on Fundamental Rights Requires Disclosure of the Essence of the Case', *Review of European Administrative Law* (2014), pp. 69-79

### *Directive 2013/32/EU (Recast Procedures Directive)*

Article 12 (1) (d) states that asylum applicants and if applicable, their legal advisers or other counsellors, shall have access to the country of origin information referred to in Article 10 (3) (b) and to the information provided by the experts (on for example medical, cultural, religious, child-related or gender issues) referred to in Article 10 (3) (d), where the determining authority has taken that information into consideration for the purpose of taking a decision on their application. It follows from Article 12 (2) that these guarantees also apply to the proceedings before a court or tribunal as referred to in Article 46 of the Directive.

Article 23 of the Directive provides for the same general rule of access to the file for legal advisers or other counsellors as Article 16 of the Procedures Directive and allows the same exceptions to this rule. However, Article 23 provides that if an exception to the right of access to the file is made, Member States should:

- make access to such information or sources available to the court or tribunal referred to in Article 46 of the Directive; and
- establish in national law procedures guaranteeing that the applicant's rights of defence are respected. 'Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection.' This is a reference to the special advocate system which will be discussed below.

### *Regulation 604/2013 (Dublin III Regulation)*

The Regulation does not provide for a right of access to the file during the administrative or appeal phase.

## **10.5.2 Relevant EU fundamental rights and principles**

### *The right to an effective remedy and a fair trial*

The EU right to an effective remedy and a fair trial guaranteed by Article 47 of the Charter includes the right to adversarial proceedings and the right to equality of arms. The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court.<sup>503</sup> It also requires that in proceedings before courts, the parties be appraised of and be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings.<sup>504</sup> According to the CJEU the principle of equality of arms implies 'that each party must be afforded a reasonable opportunity to present his case, including

503 CJEU, Case C-450/06, *Varec SA v. Belgian State*, 14 February 2008, para 47.

504 CJEU, Case C-89/08 P, *Commission v. Ireland and others*, 2 December 2009, para 56.

his evidence, under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent'.<sup>505</sup>

The ECtHR has recognised that all procedures governed by Articles 5 (4)<sup>506</sup>, 6<sup>507</sup> and 13<sup>508</sup> ECHR must be adversarial and that in those proceedings the principle of equality of arms must be respected.<sup>509</sup> The principle of adversarial proceedings entails that the parties to a trial have knowledge of and are able to comment on all evidence adduced or observations filed.<sup>510</sup> The principle of equality of arms 'requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.<sup>511</sup>

### 10.5.3 Case law

#### *The Court of Justice of the European Union*

The EU courts have developed standards concerning the use of secret information in cases involving business secrets<sup>512</sup> and EU sanctions against persons and organisations suspected of terrorist activities<sup>513</sup> or against third countries.<sup>514</sup> In ZZ the CJEU applied (and referred to) the standards developed in these fields of EU law in a case concerning free movement of EU citizens. ZZ concerned a decision of the United Kingdom to refuse an EU citizen admission to its territory on national security grounds. ZZ appealed the decision before the Special Immigration Appeals Commission (SIAC), but did not receive the information underlying the contested decision. Therefore ZZ was assisted by two special advocates during the appeal proceedings. These security-cleared lawyers had access to the secret information in the case-file. They pleaded for the disclosure of secret information and submitted arguments against the decision on behalf of their client. However, after they had seen the secret information they were no longer allowed to communicate with their client. The SIAC held open and closed sessions (without ZZ and his lawyers, but in the presence of the special advocates). It dismissed ZZ's appeal in an 'open' judgment and a 'closed' judgment, which was only disclosed to the Secretary of State and ZZ's special advocates. The SIAC acknowledged in its judgment that 'little of the case' against ZZ

505 CJEU, Case C-199/11, *Europese Gemeenschap v. Otis NV*, 6 November 2012, para 71.

506 ECtHR [GC], *A et al v. the United Kingdom*, Appl. no 3455/05, 19 February 2009, para 204.

507 ECtHR [GC], *Lobo Machado v. Portugal*, Appl. no. 15764/89, 22 January 1996.

508 ECtHR, *Al-Nashif v Bulgaria*, Appl. no 50963/99, 20 June 2002, paras 123 and 137.

509 Trechsel notes that in the ECtHR's case law, the right to adversarial proceedings is not always clearly separated from the principle of equality of arms. Trechsel 2005, p 90.

510 ECtHR [GC], *Lobo Machado v Portugal*, Appl. no. 15764/89, 22 January 1996, para 31.

511 ECtHR, *Dombo beheer v the Netherlands*, Appl. no 14448/88, 27 October 1993, para 33.

512 See eg CJEU, Case C-450/06, *Varec SA v Belgian State*, 14 February 2008 and Case C-438/04, *Mobistar SA v Institut belge des services postaux et des télécommunications*, 13 July 2006.

513 See eg CJEU (Joined Cases) C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council*, 3 September 2008 and CFI Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council*, 12 December 2006.

514 See eg CJEU, Case C-417/11 P *Council v Bamba*, 15 November 2012 and Case C-548/09 P *Bank Mellat v Council*, 16 November 2011.

had been disclosed to him and that the information which had been disclosed did not concern 'the critical issues'. ZZ appealed the SIAC's decision before the Court of Appeal. This court found that SIAC's open and closed judgment read together contained findings of fact and reasoning which were easily sufficient to support the conclusion that ZZ posed a threat to public security. However, the Court of Appeal had doubts as to whether the rights of the defence of ZZ had been sufficiently respected during the proceedings.<sup>515</sup> For this reason it asked the CJEU whether the EU right to an effective remedy requires that an EU citizen, who is excluded on grounds of public policy and public security grounds, is informed of the essence of the grounds against him, even if this would be contrary to the interests of State security.

The CJEU interpreted Articles 30 (2)<sup>516</sup> and 31<sup>517</sup> of Directive 2004/38/EC<sup>518</sup> in the light of Article 47 of the Charter. It accepted that the right to an effective remedy may be limited in the interest of the protection of national security as long as the essence of this right is respected.<sup>519</sup> It held that Article 47 of the Charter requires that the following guarantees be put in place:

- The national court should carry out an independent review of the 'existence and validity' of the reasons given by the national authority for non-disclosure of information underlying the contested decision. If the court finds that non-disclosure is not justified, it should give the administrative authority the opportunity to disclose the missing grounds and evidence to the person concerned. If the authority refuses, the court should examine the legality of the decision only on the basis of the open material;<sup>520</sup>
- The national court should receive all information relevant to the decision, including the information not disclosed to the applicant;<sup>521</sup>
- The national court should ensure that the interferences with the exercise of the right to an effective remedy are limited to those which are 'strictly necessary' and that the adversarial principle is complied with 'to the greatest possible extent';<sup>522</sup>

515 *ZZ v Secretary of State for the Home Office* [2011] UK Court of Appeal (Civil Division) T2/2008/1997, [2011] EWCA Civ 440.

516 Art. 30(2) states that the persons concerned 'shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.'

517 Art. 31 states: 'The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.'

518 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 229/35.

519 CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Office*, 4 June 2013, paras 51 and 54.

520 CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Office*, 4 June 2013, paras 60-64.

521 CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Office*, 4 June 2013, para 59.

522 CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Office*, 4 June 2013, paras 64 and 65.



- The court should ‘have at its disposal and apply techniques and rules of procedural law’ which accommodate the State interest in protecting State security on the one hand and the procedural rights of the person concerned on the other;<sup>523</sup> and
- The person concerned ‘must be informed, in any event, of the essence of the grounds on which a decision is based’.<sup>524</sup>

The CJEU distinguished between the grounds of the decision and the evidence underlying those grounds. It considered that ‘disclosure of that evidence is liable to compromise State security in a direct and specific manner’.<sup>525</sup> For that reason the public interest in protecting State security should be accorded more weight when applying the balancing test to the non-disclosure of evidence than to non-disclosure of the grounds of a decision. The national courts should assess whether and to what extent the restrictions of the rights of the defence arising from a failure to disclose the evidence or grounds of the decision affect the ‘evidential value of the confidential evidence’.<sup>526</sup> Arguably the requirements set out by the CJEU in ZZ also apply in the asylum context, because the CJEU directly derived them from Article 47 of the Charter, without reference to the specific context of the case (free movement of EU citizens).<sup>527</sup>

The CJEU did not explain what constitutes ‘the essence of the grounds’ of the decision. However it may be derived from the case law of the EU Courts that the grounds should provide sufficient detail of the allegations against a person (for example mention names, dates, places) in order to enable him or her to defend him or herself against these allegations.<sup>528</sup>

### *The European Court of Human Rights*

The ECtHR has accepted that the right to an effective remedy and the right to a fair trial may be limited as a result of non-disclosure of information in order to protect the sources of information,<sup>529</sup> witnesses at risk of reprisals,<sup>530</sup> the need to keep secret police methods of investigation of crime,<sup>531</sup> or national security<sup>532</sup>.

523 CJEU, Case C-300/11, ZZ v. *Secretary of State for the Home Office*, 4 June 2013, para 57.

524 CJEU, Case C-300/11, ZZ v. *Secretary of State for the Home Office*, 4 June 2013, para 65.

525 CJEU, Case C-300/11, ZZ v. *Secretary of State for the Home Office*, 4 June 2013, para 66.

526 CJEU, Case C-300/11, ZZ v. *Secretary of State for the Home Office*, 4 June 2013, para 67.

527 Marcelle Reneman, ‘Expulsion of EU Citizens on the Basis of Secret Information: Article 47 of the EU Charter on Fundamental Rights Requires Disclosure of the Essence of the Case’, *Review of European Administrative Law* (2014), pp. 69-79.

528 See CJEU, Case C-417/11 P *Council v Bamba* [2012], paras 57-58 and CJEU Joined Cases C584/10 P, C593/10 P en C-595/10 P, *Commission et al v. Kadi* [2013], para 141. See also Marcelle Reneman, ‘Expulsion of EU Citizens on the Basis of Secret Information: Article 47 of the EU Charter on Fundamental Rights Requires Disclosure of the Essence of the Case’, *Review of European Administrative Law* (2014), pp. 69-79.

529 ECtHR 2 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 233.

530 ECtHR, *Al-Khawadja and Tahery v the United Kingdom*, Appl. nos. 26766/05 and 22228/06, 15 December 2011, paras 120-125.

531 ECtHR, *Pocius v. Lithuania*, Appl. no. 35601/04, 6 July 2010, para 52.

532 ECtHR, [GC], *A et al v. the United Kingdom*, Appl. no. 3455/05, 19 February 2009.

It follows from the case law of the ECtHR under Articles 6 and 13 ECHR that the national court should receive all the information relevant to the case including the information which was not disclosed to (one of) the parties concerned. Otherwise the national court is not able to effectively review the case. It must also review the necessity of the non-disclosure of information.<sup>533</sup>

The level of protection under the right to adversarial proceedings depends on the nature of the case. Most protection is offered under the criminal limb of Article 6 ECHR. These strict guarantees were applied in the case of *A and others* (which concerned a complaint regarding the indefinite detention of foreign terrorist suspect in the UK under Article 5 (4) ECHR). In this case the ECtHR addressed the special advocate system applied by the SIAC in the United Kingdom (which was also applied in the ZZ case discussed above). It ruled that it depends on the circumstances of the case, in particular the specificity of the information disclosed to the party concerned whether the use of a special advocate would sufficiently compensate this party's lack of access to documents. It considered that 'the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings.'<sup>534</sup> However, the ECtHR also noted 'that the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.'<sup>535</sup> It considered that the right to adversarial proceedings would be respected in two situations:

- The evidence was to a large extent disclosed and the open material plays a predominant role in the determination;
- All or most of the underlying evidence is not disclosed, but the allegations in the open material are sufficiently specific. It must be possible for the applicant to provide his representatives and the special advocate with information with which to refute these allegations.<sup>536</sup>

The judgment gives several examples of sufficiently specific allegations: the allegation that a person attended a terrorist training camp at a stated location between stated dates, detailed allegations about the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places.<sup>537</sup>

533 Marcelle Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, Oxford/ Portland Oregon, Hart Publishing, p. 352-354.

534 ECtHR [GC], *A and others v. the United Kingdom*, Appl. no. 3455/05, 19 February 2009, para 220.

535 ECtHR [GC], *A and others v. the United Kingdom*, Appl. no. 3455/05, 19 February 2009, para 220.

536 ECtHR [GC], *A and others v. the United Kingdom*, Appl. no. 3455/05, 19 February 2009, para 220.

537 ECtHR [GC], *A and others v. the United Kingdom*, Appl. no. 3455/05, 19 February 2009, para 220.

A lower level of protection seems to apply in migration cases under Article 13 ECHR. According to the ECtHR ‘there must be some form of adversarial proceedings before an independent body competent to review the reasons for the decision, if need be with appropriate procedural limitations on the use of classified information’.<sup>538</sup> However, the ECtHR found several violations of Article 8 and 13 ECHR in expulsion cases under Article 8 and 13 ECHR because the applicant received no or insufficient information concerning the facts which had led the executive to consider the applicant a danger to national security.<sup>539</sup> In *Liu* the ECtHR considered that ‘the applicants were given only an outline of the national security case against the first applicant. The disclosed allegations against him were of a general nature ... No specific allegations mentioning the locations and dates of the actions allegedly committed by the first applicant were divulged to the applicants, making it impossible for them to effectively challenge the security services’ assertions by providing exonerating evidence, for example an alibi or an alternative explanation for the first applicant’s actions.’<sup>540</sup> The ECtHR here refers to its judgment in *A. and Others v. the United Kingdom*.

In *Othman*, a case in which the applicant claimed that his extradition would violate Article 3 ECHR, the ECtHR considered that the standards set out in *A and others v the United Kingdom* did not apply.<sup>541</sup> The ECtHR did not agree with the applicant that ‘there is an enhanced requirement for transparency and procedural fairness’ in extradition cases where diplomatic assurances are being relied upon; as in all Article 3 cases, independent and rigorous scrutiny is what is required.<sup>542</sup> The ECtHR found that the *Othman* case was different from the *A and others* case because the secret information relied upon in *Othman* did not concern allegations against the applicant.<sup>543</sup> SIAC in closed sessions heard evidence with regard to the negotiations preceding the agreement of a Memorandum of Understanding (MoU) between the United Kingdom and Jordan and the question whether this MoU would take away the risk of *refoulement* upon return to Jordan. The ECtHR found that Othman’s right to adversarial proceedings had not been violated during the proceedings before SIAC, because special advocates were used during the closed sessions. It considered that ‘there is no evidence that, by receiving closed evidence on that issue, SIAC, assisted by the special advocates, failed to give rigorous scrutiny to the applicant’s claim.’<sup>544</sup> Neither was there an unacceptable risk of an incorrect result or it was mitigated by the presence of the special advocates. Finally, the ECtHR considered that the issues (potentially) discussed before SIAC, such as the United States’ interest

538 ECtHR, *Liu and Liu v. Russia*, Appl. no. 42086/05, 6 December 2007, para 59.

539 See eg ECHR, *CG et al v. Bulgaria*, Appl. no 1365/07, 24 April 2008, para 60, ECtHR, *Lupsa v. Romania*, Appl. no. 10337/04, 8 June 2006, para 40 and 59.

540 ECtHR, *Liu v. Russia*, Appl. No. 29157/09, 26 July 2011, para 90.

541 ECtHR, *Othman v. the United Kingdom*, Appl. no. 8139/09, 17 January 2012, para 223.

542 ECtHR, *Othman v. the United Kingdom*, Appl. no. 8139/09, 17 January 2012, para 219.

543 ECtHR, *Othman v. the United Kingdom*, Appl. no. 8139/09, 17 January 2012, para 223.

544 ECtHR, *Othman v. the United Kingdom*, Appl. no. 8139/09, 17 January 2012, para 223.

in the applicant, were of a very general nature. According to the ECtHR there 'is no reason to suppose that, had the applicant seen this closed evidence, he would have been able to challenge the evidence in a manner that the special advocates could not'.<sup>545</sup>

#### 10.5.4 Other relevant sources

The Committee against Torture<sup>546</sup> and the Human Rights Committee<sup>547</sup> have raised concerns regarding the use of secret information in individual cases. The Committee against Torture also addressed the issue in its concluding observations.<sup>548</sup> UNHCR addressed the exclusion of persons from refugee status on the basis of secret information in its Guidelines on the Application of the Exclusion Clauses.<sup>549</sup>

#### 10.5.5 Conclusion

Article 16 and 39 of the Procedures Directive, Article 23 and 46 of the recast Procedures Directive and Article 27 of the Dublin III Regulation should be interpreted in the light of the right to adversarial proceedings guaranteed in Article 47 of the Charter. On the basis of the CJEU judgment in ZZ and the case law of the ECtHR under Articles 6 and 13 ECtHR it may be argued that in asylum cases Article 47 of the Charter requires that:

- the non-disclosure of information on which the decision is based is justified. It follows from the case law of the ECtHR that the grounds for non-disclosure mentioned in Article 16 of the Procedures Directive and Article 23 of the recast Procedures Directive (protection of national security, witnesses or sources of information, investigative interests or the international relations of the Member States) may justify non-disclosure in asylum cases.
- The national court should review whether non-disclosure of information underlying the contested decision is justified.<sup>550</sup> If the court finds that non-disclosure is not justified, the decision making authority should disclose the information. If he refuses to do so, the court should examine the legality of the decision only on the basis of the open material.<sup>551</sup>
- The national court referred to in Article 39 of the Procedures Directive, Article 46 of the recast Procedures Directive and Article 27 of the Dublin III Regulation should receive all information relevant to the decision, including the information not disclosed to the asylum applicant.<sup>552</sup> Arguably, therefore, Article 16 of the Procedures Directive which allows the Member States to re-

545 ECtHR, *Othman v. the United Kingdom*, Appl. no. 8139/09, 17 January 2012, para 224.

546 ComAT, *Agiza v. Sweden*, no. 233/2003, 20 May 2005, para 13.8.

547 CCPR, *Ahani v. Canada*, no. 1051/2002, 15 June 2004.

548 ComAT, Concluding Observations on Canada (25 June 2012, CAT/C/CAN/CO/6), para12. See also Concluding Observations on New Zealand (19 May 2009, CAT/C/NZL/CO/5).

549 UNHCR, *Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003, HCR/GIP/03/05)

550 CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Office*, 4 June 2013, paras 58 and 60-62.

551 CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Office*, 4 June 2013, paras 60-64.

552 CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Office*, 4 June 2013, para 59.

fuse the court or tribunal referred to in Article 39 of the Directive access to the file on national security grounds, violates Article 47 of the Charter and should be declared invalid.<sup>553</sup>

- The national court should ensure that the interferences with the exercise of the right to an effective remedy are limited to those which are 'strictly necessary' and that the adversarial principle is complied with 'to the greatest possible extent'.<sup>554</sup>
- The court should 'have at its disposal and apply techniques and rules of procedural law' which accommodate the State interest in protecting State security on the one hand and the procedural rights of the person concerned on the other.<sup>555</sup> A special advocate system, which is mentioned in Article 23 of the recast Procedures Directive, could be considered as such a technique, provided that the applicant is provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.<sup>556</sup>
- The person concerned must always be informed of the essence of the grounds on which the asylum decision is based.<sup>557</sup> This implies that the allegations against the asylum applicant must be sufficiently detailed and specific in order to enable him or her to defend him/herself against these allegations.<sup>558</sup>

## 10.6 The right to a reasoned judgment

In this section it is argued that Article 39 of the Procedures Directive, Article 46 of the recast Procedures Directive and Article 27 of the Dublin III Regulation, read in the light of Article 47 of the Charter require that the court or tribunal as referred to in these provisions gives reasons for its judgment.

### 10.6.1 EU Legislation

#### *Directive 2005/85/EC (Procedures Directive)*

The Directive does not provide rules concerning the duty of the court or tribunal referred to in Article 39 to give reasons for its judgment.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

The Directive does not provide rules concerning the duty of the court or tribunal referred to in Article 46 to give reasons for its judgment.

553 See on the invalidity of EU legislation section 1.6.

554 CJEU, Case C-300/11, *, 4 June 2013, paras 64 and 65.*

555 CJEU, Case C-300/11, *, 4 June 2013, para 57.*

556 ECtHR, [GC], *A et al v the United Kingdom*, Appl. no. 3455/05, 19 February 2009, para 220.

557 CJEU, Case C-300/11, *, 4 June 2013, para 65.*

558 See CJEU Case C-417/11 P, *Council v. Bamba* [2012], paras 57-58, CJEU Joined Cases C-584/10 P, C-593/10 P en C-595/10 P, *Commission and others v. Kadi*, 18 July 2013, para 141, ECtHR [GC], *A and others v. the United Kingdom*, Appl. no. 3455/05, 19 February 2009, para 220, ECtHR, *Liu v Russia*, Appl. no. 29157/09, 26 July 2011, para 90.

### *Regulation 604/2013 (Dublin III Regulation)*

The Regulation does not provide rules concerning the duty of the court or tribunal referred to in Article 27 to give reasons for its judgment.

#### **10.6.2 Relevant EU fundamental rights and principles**

Article 47 of the Charter guarantees the right to an effective remedy and ‘to a fair and public hearing’ before a tribunal. This right is also guaranteed by Articles 6 (the right to a fair hearing) and 13 (the right to an effective remedy) of the ECHR.

#### **10.6.3 Case law**

##### *The Court of Justice of the European Union*

No relevant case law of the EU courts has been found on this issue.

##### *The European Court of Human Rights*

Article 6 (1) ECHR obliges the courts to give reasons for their judgments. The ECtHR held that ‘even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties’ submissions, an authority is obliged to justify its activities by giving reasons for its decisions’.<sup>559</sup> According to the ECtHR, ‘another function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice’.<sup>560</sup> However, the ECtHR also considered that Article 6 (1) ECHR:

‘cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinions and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case’.<sup>561</sup>

The ECtHR has found a violation of Article 6 ECHR where the court ignored central points raised before it in its judgment.<sup>562</sup>

559 ECtHR, *Tatishvilli v. Russia*, Appl. no. 1509/02, 22 February 2007, para 58.

560 ECtHR, *Tatishvilli v. Russia*, Appl. no. 1509/02, 22 February 2007, para 58.

561 ECtHR, *Voloshyn v. Ukraine*, Appl. no. 15853/08, 10 October 2013, para 29.

562 See eg ECtHR, *Voloshyn v. Ukraine*, Appl. no. 15853/08, 10 October 2013, para 34-35, ECtHR, *Ruiz Torija v Spain*, Appl. no. 18390/91, 9 December 1994, para 30.

In the case of *Arvelo Aponte* concerning Article 13 ECHR, the ECtHR considered ‘the expression “effective remedy” used in Article 13 cannot be interpreted as entailing an obligation to give a detailed answer to every argument raised, but simply an accessible remedy before an authority competent to examine the merits of a complaint’.<sup>563</sup>

#### 10.6.4 Other relevant sources

The Human Rights Committee’s General Comment no. 32 provides that ‘even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children’.<sup>564</sup>

#### 10.6.5 Conclusion

Article 39 of the Procedures Directive, Article 46 of the recast Procedures Directive and Article 27 of the Dublin III Regulation, read in the light of Article 47 of the Charter require that the court or tribunal as referred to in these provisions gives reasons for its judgment, at least with regard to the main point raised before it. The court or tribunal is not required to give a detailed answer to every argument.

#### Suggested further reading

- Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) [2007] OJ C 303/17, Article 47.
- D. Baldinger (2013), *Rigorous scrutiny versus marginal review*, Nijmegen: Wolf Legal Publishers 2013, Chapters 5, 6 and 7.
- Marcelle Reneman, *EU asylum procedures and the right to an effective remedy*, Oxford/Portland Oregon: Hart Publishing 2014, Chapters 9 and 10.
- Marcelle Reneman, ‘Access to an Effective Remedy before a Court or Tribunal in Asylum Cases’, in: E. Guild and Paul Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law*, Leiden/Boston: Martinus Nijhoff Publishers 2011, pp. 401-436.
- N. de Boer, Case C-300/11.ZZ v Secretary of State for the Home Department, Judgment of the Court (Grand Chamber) of 4 June 2013, 51 *Common Market Law Review* (2014), p. 1235.

563 ECtHR, *Arvelo Aponte v. the Netherlands*, Appl. no. 28770/05, 3 November 2011, paras 67-68.

564 HRC, General Comment No 32 (2007, CCRP/C/GC/32) under III.





# 11 The examination of new elements and findings in appeal proceedings and subsequent asylum applications

Marcelle Reneman

Asylum applicants sometimes submit new evidence, statements or grounds in support of their claim that their expulsion would lead to *refoulement* after the determining authority's decision on their (first) asylum claim. The reason for this may be that evidence was not available at the time of this decision or they were not able to talk about traumatic events at an earlier stage of the proceedings. The determining authority, which is examining a subsequent (second or further) asylum procedure, may be unable according to national law, or unwilling to take into account such new evidence, statements or asylum grounds. The Procedures Directive and the recast Procedures Directive allow for special procedures to be put in place to deal with subsequent asylum claims.

In this sub-section, it will be argued that EU law requires that relevant new evidence, statements or asylum grounds be examined by the determining authority. The effective protection of the EU right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter) set limits on Member States' discretion to reject a subsequent asylum application in a preliminary procedure and to refrain from taking into account evidence, which the applicant could and, therefore, should have submitted during a previous asylum procedure.

## 11.1. Assessment by the determining authority of a subsequent application

This sub-section addresses the guarantees, which should be offered during the administrative proceedings in which a subsequent asylum application will be assessed.

### 11.1.1 EU legislation

#### *Directive 2005/85/EC (Procedures Directive)*

Recital 15 of the Preamble of the Procedures Directive states that 'where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant.' It follows from Article 24 (1) (a) of the Directive that Member States may apply a specific procedure to subsequent asylum applications, which derogates from the basic principles and guarantees of Chapter II (Articles 6-22 of the Directive). Articles 32-34 of the Procedures Directive stipulate the minimum standards which apply to subsequent asylum applications.

Article 32 (1) of the Procedures Directive states that where an asylum applicant makes further representations or a subsequent application the Member State has two options. These further representations in the appeal procedure or the elements of the subsequent application may be examined:

- in the framework of the examination of the previous application;
- in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

#### Cases in which a preliminary examination may be applied

Member States may conduct a preliminary examination where:

- a person makes a subsequent asylum application after his previous application has been explicitly or implicitly withdrawn or abandoned (see Article 32 (2) read in conjunction with Articles 19 and 20 of the Directive);
- a person makes a subsequent asylum application after a decision has been taken on the previous application (Article 32 (2) of the Directive);
- a dependant lodges an application after he has consented to have his case be part of an application made on his behalf (Article 32 (7) read in conjunction with Article 6 (3) of the Directive);
- the application for asylum was filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time (Article 33 of the Directive).

#### New findings and elements

In any such preliminary examination it should be assessed whether, after the withdrawal or rejection of the previous application, 'new elements or findings relating to the examination of whether he qualifies as a refugee (...) have arisen or have been presented by the applicant' (Article 32 (3) of the Directive).

### Further examination

If the determining authority finds that new elements or findings have arisen or have been presented by the applicant, 'which significantly add to the likelihood of the applicant qualifying as a refugee' the application shall be further examined in conformity with the basic principles and guarantees of Chapter II of the Procedures Directive (Article 32 (4) of the Procedures Directive). If not, the subsequent asylum application may be rejected with reference to the earlier asylum decision. Arguably the elements which may add to the likelihood of the applicant qualifying as a refugee can be found in Article 4 (2) of the recast Qualification Directive. These elements include the applicant's statements, documentation and the reasons for applying for international protection.

An important exception to the rule that a subsequent application should be subjected to a full examination in accordance with Chapter II of the Directive if there are new elements or findings can be found in Article 32 (6) of the Directive. This provision states that 'the Member States may decide to further examine the application only if the applicant concerned was, through no fault of his own, incapable of asserting the new elements or findings in the previous procedure, in particular by exercising his right to an effective remedy pursuant to Article 39 of the Directive'. Furthermore Member States may require the applicant to submit the new information within a certain time-limit after he obtained such information. Such requirement must not, however, render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access (Article 34 (2) of the Directive).

### Procedural guarantees

During the preliminary examination, Member States do not need to observe all the guarantees required by Chapter II of the Directive. According to Article 34 (1), applicants whose application is subject to a preliminary examination should enjoy the guarantees provided for in Article 10 (1) of the Directive (the right to information on the procedure and the decision on the application, the right to interpretation and to contact with UNHCR). Furthermore, Member States must ensure that the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision. However, the Directive allows the determining authority to conduct the preliminary examination on the basis of written submissions without a personal interview, provided that this does not render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access (Article 34 (2) of the Directive). See Section 4 for information relating to the right to remain.

Article 23 (4) (h) of the Directive provides that subsequent asylum applications, which do not raise any relevant new elements with respect to the particular circumstances or to the situation in the country of origin of the applicant may be processed in an accelerated procedure. Such applications may, according to Article 28(2) of the Directive, also be declared manifestly unfounded. Article 25 (2) (f) of the Directive states that an *identical* application submitted after a final decision may be declared inadmissible. In that case no examination of the content of the application is necessary.

#### *Directive 2013/32/EU (Recast Procedures Directive)*

Recital 36 of the Preamble of the recast Procedures Directive states that 'where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.<sup>565</sup> Article 2 (q) defines a subsequent application as 'a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28 (1)'. Articles 40-42 of the Directive specifically concern the processing of subsequent asylum applications and further representations. Article 40 (1) states that where an asylum applicant makes further representations or a subsequent application the Member State must examine these further representations or the elements of the subsequent application:

- in the framework of the examination of the previous application;
- in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

#### Cases in which a preliminary examination must/may be applied

According to Article 33 (2) (d) of the Directive, an asylum application may be considered inadmissible if the application is a subsequent application, 'where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU (the recast Qualification Directive) have arisen or have been presented by the applicant'. Article 40 (2) of the Directive provides that for the purpose of assessing the admissibility of the subsequent asylum application a preliminary examination should be applied. Such preliminary examination may also be applied in cases of:

<sup>565</sup> *Res judicata* is a legal doctrine which seeks to prevent that the same case is decided by a court twice. It seeks to preserve the binding nature of the court's decision.

- a dependant who lodges an application after he or she has consented to have his case be part of an application lodged on his behalf (Article 40 (6) (a) read in conjunction with Article 7 (2) of the Directive);
- an unmarried minor who lodges an application after an application has been lodged on his behalf (Article 40(6)(b) read in conjunction with Article 7 (5) (c) of the Directive).

### Further examination

The asylum application must be further examined in a procedure in accordance with the guarantees of Chapter II of the Directive (Articles 6-30) if 'new elements or findings have arisen or have been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection' by virtue of the recast Qualification Directive. Otherwise the application shall be considered inadmissible (Article 40 (5) of the Directive). The possibility, also allowed by the Procedures Directive, to refrain from further examination if the applicant could have submitted the new elements or findings in an earlier (appeal) procedure continues to exist (Art 40 (4) of the Directive).

### Dublin Cases

Article 40 (7) of the recast Procedures Directive provides that where a person with regard to whom a transfer decision has to be enforced pursuant to the Dublin III Regulation makes further representations or a subsequent application in the transferring Member State, those representations or subsequent applications shall be examined by the responsible Member State, as defined in that Regulation. The Dublin III Regulation does not provide for provisions with regard to subsequent asylum procedures.

### Procedural guarantees

Recital 32 of the Preamble of the recast Procedures Directive provides that the complexity of gender-related claims should be properly taken into account in procedures based on the notion of subsequent applications. During the preliminary examination Member States do not need to observe all the guarantees required by Chapter II of the Directive. According to Article 42 (1) applicants whose application is subject to a preliminary examination should enjoy the guarantees provided for in Article 12 (1) of the Directive (the right to information on the procedure and the decision on the application, the right to interpretation and to contact with UNHCR). Member States may omit a personal interview during the preliminary examination (Articles 34 (1) and 42 (2) (b) of the Directive). This does not apply in cases of dependent adults or unaccompanied minors who lodged an asylum claim after an application had been lodged on their behalf (Article 40 (6) of the Directive). For information pertaining to the right to remain, see Section 4. Subsequent applications which are not inadmissible can be examined in an accelerated procedure (Article 31 (8) (f) read

in conjunction with Article 40 (5) of the Directive). Also unaccompanied minors who have introduced a subsequent application that is not inadmissible in accordance with Article 40 (5) can be processed in an accelerated procedure (Article 25 (6) (a) (ii) of the Directive).

#### *Regulation 604/2013 (Dublin III Regulation)*

The Dublin III regulation contains no relevant provisions.

### **11.1.2 Relevant EU fundamental rights and principles**

#### *Principle of effectiveness*

The rules concerning subsequent asylum procedures, in particular the fact that Member States could ignore relevant new elements or findings (statements, evidence or asylum grounds) submitted during a subsequent asylum procedure:

- if they could have been raised earlier or;
- if they have been submitted after the time-limit had expired

may undermine the effectiveness of the right to asylum (Article 18 of the Charter) or the prohibition of *refoulement* (Article 19 of the Charter). This also applies if the Member State uses a very restrictive interpretation of the term 'new elements or findings, which significantly add to the likelihood of the applicant qualifying as a refugee'. If elements or findings which support the applicant's claim that they will be persecuted or subjected to serious harm in their country of origin are ignored this may lead to *refoulement* and an unjustified refusal of asylum status.

### **11.1.3 Case law**

#### *The Court of Justice of the European Union*

The general rule in both the Procedures Directive and the recast Procedures Directive is that asylum applications are examined on their merits in asylum proceedings, which comply with the basic principles and guarantees of Chapter II of these Directives, such as the right to information,<sup>566</sup> the right to a personal interview<sup>567</sup> and the right to legal assistance and representation.<sup>568</sup> In subsequent asylum applications, Member State may derogate from this rule and conduct a preliminary examination which does not comply with the guarantees of Chapter II. If new elements or findings have arisen or have been presented by the applicant, the application should be referred to the 'normal' asylum procedure, which complies with the guarantees of Chapter II. Member States may, however, derogate from this rule if the applicant concerned could have raised the

566 Article 10(1) (a) of the Procedures Directive and Article 12(1) (a) and 19 of the recast of the Procedures Directive.

567 Article 12 of the Procedures Directive and Article 14 of the recast of the Procedures Directive.

568 Articles 15 and 16 of the Procedures Directive and Articles 20-22 of the recast of the Procedures Directive.

new elements or findings in a previous procedure. It follows from the CJEU's case law that provisions which derogate from a right, such as those mentioned in both Directives which apply to subsequent applications, should be interpreted restrictively.<sup>569</sup>

With respect to subsequent applications, the case *Salahadin Abdullah*, which concerned the withdrawal of refugee status, may be relevant.<sup>570</sup> In this case it was ruled that in a procedure in which refugee status is withdrawn the refugee may invoke a reason for persecution other than that accepted at the time when refugee status was granted. The CJEU considered in *Salahadin Abdullah* that Article 4 (4) Qualification Directive requires decision-making authorities to take into account acts or threats of persecution connected to this other reason of persecution. The CJEU seems to be of the opinion that this applies even if the acts or threats of persecution occurred in the country of origin before the asylum application was lodged, but were not mentioned by the applicant in the asylum procedure.<sup>571</sup> This implies that when the Member State authorities intend to withdraw a refugee status an *ex nunc* assessment needs to take place. This judgment does not address the question whether a court should take into account facts or evidence submitted after the decision by the decision-making authorities. However, the judgment may indicate that an applicant's statements, in particular those regarding previous persecution, cannot be excluded from the assessment of the risk of future persecution or serious harm on the sole ground that the applicant could and should have submitted them earlier.

The judgments in *Orfanopoulos and Oliveiri*<sup>572</sup> and *Byankov*<sup>573</sup> show that national procedural rules which limit the possibility to invoke new facts or circumstances which emerged after a national decision may undermine the effectiveness of rights granted by EU law. In *Orfanopoulos and Oliveiri*, the CJEU addressed the standard of judicial review of expulsion measures against EU citizens on public policy grounds.<sup>574</sup> In such cases the competent national authorities must assess the existence of personal conduct constituting a *present threat* to the requirements of public policy. The CJEU held that a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of an EU citizen, factual matters which occurred after the final decision

569 CJEU, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para 43.

570 CJEU (Joined Cases) C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla et al v. Bundesrepublik Deutschland*, 2 March 2010.

571 CJEU (Joined Cases) C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla et al v. Bundesrepublik Deutschland*, 2 March 2010, para 97.

572 CJEU (Joined cases) C-482/01 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*.

573 CJEU, Case C-249/11, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatrešnite raboti*, 4 October 2012.

574 CJEU (Joined cases) C-482/01 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, paras 77-82. See also Case C-467/02, *Cetinkaya*, 11 November 2004, para 47.

of the competent authorities, which may point to the cessation or the substantial diminution of the present threat to public policy, is liable to adversely affect the right to freedom of movement to which nationals of the Member States are entitled and particularly their right not to be subjected to expulsion measures save in the extreme cases provided for by EU law. According to the CJEU that is particularly so, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court. The principle of effectiveness thus requires courts to perform an *ex nunc* review of the threat to public policy posed by an EU citizen against whom an expulsion measure was taken. In *Byankov*, the decision to prohibit *Byankov* from leaving his country of nationality was not appealed and became final. Later judgments of the CJEU made clear that this prohibition to leave was contrary to EU law. However, national law prevented the case of *Byankov* from being reopened. The CJEU decided that this national procedural rule infringed EU law as it undermined the effectiveness of *Byankov's* right to free movement.<sup>575</sup>

### *The European Court of Human Rights*

The ECtHR has accepted that 'even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner'.<sup>576</sup> However, the case law of the ECtHR also shows that evidence which supports a claim of *refoulement* may not be ignored only because it was submitted at a late stage of the asylum procedure or in a subsequent asylum procedure.

In *I.K. v. Austria*, the ECtHR found that the applicant's claim under Article 3 ECHR had not been thoroughly examined because the Austrian authorities failed to take into account an important new fact during the applicant's subsequent asylum procedure.<sup>577</sup> In this case the authorities rejected the first asylum claim of the Chechen applicant because they considered his story contradictory and unconvincing and also found that he had failed to substantiate the existence of any real risk. The applicant's asylum account was the same as that of his mother. The asylum claim of his mother was also refused. The applicant appealed, but withdrew his appeal as a result of bad legal advice. His mother's appeal, however, was upheld. The Asylum Court considered that her story was credible and convincing and that she faced a considerable risk of persecution. She was granted refugee status. The applicant lodged a subsequent application on the basis of this decision. However, the authorities stated that his asylum

575 CJEU Case C-249/11, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, 4 October 2012.

576 ECtHR, *Bahaddar v. the Netherlands*, Appl. no. 25894/94, 19 February 1998, para 45.

577 ECtHR, *I.K. v. Austria*, Appl. no. 2964/12, 28 March 2013.



motives had been sufficiently thoroughly dealt with in his first proceedings, and continued to dismiss his request as *res judicata*. The ECtHR noted that the asylum authorities had been aware of the applicant's mother's asylum status in Austria. Nevertheless, the domestic authorities did not examine the connections between the applicant's and his mother's proceedings and any potential similarities in or distinctions between these two cases during the subsequent asylum proceedings.<sup>578</sup>

In the case of *Bahaddar v. the Netherlands*, the ECtHR had to decide whether the applicant had exhausted domestic remedies even though he had lodged several asylum applications, and failed to submit the grounds for appeal in time twice.<sup>579</sup> In this case, the ECtHR considered that special circumstances may absolve an applicant from the obligation to comply with procedural rules, such as time-limits. It stated:

'It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim'.<sup>580</sup>

The ECtHR has indicated that the submission of statements or evidence are at a late stage of the procedure may undermine the credibility of these statements or evidence.<sup>581</sup> However, the ECtHR does not exclude evidence or statements from its assessment only because they have been submitted long after the first asylum application. In *Hilal v. the United Kingdom* the applicant mentioned that he was tortured in his second interview, which took place more than a month after the initial interview.<sup>582</sup> Furthermore, he waited almost two years to submit significant evidence, such as the death certificate of his brother, medical reports and a police summons. The ECtHR found no reasons to reject these documents as forged or fabricated, referring to an expert opinion submitted by the applicant which concluded that the documents were genuine. On the basis of these documents and the applicant's statements the ECtHR concluded that there was a real risk of *refoulement*.<sup>583</sup> In order to guarantee the subsidiary role of the ECtHR, national authorities should take into account statements and evidence submitted during a subsequent asylum procedure.

578 ECtHR, *I.K. v. Austria*, Appl. no. 2964/12, 28 March 2013.

579 ECtHR, *Bahaddar v. the Netherlands*, Appl. no. 25894/94, 19 February 1998.

580 ECtHR, *Bahaddar v. the Netherlands*, Appl. no. 25894/94, 19 February 1998, para 45.

581 ECtHR (Adm), *A.A. v. Sweden*, Appl. no. 8594/04, 2 September 2008, paras 66-68. ECtHR, *Y v. Russia*, Appl. no. 20113/07, 4 December 2008.

582 ECtHR, *Hilal v. the United Kingdom*, Appl. no. 45276/99, 6 March 2001.

583 ECtHR, *Hilal v. the United Kingdom*, Appl. no. 45276/99, 6 March 2001.

#### 11.1.4 Conclusion

Articles 32-34 of the Procedures Directive and Articles 40-42 of the recast Procedures Directive offer the possibility to derogate from the general rule that asylum applications should be assessed in conformity with the guarantees as laid down in Chapter II of these Directives in subsequent asylum procedures. The Directives even allow Member States to refrain from a full examination of a subsequent asylum application in conformity with the guarantees of Chapter II in some cases where new elements or findings have arisen or have been presented by the applicant, which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection. It follows from the CJEU's case law that such derogation provisions should be interpreted restrictively. Furthermore, Member States should make sure that the application of such provisions does not undermine the effectiveness of the right to asylum (Article 18 of the Charter) and the prohibition of *refoulement* (Article 19 of the Charter). The case law of the CJEU, in particular the judgments in *Orfanopoulos and Oliveri* and *Byankov*, show that national procedural rules which prevent certain new facts or circumstances from being taken into account by a national authority, may undermine the effectiveness of rights granted by EU law. Furthermore, it follows from the ECtHR's case law under Article 3 ECHR that evidence or statements may not be ignored for the sole reason they were submitted in a late stage of the asylum procedure or in a subsequent asylum procedure. In order to comply with the requirement of a thorough examination of the claim under Article 3 ECHR all relevant evidence and circumstances should be taken into account by the national authorities. It should be concluded that EU law requires that facts or evidence which support a claim of *refoulement* submitted during subsequent asylum procedures be assessed in the context of the earlier asylum claim(s).

## Annex I Table of EU legislation

<p>European Union, Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1</p>	<p>The Charter</p>
<p>European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01</p>	<p>Treaty on the EU</p>
<p>European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01</p>	<p>Treaty on the Functioning of the EU</p>
<p>Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status</p>	<p>Procedures Directive</p>
<p>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)</p>	<p>Recast Procedures Directive (applicable as of 21 July 2015)</p>
<p>Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted</p>	<p>Qualification Directive</p>
<p>Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)</p>	<p>Recast Qualification Directive</p>

<p>Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)</p>	<p>Dublin III Regulation</p>
<p>Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union</p>	<p>Regulation relating to External Sea Border Surveillance in the context of Frontex Operations</p>
<p>Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)</p>	<p>Schengen Borders Code</p>
<p>Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council</p>	<p>Amended Schengen Borders Code</p>
<p>Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas</p>	<p>EU Visa Code</p>



The aim of this booklet is to increase the understanding and use of the Charter in asylum procedural law. This booklet is published as part of the FRAME project, which seeks to increase the use of the Charter in asylum and migration cases.

Improving the understanding as to how the Charter can be used in asylum proceedings is essential for the proper implementation of the EU asylum *acquis* and ultimately to ensure that the rights of those seeking international protection are respected. It is hoped that this booklet will contribute towards ensuring these objectives.



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