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Judicial Checklist of Country of Origin Information and Due Process in the Light of EU (Fundamental) Law

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ABSTRACT

The author identifies an important trend in deliberation of international standards of good practice in protection of refugees based on *ad hoc* networking and cooperation between judges and other experts under the auspices of the IARLJ. Since the legal questions in status determination procedures under EU law very often fall under the competence of the Court of Justice of the EU (CJEU), the author suggests that stakeholders in those projects must respect the constitutional structure of the EU by considering what kind of approach towards the standards of due process can be expected to be introduced by the CJEU. This is also relevant for the ongoing project of the IARLJ on the use of country-of-origin information and due process. While the minimum standards clauses under EU secondary law give a clear direction to the IARLJ's checklist as to where to build on a value added, it remains highly unclear what is the interpretative relevance of the Charter of the Fundamental Rights of the EU (the Charter) and the right to effective judicial protection. The author's short analysis of the recent case-law of the CJEU identifies two major, though different, approaches towards legal interpretation of the EU law based on the Charter. A combination of both – top-down and bottom-up - approaches puts the Charter into a specific perspective, where one cannot be expected to act under the legal circumstances of having EU constitutional law as a starting point, with the Charter being always placed at the top of legal argumentation. This will very probably also affect the "duty of cooperation" laid down in the Article 4(1) of the Qualifications Directive in relation to the use of country-of-origin information. In the conclusion, the author suggests that with its checklist on "best international practice", the IARLJ might considerably improve legal uncertainties and minimum standards based on EU (fundamental) law.

Keywords: *country of origin information, effective judicial protection, duty of cooperation, judicial dialogue, IARLJ, interpretative meaning of the Charter, legal certainty*

INTRODUCTION

The International Association of Refugee Law Judges (IARLJ) has so far issued two checklists or guidelines for improving the rule of law in the field of international refugee law: these are the 'Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist' (October 2006) and the 'Guidelines on the Judicial Approach to Expert Medical Evidence' (June 2010). In 2012, in collaboration with the Hungarian Helsinki Committee and the UNHCR, the IARLJ is participating in a project to define the criteria for assessing the credibility of applicants for international protection; this project is expected to be completed at the end of 2012. The London roundtable of the Procedures Working Party and Country of Origin Information Working Party of the IARLJ is the next example of this new type of deliberation of (legal) standards of good practice based on horizontal *ad hoc* cooperation and networking between national judges of different Member States, academics, lawyers, experts, non-governmental organisations, specialised agencies of the EU, like European Asylum Support Office, the UNHCR and decision makers in the field of refugee protection.

THE IARLJ CHECKLIST AS A SET OF STANDARDS COMPLEMENTARY TO THE MINIMUM STANDARDS UNDER EU LAW

Both terms contained in the title of the London roundtable are legal notions under EU law. The problem is that EU directives do not regulate procedural standards for the use of COI in administrative and judicial procedures. However, under the Lisbon Treaty, the general principle of a right to an effective legal remedy is explicitly regulated in Art. 47 of the Charter of Fundamental Rights of the EU (the Charter)[1] as primary law. There is also Art. 39 of the Procedures Directive (PD)[2], which is secondary law and which introduces effective legal remedy in the relevant specific field of refugee law. This means that any lacunae in law and any open questions regarding the interpretation of due process in relation to COI fall under the constitutional competence of the Court of Justice of the EU (CJEU). This is important from the standpoint of the democratic structure of the EU and the institutional balance between the CJEU, the EU legislator and national judiciaries, where members of the IARLJ are acting judges of national courts. In other words, with the forthcoming checklist, which aims to set good procedural standards for the use of COI, the IARLJ will in some sense step into the shoes of the CJEU. Therefore, in discussing or preparing a checklist or set of guidelines for the fair and effective use of COI, the stakeholders in this project should carefully consider what kind of approach towards the standards of due process can be expected to be introduced into our legal systems by the CJEU based on the preliminary rulings. Rather than opposing it, the IARLJ checklist should complement the standards ensuing from CJEU case-law. Thus, the IARLJ checklist will not oppose the EU (constitutional) law and legal interpretations of the CJEU. Such informal and indirect judicial dialogue between the IARLJ and CJEU could be beneficial for the development of the rule of law.

Legally speaking, the IARLJ checklist is able to complement the standards ensuing from CJEU case-law because the existing directives and the forthcoming Recast Procedures Directive regulate (and will regulate) only minimum standards.[3] However, the relevant question is what those

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[1]Charter of Fundamental Rights of the European Union (O J C, 83/02, 30. 3. 2010).

[2]Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (O J L, 326/13, 13. 12. 2005).

[3]Article 5 of the PD; Art. 3 of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need

minimum standards will be in practice, and what kind of role the Charter as a fundamental (primary) law is expected to play in the legal interpretation of those standards.

LEGAL RELEVANCE OF THE CHARTER

From the CJEU judgment in the case of Brahim Samba Diouf from July 2011,[4] which dealt with accelerated procedures, two important conclusions can be drawn.

First, Art. 47 of the Charter might not play a very significant role in the use of COI; this is because, in this judgment, the CJEU only mentions the Charter in the introductory part of the judgment,[5] while the CJEU's main argument is built on the text of Art. 39 of the PD and on the purpose of the PD. In relation to effective legal remedy, the CJEU even uses the term 'general principle' and not the term 'right'. One cannot therefore be expected to act under the legal circumstances of having EU ("constitutional") law as a starting point, with the Charter being placed on the top of legal interpretation and argumentation. On the basis of the Diouf judgment, it is quite obvious that secondary law could be more important than primary law. Within the framework of the hierarchy of EU legal sources, we can reasonably expect a bottom-up and not a top-down approach to the legal interpretation of due process and the use of COI. EU secondary legislation will be of paramount importance; it will give specific expressions to the provisions of the Charter and not vice versa.[6] A similar approach to legal interpretation was adopted by the CJEU in case(s) not dealing with asylum, where the CJEU states that "the principle of non-discrimination on grounds of age is *proclaimed* in Art. 21 of the Charter and given specific expression in the Directive 2000/78" /.../.[7] In the case of El Dridi,[8] which relates to the detention of a third-country national staying illegally in a Member State and refusing to obey an order to leave, the CJEU based the standard of proportionality on the recital 13 of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals,[9] while the Charter was not mentioned at all.

If secondary law will give specific expressions to the provisions of the Charter and not *vice versa*, judges will have much less room in which to produce legal interpretations of the EU law.

Second, in the Diouf judgment the CJEU states that effective standards of judicial protection are applicable only at the level of the national court of first instance and not at the level of appellate courts.[10]

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international protection and the content of the protection granted (hereinafter: QD), O J L 304/12, 30. 9. 2004); Article 5 of the amended proposal for a directive /.../ on common procedures for granting and withdrawing international protection status (Recast) Brussels, 1. 6. 2011, COM(2011) 319 final, 2009/0165 (COD) – hereinafter: the Recast Procedures Directive.

[4]C-69/10, 18 July 2011.

[5]Ibid. para. 3

[6]See judgment in the Diouf case, C-69/10, paras. 28., 33–35, 48–49, 54, 60–61.

[7]Judgment of the CJEU, C-297/10 and C-298/10, para. 78.

[8]Judgment of the CJEU, C-61/11 PPU, 28. 4. 2011, para. 57.

[9]O J L 348, 24. 12. 2008.

[10]Judgment of the CJEU, Diouf, C-69/10, para. 69

"A DUTY OF COOPERATION"

The judgment in the case of M., which is now pending before the CJEU, will be even more important for the judicial checklist, since its preliminary question relates to the scope of the duty of cooperation between the applicant and decision-maker in relation to the use of COI. Advocate-General Bot has already issued his opinion in this case.[11] It is a very interesting opinion and one that is relevant to determining the checklist on COI and due process, although he did clearly follow the approach of the CJEU in the Diouf Case in respect of the legal relevance of the Charter.

In the case of M., the referring Irish court asks the CJEU whether the duty of cooperation laid down in Art. 4(1) of the QD requires the administrative authority to communicate to the applicant the elements on which it intends to base its decision and to seek the applicant's observations in that regard before adopting a negative decision. In this case, the Irish authorities rejected the application due to serious doubts regarding credibility, relying on a COI from Rwanda which Mr M. was not made aware of during the procedure. At the hearing before the CJEU, a legal representative of the applicant requested that the CJEU reformulate the question so as to allow it, in essence, to consider whether the examination procedure ensured provision of the right to an effective judicial remedy as embodied in Art. 47 of the Charter. The Advocate-General proposes that the CJEU should not grant this request for reformulation of the question.[12] To an extent, his reluctance to use Art. 47 of the Charter is understandable, since Art. 4(1) QD refers to the assessment of facts submitted by the applicant for international protection. However, the provision of Art. 4(1) of the QD does not refer to communication between the administrative or determining authority and the applicant; instead, it refers to communication between the Member State and the applicant. In any case, the Advocate-General at that stage of argumentation does not place the issue of referral under Art. 47 of the Charter or Art. 39 of the PD, but regards it as the right to be heard and the general principle of good administration. His chief method of interpretation of the referral issue is as follows:

He examines the concrete expression given to the right to be heard by EU secondary legislation in the PD and QD. Although it is very clear that Art. 4 of the QD is of procedural nature, he states that the content and purpose of the QD do not seek to set out the procedural rules or to lay down the procedural safeguards that the applicant must be afforded. The sole objective of the QD is to set the criteria that must be met in order to qualify for international protection. In his opinion, the PD sets and specifies what is entailed by the term 'cooperation' in Art. 4(1) of the QD.[13] Bot's main argument is that since the provision on the first meeting under Art. 12(2(b) of the PD and the provision on the personal interview under Art. 12(1) of the PD do not regulate the right to communicate the relevant elements to the applicant before the decision is taken, the applicant does not have the right to be heard in the sense that this issue was referred to by the referring court. Furthermore, in his opinion, this right in asylum matters cannot be derived from CJEU case-law from other fields of legal dispute under EU law.[14]

The important consequence of this opinion, should the CJEU accept it, is that national courts, as the

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[11]Opinion of Advocate General Bot delivered on 26 April 2012, C-277/11, M. v Ministry for Justice, Equality and Law Reform.

[12]Ibid. para. 10.

[13]Ibid. paras. 18–19, 22. This is confirmed by the Recast Qualification Directive (O J, L 33779, 20. 12. 2011, recital 16), which explicitly states that the Recast Qualification Directive promotes the application of certain articles from the Charter, but Art. 47. of the Charter is not mentioned among them. The Recast Procedures Directive will promote the right from Art. 47. of the Charter (see Recast Procedures Directive, recital 47).

[14]Ibid. paras. 68, 73, 75.

second independent instance, will have to give an applicant the chance to comment on the COI when it was not presented to the applicant in the administrative procedure, since Advocate-General Bot at that point refers to Art. 39 PD and the thorough review of the national court.[15]

This is in line with the amended proposal for the recast PD, which in a new article on effective legal remedy states that effective remedy provides for a full examination of both facts and points of law, including an *ex nunc* examination in appeal procedures at least before a court or tribunal of first instance.[16]

What I see as being very positive in this opinion is that it stresses at several points that Member States are free to strengthen the fundamental safeguards afforded to the applicant in the examination of his application.[17] This therefore provides a legitimate space for the IARLJ checklist to propose higher standards. The checklist must retain this difference in terminology and substance: while the CJEU will set an authoritative interpretation of positive law based on minimum or basic standards, the IARLJ checklist could advocate 'best standards in international practice'. This would constitute a useful indirect dialogue between the CJEU and IARLJ.

Furthermore, the Advocate-General Bot adds that he shall interpret the provision with regard, in particular, to the interpretation adopted by the UNHCR under Art. 35 of the 1951 Geneva Convention.[18]

He states that the right to be heard is linked to a fair trial under Art. 47 of the Charter;[19] in his opinion, the right to be heard is a general principle of EU law applicable even when the legislation does not expressly provide for such a procedural requirement.[20] Adherence to this procedural right in asylum procedures is of cardinal importance, and any infringement of that right must be censured as such by the court and entail annulment of the national authorities' decision or the part of the national authorities' decision concerning the facts or objections on which the person concerned has been unable to make representations.[21]

I believe his opinion to be very reasonable when it states that any failure to confront an applicant with a particular COI before a negative decision is taken is not an absolute error in procedural law in every case: it depends whether this error in procedure could have any significance for the result of the procedure.[22]

The Advocate-General makes no reference whatsoever to ECtHR case-law in Art. 13 in conjunction with Art. 3 of the ECHR, but I do not think his opinion contradicts ECtHR case-law as long as national courts take that responsibility and confront an applicant with the important COI and give

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[15]Ibid. para. 84.

[16]From the standpoint of the case law of the ECtHR, even the national court of final instance must, if circumstances change, provide a full *ex nunc* assessment of the case (Salah Sheekh, para. 136; N.A. v. the UK, para. 112).

[17]Opinion of Advocate General Bot, C-277/11, paras. 85, 92, second paragraph of the conclusion.

[18]Ibid. para. 29

[19]Ibid. para. 31

[20]Ibid. 32. This is an important adjustment to the position that secondary law will give specific expressions to the provisions of the Charter (and not vice versa).

[21]Ibid. 41.

[22]Ibid. paras. 107–111.

him/her a chance to respond in judicial procedure. The ECtHR states that it is 'frequently necessary to give the applicants the benefit of doubt when it comes to assessing the credibility. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies'.[23] For realisation of this standard, it is necessary for the applicant to be confronted with that COI before a negative decision on credibility is taken.

LEGAL RELEVANCE OF THE CHARTER IN CONJUNCTION WITH THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

In comparison to the previously described legal interpretation of effective judicial protection, formally a different approach to legal interpretation and the role of the Charter was adopted by Advocate-General Verica Trstenjak in her opinion in the case of N.S. from 22 September 2011[24]. Here, the Charter (Art. 47 in general terms) as the fundamental law is put on the top of the legal interpretation. In her opinion, Dublin Regulation no. 343/2003[25], which allows a certain measure of discretion, in Art. 3(2), to Member States, must, as far as possible, be interpreted in a manner consistent with fundamental rights; Member States must ensure that they do not rely on interpretation of an instrument of secondary legislation that would be in conflict with fundamental rights.[26] The CJEU has followed the approach of Advocate-General Trstenjak. However, in the same manner as the Advocate General, the CJEU in the context of the preliminary question on the right to effective remedy and fair trial does not refer specifically to the Art 47(1) or to the Art. 47(2) of the Charter, but it merely refers to "fundamental rights protected by the European legal order" and to "general principles of European Union law".[27]

Furthermore, one needs to bear in mind that the CJEU, in the same judgment, acknowledged that, according to the judgment of the ECtHR in the case of M.S.S.[28], '*the Member State would infringe Article 4 of the Charter if it transferred an asylum seeker to the Member State responsible within the meaning of Regulation no. 343/2003 in the circumstances described in paragraph 94 of the present judgment.*'[29]

What is highly relevant for the judicial checklist on COI and due process is the method of interpretation adopted by the Advocate-General Trstenjak concerning the right to effective legal remedy within the meaning of Art. 47 of the Charter. She says that the '*specific procedural form of the effective remedy /.../ is largely left to the Member States. However, this margin of discretion /.../ is limited by the requirement that the effectiveness of the remedy must always be guaranteed /...*/';

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[23]N. v. Sweden, 20 July 2010, para. 53, Akasiebie v. Sweden, 8 March 2007; S.S. v. UK, 24 January 2012, para. 69

[24] Opinion of Advocate General Trstenjak delivered on 22 September 2011, Case C-411/10 N.S. v Secretary of State for the Home Department.

[25] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by the third-country national, O J L 50, 25. 2. 2003.

[26]Opinion of Advocate General Trstenjak, Case C-411/10, paras. 118–119, 154.

[27]Judgment of the CJEU (Grand Chamber) in the case of N.S. from 21 December 2011, para. 77.

[28] Judgment of the European Court of Human Rights (Grand Chamber) in case of M.S.S. v. Belgium and Greece from 21 January 2011.

[29]Judgment of the CJEU (Grand Chamber) in the case of N.S. from 21 December 2011, para. 113.

she also refers to the principle of proportionality from Art. 52(1) of the Charter.[30] She adds that '*the minimum content of the right to an effective remedy includes the requirements that the remedy to be granted to the beneficiary must satisfy the principle of effectiveness /.../. According to that principle, the realisation of the rights conferred by EU law may not be rendered practically impossible or excessively difficult'*.[31] What does this mean in the light of the firm text of the Art. 47(1) on the right to an effective remedy "in compliance with the conditions laid down in this Article" and in the light of the Art. 47(2) which incorporate a fair and public hearing, remains entirely an open issue. It also provokes an additional problem, since the standard of "practically impossible or excessively difficult" realisation of the rights conferred by EU law is not comparable to the "close scrutiny" test of the ECtHR, which says that "in order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the Respondent State" and that domestic remedy "must deal with the substance of an arguable claim".[32]

CONCLUSION: TOWARDS THE BETTER LEGAL CERTAINTY

Before the Charter formally came into force on 1 December 2009, the CJEU often used the argument that fundamental rights, either with reference to the European Convention on Human Rights or to the constitutional traditions common to Member States, were an integral part of the general principles of law; however, it seems that the Charter has not strengthened the fundamental (nor constitutional) law of the EU as much as one might reasonably have expected given its undisputed formal legal value.[33] It is highly likely that the CJEU, in its future case-law, will sometimes regard a particular human right as only 'proclaimed' or 'recognized' in the Charter, while the specific expression to that right will be given by the CJEU on the basis of an interpretation of secondary law provisions. One can expect in some cases that the Charter will not be even mentioned, despite the fact that human rights from the Charter will be at stake.[34] In some cases perhaps, where secondary law leaves Member States with a margin of discretion, national authorities and courts will have to apply secondary law rules in a manner consistent with the requirements ensuing from the protection of fundamental rights.[35] In cases where the ECtHR has already issued a relevant judgment on the infringements of human rights under the ECHR, the CJEU will certainly use the argument of fundamental law in regard of the relevance of the Charter.

Furthermore, it will be hard to ignore, in future case-law on asylum the fact that asylum is a fundamental right under Art. 18 of the Charter, which means that it is not just the right or the principle of an effective legal remedy under Art. 47(1) of the Charter that is at stake but also the fundamental right to a 'fair and public hearing' under Art. 47(2) of the Charter. The right under that Article is not limited to civil rights as is the case under the case-law of the ECtHR in relation to Art. 6 of the ECHR in immigration, expulsion and deportation matters.

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[30] Opinion of Advocate General Trstenjak, Case C-411/10, para. 160.

[31] Ibid. paras. 160–161.

[32] Judgment of the ECtHR in case of M.S.S. v. Belgium and Greece, 21 january 2011, paras. 288, 290, 293.

[33] See Art. 6(1) of the TFEU; the CJEU confirms the Charter has the same legal status as the Treaties in judgment C-297/10 and C-298/10, para. 47.

[34] See e.g. Achughbabian, C-329/11 from 6 December 2011 and El Dridi, C-61/11 PPU, which dealt with the detention of third-country nationals illegally residing in a Member State.

[35] See e.g. the judgment of the CJEU in Case 5/88, Wachauf, para. 22 and C-540/03 from 27 June 2006, para. 104.

Under such uncertain legal circumstances, clear and firm guidelines or the IARLJ checklist on best international practice concerning procedural standards for the use of COI would contribute substantially to improving the rule of law and to promote a meaningful judicial dialogue in the field of international protection of refugees.[36]

[36]In the Proposal for the Recast Procedures Directive, there is no general obligation on the part of the determining authority to show the COI before a negative decision is taken, but the applicant and his legal adviser may not be denied access to the COI, where the determining authority takes that COI into consideration for the purpose of taking a decision (Art. 12(1)(d)). However, Art. 16 could set a better standard by saying that an opportunity to present elements needed to substantiate the application in accordance with Art. 4 of the QD includes the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements. Since contradictions may relate to general or specific COI, this means that the determining authority should present decisive relevant facts from the COI to the applicant before any negative decision is taken.