THE IMPORTANCE OF JUDICIAL PROTECTION IN ASYLUM PROCEDURES WITHIN THE EUROPEAN UNION

The Impact of the EU Charter of Fundamental Rights on the development of the second generation Asylum Procedures Directive

Master Thesis
'Master of Laws'

submitted by

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WORDS OF THANKS

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<table>
<thead>
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>CEAP</td>
<td>Common European Asylum Procedure</td>
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<td>CEAS</td>
<td>Common European Asylum System</td>
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<td>ECHR</td>
<td>European Convention for the Protection of Human rights and Fundamental Freedoms</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ECJ</td>
<td>Court of Justice of the European Union</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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INTRODUCTION

Since the entry into force of the Lisbon Treaty, under the new Article 267 TFEU, all national courts and tribunals can introduce preliminary references on questions relating to asylum to the Court of Justice of the EU, and not only the courts of final appeal as was the case before the Lisbon Treaty.¹ This extension of the jurisdiction of the Court is an impetus for an increasingly harmonised interpretation of EU legislation.

At the same time, the EU Charter of Fundamental Rights was, due to the Lisbon Treaty, granted the same legal status as the EU Treaties themselves.² This might have major effects on the enforcement of human rights dispositions. For example, will the interpretation of article 47 EU Charter in the future provide for the same protection (or even wider than) of article 6 ECHR – which is not applicable in asylum cases?³ Will the scope of protection granted be wider than the interpretation given to the general principle of EU law of the right to an effective remedy, also based on articles 13 and 3 ECHR? What will the interpretation of the suspensive effect of appeals procedures be? Does a right to interim protection exist? And what about the right to legal aid? Recent jurisprudence of both the ECJ and the ECtHR certainly provides clarifications, but also raises new questions.

In the case of Brahim Sambia Diouf, advocate general M.P. Cruz-Villalón pleads for an extended interpretation of article 47 EU Charter, taking international and constitutional law into account and building upon the rights granted through articles 6 and 13 ECHR.⁴ The analysis of judicial protection granted by article 47 EU Charter will make up the core focus of this master thesis. The EU Charter also contains an article 18 concerning the right to asylum. Will this article have an impact on judicial protection?

² Article 6 TEU.
³ ECtHR (GC), 5 October 2000, Maaouia v. France, 39652/98.
These changes might contain large implications for the existing judicial protection granted in asylum procedures, considering that the Asylum Procedure Directive\(^5\) is commented upon by Prof. Steve Peers in a dramatic way: “Never before in the history of the Community have so many human rights breaches – leaving aside the breaches of EC constitutional law – been committed by a single piece of legislation. The legitimacy of EC asylum law and of Community pretences to be committed to the protection of fundamental human rights and the full application of the Geneva Convention is dependent upon finding the above provisions invalid, or radically reinterpreting or amending them, as soon as possible”.\(^6\) In this Master’s thesis, a number of specific themes and dispositions are compared with the relevant fundamental rights standards. Do these minimum standards suffice? A considerable part of this Master’s thesis focuses on future developments. Is the interpretation of rights guaranteed by article 47 EU Charter integrated into the 2009 Recast Proposal\(^7\) and the 2011 Amended Recast Proposal\(^8\)? Or will a new directive take the lead in ensuring a full judicial protection?\(^9\)

The Procedures Directive cannot be examined without a look at the Dublin II Regulation. How do both pieces of legislation interrelate? Do provisions of one legislation affect the other? And what is the place of fundamental rights in this debate? Are procedural rights guaranteed in the Dublin II Regulation? And does the ECtHR jurisprudence in the case of M.S.S. v Belgium and Greece\(^10\), and the ECJ jurisprudence in N.S.\(^11\) provide for solutions ending this debate?

With a clear focus on the analysis of the impact of art. 47 EU Charter on judicial protection in EU asylum procedures since the entry into force of the Lisbon Treaty, these questions will be addressed in this Master’s thesis. The central research question of this Master’s thesis is:

\(^9\) The current article 39 Asylum Procedures Directive already contains the right to judicial protection. The provisions in the Directive are however rather weak and not innovative.
\(^10\) ECtHR, 21 January 2011, M.S.S. v Belgium and Greece, 30696/09.
\(^11\) Joined Cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported.
“What is the (potential) effect of human rights dispositions on the judicial protection in European asylum procedure standards after the entry into force of the Lisbon Treaty?”

The following sub-questions will allow to formulate a coherent answer to this research question:

1. What does the Common European Asylum System contain?
2. Which changes did the Lisbon Treaty introduce to the European Asylum System?
3. What is the current state of judicial protection in European asylum procedures?
4. Which importance/effect is given to human rights dispositions in the European legal order?
5. What is the (potential) effect of human rights dispositions – especially article 47 EU Charter - on the judicial protection in European asylum procedure standards after the entry into force of the Lisbon Treaty?
6. What is the impact of possible future developments on judicial protection in asylum procedures?
7. What is the procedural effect of rulings detecting fundamental rights violations on the specific provisions?

In order to conduct research on these matters that allows to draw conclusions, the following methodology is applied. First, a framework of the developments in the field of Asylum law in the European Union law is provided. Equally, the status of human rights or fundamental rights in the European legal order is assessed. More concretely, the elements of the right to an effective remedy and a fair trial are examined. These frameworks are explained based on the institutional developments in the European Union and the role of the jurisprudence of the Court of Justice of the European Union therein.

The legality and validity of the Common European Asylum Procedures – and more specifically the Procedures Directive 2005/85/EC - is analysed in the light of the jurisprudence of the Court of Justice of the European Union and of the European Court of Human Rights. They are held against the current understanding of the right to an effective remedy and a fair trial. Hence, the innovations the Lisbon Treaty has introduced, are taken into account. Special attention is given to the analysis and impact of article 47 of the EU Charter of Fundamental Rights, based on
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jurisprudence.

Based on the results of the analysis of the current Procedures Directive held against procedural rights provisions, the proposals for future legislation are evaluated. Does the Amended Recast Proposal of the European Commission for a second generation of the Procedures Directive – targeting EU harmonisation – tackle the criticisms in the light of fundamental rights? What will the potential effect be of fundamental rights dispositions, if the proposed legislation were adopted? All these changes are situated within the complex interplay between the ECtHR and the ECJ, not necessarily providing for similar interpretations. Below, this Master's thesis takes up all these challenges.
I European Asylum Law
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I. EUROPEAN ASYLUM LAW

A. THE ORIGINS OF THE RIGHT TO SEEK ASYLUM

On the 28th of July 1951, the UN members signed the International Convention Relating to the Status of Refugees (hereafter: the Geneva Convention)\(^\text{12}\), and in 1967 the associated Protocol\(^\text{13}\). This marked the beginning of international asylum law and the international obligation to grant asylum to refugees\(^\text{14}\). The refugee status was introduced in article 1A: everyone with “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” and who cannot rely on the protection of his/her country of nationality. Another fundamental article of this Convention is article 33, that contains the prohibition to expulsion (‘non-refoulement’)\(^\text{15}\). This granted asylum seekers an extremely minimal judicial protection.\(^\text{16}\) Nonetheless this is guaranteed in the European legislative instruments, for example articles 6 and 13 of the ECHR.\(^\text{17}\)

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14 The first entries in international treaties on behalf of asylum seekers were already made in the seventeenth century, for example in the Peace Treaty of Westphalia in 1648. These recognitions were made only ad hoc and were not part of a continuous protection. The latter was only developed after the two World Wars and the emergence of the Cold War. See: BETTS, A., LOESCHER, G. and MILNER, J., UNHCR: The Politics and Practice of Refugee Protection, London, Routledge, 191 p. 7-17.
16 See also the non-binding article 16 Convention Relating to the Status of Refugees, Geneva, 28 July 1951 (‘Access to Courts’).
B. THE INSTITUTIONAL FRAMEWORK OF THE COMMON EUROPEAN ASYLUM SYSTEM

In the context of the European Union, some member states intended to harmonise their asylum policies. The goal of this harmonisation was to guarantee the same standards and protection throughout the European Union. Furthermore, collaboration and burden-sharing were supposed to lead to a better management of the external borders of the European Union. The process of harmonisation was accompanied by a growing need for a common policy.

B.1. The growing attention to asylum law in the EU Treaties

What originated as an informal intergovernmental cooperation between a number of ministers of Internal Affairs of the EU Member States in 1986, has now become one of the policy issues subjected to the Community method. In 1991 this collaboration under Title IV of the EC-Treaty was formally adopted under the third - intergovernmental - pillar of the European Community. The Member States and the European Council maintained their right of initiative under this construction. The European Commission and the European Parliament (hereafter: “EP”) only had limited consultative powers. This decision-making process led however to contradictions between the intergovernmental and supranational level, and to a slowly progressing decision-making. Moreover, it prevented the conversion of concrete proposals in legislative documents. This was contradictory to its purpose, namely the realisation of harmonisation.

With the entry into force of the Treaty of Amsterdam in 1999, the asylum policy became a supranational competence of the European Commission. Title IV was adopted under the first pillar. The treaty of Amsterdam initiated the Common European Asylum System. Within a period of five years, the member states would fix a number of instruments in this domain (art. 61-63 EC-Treaty). One example is the policy on minimum standards for procedures or the withdrawal


of refugee status (art. 63, 1, d EC-Treaty). This could however only be achieved using the
procedure of unanimity in the Council (art. 67 EC-Treaty).

The Treaty of Amsterdam also limits the access to the Court of Justice. Under article 68 EC-Treaty only the highest legal authorities – against whose decision no appeal was allowed – could pose a prejudicial question to the Court of Justice ex. Article 234 EC-Treaty. This right was not granted to the lower national courts and tribunals. The access to other procedures regarding actions for annulment ex. article 230 EC-Treaty, actions for failure to fulfil obligations ex. article 226-227 EC-Treaty and the actions for failure to act ex. article 232 EC-Treaty was not limited.

The conclusions of the European Council in Tampere in 1999 launched the first phase of implementations of the policy goals from 1999 to 2005. During this first phase, the EU would set out common minimum standards. Only in the long term, the goal of full harmonisation and realisation of the CEAS would be put on the agenda.

The Treaty of Nice in 2001 continued the evolution to a supranational European competence in asylum policy. Since its entry into force in 2003, the Council no longer voted by unanimity but by a qualified majority. The limitation regarding the access to the European Court of Justice was maintained.

B.2. Creating policy through the European Council

Further progress was made by the The Hague Programme in 2004, and that of Stockholm in 2009. The conclusion of the Council in The Hague set the establishment of a common asylum procedure as one of the ten five-year objectives in the area of freedom, security and justice. The first directive on minimum standards for procedures was already adopted in 2005 (see infra).

The next five-year objective set in Stockholm for asylum policy was called a “common area of

I European Asylum Law

protection and solidarity”. The Stockholm program defines the goal accurately: “It is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome.” To achieve this goal, procedures would have to be fair and effective, and exclude the possibility of abuse.

To create a common asylum policy, the European Council proposed “the Council and the European Parliament to intensify the efforts to establish a common asylum procedure and a uniform status in accordance with Article 78 TFEU for those who are granted asylum or subsidiary protection by 2012 at the latest.”

B.3. New challenges posed by the Lisbon Treaty

Since the entry into force of The Treaty of Lisbon on the 1st of December 2009, significant steps have been made towards European integration. Due to the merger of the pillar structure, the entire area of Justice and Home Affairs – the former Titles IV and VI EC-Treaty – form together Title V Treaty on the European Union (TEU). As a result, this entire area is subjected to the exclusive right of initiative of the European Commission, the qualified majority voting procedure in the Council and the co-decision of the EP.

In addition, two elements of this Treaty could have a significant impact on the European Asylum Law. First, the Charter of Fundamental Rights of the European Union (hereafter: “EU Charter”) enjoys the same legal status as a Treaty ex. Article 6 TEU, thus this becomes primary law of the EU. This could have implications for the implications of human rights provisions in EU law (see infra).

Second, the former limitations ex. article 68 EC-Treaty are not retained. Consequently ex. Article 267 Treaty on the Functioning of the European Union (TFEU) not only the highest national courts, but also courts and tribunals now have the possibility to pose a prejudicial question.

25 Stockholm Programme p.70
26 Stockholm Programme p.70
27 Stockholm Programme p.32
I European Asylum Law

cconcerning asylum law to the ECJ. The interpretation of the Treaty can be subject to a prejudicial question, as well as the validity and the interpretation of decisions of EU instances. It should be noted that, on the one hand, between the entry into force of the Treaty of Amsterdam and the Lisbon Treaty, merely one prejudicial question was posed by a higher legal authority to the ECJ in the sphere of asylum law.29 On the other hand, the Charter of Fundamental Rights achieves a treaty status in the Lisbon Treaty. This expands the basis for review considerably.30 This Charter also applies to article 78 TFEU, the former article 68 EC-Treaty.

C. THE COMMON EUROPEAN ASYLUM PROCEDURE: GETTING OFF TO A SLOW START

The development of the Common European Asylum Procedure (CEAP) is part of the CEAS. The first step in the direction of the realisation of a common asylum procedure was made by the introduction of minimum standards. These became legally binding through the adoption of Directive 2005/85/EC on Minimum Standards in Asylum Procedures in Member States for Granting and Withdrawing Refugee Status of the Council of the 1st of December 2005.31

This Procedures Directive aims to secure procedural guarantees, such as information on procedures, the possibility for a personal interview and the access to legal assistance and representation. The directive also puts forward minimal requirements for the decision-making process, such as the right to an individual, objective and impartial decision, by specialized and trained staff, in a written and – in case of a negative outcome – motivated decision. The asylum seeker is granted a right to contest the initial decision in appeal. Finally, the directive sets a few minimum standards for the application of some concepts, such as inadmissible applications, manifestly unfounded applications, subsequent applications, ‘safe third country’ and ‘safe country of origin’.32

Member States may, however, introduce special procedures that deviate from these minimum protections, for instance for the processing of an application at the border. It is also allowed for a Member State to not fully examine an application when another Member States has jurisdiction or when the applicant has already been granted the status of asylum seeker.

In 2010 the European Commission published an evaluation on the implementation of this Procedures Directive.33 The Commission concluded that “(t)he present report shows that the objective of creating a level playing field with respect to fair and efficient asylum procedures has not been fully

achieved. (…) Procedural divergences caused by the often vague and ambiguous standards could only be addressed by legislative amendment.”

The target date of the realisation of the CEAS has already been postponed from 2010 to 2012. On the 21st of October 2009, the European Commission published a Recast Proposal for the second generation of the Procedures Directive. This proposal was renewed on the 1st of June 2011 by the publication of the Amended Recast Proposal. This last text is currently being discussed by the Commission for Justice and Home Affairs in the EP.

The EU Presidency concludes its State of Play of the CEAS on 16 April 2012 as follows:

“(a)s regards the recast for Asylum Procedures Directive, progress has been made, in particular on access to the procedure, applicants with special procedural needs and the applicability of accelerated procedures. Compromise proposals have been discussed at the level of the Asylum Working Party and the Strategic Committee for Immigration and Asylum. Further discussion continues to be necessary on key elements of the recast proposal such as guarantees for unaccompanied minors, subsequent applications and the right to an effective remedy. (…) The Presidency invites the Council to take note of the progress achieved on the legislative proposals in the field of asylum and to instruct its preparatory bodies to continue work in keeping with the commitment to establish a Common European Asylum System by the end of 2012.”

36 Council of the European Union, Common European Asylum System, Brussels, 16 April 2012, 8595/12, p.3.
II. FUNDAMENTAL RIGHTS IN THE LEGAL ORDER OF THE EUROPEAN UNION

A. THE INCREASING IMPORTANCE OF FUNDAMENTAL RIGHTS

Since its conception in 1957 the European institutions have undergone a tremendous evolution in the area of human rights. While the European Economic Community (EEC) had no reference to human rights in its Treaty of Rome, the current EU attempts to ensure these human rights and to propagate them to the rest of the world.\(^{37}\)

The EEC was a functional economical community, which only posited equality between men and women in a purely economical context.\(^{38}\) The Court of Justice in 1959 even declared itself incompetent to rule on a conflict between a decision of the High Authority of the European Community on Coal and Steel (ECCS) and the rights provided in the constitution of a Member State.\(^{39}\) But ten years later the court was forced to reverse its jurisprudence. The then new concept of primacy of the EEC law over national law had to be protected against national Constitutional Courts.\(^{40}\) Therefore the Court in the case of Stauder stated for the first time that even fundamental rights of a national constitution cannot supersede the EEC law.\(^{41}\) This was mitigated in the case of Internationale Handellsgesellschaft, in which the Court proclaimed that fundamental rights were part of the general principles of European law.\(^{42}\) These general principles are rooted in the common constitutional traditions of the Member States within the structure and the aims of the Community.\(^{43}\) Other sources are the international human rights treaties to which Member States

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37 Treaty Establishing the European Economic Community, Rome, 25 March 1957; Articles 2, 3, 5 and 6 TEU.
38 Article 119 EEC-Treaty.
39 Case 1/58, Friedrich Stork & Cie v High Authority of the European Coal and Steel Community, 1959, ECR 17, para. 4.
40 Case 6/64, Flaminio Costa v Enel, 1964, ECR 585.
41 Case 29/69, Stauder v City of Ulm, 1969, ECR 419.
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have acceded or to which they have contributed.44 Moreover, according to the Court of Justice, the ECHR was of particular interest.45

After these praetorian developments the first recognition of human rights in an EEC Treaty followed, when a symbolic reference was included in the preamble of the European Single Act.46 The Maastricht Treaty shifted these references to the articles of the EU Treaty.47 This, however, had a limited effect, since the provision was not explicitly subjected to the European Court of Justice. The introduction was coupled with the introduction of the concept of ‘European Citizenship’, and the formalization of cooperation in the area of Justice and Home Affairs.

The Amsterdam Treaty reinforced this reference, and also regarded the respect for human rights as a prerequisite for accession to the EU.48 Article 7 TEU introduced a political measure to suspend a Member States, which persistently and seriously violates human rights. In addition various human rights under the Amsterdam Treaty expanded significantly.49

In 2000 the negotiations within the Intergovernmental Conference in preparation of the European Council of Nice led to the signing of the Charter of Fundamental Rights of the EU.50 This was promulgated by the Commission, the Council and the EP. The Charter was not yet binding at this time.

In 2005 the Court of Justice got involved again in the discussion. The Court held that human rights as guaranteed by the EU, and as a norm of jus cogens under international law, take precedence over international treaties and even decisions of the Security Council of the United Nations.51

With the entry into force of the Lisbon Treaty on the 1st of December 2009 the Charter of

47 Article F, §2 TEU.
49 For example: the equality between men and women does not only need to be ensured in an economic context, but is also applicable as a general principle of the EU law. The respect for the economic nd social rights was replaced from the preamble to article 136 EC-Treaty.
II Fundamental Rights

Fundamental Rights of the EU became binding and was even accorded Treaty status.\textsuperscript{52} Respect for and promotion of human rights was given a prominent place in articles 2, 3 and 5 TEU. This, however, within the limits of the competences of the EU and with respect for the national identities of Member States. Notwithstanding these various references, the new Title V TFEU on Freedom, security and justice reiterates in article 67 THEU the respect for fundamental rights.

\textsuperscript{52} Article 6 TEU.
II Fundamental Rights

B. THE GENERAL PRINCIPLES OF EU LAW

B.1. The scope of the general principles

What started in 1970 as a Praetorian development of the ECJ has become an independent and extensive source of European law. The general principles of European law are applicable wherever a sufficient link with European law is established.

B.2. The sources the Court of Justice draws from

These principles are based on different sources: first, the ECHR, second international human rights treaties and possibly ‘soft law’, and thirdly praetorian developments of the ECJ.

a) The ECHR before the ECJ

The ECHR as a source is of "particular importance", as all EU member states have acceded to the ECHR. The ECJ has never explicitly stated that the Convention itself is applicable within the EU legal order. But the Court has regularly referred to specific provisions of the ECHR and the related jurisprudence of the ECtHR. These provisions prescribe the guidelines for whether or not restrictions on fundamental rights are permissible. This is the so called ‘community standard’ which states that rights may be limited only in the light of the general interest of the Community. These limitations may not constitute a disproportionate and intolerable restriction that affects the core of those rights.

The Court also takes account of the jurisprudence of the ECtHR. However, although many general principles are inspired by the ECHR, they may find a wider application in the EU. For

53 Case 11/70, Internationale Handelsgesellschaft, 1970, ECR 1146, para. 4; Article 6, §3 TEU.
55 Case 36/75, Rutili, 1974, ECR 1219.
57 Case 222/84, Johnston v Chief Constable of the RUC, 1986, ECR 1651, para. 18.
58 Joint Cases C-20/00 and C-64/00, Booker Aquaculture, 2003, ECR I-7411, para.68.
59 For example as regards article 6 ECHR: Case C-276/01, Steffensen, 2003, ECR I-3735, para. 72; Case C-105/03, Pupino, 2005, ECR I-5285, para. 59.
60 A less broad application of the ECHR would be problematic, given that the ECtHR ex article 53 ECHR
instance, the ECtHR rules out the application of Article 6 ECHR (‘the right to a fair trial’ implying ‘the right of access to justice’) for administrative procedures, such as asylum cases. By contrast, the ECJ makes no distinction. Before the ECJ it is only required that there exists a sufficient link with European law (see supra). Since the ECJ declared Articles 6 and 13 ECHR applicable in immigration procedures, the same is probably valid for asylum procedures.

A concrete example is the case of Elgafaji of the Grand Chamber of the ECJ. Here the Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, and the content of the protection granted (hereafter: “the Qualification Directive”) are assessed by reference to Article 3 ECHR:

“(…) while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR”.

b) The EU law before the ECtHR

Yet the relationship between EU law and the ECHR is anything but simple. The ECtHR has already been urged to assess European regulations by reference to the ECHR. The Court declared that it had no jurisdiction ratione personae with respect to the responsibility of the EU, at least to the extent that the EU has not joined the Convention. By contrast, the ECHR already assessed the responsibility of individual Member States in the transposition of European legislation. The

only determines a minimum standard for the protection of human rights.

61 ECtHR (GC), 5 October 2000, Maouia v. France, 39652/98.
63 Case C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, 2009, ECR I-00921, para. 28.
64 ECtHR, 30 June 2005, Bosphorus Hava Yollari Turizm v Ireland, 45036/98; ECHR, 9 December 2009, Connolly v 15 Member States of the European Union, 73274/01.
65 ECtHR (GC), 18 February 1999, Matthews v United Kingdom, 24833/94, para. 33; ECtHR, 30 June 2005,
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responsibility of a Member of an international organization under international law is not limited to acts of that organization. The ECHR applied above the rule 'pacta sunt servanda' to successive treaties.

Specifically, the ECtHR held that if the EU Member States still retained discretionary powers, the normally applicable examination test would have to be applied. This would also be the case if the Procedures Directive 2005/85 would be subject in a case before the ECtHR, because it merely fixes minimum standards. But when EU Member States have no discretion when implementing EU law, the ECtHR applies a lower level of scrutiny. The question posed in that case is whether the EU law affords an “equivalent” protection. This means that there is a refutable presumption that both are compatible, unless in case of a manifest deficiency. If the second generation of the Procedures Directive will impose a maximum harmonization, this latter examination test comprising of a refutable presumption of equivalence will be applicable in case of a review before the ECtHR.

Finally, the precise relationship of the EU legal order to that of the ECHR is currently being negotiated further in the context of the accession process of the EU to the ECHR. The issues being discussed in the negotiations include the autonomy of the EU legal order and whether or not internal procedures have to be exhausted for the admissibility of the ECHR.

c) The influence of international (soft) law

A second source for the development of the general principles are the international human

Bosphorus Hava Yolları Turları v Ireland, 45036/98, paras.137 and 153; Contravening cases in the context of state responsibility by NATO member states and the non-recevability ratione personae: ECtHR (GC), 2 May 2007, Behrami and Behrami v France, 71412/01; ECtHR (GC), 2 May 2007, Saramati v France, Germany and Norway, 78166/01.


67 Article 30, §4 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969; Article 351 TFEU.


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rights treaties to which the EU Member States have acceded, such as the International Convention on Civil and Political Rights. Furthermore the ECJ is prepared to investigate the compatibility of European legislation and international treaties, if this legislation states its compatibility in its preamble. Although the Court has not referred to the Geneva Convention of 1951 as a source of general principles, based on these criteria the Convention would be applicable. Indeed, the Procedures Directive states its compatibility with the Geneva Convention in its Recital 7. The applicability of “soft law”, such as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the Geneva Convention, is more questionable. The Court refused to apply the opinions of the Human Rights Committee for the implementation of the ICCPR. A similar consideration is relevant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, which may also be applicable to asylum cases.

d) The creating power of the ECJ

Thirdly, the ECJ has developed rights independently of those rights guaranteed by the ECHR through its case law. The most important of these rights is ‘the right to human dignity’. In the sphere of asylum law the result of this, together with Article 13 ECHR, is that asylum seekers should not be deported to a country where an inhumane and degrading treatment, or the death penalty awaits them (the ‘Soering-effect’).

72 Article 78, §1 TFEU: “The Union shall develop a common policy on asylum (...) ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”. See also: Consideration 2 to Council Directive 2005/85/EC.
73 Case C-249/96, Grant, 1998, ECR I-621.
Finally, the Charter of Fundamental Rights is also a part of the general principles of European law (see infra).

B.3. The protection level of the general principles

The general principles obtained from these sources, are used to interpret European Law in the broad sense. In addition, these principles also form the basis for assessing the validity of European legislation. The standard of protection granted by these general principles is neither minimal nor maximal. The ECJ makes a variable consideration, based on a balance between the general and individual interests. In doing so, the Court considers the constitutional traditions common to the Member States.

Even if the EU legislation only defines minimum standards, a transposition by Member States at a higher level may nevertheless be necessary. This may be the case if this is necessary to fulfill the protection standard of the general principles, for instance an effective procedural protection.

B.4. The juridical value since the Lisbon Treaty

These general principles will retain their value as an independent source of law, even after the EU Charter was granted a treaty status since the entry into force of the Treaty of Lisbon. They are particularly relevant when the Court must decide whether certain rights exist that are not included in the Charter. Or when article 53 of the Charter ('level of protection', see infra) would be interpreted as a limitation of the primacy of European law, in contrast to the general principles designed to ensure this primacy.

77 Article 6, §2 TEU requires the EU to protect fundamental right, as guaranteed by the ECHR. The ECJ is competent to interpret article 6, §2 TEU.
80 Article 6, §3 TEU.
C. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

C.1. The juridical value of the Charter in the ascendant

Ever since its promulgation in 2000 and even before the Charter of Fundamental Rights acquired binding force, the text generated effects as part of the general principals of European law.\(^{81}\) The Court of First Instance of the EU referred for example to Article 47 EU Charter (‘the right to an effective remedy and to a fair trial’). According to the Court this article confirmed the value of the general principle on the necessity of providing for a judicial review.\(^{82}\)

Since 1 December 2009, the date of entry into force of the Lisbon Treaty, the Charter of Fundamental Rights has binding force and even the same status as a treaty.\(^{83}\) So far some legal implications are unclear. Have these rights, unlike the general principles, a direct effect? The Charter has at least primacy on all measures taken by Member States to transpose European law. The fundamental rights are also addressed to the EU institutions.\(^{84}\)

C.2. The sources underlying the Charter of fundamental rights

The sources that underlie the EU Charter are the ECHR, other international human rights treaties, national constitutional traditions and the European right on freedom of movement. Most of these rights are already part of the European legal order through the concept of the general principles. But the EU Charter also includes rights that have not been recognized as a general principle. These are article 2 EU Charter (‘the right to life’), article 4 EU Charter (‘the prohibition of torture and inhuman or degrading treatment or punishment’) and article 6 EU Charter (‘the right to liberty and security’). Also an article that was developed in the jurisprudence of the ECHR, namely the ‘Söering-effect’, is included in the Charter. This is the right in article 19 EU Charter not to be expelled to countries that for example torture, or that would perform the death penalty with respect to that person.\(^{85}\)

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83 Article 6, §1 TEU.
85 ECtHR, 19 January 1989, Söering v United Kingdom, 14038/88; Articles 2 and/or 3 taken together with
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In addition, the EU Charter contains rights that do not find their origin in the ECHR or its case law. Article 1 EU Charter (‘the right to human dignity’), emerged in the jurisprudence of the ECJ. By means of the EU Charter, this article can effectuate more broadly in asylum law. Article 18 EU Charter (‘the right to asylum’) exists in no other Treaty and has not been applied by the ECJ. So far the added value of this article is unclear.

C.3. The interpretation of rights and freedoms

The interpretation rules are defined in Articles 52 to 54 of the Charter. These articles and all other articles of the Charter, were in turn provided with an explanation. The Praesidium which drafted the Charter, added to each article a framework of the human rights law in a European context. This explanation from the Praesidium was included in Declaration 12 to the promulgation of the Constitutional Convention in 2004. “These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter”. 87

In the text of the EU Charter, article 52, §2 EU Charter states that rights that have their origin in the treaties of the Union, are applied under the conditions and within the limits contained therein. This applies, for example with regard to the rights arising from citizenship of the Union.88

Article 52, §3 EU Charter provides that the fundamental rights consistent with provisions of the ECHR have the same meaning and scope as those of the ECHR.89 The “ECHR” covers both the text of the Convention and its Protocols. The interpretation of the "meaning and scope" refers not only to the texts of the ECHR, but also to the jurisprudence of the ECtHR.90 This paragraph is intended to ensure consistency of interpretation of the Charter and the ECHR. This without

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86 Article 6, §1 TEU; Titel VII EU Charter.
88 Præsidium Explanations to the Charter of Fundamental Rights, article 52.
90 Præsidium Explanations to the Charter of Fundamental Rights, article 52.
restricting unduly the autonomy of the European Union. The EU law may provide a higher protection than the ECHR.\textsuperscript{91} The level of protection provided by the Charter may under no circumstances be lower than that of the ECHR.

This requirement shall not affect the ability to waive certain rights as stipulated in article 15 ECHR.\textsuperscript{92} Proportional measures are allowed in the event of war or of a public emergency which threatens the existence of the people. This provision is directly confirmed in article 4, §1 TEU and is equivalent to the responsibilities of Member States under the article 72 TFEU (‘internal order and public security’) and article 347 TFEU (safeguard the functioning of the internal market in case of a serious disturbance of the public policy, war(danger), etc.).

The articles of the EU Charter that are relevant to the European asylum law and that have the same meaning and scope as the corresponding articles of the ECHR are: Article 2 EU Charter and Article 2 ECHR (‘the right to life’), Article 4 EU Charter and Article 3 ECHR (‘the prohibition of torture and inhuman or degrading treatment or punishment’), Article 5, §1 and §2 EU Charter and Article 4 ECHR (‘the prohibition to slavery and forced labour’).

There exist also articles in the Charter relevant for asylum law whose meaning is the same as the corresponding articles of the ECHR, but its scope is wider: article 47, §2 and §3 EU Charter (‘the right to an effective remedy and to a fair trial’) correspond to article 6, §1 ECHR, but its limitation to civil rights and obligations and to an indictment does not apply with respect to the implementation of European law.\textsuperscript{93} This confirms that article 47 EU Charter also applies to administrative procedures such as asylum procedures.

Moreover, article 53 EU Charter states that human rights and fundamental freedoms already recognised in European or international treaties to which the Union or all of the Member States have acceded, within their respective scope based on the EU Charter should not be interpreted as a limitation to the afforded protection.\textsuperscript{94}

\textsuperscript{91} Article 52, §3 EU Charter.
\textsuperscript{92} Præsidium Explanations to the Charter of Fundamental Rights, article 52.
\textsuperscript{93} Præsidium Explanations to the Charter of Fundamental Rights, article 52.
fundamental rights that correspond to ECHR provisions include a "Soering-effect" (see supra). This "Soering-effect" thus extends beyond the addition in article 19 EU Charter in case of torture or the death penalty. Moreover, these interpretation rules imply that protection standard must at least be the same as the standard guaranteed by the Geneva Convention and the Convention Against Torture.

To these interpretation rules a number of new provisions were added, in comparison to the original version as promulgated in 2000. The Charter was renewed after the entry into force of the Lisbon Treaty. Both the national constitutional practices and legislation, and the executive arm of the EU institutions have hereby gained importance. Article 52, §4 EU Charter states: “Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”.

This paragraph is based on the text of article 6, §3 TEU and builds on the jurisprudence of the ECJ in the cases of Hauer of 1979 and Omega of 2004 (see supra).95

“There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right. (para. 34) (...) (T)he protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (para. 35) (...) It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.”96

Accordingly, the interpretation consistent with the constitutional traditions common to the Member States does not lead to the "lowest common denominator" in accordance with Article 52 §4 EU Charter. It guarantees more a level of protection as required by European law and in harmony with those traditions.97

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Another new rule of interpretation which gives prominence to the Member States is the Article 52, §6 EU Charter: “Full account shall be taken of national laws and practices as specified in this Charter“. This refers to the subsidiarity rule in Article 5 §1 TEU.

The interpretation rule of article 52, §5 EU Charter does not refer to ‘rights’ but to ‘principles’ of the EU Charter:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

Most of the principles of the EU Charter are to be found in Titel III (‘Equality’) and Titel IV (‘Solidarity’). An example is the article 18 on the right to asylum. These principles cannot require a direct claim for EU institutions or Member States to undertake positive action. They can however be of relevance when courts interpret legislation implementing these principles.

The last of the newly added rules of interpretation aims to provide a uniform interpretation of the Charter. “The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”

C.4. Limitations to fundamental rights

The application of the EU Charter can only be limited under restrictive conditions listed in Article 52, §1 EU Charter. The limitation of fundamental rights must be provided by law and respect the essence of the rights and freedoms. This also applies to the lower limit that the level of protection of the Geneva Convention provides. Furthermore, the restriction must be proportionate with respect to the need to protect the rights and freedoms of others, or with respect to the objectives of general interest of the Union. This text is based on the jurisprudence of the ECJ.

98 Article 52, §7 EU Charter.
100 Case C-292/97, Karlsson, 2000, ECR I-2737, para. 45.
equality of States, respect for national identities, public order, safety and health, and public morality.\textsuperscript{101}

These restrictive conditions to limit the fundamental rights mean that article 47 EU Charter (‘the right to an effective remedy and to a fair trial’), in contrast to the corresponding Article 6 ECHR, is not limited to civil litigation and criminal proceedings. Article 47 EU Charter is also applicable to administrative procedures such as asylum procedures.

The ECJ made in 2006 a first reference to the Charter, before it became binding. The Directive on the right to family reunification was tested against the article 8 ECHR and article 7 EU Charter (‘the right to family life’), and the article 14 ECHR and article 21 EU Charter (prohibiting discrimination based on age).\textsuperscript{102}

\textsuperscript{101} Præsidium Explanations to the Charter of Fundamental Rights, article 52; Articles 3 and 4, §1 TEU; Article 35, §3, 36 en 346 TFEU.

\textsuperscript{102} Case C-540/03, Parliament v Council, 2006, ECR I-5769.
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D. THE FAR-REACHING IMPLICATIONS OF ARTICLE 47 EU CHARTER IN EU LAW

“1. 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.

2. 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.

3. 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 47 EU Charter of Fundamental Rights has crystallized the right to an effective remedy and to a fair trial in European law. The use of the term “everyone” in paragraphs 1 and 2 identifying the recipients of these rights, causes a procedural revolution.

Previously, there was obviously already a similar general principle in European law, developed by the jurisprudence of the ECJ. And this principle continued to build on the jurisprudence of the ECtHR. In the case of the latter court a protection “par ricochet” was granted in respect to asylum cases. This is the coupling of for example Article 2 (‘right to life’) or Article 3 (‘the prohibition of torture’) to Article 13 ECHR. But the main difference is that, through Article 47 EU Charter, the ECtHR case law with respect to Article 6 ECHR (‘the right to a fair trial’) will be applicable more extensively in EU law. Before the ECtHR article 6 ECHR was excluded for administrative procedures (both concerning the well-foundedness of the asylum application and the decision on expulsion).

“Compte tenu de ce qui précède, la Cour estime que la procédure en relèvement de l’interdiction du territoire français, objet du présent litige, ne porte pas sur une contestation de « caractère civil » au

103 Case C-222/84, Johnston v Chief Constable of the RUC, 1986, ECR 1651; Case C-222/86, Heylens, 1986, ECR 04097; Case C-91/97, Borelli, 1992, ECR I-6313.


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sens de l'article 6 § 1. Le fait que la mesure d'interdiction du territoire français a pu entraîner accessoirement des conséquences importantes sur la vie privée et familiale de l'intéressé ou encore sur ses expectatives en matière d'emploi ne saurait suffire à faire entrer cette procédure dans le domaine des droits civils protégés par l'article 6 § 1 de la Convention (...).”

Article 47 EU Charter in contrast focuses both on criminal and civil matters as well as administrative disputes. This follows from the jurisdiction of the ECJ in the case of Les Verts v European Parliament in 1986. The Praesidium of the Charter commented on this matter in its explanation: “In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. (...) Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.”

What is the value of the applicability of Article 6 ECHR and the binding force of article 47 EU Charter with respect to the already existing general principle and the rights that article 13 ECHR ("right to an effective remedy") implies? First, article 13 ECHR guarantees only a "remedy" for a “national authority”. It is not required that this authority is a court. Article 6, §1 ECHR and article 47, §2 EU Charter by contrast command “a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”. A “national authority” is insufficient, the “determining authority” must be a "court".

Secondly, article 6 ECHR requires access to all authorities as provided by national law, including courts of appeal and a court of cassation. Finally, the ECtHR held as regards article 6 ECHR that the procedural limitations on the exercise of this right may not be overly formalistic. Likewise, the financial costs of entry must legitimate and proportionate, and they may not prevent access to a court. Article 6, §3 ECHR also includes specific procedural safeguards (see infra).

106 ECtHR (GC), 5 October 2000, Maaouia v. France, 39652/98, para. 38.
109 Article 6, §1 ECHR.
111 Similar requirements in EU law: Case C-276/01, Steffensen, 2003, ECR I-3735, para. 66.
112 ECtHR, 24 May 2006, Weismann v Romania, 63945/00; And specifically regarding asylum procedures: ECHR, 13 July 1997, Tolstoy Miloslavsky v United Kingdom, 18139/91; Case C-20/92, Hubbard v Hamburger, 1993, ECR
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A formal right to establish a procedure does not suffice. Practical barriers to access may not constrain access to an effective remedy. This is the so called ‘principle of effectiveness’. When the effective protection of a fundamental right under the EU Treaty (such article 18 EU Charter concerning ‘the right to asylum’) is compromised, an effective remedy must be available:

“Since free access to employment is a fundamental rights which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right.”

Below, the specific factors are discussed that are required to ensure the right to effective remedy and access to a court. All these basic principles laid down in the national judicial system may be subject to a review by the Court of Justice of the EU.

113 ECtHR, 9 October 1979, Airey v Ireland, 6289/73, para. 24: The ECtHR requires the same with regards to EU law.
III. A. General Evaluation

III. THE (POTENTIAL) IMPACT OF HUMAN RIGHTS DISPOSITIONS ON EUROPEAN ASYLUM PROCEDURES

A. GENERAL EVALUATION OF THE FIRST AND SECOND GENERATION (PROPOSED) PROCEDURE DIRECTIVES

Whereas the 2005 Procedure Directive formulates minimum standards regarding asylum procedures, the 2009 Recast Proposal and the 2011 Amended Recast Proposal aim at ensuring a higher degree of harmonisation in the EU Member States. This is, however, no maximum harmonisation. Article 5 Amended Recast Proposal still allows Member States to provide more favourable standards.

A.1. The first generation asylum procedures directive: beneath the minimum protection level

As will be analysed and established below, the Procedures Directive formulates minimum standards that do not always comply with the minimum protection required by fundamental rights. This is disappointing, as it is one of the aims for the EU, especially since the incorporation of the EU Charter as a text with Treaty status. The UNHCR has repeatedly called for better standards within the CEAS. UNHCR argues that, in a CEAS where asylum seekers are transferred from one Member State to another, the applicants should be entitled to the same rights everywhere in the EU. This is a requirement in order to make the Dublin II Regulation function with full respect for fundamental rights. In practice, however, there are enormous differences between the Member States. This is due to the lack of sufficient protection standards in EU legislation, and in particular, the Procedures Directive.

The analysis below will be conducted based on various sources. First, the general principle of the right to an effective remedy and the jurisprudence of the ECtHR and the ECJ provide the basis of this analysis. Second, the opinions of renowned authors in this field are included. Third, where relevant, the detailed reports of several instances are taken into account, such as the European Commission’s 2009 Impact Assessment Report, the 2010 UNHCR report containing recommendations, and the specific reports of the EU’s Agency for Fundamental Rights.
A.2. The influence of human rights on the emergence of the second generation asylum procedures directive

Based on the results of the fundamental rights standards in the Procedures Directive, changes and improvements can be detected in the 2009 Recast Proposal and the 2011 Amended Recast Proposal. In general, these proposals lay down new rules ensuring a higher degree of protection of fundamental rights compared to the 2005 Procedures Directive.

Moreover, it needs to be highlighted that also the scope of the proposed second generation Procedures Directive has been widened. First, on territorial aspects, it has been stated that the new protection rules will also apply as regards the waters of the Member States. This is merely a clarification, since this was already implied before, as these protection rules are part of the Member States territories and equally fall under the protection of the ECHR pursuant to its scope of jurisdiction.\textsuperscript{117} This approach has been confirmed in the 2012 ECtHR judgement in \textit{Hirshi Jamaa v Italy}.\textsuperscript{118}

Second, the second generation Procedures Directive will not only apply to asylum procedures, but also regarding applications for subsidiary protection. Therefore, the proposals use the general term of ‘international protection’ comprising of both types of protection. The Recast Proposal not only widens the scope of the Procedures Directive to all types of international protection, it also introduces an explicit hierarchy between the two regimes. \textit{“Applicants for international protection shall first be examined to determine whether applicants qualify as refugees. If not, they shall be examined to determine whether the applicants are eligible for subsidiary protection.”}\textsuperscript{119} This hierarchy had already been explicitly established in the 2010 case of \textit{Abdulla} before the ECJ.\textsuperscript{120} This is relevant, given that the asylum regime offers a more extended protection. Under the 2005 Procedures Directive, this hierarchy was already implicitly present.\textsuperscript{121} Back then, the distinction

\textsuperscript{117} Article 1 ECHR.
\textsuperscript{118} ECtHR, 23 February 2012, \textit{Hirshi Jamaa v Italy}, 27765/09.
\textsuperscript{120} Joined cases C-175/08, 176/08, 178/08 and 179/08, \textit{Salahadin Abdulla and others}, 2010, not yet reported, paras. 77-80.
\textsuperscript{121} PEERS, S., ‘Chapter 14: Asylum Procedures’ in PEERS, S. and ROGERS, N., eds., \textit{EU Immigration and...
III. A. General Evaluation

between the two regimes was larger, as the procedures for subsidiary protection were not subject to the protection offered by the 2005 Procedures Directive.

Below, a detailed analysis is made of art. 47 EU Charter since the entry into force of the Lisbon Treaty. This analysis consists of an evaluation of the interpretation of these provisions. In addition, the compatibility of the amended recast proposal for the second generation EU asylum procedure legislation with the human rights dispositions is analysed.

III. B. Access to Justice

B. THE ACCESS TO JUSTICE IN EU ASYLUM PROCEDURES

The scope for the analysis under Part B is limited. Although these elements are an integral part of the right of access to justice, this part will not deal with legal aid (see infra), the requirements of a personal interview, or the right to an effective remedy (see infra).

B.1. The requirement of access to justice

a) The 1951 Geneva Convention’s influences

The principle of ‘non-refoulement’, the core principle of asylum law since 1951, implies the access to a national authority or a court.122 This principle prohibits any Contracting State to expel or return an asylum seeker to the frontier of the territories from which the refugee has fled under article 1A, §2 of the 1951 Geneva Convention.123 The principle of ‘non-refoulement’ is complemented by the right of ‘access to courts’ – mind the plural – guaranteed by article 16 Geneva Convention.124 Notwithstanding its non-binding character, article 16 and the dispositions of the rest of the Geneva Convention do provide for a source that allows the general principle of a right to a fair trial within European law125, and to determine the protection levels of articles 18 and 47 EU Charter126.

b) Access to justice under the ECHR

124 Article 16 of the Convention Relating to the Status of Refugees, Geneva, 28 July 1951 states the following:

“I. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.”
125 All EU Member States adhered to the 1951 Geneva Convention. Consequently, this Convention is a source of fundamental rights within European law (see supra).
126 Article 53 EU Charter of Fundamental Rights.
III. B. Access to Justice

Articles 13 and 6 ECHR contain the right of access to a 'national authority' (article 13) and a 'court' (article 6). The latter is interpreted as one court. Consequently, article 6 ECHR does not provide for a right to appeal. Notwithstanding the fact that article 13 only requires the access to an effective remedy before a national authority, which is not necessarily a court, this ‘authority’ does need to fullfil certain conditions. Most importantly, the national authority needs to be independent and impartial. These prerequisites are assessed case by case.

Although article 6 ECHR does not require expressis verbis the right of access to justice, the ECtHR has adjudged that the procedural guarantees of this article do provide for such a right. Moreover, in case an appeals procedure and/or a procedure in cassation is foreseen, article 6 ECHR applies as well. The court dealing with the application must have full jurisdiction. The court must thus to be able to pronounce itself on all aspects, both factual and legal questions.

The right of access to justice is not absolute. Article 6 ECHR can be limited by the margin of appreciation of the contracting states, and by the conditions provided for by the case of Ashingdane. These limitations can not restrict the right of access to justice in such a manner so that as a result, the essence of the right is no longer guaranteed. Neither is a limitation allowed if it does not have a legitimate aim, and if the measures applied are not proportional in relation to that aim.

c) The right to an independent and impartial court

Evidently, the court must be independent and impartial to be able to take a decision regarding a particular application. ‘Independence’ relates to the appointment of the judges and the duration of their mandate, guarantees against pressure from third parties and an independent

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128 ECtHR, 26 March 1987, Leander v Sweden, 9248/81, para. 77.
129 ECtHR, 21 February 1975, Golder v United Kingdom, 4451/70; ECtHR, 22 March 2007, Staroszczyk v Poland, 59519/00, para. 123.
130 ECtHR, 22 March 2007, Sialowska v Poland, 8932/05, para. 104: Before a court of cassation, the procedure may however be of a formal nature, due to the particular role of this type of court.
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court. The independence test under article 6 ECHR has been brought before the ECtHR within an administrative procedure. As a minimum, the court needs to be independent from the parties and the executive powers – especially in case the national authorities are a party in the case. In administrative procedures, the composition of the court is all the more important. If civil servants undertake the task of judges in an administrative court, the ECtHR requires them to do so in their own name. The term ‘impartiality’ contains a subjective component (whether the judges estimate themselves to be impartial) and an objective component (based on evidenced behaviour).

*d) The right to understandable information and a personal interview*

The ECtHR case law requires under article 6 ECHR that information is provided in a language the defendant in a criminal procedure understands. The indictment equally needs to be translated into a language the defendant understands. Although article 6 ECHR does not apply to administrative procedures, its interpretation does provide for a source to interpret the requirements of article 47 EU Charter (see supra). Consequently, the language requirements posed by the ECtHR equally apply to asylum procedures within the scope of EU law.

Finally, to give a full explanation of the circumstances for seeking asylum, the applicant has the right to a personal interview. This was discussed elaborately in the case of Hatami before the European Human Rights Commission of the ECtHR. In this case, the Commission concluded that a violation of article 3 ECHR had taken place, due to the negative decision of the Swedish determining authority. The decision of the Swedish determining authority was based on vagueness and inconsistencies in Hatami’s story. The Commission stated that this decision cannot be taken based on an interview which “lasted less than ten minutes with interpretation provided over the

133 ECtHR, 6 May 2003, Kleyn and others v the Netherlands, 39343/98, para. 190; MOLE, N. and HARBY, C., The right to a fair trial. A guide to the implementation of article 6 of the European Convention on Human Rights, Council of Europe, Belgium, 2006, p. 30-38.
135 ECtHR, 16 July 1971, Ringeisen v Austria, 2614/65, para. 95.
136 ECtHR, 6 May 2003, Kleyn and others v the Netherlands, 39343/98, para. 191.
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phone”. It was only reported on “one page and does not explain or set out in any detail the applicant's situation”. This report was written in a language the applicant did not understand and the contents were not explained to the applicant. According to the Commission, “no reliable information” could be deduced from this interview. Another case in point is Chahal. Here the ECtHR condemned the failure to provide a full record of the personal interview, as this is the main fact-finding instrument.

The case of Chahal is also relevant when the right to information needs to be held against national security considerations. In earlier cases outside the sphere of asylum law, the ECtHR had held that where questions of national security are an issue, an effective remedy under article 13 ECHR requires that "a remedy that is effective as can be", taking into account the necessity of relying on secret sources of information. In the case of Chahal regarding an asylum application, the ECtHR makes a distinction from these previous cases and further clarifies that:

"150. (...) The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3 (art. 3), where the issues concerning national security are immaterial. 151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3 (art. 3), the notion of an effective remedy under Article 13 (art. 13) requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (art. 3). This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State. 152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective."

e) The impact of the Geneva Convention and the ECHR on article 47 EU Charter

Based on the interpretations of the Geneva Convention and the ECHR, article 47 EU Charter prescribes in §2 that one has the right of access to “an independent and impartial tribunal previously established by law”. In previous cases, the ECJ has interpreted the term 'tribunal'. In the

140 ECtHR (Commission of Human Rights), 23 April 1998, Hatami v Sweden, 32448/96, para. 104
141 ECtHR, 15 November 1996, Chahal v United Kingdom, 22414/93.
142 ECtHR, 6 September 1978, Klass and Others v. Germany, Series A no. 28, para. 69; ECtHR, 26 March 1987, Leander v. Sweden, 9248/81, para. 84.
143 ECtHR, 15 November 1996, Chahal v United Kingdom, 22414/93, paras. 150-152.
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case of Graham Wilson, the Court adjudged that an organ composed of members to a Bar cannot decide on an application for membership, in case a positive decision would result in an elevated competition for the members of that organ.\textsuperscript{144} The independence and impartiality of a tribunal thus require that with regards to the composition of the organ, the duration of its mandate, the grounds for abstention or dismissal of its members, rules must exist to rule out a reasonable doubt concerning the impossibility for external factors to influence that organ and concerning its neutralty \textit{vis à vis} the interests in the case.\textsuperscript{145} Subsequently, a tribunal needs to be adequately independent from the decision-making administration, which is a relevant requirement for the decision making bodies in national asylum procedures. In the case of Schmid, the ECJ stated that:

\begin{quote}
"The authority before which an appeal can be brought against a decision adopted by a department of an administrative authority cannot be regarded as a third party in relation to that department and, accordingly, as a court or tribunal within the meaning of Article 234 EC, where it has an organisational link with that administrative authority (see, to that effect, Corbiau, paragraph 16). This will be so unless the national legal framework is such as to ensure a separation of functions between, on the one hand, the department of the administrative authority whose decision is being challenged and, on the other, the authority which rules on complaints lodged against decisions of that department without receiving any directions from the administrative authority to which that department is responsible (see, to that effect, Gabalfisa and Others, paragraph 39)."\textsuperscript{146}
\end{quote}

In addition, on the principle of the equality of arms and the rights of defence, the Advocate-General Kokott observed that:

\begin{quote}
"The principle of respect for the rights of the defence is a fundamental principle of Community law. That principle is infringed where a judicial decision is based on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment."\textsuperscript{147}
\end{quote}

B.2. The 2005 Procedures Directive: a meager access to justice

The right to a fair trial and the access to justice are transposed into concrete dispositions in article 4 and Chapter II (Basic principles and guarantees) of the 2005 Procedures Directive. These

\begin{flushleft}
144 Case C-506/05, Graham Wilson, 2006, ECR I-8613, para. 52.
147 Case C-144/07, Commission of the European Communities v Alrosa Company Ltd: Opinion of Advocate-General Kokott, 17 September 2009.
\end{flushleft}
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include the access to the procedure (article 6) and the right to remain in the Member State pending the examination in the first instance procedure (article 7). In addition, the requirements are set out for the first instance determining authority (article 4), its examination (article 8) and decision (article 9). The special cases explained in Chapter III are not examined in Part B. A selection of those issues is analysed separately (see infra).

a) Whose access to justice?

The asylum seeker’s access to justice is enshrined in article 6, §2 Asylum Procedures: “each adult having legal capacity has the right to make an application for asylum on his/her own behalf”. For so-called ‘dependant adults’, a different regime applies. An applicant can introduce the procedure on behalf of his/her dependants, provided that the dependant adult consents to the lodging of the application on their behalf. However, this decreases the rights of the ‘dependant adult’ considerably. It is not required that the dependant adult is interviewed personally, neither is a separate decision on the dependant adult required. To the right of a minor to make an application on his/her own behalf, restrictions may apply in which the consent of the minor is not required. The Member States have large discretionary powers in this matter.

During the examination of the application in the first instance procedure, the asylum seeker has the right to remain in the Member State ex article 7, §1 Procedures Directive. This right does not apply pending appeals procedures (see infra). Article 7, §2 Procedure Directive introduces limitations in case of an extradition. According to the Soering case law of the ECtHR, this limitation is not valid in case of a possible further chain removal to a country deemed unsafe for the applicant. Moreover, this invalidity applies even more so in case of an extradition to the country...

148 Article 6, §3 Asylum Procedures Directive 2005/85/EC.
149 Article 12, §1 Asylum Procedures Directive 2005/85/EC.
150 Article 9, §3 Asylum Procedures Directive 2005/85/EC.
151 Article 6, §3 and 4 Asylum Procedures Directive 2005/85/EC.
152 Article 6, §4 Asylum Procedures Directive 2005/85/EC.
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of origin. This is quite simply a violation of the principle of 'non-refoulement'. The second consideration to the Procedures Directive expressly supports this interpretation: “(...) establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention (...), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.”

b) The requirements set for the determining authority

The 'determining authority' is defined as “any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I”. Article 4, §1 Procedures Directive regarding the requirements for the determining authority refers to articles 8, §2 and article 9 Procedures Directive. Most importantly in this regard, the determining authority must examine and take decisions “individually, objectively and impartially”. The requirement of 'independence', which is separate from 'impartiality' under the interpretation of article 47 EU Charter, is, however, not expressly mentioned. This independence is required by the case law of the ECJ. Also in administrative procedures the independence test of the court is necessary according to the ECtHR (see supra). It is nevertheless remarkable that articles 4, 8 and 9 Procedures Directive do not require independence expressis verbis. It is unclear whether this creates independence problems in practice.

c) Information – to be understood or not to be understood

Furthermore, according to article 8 Procedures Directive, the country of origin information needs to be up to date and the personnel must have the knowledge about the relevant standards. Regarding the requirements for the decision, it needs to be given in writing and the reasons for a negative decision need to be stated in fact and in law. The information on how

155 The principle of 'non-refoulement' is a core procedural fundamental right in asylum procedures, under article 33, §1 Geneva Convention and articles 3 and 13 ECHR, as a source of article 47 EU Charter (see supra).
157 Article 8, §2 a Asylum Procedures Directive 2005/85/EC.
158 Article 8, §2 b Asylum Procedures Directive 2005/85/EC.
159 Article 8, §2 c Asylum Procedures Directive 2005/85/EC.
160 Article 9, §1 Asylum Procedures Directive 2005/85/EC.
161 Article 9, §2 Asylum Procedures Directive 2005/85/EC.
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to challenge a negative decision equally needs to be given in writing.\textsuperscript{162}

Article 10 Procedures Directive provides for a number of communication guarantees. Information and the decision must be provided "in a language which they may reasonable be supposed to understand".\textsuperscript{163} The recommendation of the European Union's Fundamental Rights Agency is quite different. "To be meaningful, oral as well as written information should be provided in a language the asylum seeker understands, which should be elevated in law and in practice to become the European Union standard."\textsuperscript{164} Article 10 Procedures Directive, however, does not guarantee that the asylum seeker actually understands the information and decision. The provision is merely based on a presumption of understanding. In case the information and/or decision is not correctly understood by the applicant, this has consequences both for the first instance and the appeals procedure. Indeed, the asylum seeker might not fully understand on which grounds a negative decision is taken, and how to appeal. To the contrary, the understanding of the asylum-seeker is required according to the ECtHR \textit{Hatami} case law via article 47 EU Charter (see supra).\textsuperscript{165}

A second guarantee is (albeit partially) ensured by article 10 Procedures Directive, namely the services of an interpreter. These are only provided "whenever necessary". At minimum, an interpreter translates the applicant's answers during the personal interview when "appropriate information cannot be ensured without such services". Only when the competent authorities call upon the applicant shall the services of an interpreter be paid with public funds.\textsuperscript{166} Accordingly, in other instances, even in case the applicant lacks sufficient resources, these services may be required to be paid for by the applicant. This provision is contrary to the ECtHR case law of \textit{Hatami}, which requires an interpreter to make the interviewer and the applicant able to understand each other.\textsuperscript{167}

d) The applicant's personal interview

"Before a decision is taken by the determining authority, the applicant for asylum shall be given the

\begin{itemize}
\item \textsuperscript{162} Article 9, §2 Asylum Procedures Directive 2005/85/EC.
\item \textsuperscript{163} Article 10, §1 a and e Asylum Procedures Directive 2005/85/EC.
\item \textsuperscript{164} European Union Agency for Fundamental Rights, \textit{Access to effective remedies: the asylum-seeker perspective, Thematic report}, Vienna, 2011, p. 9.
\item \textsuperscript{165} ECtHR (Commission of Human Rights), 23 April 1998, \textit{Hatami v Sweden}, 32448/96, paras. 96-109.
\item \textsuperscript{166} Article 10, §1 b Asylum Procedures Directive 2005/85/EC.
\item \textsuperscript{167} ECtHR (Commission of Human Rights), 23 April 1998, \textit{Hatami v Sweden}, 32448/96, paras. 96-109.
\end{itemize}
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opportunity of a personal interview on his/her application (...)” is guaranteed by article 12, §1 Procedures Directive. The second and third paragraph go on to enlist a large number of exceptions to this rule. The §2 derogations apply to an applicant raising issues of no or minimal relevance to the refugee status168, an application considered unfounded because the applicant comes from a ‘safe country of origin’ or a ‘safe third country’169 or “the applicant has made inconsistent, contradictory, unlikely, insufficient representations which make his/her claim clearly unconvincing(...)”170. Member States may also refuse a personal interview when a subsequent application raises no new elements171, or if the application is merely made to delay or frustrate a removal decision172. “Where it is not reasonably practical” is an occasion to bypass a personal interview under §3, “in particular” when the applicant is deemed “unfit or unable to be interviewed owing to enduring circumstances beyond his/her control”.173 Remarkable for this last ground for derogation is that a medical or psychological certificate is not mandatory. “Reasonable efforts” must, however, be made “to allow the applicant or the dependant to submit further information”.174 For all derogations the absence of a personal interview “shall not prevent the determining authority from taking a decision”.175

In an effort to ensure the validity of these derogations, the Procedures Directive provides for two safeguards. First, the list of §2 derogations are made “on the basis of a complete examination of information provided by the applicant”. The term ‘complete’ might, however, apply to a very small amount of information provided, as there are no standards foreseen for the opportunity of the applicant to establish his/her refugee claim. This safeguard therefore does not substantially comply with the right of the applicant to a personal interview.176 This rights has been established by the ECtHR case law177 as encompassed by article 47 EU Charter (see supra).178

168 Articles 12, §2 c jo. article 23, §4 a Asylum Procedures Directive 2005/85/EC.
169 Articles 12, §2 c jo. article 23, §4 c Asylum Procedures Directive 2005/85/EC.
170 Articles 12, §2 c jo. article 23, §4 g Asylum Procedures Directive 2005/85/EC.
171 Articles 12, §2 c jo. article 23, §4 h Asylum Procedures Directive 2005/85/EC.
172 Articles 12, §2 c jo. article 23, §4 j Asylum Procedures Directive 2005/85/EC.
173 Articles 12, §3 Asylum Procedures Directive 2005/85/EC.
174 Articles 12, §3 Asylum Procedures Directive 2005/85/EC.
175 Articles 12, §4 Asylum Procedures Directive 2005/85/EC.
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Neither the second safeguard prevents article 12, §2 and 3 from violating article 47 EU Charter. “The absence of a personal interview (...) shall not adversely affect the decision of the determining authority.”179 According to professor Steve Peers, it is quite simply impossible to guarantee this safeguard. While the lack of an interview might not additionally substantiate a negative decision, the asylum seeker is deprived of the opportunity to establish his/her application through declarations. In practice, this deprivation will adversely affect the decision.180 Evidently, this effect will not be known without conducting an interview.

Article 13 Procedures Directive provides for standards for the conduct of the personal interview by a competent interviewer. Article 14 Procedures Directive ensures that a report is written “containing at least the essential information regarding the application”.181 It is however not guaranteed that the applicant has “timely access” to this report.182 Nor is the applicant’s approval of the content required under the Directive.183

These provisions do not correspond to the ECtHR case law. First, a report containing merely the essential information is not sufficient, as the jurisprudence requires a report to set out in detail the applicant’s situation in a full record of the personal interview (see supra).184 Moreover, if the written report is not made in a language the applicant understands, the content needs to be explained to him/her.185 According to ECtHR case law, it is thus insufficient to grant access to the written report only after the decision is taken by the determining authority.

If the report is not accessible before the first instance decision, access needs to be possible

178 Article 47 EU Charter is interpreted based to the corresponding article 6 ECHR, providing for the same or a higher protection level according to the interpretation rules in articles 52, §3 and 53 EU Charter (see supra).
179 Article 12, §5 Asylum Procedures Directive 2005/85/EC.
181 Article 14, §1 Asylum Procedures Directive 2005/85/EC.
183 Article 14, §3 Asylum Procedures Directive 2005/85/EC.
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“as soon as necessary for allowing an appeal to be prepared and lodged in due time”.\(^{186}\) This can be very problematic given the non-suspensive effect of appeals procedures (see infra). An applicant could already be removed from the Member State where the first instance procedure took place, before he/she received the report.\(^{187}\)

e) The scope of the guarantees ensured

These safeguards are however excluded for a number of procedures\(^{188}\), such as procedures where Dublin II applies\(^{189}\), procedures with national security considerations\(^{190}\), subsequent applications\(^{191}\), certain border procedures\(^{192}\) or expulsion towards a safe third country\(^{193}\). The language guarantees of article 10 Procedures Directive are also excluded for appeals procedures.\(^{194}\)

f) Conclusion: failing the test

The minimum standards do not fulfil the minimum level as required by article 47 EU Charter. The applicant is denied various crucial procedural guarantees that are necessary to ensure a full access to justice and a fair procedure. An applicant that does not have the right to information in a language he/she understands, and no guaranteed right to a personal interview in all cases, does not have ‘equal arms’. In addition, the scope of these ‘minimum standards below the minimum’ is very limited. The applicants falling outside its scope have even less procedural safeguards to rely on. Article 47 EU Charter, however, commands national determining authorities to apply a much higher standard. Accordingly, the relevance of these minimum standards can be questioned.

\(^{186}\) Article 14, §2 Asylum Procedures Directive 2005/85/EC.
\(^{188}\) Article 4, §2 Asylum Procedures Directive 2005/85/EC.
\(^{189}\) Article 4, §2 a Asylum Procedures Directive 2005/85/EC.
\(^{190}\) Article 4, §2 b Asylum Procedures Directive 2005/85/EC.
\(^{191}\) Article 4, §2 c Asylum Procedures Directive 2005/85/EC.
\(^{192}\) Article 4, §2 d and e Asylum Procedures Directive 2005/85/EC.
\(^{193}\) Article 4, §2 f Asylum Procedures Directive 2005/85/EC.
\(^{194}\) Article 10, §2 Asylum Procedures Directive 2005/85/EC.
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B.3. The second generation Procedures Directive: a general improvement

The 2009 Recast Proposal introduced considerable changes improving the access to justice and procedural guarantees at the first instance level. The Amended Recast Proposal published in 2011, however, diminishes again the procedural protection level granted to asylum seekers.

a) A broader scope

The Recast Proposal removed various limitations on the scope of the procedural guarantees. In the Recast Proposal, procedures with national security considerations, subsequent applications, certain border procedures or expulsion towards a safe third country are made subject to the same procedural guarantees as a regular asylum procedure. Accordingly, only the procedures pursuant to the Dublin Regulation are still not subject to the procedural guarantees of the Recast Proposal. Dublin-specific rules govern the procedures on the determination of the responsibility of a Member State to process an asylum application. This is, however, problematic, as these standards are lower than those foreseen in the Recast Proposal. Omitting Dublin procedures from the Recast Proposal is especially problematic, given the ECtHR jurisprudence in the case of M.S.S. v Belgium and Greece (see infra). The Amended Recast Proposal does not introduce changes to the scope. By doing so, the Amended Recast Proposal does not take this recent jurisprudence sufficiently into consideration (see infra).¹⁹⁵

The Recast Proposal, however, does widen the scope of international protection to subsidiary protection applications. Moreover, an explicit hierarchy is included: first the application is reviewed to accord the refugee status. Only in case of rejection of the refugee status, an application for subsidiary protection will be examined.¹⁹⁶

b) A better understanding of information

¹⁹⁶ Article 9, §2 Proposal for a Directive of the European Parliament and of the Council on minimum standards of procedures in Member States for the granting and withdrawing of international protection COM 2009, 554/4; Joined cases C-175/08, 176/08, 178/08 and 179/08, Salahadin Abdulla and others, 2010, not yet reported, paras. 77-80.
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The newly inserted article 7 Recast Proposal introduces information and interpreting provisions at border crossing points and in detention facilities. The access to those places of organisations providing advice and counselling is ensured as well.

The right of the applicant to be informed on the decision in a language he/she is reasonably supposed to understand, in case the applicant is not assisted or represented, is no longer limited to cases where free legal assistance is not available.\(^{197}\)

c) A widened access to procedures

Article 6 Recast Proposal introduces a text offering a much better guarantee of access to justice. More specifically, “an effective opportunity to lodge the application with the competent authority” is ensured.\(^{198}\) In this article, a clear distinction is made between ‘making’ a request for international protection (a simple request starting the procedure, without further requirements), and ‘lodging’ an application (involving all the administrative rules).

The so-called dependants of the applicant are also provided more individual rights. Adult dependants will be informed on the procedural consequences of consent to be dependent on the applicant, and on their right to introduce an application on their own behalf. The adult dependants of the applicant are granted the opportunity to express his/her opinion in private and to be interviewed on his/her application.\(^{199}\) Equally, the right of a minor to apply for international protection on his/her own behalf is introduced. Contrary to the limited minor rights in the Procedures Directive, this right of the minor applies not only to married but also unmarried minors.\(^{200}\) Pursuant to the Amended Recast Proposal, the right of a minor is, however, limited to

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minors with a legal capacity under national law. This can be remedied due to the widening of the persons able to represent the minor on his/her own behalf. Not only parents and family members can do so, but also responsible authorities. It is however not required or specified that the latter need to act independently from the Member State and in the interest of the minor they are responsible for.

d) A trained determining authority

Whereas the 2005 Procedures Directive did not list explicit requirements for the capacities and training of the first instance court personnel, article 4 Recast Proposal introduces a set of training components. Training requirements equally apply to border guards, police and immigration authorities and personnel of detention facilities. Through these provisions, a better information mechanism is ensured.

Even when the personnel examining the application is not sufficiently trained on certain specific issues, expert advice can be obtained. Article 9, §3 Recast Proposal introduces the requirement for this personnel to be instructed and have the possibility to seek expert advice on particular issues. These include amongst others medical, cultural, child or gender issues.

However, Article 9, §3 Recast Proposal fails to introduce the requirement of independence. The provisions on an “individually, objectively and impartially” taken decision remain unchanged. Consequently, the Recast Proposal still does not explicitly require the independence standard despite article 6 ECHR.

e) The applicant’s right to remain in the Member State

Applicants have the right to remain in the Member State pending the first instance proceedings. This right is protected under article 6, §8 ECHR. The right of a minor to apply for international protection on his/her own behalf is introduced. Contrary to the limited minor rights in the Procedures Directive, this right of the minor applies not only to married but also unmarried minors.

203 Article 6, §8 Equally, the right of a minor to apply for international protection on his/her own behalf is introduced. Contrary to the limited minor rights in the Procedures Directive, this right of the minor applies not only to married but also unmarried minors.
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procedure. This right may be refused in case of subsequent applications or a decision to surrender or extradite pursuant to the European arrest warrant.\textsuperscript{204} Under the Recast Proposal, this possibility to expel or extradite an applicant pending an asylum procedure is however subject to the condition that this would not result in direct or indirect refoulement.\textsuperscript{205} This condition reflects the expression of the requirements pursuant to article 3 ECHR and the principle of non-refoulement of the Geneva Convention.

\textit{f) Personal interview standards moving forwards and backwards}

In the Recast Proposal, the provisions of the right of the applicant to a personal interview are subject to considerable changes. These are made with due consideration of the ECtHR jurisprudence of the case law in Hatami. Pursuant to this case law and the interpretation rules of the EU Charter, article 18 and 47 EU Charter require the applicant to be interviewed. It must have been clear to the authors of the Recast Proposal that the two safeguards (see supra) do not suffice to remedy the severe limitations to the right of a personal interview. This was also stressed by the UNHCR report on the application of the Procedures Directive.\textsuperscript{206}

Accordingly, the personal interview may no longer be refused to an applicant raising issues of no or minimal relevance to the refugee status, an application considered unfounded because the applicant comes from a 'safe country of origin' or a 'safe third country' or because the applicant has made inconsistent, contradictory, unlikely, or insufficient representations. Neither may Member States refuse a personal interview in case of a subsequent application raising no new elements or an application merely made to delay or frustrate a removal decision.

To the contrary, when the applicant is deemed “unfit or unable to be interviewed owing to enduring circumstances beyond his/her control”, the personal interview may still be refused. The consultation of a medical expert is however required in case of doubt.\textsuperscript{207}


\textsuperscript{207} Article 13, §2 b Proposal for a Directive of the European Parliament and of the Council on minimum
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The requirements for the personal interview have equally been improved. The Recast Proposal takes gender, child and cultural issues into account. This will lead to less cases in which the interview has been biased because of such issues. For example, the interviewer may not wear a uniform and must be of the same sex if the applicant so requests.\textsuperscript{208} According to the UNHCR 2010 Analysis of the Procedures Directive, the implementation of these requirements needs to be accompanied by the training of the interviewers.\textsuperscript{209} Training requirements have been inserted in article 14, §1 Amended Recast Proposal. In practice, the creation of the European Asylum Support Office will improve the training standards of interviewers.

Finally, under the Recast Proposal the reporting of the personal interview has been considerably improved. The entire article 14 Procedures Directive subject to various limitations has been deleted and replaced by article 16 Recast Proposal. Contrary to the former article 14 Procedures Directive, article 16 Recast Proposal requires a transcript of the interview.\textsuperscript{210} Moreover, the applicant is ensured to have timely access to the transcript and if applicable the report, before the determining authority takes a decision.\textsuperscript{211} At last, the applicant is granted the opportunity to make comments or provide clarifications on possible mistranslations or misconceptions.\textsuperscript{212}

By contrast, the 2011 Amended Recast Proposal removed the requirement of a transcript of standards of procedures in Member States for the granting and withdrawing of international protection COM 2009, 554/4.


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a personal interview. Only a “thorough report containing all substantial elements” is provided.213 An improvement however is the suggestion – not the obligation – for Member States to record the personal interview on audio or audio-visual, as recommended by UNHCR.214

g) Conclusion: the largest defects remedied

The second generation Asylum Procedures Directive tackles the most severe criticisms with regards to the 2005 Procedures Directive. Considerable improvements have been made on the right to a personal interview. The widening of the scope of the procedural rights is also of relevance, given the large numbers of applications at the borders.

III. C. Legal Aid

C. THE ASYLUM SEEKER'S RIGHT TO LEGAL ASSISTANCE AND REPRESENTATION

C.1. The requirements posed by the right to legal assistance and representation

Legal aid is explicitly mentioned in article 47, §3 EU Charter. Not any natural person can rely on this provision, contrary to article 47, §1 and §2 EU Charter. The right to legal aid is preserved only for “those who lack sufficient resources” to hire a lawyer. Moreover, this legal aid needs to be “necessary to ensure effective access to justice”.

These conditions prove that the authors of the EU Charter drew from the jurisprudence of the ECtHR, especially the 1979 case of Airey. In this case, the ECtHR further explains the principles first developed in the case of Golder about the non-theoretical nor illusionary character of the rights guaranteed by article 6 ECHR (see supra).

“(...) Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”

“Having regard to all the circumstances of the case, the Court finds that Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation. There has accordingly been a breach of Article 6 para. 1 (art. 6-1).”

Like the ECJ in a later stage, the ECtHR adjudged that the right to legal aid is one of the elements of the right to a fair trial as guaranteed by articles 6 ECHR and article 47 EU Charter. The right to legal aid is however not an absolute right, since legal aid is according to the ECtHR not a necessary prerequisite for the good progress of a procedure. In later jurisprudence, the

215 Præsidium of the Charter of Fundamental Rights, Præsidium Explanations to the Charter of Fundamental Rights, article 47.
216 ECtHR, 9 October 1979, Airey v Ireland, 6289/73, para. 26.
217 ECtHR, 9 October 1979, Airey v Ireland, 6289/73, para. 27.
218 ECtHR, 9 October 1979, Airey v Ireland, 6289/73, para. 28.
219 Case C-305/05 [GC], Ordre des barreaux francophones et germanophones, 2007, ECR I-5305.
220 ECtHR, 14 September 2010, Farcas v Roumania, 32596/04.
ECtHR has clarified the grounds to deny legal aid. For instance, legal aid may only be refused on the basis of a minor chance to succeed in a procedure, in case legal representation is not obligatory in that particular type of procedure.\textsuperscript{221} The ECtHR also stated that “permitting the applicant to represent himself in proceedings against a legal practitioner did not afford him access to a court under conditions that would secure him the effective enjoyment of equality of arms that is inherent in the concept of a fair trial.”\textsuperscript{222} Regarding asylum seekers, the ECtHR adjudged, building upon the Airey jurisprudence, that the contracting states are obligated to provide legal aid to all asylum seekers but not necessarily free legal aid (the Goldstein case).\textsuperscript{223} Another case in point is the 2012 ECtHR judgement in I.M. \textit{v} France, in which the ECtHR found that a lawyer being available only shortly before the hearing in an appeals procedure, was not sufficient for France to comply with the right to an effective remedy (see supra).\textsuperscript{224}

The right for asylum seekers to be represented is equally guaranteed as regards remedies against an expulsion decision. This is enshrined in article 1 of Protocol no. 7 to the ECHR (‘procedural safeguards relating to expulsion of aliens’) but only applies to those who have been lawfully residing.\textsuperscript{225} Although article 1 of Protocol 7 to the ECHR does not explicitly require the representative to be a lawyer or a person with legal qualifications, this has been noted with approval.\textsuperscript{226} Moreover, in case hearings are conducted in the absence of the applicant’s legal representative, no significance is attached to those hearings, which may result in the declaration of the orders to be null and void.\textsuperscript{227} It is however up to the person being expelled to complain about the lack of a representative to conclude to a violation of article 1 Protocol 7 to the ECHR.\textsuperscript{228}

\begin{enumerate}
\item \textsuperscript{222} ECtHR, 13 February 2003, \textit{Bertuzzi v France}, 36378/97.
\item \textsuperscript{223} ECtHR, 12 September 2000, \textit{Goldstein v Sweden}, 46636/99.
\item \textsuperscript{224} ECtHR, 2 February 2012, \textit{I.M. v France}, 9152/09, para. 152.
\item \textsuperscript{225} Article 1 Protocol no. 7 to the ECHR; MCBRIDE, J., \textit{Access to Justice for Migrants and Asylum Seekers in Europe}, Council of Europe, Strasbourg, p. 99-102; ECtHR, 8 June 2006, \textit{Lupsa v Romania}, 10337/04.
\item \textsuperscript{226} MCBRIDE, J., \textit{Access to Justice for Migrants and Asylum Seekers in Europe}, Council of Europe, Strasbourg, p. 101; ECtHR, 5 April 1995, \textit{Charfa v Switzerland}, 20002/92.
\item \textsuperscript{228} ECtHR, 5 December 1996, \textit{Bankar v Switzerland}, 33829/96; MCBRIDE, J., \textit{Access to Justice for Migrants and Asylum Seekers in Europe}, Council of Europe, Strasbourg, p. 101.
\end{enumerate}
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The ECJ has already pronounced itself on the scope and application of the concept of legal aid based on article 47 EU Charter. In the case of DEB, the ECJ concluded that:

“The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning (...) that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve. In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the relevant law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.”

C.2. The 2005 Procedures Directive: merely partial compliance with the right to legal aid and representation

a) The hiatus between article 15 Procedures Directive and fundamental rights requirements

Article 15 Procedures Directive provide for an enormous margin of appreciation for the Member States. When holding article 15 Procedures Directive against the requirements of article 47, §3 EU Charter as listed by the ECJ in the case of DEB (see supra), one can only conclude this article is not in compliance with the human rights principle. An effective access to justice is not guaranteed for those who lack sufficient resources to pay for legal assistance.

According to this Directive, Member States are only compelled to develop a system of legal aid for asylum seekers in the appeals procedure. This does not include onward appeals or reviews, even if there is a rehearing. The non-requirement of the granting of legal aid in first instance or onward appeals procedures breaches article 47 EU Charter. This limitation on the granting of legal assistance restricts the very core of the access of justice, for various reasons. An

229 Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 2010, not yet reported, para. 63.
230 Article 15, §2 Asylum Procedures Directive 2005/85/EC.
231 Article 15, §3 Asylum Procedures Directive 2005/85/EC.
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asylum seeker is not familiar with the legal system of the country whose protection he or she seeks. Thus, “the complexity of the relevant law and procedure, and the applicant’s capacity to represent himself effectively”\textsuperscript{232} require a system of legal aid, also in first instance procedures. This is enforced by “the importance of what is at stake for the applicant in the proceedings”\textsuperscript{233}, which is very high for a refugee under article 1A of the 1951 Geneva Convention.

It is unclear what is the “legitimate aim” of the restriction of legal assistance to appeals procedures. This legitimate aim might be a restriction by Member States for financial reasons. This is however counterproductive, as many appeals procedures are conducted after an error made in the first instance procedure because the asylum seeker did not comprehend the procedure without legal assistance.\textsuperscript{234} Moreover, the measures taken need to be proportional in relation to the unknown legitimate aim.\textsuperscript{235} Therefore, the restriction under article 15, §3 a Procedures Directive on legal assistance is not compliant with the human rights requirements.\textsuperscript{236}

Additionally, Member States may limit this right by imposing various conditions.\textsuperscript{237} These are the requirement for asylum seekers to lack sufficient resources, for the appeal to have a likely chance of success on non-arbitrarily grounds, and to limit the representation to legal advisors specifically designated for asylum procedures.\textsuperscript{238}

The optional limitation under article 15, §3 d Procedures Directive is not per se in violation of article 47 EU Charter and its corresponding jurisprudence. The granting of legal assistance may be dependent on the likelihood to succeed according to human rights law, if not applied arbitrarily. The Procedures Directive however does not specify any further the procedural guarantees for legal aid applications. However, taking into account the absence of a suspensive

\begin{itemize}
  \item \textsuperscript{232} ECtHR, 9 October 1979, Airey v Ireland, 6289/73, para. 26; Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 2010, not yet reported, para. 63.
  \item \textsuperscript{233} Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 2010, not yet reported, para. 63.
  \item \textsuperscript{235} Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 2010, not yet reported, para. 63.
  \item \textsuperscript{236} This conclusion is supported by PEERS, S., ‘Chapter 14: Asylum Procedures’ in PEERS, S. and ROGERS, N., eds., EU Immigration and Asylum Law, Text and Commentary, Leiden, Martinus Nijhoff Publishers, 2006, p. 392.
  \item \textsuperscript{237} Article 15, §3 and 5 Asylum Procedures Directive 2005/85/EC.
  \item \textsuperscript{238} Article 15, §3 Asylum Procedures Directive 2005/85/EC.
\end{itemize}
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effect of appeals procedures (see supra), an asylum seeker may already be expelled before being able to request legal aid. The combination of these restrictions constitutes a particularly grave violation of article 47 EU Charter. 239

At last, The Member States are allowed to prohibit the presence of the legal advisor at the personal interview of the asylum seeker. In case the legal advisor is allowed to be present at the interview, his absence will not prevent the national authority to conduct the interview. 240 Moreover, Member States may impose monetary and time limitations on the right to legal assistance and representation, determined on non-arbitrary grounds. 241 Finally, the Procedures Directive does not specify the rules for filing and processing the requests for legal assistance and representation. These rules are determined by the individual Member States and not subject to minimum standards under the Procedures Directive. 242

The aim of the possibility for the Member States to refuse the presence of a legal advisor during the personal interview of the applicant – taking into account that the determining authority may require the asylum seeker to answer questions – is unclear. The denial of such a presence can only decrease the protection level, since there are no grounds indicated to justify such denial.

b) The restricted access to information of article 16 Procedures Directive

The provisions on access to information are included in article 16 of the Procedures Directive. The asylum seeker’s legal advisor can only claim access to the file of the asylum seeker “insofar as the information is relevant for the examination of the application”. 243 Thus, the legal advisor may not have full access to all the documents used by the determining authority to make a decision. Hence, the legal advisor is not able to assess whether all information used is up to date, accurate and relevant for the application. 244 According to the ECtHR, the applicant or legal advisor

241 Article 15, §5 Asylum Procedures Directive 2005/85/EC.
242 Article 15, §3 Asylum Procedures Directive 2005/85/EC.
243 Article 16, §1 Asylum Procedures Directive 2005/85/EC.
needs to have access to all relevant information in a dossier. The judicial authorities even have a positive obligation to make information available to the applicant or at least inform on this availability, in case he or she does not make use of a legal advisor. This is confirmed by the ECJ in the case of Alrosa Company.

This provision can be even further restricted by withholding information “where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information”. In the same manner, the disclosing of information may be refused where it could compromise the “investigative interests relating to the examination of applications of asylum” or the “international relations of the Member State”.

The non-governmental umbrella organisation European Council on Refugees and Exiles criticises the lack of clearly defined situations wherein information could be withheld. The level of discretion accorded to the Member States is unacceptable in its view, because the restriction on access to information impairs the ability of the legal advisor to effectively represent the asylum seeker. A case in point in a civil procedure is McGinley and Egan v UK. The ECtHR concluded in that case that state secrets are subordinate to the right of access to information. Accordingly, due to the lack of restrictive conditions to apply these limitations to the access of information, article 16, §1 Procedures Directive unduly impairs the equality of arms as one of the core principles of the right of access to justice.

C.3. The proposed second generation Procedures Directive: towards substantial legal assistance and representation

a) General changes in the (Amended) Recast Proposal on legal aid

The 2009 European Commission Recast Proposal was subject to considerable changes on

245 ECtHR, 19 July 1995, Kerojärvi v Finland, 17506/90, para. 42.
246 Case C-441/07, Commission of the European Communities v Alrosa Company Ltd: Opinion of Advocate-General Kokott, 17 September 2009; Case C-441/07 P, Commission of the European Communities v Alrosa Company Ltd, 2010, not yet reported.
247 Article 16, §1 Asylum Procedures Directive 2005/85/EC.
248 Article 16, §1 Asylum Procedures Directive 2005/85/EC.
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content with regards to the granting of legal aid. In general, these changes improved the judicial protection of the asylum seeker. These are reflected in articles 18 Recast Proposal (article 15 Procedures Directive) and article 19 Recast Proposal (article 16 Procedures Directive) (see infra).

In 2011, the European Commission's Amended Recast Proposal formulated considerable changes in structure. Article 15 of the Procedures Directive (article 18 of the Recast Proposal) is split into four articles, namely articles 19-22 of the Amended Recast Proposal. These adaptations intend to divide the regime of legal and procedural information free of charge in the first instance procedure (article 19), legal assistance and representation at all stages (article 22). These are separated from the free legal assistance and representation regime in appeals procedures (article 20). Moreover, the conditions and limitations are provided for in separate articles. The conditions for both free legal and procedural information and free legal assistance are found in article 21, and the conditions for access to information in procedures with national security considerations are laid down in article 23 (which was part of article 16 of the Procedures Directive and article 19 of the Recast Proposal).

This restructuring does not merely aim at a change in form, but also a change in substance on several points. These changes are not always for the better of the judicial protection of the asylum seeker, contrary to the requirements from a human rights law angle (see supra). The European Commission indicates in the Explanatory Annex to the amended Recast Proposal that the provisions on free legal assistance and representation in articles 19-22 are more flexible. The aim is the so-called 'frontloading': by offering better assistance, the decisions in first instance procedures significantly improve in quality. This has been confirmed by the 'Solihull-project' conducted in the United Kingdom. Despite these intentions, the concrete translation of this aim in the text of the Amended Recast Proposal remains largely absent.


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b) The lack of a sufficient level of legal aid in first instance procedures

Since the 2009 Recast Proposal, the provision of a legal aid system may no longer be restricted to the appeals procedure (article 15 Procedures Directive). Applicants in first instance procedures can equally apply for legal assistance under article 18, §2 a Recast Proposal. This legal assistance does not necessarily include representation, as this is not required under the disposition. Only legal assistance regarding “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” is provided. Accordingly, the Recast Proposal only partially improves the system of legal aid in first instance procedures.

However, the regime in article 19 of the 2011 Amended Recast Proposal regarding legal and procedural information free of charge in first instance procedures does not include legal assistance and representation. Nor is it necessary to appoint a lawyer to every applicant. It is only necessary to provide “information on the procedure in the light of the applicant’s particular circumstances and explanations of reasons in fact and in law in the event of a negative decision.”254 This information provision of article 19 Amended Recast Proposal is subject to the conditions and limitations of article 21 Amended Recast Proposal.255 Accordingly, they may only be provided to those who lack sufficient resources, legal aid subject to monetary and/or time limits and under the rules on filing and processing modalities provided by national law. The European Union’s Fundamental Rights Agency however recommends that all asylum seekers receive this information. “To be meaningful, oral as well as written information should be provided in a language the asylum seeker understands, which should be elevated in law and in practice to become the European Union standard.”256

Beyond these requirements, an asylum seeker in first instance procedures can only rely on the right to contact a lawyer at the applicant’s own cost. Based on these dispositions, the

advantages of ‘frontloading’ will not be achieved. The advise of the European Union’s 
Fundamental Rights Agency even goes much further:

“The right to be assisted free of charge by a lawyer is a precondition to ensure effective access to 
justice, particularly in light of the complexity of asylum procedures. Such a right should therefore 
not be subject to any limitations, except for a means test and to modalities for processing requests, 
which are necessary to ensure an effective administration of the mechanism to provide free legal 
aid.”

Accordingly, the Amended Recast Proposal’s changes on content do not fulfill the 
requirements set by article 47, §3 EU Charter and the ECJ and ECtHR jurisprudence (see supra). 

Based on the 2009 Recast Proposal, the applicant will be allowed to have a legal adviser – 
which is permitted to under national law - present during the personal interview. This is a clear 
improvement compared to article 16 of the Procedures Directive, according to which Member 
States could prohibit this presence. The allowance of assistance and representation is, however, not 
included in the Recast Proposal. 
The 2011 Amended Recast Proposal did not introduce any 
clarifications on the presence of a lawyer during the personal interview. 
Equally, this provision 
does not compel Member States to allow the legal advisor or lawyer to assist the asylum seeker 
during this interview.

c) Legal aid in appeals procedures and the tangible prospect of success

In the 2011 Amended recast Proposal, the content of legal assistance (preparation of 
documents) and representation (participation in the hearing) is clarified for the better. Article 20, 
§1 Amended Recast Proposal no longer requires “assistance and/or representation”, but states that

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258 For example: Airey v Ireland, 6289/73, paras. 26-28; Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 2010, not yet reported, para. 63.
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these are cumulative by using only the term “and.” This is especially important because the
ccontent of legal “assistance” and “representation” is not defined.

At the stage of the 2009 Recast Proposal, the requirement of a likelihood of success – or the
so-called ‘merits-test’ - had been deleted. Member States could no longer restrict the granting of
legal aid based on weak grounds to establish a refugee status. Although the full deletion of the
‘merits-test’ is not required by procedural rights standards, it does rule out possible fundamental
rights violations. Indeed, a ‘merits-test’ is always an assessment on how the assessor estimates
what the determining authority will conclude after a full examination of the dossier.

The 2011 Amended Recast Proposal took a downturn by reintroducing a ‘merits-test’ as a
condition for free legal assistance and representation in appeals procedures. Article 20, §3
Amended Recast Proposal reinstated this assessment, which had been deleted in the Recast
Proposal. The wording and procedure is however different compared to article 15, §3 d of the
Procedures Directive. Whereas article 15, §3 d of the Procedures Directive only compels Member
States to provide for legal aid “only if the appeal or review is likely to succeed”, the Amended Recast
Proposal uses the terms “no tangible prospect of success”. The Amended Recast Proposal also
introduced the requirement that only a court or tribunal – not the determining authority - may
consider whether or not the application has a tangible prospect of success.

Despite the improvement of the procedure, one needs to take into consideration that the
appreciation of the facts in an asylum procedure is an assessment of a set of complex factual
circumstances, requiring an in-depth knowledge of the country of origin of the asylum-seeker.
Therefore, it is unclear whether the appreciation of “tangible prospects of success” will be on a
sufficiently high level to meet the art 47 EU Charter requirements, as there are no further details
provided for in the Amended Recast Proposal.

At last, notwithstanding the right to legal assistance and representation in appeals

261 European Commission, Annex, Detailed Explanation of the Amended Proposal, Accompanying the document
granting and withdrawing international protection status, Brussels, 1 June 2011, COM 319 final ANNEX, p. 8.
262 Like article 19 Amended Recast Proposal, the provision of free legal assistance and representation in
appeals procedures under article 20 Amended Recast Proposal is subject to the conditions and limitations
of article 21 Amended Recast Proposal (see supra).
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procedures (article 20), these provisions are limited to first-tier procedures. As explained by the Commission’s Explanatory Annex, the Amended Recast Proposal does not compel the Member States to provide free legal assistance and representation in further instances.\textsuperscript{263} Article 20 of the Amended Recast Proposal therefore remains in violation of article 47, §3 EU Charter, under its interpretation rules of articles 52, §3 and 53 of the same EU Charter. Indeed, the scope of the corresponding article 6 ECHR includes onward appeals procedures (see \textit{supra}).\textsuperscript{264}

To conclude, these limitations to the right to free legal assistance and representation in appeals procedures need to be assessed in the light of the overall standards of legal aid in all instances of the asylum procedures. Since the level of legal aid in first instance procedures is far below the requirement of article 47, §3 EU Charter, the very strict standards for legal assistance and representation in appeals procedures are all the more questionable.

d) Access to information limited for national security considerations

The access to information for the applicant and his/her legal adviser, that has been taken into account in the examination procedure, has been improved. Article 9, §3 Recast Proposal stipulates that information obtained from various sources, such as UNHCR and the European Asylum Support Office, and country of origin reports need to be communicated. This is a considerable procedural improvement. The applicant now has the possibility to challenge the accuracy of these reports.


\textsuperscript{264} ECtHR, 22 March 2007, \textit{Sialowska v Poland}, 8932/05, para. 104; See also: Case C-305/05 [GC], \textit{Ordre des barreaux francophones et germanophone}, 2007, ECR I-5305; ECtHR, 9 October 1979, \textit{Airey v Ireland}, 6289/73, paras. 26-28.
D. THE RIGHT TO AN EFFECTIVE REMEDY: ENSURING THE ESSENCE?

D.1. The required accessibility level and effects of appeals procedures

a) The praetorian development of the right to an effective remedy

The lack of a right to appeal in article 6 ECHR is remedied by the adoption of article 2 of Protocol 7 to the ECHR. The latter article is related to the right to appeal in penal procedures. But it applies equally to administrative procedures, due to the interpretation mechanism of article 47 EU Charter, and to the general principle of European law (see supra).

Article 13 ECHR provides for an effective remedy. This requires that the access to such a remedy is ensured in practice, without limitations impairing the essence of this right. The appeals body must be able to take binding decisions on substantial and procedural elements that have found to be disregarded in the first instance procedure.265

“(…) Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief. The scope of the Contracting States’ obligations under Article 13 varies depending on the nature of the applicant’s complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law (…)”.266

This is supported by the ECJ, whose jurisprudence requires an appeals procedure based on the application of article 47 EU Charter:

“Article 49 EC (now Article 56 TFEU) precludes national legislation, such as that at issue in the main proceedings, under which enrolment in a register of court expert translators is subject to conditions concerning qualifications, but the interested parties cannot obtain knowledge of the reasons for the decision taken in their regard and that decision is not open to effective judicial scrutiny enabling its legality to be reviewed, inter alia, as regards its compliance with the requirement under European Union law that the qualifications obtained and recognised in other Member States must have been properly taken into account.”267

266 ECtHR, 21 January 2011, M.S.S. v Belgium and Greece, 30696/09, para. 288; This jurisprudence has been built upon: ECtHR, 15 November 1996, Chahal v United Kingdom, 22414/93, para. 145; Reiterated more recently in: ECtHR, 11 July 2000, Jabari v Turkey, 40035/98, para. 48.
267 Joined Cases C-372/09 and C-373/09, Josep Penarroja Fa, 2011, not yet reported.
III. D. Effective Remedies

The asylum seeker especially has a right to an effective remedy before an expulsion or extradition. The ECtHR first and foremost attempts to assess whether effective guarantees exist to protect the applicant against an arbitrarily conducted *refoulement*, both directly and indirectly. In its 2011 milestone case of *M.S.S. v Belgium and Greece*, the ECtHR used the opportunity to reaffirm the requirement of an effective remedy against a decision of expulsion. This jurisprudence builds upon the longstanding development of jurisprudence introducing the ‘Soering effect’.

“(…) in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see *Shanagayev and Others v. Georgia and Russia*, no. 36378/02, ¶ 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, ¶ 50), as well as a particularly prompt response (see *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, ¶ 136, ECHR 2004-IV (extracts)) (…)”

This protection against torture in conjunction with article 3 ECHR is absolute. No derogation is even permitted in case the applicant is suspected of posing a threat to state security. This was reiterated by the ECtHR in the 2012 case of *M.S. v Belgium*:


In addition, these praetorian developments of the ECtHR have been supported by the adoption of article 4 of Protocol no. 4 to the ECHR (‘the prohibition of collective expulsion of aliens’) in 1963, and article 1 Protocol no. 7 to the ECHR (‘procedural safeguards relating to the expulsion of aliens’) in 1984. One can only rely on the procedural safeguards ex article 1 to

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268 ECtHR, 2 February 2012, *I.M. v France*, 9152/09, para. 139.
271 ECtHR, 31 January 2012, *M.S. v Belgium*, 50012/08, para. 127.
272 In the milestone case of *Conka* regarding the suspensive appeal (see *infra*), a violation was found of article 4 Protocol 4 to the ECHR in conjunction with article 13 ECHR.
III. D. Effective Remedies

Protocol no. 7 to the ECHR if he or she is an alien lawfully resident.\textsuperscript{273} These safeguards include “\textit{a}) to submit reasons against his expulsion, \textit{b}) to have his case reviewed, and \textit{c}) to be represented for these purposes before the competent authority or a person or persons designated by that authority”\textsuperscript{274}. Again, the EctHR emphasised that these procedural guarantees need to be practical and effective rather than theoretical and illusory.\textsuperscript{275} This implies that the case needs to be reviewed by a competent authority, which looks at the grounds for the expulsion measure, and for the applicant to have sufficient time to prepare submissions.\textsuperscript{276}

The right of non-refoulement is also protected by article 3 UN Convention against Torture. The right to an effective remedy is enforced by article 2, §3 ICCPR. These international treaties ratified by the EU Member States are sources for the general principles of EU law and the interpretation of the EU Charter (see \textit{supra}). The jurisprudence of their associated bodies, however, is not a source, according to the ECJ (see \textit{supra}). By contrast, the ECtHR does take this jurisprudence into account. A case in point is the decision of the Committee against Torture on the requirements of the protection against refoulement in case of a risk of being exposed to torture. According to the case of Agiza, this article 3 UN Convention against Torture requires an effective remedy as well.\textsuperscript{277} The Human Rights Committee to ICCPR has ruled as well that article 2, §3 ICCPR read together with article 7 ICCPR (on ‘torture and cruel, inhuman or degrading treatment or punishment’) requires an effective remedy against a decision of expulsion.\textsuperscript{278}

The ECJ has confirmed the right to an effective remedy against a decision of expulsion:

\begin{quote}
“The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva
\end{quote}

\textsuperscript{273} Article 1, §1 Protocol 7 to ECHR; MCBRIDE, J., \textit{Access to Justice for Migrants and Asylum Seekers in Europe}, Council of Europe, Strasbourg, p. 99; ECtHR, 8 June 2006, \textit{Lupsa v Romania}, 10337/04.

\textsuperscript{274} Article 1, §1 Protocol 7 to ECHR

\textsuperscript{275} ECtHR, 8 June 2006, \textit{Lupsa v Romania}, 10337/04, para. 60.

\textsuperscript{276} ECtHR, 8 June 2006, \textit{Lupsa v Romania}, 10337/04, para. 82.


III. D. Effective Remedies

Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 Salahadin Abdulla and Others [2010] ECR I-1493, paragraph 53, and Case C-31/09 Bolbol [2010] ECR I-5539, paragraph 38).”

It needs to be highlighted, however, that according to the ECJ the right to an effective remedy against expulsion does not always lead to a prohibition to transfer an applicant to another responsible Member State responsible for lodging the application within the framework of the Dublin Regulation 343/2003, when infringements of minimum guarantees are detected in that particular Member State. The ECJ makes a distinction between “minor infringements” where the transfer is allowed versus “systemic flaws in the asylum procedure and reception conditions for asylum applicants (...) resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter (...)”.

Moreover, the ECJ clarifies in the case of N.S. that the extent of the protection offered by the general principles of EU law, and in particular the rights guaranteed in article 1 EU Charter (‘the right to human dignity’), article 18 EU Charter (‘the right to asylum’) and article 47 EU Charter (‘the right to an effective remedy’), is not wider than the protection level of article 3 ECHR. Accordingly, the ECJ does not make use of the possibility ex article 52, §3 EU Charter to grant a more extensive protection based on the EU Charter articles than that ensured by the ECHR (see supra).

b) Time-limits constraining the effective remedy

The possibility to appeal may be limited in time, but cannot be so short that it deprives the applicant of making use of this right. In the 2012 case of I.M. v France, the ECtHR considered the time limit of forty-eight hours too short for an asylum seeker to introduce an appeal.

279 Joined cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, para. 75.
280 Joined cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, para. 85.
281 Joined cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, para. 86. The case of ECtHR, 21 January 2011, M.S.S. v Belgium and Greece, 30696/09 is an example of such “systemic flaws”. See: Joined cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, paras. 87-90.
282 Joined cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, paras. 109 and 114.
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“la Cour met en exergue le caractère extrêmement bref du délai de quarante-huit heures imparti au requérant pour préparer son recours, en particulier par rapport au délai de droit commun de deux mois en vigueur devant les tribunaux administratifs.” 284

As regards asylum procedures and the interpretation of the right to an effective remedy ex art 13 EVRM, the ECtHR formulated criteria in the case of Jabari. A time limit of five days to register as an asylum seeker was deemed too short by the ECtHR. 285

“It would appear that the applicant’s failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran (see paragraph 16 above). In the Court’s opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.” 286

This view has been reiterated in the case of I.M. v France, regarding the time limit for lodging a procedure applicable to detained asylum seekers.

“(…) le délai imparti au requérant pour présenter sa demande a été réduit de vingt et un à cinq jours, sous peine, en cas de non-respect, de rejet pour tardiveté. La Cour relève le caractère particulièrement bref et contraignant d’un tel délai, s’agissant pour le requérant de préparer, en rétention, une demande d’asile complète et documentée en langue française, soumise à des exigences identiques à celles prévues pour les demandes déposées hors rétention selon la procédure normale (…).”

Time limits equally apply during a pending asylum procedure. In the case of Bahaddar, the ECtHR adjudged that time limits may not be so short or applied so inflexible as to deprive the asylum seeker of a realistic opportunity to substantiate his or her account. 287

c) The suspensive effect pending an appeals procedure

The jurisprudence of the ECtHR regarding the suspensive effect of a pending procedure has evolved during the years when the Asylum Procedures Directive has been drafted and

284 ECtHR, 2 February 2012, I.M. v France, 9152/09, para. 150.
285 ECtHR, 11 July 2000, Jabari v Turkey, 40035/98.
286 ECtHR, 11 July 2000, Jabari v Turkey, 40035/98, para. 40.
287 ECtHR, 19 February 1998, Bahaddar v the Netherlands, 25894/94.
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negotiated. In 2000, the ECtHR jurisprudence on article 13 ECHR in the case of Jabari required the “possibility of suspending the implementation of the measure impugned”. From this case onwards, the right of an effective remedy would no longer have to be assessed based on the determining authority’s first instance decision on the application, but rather based on the irreversible nature of the harm the expelled alien could be suffering from.

Two years later, the term “possibility” had been erased by the ECtHR. The opportunity to request the suspensive effect pending the procedure is no longer sufficient. Since the 2002 Conka judgement, the ECtHR requires an automatic suspensive effect for a minimum reasonable period. This full suspensive effect aims to prevent for the risk of damage of a wrongful expulsion to materialise, by imposing an absolute safeguard. The automatic suspensive effect has been confirmed recently in the M.S.S. jurisprudence of the ECtHR: “(...)the effectiveness of a remedy within the meaning of Article 13 (...) requires that the person concerned should have access to a remedy with automatic suspensive effect (...).”

It needs to be stressed that the jurisprudence in the cases of Conka prescribes the automatic suspensive effect pending a first instance procedure that resulted in an expulsion (or transfer) decision. The same automatic suspensive effect ex article 13 ECHR could not automatically be concluded pending appeals procedures. Based on the Conka jurisprudence, it was, however, arguable that the same reasoning would be applicable for appeals procedures. Indeed, the ratio for the ECtHR to require an automatic and full suspensive effect ex article 13 ECHR would be the same for both procedures. This reasoning has been confirmed in the 2007 ECtHR cases of

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289 ECtHR, 11 July 2000, Jabari v Turkey, 40035/98, para. 50.
292 ECtHR, 21 January 2011, M.S.S. v Belgium and Greece, 30696/09, para. 293; See also: ECtHR, 26 April 2007, Gembremedhin v France, 25389/05, paras. 66-67.
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Gembremedhin and I.M. v France as regards an accelerated appeal procedure.294


a) A non-absolute right to an effective remedy

Pursuant to European law, and more specifically pursuant to the Procedures Directive, an asylum seeker has the right to an effective remedy. Article 47 EU Charter and articles 6 and 13 ECHR are transposed into article 39 Procedures Directive. The first paragraph stipulates the need for an effective remedy against a number of specified decisions. “The concept of a ‘decision taken on [the] application for asylum’ covers a series of decisions which (...) amount to a final decision rejecting the application on the substance.”295 According to the ECJ, the list of decisions is not exhaustive.296

A case in point is the case of Brahim Sambia Diouf. The applicant sought an effective remedy, pursuant to article 39 Procedures Directive, against a decision to process his application under an accelerated procedure. The ECJ ruled that:

“(…) Article 39 of Directive 2005/85 and the principle of effective judicial protection do not preclude national rules such as those at issue in the main proceedings, under which no separate action may be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application – a matter which falls to be determined by the referring court.”297

Consequently, according to the ECJ, neither article 39 Procedures Directive nor article 47 EU Charter require that the right to an effective remedy apply to non-final decisions.298 The ECJ even takes into account that the decision to subject the application to an accelerated procedure was taken on very similar grounds as the criteria which apply for rejecting a request for asylum.

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condition posed by the ECJ is that under the national procedural rules, the final decision must still be subject to a full judicial review, regardless of the interim-decision on an accelerated procedure.299

The ratio for this reasoning of the ECJ is the efficiency of the (accelerated) procedures. Professor Steve Peers is of the opinion that Brahim Sambia Diouf was entitled to an appeal against the decision to subject his application to an accelerated procedure “in the absence of any provision permitting Member States to exclude any category of decisions on asylum applications from judicial review and in light of the principles of international human rights law”.300 Even with regards to the solution laid down by the ECJ, it can be doubted whether there exists a truly effective remedy on the substance, given the context of the accelerated procedure. If it is already decided to process the application in this procedure, based on very similar criteria as those for rejection, then the rejection of the application has (possibly only prima facie, without a full examination) been decided before the determining authority takes a decision. The impartiality of the determining authority is conferred a crucial role in this type of procedure, in order to ensure a fair hearing of the applicant’s case.

Particularly interesting is that shortly after the ECJ judgement in the case of Brahim Sambia Diouf, the ECtHR was requested to decide on a partly similar case. In the case of I.M. v France, the right to an appeal was impaired in practice for an applicant in a priority procedure (an accelerated procedure). The ECtHR did mention the ECJ case of Brahim Sambia Diouf as a part of the relevant facts301, but did not reflect on it or take it into account in its reasoning. This is logical, as the ECtHR is not required to rely on the ECJ. Only the ECJ must consider the ECtHR judgements (see infra). Moreover, the factual circumstances of both cases show differences. In the case of I.M. v France, the applicant did have a remedy for his application as a whole in the priority procedure, but this remedy was deemed insufficiently effective by the ECtHR.302

b) Access to an appeals procedure versus time limits

301 ECtHR, 2 February 2012, I.M. v France, 9152/09, paras. 86-88.
302 ECtHR, 2 February 2012, I.M. v France, 9152/09, paras. 86-88.
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Pursuant to article 39, §2 and §4 Procedures Directive, Member States are obligated to impose time limits for introducing an appeals procedure. The length of those time limits is not specified in the Procedures Directive. In practice, these time limits vary in the Member States between 10 and 60 days for regular procedures, and between 2 and 60 days for the accelerated procedures. Time limits are more often short than long. The EU Agency for Fundamental Rights observes that “(i)n some countries, (...) short time-limits make the submission of an appeal a race against time”. Therefore, the Agency concludes that “(t)ime limits to submit an appeal must be reasonable. They must not render the lodging of an appeal impossible or extremely difficult.”

According to the ECJ in the case of Brahim Sambia Diouf:

“As regards the fact that the time-limit for bringing an action is 15 days in the case of an accelerated procedure, whilst it is 1 month in the case of a decision adopted under the ordinary procedure, the important point (...) is that the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action. With regard to abbreviated procedures, a 15-day time limit for bringing an action 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 is, however, for the national court to determine – should that time-limit prove, in a given situation, to be insufficient in view of the circumstances – whether that element is such as to justify, on its own, upholding the action brought indirectly against the decision to examine the application for asylum under an accelerated procedure, so that, in upholding the action, the national court would order that the application be examined under the ordinary procedure.”

The lack of a suspensive effect

The 2005 Procedures Directive does not require Member States to provide for a suspensive effect pending the appeals procedure. In addition, in case there is no suspensive effect foreseen, the Member States can choose whether or not to provide for a legal remedy or protective measures in order to remain in the Member State pending the appeals decision.

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307 Article 39, §3 a Asylum Procedures Directive 2005/85/EC.
308 Article 39, §3 b Asylum Procedures Directive 2005/85/EC.
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The text of article 39, §3 Procedures Directive reads like a political compromise. On the one hand, Member States are by no means obligated to allow applicants to stay and be present during the appeals procedure (and hearing). On the other hand, the introduction of paragraph 3 requires the rules of the Member States to be “in accordance with their international obligations”. Of course, States cannot invoke internal law to justify a failure of compliance with an international treaty. And that is exactly where a conflict arises within the text of paragraph 3. If a Member State were to expell an asylum seeker pending the appeals procedure, it would be violating a) article 33 Geneva Convention; b) article 13 ECHR in conjunction with articles 2, 3 ECHR and or article 4 of Protocol 4 to ECHR; c) article 2, §3 ICCPR read together with article 7 ICCPR; and d) article 3 UN Convention against Torture. The list is long. In case of a child, it would be even longer.

Accordingly, the non-requirement of a suspensive effect pending an appeals procedure has been subject to many criticisms. Long before the adoption of the Procedures Directive on 1 December 2005, the ECtHR published its judgement in the case of Conka (see supra). Whereas the judgement in Jabari and Hilal still left some room for manoeuvre – albeit small – the Conka judgement raises no doubts: an applicant has the right to a full and automatic suspensive effect pending the appeals procedure. Only the lack of a suspensive effect of the onwards appeals procedure after the first instance appeals, and of the appeals procedure following a negative decision in a subsequent procedure might be compatible with human rights law. This is unclear, as neither the ECtHR nor the ECJ have pronounced their reasoning on this matter. However, the failure to provide for a suspensive effect in regular first instance appeals procedures is clearly incompatible with the jurisprudence of the ECtHR. Consequently, in the latter regard, article 29, §3 a and b Procedures Directive is invalid.

III. D. Effective Remedies

D.3. Improving the rights of the appellant in appeals in the proposed second generation procedures

a) Access to an effective remedy

On the one hand, the scope of the right to an effective remedy has been widened pursuant to the (Amended) Recast Proposal. Article 41 Recast Proposal and article 46 Amended Recast Proposal introduce the basic requirement of remedy against an asylum rejection resulting from a regular first instance procedure – for clarity purposes.\textsuperscript{313} Moreover, an applicant eligible for subsidiary protection can now introduce a remedy against the rejection of the asylum status.\textsuperscript{314}

On the other hand, the opportunity to introduce an appeal against certain specific decisions has been removed. An applicant can no longer introduce an appeals procedure against a decision not to further examine a subsequent application.\textsuperscript{315} Regarding border procedures, one does not have the opportunity to oppose a refusal to entry before a court of appeals.\textsuperscript{316}

In addition, article 41, §3 Recast Proposal stipulates what type of procedure is deemed effective. “A full examination of both facts and points of law, including an ex nunc examination” is required.\textsuperscript{317}

b) Time constraints improved

Notwithstanding the failure to introduce specified minimum time limits to lodge an appeal, the extension is made in the Recast Proposal, which requires these time limits to be “reasonable”.\textsuperscript{318}


\textsuperscript{315} Article 39, §1 c Procedures Directive has been deleted in the (Amended) Recast Proposal.

\textsuperscript{316} Article 39, §1 d Procedures Directive has been deleted in the (Amended) Recast Proposal.


\textsuperscript{318} Article 41, §4 Proposal for a Directive of the European Parliament and of the Council on minimum standards of procedures in Member States for the granting and withdrawing of international protection
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This term is clarified as “the time-limits shall not render impossible or excessively difficult the access of applicants to an effective remedy”. The 2011 Amended Recast Proposal does not introduce changes to the Recast Proposal in this matter.

The proposed changes are necessary for the second generation proposals to comply with the human rights standards. According to both ECtHR and ECJ jurisprudence, the applicant needs to be able to effectively make use of the right to a remedy (see supra). As evidenced by the case of I.M. v France, a time-limit to lodge an appeal within forty-eight hours is too short (see supra).

In addition, under the Recast Proposal it became an obligation for Member States to set out clear time limits for all appeals procedures. In the 2011 Amended Recast Proposal, laying down time limits returns to being an option, not an obligation. The ratio for this amendment is unclear. It seems much more logical for the legal certainty, of both the Member States and the applicants, to set a certain time limit.

c) Introducing a limited suspensive effect

As regards the second generation Procedures Directive, the Proposals have to a certain extent taken into account the jurisprudence of the ECtHR and the ECJ by introducing a suspensive effect in certain cases. Pursuant to article 41, §5 Recast Proposal and article 46, § 5 Amended Recast Proposal, applicants are allowed to remain in the Member State pending the outcome of the appeals procedure.

Paragraph 6 of those proposed articles considerably limits the scope of this right, by enumerating certain exceptions. The first exception comprises an appeal within an accelerated procedure. Second, in case the application is inadmissible due to the lodging of an identical

320 ECtHR, 2 February 2012, I.M. v France, 9152/09, para. 150.
application after a final decision, no suspensive effect is granted pursuant to the Recast Proposal, in addition to inadmissibility due to the granting of a refugee status in another Member States pursuant to the Amended Recast Proposal. Both exceptions are subject to two conditions. First, remaining in the Member State may only be refused “where the right to remain in the Member State pending the outcome of the remedy is not foreseen under national legislation”\(^{323}\). The second condition is that “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 concerned applicant or acting on its own motion”.

It needs to be highlighted that the applicants in appeal have the right to remain in the Member State pending the procedure ruling on the right to remain in the State.

Assessing these exceptions, several comments and considerations come to mind. First, the ECtHR has explicitly ruled that the suspensive effect of an appeals procedure is also required in the context of an accelerated procedure. It did so in the 2007 case of *Gembremedhin*\(^{324}\) and in the 2012 case of *I.M. v France*\(^{325}\). In the latter case, the ECtHR concluded to a violation of the principle of *non-refoulement*\(^{326}\). Accordingly, the first exception is clearly invalid in the light of this jurisprudence.

The ECJ judgement in the case of *Brahim Sambia Diouf* does not surmount this invalidity, as the ECJ merely stated that there is no right to an effective remedy against a decision to process the application in an accelerated procedure\(^{327}\). Nor can the condition of a court or tribunal ruling on the right to remain or not surpass the invalidity of this exception. All courts will have no other choice than to rule with due recognition of the ECtHR jurisprudence. This condition, together with the condition of laying down this exception in national legislation, seems to be nothing more than protecting the second generation Procedures Directive against invalidity for human rights violations. Indeed, if a case arises where the ECtHR or the ECJ establish the invalidity of this first

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323 Article 41, §6 Proposal for a Directive of the European Parliament and of the Council on minimum standards of procedures in Member States for the granting and withdrawing of international protection COM 2009, 554/4. This condition could in article 41, §6 of the 2009 Recast Proposal have been interpreted not as a condition, but as a third exception. This has been clarified by the addition in article 46, §6 Amended Recast Proposal of the words “in such cases”, making it a condition for the two exceptions.


326 ECtHR, 2 February 2012, *I.M. v France*, 9152/09, para. 158.

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exception, this invalidity will be accountable to the Member State, not to the Directive. Article 41, §6 Recast Proposal and article 46, §6 Amended Recast Proposal put the responsibility in the hands of the Member State itself to determine that there is no right to remain in the Member State.

As regards the second exception, there seems to be no reason for invalidity. In case the applicant is granted asylum in another Member State, there is no longer a personal interest related to the request for international protection. Similarly, if the asylum seeker’s application has been decided upon in a final decision and the applicant lodges an identical application, the principle of non bis in idem applies. To conclude, only the exceptions to the right to remain in the Member State pending an appeals procedure pursuant to inadmissibility grounds seem to be valid according to the ECtHR jurisprudence and the principle of non-refoulement.

328 Personal interests regarding, for example, family reunion fall outside the scope of the Procedures Directive.
E. PROCEDURAL RIGHTS AND THE DUBLIN II REGULATION

E.1. The Dublin II Regulation

To avoid an increase in multiple asylum applications in various EU Member States in an EU without internal borders, the Dublin Convention came into force in 1997.329 The adapted Dublin II Regulation now governs the system to determine which Member State is responsible for processing an asylum application.330 The criteria are, in the following order:

“Article 6. Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.

Article 7. Where the asylum seeker has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

Article 8. If the asylum seeker has a family member in a Member State whose application has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

(etc.)”331

As regards the human rights obligations of each Member State referring an asylum seeker to another Member State based on its Dublin II responsibility, this system functions on a presumption: within the EU, all Member States provide for a sufficient protection of the ECHR and the principle of non-refoulement. Member States did not add an obligation to verify these protection

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330 Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 18 February 2003, OJ L 50/01.
331 Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 18 February 2003, OJ L 50/01; For all criteria, see articles 6-14 Dublin II Regulation.
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levels to the Dublin II Regulation. After all, the EU had developed a series of minimum standard Directives on qualification\textsuperscript{332}, reception conditions\textsuperscript{333} and procedural guarantees\textsuperscript{334}. It must be highlighted that one of the aims and objectives of these minimum directives is to enable the Dublin II Regulation to function on these premises.\textsuperscript{335}

E.2. ECtHR and ECJ jurisprudence

a) ECtHR jurisprudence

A similar practice of a presumption had been applied by the ECtHR in the case of Bosphorus: when a State transposes legal obligations pursuant to its participation in an international organisation, there is a presumption of equivalent protection. However, in case a Member State retains discretionary powers when transposing EU legislation, the ECtHR does not apply this presumption but rather its normal (full) review procedure (see supra).\textsuperscript{336} The ECtHR started detecting cracks in the Dublin system. Whereas its jurisprudence in the case of T.I. \textit{v} UK\textsuperscript{337} in 2000 and later the case of K.R.S. \textit{v} UK\textsuperscript{338} in 2008 did not detect violations, the 2011 milestone case of M.S.S. \textit{v} Belgium and Greece\textsuperscript{339} did.

The first case before the ECtHR questioning the Dublin Convention was the case of T.I. \textit{v} UK. The United Kingdom wanted to expel the Sri Lankan applicant, T.I., to Germany. According to the United Kingdom, Germany was responsible for processing this application under the Dublin Convention. T.I. feared, however, that he would be removed to Sri Lanka, where he claimed to fear ill-treatment as a suspected Tamil Tiger. The ECtHR reasoned that the Dublin Convention could

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\textsuperscript{332} Directive 2004/83/EC 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, 29 April 2004, OJ L 304/12.


\textsuperscript{336} ECtHR, 30 June 2005, \textit{Bosphorus Hava Yollari Turizm v Ireland}, 45036/98, paras. 137 and 150-156.

\textsuperscript{337} ECtHR, 7 March 2000, \textit{T.I. v United Kingdom}, 43844/98.

\textsuperscript{338} ECtHR, 2 December 2008, \textit{K.R.S v United Kingdom}, 32733/08.

\textsuperscript{339} ECtHR, 21 January 2011, \textit{M.S.S. v Belgium and Greece}, 30696/09.
indeed affect fundamental rights of individuals. Therefore the ECtHR did not follow the argument from the UK that the Dublin Convention was merely a system to determine responsibility. The ECtHR argued that it would be contrary to the aims and objectives of the ECHR that States would be exonerated from their responsibilities in this domain. The ECtHR, however, declared the declaration inadmissible, as there was no real risk established in casu that Germany would expel the applicant contrary to article 3 ECHR.340

In 2008, the ECtHR came to a similar conclusion regarding the Dublin II Regulation – albeit in a different situation. The Iranian applicant K.R.S. had arrived in the United Kingdom via Greece. Based on the Dublin II Regulation, Greece accepted its responsibility to process the application of K.R.S. upon request of the United Kingdom. The applicant K.R.S. contested this transfer due to an alleged violation of article 3 ECHR because of the deplorable situation of asylum seekers within Greece. The reason was not the fear of being expelled to Iran in violation of article 3 ECHR, because at that time, Greece did not deport anyone to Iran. This is different from the case of T.I. v UK, where the situation of asylum seekers within Germany was not put into question, only the procedural guarantees. In the case of K.R.S. v UK, the ECtHR again declared the application inadmissible.

“In reaching this conclusion the Court would also note that the Dublin Regulation, under which such a removal would be effected, is one of a number of measures agreed in the field of asylum policy at the European level and must be considered alongside Member States’ additional obligations under Council Directive 2005/85/EC and Council Directive 2003/9/EC to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. The presumption must be that Greece will abide by its obligations under those Directives.”341 “In the absence of any proof to the contrary, it must be presumed that Greece will comply with (its) obligation in respect of returnees.”342

These decisions on inadmissibility, and especially the decision on K.R.S., were reviewed in the case of M.S.S. v Belgium and Greece. Both Belgium and Greece were found to have violated articles 3 and 13 ECHR, although on different grounds. As regards Greece, a violation of article 3 ECHR has been detected due to the inhuman and degrading treatment of asylum seekers in the detention facilities in Athens. Various organisations had provided reports establishing these facts.

341 ECtHR, 2 December 2008, K.R.S v United Kingdom, 32733/08, p. 17.
These reports were not yet at hand during the procedure of K.R.S. v UK. Moreover, Greece violates article 13 ECHR, in combination with article 3 ECHR. Greece failed to provide for an effective remedy, despite having transposed the 2005 Procedures Directive into national law.

As for Belgium, a violation of article 3 ECHR was found for exposing the applicant to serious deficiencies in both the detention and procedural asylum provisions in Greece. Belgium could have used the opportunity under the sovereignty clause of article 3, §2 Dublin II Regulation to process the application in Belgium and not to transfer applicants to Greece. The UNHCR had already in 2009 requested that the Belgian minister stop transferring asylum seekers to Greece. Therefore, Belgium was responsible. It should have departed from the presumption of trust vis à vis Greece but did not, and Belgium should have disregarded the outdated K.R.S. v UK judgement. In addition, Belgium violated article 13 ECHR, because it did not allow for the applicant to have an effective remedy against his expulsion to Greece.

b) ECJ jurisprudence

Not long after the ECtHR judgement in the case of M.S.S. v Belgium and Greece, the ECJ had the opportunity as well to rule on the Dublin II Regulation. In the case of N.S., the ECJ proceeded on the direction set out by the ECtHR and added new elements. The ECJ ruled that the very core of the Dublin II Regulation and the CEAS were subject to its examination, because the system is based on mutual confidence and a presumption of compliance of EU law, and in particular with regards to fundamental rights.

According to the ECJ, a clear distinction needs to be made between the types of infringements of the Member States implementing the Dublin II Regulation and the rest of the CEAS, and the compatibility with their fundamental rights obligations. On the one hand, there are the “minor infringements” of the individual provisions of the CEAS Directives by the Member State responsible based on the Dublin II Regulation. The ECJ stresses that these “minor infringements” cannot result in precluding the Member State in which the application is lodged, from transferring...
the asylum seeker to the responsible Member State. Such a conclusion would lead to the Member State committing “minor infringements” to be exempted from its responsibility under the Dublin II Regulation. This would, according to the ECJ, deprive these obligations of their substance. Indeed, based on the implementation reports of the CEAS in practice and the fundamental rights standards of the Procedures Directive analysed above, the Dublin II Regulation would become inapplicable.

On the other hand, the ECJ detects “systemic flaws” that have been established by the ECtHR in the case of M.S.S. v Belgium and Greece. These are the type of violations resulting in inhumane and degrading treatment of asylum seekers, as prohibited by article 4 EU Charter. In such circumstances, the ECJ concludes that a transfer to the responsible state pursuant to the Dublin II Regulation would be incompatible with the EU Charter. Accordingly, and very importantly, the ECJ concludes that “an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker’s fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights”. This means that, to respect fundamental rights, the Member States requesting a transfer to another Member State will need to ensure that there are no such systemic flaws present in the Member State responsible. If not, the transferring Member State violates fundamental rights.

In the judgement of N.S., it was rather easy for the ECJ to observe a systemic flaw in the case at hand. The applicant was being transferred to Greece, where such a systemic flaw had already been established by the ECtHR. The ECJ, however, did make use of the opportunity of this case to give a vague indication on where to draw the line.

“Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be

348 Joined Cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, para. 85.
350 Joined Cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, para. 86.
351 Joined Cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, para. 99.
352 ECtHR, 21 January 2011, M.S.S. v Belgium and Greece, 30696/09.
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unaware that systemic deficiencies 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 that provision.”353

The criterion put forward for detecting a systemic flaw is thus that the transferring Member State “cannot be unaware” of the fundamental rights violations. It is questionable whether the ECtHR will follow the same criterion to determine whether a transfer is possible. In the case of K.R.S. v UK, it has of course awaited a bulk of proof of violations before it came to its conclusion in the case of M.S.S. v Belgium and Greece. These evolution of judgements seems to be in accordance with the criterion of “cannot be unaware”. But this does not necessarily mean that the ECtHR will apply the same approach in the future. The ECtHR has been concluding to more violations, for example in the 2012 case of I.M. v France. The ECtHR concluded to a violation of articles 3 and 13 ECHR in the latter case, exposing the applicant of the danger of refoulement. Building further on its case law that aims at preventing a “real risk” of inhumane and degrading treatment, and the prohibition of the principle of non-refoulement, it seems like only one conclusion can be drawn: the ECtHR will apply a harder stance. Accordingly, an established violation by France with regards to “priority procedures” would have to lead to a prohibition to transfer applicants to France falling under that procedure, if a transfer would be subject to a Court evaluation.

Earlier, the ECJ had already pronounced itself on specific fundamental rights and their application within the Dublin II Regulation procedures. In the 2009 case of Petrosian, the ECJ concluded that:

“Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 of 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 a third-country national are to be interpreted as meaning that, where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure.”

353 Joined Cases C-411/10 and C-493/10, N.S. and M.E., 2011, not yet reported, para. 106.
Accordingly, the ECJ extends the time period to which the suspensive effect applies. This is only valid for Member States providing for such a suspensive effect. At that time, the ECtHR had already judged in the case of Conka that appeals procedures must have a suspensive effect regarding expulsion. In the ECJ Petrosian judgement, only the suspensive effect of not being transferred to another Member State is questioned. Drawing from the conclusions in the case of M.S.S. v Belgium and Greece and the fact that article 3 and 13 ECHR can also be violated within the EU and not only regarding non-refoulement, this judgement seems to provide for an insufficient protection of fundamental rights. Taking into account the existing jurisprudence, the suspensive effect should not only apply sufficiently when a Member State provides for this possibility in its national legislation. The suspensive effect in appeals against a transfer decision should apply, in all cases, regardless of national legislation.

In a judgement as recent as 3 May 2012, the ECJ further elaborates on the obligations of Member States under the Dublin II Regulation. In the case of Kastrati, the ECJ concluded that:

"(…) the withdrawal of an application for asylum within the terms of Article 2(c) of that regulation, which occurs before the Member State responsible for examining that application has agreed to take charge of the applicant, has the effect that that regulation can no longer be applicable. In such a case, it is for the Member State within the territory of which the application was lodged to take the decisions required as a result of that withdrawal and, in particular, to discontinue the examination of the application, with a record of the information relating to it being placed in the applicant’s file.”


Due to the judgement in M.S.S. v Belgium and Greece (and also N.S.), the Dublin II Regulation came under an enormous pressure. The judgement also implies a violation of the Minimum Directive on Reception Conditions and the 2005 Procedures Directive. On the one hand, these minimum standards are found to be not sufficiently guaranteed in certain Member States.

354 C-19/08, Petrosian, 2009, ECR I-495.
355 Case C-620/10, Kastrati, 2012, not yet reported.
356 It needs to be nuanced, although, that four Member States had ceased to transfer applicants to Greece based on the Dublin II Regulation, prior to the judgement in M.S.S. v Belgium and Greece.
On the other hand, the procedural guarantees of the individual applicants are not sufficiently ensured in the current Dublin II Regulation.

This makes it all the more surprising that the Amended Recast Proposal, published after the judgement, does not remedy these shortcomings. In article 4, §2 a Amended Recast Proposal, the processing of cases pursuant to the Dublin II Regulation remains out of the scope of the responsibility of the determining authority in accordance with the Procedures Directive. Recital 41 Amended Recast proposal leaves no doubt in this matter: “Recital 41. This Directive does not deal with Procedures within Member States governed by the (...) Dublin Regulation”. This Recital is similar to the existing Recital 29 Procedures Directive.

Since the 2009 Recast Proposal, an additional Recital has been inserted. Recital 42 Amended Recast Proposal now states: “Applicants with regard to whom the (...) Dublin Regulation (...) applies should enjoy access to the basic principles and guarantees set out in this Directive and to the special guarantees pursuant to (...) the Dublin Regulation.”357 It is not clear what those “basic principles and guarantees” entail: are these the minimum procedural standards that were guaranteed pursuant to the 2005 Procedures Directive?

On the other hand, it is clear that certain guarantees of the Amended Procedures Proposal do not apply to Dublin transfer procedures. For example, article 46, §7 Amended Recast Proposal explicitly rules out the right of an applicant to remain in the Member State pending the exercise of their right to an effective remedy. Accordingly, in practice, the hypothetical application of this article would have allowed Belgium to send the applicant M.S.S. to Greece, even if he would have had an effective remedy. Despite the refusal of the ECtHR to grant M.S.S. provisional measures for remaining in Belgium, this hypothetical application would not have been in accordance with the established violations of articles 3 and 13 ECHR.

Another example is the aforementioned article 4, §2 a Amended Recast Proposal. Not only do applicants not have the right to have an effective remedy processed by the determining authority. It also deprives them of all the requirements attached to that determining authority. These are, namely, the required individual, objective and impartial examination and decision-

357 These Recitals 41 and 42 were not newly inserted in the Amended Recast Proposal. They were already part of the 2009 Recast Proposal in Recitals 36 and 37.
making\(^{358}\), the requirement that the determining authority is competent and trained\(^{359}\).

**E.4. Evaluation of the Dublin II Regulation**

**a) Evaluation of the 2003 Dublin II Regulation**

Reviewing the procedural guarantees offered by the Dublin II Regulation, there is not much to discuss. This Regulation focuses first and foremost on the procedures between the Member States, the transfer rules and administrative cooperation. The asylum seeker is far out of sight. There are, however, three types of procedural guarantees to be mentioned. First, the applicant shall be informed of the transfer decision and on which grounds it is taken. He or she can introduce an appeal against it:

“Article 20. §1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows: (…) (e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this.\(^{360}\)”

Second, certain criteria for determining the responsible Member State concern the separation or reunion of families. As regards articles 7 and 8, Article 15(1) and Article 21(3) Dublin II Regulation, the persons concerned are required to express a desire or give consent. The Commission Regulation that contains the application rules of the Dublin II Regulation clarifies that approval must be given in writing\(^{361}\).

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360 Article 20, §1 e Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 18 February 2003, OJ L 50/01.
III. E. Dublin

Third, “(t)he asylum seeker shall have the right to be informed, on request, of any data that is processed concerning him.” Although this right mainly concerns the protection of personal data, the applicant can have it corrected, erased or blocked in case this data is incomplete or inaccurate. It needs to be highlighted that this right only concerns personal data, not the information collected on the applicant’s grounds for seeking asylum.

Despite these few articles providing for a minimum explanation of the applicant’s procedural rights, the rules are clear. All requirements on information provisions, language, the right to legal assistance and representation, the right to an effective remedy and its suspensive effect, time limits etcetera need to be interpreted in the light of the aforementioned human rights provisions. These are not only articles 47 EU Charter and the ECHR, but also the general principles of European law, starting with the procedural guarantees established in the case of Johnston. Indeed, the Dublin II Regulation is a part of the EU law. Accordingly, it falls within the scope and under the interpretation rules of these fundamental rights provisions and jurisprudence. This has been confirmed by the ECJ: even “a Member State which exercises (…) discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter”.

Therefore, the rules are clear – albeit not explained in the Dublin II Regulation. This leads to unclarity in the Member States, as processing administrations are not always aware of all these rules. Or, it quite simply might lead to (an attempt to) disregard(ing) fundamental rights as they are not explicitly foreseen in the Dublin II Regulation.

b) Evaluation of the 2008 Proposal for Dublin III

On 3 December 2008, the European Commission published the Recast Proposal to replace
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the Dublin II Regulation. This proposal is part of a group of asylum law proposals aiming to ensure more harmonisation and better protection standards for the CEAS. This Proposal certainly tackles some criticisms by introducing new provisions on procedural protection.

Article 4 Dublin Recast Proposal grants the applicant a right to information, concerning the Dublin Regulation and its hierarchy of criteria, the procedure and time limits Member States need to follow, the possibility to challenge a transfer decision, data exchange, etcetera. The information is not necessarily foreseen in a language the applicant understands, but is “reasonably supposed to understand”, and orally when necessary. In addition, the applicant shall be given the opportunity of a personal interview under article 5 Dublin Recast Proposal. The applicant can then submit relevant information for determining the responsible Member State. The interview is conducted in a language the applicant is reasonably supposed to understand. A short written report is drawn up and made available to the applicant. It is not foreseen that the applicant has the opportunity to comment on this report.

Article 25 Dublin Recast Proposal ensures the notification of the transfer decision, including the grounds on which it is based. This notification will also inform the asylum seeker on the available legal remedies, time limits and where to possibly find available legal assistance and/or representation. The appeal or review will, however, not suspend the implementation of the transfer decision, unless a competent body so decides and if allowed under the national law of the Member State. The “effective” remedy and a “reasonable” time-limit are governed by article 16

365 Proposal for a Regulation of the European Parliament and of the Council 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, Brussels, 3 December 2008, COM 2008, 820.
366 Article 4 Proposal for a Regulation of the European Parliament and of the Council 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, Brussels, 3 December 2008, COM 2008, 820.
367 Article 5 Proposal for a Regulation of the European Parliament and of the Council 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, Brussels, 3 December 2008, COM 2008, 820.
368 Article 25 Proposal for a Regulation of the European Parliament and of the Council 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, Brussels, 3 December 2008, COM 2008, 820.
Dublin Recast Proposal. Access to legal assistance and/or representation, and possibly linguistic assistance are also included.

The proposal for the Dublin III Regulation comprises considerable improvements with regards to the explanation of the procedural rights applicants are entitled to. It does, however, not fully comply with the standards as set by fundamental rights and jurisprudence thereon. Certain aspects will need to be improved, such as the requirement for the applicant to effectively understand the decisions taken on his case, and to be understood. Also, taking into account the “systemic flaws” an applicant might face within the EU as evidenced by M.S.S. v Belgium and Greece, the suspensive effect of an appeal against a transfer decision needs to be mandatory.
F. THE CONCEPTS OF ‘SAFE THIRD COUNTRY’ AND ‘SAFE COUNTRY OF ORIGIN’ VERSUS NON-REFOULEMENT

From its very outset, there has been doubt as to whether the ‘safe country’ concept is in compliance with the principle on non-refoulement. There are three types of ‘safe countries’: The ‘safe third country’ concept\(^{369}\), the ‘European safe third countries’ concept\(^{370}\), and the ‘safe country of origin’ concept\(^{371}\). Member States were supposed to set up lists of safe countries in the Council, but this provision was successfully challenged by the European Parliament before the ECJ. The Council did not have the competence to start a quasi-legislative procedure not provided for in the EU Treaty.\(^{372}\)

Under the ‘safe third country’ provisions in article 27 Procedures Directive, a Member State may send an applicant to a third country on the basis of “a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country”.\(^{373}\) The concept of a ‘safe third country’ relies on the confidence that other countries process asylum applications in sufficient compliance with fundamental rights and the principle of non-refoulement. In the text of article 27 Procedures Directive, this trust is described as “being satisfied that…”. In article 38 Amended Recast Proposal, certain changes are made to this provision. According to this Proposal, there can be no risk of ‘serious harm’, as defined in the Qualification Directive.\(^{374}\) In addition, an asylum seeker is granted the right to challenge the connection between him or her and the third country.\(^{375}\) This was not the case in the current Procedures Directive, which also excluded expulsions towards a safe third country from other guarantees under the Procedures Directive.\(^{376}\)

\(^{369}\) Article 27 Asylum Procedures Directive 2005/85/EC.
\(^{370}\) Article 36 Asylum Procedures Directive 2005/85/EC.
\(^{371}\) Articles 29-31 Asylum Procedures Directive 2005/85/EC.
\(^{372}\) Case C-133/06, Parliament v Council, 2006, ECR I-3189.
\(^{373}\) Article 27, §2 a Asylum Procedures Directive 2005/85/EC.
\(^{376}\) Article 4, §2 f Asylum Procedures Directive 2005/85/EC.
III. F. Safe Countries

The ‘European safe country concept’ applies for ‘safe third countries’ in a European context, but provides for fewer guarantees. Regarding the ‘European safe countries’, the removing Member State does not need to verify or even be satisfied in practice whether fundamental rights in the receiving country are guaranteed. Only the accession to the ECHR and the Geneva Convention are required, next to other less stringent guarantees.377

This type of conclusive presumption is in violation of the fundamental rights. Pursuant to the ECtHR jurisprudence in the cases of *T.I. v UK, K.R.S. v UK* and *M.S.S. v Belgium and Greece*, this was clearly implied.378 The ECJ now ruled in the case of *N.S.* that:

"100. (...) a conclusive presumption of compliance with fundamental rights (...) could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.

101. That would be the case, inter alia, with regard to a provision which laid down that certain States are ‘safe countries’ with regard to compliance with fundamental rights, if that provision had to be interpreted as constituting a conclusive presumption, not admitting of any evidence to the contrary.

102. In that regard, it should be pointed out that Article 36 of Directive 2005/85, concerning the safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a ‘safe third country’ where not only has it ratified the Geneva Convention and the ECHR but it also observes the provisions thereof.

103. Such wording indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. The same principle is applicable both to Member States and third countries.

104. In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.”379

The ECJ is rather soft in its reasoning on the ‘safe countries’. Whereas the ECJ in the *N.S.* judgement states that the ‘safe country’ needs to observes the provisions of the ECHR as required in article 36 Procedures Directive, the ECJ did not specify that the removing Member States need to verify whether fundamental rights are sufficiently and continuously respected in practice. By contrast, the ECtHR does require a verification. This jurisprudence seems to not fully follow the jurisprudence of the ECtHR in the cases of *T.I. v UK, K.R.S. v UK* and *M.S.S. v Belgium and Greece*. Moreover, the applicants need to be able to have a suspensive appeal to contest their removal to a ‘safe country’ (see *supra*).

377 Article 36 Asylum Procedures Directive 2005/85/EC.
379 Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, 2011, not yet reported, paras. 100-104.
IV. THE PROCEDURAL EFFECTS OF ESTABLISHED HUMAN RIGHTS VIOLATIONS ON THE VALIDITY OF THE ASYLUM PROCEDURES DIRECTIVE AND THE DUBLIN II REGULATION

Above, various provisions of the existing Procedures Directive and the Dublin II Regulation are found to be invalid (see supra). This might also be the case for dispositions as proposed by the (Amended) Recast Proposals replacing the Procedures Directive and the Dublin II Regulation. These concluded invalidities with regards to the fundamental rights protecting the procedural rights of individual applicants are based either on existing jurisprudence of the ECtHR and the ECJ, or on the analysis in Chapter IV, which compares this legislation with fundamental rights requirements.

In order for a court to be able to exclude the application of provisions ruled to be violating fundamental rights, it is not necessary to expressively declare certain articles invalid. In 2001, the ECJ has ruled in the case of Siples that the general principle on the right to an effective remedy may overrule the provisions in specific EU legislation. In that case, a provision on the possibility for suspending implementation of contested decisions pursuant to the Community Customs Code was contested. Only national customs authorities could make use of this provision, which was excluded for national courts.

“(T)hat provision cannot limit the right to effective judicial protection. The requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (…).”

“With more specific regard to the possibility of suspending implementation of a decision of a customs authority, it should be pointed out that a court seised of a dispute governed by Community law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law (Factortame, cited above, paragraph 21).”

IV Procedural Effects

The reasoning of the ECJ was in line with the earlier case of *Factortame*, in which the ECJ reasoned:

“It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.”

Very recently, the ECJ reaffirmed this principle with regards to fundamental rights applicable in the CEAS:

“According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 Lindqvist [2003] ECR I-12971, paragraph 87, and Case C-305/05 Ordre des barreaux francophones et germanophone and Others [2007] ECR I-5305, paragraph 28).”

This established case law must be applicable *a fortiori* since the EU Charter was accorded the same status as a Treaty since the entry into force of the Lisbon Treaty. Consequently, once the ECJ rules that the asylum seeker’s procedural rights are impaired due to EU legislation, the Member States can no longer apply the specific provisions that violate fundamental rights.

CONCLUSION

The EU has gone through an evolution with an emerging attention for the respect of fundamental rights. The development of the general principles of EU law since the seventies has cleared the path for the current treaty status accorded to the EU’s own Charter of Fundamental Rights. What started as a praetorian development is currently still a system heavily relying on the judicial review of both the ECJ and the ECtHR. Not only did these courts construct what 'the right to an effective remedy' and all other procedural rights entail. These are also the instances ensuring that the EU legislation does respect fundamental rights.

This appears to be necessary. Although the Asylum Procedures Directive was adopted in 2005 with the intention of setting minimum standards, many provisions remain below that minimum. Regarding the access to justice, this is limited for dependants. Moreover, it is not required that asylum seekers can understand the person conducting a personal interview or via an interpreter, neither that they are themselves understood. The only guarantee is communication in a language they are reasonably supposed to understand. The right to a personal interview and a report thereof is limited contrary to the ECtHR case law in Hatami.

The legal assistance and representation provided is very restricted and insufficient according to the ECtHR in the case of I.M. v France. A legal representative only has the right to review documentation used in the applicant's case, if this is deemed necessary by the determining authorities. The right to an appeal does not necessarily entail a suspensive appeal, contrary to the ECtHR jurisprudence in the case of Conka. And the current Dublin II Regulation does even not specify the requirements for an effective remedy. This is clearly contrary to the ECtHR's jurisprudence in the case of M.S.S. v Belgium and Greece.

These are just a few of the invalidities contained in the existing Procedures Directive and the Dublin II Regulation. When found insufficient to comply with procedural guarantees of fundamental rights, these provisions can automatically no longer be applied. This is established jurisprudence of the ECJ since the cases of Factortane and Siples, as affirmed for the CEAS in the case of N.S.

Given this very meager procedural rights protection and the opportunities for claiming the
invalidity of certain provisions, there are only few cases dealing with these violations. In recent years, the ECJ has referred to the Procedures Directive in the cases of Brahim Sambia Diouf, Salahadin Abdulla, N.S. and Kastrati. The ECtHR has reviewed the applications in the cases of M.S.S. v Belgium and Greece, I.M. v France, Gembremedhin, M.S. v Belgium and Hirshi Jamaa v Italy.

This jurisprudence has made two points clear. First, the ECtHR tends to provide for a more extended interpretation of procedural rights, protecting the individual. The EU needed the ECtHR to review the Dublin system and conclude that asylum seekers could no longer be sent to Greece. It were not the EU institutions nor the ECJ that took the lead, they merely had to follow and affirm the ECtHR's conclusions. Second, it became apparent that the ECJ, despite the possibility in article 52, §3 EU Charter to accord a more extended interpretation to the EU Charter's provisions than to its corresponding ECHR articles, does not accord a more extended protection. The ECJ stated this in its judgement on N.S.

From a pragmatic point of view, the Procedures Directive's objective of fair and efficient procedures is not met. Member States attempt to lay down rules to comply with what is required according to human rights law with a minimalistic approach, in an attempt to process asylum applications more quickly. But these exceptions to rights require in their turn special guarantees. This results in an over-burdening the system. It is less efficient than if applicants would be fully accorded their rights to legal aid, remain in the Member State pending an appeals procedure, etcetera.

But there is a light at the end of the tunnel. Both the 2011 Amended Recast Proposal to replace the Procedures Directive, and the 2008 Recast Proposal to replace the Dublin II Regulation, introduce considerable improvements to the fundamental rights standards.

Both proposals have, however, not yet sufficiently improved to fully comply with fundamental rights standards. Instead of introduce its own minimal regime of procedural protection, the Dublin Recast Proposal should quite simply fall within the scope of the Amended Recast Proposal for the Procedures Directive. The latter should fully live up the the fundamental rights standards as set by article 47 EU Charter. Under the interpretation rules for that article, the recent ECtHR and ECJ jurisprudence should be taken into account. This includes, amongst others, the suspensive effect of appeals pursuant to the Conka judgement of the ECtHR. Also a fully-
fledged effective remedy should be in place against transfer decisions based on the Dublin system and removal to so-called ‘safe third countries’. This is required according to the *M.S.S. v Belgium and Greece* jurisprudence of the ECtHR. The ECJ has affirmed in the case of *N.S.* that the Dublin system cannot entail a conclusive presumption. This will require fundamental changes to the current system.
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