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EU asylum procedures and the right to an effective remedy

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EU asylum procedures and the right to an effective remedy

EU asylum procedures and the right to an effective remedy

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Acknowledgements

The adventure of writing this book started somewhere in 2006, when I was working as a policy officer for the Dutch Council for Refugees. Upcoming reorganisations urged me to think about my plans for the future. I decided to explore the possibilities to write a PhD thesis. The topic I intended to research, the meaning of the right to an effective remedy for asylum procedures, followed logically from my work for the Dutch Council for Refugees. The previous years I had focused on the Dutch asylum procedure, in particular the problems encountered by asylum applicants and their lawyers in the Netherlands as a result of, amongst others, the 48-hour accelerated procedure, the limited form of judicial review and the strict requirements for new evidence imposed by the case-law of the Council of State. Pieter Boeles' instant enthusiasm about my ideas convinced me that I had chosen the right direction. We agreed that we would try to find funding for a PhD position. Together with Thomas Spijkerboer we submitted an application for the MaGW Open competition of the Netherlands Organisation for Scientific Research (NWO), which was granted. This allowed me to dedicate myself full-time to my PhD research from 1 December 2007.

There are so many things I learned during the process of writing this thesis. Probably most important to me was my discovery of the potential impact of EU law on national asylum procedures. I never imagined that it would be that relevant and inspiring to read EU Courts' judgments concerning competition law, tax law or agricultural policies. It became clear to me that the same procedural questions arise in all kinds of cases, and that EU law provides similar answers to these questions. Hopefully this book will inspire lawyers working in the field of asylum law to use EU law in order to improve procedural guarantees for asylum applicants in Europe.

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List of abbreviations

Adm	admissibility decision
A.G.	Advocate-General
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFI	Court of First Instance
Charter	Charter of Fundamental Rights of the European Union
CRC	United Nations Convention on the Rights of the Child
ComAT	Committee against Torture
ComRC	Committee on the Rights of the Child
EASO	European Asylum Support Office
EC	European Community
EC Treaty	Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EComHR	European Commission of Human Rights
EEA	European Economic Area
EU	European Union
EXCOM	Executive Committee of the Programme of the High Commissioner
GC	Grand Chamber (European Court of Human Rights)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
PD	Procedures Directive (2005/85/EC)
Plen	plenary session
RCD	Reception Conditions Directive (2003/9/EC)
RD	Return Directive (2008/115/EC)
SIAC	Special Immigration Appeal Commission
TEU	Treaty on European Union
TfEU	Treaty on the functioning of the European Union
TPD	Temporary Protection Directive (2001/55/EC)
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNWRA	United Nations Relief and Works Agency for Palestine Refugees
QD	Qualification Directive (2004/83/EC)

1 Introduction: in search of EU standards for asylum procedures

This introductory chapter starts with sketching the field of investigation and the nature of the issues to be scrutinised. This will result in the formulation of a research question and the outline of this book.

1.1 ADEQUATE AND FAIR ASYLUM PROCEDURES IN THE EU: STATE OF THE ART

Adequate and fair procedures are a precondition for the effective exercise of rights.¹ In the context of EU law it is generally recognised that the rights granted by EU law to individuals would become useless if they cannot be enforced in national administrative proceedings² and in particular before national courts.³ The importance of procedural rights is acknowledged by the Charter of Fundamental Rights of the European Union (henceforth also: the Charter), as it has accorded fundamental rights status to procedural rights, such as the right to an effective remedy and the right to good administration on an equal footing with substantive rights.⁴

In asylum cases a lack of procedural guarantees may undermine the EU rights usually claimed by asylum applicants: the right not be expelled or extradited to a country where they face the risk of being subjected to human rights violations (the principle of *non-refoulement*)⁵ and the right to asylum. The need for fair asylum procedures is recognised both in the light of the

1 See for example ECtHR 10 January 2012, *G.R. v the Netherlands*, no 22251/07, where the ECtHR ruled that the extremely formalistic attitude of the Dutch authorities deprived the applicant of access to the competent administrative tribunal and prevented the applicant from seeking recognition of his arguable claim under Art 8 of the Convention.

2 Ponce states that 'administrative procedures make fundamental rights work'. Ponce 2005, p 577. Schwartz derives from the Court of Justice's case-law that the protection of fundamental, constitutional rights is inextricably linked to correct administrative procedure. Schwartz 2004, p 97.

3 Accetto and Zlepzig for example contend that procedure is essential for the effectiveness of EU law because 'the substantive legal regime greatly depends on the national procedural and institutional framework to develop its full effect'. Accetto & Zlepzig 2005, p 380. See also Kańska 2004, p 301.

4 Kańska 2004, p 302. Procedural rights can also be seen as an end in themselves. They aim to 'protect an individual and to ensure fairness of proceedings'. Ponce 2005, pp 552-553, Kańska 2004, p 301.

5 Wouters 2009, p 1.

‘grave consequences of an erroneous determination for the applicant’⁶ and the vulnerable situation in which asylum applicants often find themselves.⁷

Taking a careful asylum decision is not easy. The task of assessing fear of persecution and future risk of certain harms poses unique challenges, which as Costello remarks, ‘requires both sensitive communicative approaches and objective risk assessment’.⁸ This is to a large extent due to the fact that in most asylum cases there is a lack of documentary evidence and that therefore the asylum applicant’s statements may be the only evidence available. Thomas even states that:

There can be little doubt that asylum decision-making, involving an assessment of future risk for the claimant often on the basis of limited information, is amongst the most problematic, difficult and complex forms of decision-making in the modern state. Decision-makers may feel pulled in different directions in light of both the considerable evidential uncertainty and a complex combination of facts pointing both ways in favour of awarding or refusing international protection.⁹

The examination of the credibility of the asylum applicant’s asylum account plays a central role in many asylum decisions.¹⁰ As a result rules regarding (judicial review) of the evidentiary assessment of asylum claims are crucial for the outcome of the case. Furthermore factors such as the quality of the personal interview, the speed of the asylum procedure and the asylum applicants’ (lack of) access to legal aid and interpretation services may increase or decrease an applicant’s chances of success. This study examines which procedural guarantees are required by EU law in asylum cases.

Rights claimed by asylum applicants: the prohibition of refoulement and the right to asylum

The prohibition of *refoulement*, explicitly laid down in the United Nations Convention relating to the Status of Refugees (Refugee Convention, also often referred to as the 1951 Geneva Convention) and the UN Convention against Torture (CAT) and recognised under the European Convention on Human Rights (ECHR), and the International Covenant on Civil and Political Rights (ICCPR), is the cornerstone of international refugee and asylum law.¹¹ The fundamental nature of the prohibition of *refoulement* is stressed in particular by the European Court of Human Rights (ECtHR) in its case-law. In the ECtHR’s view the prohibition of torture and inhuman or degrading treatment or punish-

⁶ See EXCOM Conclusion no 30 (XXXIV), 1983, sub (e).

⁷ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 190.

⁸ Costello 2006, p 2.

⁹ Thomas 2006, p 84.

¹⁰ Noll 2005, pp 1-6, Spijkerboer & Vermeulen 2005, p 261.

¹¹ Art 33 Refugee Convention, Art 3 CAT, Art 3 ECHR and Art 7 ICCPR.

ment guaranteed by Article 3 ECHR enshrines one of the fundamental values of democratic societies. Protection against the treatment prohibited by Article 3 is absolute. As a result that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. According to the ECtHR there can be no derogation from that rule, not even if the person concerned acts undesirably or dangerously.¹² The principle of *non-refoulement* requires that a State assesses a person's claim that he is in need of international protection, in particular if this State intends to expel or extradite this person.¹³

The prohibition of *refoulement* is also recognised as an EU fundamental right in Article 19 of the Charter which provides:

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.¹⁴

According to the Court of Justice the issues at stake in the assessment of the extent of the risk of *refoulement* relate 'to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union'.¹⁵ In *Elgafaji* the Court of Justice considered that the fundamental right guaranteed under Article 3 ECHR forms part of the general principles of EU law, observance of which is ensured by the Court.¹⁶ The Court recognised in *Schmidberger* that the prohibition of torture and inhuman or degrading treatment or punishment laid down in Article 3 ECHR is absolute. The ECJ considered:

[U]nlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose.¹⁷

EU law not only provides for a prohibition of *refoulement* but also for a right to asylum in Article 18 of the Charter. This right is reflected in Directive 2004/83/EC (the Qualification Directive or QD), which provides that a person who

12 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, paras 137-138. Also the prohibitions of *refoulement* guaranteed by the CAT and ICCPR are absolute, see HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, para 10 and ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003, para 13.8. The Refugee Convention does allow for exceptions to the prohibition of *refoulement*, according to Art 33 (2).

13 Staffans 2010, p. 275, Wouters 2009, p. 164. Lauterpacht & Bethlehem 2003, p. 118.

14 The principle of *non-refoulement* is also recognised in Art 21 (1) QD.

15 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 90.

16 Case C-465/07, *Elgafaji* [2009], para 28.

17 Case C-112/00, *Schmidberger* [2003], para 80.

qualifies as a refugee or is eligible for subsidiary protection in accordance with the directive, should be granted a refugee status or a subsidiary protection status.¹⁸ The right to asylum is not absolute. A refugee may be refused a refugee status, amongst others where there are serious reasons for considering that he has committed a serious crime outside the country of refuge,¹⁹ if there are reasonable grounds for regarding him as a danger to the security of the Member State, or if he constitutes a danger to the community of that Member State.²⁰ A person who is in need of subsidiary protection may be refused an asylum status on similar grounds.²¹ Balancing of interests may thus take place in cases in which only the (refusal of) an asylum status is under dispute. International treaties such as the ECHR do not provide for a right to asylum.²²

Lack of harmonisation of standards for asylum procedures on the international level

Although the importance of fair asylum procedures for the effective exercise of the prohibition of *refoulement* is widely recognised, the level of harmonisation of standards for such procedures on the international level is strikingly low.²³ Most importantly the Refugee Convention does not contain any standards for refugee status determination proceedings. The UN High Commissioner for Refugees (UNHCR) and the Executive Committee of the Programme of the High Commissioner (EXCOM) have adopted guidelines regarding asylum procedures.²⁴ However these guidelines are not binding and provide only limited guidance, as they take the freedom of States to choose their own procedural system as a basis.²⁵ The ECtHR has set important requirements for procedures in which claims based on the prohibition of *refoulement* are assessed, in its case-law under the right to an effective remedy recognised in Article 13 ECHR. However it is not possible to derive a comprehensive set of standards from this case-law, as it only addresses a limited number of

18 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12. See Artt 13 and 18 of the directive. A.G. Maduro stated in para 21 of his opinion in Case C-465/07, *Elgafaji* [2009]: 'The Directive pursues the objective of developing a fundamental right to asylum which follows from the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States and the ECHR, as reproduced, moreover, in the Charter of Fundamental Rights of the European Union [..].'

19 Art 12 (2) QD. It concerns crimes against peace, war crimes, crimes against humanity, serious non-political crimes outside the country of refuge prior to his admission as a refugee and acts contrary to the purposes and principles of the United Nations.

20 Art 14 (4) and (5) QD.

21 Art 17 QD.

22 See for example ECtHR 20 July 2010, *A v the Netherlands*, no 4900/06, paras 152-153.

23 See also Costello 2006, p 3.

24 See for example UNHCR Handbook and EXCOM Conclusion no 8 (XXVIII), 1977, Determination of Refugee Status.

25 Noll 2005, p 5.

procedural issues and still leaves a lot of questions unanswered. Also the (non-binding) views of other supervising bodies such as the Human Rights Committee (HRC) and the Committee against Torture (ComAT) only provide very limited guidance.

As a result of the lack of international standards, asylum procedures adopted by States vary considerably.²⁶ Costello notes that governments have taken this leeway granted by international law 'and manipulated asylum procedures in order to pursue manifold objectives, from deterring and deflecting asylum seekers, to ensuring that failed asylum seekers will be deportable'.²⁷ Indeed many States have decided to take measures in reaction to for example large influxes of asylum applicants or the political demand for the prevention of abuse of the asylum procedure. UNHCR in 2001 noted within the Member States of the EU

a gradual shift of emphasis away from the identification of persons in need of protection towards the deterrence of real or perceived abuse, if not sheer deterrence of arrivals of asylum applicants. Concern about growing backlogs and the difficulty of agreeing on burden-sharing formulas have resulted in policies of deflection, with less attention paid to key issues of responsibility and international solidarity.²⁸

Many of the measures taken by the EU Member States lead to diminishing safeguards in the asylum procedure. Arguably, one of the most far-reaching is the introduction of accelerated asylum procedures in many of the Member States. Procedures in these countries have in common that applications are dealt with within a (very) short period of time and often offer limited procedural safeguards.

EU standards for asylum procedures

The lack of harmonisation of procedural standards in asylum cases (and migration cases in general) as well as the tendency to curtail procedural guarantees in national legal systems was already noted by Pieter Boeles in 1997.²⁹ At the time Boeles concluded that there was a lacuna in legal protection of immigrants at the Community level. The only measure available

26 See UNHCR Handbook, paras 191-192. It mentions that refugee status in practice may be determined under formal procedures specifically established for this purpose, within the framework of general procedures for the admission of aliens or under informal arrangements, or ad hoc for specific purposes, such as the issuance of travel documents. See also Gorlick 2003, pp 357-358.

27 Costello 2006, p 3.

28 UNHCR's observations on the European Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status, COM(2000) 578 final, Geneva: 20 September 2000, para 5.

29 Boeles 1997, Chapter 19.

was the Council Resolution on minimum guarantees for asylum procedures of 1995.³⁰

Since Boeles' research on procedural standards in immigration proceedings has been concluded some major developments took place at the European level. In 1999 the European Council recognised that the issues of asylum and migration call for the development of a common EU policy. In that year the European Council decided during the summit in Tampere to work towards a Common European Asylum System (CEAS). This system should, according to the Presidency Conclusions, include 'standards for a fair and efficient asylum procedure'. It was even decided that EU legislation should in the longer term lead to a common asylum procedure.³¹ The intention to develop a common asylum procedure was repeated in several later policy documents.³²

After lengthy and difficult negotiations Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (the Procedures Directive or PD)³³ was adopted in 2005.³⁴ This directive contains minimum standards for the examination of asylum applications in first instance as well as in appeal. The goal of the approximation of rules on the procedures for granting and withdrawing refugee status was to limit the secondary movements of applicants for asylum between Member States, where such movement would be caused by differences in legal frameworks.³⁵ Nevertheless the minimum set of standards laid down in the Procedures Directive leaves much discretion to the participating Member States, as it contains a large number of vaguely defined concepts and has failed – due to political differences in opinion – to provide clear-cut answers to a number of core issues in procedural asylum law. It therefore did not succeed in effectively harmonising procedural standards.³⁶ According to Vedsted-

30 Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures [2006] OJ C 274/13.

31 Presidency Conclusions of the Tampere European Council 15-16 October 1999 (SN 200/99), paras 14-15.

32 See for example: The Stockholm Programme, An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01), para 6.2.

33 Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

34 According to Michelogiannaki the negotiations 'were proved to be the most intense, lengthy and difficult negotiations compared to any other that had taken place in the past, regarding the asylum agenda'. Michelogiannaki 2008, p 21. See further on the Procedures Directive section 2.2.

35 Recital 6 Preamble PD. See also Communication from the Commission to the Council and the European Parliament, Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, 22 November 2000, COM(2000) 755 final. Gorlick states that 'a common understanding and interpretation of the key aspects of refugee status determination would help avoid disparate interpretation of international standards, first and foremost, and by consequence would result in more consistent recognition and treatment of refugees and asylum seekers'. Gorlick 2003, p 358.

36 See also Vedsted-Hansen 2005, p 371.

Hansen the Member States' unwillingness to achieve a higher level of harmonisation on asylum procedures can potentially be explained by the fact that non-compliance with administrative and procedural matters 'will be readily discovered both by the affected individuals and by those bodies controlling the implementation of EU law'.³⁷

Arguably the common standards on asylum procedures were also meant to serve the general objective of CEAS, namely the full and inclusive application of the Refugee Convention and safeguards maintaining the *non-refoulement* principle.³⁸ However, the minimum standards contained in the directive violated, according to UNHCR and various NGO's, international human rights standards and reflected a 'race to the bottom'.³⁹

Should the attempt on the EU level to develop common standards for asylum procedures then be considered useless or even harmful, both from a human rights perspective as well as in the light of the aim to harmonise such procedures? In this study it is argued that it should not. In spite of its shortcomings the Procedures Directive may enhance the position of persons who apply for asylum in one of the Member States and lead at least to some form of harmonisation of standards on asylum procedures within the EU. This is not only due to the fact that the Procedures Directive does provide for important safeguards in national asylum procedures. More importantly the Directive has brought many aspects of national asylum procedures within the scope of EU law. As a result, the Charter of Fundamental Rights of the EU and general principles of EU law, such as the right to an effective remedy and the principle of effectiveness, apply. These rights and principles will be used by the Court of Justice of the European Union (Court of Justice) and national courts in order to interpret the Procedures Directive's provisions and to test their legality. On the basis of these rights the courts may limit the Member States' discretion and even require the application of additional procedural safeguards that are not included in the directive. The Charter and general principles of EU law also come into play because of the clear rights included in the Qualification Directive: a right to a refugee status for those who qualify as a refugee, a right to a subsidiary protection status for those who are in need of subsidiary protection, and a right to be protected against *refoulement*. The

37 Vedsted-Hansen 2005, p 374.

38 Vedsted-Hansen 2005, p 370. He states that the fulfilment of the Tampere objectives 'clearly presupposes that EU standards on asylum procedures provide the necessary safeguards to ensure correct application of the substantive protection norms'.

39 Just before political agreement on the proposed directive was reached, ten NGO's asked EU Commissioner for Justice and Home Affairs Vitorino to withdraw the proposal. Press release 29 April 2004, European Council for Refugees and Exiles, Amnesty International and Human Rights Watch, available at www.ecre.org. See also UNHCR Press Release, 30 April 2004, UNHCR regrets missed opportunity to adopt high EU asylum standards, available at www.unhcr.org.

principle of effectiveness abolishes procedural hurdles which render the exercise of these rights practically impossible or excessively difficult.

Via the Charter and principles of EU law the Procedures Directive may therefore provide more procedural safeguards to asylum applicants than many had expected at the time of their adoption. Costello explains that this 'new legal context and the general principles it incorporates, as well as the inevitable intervention of another supranational jurisdiction, the European Court of Justice, may well thwart the race bottom more than the negotiators anticipated'.⁴⁰ Of course, the extent to which the Court will be able to do this largely depends on the national courts' willingness to refer questions regarding the interpretation of the Procedures Directive to the Court for preliminary ruling and to interpret these directives in the light of EU fundamental rights and general principles.

1.2 IN SEARCH OF EU STANDARDS FOR ASYLUM PROCEDURES

This study focuses on the potential meaning of EU procedural rights, in particular the right to an effective remedy and fair trial and the right to good administration for the asylum procedures of the EU Member States. EU Courts have developed an important body of case-law on procedural guarantees. Now that national asylum procedures also fall within the scope of EU law, this case-law is in principle also applicable to those procedures. Expectedly, when applying EU procedural rights and principles to asylum cases, the Court of Justice will be inspired by relevant international treaties and the judgments and views of the bodies supervising those treaties. This study aspires to derive from EU legislation and (the case-law regarding) EU fundamental rights and general principles a set of EU procedural standards for several important issues in national asylum procedures.

1.2.1 Protection of fundamental rights in the EU legal order

Until the entry into force of the Treaty of Lisbon on 1 December 2009, fundamental rights, including the right to an effective remedy, have mainly been protected in the EU as general principles of EU law by the Court of Justice.⁴¹ In its case-law the Court of Justice has developed an 'unwritten charter of rights'.⁴² Many of the most far-reaching decisions of the Court of Justice in

⁴⁰ Costello 2006, p 6.

⁴¹ See for the history and development of EU fundamental rights and general principles of EU law for example De Witte 1999, pp 859-897, Craig 2006, pp 484-486, Murray 2008, pp 531-550.

⁴² Craig 2006, p 484.

the field of fundamental rights have been the result of preliminary references by national courts.⁴³

Murray states that the Member States have so far actively endorsed the Court of Justice's approach with regard to human rights protection, amongst others by including provisions requiring respect for human rights in successive treaties.⁴⁴ Article 6 (3) of the Treaty on European Union (TEU) states in general that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Many of the fundamental rights recognised by the Court of Justice were incorporated in the Charter of Fundamental Rights of the European Union. The Charter's Preamble states:

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.

The Charter thus made EU fundamental rights, including general principles of EU law more visible.⁴⁵ The Procedures Directive states in its preamble that it respects fundamental rights and observes the principles recognised in particular by the Charter.⁴⁶

Although until 1 December 2009 the Charter had no binding force, it did play a role in the EU Courts' case-law. The Court referred to the Charter mainly in order to reaffirm the existence of a general principle of EU law.⁴⁷ Since the entrance into force of the Treaty of Lisbon the Charter has become binding.⁴⁸ The Court of Justice has in its case-law referred to the binding force

43 Murray 2008, p 535. He states that national courts play a very important role in the development of EU law including the protection of fundamental rights. See also Lenaerts & Gutiérrez-Fons 2010, p 1635.

44 Murray 2008, p 536, see also Lenaerts & Gutiérrez-Fons 2010, p 1633.

45 According to the preamble to the Charter 'it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter'. See also Lenaerts & Gutiérrez-Fons 2010, p 1656, who state that the Charter brings clarity as to how fundamental rights are protected at the EU level.

46 Recital 8 Preamble PD.

47 See for example Case C-432/05, *Unibet* [2007], para 37 where the Court considered that the principle of effective judicial protection had been reaffirmed by Art 47 of the Charter. See also Case C-303/05, *Advocaten voor de Wereld* [2007], para 46 and Case C-450/06, *Varec* [2008], para 48.

48 Art 6 (1) TEU states that the EU recognises the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties.

of the Charter.⁴⁹ In some cases however it still only mentioned the Charter in order to reaffirm an existent general principle of EU law⁵⁰ or used it to support its textual interpretation of a provision of an EU directive.⁵¹ In other cases the Court attached much more weight to the Charter. In *DEB* for example the Court of Justice considered that the principle of effective judicial protection is enshrined in Article 47 of the Charter and focused on the interpretation of this provision (instead of that of the principle).⁵² It may be expected that the Court will in the future more often or maybe always base its interpretation on the Charter instead of a general principle if it has the choice.

General principles of EU law recognised by the Court of Justice

In literature various lists can be found of the general principles recognised by the Court of Justice.⁵³ These include amongst others: the principle of equality, the principle of proportionality, the non bis in idem principle, the principle of legal certainty and legitimate expectations, the right to effective judicial protection and the principle of good administration. Many of these general principles of EU law can be considered relevant in the context of asylum procedures.

Rights included in the Charter

The Charter consists of five chapters: Dignity, Freedoms, Equality, Solidarity and Citizen's rights. Some of the core rights of the ECHR are included in the Charter, such as the right to life, the prohibition of torture and slavery, the right to respect for private life and the freedom of religion, expression, assembly and association. The Charter furthermore contains economic and social rights, such as the right to education and the right to social security and social assistance.

The Charter lists many rights, which may be of particular relevance for asylum cases, such as the right to asylum (Article 18) and the prohibition of *refoulement* and collective expulsions (Article 19). With respect to asylum procedures Article 47 of the Charter, which lays down the right to an effective remedy⁵⁴ and Article 41 on the right to good administration are particularly relevant.

49 See for example Case C-555/07, *Küçüdeveci* [2010], para 22 and Case C-578/08, *Chakroun* [2010], para 44.

50 See Case C-555/07, *Küçüdeveci* [2010], paras 21-22 and Joined Cases C-317/08, C-318/08, C-319/08 en C-320/08, *Alassini* [2010], para 61.

51 Case C-403/09 PPU, *Detiček* [2010], paras 53-59.

52 Case C-279/09, *DEB* [2010], para 33 and further.

53 For a list of procedural guarantees see Kerse 2000, p 208. See for a comprehensive discussion on the most important principles Tridimas 2006 and Groussot 2006.

54 In this study the terms 'right to and effective remedy' and 'right to effective judicial protection' are used interchangeably and both refer to Art 47 of the Charter.

1.2.2 Scope of application of the Charter and general principles of EU law

For the purpose of this study it is necessary to know when the Member States should abide by the Charter and general principles of EU law. Are they only bound by EU fundamental rights and principles when implementing the Procedures Directive or also when taking individual asylum decisions which fall within the scope of this directive or other provisions of EU law?

According to Article 51 (1) of the Charter the provisions of the Charter are first of all addressed to the institutions, bodies, offices and agencies of the Union. Furthermore the Member States are bound by the Charter 'only when they are implementing Union law'. The EU institutions and the Member States shall 'respect the rights, observe the principles and promote the application' of the Charter in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The question rises when Member States are exactly 'implementing Union law'. In *N.S.* the Court of Justice interpreted the term 'implementing Union law'. It was asked whether a Member State's decision to examine an asylum claim which is not its responsibility on the basis of Article 3(2) of the Dublin Regulation⁵⁵ falls within the scope of EU law for the purposes of Article 6 TEU and/or Article 51 of the Charter. The Court answered that the discretionary power conferred on the Member States by Article 3(2) of the Dublin Regulation forms part of the Dublin system and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing Union law within the meaning of Article 51(1) of the Charter.⁵⁶ Furthermore in *Dereci* the Court of Justice considered that Member States are bound by the rights included in the Charter if a situation is 'covered by European Union law'.⁵⁷ Both *N.S. and others* and *Dereci* imply that the scope of application of the Charter is the same as that of general principles of EU law, which bind the Member States when they act within the scope of EU law.⁵⁸ The following categories of national measures fall within the scope of EU law and may

⁵⁵ 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 [2003] OJ L50/1.

⁵⁶ Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], para 68.

⁵⁷ Case C-256/11, *Dereci and others* [2011], para 72. Several authors have argued that the scope of application of the Charter and general principles of EU law should be the same. See Lenaerts & Gutiérrez-Fons 2010, pp 1659-1660, Oliver 2011, p 2037 and Craig 2006, pp 503-505.

⁵⁸ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/32. Some authors were of the opinion that the Charter only applies when the Member States act as agents of the Union, for example when they implement a directive. This would mean that the Charter's scope of application is more limited than the scope of application of EU general principles. See Lenaerts & Gutiérrez-Fons 2010, pp 1657-1659.

therefore fall to be tested against general principles of EU law as well as the Charter.⁵⁹

- Measures implementing EU law⁶⁰
- Measures adopted under an EU derogation in order to justify a measure which restricts one of the fundamental freedoms protected by the Treaty⁶¹
- Measures which otherwise fall within the scope of EU law⁶²

The Court of Justice generally seems to be rather willing to accept that a sufficient EU law context exists.⁶³ Nevertheless several examples can be found in the Court of Justice's case-law of cases where the Court considered that the situation fell out of the field of application of EU law.⁶⁴ Matters of pure national law are not governed by the Charter and EU general principles.

For the purpose of this study it is important to note that the fact that procedural issues are not governed by EU legislation does not mean that EU fundamental rights do not apply. EU procedural rights and principles such as the fundamental right to an effective remedy require that EU rights be effectively protected in national proceedings. If a person claims a right provided for by EU law in national asylum proceedings, those rights and principles may set requirements as to these proceedings.⁶⁵ With regard to national procedural rules, the scope of EU law is therefore also determined by the substantive right claimed in the national procedure.

Since the inclusion of Title IV in the EC Treaty and the adoption of the various directives on asylum, national measures in the field of asylum will often fall within the field of application of EU Law. Asylum issues that the directives (obviously) did not aim to harmonise will fall outside the scope of

⁵⁹ Schermers and Waelbroeck 2001, p 36, Tridimas 2006, pp 36-42, Prechal 2010, p 8.

⁶⁰ See for example Case 5/88, *Wachauf* [1989], para 19. 'Implementation' should be understood in a broad sense. Prechal mentions that this category includes 'the transposition of directives, adoption of measures aimed at giving effects to regulations or other EU law provisions, the application of EU rules and the enforcement of Union law. The fact that the Member State enjoys discretion and the degree of discretion is irrelevant'. Prechal 2010, p 8.

⁶¹ See for example Case C-260/89, *ERT* [1991], para 43.

⁶² Lenaerts & Gutiérrez-Fons 2010, p 1639, state that general principles are applicable where some specific substantive EU rule is applicable to the situation in question.

⁶³ See for example Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], paras 64-69 and Case C-555/07, *Küçükdeveci* [2010], paras 23-26. Tridimas notes that there is 'a clear and, indeed, remarkable tendency towards the broad application of general principles, in particular fundamental rights'. Tridimas 2006, p 39.

⁶⁴ Case C-299/95, *Kremzow* [1997], paras 16-18. In this case Kremzow claimed that Austria infringed the fundamental right to freedom of movement for persons by executing an unlawful penalty of imprisonment. See also Case C-144/95, *Maurin* [1996]. Further examples are mentioned in Prechal 2010, p 11.

⁶⁵ See also Prechal 2010, pp 11-13.

EU law and therefore remain out of the reach of EU fundamental rights.⁶⁶ Section 2.4.2 specifically discusses the scope of application of EU fundamental rights with respect to national asylum procedures. The Procedures Directive provides the Member States with wide discretion with respect to many issues. Therefore in section 2.4.2 the question will be addressed whether Member States are bound by EU fundamental rights when making use of their discretionary power.

1.2.3 Function of EU fundamental rights and general principles

EU fundamental rights and general principles have been applied by the national courts and the EU courts for different purposes. First of all, these courts use those rights and principles to review the legality of EU legislation. The Court of Justice considered that 'respect for human rights is a condition of the lawfulness of Community acts [...] and that measures incompatible with respect for human rights are not acceptable in the Community'.⁶⁷

EU fundamental rights and general principles can be invoked under Article 263 or Article 267 of the Treaty on the functioning of the European Union (TFEU) to obtain the annulment of an EU Measure. An individual may attack the legality of an EU measure before a national court on grounds of infringement of EU fundamental rights and general principles. If the national court considers that an EU measure may be invalid on this ground, it should make a reference to the Court of Justice for a preliminary ruling.⁶⁸ The Court of Justice has in several cases declared a provision of secondary EU law invalid because it infringed a provision of the Charter⁶⁹ or a principle of EU law.⁷⁰ Section 2.4.1 examines the question whether minimum standards, such as those included in the Procedures Directive are capable of infringing EU fundamental rights and general principles. This question is relevant because, arguably

66 National rules concerning special protection policies for unaccompanied minors or humanitarian cases (who are not refugees and do not need subsidiary protection) will for example fall outside the scope of the QD. Battjes also mentions the example of the prohibition on expulsion based on Art 3 ECHR for humanitarian (medical) reasons, which is not included in the QD. Battjes 2006, p 88.

67 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 284. See also para 285.

68 Case 314/85, *Foto-Frost* [1987], paras 17-20. See also Tridimas 2006, pp 31 and 35. See more extensively section 2.5.1.

69 See for example Case C-236/09, *Association Belge des Consommateurs Test-Achats and Others* [2011], para 32.

70 See for example Case C-25/02, *Rinke* [2003], para 27, in which the Court of Justice stated that a provision of a directive adopted by the Council in disregard of the principle of equal treatment for men and women is vitiated by illegality. In Case C-120/86, *Mulder* [1988] the Court of Justice held that a Community regulation on additional levy on milk was adopted in breach of the principle of protection of legitimate expectations.

Member States are never forced by those minimum standards to violate EU fundamental rights, as they are generally allowed to introduce or maintain more favourable provisions than those minimum standards.⁷¹

Secondly, the national courts of the Member States and the Court of Justice use the Charter and general principles of EU law to interpret EU legislation.⁷² The Court has held that EU legislation cannot be interpreted in such a way that it disregards a fundamental right included in the Charter.⁷³ Furthermore it has considered that where an EU measure must be interpreted, preference must be given as far as possible to the interpretation that renders it compatible with general principles of EU law.⁷⁴ National rules and practice will be tested against this interpretation of EU law.⁷⁵ Finally the EU Courts have used general principles of EU law to fill in gaps in EU legislation and to supplement the provisions of written EU law.⁷⁶

In sum EU fundamental rights and general principles may thus require that relevant EU legislation is set aside and may set additional standards to those explicitly included in EU legislation. In order to discover which requirements are set by EU law for national asylum procedures, it is therefore not only necessary to have regard to the Procedures Directive, but also to relevant EU fundamental rights and general principles. This study in particular tries to define the meaning and content of the EU fundamental right to an effective remedy and to a fair trial and related rights and general principles for the legality and interpretation of EU legislation on asylum procedures.

1.2.4 Sources of inspiration of EU fundamental rights and general principles

Both the EU Charter and general principles of EU law have several sources of inspiration, in particular the common constitutional traditions of the Member States and international obligations common to the Member States.⁷⁷ Further-

71 See for example Art 5 PD, which allows Member States to introduce or maintain more favourable standards insofar as those standards are compatible with the directive.

72 The Court has interpreted provisions of secondary EU legislation in the light of the Charter. See Case C-578/08, *Chakroun* [2010], para 44, Joined Cases C-175/08, C-176/08, C-178/08 en C-179/08, *Salahadin Abdulla* [2010], para 54.

73 Case C-403/09 PPU, *Detiček* [2010], para 55. This case concerned the compatibility of a regulation with the rights of the child set out in Art 24 of the Charter.

74 Tridimas 2006, p 29. He refers to several cases, such as Case C-314/89, *Rauh* [1991].

75 Lenaerts & Gutiérrez-Fons 2010, p 1650.

76 See as to the triple function of general principles of EU law: Lenaerts & Gutiérrez-Fons 2010, pp 1629-1631. They state that gap-filling 'involves addressing legal problems overlooked by the authors of the Treaties or by the Union legislature'.

77 The preamble to the Charter mentions that the Charter is based amongst others on the constitutional traditions and international obligations common to the Member States. Art 6 (3) TEU states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

more potentially also secondary EU legislation⁷⁸ and EU soft law⁷⁹ may serve as a source of inspiration for EU fundamental rights and general principles. Both secondary legislation and EU soft law play a minor role in this study and will therefore not be further addressed in section.⁸⁰ For the purpose of this study by far most weight is attached to international law as a source of inspiration.

International law as a source of inspiration

Article 6 (2) TEU states that the Union shall accede to the ECHR. Potentially the EU will also become a party to other human rights treaties.⁸¹ For now however, the European Union, unlike its Member States, is not a party with human rights treaties, such as the ECHR or the ICCPR.⁸² The EU is therefore not directly bound by human rights treaties. Although the wording of their case-law sometimes suggests differently, the EU courts therefore have generally not directly applied these treaties.⁸³ Instead they use human rights treaties as a source of inspiration for EU fundamental rights and general principles of EU law. The following standard consideration has been used by the Court of Justice:

78 See Case T-228/02, *Organization des Modjahedines du peuple d'Iran v Council* [2006], para 149 and Case T-47/03, *Sison v Council* [2007], para 204. See also Kunoy & Mortansson 2010, p 1825.

79 In Case C-322/88, *Grimaldi* [1989], paras 18-19, the Court of Justice considered that national courts are bound to take account of Commission recommendations where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions. See also Case C-188/91, *Deutsche Shell* [1993] and Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and others* [2010], para 40. Several Advocates General are of the opinion that the *Grimaldi* obligation should also apply to the EU courts. See the opinion of A.G. Tesouro in Case C-450/93, *Kalanke* [1995], para 20 and the opinion of A.G. Fennelly in Case C-76/97, *Tögel* [1998], para 34. See also Senden 2004, p 399.

80 Relevant are Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures [2006] OJ C 274/13, Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries [1997], OJ C 221/23 and Council Resolution of 30 November 1992 on manifestly unfounded applications for asylum (not published in the Official Journal).

81 The Stockholm Programme, An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01), para 6.2.1 mentions a possible accession to the Geneva Convention and its 1967 Protocol.

82 In opinion 2/94 the Court of Justice held that the European Community had no competence to accede to the ECHR. According to Groussot opinion 2/94 marked the start of an extensive use of the ECtHR's jurisprudence and acceleration in the shaping of fundamental rights. Groussot 2006, p 61.

83 In Case C-60/00, *Carpenter* [2002] and Case C-413/99, *Baumbast* [2002] the Court of Justice directly applied Art 8 ECHR. See Groussot 2003, p 199. In Case T-112/98, *Mannesmannröhren-Werke v Commission* [2001] the CFI considered however: 'It must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law'.

Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.⁸⁴

International law also inspired the drafters of the Charter. The Preamble of the Charter states that the Charter reaffirms the rights as they result from, amongst others, the international obligations common to the Member States and the ECHR as well as the ECtHR's case-law. Many of the rights included in the Charter are clearly based (partly or in whole) on the ECHR. When interpreting the fundamental rights included in the Charter the Court of Justice has relied on the ECtHR's case-law.⁸⁵

The Court of Justice has recognised several international treaties as sources of inspiration for EU fundamental rights and general principles of EU law.⁸⁶ Among those treaties are the ECHR, the Refugee Convention,⁸⁷ the ICCPR⁸⁸ and the UN Convention on the Rights of the Child (CRC)⁸⁹ which play a significant role in the context of this study. According to Article 6(3) TEU, the Charter⁹⁰ and the Court of Justice's case-law, the ECHR has special significance for the development of EU fundamental rights and general principles.⁹¹ Therefore, in many cases in which the Court of Justice applies EU fundamental rights or general principles, it refers to the ECHR and/or the ECtHR's case-law. The CAT, which will also be included in this study as a source of inspiration has so far not been recognised as such by the EU Courts. However, it may be expected that the Court of Justice will do so in the future as all Member States are a party with this convention.⁹²

84 See for example Case C-540/03, *Parliament v Council* [2006], para 35.

85 See for example Case C-279/09, *DEB* [2010], where the Court of Justice interpreted Art 47 of the Charter in the light of the ECtHR's case-law concerning Art 6 ECHR.

86 The European Social Charter in Case C-438/05, *Viking Line* [2007], para 44 and Case 149/77, *Defrenne* [1978], para 28 and the and the ILO Conventions in Case 149/77, *Defrenne* [1978], para 28.

87 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], paras 51-53 and Joined Cases C-57/09 and C-101/09, *B. and D.* [2010], paras 76-78.

88 Case C-347/87, *Orkem*, [1989] and Case C-540/03, *Parliament v Council* [2006].

89 Case C-540/03, *Parliament v Council* [2006], see also Case C-244/06, *Dynamic Medien* [2008].

90 The Charter specifically states that it reaffirms the rights included amongst others in the ECHR and following from the case-law of the ECtHR. Furthermore Art 52 (3) states that the meaning and scope of the rights included in the Charter which correspond to right guaranteed by the ECHR shall be the same as those laid down by the ECHR. Other human rights conventions such as the ICCPR or the CAT are not explicitly mentioned by the Charter.

91 Case C-222/84, *Johnston* [1986], see also Case C-540/03, *Parliament v Council* [2006], para 35.

92 See also Battjes 2006, p 85.

Chapter 3 will further address the Court of Justice's use of international treaties as sources of inspiration for EU fundamental rights and principles. It will in particular explain the (relative) weight which must be attached to these sources of inspiration *for the purpose of this study*.

The constitutional traditions of the Member States

Although the constitutional traditions of the Member State may be relevant in order to define the meaning of the EU right to an effective remedy, they are not included in this study (see section 1.5). The reason for this choice is that it is very difficult to identify principles which are common to the constitutional traditions of the Member States. First of all in order to discover such principles an assessment of the legislation of the 27 Member States may be necessary, which is a complicated and time-consuming operation. This may also be the reason why in practice, the Court of Justice does not very often enter into a comparative analysis of the constitutions of the Member States.⁹³ Secondly the EU Courts have not set out any criteria on the basis of which it should be decided whether a constitution tradition is common to the EU Member States.⁹⁴

Arguably an EU general principle is common to the constitutional traditions of the Member States if it is laid down in a treaty of which the Member States are signatories. Groussot states that the most common approach is to let the use of the constitutional traditions come after international law. The reason is that international law is appraised as having a unifying potential. International obligations are also easier to identify than the common constitutional traditions of the Member States. Thus only if the international treaties do not provide any guidance, the absence of an assessment of the constitutional traditions of the Member States, may be problematic.⁹⁵ In such a situation it is not excluded that the Court of Justice will accept a (certain interpretation

93 In most cases the Court of Justice just mentions that the right is common to the constitutional traditions of the Member States. See for example Douglas-Scott 2006, p 658, De Witte 1999, p 878 and Murray 2008, p 537. One example of a case in which the Court of Justice does make an analyses of the constitutions in a number of Member States is Case 44/79, Hauer [1979]. De Witte notes however that in the ECJ in this case examined the constitutional protection of the right to property in only three of the nine Member States and did not delve deeply into them. De Witte 1999, p 878. The Advocates General are more tended to analyse the constitutional traditions of the Member States than the Court of Justice.

94 See also Young 2005, pp 223-224, Groussot 2006, p 50. In Joined Cases C-46/87 and C-227/88, *Hoechst* [1989], para 17, the Court of Justice stated that if there 'are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection', a right cannot be recognised as a principle common to the laws of the Member States. This seems to point in the direction of an evaluative approach and to exclude the possibility of the minimalist approach. In Case C-144/04, *Mangold* [2005] however the Court of Justice accepted a general principle, which was not obviously (or even obviously not) common to the constitutional traditions of the Member States. Schiek 2006, pp 329-341. See for an overview of other critics Lenaerts & Gutiérrez-Fons 2010, p 1654.

95 See also section 1.5.

of) an EU fundamental right or general principle on the basis of the common constitutional traditions of the Member States alone.⁹⁶

1.3 RESEARCH GOAL AND QUESTIONS

The purpose of the study is in general to examine the potential meaning of EU fundamental rights and general principles for national asylum procedures and in particular to derive a set of EU procedural standards for several key issues of asylum procedures from EU legislation and/or EU fundamental rights and general principles. The central research question should therefore be phrased as follows:

What is the meaning of the EU fundamental right to an effective remedy for (1) the legality; and (2) the interpretation of EU legislation on asylum procedures?

This question includes the meaning of EU procedural rights and principles which are included in or strongly connected to the right to an effective remedy, such as the right to a fair trial, the principle of effectiveness and the right to good administration.⁹⁷ More specifically the study aims to define the meaning of the EU right to an effective remedy and these related rights and principles for the following procedural topics:

- 1 The right to remain in the territory during asylum proceedings in first instance and appeal
- 2 The asylum applicant's right to be heard in first instance and appeal
- 3 Questions relating to evidence in asylum procedures:
 - the standard and burden of proof and evidentiary assessment
 - judicial review of the establishment and qualification of the facts
 - the use of secret evidence

1.3.1 Preliminary issues (Part I)

In order to make it possible to answer the central research question and to define the meaning of EU procedural rights for the three specific procedural topics mentioned above, several preliminary issues should be addressed. This will be done in Chapters 2 to 4.

⁹⁶ The *Mangold* case may be an example of that. No prohibition of age discrimination existed in international law. Furthermore Schiek notes that the Court chose not to refer to Art 21 of the Charter and Art II-82 of the Constitutional Treaty, which establish a prohibition of age discrimination. By doing so, it could have showed that the Member States have established a common constitutional accord which includes a prohibition to discrimination on grounds of age. Schiek 2006, pp 329-341.

⁹⁷ See further Chapter 4.

Chapter 2: The Common European Asylum System and EU procedural standards

First of all it is necessary to know the potential impact and the scope of application of EU fundamental rights in asylum cases, taking into account the particular characteristics of the Procedures Directive. It should be examined whether the minimum standards of the Procedures Directive are capable of infringing EU fundamental rights. Arguably the Member States are never forced by those minimum standards to violate EU fundamental rights, as they are allowed to introduce or maintain higher standards. If minimum standards are capable of infringing fundamental rights, in which circumstances should they then be considered invalid?

Another question which should be addressed is whether Member States act within the scope of EU law when making use of the discretion offered by the Procedures Directive (for example exceptions to procedural guarantees). If they are not, that means that they are not bound by EU fundamental rights. These questions are addressed in Chapter 2.

Chapter 3: International treaties as sources of inspiration for EU fundamental rights in the context of the Common European Asylum System

Chapter 3 discusses the Court of Justice's use of international treaties as sources of inspiration for EU fundamental rights. In particular it examines the (relative) weight which should be accorded to the ECHR, the Refugee Convention, the CAT, the ICCPR and the CRC as a source of inspiration for the EU right to an effective remedy when applied in the context of asylum procedures.

Chapter 4: Introduction to the EU right to an effective remedy and related procedural rights and principles

Finally it is useful to select the EU procedural rights, which are relevant for the purpose of this study and to examine their general content and meaning before turning to the specific themes mentioned above. Chapter 4 therefore introduces the EU procedural rights, which will be used in this study in order to build a set of EU standards for the themes discussed in later chapters. It shows how EU fundamental rights have limited the procedural autonomy of the Member States. Furthermore this chapter explains how EU procedural rights and principles are interlinked and it discusses their general content. It also gives an overview of the specific provisions of international treaties, which may inspire the Court of Justice when defining the meaning and content of the EU right to an effective remedy in the asylum context. Finally three basic notions are introduced which may be helpful to explain the Court of Justice's as well as the ECtHR's case-law and predict how they will rule on procedural issues in the future.

Chapter 5: Preliminary conclusions and methodology used for the following chapters

In this final chapter of Part I conclusions will be drawn as to the preliminary issues discussed and the methodology applied in the following chapters will be explained.

1.3.2 Key issues of asylum procedures (Part II)

Chapters 6 to 10 will examine the meaning of the EU fundamental right to an effective remedy for the following key issues of asylum procedures.

Chapter 6: The right to remain on the territory during first instance and appeal asylum proceedings

This chapter addresses the question whether, according to EU law, Member States are required to allow asylum applicants to remain on their territory during first instance proceedings and the appeal procedure. Furthermore it examines whether the Member States must grant applicants the opportunity to lodge an appeal against this expulsion before being expelled.

Chapter 7: The asylum applicant's right to be personally heard on his asylum motives

The statements of the claimant play an essential role in the assessment whether this person runs a risk of *refoulement* upon return to his country of origin. This chapter addresses the EU standards with regard to the asylum applicant's right to be personally heard on his asylum motives in first instance and appeal proceedings

Chapter 8: The burden and standard of proof and evidentiary assessment

This chapter addresses the EU requirements with regard to the standard and burden of proof and the evidentiary assessment in asylum cases

Chapter 9: Judicial review of the establishment and qualification of the facts

Chapter 9 concerns the standard of judicial review in asylum cases. It examines in particular whether the (first instance) courts of some Member States are allowed to pay (more or less) deference to the authorities' decision on the establishment of the facts or whether they are required to apply a full judicial review to the asylum decision.

Chapter 10: The use of secret information in asylum proceedings

This chapter specifically addresses procedural safeguards applying to asylum cases in which (part of) the establishment of the facts is based on evidence gathered by the authorities, which is not made available to the asylum applicant concerned or his legal representative.

1.3.3 Conclusions (Part III)

Chapter 11: Towards a common and fair European asylum procedure?

This chapter recapitulates the methodology used for the purpose of this study. It draws some conclusions as to the achievements of the Procedures Directive up to now and the potential impact it may still have. It also contains a list of procedural standards which were derived from the Procedures Directive and the EU right to an effective remedy in Chapters 6 to 10. Finally this chapter glances into the future. It addresses the proposed recast of the Procedures Directive and the recast of the Qualification Directive. Their provisions will be tested against the conclusions drawn in this study as to the requirements following from the EU right to an effective remedy concerning each of the procedural topics discussed in the previous chapters.

1.4 STEP WISE APPROACH

In order to define the meaning of the EU fundamental right to an effective remedy for each of the specific topics addressed in Chapters 6 to 10, the following five steps are taken.

Step 1: Identification of the applicable provisions of the Procedures Directive. The first step is to identify the provisions of the Procedures Directive, which are applicable to the procedural issue concerned. With regard to some procedural issues the Procedures Directive provides for clear standards. In such a situation it is examined whether these standards comply with the EU right to an effective remedy. However, with regard to most topics the provisions of the Procedures Directive do not provide such clear standards. In such situation the EU right to an effective remedy will be used to interpret these provisions.

Step 2: Assessment of the existing case-law of the EU Courts concerning the specific topic.

With regard to most of the asylum topics addressed in this study the Court of Justice has not answered any preliminary questions yet. Most of the case-law examined therefore regards the Court of Justice's and the General Court's or former CFI's interpretation of the EU right to an effective remedy in other fields

of EU law.⁹⁸ The procedural principles which emerge from this case-law will be applied in the asylum context.

Step 3: Examination of the ECtHR's case-law and other sources of inspiration
The ECtHR's judgments and the relevant views of other supervising bodies inspire the interpretation of the EU right to an effective remedy. Moreover they set procedural requirements for asylum procedures specifically. They thus give a good indication which guarantees are needed in order to establish a fair asylum procedure.

Step 4: Conclusion as to the meaning of the EU right to an effective remedy for the specific aspect of the asylum procedure

On the basis of the EU Courts' case-law, the case-law of the ECtHR and the views of the other supervising bodies the meaning and content of the EU right to an effective remedy with regard to a specific procedural aspect is defined.

Step 5: Application to the provisions of the Procedures Directive

Finally the provisions of the Procedures Directive identified in step 1 are interpreted in the light of the EU right to an effective remedy. If the text of a relevant provision does not allow an interpretation in conformity with the EU right to an effective remedy, conclusions are drawn with regard to the legality of this provision.⁹⁹

The method applied in order to find the meaning of the EU right to an effective remedy is further explained in Chapter 5.

1.4.1 The method of selecting research material

This study was concluded on 1 October 2011. Later developments were only taken into account in exceptional cases. Hereunder it is briefly explained how the EU Courts' judgments and the sources of inspiration used for the purpose of this study were selected.

98 Although the General Court/ former CFI only rules in appeals against decision taken by the EU Institutions, arguably their interpretation of the EU right to effective judicial protection is relevant for cases decided on the national level in which this right is involved. The CFI has for example decided that several procedural rights (among which the right to an effective remedy) were infringed in EU sanction cases, in which crucial information was not disclosed to the person concerned. This study takes this interpretation into account in order to define the content and meaning of these rights in the context of asylum cases, in which the decision is based on secret information.

99 See further with regard to the legality test sections 2.4.1 and 2.5.1.

EU Courts judgments

The EU Courts' case-law examined in this study was found through the search engine of the Court of Justice on the internet¹⁰⁰ and through literature in which this case-law was discussed or mentioned. Procedural issues have been addressed by the EU Courts in cases regarding all fields of EU law and under different EU rights and principles. Furthermore the EU Courts have used various terms for the same procedural rights.¹⁰¹ As a result sometimes considerations which concern procedural issues remain hidden. This makes it very difficult to disclose all relevant case-law. It is therefore possible that not all relevant judgments were included in this research.

Sources of inspiration

For the purpose of this study the following judgments and views of supervising bodies with international treaties were examined:

- European Court Human Rights: all judgments and admissibility decisions by the ECtHR in *non-refoulement* cases (notably Article 3 ECHR) and judgments concerning Article 6 (1) and (3) on relevant issues.¹⁰²
- European Commission on Human Rights: some relevant decisions mentioned in literature
- Council of Europe Committee of Ministers and Parliamentary Assembly Resolutions: Recommendations and Guidelines specifically addressing asylum matters or procedural issues such as the right to legal assistance or access to justice.
- Human Rights Committee: views in individual cases concerning Articles 6, 7 and 14 ICCPR, General Comments and Concluding Observations and Recommendations with regard to the EU Member States, other European countries, Australia, Canada, New Zealand and the United States.¹⁰³
- Committee against Torture: views in individual cases concerning Article 3 CAT, General Comments and Concluding Observations and Recommendations with regard to the EU Member States, other European countries, Australia, Canada, New Zealand and the United States.¹⁰⁴

100 In order to search the data-base terms were used such as: effective judicial protection, effective remedy, effectiveness, fair trial, equality of arms, adversarial proceedings, right to be heard, statement of reasons, good administration, interim relief, suspensive effect, interim protection, burden of proof, standard of proof, evidence, legal aid, legal assistance, time-limits etc.

101 The Court of Justice has used terms such as 'effective protection of fundamental rights', 'the legal protection which persons derive from the direct effect of provisions of Community law' or 'requirements of sufficiently effective protection' when addressing the procedural rights of parties.

102 Judgments were found via Hudoc (www.echr.coe.int) and literature.

103 Individual views were found via the search engine of the UN treaty body base, www.bayefski.com and via literature.

104 Individual views were found via the search engine of the UN treaty body base, www.bayefski.com and via literature.

- Committee on the Rights of the Child: General Comments and Concluding Observations and Recommendations with regard to the EU Member States, other European countries, Australia, Canada, New Zealand and the United States.

1.5 SCOPE AND LIMITATIONS OF THE STUDY

The section will set out the scope and limitations of the study and explain some of the choices which have been made in order to clearly define the research topic.

Focus on EU law

As is apparent from the central research question described in section 1.3 this study focuses primarily on EU law. Its purpose is to develop a set of EU procedural standards for several important issues in national asylum procedures. International law (the ECtHR and other human rights treaties) are only included in this study as sources of inspiration for EU fundamental rights. It is therefore only in this context that the study assesses the requirements for asylum procedures which follow from those treaties.

No assessment of national law

This study does not include an assessment of the national law and practices of the Member States. It only briefly refers to European Commission evaluations and UNHCR research, which examined the implementation of the Procedures Directive in the Member States, in order to show that certain procedural aspects addressed in this study cause problems or are discussed in practice and not only in theory. However a set of EU standards for national asylum procedures has been developed in the abstract, on the basis of EU legislation, the EU Court's case-law and relevant sources of inspiration.

This approach does have at least two drawbacks. First of all, as was explained in section 1.2.3, the common constitutional traditions of the Member States serve as a source of inspiration for EU fundamental rights. National asylum legislation and practice may thus influence the Court of Justice's interpretation of EU fundamental rights in the asylum context. It was already pointed out in section 1.2.4. that it is difficult to identify principles which are common to the constitutional traditions of the Member States.

Secondly the Court of Justice will often take the national asylum system into account when deciding whether a national procedural rule infringes the EU fundamental right to an effective remedy. As will be explained in section 4.5.2 the Court assesses the fairness of a national procedural rule not in a vacuum but in the context of the national procedure as a whole. Therefore in order to know what the set of EU standards developed in this study means

for a specific Member State, it is usually necessary to take into account the national context.

Only asylum procedures governed by the Procedures Directive

This study only assesses which EU standards should apply to asylum procedures which fall within the scope of the Procedures Directive. According to Article 3 PD, the Procedures Directive applies to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status. Cases of requests for diplomatic or territorial asylum submitted to representations of Member States fall outside the scope of the directive. In 2010 all Member States except one had put in place a single procedure in which both refugee status and subsidiary protection status are determined.¹⁰⁵ As a result in 26 Member States the Procedures Directive applies to the determination of both statuses.¹⁰⁶

Asylum applications governed by the Procedures Directive (procedural standards) are also governed by the Qualification Directive (substantive standards).¹⁰⁷ The standards laid down by the Qualification Directive are relevant for the purpose of this study for two reasons. First of all it defines the content of the substantive EU rights claimed by asylum applicants: the right to asylum and the prohibition of *refoulement*. National procedural rules which render the effective exercise of these rights impossible or excessively difficult are contrary to EU law. Furthermore it will be argued in section 4.5.3.1 that the nature of the substantive EU rights claimed by a person defines to a certain extent the level of procedural protection which must be offered to this person. Secondly the Qualification Directive contains standards regarding several evidentiary issues which are addressed in Chapter 7. The standard of proof which must be met in asylum cases should be derived from the criteria for qualifying as a refugee or a person eligible for subsidiary protection included in the directive. Moreover Article 4 QD provides for standards concerning the burden of proof and evidentiary assessment. For these reasons the Qualification Directive is included in this study when relevant.

This study does not address the procedural guarantees applicable when a person claims that his expulsion, extradition or transfer to another country will violate the prohibition of *refoulement* in a procedure governed by another EU measure than the Procedures Directive. A claim of a risk of *refoulement* may be done in the context of a refusal of entry to the EU at the border in the meaning of the Schengen Borders Code,¹⁰⁸ a transfer to another Member State

¹⁰⁵ Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final, p 3.

¹⁰⁶ Art 3 (3) PD.

¹⁰⁷ See Artt 2 (b) and 3 (1) PD and Art 1 and 2 (g) QD.

¹⁰⁸ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L105/1.

on the basis of the Dublin Regulation or a return procedure governed by the Return Directive.¹⁰⁹ In such procedures, it should also be assessed whether there is a risk of a violation of the prohibition of *refoulement*. Arguably many of the standards which apply to asylum procedures governed by the Procedures Directive should also apply to those procedures. However border, Dublin or return proceedings have different characteristics than asylum procedures, which may influence the level of procedural protection which should be offered to the individual. In Dublin cases the asylum applicant will be transferred to another EU Member State, which may have impact on, for example, the burden of proof. A return procedure may follow an asylum procedure, which may have implications for the procedural safeguards which need to be offered. If a person first claims a violation of the prohibition of *refoulement* when a decision to refuse at the border or to return him is taken, the most logical step would be to lodge an asylum claim. From the moment the asylum claim is lodged the Procedures Directive applies.

No questions concerning the exclusion from an asylum status and detention

This study only concerns the assessment of the question whether a person falls within the scope of the EU prohibition of *refoulement*, according to the criteria laid down in the Qualification Directive. Most persons who have a well-founded fear of persecution or run a real risk of serious harm are not only protected by the prohibition of *refoulement* but will also be granted an EU asylum status. However some persons in need of protection will be excluded from such a status, for example because they committed serious crimes in their country of origin or because they constitute a danger to the national security or community of the Member State.¹¹⁰

EU procedural standards applicable to the decision to refuse a person an asylum status or to withdraw an asylum status for other reasons than that protection against expulsion is no longer necessary, will not be examined in this study. The reason for this choice is that the nature of the EU right involved in such decision (the right to asylum) is different than the EU right to protection against *refoulement*. While the EU right to asylum may be subject to limitations, the EU prohibition of *refoulement* is absolute. Before refusing or withdrawing an asylum status for national security reasons, the interests of the person concerned should be balanced against the interests of the State. This has implications for the level of procedural protection which should be offered and specific procedural questions may arise.¹¹¹ For example the burden of proof and the required intensity of judicial review is different in case of a

109 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

110 Artt 12 (2), 14 (4) and (5) and 18 QD.

111 See also section 4.5.1.

balancing test in the context of a decision whether an asylum status may be refused for reasons of national security than in case of a decision regarding the existence of a real risk of *refoulement* upon return.

Also procedural guarantees applicable to detention cases falling within the scope of Article 18 PD will not be assessed.

Limited number of procedural topics

As was set out in section 1.3 a choice has been made for a number of key procedural topics: the right to remain on the territory during first instance and appeal proceedings, the asylum applicant's right to be personally heard on his asylum motives and several questions relating to evidence. Arguably the way these procedural issues are regulated in a Member State determines to an important extent the fairness of the asylum procedure.

Another reason to choose these particular topics was the assumption that they cause problems in practice in at least part of the Member States. This assumption was based among others on the emergence of those issues in the ECtHR's case-law and in legal discourse, the fact that they raised cause of concern according to reports evaluating the implementation of the Procedures Directive or (other) human rights reports and the researcher's experience with the Dutch asylum procedure.

Several important procedural topics, such as the right of access to the asylum procedure, the right to (free) legal assistance and interpretation services, the application of safe country of origin, first country of asylum and safe third country concepts and the use of very speedy (accelerated) procedures, will not be discussed in this book. This book thus does not give a complete overview of the potential meaning of the EU fundamental right to an effective remedy in the asylum context. However it should be noted that the procedural topics mentioned are also governed by the Procedures Directive and, as a result, by the EU right to an effective remedy and related procedural rights. The stepwise approach used to discover the meaning of the EU procedural right to an effective remedy can therefore also be applied to these procedural topics.¹¹²

¹¹² See with regard to the right of access to (free) legal assistance in relation to the right of access to court Reneman 2011.

PART I

Preliminary issues

2 | The Common European Asylum System and the applicability of EU procedural standards

In order to be able to interpret the Procedures Directive and to test the legality of its provisions it is necessary to know more about the context in which the directive was adopted, its purposes, its system and the minimum character of its norms. Therefore this chapter will introduce the Common European Asylum System of which the Procedures Directive is part (section 2.1) as well as the Procedures Directive itself (section) 2.2.

Relevance of the Qualification Directive

When assessing the procedural guarantees applying to the asylum procedures one cannot ignore the importance of the Qualification Directive. This directive defines the content of the right to asylum and the prohibition of *refoulement*, the substantive EU rights usually claimed by asylum applicants during the asylum procedure. National procedural rules should not undermine the effective exercise of these rights. These substantive rights also determine to a certain extent the level of procedural protection which should be offered.¹ Furthermore the Qualification Directive contains minimum standards regarding the evidentiary issues discussed in Chapter 8.² Therefore this directive will be introduced in section 2.3.

Potential impact and scope of application of EU fundamental rights

The Procedures Directive contains minimum standards and leaves wide discretion to the Member States in designing their asylum procedure. This raises two important questions relating to the potential impact and scope of application of EU fundamental rights. These questions should be answered in order to be able to define the meaning and content of EU procedural rights for the themes which will be addressed in Chapters 6 to 10.

Testing the legality of the Procedures Directive's provisions

First of all it should be examined whether the minimum standards included in the Procedures Directive are capable of infringing EU fundamental rights. Member States are allowed to introduce or maintain more favourable provisions than those minimum standards, provided that those provisions are

1 See further section 4.5.3.

2 See also section 1.5 above.

compatible with the directive. Arguably the Member States are therefore never forced by those minimum standards to violate EU fundamental rights. Section 2.4.1 explains that the Court of Justice is competent to test the legality of the minimum standards included in the Procedures Directive against EU fundamental rights and sets out in which circumstances these standards should be considered invalid.

Applying EU fundamental rights to national asylum procedures

Secondly questions arise with regard to the *scope of application* of EU fundamental rights in the context of the Procedures Directive. The Procedures allows numerous exceptions to the procedural safeguards which should be offered to asylum applicants and many vague terms are used.³ Member States may argue that they are not bound by EU fundamental rights when making use of their discretionary power, because the national measures implementing this discretionary power fall outside the scope of EU law. It is contended in section 2.4.2 that this line of reasoning is not compatible with the Court of Justice's case-law. According to the Court of Justice Member States are bound by EU fundamental rights when making use of the discretion allowed by EU legislation.

The role of the national courts and the Court of Justice

Finally it is relevant to examine how questions regarding the interpretation and legality of the provisions of the Procedures Directive may be brought before the national courts and the Court of Justice. This issue is addressed in section 2.5.

2.1 THE COMMON EUROPEAN ASYLUM SYSTEM AND ITS LEGAL BASIS

2.1.1 Legal basis of EU asylum legislation

With the Treaty of Amsterdam which was concluded in 1997, asylum and immigration was moved from the third pillar to the first pillar of the European Union. The relevant provisions with regard to this area were laid down in Title IV of Part Three of the former EC-Treaty (Articles 61-69). Article 63 of the former EC-Treaty required the Council to adopt within a period of five years after the entry into force of the Treaty of Amsterdam⁴:

³ See further section 2.3.3

⁴ Measures to be adopted pursuant to points 2(b), 3(a) and 4 of Art 63 were not subject to this five-year period. According to Art 67 of the former EC-Treaty during the initial period of five years after the entry into force of the Treaty of Amsterdam, these measures had to be adopted according to the consultation procedure. After this period measures based on Art 63 EC-Treaty had to be adopted according to the co-decision procedure.

- measures on asylum
- measures on refugees and displaced persons
- measures on immigration policy
- measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States

The Procedures Directive together with the Qualification Directive is based on Article 63 (1) of the former EC-Treaty.

Since the entry into force of the Treaty of Lisbon the legal basis for EU policies on border checks, asylum and immigration is laid down in Chapter 2 of Title V TFEU (Articles 77-80). Article 78 TFEU states that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. Like Article 63 of the former EC-Treaty, this provision states that EU asylum policy must be in accordance with the Refugee Convention and other relevant treaties.

2.1.2 Policy framework: the Common European Asylum System

The Procedures Directive, together with the Qualification Directive, Dublin Regulation, the Reception Conditions Directive (RCD)⁵ and arguably the Temporary Protection Directive (TPD)⁶ are part of the Common European Asylum System (CEAS).⁷ It was decided to work towards establishing CEAS during a special meeting held on 15 and 16 October 1999 in Tampere. CEAS was to be established as part of the European Council's objective to develop the European Union as an area of freedom, security and justice.⁸ It was agreed that this system should include a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum applicants, and the approximation of rules on the recogni-

5 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18 (Reception Conditions Directive or RCD), based on Art 63 (1)(b) EC Treaty.

6 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12 (Temporary Protection Directive or TPD), based on Art 63 (2)(a) EC Treaty. Recital 1 Preamble TPD refers to a 'common policy on asylum, including common European arrangements for asylum'.

7 See the second recitals of the preambles to the PD, the QD, the RCD and the Dublin Regulation, which refer to CEAS.

8 See the first recitals of the preambles to the PD, QD and the Dublin Regulation.

tion and content of the refugee status. These measures had to be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. It was agreed that in the longer term, EU rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.⁹ This aim was reaffirmed in the 'The Hague Programme' of 2004¹⁰ and 'The Stockholm Programme of 2009'.¹¹

In 2009 and 2011 the European Commission (henceforth: the Commission) issued proposals for a recast of the Procedures Directive. At the time of conclusion of this study the amended proposal for the recast was still being discussed.¹² This also applies to the recast proposals for the Reception Conditions Directive¹³ and the Dublin Regulation¹⁴ were introduced in 2008, 2009 and 2011.¹⁵ A recast of the Qualification Directive was adopted in 2011.¹⁶

Objectives

The main objective of the measures constituting CEAS was simply to lay down minimum standards regarding the subject matter they address.¹⁷ The preambles of all the measures of CEAS furthermore mention that they aim to preclude secondary movements of third country nationals.¹⁸ Differences in protection or reception standards between Member States may encourage

9 See also recital 3 Preamble PD.

10 Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005], OJ C 53/1.

11 Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizen [2010] OJ C 115/1, para 6.2.1.

12 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554 and Amended proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection status (Recast) COM(2011) 319 final.

13 Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815.

14 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 (Recast), COM(2008) 815.

15 See further section 11.5.

16 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

17 Recital 5 Preamble and Art 1 PD.

18 See Preambles recital 6 PD, recital 7 QD, recital 8 RCD and recital 9 TPD. Battjes remarks that the preamble to the Dublin Regulation refers to the Dublin Convention, which aimed to preclude secondary movements in recital 5. Battjes 2006, p 200.

persons to move from one Member State to another. Therefore harmonisation of those standards is deemed necessary.

Another main objective of CEAS is to ensure respect for the fundamental rights of third country nationals.¹⁹ In the Presidency conclusions of the Tampere summit the European Council reaffirmed the importance the Union and Member States attach to absolute respect of the right to seek asylum.²⁰ The conclusions moreover state that CEAS should be based on the full and inclusive application of the Refugee Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*.²¹ This is reflected in Article 63 (1) of the former EC-Treaty and Article 78 TFEU and the preambles of the measures adopted under CEAS, which refer to the fact that CEAS is based on respect for the Refugee Convention.²² Finally the preambles of all these measures except the Temporary Protection Directive state that they respect fundamental rights and observe the principles recognised in particular by the Charter.²³

Applicability to third country nationals only

The EU measures adopted under CEAS are only applicable to asylum applications lodged by third country nationals.²⁴ Asylum applications submitted by EU nationals thus fall outside the scope of CEAS.

Character of the norms

The level of harmonisation achieved by the directives adopted under CEAS is rather limited, because the standards laid down in those directives are minimum standards.²⁵ This means that the Member States are allowed to introduce or maintain more favourable standards, in so far as these standards are compatible with the directive.²⁶ Section 2.4.1 examines whether and if so in which circumstances these minimum standards are capable of infringing EU fundamental rights. Article 78 TFEU requires the European Parliament and the Council, to adopt measures for a Common European Asylum System which no longer contain minimum standards, but instead comprise among others a uniform status of asylum and subsidiary protection for third country nationals and common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status.

19 See also Battjes 2006, p 201.

20 See also recital 10 Preamble QD and recital 5 Preamble RCD.

21 Tampere European Council (15 and 16 October 1999) Presidency Conclusions, para 13.

22 See Preambles recital 2 PD, recital 2 QD, recital 2 RCD, recital 10 TPD.

23 See Preambles recital 8 PD, recital 10 QD, recital 5 RCD, recital 15 DR.

24 Artt 1 and 2 (c) Directive 2001/55/EC, Art 3 (1) RCD, Art 1 Dublin Regulation, Art 1 QD, Art 2 (b) and (c) PD.

25 See Art 63 (1) and (2)(a) of the former EC-Treaty.

26 Art 5 PD, Art 3 QD, Art 4 RCD, Art 5 TPD.

Relation between the measures adopted under CEAS

The fact that the measures adopted under CEAS are constituents of a system implies that their provisions must be read in conjunction.²⁷ In these measures common definitions are used. An important example is the term ‘application for asylum’, which can be found in the Procedures Directive, Dublin Regulation and the Reception Conditions Directive.²⁸ Furthermore several cross-references can be found in the measures of CEAS. The Procedures Directive refers several times to provisions of the Qualification Directive. Article 10 (1) (a) PD for example, which includes the duty to inform the asylum applicant of his obligations refers to Article 4 QD. Article 4 QD imposes a duty upon the asylum applicant to submit all elements needed to substantiate the application for international protection.

Relation with other measures adopted on the basis of Article 63 of the former EC-Treaty

The measures adopted under the Common Asylum System are not only linked to each other, but also to other measures adopted on the basis of Article 63 EC-Treaty. These include EU measures constituting the EU removal and repatriation policy,²⁹ such as the Return Directive (RD) adopted in 2008.³⁰ Other measures which have been adopted on the basis of Article 63 EC-Treaty, which are also relevant for asylum applicants are amongst others the directives regarding family reunification³¹ and human trafficking.³²

2.2 THE PROCEDURES DIRECTIVE

The Procedures Directive introduces a minimum framework in the EU on procedures for granting and withdrawing refugee status. According to the Tampere conclusions these procedures need to be fair and efficient.³³ The

27 Battjes 2006, p 211.

28 Battjes 2006, pp 206-207.

29 The ‘The Hague Programme’ of 2004 called for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity. Brussels European Council, Presidency Conclusions, Annex 1, para 1.6.4, 14292/1/04 REV 1.

30 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98. An example is Art 13 (4) RD which refers to Art 15 PD.

31 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12, based on Art 63 (3) (a) EC-Treaty.

32 Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19, based on Art 63 (3) EC-Treaty.

33 Presidency Conclusions of the Tampere European Council 15-16 October 1999 (SN 200/99), para 14.

legal basis for the directive was Article 63 (1)(d) of the former EC-Treaty. The directive was adopted by the Council on 13 December 2005 as the last asylum measure of the legislative programme.

The directive was the result of lengthy and difficult negotiations.³⁴ Those with regard to the first proposal for the directive came to a standstill and the proposal was withdrawn. The Commission issued a new proposal in June 2002. The process progressed slowly, as Member States wanted to adhere to the special characteristics of their asylum procedures. Article 39 on appeal procedures and suspensive effect for example, was extensively discussed, because the national procedures greatly differed on this point. Furthermore in several countries national asylum policy was revised and the relation of these changes to the proposal of the directive had to be analysed.

On 29 April 2004 a political agreement on the Directive was reached.³⁵ After the political agreement the negotiations on the minimum common list of safe countries of origin were continued. The directive was published on 15 December 2005 and had to be transposed in the Member States before 1 December 2007.³⁶ Article 15 on the right to legal aid and representation had to be transposed by 1 December 2008.

The proposal for the directive was subjected to heavy criticism. The European Parliament had proposed a list of 102 amendments to the directive.³⁷ None of these amendments was taken into account by the Council.³⁸ The amendments regarded amongst others a right to remain in the Member State during the appeals procedure, the right to free legal aid, detention and a duty for the Member States to give notice of the decision on the asylum application within a time-limit of 6 months.

Also UNHCR and several NGO's expressed fundamental criticism on the proposal. Just before political agreement on the proposed directive was reached, ten NGO's asked EU Commissioner for Justice and Home Affairs, Vitorino to withdraw the proposal. The organisations were concerned that proposals to designate certain countries as 'safe countries of origin' or 'safe third countries' and the absence of a guaranteed right for all asylum applicants to remain in a country of asylum pending an appeal, violated EU Member States' international obligations.³⁹

34 According to Michelogiannaki the negotiations 'were proved to be the most intense, lengthy and difficult negotiations compared to any other that had taken place in the past, regarding the asylum agenda'. Michelogiannaki 2008, p 21.

35 See for the negotiation process: Ackers 2005 and Michelogiannaki 2008.

36 Art 43 PD.

37 European Parliament legislative resolution on the amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (14203/2004 – C6-0200/2004 – 2000/0238(CNS)) of 27 September 2005.

38 Michelogiannaki 2008, p 21.

39 Press release 29 April 2004, European Council for Refugees and Exiles, Amnesty International and Human Rights Watch, available at www.ecre.org.

The European Parliament challenged the legality of several provisions of the Procedures Directive before the Court of Justice. It asked for the annulment of Articles 29 (1) and (2) and 36 (3) of the directive, which lay down the procedures for adopting and amending common minimum lists of safe countries of origin (Article 29) and European safe countries (Article 36). The Parliament argued that, according to Article 67 (5) of the EC-Treaty, those lists should be adopted and amended according to the co-decision procedure of Article 251 of the former EC-Treaty. The challenged provisions only envisaged a consultative role for the European Parliament in adopting the lists. The Court of Justice deemed the Parliament's appeal well-founded and annulled the challenged provisions in a judgment of 6 May 2008.⁴⁰

2.2.1 Scope of application

The Procedures Directive applies to applications for asylum made in the territory of the Member States and to the withdrawal of refugee status.⁴¹ This includes asylum applications made at the border or in transit zones. The Procedures Directive does not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.⁴² It also does not apply to procedures which are governed by the Dublin Regulation.⁴³ The United Kingdom and Ireland take part in the application of the Procedures Directive. The directive does not apply to Denmark.⁴⁴

In principle the directive is only applicable to procedures in which a person's right to a refugee status is assessed. This follows from the definition of the term 'application for asylum' laid down in Article 2 (b) PD. This term means 'an application by a third country national or stateless person, which can be understood as a request for international protection from a Member State under the Geneva Convention'. In practice almost all requests for international protection need to be assessed according to the minimum standards of the Procedures Directive for two reasons. First of all asylum applicants are not expected to mention which form of protection they seek. Any application for international protection is presumed to be an application for asylum in the meaning of the Procedures Directive, unless the asylum applicant explicitly requests another kind of protection (such as subsidiary protection), that can be applied for separately. Secondly where Member States have one procedure, in which both a person's right to a refugee status and to a subsidiary protection status is assessed, the Member State shall apply the Procedure Directive

⁴⁰ Case C-133/06, *Parliament v Council* [2008].

⁴¹ Art 3 (1) PD.

⁴² Art 3 (2) PD.

⁴³ Recital 29 Preamble PD.

⁴⁴ Recitals 32-34 Preamble PD.

throughout the procedure.⁴⁵ In 2010 all Member States but one (Ireland) employed such a single asylum procedure. Therefore the Procedures Directive in practice also applies to the assessment of the right to subsidiary protection status in 26 Member States.⁴⁶

2.2.2 Overview of the directive's provisions

The Procedures Directive consists of six chapters. Chapter I contains some general provisions on the purpose and scope of the directive and definitions. Chapter II consists of a list of basic principles and guarantees. First of all the right to access to the asylum procedure is guaranteed.⁴⁷ Furthermore this chapter grants some important rights to asylum applicants, such as: the right to remain in the territory of the Member State pending the examination of the asylum application,⁴⁸ the right to be informed of the procedure to be followed, of rights and obligations and of the result of the decision on the application,⁴⁹ the right to interpretation services⁵⁰ and legal aid and assistance,⁵¹ the right to a personal interview⁵² and the right to contact UNHCR.⁵³ Special guarantees are provided for unaccompanied minors.⁵⁴ Chapter II also sets out requirements for the examination of and decisions on asylum applications.⁵⁵ It furthermore states which obligations may be imposed on asylum applicants, such as the obligation to hand over documents in their possession relevant to the examination of the asylum application.⁵⁶ Finally this chapter contains provisions regarding detention,⁵⁷ (implicit) withdrawal of the asylum application,⁵⁸ the role of UNHCR⁵⁹ and a provision, which seeks to prevent that actors of persecution are informed of the asylum application of an asylum applicant.⁶⁰

45 Art 3 (3) PD.

46 Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final, p 3. Art 3 (4) PD states that Member States may decide to apply this Directive in procedures for deciding on applications for any kind of international protection.

47 Art 6 PD.

48 Art 7 PD.

49 Art 10 (1) (a) and (d) PD.

50 Art (1) (b) PD.

51 Art 15 and 16 PD.

52 Art 12 PD.

53 Art 10 (1) (c) PD.

54 Art 17 PD.

55 Artt 8 and 9 PD.

56 Art 11 PD.

57 Art 18 PD.

58 Art 19 PD.

59 Art 21 PD.

60 Art 22 PD.

Chapter III sets out standards for procedures at first instance. Member States are obliged to process asylum applications in a procedure which is in accordance with the principles and guarantees laid down in Chapter II.⁶¹ Article 24 however mentions three kinds of situations in which Member States may derogate from those principles and guarantees: subsequent asylum applications, applications submitted at the border and cases in which the asylum applicant seeks to enter or has entered the territory illegally from a European safe third country. Special standards for the examination of subsequent applications and applications submitted at the border are laid down in sections IV and V. Chapter III furthermore covers the prioritisation and acceleration of the examination procedure. It also sets out the conditions on which applications may be declared inadmissible⁶² or unfounded.⁶³ Chapter III finally contains minimum standards as regards four concepts of safe countries: first country of asylum, safe third country, safe country of origin and European safe third country.⁶⁴

Chapter IV contains rules regarding the withdrawal of refugee status. Chapter V consists of one provision, Article 39, which grants asylum applicants the right to an effective remedy before a court or tribunal against a negative decision on his asylum application. Article 39 PD leaves discretion to the Member States as to the question whether this remedy should have suspensive effect. Finally Chapter VI contains some general and final provisions.

2.2.3 Low level of harmonisation and wide discretion

The minimum standards included in the directive allow the Member States wide discretion. First of all, as was mentioned in the previous section, the directive provides for a possibility to employ specific procedures may derogate from the basic principles and guarantees of Chapter II of the directive. Secondly the basic principles and guarantees themselves contain many options for derogation. Examples are Article 12 which allows for exceptions to the right to a personal interview and Article 15, which provides for several possibilities to limit the right to free legal aid in the event of a negative decision on the asylum application. Finally the derogation provisions included in the directive contain many vague terms, which need to be interpreted by the Member States. Article 12 (3) PD states for example that a personal interview may be omitted amongst others where it is *not reasonably practicable*, in particular where the

61 Art 23 PD.

62 Art 25 PD.

63 Art 28 PD.

64 Artt 26, 27, 29-31 and 36 PD. The application of asylum applicants who came from a first country of asylum, a safe third country or a European safe third country does not need to be examined on the merits. See Artt 25 (2) and 36 (1) PD.

competent authority is of the opinion that the applicant *is unfit or unable to be interviewed* owing to *enduring circumstances beyond his/her control*.

The fact that the directive leaves wide discretion for the Member States may have consequences for the application of EU fundamental rights. As was set out in section 1.2.1 these EU fundamental rights and general principles of EU law only apply to issues falling within the scope of EU law. The question whether Member States are acting within the scope of EU law when they are making use of the possibilities for derogation offered by the directive will be addressed in section 2.4.2.

2.3 THE QUALIFICATION DIRECTIVE

The Qualification Directive was based on Article 63 (1) (c) of the former EC Treaty. The directive has been described as the heart of CEAS, because of its subject matter.⁶⁵ It lays down the criteria for the qualification for two statuses: the refugee status and the subsidiary protection status. Furthermore the directive sets out which rights should be granted to persons eligible for these statuses. The Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.⁶⁶

The Qualification Directive was adopted by the Council on 27 April 2004 and published on 30 September 2004. It was the result of 'intense and protracted negotiations'.⁶⁷ The level of protection offered by the directive has been criticised⁶⁸ and it has been argued that some of the provisions of the directive infringe the international obligations of the Member States.⁶⁹ The provisions of the directive had to be implemented in the Member States by 10 October 2006.

⁶⁵ Battjes 2006, p 197.

⁶⁶ See recital 10 Preamble QD.

⁶⁷ Controversial issues were the inclusion of non-state agents of persecution, the definition of subsidiary protection and the exclusion clauses. Peers & Rogers 2006, p 323. See for more information on the background and legislative history of the directive Peers & Rogers 2006, pp 326-333.

⁶⁸ McAdam 2007, p 9.

⁶⁹ See Peers pp 334-340 and Battjes 2006, p 275. Battjes argues that Art 7 (2) suggests an overly wide scope of agents of protection, Art 8 (3) proposes an overly wide application of the internal flight alternative and Art 9 (3) states overly restrictive rules on the causal nexus with the Convention grounds for well-founded fear of persecution.

2.3.1 Scope of application

The Qualification Directive is silent on its territorial scope of application. Battjes argues that it is hardly likely that the Community legislator intended to harmonise the criteria for dealing with asylum applications lodged outside the territory of the Member States of the European Union.⁷⁰ The Qualification Directive does not apply to Denmark. Ireland and the United Kingdom do take part in the directive.⁷¹

2.3.2 Overview of the directive's provisions

The directive consists of nine chapters. The first chapter contains provisions regarding the subject and scope of the directive, definitions, and more favourable standards. The second chapter regards the assessment of applications for international protection. This chapter applies to the examination of both the right to a refugee status and to subsidiary protection. Of specific relevance for the purpose of the study is Article 4 on the assessment of facts and circumstances in applications for international protection. It contains important rules of evidence, amongst others concerning the burden of proof, evidentiary assessment and the granting of the benefit of the doubt.⁷²

Chapter III lays down the criteria for the qualification for being a refugee, while Chapter V sets out the criteria for subsidiary protection. It is of crucial importance that Articles 13 and 18 QD provide that a person who qualifies as a refugee or is eligible for subsidiary protection in accordance with the directive, should be granted a refugee status or a subsidiary protection status. Arguably these provisions reflect the EU fundamental right to asylum laid down in Article 18 of the Charter. Usually persons applying for asylum in the EU Member States will claim the EU right to an asylum status. According to the EU principle of effectiveness hurdles in national asylum procedures which render the exercise of these rights practically impossible or excessively difficult are not allowed.

The right to an asylum status is absolute nor permanent. Chapters III and V contain provisions regarding cessation of and exclusion from international protection. Chapters IV and VI provide rules for granting and withdrawing the refugee and the subsidiary protection status. Chapter VII lists the rights which should be granted to persons eligible for international protection.⁷³

⁷⁰ Battjes 2006, pp 209-210 and 474. See also Den Heijer 2012, pp 203-204.

⁷¹ Recitals 38-40 preamble QD.

⁷² Art 4 plays a crucial role in Chapter 8 on the standard and burden of proof and evidentiary assessment.

⁷³ It includes a right to a residence permit and to travel documents and contains rules concerning access to employment, education, social welfare, health care, accommodation and integration facilities.

The obligation for Member States to respect the principle of *non-refoulement*, laid down in Article 21 QD, which arguably reflects Article 19 of the Charter, is of particular importance for this study. Finally Chapter VIII and XIV contain rules regarding administrative cooperation and final provisions.

2.4 APPLICABILITY OF EU FUNDAMENTAL RIGHTS

In this section the following two questions are answered:

- 1 Is the Court of Justice competent to test the legality of the provisions of the Procedures Directive against EU fundamental rights and if so, what could be the result of this legality test (section 2.4.1)?
- 2 Are Member States bound by EU fundamental rights when making use of the discretionary powers offered by the Procedures Directive to make exceptions to rights included in that directive (section 2.4.2)?

2.4.1 Testing the legality of minimum standards

According to Article 263 TFEU the Court of Justice is competent to review the legality of acts of EU Institutions, including EU legislation, such as directives and regulations. This provision also mentions the grounds on which such an act may be deemed illegal: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. The Court of Justice also has the power to test the legality of provisions of EU legislation against EU fundamental rights and general principles of EU law.⁷⁴ If the Court of Justice concludes that an action on grounds of illegality is well-founded, Article 264 TFEU requires it to declare the act concerned to be void.

It should be examined whether the Court of Justice is also competent to review the legality of minimum standards or provisions affording the Member States wide discretion to derogate from the rights included in the Procedures Directive against the EU right to an effective remedy. It may be argued that the directive enables Member States to retain or adopt national provisions compatible with respect for fundamental rights and thus cannot infringe EU fundamental rights. At the same time provisions adopted and applied by Member States which might be contrary to EU fundamental rights do not constitute acts of EU Institutions of which the legality can, according to Articles 263 and 267 TFEU, be reviewed by the Court of Justice.⁷⁵

⁷⁴ Artt 51 (1) and 52 (5) of the Charter. See also Battjes 2006, p 85.

⁷⁵ This was argued by the Council with regard to the Court of Justice's competence to review the legality of the provisions of the Family Reunification Directive in Case C-540/03, *Parliament v Council* [2006], para 16.

The judgment in *Parliament v Council*,⁷⁶ which concerned the Family Reunification Directive,⁷⁷ shows that the Court of Justice is indeed competent to test the legality of the minimum standards or provisions allowing for derogation. In this procedure, which was brought by the European Parliament, annulment was sought of provisions which are derogating from the obligations imposed on the Member States by the Family Reunification Directive. The Court of Justice decided that it is competent to review the legality of provisions in the Family Reunification Directive which allow Member States to derogate from basic rules laid down in that directive:

[T]he fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC.⁷⁸

It should be observed that in *Parliament v Council* the Court of Justice took into account that the provisions concerned derogated from a *basic rule*.⁷⁹ The Court of Justice did not give a definition of the term 'basic rule'. Arguably the provisions in the Procedures Directive which reflect the right to access to asylum procedures and the right to an effective remedy, such as the procedural standards laid down in Chapter II of the directive, should be considered *basic rules*.⁸⁰ The right to effective access to asylum procedures⁸¹ and the right to an effective remedy⁸² lie at the basis of the Procedures Directive. The observance of these rights is necessary in the interest of a correct recognition of those persons in need of protection as refugees within the meaning

76 Case C-540/03, *Parliament v Council* [2006].

77 Directive 2003/86/EC.

78 Case C-540/03, *Parliament v Council* [2006], para 22. Art 230 of the former EC-Treaty is now replaced by Art 263 TFEU.

79 In this case the provisions concerned derogated from the right of family reunification, which is the basis of the Family Reunification Directive.

80 Recital 13 Preamble PD mentions amongst others the right to stay pending a decision by the determining authority, access to the services of an interpreter during an interview, the opportunity to communicate with a representative of UNHCR, the right to appropriate notification of a decision, a motivation of that decision in fact and in law, the opportunity to consult a legal adviser or other counsellor and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.

81 Recital 13 Preamble PD.

82 Recital 27 Preamble PD states: 'It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.'

of the Refugee Convention and the Qualification Directive.⁸³ It is thus conceivable that the Court of Justice is, according to Article 263 TFEU, competent to review the legality of the provisions in the Procedures Directive that derogate from the standards reflecting the right to access to asylum procedures and the right to an effective remedy.

Like the Procedures Directive the Family Reunification Directive allows Member States to adopt or maintain more favourable provisions than those laid down in the directive.⁸⁴ In *Parliament v Council* the Court of Justice tested some of these provisions against EU fundamental Rights. It should therefore be derived from this judgment that the Court of Justice is also competent to test the legality of the minimum standards included in the Procedures Directive.

Potential results of the legality test

The next question, which should be answered is whether minimum standards or provisions allowing for derogation can be at odds with EU fundamental rights. It may be argued that such standards or provisions are not capable of infringing fundamental rights. Minimum standards allow Member States to maintain or introduce more favourable standards, insofar as those standards are compatible with the Directive.⁸⁵ Member States may make use of this possibility where the minimum standard offers a level of protection which is lower than the level required by EU fundamental rights, in order to avoid acting in violation with EU fundamental rights. In the same vein, Member States are free not to make use of provisions allowing for derogation in order to prevent that a violation EU fundamental rights occurs.

The Court of Justice in *Parliament v Council* indicated that it is not excluded that minimum standards or provisions allowing for derogation infringe fundamental rights and should thus be considered invalid. It considered that a provision of an EU act could in itself fall short of respecting fundamental rights 'if it required, or expressly or impliedly authorised' the Member States to adopt or retain national legislation not respecting those rights.⁸⁶

The minimum standards of the Procedures Directive do not require Member States to violate fundamental rights.⁸⁷ However it may be argued that minimum standards which offer less protection than the standards required by EU fundamental rights 'expressly or impliedly authorise' Member States to act in violation with those fundamental rights. The same applies to provisions that allow for derogation by the Member States of basic rights of a directive.

⁸³ Recital 13 Preamble PD.

⁸⁴ Art 3 (5) of Council Directive 2003/86/EC.

⁸⁵ See Art 5 PD.

⁸⁶ Case C-540/03, *Parliament v Council* [2006], para 23.

⁸⁷ See Battjes 2006, p 556. He concludes that for that reason minimum standards cannot be at variance with international law.

A reading of the minimum standards and provisions allowing for derogation, which authorises the Member States to disrespect fundamental rights would however be in contradiction with one of the main objectives of CEAS: ensuring the fundamental rights of third country nationals.⁸⁸ This objective is also reflected in the TFEU and the preamble and provisions of the Procedures Directive.⁸⁹ The references to international human rights treaties and the fundamental rights laid down in the Charter show that the EU legislator did not envisage to authorise the Member States to disrespect fundamental rights.⁹⁰

It is therefore submitted here that it is likely that the Court of Justice will interpret minimum standards and provisions allowing for derogation in the light of fundamental rights, thus avoiding violations of those rights. This is what the Court of Justice actually did in *Parliament v Council*. The acts of the Member States may subsequently be tested against this interpretation of EU legislation. However if no interpretation in conformity with EU fundamental rights is possible the Court of Justice should declare a provision void.⁹¹

2.4.2 Interpreting and filling in gaps in EU asylum legislation

In this section it is argued that Member States are bound by EU fundamental rights when making use of the discretionary power offered by in particular the Procedures Directive to make exceptions to rights included in that Directive.⁹² National legislation which is based on such discretionary power falls within the scope of EU law and can therefore be tested against EU law by national courts and the Court of Justice. This follows from the *Parliament v Council* judgment mentioned above.⁹³ In this judgment the Court of Justice made clear that Member States are not allowed to infringe general principles of EU law by making use of the possibility to derogate from the right to family reunification. This also applies if the derogation provision contains terms which

⁸⁸ See also Battjes 2006, p 201.

⁸⁹ See recital 2 Preamble PD.

⁹⁰ The Court of Justice in *Parliament v Council* also took into account the objectives of the Family Reunification Directive in its ruling that its provisions did not infringe EU fundamental rights. These objectives are to promote family life and to ensure that the best interests of the child are taken into account. Case C-540/03, *Parliament v Council* [2006], see e.g. paras 73 and 87.

⁹¹ See also Butler & de Schutter 2007, p, 295, where they state that ‘Community legislation will be valid as long as it can be interpreted in conformity with the general principles’.

⁹² See section 2.2.3.

⁹³ See also Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], para 69, where the Court of Justice held that a Member State is implementing EU law and is therefore bound by the Charter when it makes use of the discretionary power granted by Art 3 (2) of the Dublin Regulation to examine an asylum application, which is not its responsibility according to the criteria laid down in the regulation.

are not defined. The Court's considerations concerning Article 4 of the Family Reunification Directive are most important in this regard. This provision allows Member States to derogate under certain conditions⁹⁴ from the parents' right to family reunification with their child, if this child does not meet a condition for integration provided for by national legislation. The Court of Justice considered:

The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation [...] in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family. Consequently, the final subparagraph of Article 4(1) of the Directive cannot be interpreted as authorising the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life.⁹⁵

The Member States are thus bound by general principles of EU law and in particular to EU fundamental rights when making use of a derogation provision and also when interpreting an undefined term included in the derogation provision.⁹⁶ This implies that the Member States' discretion when making use of the possibilities for derogation offered by the Procedures Directive is limited by EU fundamental rights, such as the right to an effective remedy.⁹⁷ Therefore it is very likely that national measures that fall within the scope of a derogation provision provided by the Procedures Directive can be tested against this right.

2.5 THE ROLE OF NATIONAL COURTS AND THE COURT OF JUSTICE

This section examines how questions regarding the legality and interpretation of the provisions of the Procedures Directive may be brought before and assessed by the national courts and the Court of Justice.

⁹⁴ If the child is aged over 12 years and arrives independently from the rest of his family.

⁹⁵ Case C-540/03, *Parliament v Council* [2006], para 70.

⁹⁶ The Court seems to attach more significance to fundamental rights (in this case the right to family life) in this regard than to general principles of EU law which are not recognised as fundamental rights by the Court.

⁹⁷ Case 222/86, *UNECTEF v Heylens and others* [1987], see also Case C-340/89, *Vlassopoulou* [1991].

2.5.1 Legality review of EU legislation

Actions on grounds of the illegality of EU legislation may be brought before the Court of Justice by a Member State, the European Parliament, the Council or the Commission. Such action must be instituted within two months of the publication of the measure.⁹⁸ As was already mentioned in section 2.2, the European Parliament successfully challenged the legality of several provisions of the Procedures Directive.⁹⁹

Natural or legal persons cannot challenge the legality of the Procedures Directive directly before the Court of Justice. According to Article 263 TFEU any natural or legal person may only institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. The Court of Justice ruled in the *UPA* judgment that the principle of effective judicial protection cannot have the effect of setting aside the condition of ‘direct and individual concern’ expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the EU Courts.¹⁰⁰

An individual should plead the illegality of the Procedures Directive before the national courts, for example in the appeal against a negative asylum decision.¹⁰¹ He may contest the legality of the provisions of EU legislation on which the decision is based, for instance on the ground that an EU fundamental right has been violated. The following example illustrates how such a situation may occur. The asylum applicant’s asylum request is rejected on the basis of information, which is not disclosed to him or the court assessing the appeal against this rejection for national security reasons. Such practice is allowed by Article 16 (1) PD. The applicant argues before the national court that Article 16 (1) PD should be considered invalid, at least as far as it permits the determining authorities¹⁰² to withhold information underlying the asylum decision to the national court, because it infringes the EU right to an effective remedy.¹⁰³

National courts may consider the legality of a provision of EU legislation and reject the grounds put forward before them by the parties in support of

⁹⁸ Art 263 TFEU.

⁹⁹ Case C-133/06, *Parliament v Council* [2008].

¹⁰⁰ Case C-50/00, *Union de Pequeños* [2002], para 44.

¹⁰¹ Art 277 TFEU states that notwithstanding the expiry of the period laid down in Art 263 TFEU, any party may, in proceedings in which an act of general application adopted by an EU institution, body, office or agency is at issue, plead the grounds specified in Art 263 TFEU, in order to invoke before the Court of Justice the inapplicability of that act.

¹⁰² In this study ‘determining authority’ means: the 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. This definition can be found in Article 2 (e) PD.

¹⁰³ See on this issue Chapter 10 on the use of secret information in asylum cases.

illegality, concluding that the measure is completely valid, if they consider those grounds unfounded. However, national courts do not have jurisdiction to declare a provision of EU law invalid. The reasons for this are set out by the Court of Justice in *Foto Frost*.¹⁰⁴ First of all this rule seeks to ensure the unity of EU law and the principle of legal certainty. If national courts were competent to declare an EU act invalid, this could lead to divergences between those courts as to the legality of such acts. Such divergences would be liable to place in jeopardy the very unity of the EU legal order and detract from the fundamental requirement of legal certainty. Moreover Article 264 TFEU gives the Court of Justice exclusive competence to declare void an act of an EU Institution. The coherence of the system therefore requires that the power to declare such an act invalid must also be reserved to the Court of Justice. Furthermore the Court of Justice is in the best position to decide on the legality of EU legislation, because the EU Institutions are entitled to participate in proceedings before the Court in order to defend the legality of the acts in question.¹⁰⁵ This implies that the individual concerned needs to ask the national court to make a reference for a preliminary ruling on the legality to the Court of Justice.¹⁰⁶ According to Article 267 TFEU the Court of Justice has jurisdiction to give preliminary rulings regarding the legality of acts of EU institutions, bodies, offices or agencies.

2.5.2 Interpretation of EU law

Lower national courts as well as the highest national court may interpret the provisions of the Procedures Directive when deciding on (higher) appeals against asylum decisions. They may use EU fundamental rights to find such an interpretation. The national courts decide whether national (implementing) legislation breaches an EU fundamental right. The courts will, if they deem it necessary, be guided, by the Court of Justice under the preliminary ruling proceedings.¹⁰⁷ In *Samba Diouf* the Court of Justice for the first time interpreted the Procedures Directive in the light of the EU right to an effective remedy. It decided that the absence of a remedy against the decision to process an asylum claim in an accelerated procedure does not constitute an infringement of the right to an effective remedy. However the Court of Justice held that it must be possible to subject the reasons which led the competent author-

¹⁰⁴ Case 314/85, *Foto-Frost* [1987], paras 17-20.

¹⁰⁵ Ward writes that doubt remains on the practical utility of challenging the legality of EC measures. 'While the Court of Justice has developed an impressive range of substantive rules against which the legality of EC measures can be tested, they rarely result in a declaration of invalidity in cases arising from Article 234 reference from national courts'. Ward 2007, p 12.

¹⁰⁶ Tridimas 2006, pp 31 and 35.

¹⁰⁷ Tridimas 2006, p 38.

ity to reject the application for asylum as unfounded to a thorough review by the national court. The national court had to decide whether national procedural rules complied with this condition.¹⁰⁸

The competence of the Court of Justice to give preliminary rulings on questions regarding the interpretation of the Treaty or EU legislation is laid down in Article 267 TFEU. This competence includes answering questions regarding the conformity with EU law of Member States' acts which fall within the scope of EU law. Such questions may arise for example if an individual argues that EU fundamental rights require a certain interpretation of a provision of EU legislation and that a national act violates this (interpretation of that) legislation. He could state for example that Article 39 PD read in the light of the EU right to an effective remedy a remedy with automatic suspensive effect. A national remedy without such suspensive effect would then violate EU law.¹⁰⁹

2.5.3 The important role of the national courts as EU courts

Until the entrance into force of the Treaty of Lisbon, Article 68 of the former EC Treaty denied lower courts the opportunity to make references for preliminary rulings with regard to the measures adopted under Title IV of the former EC Treaty such as the Procedures Directive and Qualification Directive.¹¹⁰ Potentially as a result of this limited role no questions regarding the legality and few regarding the interpretation of EU measures adopted under Title IV had been referred to the Court of Justice until 1 December 2010. The Court of Justice's role in assessing the legality of and interpreting measures adopted under Title IV of the former EC-Treaty was therefore limited.

The Treaty of Lisbon repealed Article 68.¹¹¹ As a result the rules laid down in Article 267 TFEU on preliminary rulings also apply to asylum measures. However, also in the post-Lisbon situation it is the national courts which play in practice the most important role in interpreting the Procedures Directive and testing its legality. Only in very few of the total number of asylum cases pending before the national courts of the Member States a reference for preliminary ruling will be made to the Court of Justice.¹¹²

108 Case C-69/10, *Samba Diouf* [2011]. See further Chapter 9.

109 See further section 6.3.

110 This provision presumably aimed to prevent overburdening of the Court of Justice. See Battjes 2006, p 572.

111 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007/C 306/01, 17 December 2007, Art 2 sub 67.

112 The Court of Justice has recognised the importance of the role of the national courts as 'guardians' of the EU legal order and 'ordinary' courts in the EU legal order in its opinion 1/09 of 8 March 2011. See Baratta 2011.

According to the general rule any national court or tribunal of a Member State *may* request the Court of Justice to give a preliminary ruling regarding questions on the legality of an act of an EU institution, if it considers that a decision on the question is necessary to enable it to give judgment. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is *required* to bring the matter before the Court of Justice.¹¹³ However it is up to the national court to decide whether it is necessary to refer a question to the Court of Justice for preliminary ruling. National courts may be hesitant to refer questions, for example because it involves a lot of work or because it takes the Court of Justice a long time to answer the questions, which may lead to considerable delay of many asylum cases in which the same question is at issue. Individuals thus always depend on the willingness of national courts to refer a question to the Court of Justice. If the national court refuses to refer a question, the individual does not have a remedy against that decision.¹¹⁴

It should be concluded that it depends to a large extent on the national courts whether the procedural issues addressed in this study will ever be put before the Court of Justice. The national courts have an important responsibility in guaranteeing the EU right to effective judicial protection and related procedural rights in asylum cases.¹¹⁵

113 Art 267 TFEU.

114 See also De Witte 2009, p 877.

115 See also section 11.4.

3 | International treaties as sources of inspiration for EU fundamental rights

International treaties containing human rights and fundamental freedoms, in particular the ECHR are an important source of inspiration for EU fundamental rights.¹ Therefore in this study's effort to define the meaning of the EU right to an effective remedy, such treaties and the views of their supervising bodies will play a crucial role. In this chapter a few important questions will be addressed regarding the (potential) use of these treaties by the Court of Justice in the context of CEAS. Furthermore the consequences of this (potential) use for the way in which this study is conducted will be discussed.

The level of protection offered by EU fundamental rights

The first question which should be answered is whether the fact that international treaties are not directly applied by the EU Courts, but are only used as sources of inspiration may result in EU fundamental rights offering a lower level of protection than those treaties. It is concluded in section 3.1 that this is generally not the case. It is possible though, that EU fundamental rights require broader protection than that offered by international treaties. The standards following from international treaties thus indicate the minimum level of protection which should be guaranteed by EU fundamental rights.

The role and significance of international treaties in the context of CEAS

This study takes into account the ECHR, the Refugee Convention, the ICCPR, the CAT and the CRC and the views of their supervising bodies. Section 3.2 will show that these international treaties have been or should be recognised as a source of inspiration in general and in particular in the context of CEAS. It follows from Article 63 (1) of the former EC-Treaty and Article 78 (1) TFEU that EU asylum legislation must be 'in accordance' with these treaties. Section 3.2.7 addresses the question whether this requirement entails that international treaties be directly applied by the Court of Justice and not only used as sources of inspiration.

The relative weight of international treaties

Finally section 3.3 examines the relative weight which should be attached to the treaties taken into account in this study. It is argued that in practice the

1 Art 6 (3) TEU, Artt 52 and 53 of the Charter.

importance of a treaty for the development of EU fundamental rights seems to relate foremost to the authority of the judgments or views of its sources of interpretation. It will be shown that the Court of Justice attaches great weight to the (binding) judgments issued by the ECtHR. The Court of Justice is a lot more hesitant to base its interpretation of EU fundamental rights on the non-binding views of other monitoring bodies. For this reasons in this study most weight will be accorded to the ECtHR's case-law, while the non-binding views of other monitoring bodies will only play a complementary role.

3.1 INTERNATIONAL TREATIES VERSUS EU FUNDAMENTAL RIGHTS

An important question, which will be addressed in this section, is whether EU fundamental rights may offer a lower level or a higher level of protection than human rights recognised in international treaties.

3.1.1 May EU fundamental rights provide a lower level of protection?

Both the Charter and the case-law by the EU Courts (which will be discussed in more detail in section 3.3), show that in principle EU fundamental rights do not provide less protection than international treaties. Article 52 (3) of the Charter provides that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention.'² According to the explanations with Article 52 (3) of the Charter this provision is intended to ensure the necessary consistency between the Charter and the ECHR and its Protocols.³ The meaning and the scope of the guaranteed rights are determined not only by the text of the ECHR, but also by the case-law of the ECtHR and by the Court of Justice. The explanations state that 'in any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.⁴

2 The explanations contain a list of rights which may, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR. Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/33-34.

3 See also the Joint communication from the Presidents of the ECtHR and the Court of Justice, Costa and Skouris of January 2011, in which they state with regard to the relationship between the ECHR and the Charter that 'it is important to ensure that there is the greatest coherence between the Convention and the Charter insofar as the Charter contains rights which corresponding to those guaranteed by the Convention.' In their view a 'parallel interpretation' of the two instruments could prove useful.

4 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/33.

Article 53 of the Charter provides more generally that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by international law and by international agreements to which the Union or all the Member States are party, including the ECHR. According to the explanations with the Charter this provision is intended to maintain the level of protection currently afforded within their respective scope by (amongst others) international law.⁵

Level of protection offered according to the Court of Justice's case-law

Some authors argue that general principles of EU law as applied by the EU Courts by their very nature allow for balancing human rights with competing principles in cases where the underlying provisions of international law do not.⁶ However most scholars seem to be of the opinion that the indirect application of international treaties does not result in less protection than their direct application. Groussot states that 'once the ECHR has been "filtered" by the ECJ through the general principles, the end result is much the same as if the Community was formally bound by the ECHR'.⁷ Battjes notes that it is questionable that one can conclude on the basis of the mere phrasing of the Court that the application of human rights law via general principles offers less protection. He refers to the judgments in *Steffensen* and *Akrich* where the Court seems to consider that human rights treaties must be complied with within the EU legal order.⁸ In *Steffensen* the Court states:

According to the Court's case-law, where national legislation falls within the field of application of Community law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down, in particular, in the European Convention for the Protection of Human Rights and Fundamental Freedoms – whose observance the Court ensures.⁹

In *Akrich* the Court observed that the right to respect for family life as enshrined in Article 8 ECHR 'is among the fundamental rights which, according to the Court's settled case-law, restated by the preamble to the Single European Act and by Article 6(2) EU, are protected in the Community legal order'.¹⁰ Section 3.3.1 will show that, also when actually interpreting EU fundamental

5 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/35.

6 Battjes 2006, p 92.

7 Groussot 2006, p 71.

8 Battjes 2006, p 92.

9 Case C-276/01, *Steffensen* [2003], para 70. See also Case C-260/89, *ERT* [1991], para 42,

10 Case C-109/01, *Akrich* [2003]. See also Case C-60/00, *Carpenter* [2002], para 41 and Case C-482/01, *Orfanopoulos* [2004], para 98.

rights and principles, the Court of Justice complies with the standards following from the ECHR and the ECtHR's case-law.

3.1.2 May EU fundamental rights provide broader protection?

EU fundamental rights cannot offer less protection than international law, but they may offer broader protection.¹¹ An EU fundamental right has an autonomous character and comprises more than just a sum of the rights included in the ECHR which inspired it.¹² This may be derived from Article 52 (3) of the Charter, which states that this provision shall not prevent Union law providing more extensive protection than the ECHR.¹³ In the Court of Justice's case-law several examples of such a broader interpretation of a fundamental right can be found.¹⁴

3.2 INTERNATIONAL TREATIES AND THE COMMON EUROPEAN ASYLUM SYSTEM

Article 63 (1) of the former EC-Treaty requires the asylum measures based on that provision, such as the Procedures Directive, to 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'. Article 78 TFEU also states that the common policy on asylum, subsidiary protection and temporary protection must be in accordance with those treaties. This section will explain that besides the Refugee Convention, to which mentioned provisions explicitly refer, also the ECHR, the ICCPR, the CAT the CRC should be considered 'relevant treaties' in the context of CEAS. Furthermore it shows that all these treaties have been, or should be recognised as sources of inspiration for the interpretation of EU fundamental rights. Treaties which will not be addressed in this study but which may nevertheless be considered 'relevant treaties' in the context of CEAS are the International Convention on the Elim-

11 The Court of Justice has held that the nature and scope of EU fundamental rights must be determined autonomously and may thus differ from fundamental rights recognised amongst others in the ECHR. See Murray 2008, p 538.

12 See the opinion of A.G. Cruz Villalón in Case C-69/10, *Samba Diouf* [2011], para 39. Kunoy & Mortansson state that in the *Chakroun* judgment the Court of Justice declined the invitation to emancipate the Charter from the ECHR. Kunoy & Mortansson 2010, pp 1826 and 1829-1830.

13 See also A.G. Maduro, opinion in Case C-465/07, *Elgafaji* [2009], para 23.

14 Bronckers writes that the Court of Justice reserves for itself the possibility to give its own, diverging interpretation of the Convention's fundamental rights as incorporated in general principles of EC law. Bronckers 2007, p 601. See also Van Cleynenbreugel 2012, p 344. See further section 3.3.1.

ination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁵

The explicit requirement of ‘accordance with’ international law laid down in Article 63 (1) of the former EC-Treaty and Article 78 TFEU is rather unique in EU law.¹⁶ It raises the question whether, on the basis of these provisions, the Court of Justice should apply the Refugee Convention and other relevant international treaties directly, instead of using them as sources of inspiration. Section 3.2.7 briefly addresses this question and explains why this study uses international treaties only as sources of inspiration for the EU right to an effective remedy and not as a separate category of norms.

3.2.1 The European Convention on Human Rights

The ECHR contains a set of civil and political rights, which apply to every person within the jurisdiction of the High Contracting Parties irrespective of that person’s nationality or legal status.¹⁷ According to Article 6(3) TEU, the Charter¹⁸ and the Court of Justice’s case-law, the ECHR has special significance for the development of EU fundamental rights.¹⁹ In the context of the Common European Asylum System, the ECHR should also be considered a ‘relevant treaty’ in the meaning of Article 63 (1) of the former EC-Treaty and Article 78 TFEU. This is due to the fact that Article 3 ECHR contains by far the best developed prohibition on *refoulement*.²⁰ Article 2, Article 1 of Protocols Nos 6 and 13 and in exceptional cases Article 6 also contain prohibitions of *refoulement*.²¹ The grounds for qualification as a person in need of subsidiary protection laid down in Article 2 (e) in conjunction with 15 QD are (partly) based on the ECtHR’s case-law under Article 2 and 3 ECHR.²² It will be argued in

15 Both the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women addressed the position of refugees. See for example CERD General Recommendation No 22 (1996) and CEDAW General Recommendation No 19 (1992).

16 Battjes 2006, p 97.

17 Wouters 2009, p 202.

18 The Charter specifically states that it reaffirms the rights included amongst others in the ECHR and following from the case-law of the ECtHR. Furthermore Art 52 (3) states that the meaning and scope of the rights included in the Charter which correspond to a right guaranteed by the ECHR shall be the same as those laid down by the ECHR. Other human rights conventions such as the ICCPR or the CAT are not explicitly mentioned by the Charter.

19 Case C-222/84, *Johnston* [1986], see also Case C-540/03, *Parliament v Council* [2006], para 35.

20 Wouters 2009, p 187.

21 Wouters 2009, p 187. See also Den Heijer 2008.

22 There are several other ECHR provisions which are relevant in the asylum context. See for example Art 5 ECHR, which provides for rules for the detention of asylum applicants and Art 4 of Protocol No 4, which prohibits collective expulsion of aliens.

section 4.3.1 that the procedural guarantees following from Articles 3, 6, 13 and 35 ECHR inspire the EU right to an effective remedy in the context of CEAS.

3.2.2 The Refugee Convention

The Refugee Convention provides the most comprehensive codification of the rights of refugees at the international level'.²³ The most important right granted to a refugee is the right to be protected from *refoulement*, laid down in Article 33 of the Convention.

The relevance of the Refugee Convention for CEAS has been explicitly recognised in Article 63 (1) of the former EC Treaty and Article 78 TFEU.²⁴ Also the preamble and the texts of the Procedures Directive refer to the Refugee Convention.²⁵ The Refugee Convention itself does not contain any provisions which regard refugee determination procedures.²⁶

The Refugee Convention is most relevant for the interpretation of the criteria for qualification as a refugee laid down in the Qualification Directive, which are directly based on and are often exactly the same as those laid down in the Refugee Convention.²⁷ In particular in the last situation the Qualification Directive should be considered to have the same meaning as the Refugee Convention.²⁸

According to the preamble of the Qualification Directive 'the Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees'. The Court of Justice has referred to this recital in several cases in which it was asked to interpret provisions of the Qualification Directive, which are directly based on the Refugee Convention.

23 See the Introductory note to the Refugee Convention by the Office of the United Nations High Commissioner for Refugees (UNHCR), August 2007, www.unhcr.org and the preamble to the Convention.

24 In the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999, the European Council reaffirmed 'the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.' According to Battjes the reference to the Refugee Convention connected the term 'asylum' used in Art 63 of the former EC-Treaty closely to refugees in the sense of the Refugee Convention. Battjes 2006, p 146.

25 Recitals 2, 7, 13 Preamble and Art 2 (a) (b) and (f), Art 3 (3), Art 21 (1) (c), Art 27 (1) (b) and (d) and Art 36 (2) (a) and (4) PD.

26 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 191, refers to the fact that asylum procedures are not specifically regulated by the Refugee Convention and that, as a result, asylum procedures in State parties vary considerably. See also Staffans 2010, p 275.

27 See in particular Artt 2 (c), 11, 12 and 14 QD.

28 See A.G. Sharpston in her opinion with Case C-31/09, *Bolbol* [2010], para 92.

It is considered that the provisions of the Qualification Directive must be interpreted while respecting the Geneva Convention.²⁹

3.2.3 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights contains a list of civil and political rights, which apply to all persons irrespective of their nationality or legal status, including asylum applicants and refugees.³⁰ The Court of Justice has recognised the ICCPR as a source of inspiration for EU fundamental rights.³¹ Furthermore the ICCPR should be considered a relevant treaty in the sense of Article 63 (1) of the former EC-Treaty and Article 78 TFEU, as it contains prohibitions of *refoulement* in Articles 6 (the right to life)³² and 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment).³³ With respect to asylum procedures Article 2(3) ICCPR, which obliges the State parties to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy is most relevant.³⁴

3.2.4 The UN Convention against Torture

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) seeks to 'make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.'³⁵ In order to achieve this objective the Convention contains a set of obligations for the State parties, amongst others to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.³⁶

The Convention against Torture has not yet been recognised as a source of inspiration for EU fundamental rights by the Court of Justice. However it should be expected that the Convention will be recognised as such in the

29 See for example Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], paras 52-53 and Case C-31/09, *Bolbol* [2010], paras 37-38.

30 See Art 2 (1) ICCPR, HRC General Comment No 31 (2004), CCPR/C/21/Rev1/Add.13, para 10. See also Wouters 2009, p 362.

31 Case C-540/03, *Parliament v Council* [2006], para 37.

32 See for example HRC 20 October 2003, *Judge v Canada*, no 829/1998.

33 See for example HRC 10 November 2006, *Alzery v Sweden*, no 1416/2005.

34 See further section 4.3.1.

35 Nowak and McArthur point out that the CAT has following three aims: to establish specific obligations for States parties to prevent torture and to assist victims of torture, to require the use of criminal law and jurisdiction to fight impunity of torturers and to provide for stronger measures of international monitoring of States' compliance with the absolute prohibition of torture. Nowak & McArthur 2008, p 595.

36 See also Wouters p 427.

future, because all EU Member States are a party with this Convention. Article 3 CAT contains an explicit prohibition of *refoulement*³⁷, which is guaranteed to all individuals, including stateless persons and illegal aliens.³⁸ Therefore the CAT should be considered a relevant treaty in the meaning of Article 63 (1) of the former EC-Treaty and Article 78 TFEU. The CAT does not have an 'effective remedy provision', which is comparable to Articles 13 ECHR or 2 (3) (a) ICCPR. However the Committee against Torture has derived a right to an effective remedy from the absolute prohibition of *refoulement* laid down in Article 3.³⁹

3.2.5 The UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child (CRC) contains a set of civil, social, cultural and economic rights, which shall be ensured to each child⁴⁰ within the State parties' jurisdiction without discrimination of any kind.⁴¹ The Committee on the Rights of the Child (also referred to as ComRC) has identified four general principles of the CRC: the right to non-discrimination, the primary consideration of the child's best interests, the right to life and development and the right to be heard.⁴²

The CRC has been recognised as a source of inspiration for EU fundamental rights by the Court of Justice.⁴³ Furthermore it should be considered a relevant treaty for the purposes of Article 78 TFEU and Article 63 of the former EC Treaty for several reasons. First of all the preambles of the EU directives adopted in the context of CEAS state that the directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Article 24 of the Charter requires amongst others that the child's best interests be a primary consideration in all actions relating to children. The Procedures Directive reflects this fundamental right while stating that the best interests of the child 'shall be a primary consideration' for Member States when implementing the provisions of the directive.⁴⁴ The 'best interests' principle included in Article 24 of the Charter and the Procedures Directive is based on Article 3 CRC. Other provisions of the Procedures Directive clearly affect children's rights although

37 Art 3 CAT states that 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

38 Wouters 2009, p 435.

39 ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003, para 13.6. See further section 4.3.1.

40 According to Art 1 CRC a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

41 Art 2 CRC.

42 ComRC General Comment No 5 (2003), CRC/GC/2003/5, para 12.

43 Case C-540/03, *Parliament v Council* [2006], para 37.

44 Recital 12 Preamble QD and Art 17 (6) PD.

they are not directly based on one of the rights laid down in the CRC. Article 17 PD states for example that Member States must ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the asylum application. This representative must be able to inform the minor about and prepare him for the personal interview. Arguably these provisions should be interpreted in the light of the relevant provisions of the CRC. Article 22 CRC specifically addresses the rights of refugee and asylum seeking children. Moreover, the CRC contains certain provisions which should be considered relevant for asylum procedures in particular, such as the State parties' duty to give due weight to the views of the child in accordance with the age and maturity of the child (Article 12 CRC).⁴⁵

3.2.6 Direct application of international treaties?

The Court of Justice normally uses international treaties as sources of inspiration for the interpretation of EU fundamental rights. Arguably this should be different when ruling in asylum cases. The text of Article 63 (1) of the former EC-Treaty and Article 78 TFEU suggests that the Court of Justice must apply relevant international treaties directly, instead of using them as sources of inspiration.⁴⁶ This means that the Court of Justice should test the legality of the Procedures Directive against human rights treaties and interpret its provisions in the light of these treaties. Arguably the Court of Justice may also test national measures implementing the measures adopted under Article 63 (1) directly against the relevant treaties mentioned in Article 63 (1).⁴⁷ Direct application of international treaties by the Court of Justice could also be based on references to these treaties in secondary EU legislation, such as the text and preamble of the Procedures Directive, which refer to the Refugee Convention. The Court of Justice considered in several cases that the Qualification Directive, which also refers to the Refugee Convention, must 'be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU'.⁴⁸ Furthermore the Court of Justice in *Salahadin Abdulla* and *B. and D.* seems to consider the

⁴⁵ See further Chapter 7 on the asylum applicant's right to be heard on his asylum motives.

⁴⁶ See also Battjes 2006 pp 100-101.

⁴⁷ Battjes 2006 pp 98-99.

⁴⁸ Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 53 and Joined Cases C-57/09 and C-101/09, *B. and D.* [2010], para 78. The Court based this consideration on Art 63 (1) of the EC-Treaty and recitals 13, 16 and 17 Preamble QD. See also the opinion of A.G. Sharpston with Case C-31/09, *Bolbol* [2010], para 36.

Refugee Convention and the Charter separate instruments for the interpretation of the Qualification Directive.⁴⁹

It should be noted however that it was concluded in section 3.1.1 that EU fundamental rights guarantee that the treaties mentioned in Article 63 (1) of the former EC-Treaty and 78 TFEU are fully respected. For this reason it is not likely that the direct application of those treaties would result in a higher level of protection than the indirect application of international treaties as sources of inspiration of EU fundamental rights.⁵⁰ In this study international treaties will therefore not be treated as a separate category of norms, but only as sources of inspiration.

3.3 THE WEIGHT OF INTERNATIONAL TREATIES IN THE CASE-LAW OF THE COURT OF JUSTICE

It is relevant to know whether the international treaties taken into account for the purpose of this study all have the same weight as sources of inspiration. What should be done if several relevant sources of inspiration or the views of their supervising bodies contradict each other? May the interpretation of the EU fundamental rights and general principles be based on the non-binding view of supervising bodies alone?

Arguably it follows from the specific references to the ECHR and the Refugee Convention in the Treaties, the Charter and EU legislation that these treaties have special significance. Nothing can be found in those instruments as to the relative weight which should be attached to the ICCPR, the CRC or the CAT. It will be shown in this section that in practice the ECHR is by far the most important source of inspiration for EU fundamental rights. Much less weight is attributed to other international treaties. Murray states that the ECHR

has played, and was bound to play, an increasingly central role in the Court's case law as a source from which inspiration may be drawn in fundamental rights cases, in comparison to which other international sources of inspiration referred to, such as various Council of Europe instruments and those emanating from the United Nations and the International Labour Organisation ("ILO") have played bit parts.⁵¹

The authority of a treaty's sources of interpretation

The importance of a treaty for the development of EU fundamental rights seems to relate foremost to the authority of the judgments or views of its sources of interpretation. The ECJHR's judgments are binding and provide clear guid-

49 Joined Cases C-57/09 and C-101/09, *B. and D* [2010], para 78 and Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and others* [2010], paras 53-54.

50 See also Battjes 2006, p 104.

51 Murray 2008, p 538.

ance as to the interpretation of the rights included in the Convention.⁵² This makes it a suitable source of inspiration for EU fundamental rights. Section 3.3.1 will give an overview of the use of the ECtHR's case-law by the Court of Justice.

It will be pointed out below in sections 3.3.2-3.3.4 that the EU Courts attach much less weight to non-binding views of other bodies, such as the institutions of the Council of Europe and the bodies supervising the Refugee Convention, the ICCPR, the CAT and the CRC. The Refugee Convention does not have a supervising court or any other legally binding sources for interpretation.⁵³ Guidance for the interpretation of the Refugee Convention is provided by the UNHCR⁵⁴ and the Executive Committee of the Programme of the High Commissioner (EXCOM). UNHCR has given its view on the application and interpretation of the Refugee Convention, including procedural issues, in the Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook)⁵⁵ and its guidelines on international protection. The EXCOM has issued several EXCOM Conclusions regarding requirements for national asylum procedures. UNHCR's view⁵⁶ and EXCOM Conclusions⁵⁷ are not formally binding, but they do have authority.

The implementation of the ICCPR, the CAT and the CRC is supervised by the Human Rights Committee, the Committee against Torture and the Committee on the Rights of the Child (ComRC) respectively (in this study also referred to as the UN Committees).⁵⁸ The views of the UN Committees, included in

52 According to Art 46 ECHR the judgments of the ECHR are legally binding on the State party to the case. However, the Court's judgments are also of significant importance for other State parties to the Convention. ECtHR (Plen) 18 January 1978, *Ireland v the United Kingdom*, no 5310/71, para 154 and ECtHR 24 July 2003, *Karner v Austria*, no 40016/98, para 26. See also Gerards 2009, pp 2-3.

53 According to Art 38 of the Refugee Convention the International Court of Justice (ICJ) may be requested to interpret the Convention. However, as to date no referral to the ICJ has been made. There is no other body which is competent to provide legally binding decisions on the interpretation of the Refugee Convention. Wouters 2009, p 37.

54 See for the supervising role of UNHCR the Preamble and Art 35 of the Refugee Convention and Art 8 (a) of the Statute of the office of the United Nations High Commissioner for Refugees. See also Türk 2010.

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

56 Kälin 2003, pp 619 and 625-627, Battjes 2006, p 20. According to Hathaway there is 'a traditional practice of giving particular weight to UNHCR's Handbook'. Hathaway 2005, pp 114-116. Several authors have contended that the authority of UNHCR guidelines is undermined because of their number, detailedness and varying objectives, formats and discourse. Hathaway 2005, p 118, Wouters 2009, p 42.

57 Hathaway 2005, p 113, Wouters 2009, pp 45-46. Courts and tribunals in a range of jurisdictions use EXCOM Conclusions as soft law instruments as persuasive and even authoritative sources on matters of policy, legal practice or interpretation. Deschamp & Dowd 2008, pp 22-27.

58 Art 28 ICCPR, Art 17 CAT and Art 43 CRC.

General Comments, Concluding Observations regarding State parties⁵⁹ or rulings in individual cases⁶⁰ do not bind the State parties.⁶¹ However the Committees' views on interpreting an application of the Convention should be considered an authoritative interpretation.⁶²

The following sections will examine the Court of Justice's use of documents issued by the institutions of the Council of Europe (3.3.2) and UNHCR (3.3.3) and the views of the UN Committees (3.3.4). In section 3.3.5 it will be argued that the Court of Justice should, like the ECtHR, take account of non-binding, but authoritative views of supervising bodies in its case-law.

3.3.1 The ECtHR's judgments

The expansion of the European Union's areas of competence, has resulted in the spheres of activity of the Luxembourg and Strasbourg courts progressively converging on each other. Asylum law is a very clear example of an area in which the competences of the Court of Justice and the ECtHR overlap.⁶³ It would be problematic if the two courts would develop diverging case-law on similar human rights issues. For this reason the courts need to cooperate and take each other's judgments into account.⁶⁴

The EU Courts have regularly referred to the ECtHR's case-law when applying general principles of EU law as well as the fundamental rights included in the Charter.⁶⁵ Douglas-Scott notes however that the citation of the ECtHR's case-law is a relatively new phenomenon, which started in the late 1980's with the opinions of Advocates General and only occurred in a judgment by the Court of Justice in 1996.⁶⁶ He recognises two trends: the Court of Justice has

59 See with regard to the procedure followed by the Committees: Joseph, Schultz & Castan 2004, p 19 (HRC) and Nowak & McArthur 2008, p 648 (ComAT). See for the procedure followed by the ComRC Rule 75 of its Rules of Procedure.

60 See the Optional Protocol with the ICCPR and Art 22 CAT.

61 See with regard to the HRC Battjes 2006 p 21, Wouters 2009 p 365 and Conte & Burchill 2009, p 37, with regard to the ComAT Nowak & McArthur 2008, p 777 and Battjes 2006, p 22.

62 See with regard to the HRC for example Boerefijn 1999, p 300. See with regard to the ComAT Nowak & McArthur 2008, p 12 and Wouters 2009, p 431.

63 See also Harpaz 2009, p 119.

64 See Costa 2008. The President of the Strasbourg Court stressed that there is a clear need for a coherent and effective system of human rights protection in Europe, which requires the Luxembourg and Strasbourg courts to cooperate.

65 See for example the extensive references to the ECtHR's case-law in Case C-279/09, *DEB* [2010], para 46 and further and Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008], paras 310-314, 344, 360-363 and 368. An example of an asylum cases is Case C-465/07, *Elgafaji* [2009], para 27.

66 Douglas-Scott wrote in 2006 that the Court of Justice had referred to Strasbourg case-law in over 20 cases. The Advocates-General had at that moment made over 60 references and

in recent years referred to the case-law by the ECtHR more frequently than before. Furthermore, he states that while the earlier references to Strasbourg case-law tended to be brief and unexpansive, the more recent references tend to be more reliant on it as a ground of justification, especially if they are made by Advocates General.⁶⁷ He states that references to Strasbourg case-law continue to be relatively brief, but tend to cite Strasbourg more unqualifiedly as an authority. Scott-Douglas points at a lack of coherence and method when the Court of Justice refers to the Strasbourg case-law.⁶⁸

The ECtHR's case-law as minimum standard

The Court of Justice has not explicitly pronounced itself on the weight which should be attached to the case-law by the ECtHR.⁶⁹ It has never explicitly accepted that it is bound by this case-law.⁷⁰ However the Court of Justice usually ensures that the level of protection offered by EU fundamental rights is not lower than that offered by the ECtHR's case-law.⁷¹ In some cases the Court stressed that its interpretation is fully compatible with the ECHR, including the case-law of the European Court of Human Rights.⁷² The Court of Justice strongly reacts to the Strasbourg Court's findings as regards interpretation and level of protection.⁷³

Although the Court of Justice has shown that it does not offer less protection than the ECtHR under the ECHR, the Court finds that it is free to offer

the Court of First Instance had made about 20. Douglas-Scott 2006, p 644. See also De Witte 1999, p 878.

67 Douglas-Scott, p 645. See also Murray 2008, p 538.

68 Douglas-Scott 2006, p 656.

69 Douglas-Scott 2006, pp 649 and 651, Harpaz 2009, pp 109-110.

70 The CFI stated however in Case T-69/04, *Schunk and Schunk Kohlenstoff-Technik v Commission* [2008], para 32: '[T]here is nothing which would justify the Court of First Instance giving a different interpretation of the principle of legality, which is a general principle of Community law, from that resulting from the Strasbourg Court's case-law.' Bronckers states that the EU Courts use the ECtHR's case-law to 'bolster the persuasive force of their own rulings'. Bronckers 2007, p 601.

71 Battjes states that the EU Courts 'quite scrupulously test against Community principles in full accordance with the criteria laid down in the provisions of the European Convention as well as the relevant Strasbourg case-law'. Battjes 2006, p 94. See also Douglas-Scott 2006, p 650 and Spielmann 1999, p 770. See also section 3.1.

72 See Case C-465/07, *Elgafaji* [2009], para 44, in which the Court stated: 'It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR.'

73 Gerards states that she expects an extension of the scope of the rights laid down in the ECHR in the Strasbourg context, to be reflected in the Luxembourg case-law. Gerards 2008, pp 667 and 672.

its own divergent jurisprudence of EU law.⁷⁴ Advocate General Maduro stated in his opinion in the *Elgafaji* case that ‘Community provisions, irrespective of which provisions are concerned, are given an independent interpretation which cannot therefore vary according to and/or be dependent on developments in the case-law of the European Court of Human Rights’.⁷⁵ He added that the interpretation of the Convention by the ECtHR is a dynamic interpretation, which is always changing. He argued that it is not for the EU Courts to determine the interpretation of Article 3 ECHR which prevails. However he did recognise in this same opinion that

although the case-law of the Strasbourg court is not a binding source of interpretation of Community fundamental rights, it constitutes none the less a starting point for determining the content and scope of those rights within the European Union. Taking that case-law into account is, moreover, essential to ensure that the Union, founded on the principle of respect for human rights and fundamental freedoms, will contribute to extending the protection of those rights in the European area.⁷⁶

Similarly Advocate General considered in his opinion in *Samba Diouf* that

the right to effective judicial protection, as expressed in Article 47 of the CFREU, has, through being recognised as part of European Union law by virtue of Article 47, acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR.⁷⁷

The independent interpretation of EU provisions thus only seems to result in broader (and not more limited) protection than under the ECHR.⁷⁸

Several examples can be found in the Court of Justice’s case-law in which the Court adopted a more generous interpretation of a fundamental right than the ECtHR. Douglas Scott refers to the judgments in *Carpenter*⁷⁹ and *Akrich*,⁸⁰ in which the Court gave a very generous interpretation of the ECtHR’s judgment in *Boultif*.⁸¹ Some commentators refer to the Court of Justice’s judgment in *Parliament v Council*, in which the Court of Justice recognised a ‘right to live

⁷⁴ Harpaz 2009, p 112. He states that the Court of Justice has a deferential approach, according to which the Court relies on ECHR provisions and follows the judgments of the Strasbourg Court.

⁷⁵ Opinion of A.G. Maduro in Case C-465/07, *Elgafaji* [2009], para 19.

⁷⁶ The Court of Justice itself seems to suggest in *Elgafaji* that the interpretation of the scope of EU provisions which correspond to rights laid down in the ECHR (i.e. Article 15 (b) QD) does have to be carried out on the basis of the ECtHR’s case-law. Case C-465/07, *Elgafaji* [2009], para 28.

⁷⁷ Opinion of A.G. Cruz Villalón in Case C-69/10, *Samba Diouf* [2011], para 39.

⁷⁸ This also follows from Case C-465/07, *Elgafaji* [2009], para 28.

⁷⁹ Case C-60/00, *Carpenter* [2002].

⁸⁰ Case C-109/01, *Akrich* [2003].

⁸¹ ECtHR 2 August 2001, *Boultif v Switzerland*, no 54273/00.

with one's close family'⁸² and stated that it follows from the Family Reunification Directive⁸³ that applications for family reunification should be examined with a view to promoting family life.⁸⁴ Both formulations seem to offer more protection than the standing case-law by the ECtHR under Article 8 ECHR.⁸⁵ In the cases mentioned the Court has not given any reasons for a broader interpretation.⁸⁶

Possible situations of the Court of Justice providing a lower level of protection than the ECtHR

Three situations may be distinguished, in which the Court of Justice has adopted or may adopt a different view on a human rights issue than the ECtHR, which results in a lower standard of protection. First of all the Court of Justice may have to apply existing Strasbourg case-law to a new situation, on which the Strasbourg court has not yet ruled. Then, the Court of Justice has to give its own interpretation of an EU fundamental right which is corresponding to a right laid down in the ECHR. In this kind of situations it has occurred that the Court of Justice adopted a different, more restrictive view on the content of such a right, than the ECtHR in later case-law.⁸⁷ The Court of Justice showed to be prepared to reconsider its own case-law in view of subsequent developments in Strasbourg.⁸⁸

Secondly, the ECtHR may change its line of case-law concerning an issue after a judgment of the Court of Justice on the same issue. As Maduro noted in his opinion with *Elgafaji* that the interpretation of the Convention by the Strasbourg court is dynamic and is changing over time.⁸⁹ This is the result of the fact that the ECtHR considers the Convention to be 'a living instrument',

82 Case C-540/03, *Parliament v Council* [2006], para 52.

83 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

84 Case C-540/03, *Parliament v Council* [2006] para 88.

85 Boeles 2006. Kunoy & Mortansson point out that Art 4 of the Family Reunification Directive, by contrast to Art 8 ECHR, imposes precise obligations, with corresponding individual rights, on the Member States, since it requires them to authorise family reunification in certain cases without being left a margin of appreciation. Kunoy & Mortansson 2010, p 1825. See also Case C-404/92P, *X v Commission* [1994], para 17, where the Court of Justice held that the right to respect for private life, embodied in Art 8 of the ECHR and deriving from the common constitutional traditions of the Member States includes in particular a person's right to keep his state of health secret. See Spielmann 1999, pp 775-776.

86 Bulterman argues that the Court of Justice has to reason why a specific human right which can be found in the ECHR should be given a more favourable interpretation when it is applied as a fundamental principle of EU law. Bulterman 2008, under 5.3.

87 Douglas-Scott refers to *Orkem* and *Hoechst*. Douglas-Scott 2006, p 645.

88 Costa 2008. See also Murray 2008, p 543.

89 He stated: 'In terms of the dynamic interpretation, it must be noted that the interpretation of Article 3 of the ECHR has not been linear and that the European Court of Human Rights currently gives a broader content and therefore scope to that article. Moreover, it is necessary for the interpretation of that provision to evolve and it should not, therefore, be fixed'.

which must be interpreted in the light of present-day conditions.⁹⁰ It may therefore occur that the ECtHR adopts a broader view on a certain issue than the view of Court of Justice, which was based on the 'old' case-law by the ECtHR. On the basis of Article 52 (3) of the Charter and the standing case-law of the Court of Justice it is likely that also in this situation the Court of Justice will reconsider its case-law to the subsequent developments in Strasbourg.

Thirdly it is possible that the Court of Justice misunderstands the ECtHR's case-law and as a result adopts a different view than the ECtHR. Arguably the Court of Justice misunderstood the ECtHR's judgment in *NA v the United Kingdom* in its ruling in the *Elgafaji* case.⁹¹ In this case the Court of Justice considered that the serious harm as defined in paragraphs (a) and (b) of Article 15 QD, which are based on Articles 2 and 3 ECHR and the ECtHR's case-law, requires a clear degree of individualisation of the risk to serious harm. However the ECtHR had ruled less than a year before the judgment in *Elgafaji*, in *NA v the United Kingdom* that Article 3 ECHR may also apply in extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.⁹² Therefore under Article 3 ECHR in a situation of extreme general violence no 'individualisation' is required. Although the Court of Justice referred to *NA* in its judgment it did not seem to recognise this. Errors like the one in *Elgafaji*, should be considered as incidents, which do not detract from the fact that in principle the Court of Justice abides by the ECtHR's case-law. The error in *Elgafaji* did not result in a lower level of protection than that guaranteed by the ECtHR.⁹³

3.3.2 Council of Europe documents

Texts adopted by the Institutions of the Council of Europe have played a marginal role in the EU Courts' case-law. The CFI referred to guidelines by the Committee of Ministers in *Sison* in order to support its position that a right to an effective remedy should be provided in particular in the context of measures to freeze the funds of persons or organisations suspected of terrorist activities.⁹⁴ In *Parliament v Council*, the European Parliament invoked two

⁹⁰ See for example ECtHR (GC) 4 February 2005, *Mamatkulov and Askarov v Turkey*, no 46827/99, para 121.

⁹¹ Case C-465/07, *Elgafaji* [2009]. See for example Spijkerboer 2009.

⁹² ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 115.

⁹³ According to the Court of Justice Art 15 (c) QD does cover risks of serious harm which result from the general human rights situation in the country of origin.

⁹⁴ Case T-47/03, *Sison v Council* [2007], paras 157-158, see also Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 111 and 135. In Case C-421/09, *Humanplasma GmbH* [2010] the reference in the applicable EU legislation to a specific Council of Europe document was the reason to take it account.

Committee of Minister Recommendations in support of its appeal.⁹⁵ However, the Court did not include these recommendations in its judgment.⁹⁶ The Advocates General have referred to recommendations of the Committee of Ministers and the Parliamentary Assembly in some of their opinions.⁹⁷

3.3.3 UNHCR documents and Excom Conclusions

In its case-law the Court of Justice has not yet (explicitly) taken account of, or made reference to UNHCR's view, although it did have opportunity to do so.⁹⁸ Several cases concerned the interpretation of provisions of EU law, which were directly based on the Refugee Convention. Furthermore in some of these cases the applicant relied on UNHCR's view.⁹⁹ Finally UNHCR issued statements in the context of these cases in which it set out its views on the questions referred to the Court of Justice.¹⁰⁰ In *Salahadin Abdullah* the Court of Justice adopted a different interpretation of the cessation clauses provided by the Qualification Directive than that proposed by UNHCR.¹⁰¹

The Advocates General have paid more attention to UNHCR documents in their opinions. A.G. Sharpston considered in the *Bolbol* case concerning the criteria for excluding Palestinians from refugee status that 'the UNHCR occa-

95 Recommendation No R (94) 14 of the Committee of Ministers of the Council of Europe to Member States of 22 November 1994 on coherent and integrated family policies and Recommendation No R (99) 23 of the Committee of Ministers to Member States of 15 December 1999 on family reunion for refugees and other persons in need of international protection.

96 Case C-540/03, *Parliament v Council* [2006], para 33.

97 See for example A.G. Léger in his opinion with Case C-353/99 P, *Hautala* [2001], para 62, A.G. Kokott in her opinion with Case C-105/03, *Pupino* [2005], para 55 and A.G. Jacobs in his opinion with Case C-270/99 P, *Z v Parliament* [2001], para 40.

98 The Government of the United Kingdom has argued before the Court of Justice that the UNHCR Guidelines are not binding on Member States as a matter of international law and have not been incorporated into Community law. See the opinion with Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 36.

99 See for example the opinion with Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 32.

100 See with regard to the Procedures Directive: UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures, issued in Case C-69/10, *Samba Diouf* [2011], 21 May 2010, available at www.unhcr.org.

101 The Court ruled that refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted'. According to UNHCR the cessation clauses should only apply when the applicant is effectively protected in his country of origin, which entails more than the absence of a fear of persecution, namely alrespect for human rights, including the right to a basic livelihood. See UNHCR Statement on the "Ceased Circumstances" Clause of the EC Qualification Directive, issued in Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], August 2008, para 4.1.2, available at www.unhcr.org.

sionally makes statements which have persuasive, but not binding, force'.¹⁰² In her opinion she disagreed with the interpretation put forward by the Office of the UNHCR because she was guided primarily by the clear text of the provision of the Refugee Convention, which has not been amended in over 50 years. She stated: 'In contrast, it seems to me that the UNHCR's reading has varied over time, reflecting the intractable nature of the Palestine problem.'¹⁰³ A.G. Mengozzi wrote in his opinion with *B. and D.* which concerned the interpretation of the EU criteria for excluding a person from refugee status that guidance for interpreting provisions of the Qualification Directive which have their origin in the text of the Refugee Convention is provided by the EXCOM conclusions, the UNHCR Handbook and UNHCR's Guidelines on International Protection. He also referred to the fact that UNHCR's view is not always clear, as UNHCR documents sometimes contradict each other.¹⁰⁴ A.G. Mengozzi in this opinion made extensive references to UNHCR documents, such as the UNHCR Handbook and Guidelines as well as the document specifically drawn up by UNHCR for the purposes of the case before the Court of Justice.¹⁰⁵

3.3.4 The views of the UN Committees

The views of UN Committees have played a minor role in the Court of Justice's case-law.¹⁰⁶ The Committee only ruled on the relevance of the Human Rights Committee's view in its judgment in *Grant*.¹⁰⁷ So far the Court of Justice has not addressed the relevance of General Comments or Concluding Observations of the Human Rights Committee, or of the views of the Committee against Torture or the Committee on the Rights of the Child in its case-law. The considerations in *Grant* may however also apply to those sources of interpretation.

In *Grant* the applicant argued before the Court of Justice that Article 119 of the former EC-Treaty, which prohibited discrimination on the basis of sex, should include discrimination on the basis of sexual orientation.¹⁰⁸ She referred to a view of the Human Rights Committee in an individual complaint,

102 A.G. Sharpston, Opinion with Case C-31/09, *Bolbol* [2010], para 16.

103 A.G. Sharpston Opinion with Case C-31/09, *Bolbol* [2010], para 76.

104 A.G. Mengozzi, Opinion with Joined Cases C-57/09 and C-101/09, *B. and D.* [2010], para 43.

105 In the opinions with Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 32 and Case C-465/07, *Elgafaji* [2009], the A.G. did not take UNHCR's view into account.

106 Butler & de Schutter 2007, pp 282-283.

107 Case C-249/96, *Grant* [1998], paras 44-47.

108 Ms Grant was refused travel benefits for her female partner by her employer, while those benefits were granted to persons of opposite sex, who were married or involved in a meaningful relationship.

according to which the term 'sex' mentioned in the prohibitions of discrimination laid down in Articles 2 (1) and 26 ICCPR includes 'sexual orientation'.¹⁰⁹

The Court of Justice reiterated first of all that the Covenant is one of the international instruments relating to the protection of human rights, of which the Court takes account in applying the fundamental principles of EU law. However, it considered that the Human Rights Committee is not a judicial institution and that its findings have no binding force in law. It furthermore noted that the Human Rights Committee's view did not in any event appear to reflect the interpretation so far generally accepted of the concept of discrimination based on sex which appeared in various international instruments concerning the protection of fundamental rights. In this regard it referred to the ECtHR's case-law, which stated that homosexual relationships did not fall within the scope of Articles 8 and 12 ECHR.¹¹⁰ Furthermore the Court took into account that the laws of the Member States generally did not treat same-sex relationships the same as marriages between persons of opposite sex. The Court concluded that the Human Rights Committee's view could not constitute a basis for the Court to extend the scope of Article 119 of the former EC Treaty, to include sexual orientation. Butler and de Schutter state that the *Grant* case underlines the lack of faith that the Court of Justice places in the interpretations of international human rights law issued by the monitoring bodies responsible for supervising the correct implementation of these treaties. In their view the Court of Justice ignores the generally accepted view that the UN monitoring bodies' interpretation of the treaties should be treated as authoritative.¹¹¹

One may conclude from this judgment that the view of the Human Rights Committee (or the Committee against Torture or the Committee on the Rights of the Child) alone cannot provide sufficient basis for extensive interpretation of a Treaty provision. However the Court did not exclude that those views may inspire the Court in future cases.¹¹² This could be the case especially where they corroborate the case-law of the ECtHR and/or other treaty bodies

109 HRC 31 March 1994, *Toonen v Australia*, no 488/1992. The Court of Justice remarks that the HRC confined itself, as it stated itself without giving specific reasons, to 'noting ... that in its view the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation'. Case C-249/96, *Grant* [1998], para 46.

110 Spielmann notes however that the Court of Justice omitted to have a close look at the ECtHR's case-law on Art 8 ECHR, in particular the so-called 'positive obligations' theory imposing concrete action on public authorities. Spielmann 1999, p 774.

111 Butler & de Schutter 2007, pp 284-285.

112 The fact that Advocates General have referred to the views of the HRC in several opinions may indicate that the UN supervising bodies' views may be taken into account by the Court in future cases. See the opinions of A.G. Ruiz-Jarabo Colomer with Case C-436/04, *van Esbroeck* [2006] (interpretation of the *ne bis in idem* principle) of A.G. Kokott with Case C-540/03, *Parliament v Council* [2006] (the right to family life) and the view of A.G. Mazák with Case C-357/09 PPU, *Kadzoev* [2006] (possibilities of detention of asylum applicants).

and/or the interpretation stemming from the laws of the Member States.¹¹³ The Court of Justice may be more willing to follow the UN Committees' views when interpreting secondary EU legislation than when determining the meaning of a Treaty provision.

3.3.5 Should non-binding documents be taken into account?

There are strong arguments that the non-binding views of the institutions of the Council of Europe, UNHCR and the UN Committees should be taken into account by the Court of Justice. The weight which should be attached to those views depends on their quality of reasoning.¹¹⁴ Most importantly it would be inconsistent for the Court of Justice to recognise a treaty as a source of inspiration, while ignoring the views of the body supervising this treaty which are generally considered to be an important subsidiary means of interpretation of those treaties. Furthermore systematic interpretation of a fundamental right may be facilitated by a comparative analyses of international or regional human rights treaties, which include a similar right.¹¹⁵ An interesting development in this regard is the current trend in the ECtHR's case-law to use 'soft law standards' as a source of interpretation.¹¹⁶ Potentially this may prompt the Court of Justice to do the same, in particular when interpreting EU fundamental rights corresponding to rights recognised in the ECHR.

The ECtHR, when interpreting the rights laid down in the Convention takes into account 'any relevant rules and principles of international law applicable in relations between the Contracting Parties'.¹¹⁷ In *Demir and Baykara v Turkey* the ECtHR considered that in interpreting the Convention it

can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States

113 See also Butler & de Schutter 2007, p 283. They state that it emerges from the Court of Justice's cases that the Court will rely primarily on the ECHR and while it may draw on other treaties to complement its analysis, it may not draw on them where they appear to go beyond the ECHR, except when there appears to be some support for this in the EC or EU Treaty.

114 See Battjes 2006, p 22.

115 Wouters 2009, p 12, Nowak & McArthur, p 12.

116 See Barkhuysen & Van Emmerik 2010.

117 ECtHR (GC) 29 January 2008, *Saadi v United Kingdom*, no 13229/03, para 62. See also ECtHR 12 March 2003, *Öcalan v Turkey*, no 46221/99, para 190, in which the Court 'reiterates that it must be mindful of the Convention's special character as a human-rights treaty and that the Convention cannot be interpreted in a vacuum. It should so far as possible be interpreted in harmony with other rules of public international law of which it forms part'.

may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

The ECtHR has mentioned many different sources which may be relevant, including the ICCPR, CAT, CRC¹¹⁸ and the Refugee Convention.¹¹⁹ In its case-law the Court regularly refers to non-binding documents such as views in individual cases¹²⁰ or General Comments and Concluding Observations of UN supervising bodies.¹²¹ The ECtHR also takes into account UNHCR documents, such as the UNHCR Handbook,¹²² EXCOM conclusions and Guidelines.¹²³ Council of Europe documents, such as the recommendations, resolutions or guidelines of the Committee of Ministers and the Parliamentary Assembly were taken into account in several cases, among which some asylum cases.¹²⁴ The ECtHR does not seem to have developed clear guidelines for using non-binding documents for its interpretation of the Convention. Its case-law does not show when such documents should be taken into account and the weight which should be granted to them.¹²⁵ The Court seems to regard the views adopted by supervisory bodies to international treaties a relevant consideration for the ECtHR. However, it does not always follow such views.¹²⁶

118 ECtHR (GC) 12 November 2008, *Demir and Baykara v Turkey*, no 34503/97, paras 69-86.

119 ECtHR 28 October 2010, *Fawsie v Greece*, no 40080/07, para 38.

120 See ECtHR (GC) 29 January 2008, *Saadi v United Kingdom*, no 13229/03, paras 31-32. In ECtHR 12 March 2003, *Öcalan v Turkey*, no 46221/99, paras 60-62 and 203, the ECtHR used the view of the HRC to support its ruling that the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible under Art 2 ECHR.

121 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 110 and 178, ECtHR (GC) 23 June 2008, *Maslov v Austria*, no 1638/03, para 83 jo 37-38, ECtHR 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, no 13178/03, para 40 and ECtHR 10 February 2011, *Soltysyak v Russia*, no 4663/05, para 51.

122 ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 73.

123 ECtHR (GC) 29 January 2008, *Saadi v United Kingdom*, no 13229/03, paras 34-35. The Court rejected a narrow interpretation of Art 5 (1)(f) ECHR amongst others because such interpretation would be inconsistent with EXCOM Conclusion no 44 (XXXVII), 1986, the UNHCR's Guidelines and a Recommendation of the Committee of Ministers of the Council of Europe.

124 ECtHR 26 April 2007, *Gebremedhin v France*, no 25389/05, para 58, ECtHR (Adm) 2 December 2008, *K.R.S. v United Kingdom*, no 32733/08, ECtHR 23 October 2008, *Soldatenko v Ukraine*, no 2440/07, para 30.

125 See also Barkhuysen & Van Emmerik 2010, pp 834-835.

126 In ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 110 and 178 for example the Court did not follow the HRC's view that emergency measures must be of a temporary nature. In ECtHR (GC) 29 January 2008, *Saadi v United Kingdom*, no 13229/03, it does not seem to follow the HRC's views regarding detention of aliens under Art 9 ICCPR.

3.4 THE RELATIVE WEIGHT OF INTERNATIONAL TREATIES AS SOURCES OF INSPIRATION

It should be expected on the basis of the Court of Justice's existing case-law that, also in the context of asylum procedures, the Court of Justice will attach by far most weight to the ECHR and the ECtHR's case-law when looking for inspiration for the interpretation of EU fundamental rights. This is not only the result of the 'special significance' granted to the ECHR by Article 6 (3) TEU and the Charter. It is also due to the fact that the most important source of interpretation of the ECHR, the judgments of the ECtHR, are binding upon the State parties to the ECHR and constitute an extensive body of case-law. The non-binding recommendations and resolutions issued by Council of Europe institutions have played a marginal role in the EU Courts' case-law.

In asylum cases the Refugee Convention also seems to have a special status as a source of inspiration, because of its explicit recognition as a 'relevant treaty' in the asylum context by Article 63 of the former EC-Treaty and Article 78 TFEU as well as the preambles and texts of the EU measures adopted under this provision. The Court of Justice interprets EU asylum legislation and expectedly also EU fundamental rights in the light of the Refugee Convention. However this is difficult if the relevant provisions of the Refugee Convention need interpretation, because the Convention lacks a supervising body, which is competent to provide legally binding decisions on the interpretation of its provisions. With regard to procedural issues the Refugee Convention does not provide much guidance, as it does not contain any provisions which regard refugee determination procedures. The Court of Justice can only rely on (non-binding) UNHCR documents and EXCOM conclusions when examining the procedural requirements following from the Refugee Convention. However those documents have so far not played any visible role in the Court of Justice's case-law. In fact the Court of Justice itself arguably has become the most important source of interpretation of the Refugee Convention.

The potential impact of the UN treaties on the development of EU fundamental rights, including the right to effective judicial protection, seems to be limited. This is due to the fact that the Court is clearly hesitant to take into account the non-binding views of the UN supervising bodies, which may provide guidance as to the interpretation of those treaties. The UN Conventions have played a minor role in the Court of Justice's case-law. It should be concluded from *Grant* and the lack of references to the non-binding views of UN supervising bodies that the Court of Justice is not easily prepared to follow those views. This seems to be specifically the case when this view is not sustained by ECtHR case-law, the constitutional traditions of the Member States or potentially non-binding views of other supervising bodies.

It should however not be excluded that the non-binding views of institutions of the Council of Europe, UNHCR and the UN Committees will serve as sources of inspiration in future (asylum) cases. It was even argued in section

3.3.5 that the Court of Justice should take into account these authoritative views and attach weight to them according to their quality of reasoning. Such practice would correspond with the current trend in the ECtHR's case-law to use 'soft law standards' as a source of interpretation.

Consequences for the way this study is conducted

In this study international treaties are not treated as a separate category of norms, which should be directly applied by the Court of Justice in the asylum context. They are only used as sources of inspiration for the EU right to an effective remedy. As was explained in section 3.1.1 this has expectedly no consequences for the way the EU right to an effective remedy will be interpreted.

For the purpose of finding the content and meaning of the EU right to effective judicial protection for the asylum context the following assumptions will be used as to the relative weight which should be granted to the different sources of inspiration included in this study.

- The ECHR and the ECtHR's case-law have most significance as a source of inspiration for EU fundamental rights.
- Where the ECtHR's view is corroborated by the non-binding views of other supervising bodies, an even more solid basis for the interpretation of EU fundamental rights is provided.
- Where the ECtHR's case-law and the non-binding view of another supervising body conflict, the Court of Justice is arguably inclined to follow the ECtHR.

The Court of Justice does not seem to be prepared to adopt a far-reaching interpretation of an EU fundamental right on the basis of the non-binding view of one supervising body alone.

If the views of more supervising bodies (e.g. Human Rights Committee, Committee against Torture and UNHCR) agree, the Court of Justice may be more inclined to follow these views.

In this study the ECHR and the ECtHR's case-law will thus play a central role as a source of inspiration for the interpretation of the EU right to an effective remedy. Where the ECtHR's case-law is clear on a certain issue, the non-binding views of other (supervising) bodies will only be briefly addressed. Where the ECtHR's case-law does not set (clear) requirements, more attention will be paid to such non-binding views. The weight which is attached to these non-binding views depends on their quality of reasoning. This study will be reluctant to base the interpretation of the EU right to an effective remedy on non-binding views only.

4 | The EU right to an effective remedy and related procedural rights and principles

This chapter will address the scope of application and the general content and meaning of the EU right to an effective remedy. Furthermore it will introduce the procedural rights included in or linked to this right, such as the right to a fair trial, the principle of effectiveness and the right to good administration as well as the specific rights they encompass (sections 4.3-4.4). These EU rights and principles will be used in this study in order to build a set of EU standards for the themes discussed in Chapters 6 to 10. This chapter also establishes which are the specific sources of international law inspiring these EU procedural rights.

The Court of Justice has so far only recognised Articles 6 and 13 ECHR as sources of inspiration for the EU right to effective judicial protection. However it is argued in this chapter that in the asylum context also the ECtHR's case-law regarding substantive provisions such as the prohibition of *refoulement* and provisions regarding the exhaustion of domestic remedies should be considered relevant for the development of EU procedural rights. Furthermore expectedly other provisions of international law, which also include a right to an effective remedy or a right to a fair hearing, such as Articles 2 (3) and 14 ICCPR and Article 3 CAT will serve as sources of inspiration for EU fundamental rights.¹

Before introducing the EU rights to effective judicial protection and the right to good administration two important issues will be addressed. Section 4.1 concerns the potential impact of EU procedural rights on national procedural systems. It shows that the Court of Justice's case-law regarding EU procedural rights, in particular the right to effective judicial protection, has considerably limited what is often called the principle of procedural autonomy of the Member States. It may therefore be expected that the EU right to an effective remedy will limit the Member States discretion to design their asylum procedures.

Section 4.2 addresses the interrelationship between the different EU procedural rights. It contends that all EU procedural rights discussed in this study are interlinked. Therefore it is sometimes difficult to establish which procedural right should be applied to a certain procedural issue. The EU Courts do not give clear guidance in this respect. It is argued however that it is not necessary

¹ It was argued in sections 3.2.4 and 3.2.5 that the ICCPR and the CAT should be considered sources of inspiration for EU fundamental rights in the asylum context.

for the purpose of this study to define the exact relationship between the EU procedural rights discussed in this chapter. With regard to each of the themes addressed in Chapters 6 to 10 the EU Courts' relevant case-law will be examined, irrespective of the procedural right applied by these courts. EU procedural rights are thus treated as a category of rights, which overlap and complement each other.

It will finally be explained in section 4.5 that three 'basic notions' emerge from the Court of Justice's as well as the ECtHR's case-law regarding procedural rights. These notions will be used as a tool to analyse the case-law examined in the thematic chapters and to develop a set of EU procedural standards for the procedural topics discussed in some of the thematic chapters:

- 1 When assessing whether EU procedural rights have been infringed (often) interests must be balanced against each other
- 2 When determining whether a procedure should be considered fair, regard should be had to all aspects and instances of this procedure: the overall fairness of a procedure must be examined
- 3 The subject matter of the procedure influences the level of procedural protection which must be offered to the applicant.

4.1 LIMITATIONS TO THE PROCEDURAL AUTONOMY OF THE MEMBER STATES

The Court of Justice when assessing national procedural rules which are not governed by EU law takes national procedural autonomy as a starting point² by considering that: 'in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.'³ The idea which is underlying the principle of national procedural autonomy is consistent with the principle of subsidiarity and recognises that 'national procedural rules may reflect deep-seated cultural and ethical values and should not be lightly set aside'.⁴ Indeed sometimes the EU Courts seem to be reluctant to impose obligations on Member States with regard to procedural guarantees or remedies. The Court of Justice for example refrained from imposing the conditions for granting interim protection on the national level, when compat-

2 Accetto & Zlepzig 2005, p 396. The Court of Justice has explicitly referred to the principle of procedural autonomy in Case C-201/02, *Wells* [2004], para 67, Case C-212/04, *Adeneler* [2006], para 95 and Case C-314/09, *Strabag and Others* [2010], para 34.

3 See for example Case C-115/09, *Trianel Kohlekraftwerk Lünen* [2011], para 43.

4 Arnall 2011, p 52. See also Accetto & Zlepzig 2005, p 395 and Delicostopoulos 2003, p 603.

ibility of national law with EU law is concerned. It did so only for cases before the national courts in which the legality of EU law is contested.⁵

Much has been written on the principle of national procedural autonomy and it is not feasible to give an extensive overview of relevant literature in this section.⁶ However it should be noted here that there seems to be a broad consensus between scholars that as a result of the Court of Justice's case-law the national procedural autonomy of the Member States is in practice considerably limited. This limitation is the result of the important role of national legal systems to implement and enforce EU law.⁷ According to Trstenjak and Beysen 'the concept of procedural autonomy of the Member States does not imply the existence of a general principle of EU law, according to which each Member State has the right to preserve a nucleus of national procedural rules with regard to the enforcement of rights derived from EU law'.⁸ Schwartze states that 'notwithstanding national autonomy, the need for equity and effectiveness has led to considerable Community influence on national administrative law and procedure'.⁹ The national procedural framework for the enforcement of EU law must comply with several EU rights and principles such as the EU right to an effective remedy, the right to a fair trial, the principle of effectiveness and the right to good administration. These rights and principles will be discussed in the next sections of this chapter.

Traditionally it is thought that the principle of effectiveness must be balanced against the national procedural autonomy of the State.¹⁰ Some authors however suggest that EU procedural rights have become hierarchically superior to that of national procedural autonomy.¹¹ Haapaniemi suggests that 'to speak about national procedural autonomy is, [...] at least today, much more about lipservice than reality'.¹² Kakouris even argues that procedural autonomy does not exist at all and that national procedural rules have become ancillary EU law. He states that national procedural law is there to serve EU Law. 'Its provisions only apply insofar as they contribute to the effective application of Community law. Where they do not they must be set aside'. According to Kakouris therefore there is no question of balancing the principle of effectiveness against the procedural autonomy of the Member States.¹³ In his view

5 See further Chapter 6 on the right to remain. Anagnostaras states that the fact that two separate regimes of interim protection exist seems to be a concession to the national procedural autonomy principle in an area where that may be of little practical importance to the legal interests of individuals due to the existence of domestic law principles that correspond generally to the Community law mandates. Anagnostaras 2008, p 597.

6 See for an overview Accetto & Zlepzig 2005, pp 395-397.

7 Accetto & Zlepzig 2005, p 394.

8 Trstenjak & Beysen 2011, pp 98-99.

9 Schwartze 2004, p 87.

10 Accetto & Zlepzig 2005, pp 397 and 401.

11 Arnulf 2011, p 68. See also Accetto & Zlepzig 2005, p 397.

12 See for an overview Accetto & Zlepzig 2005, pp 395-397.

13 Kakouris 1997, pp 1390 and 1408.

the Member States only have institutional autonomy, freedom in organising their legal system, the jurisdictional hierarchy of the courts and the division of competence between and amongst the courts.¹⁴

This study contains numerous examples of cases in which the Court of Justice has limited the Member States discretion to design their national procedures. In its judgment in *Factortame* for example, which is discussed in Chapter 6, the Court of Justice held that the national court should be able to grant interim relief if this is necessary to ensure the effectiveness of a judgment on the existence of the rights claimed under EU law. This applies even if the court does not have the power to grant interim relief under national law.¹⁵ In Chapter 8 it is explained that any requirement of proof which has the effect of making it virtually impossible or excessively difficult to exercise a right granted by EU law would be incompatible with EU law. In *Danfoss* and other cases the Court of Justice made clear that the principle of effectiveness requires a shift of the burden of proof from one party to the other if this is necessary to ensure the effectiveness of EU law.¹⁶

In the field of asylum procedures the Procedures Directive limits the procedural autonomy of the Member States. It was even decided that EU legislation should in the longer term lead to a common asylum procedure.¹⁷ However as the directive does not address every aspect of asylum procedures and contains many possibilities for exceptions to the main rules and many vague norms, it leaves the Member States plenty of room to design their own asylum procedure. It also follows from the directive's preamble that Member States have discretion in organising their asylum system and legal remedies.¹⁸ This study shows that EU procedural rights and principles will potentially set considerable additional requirements for national asylum procedures and will thus further limit the Member States' discretion in laying down national procedural rules. The principle approach taken in this study is that national procedural rules should ensure the effectiveness of the right to asylum and the prohibition of *refoulement*. In the absence of requirements set by the Procedures Directive the Member States are free to decide how they comply with that duty as long as they do so. This approach thus resembles the approach taken by Kakouris.

14 Kakouris 1997, pp 1394 and 1411.

15 Case C-213/89, *Factortame* [1990]. See section 6.3.1.1.

16 See section 8.3.1.

17 Presidency Conclusions of the Tampere European Council 15-16 October 1999 (SN 200/99), paras 14-15.

18 See for example recital 11, which states that 'the organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive'. See also Case C-69/10, *Samba Diouf* [2011], paras 29-30.

A first sign that the Court of Justice is, also in asylum cases, willing to limit national procedural autonomy in favour of the EU right to an effective remedy is the judgment in *Samba Diouf*.¹⁹ In this judgment the Court of Justice held that the intensity of judicial review in asylum cases falls within the scope of the EU right to an effective remedy.²⁰ Furthermore it held that the time-limit for lodging an appeal in an accelerated procedure should be set aside should that time-limit prove, in a given situation, to be insufficient in view of the circumstances.²¹ Van Cleynenbreugel writes that the Court of Justice

thus directly interferes with Member States' discretion to adapt their national systems in conformity with newly indentified EU adequate judicial protection requirements. In so doing, *Samba Diouf* challenges the classic division of procedural competences between the EU and its Member States.²²

4.2 THE LINK BETWEEN EU PROCEDURAL RIGHTS AND PRINCIPLES

The right to an effective remedy encompasses several rights and principles such as the right to a fair trial the right to access to court and the principles of equality of arms and adversarial proceedings. Furthermore procedural guarantees are offered by the right to good administration which in its turn encompasses several rights and obligations such as the right to be heard and the obligation to state reasons. All these rights and principles will be separately addressed in the next sections. Finally the Court of Justice has also derived procedural guarantees directly from the principle of full effectiveness of EU law, such as with regard to the burden of proof in equal pay cases.²³

In their case-law the EU Courts have addressed the same procedural issues under different EU procedural rights.²⁴ An example is the Court of Justice's case-law with regard to the right to interim relief. In *Factortame* the Court held that the national court should be able to grant interim relief in order to ensure *full effectiveness of Community law*²⁵ while in *Unibet* it based the requirement to grant interim relief on the *principle of effective judicial protection*²⁶. The Court

19 See also Van Cleynenbreugel 2012, pp 344-345.

20 See also Widdershoven 2011, under para 3.

21 Case C-69/10, *Samba Diouf* [2011], para 68.

22 Van Cleynenbreugel 2012, p 337.

23 Case C-109/88, *Danfoss* [1998]. See further section 8.3.1.

24 In some cases it is not entirely clear which principle is used by the Court of Justice, mainly because it uses different terminology for the same principle. Sometimes the Court uses the words 'effective protection of fundamental rights' (Case C-340/89, *Vlassopoulou* [1991]), 'the legal protection which persons derive from the direct effect of provisions of Community law' (Case C-213/89, *Factortame* [1990]) or 'requirements of sufficiently effective protection' (Case C-136/03, *Dörr and Ünal* [2005]).

25 Case C-213/89, *Factortame*, [1990], para 21.

26 Case C-432/05, *Unibet* [2007], para 83. See also Prechal & Widdershoven 2011, p 33.

of Justice usually does not explain its choice to apply a certain EU procedural right or principle. Therefore the exact relationship between certain EU principles, in particular between the right to effective judicial protection and the principle of effectiveness has remained unclear.²⁷

The right to an effective remedy and the principle of effectiveness

In literature different views can be found on the relationship between right to effective judicial protection and the principle of effectiveness. Some consider the right to effective judicial protection to be only one feature of the overarching obligation on the Member States stemming from the principle of effectiveness.²⁸ Others see the principle of effective judicial protection as the overarching principle of which effectiveness is one aspect.²⁹

In the judgment in *Impact* the Court of Justice explains the relationship between 1) the principle that rules of EU law must be fully effective, 2) the right to effective judicial protection and 3) the principles of equivalence and effectiveness:

It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective [...].

In that regard, it is important to note that the principle of effective judicial protection is a general principle of Community law [...].

The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law [...].

The Member States, however, are responsible for ensuring that those rights are effectively protected in each case [...]

On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively

²⁷ See also Oliver 2011, p 2038 and Prechal & Widdershoven 2011, p 39.

²⁸ Accetto & Zlepnig 2005, p 388. According to Prechal and Shelkopyas it can in general be said that the principle of effective judicial protection expands the 'old' principle of effectiveness. Prechal & Shelkopyas 2004, p 591.

²⁹ Accetto & Zlepnig 2005, p 385. Haapaniemi 2009, pp 108-109. He states that the principle of effective judicial protection is a cardinal principle, whereas the principles of effectiveness and equivalence, under the *Rewe* jurisprudence, can be seen as sub principles of it.' See also the opinion of A.G. Trstenjak in Case C-411/10, *NS v Secretary of State for the Home Department*, para 161.

difficult the exercise of rights conferred by Community law (principle of effectiveness) [..].

Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law.

A failure to comply with those requirements at Community level is – just like a failure to comply with them as regards the definition of detailed procedural rules – liable to undermine the principle of effective judicial protection.³⁰

From these considerations it may be derived that the overarching principle is the principle that EU rules should be fully effective in the national legal order. This principle seeks to protect the interests of the EU. It is based on the direct effect of EU law and promotes the effective enforcement of EU law in national courts.³¹ It entails among others that Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.³² This follows from Article 4(3) TEU (the principle of sincere cooperation) which requires the Member States to

take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The right to effective judicial protection follows from the principle of full effectiveness of EU law. Article 4 (3) TEU requires national courts and tribunals to apply EU law in full and to protect the rights it confers on individuals.³³ The national procedural rules governing actions for safeguarding an indi-

³⁰ Case C-268/06, *Impact* [2008], paras 42-48.

³¹ The Court of Justice has ruled that 'the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible. The possibility of obtaining redress from the Member State is particularly indispensable where [...] the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law'. Case C-6/90, *Francovich* [1991], paras 33-34.

³² See for example Case C-104/10, *Kelly* [2011], para 33. According to the Court this follows from Art 4 (3) TEU.

³³ Case C-312/93, *Peterbroeck* [1995], para 12. See also Trstenjak & Beysen 2011, p 97.

vidual's rights under EU law before the national courts must comply with the principles of effectiveness and equivalence. Other case-law however implies another relationship between the the right to effective judicial protection and the principles of effectiveness and equivalence. In *Mono Car Styling* for example Court of Justice seems to suggest that national rules on an individual's standing and legal interest in bringing proceedings must be tested against both the principle of effectiveness and effective judicial protection.³⁴ Prechal and Widdershoven argue that this is the right approach. They point at the different purposes of the principle of effectiveness and the right to an effective remedy. The principle of effectiveness aims to guarantee the effective application of substantive EU law, while the right to an effective remedy 'is intimately linked to the right of access to court and, ultimately, to the idea of the "Rechtsstaat"'.³⁵ While those two interests may overlap, this is not necessarily the case.³⁶ Prechal and Widdershoven contend that the test applied under the principle of effectiveness is less demanding than that applied under the right to an effective remedy.³⁷

The EU right to an effective remedy and the right to good administration

It follows from the case-law of the EU courts that the specific rights following from the right to an effective remedy, the right to a fair trial and the right to good administration interrelate, overlap and complement each other. According to the EU courts for example the rights of the defence and the right to good administration are intertwined or complementary. The Charter has codified the right to be heard and the right of access to the file, often regarded to be rights of the defence under the right to good administration.³⁸ In the *Modjahe-dines* case the CFI addressed the close relation between the right to a fair hearing and the obligation to state of reasons and the right to effective judicial protection:

It is appropriate to begin by examining, together, the pleas alleging infringement of the right to a fair hearing, infringement of the obligation to state reasons and infringement of the right to effective judicial protection, which are closely linked. First, the safeguarding of the right to a fair hearing helps to ensure that the right to effective judicial protection is exercised properly. Second, there is a close link between the right to an effective judicial remedy and the obligation to state reasons. As held in settled case-law, the Community institutions' obligation under Article

34 Case C-12/08, *Mono Car Styling* [2009], paras 47-49.

35 Prechal & Widdershoven 2011, p 50. See also p 45.

36 Prechal & Widdershoven 2011, p 42. The principle of effectiveness may for example require the imposition of sanctions on individuals or the recovery of illegal State aid. In the field of asylum procedures it is hard to imagine a situation in which the effective enforcement of EU law is not in the interest of the individual asylum applicant.

37 Prechal & Widdershoven 2011, pp 39-40.

38 Barbier de La Serre 2006, pp 234-236.

253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded [...] Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question [...].³⁹

For the purpose of this study it is not necessary to define the exact relationship between all relevant EU procedural rights and principles. It is sufficient to note that all these principles set requirements for national proceedings. In the following thematic chapters all relevant case-law with regard to certain procedural topics will be assessed, regardless which right or principle was used by the EU Court. The right to an effective remedy, the principle of effectiveness and related procedural rights are taken as a category of procedural norms.⁴⁰

Provisions of international law inspiring EU procedural rights

Like the EU procedural rights, the procedural rights guaranteed by international law which inspire the interpretation of those EU right also overlap and complement each other. Provisions of international law which may inspire the interpretation of EU procedural rights in the context of CEAS could be divided into four categories: (1) provisions guaranteeing the right to an effective remedy, (2) provisions regarding the right to a fair trial, (3) substantive provisions, in particular those containing a prohibition of *refoulement*, of which the effective protection requires certain procedural guarantees and finally provisions aimed at ensuring the subsidiary role of human rights mechanisms (4). The ECtHR, like the Court of Justice, addresses the same procedural issues under different provisions. The obligation of a rigorous scrutiny of a risk of *refoulement* for example has been derived from both Article 3 ECHR and Article 13 ECHR. The use of secret information has been addressed under the right to family life guaranteed by Article 8 ECHR as well as several procedural rights (Articles 5 (4), 6 and 13 ECHR).⁴¹ The ECtHR usually does not explain in its judgments why it addresses a procedural issue under a certain provision. For these reasons the procedural rights recognised by the ECHR as well as other treaties are for the purpose of this study (like procedural rights recognised by EU law) considered to be one category of procedural rights which are all interlinked. In the thematic chapters the relevant case-law and views of the supervising bodies with regard to each theme is taken into account, irrespective which provision was applied.

39 Case T-228/02, *Organization des Modjahedines du peuple d'Iran v Council* [2006].

40 See also Accetto & Zlepniġ 2005, p 385.

41 See section 10.3.

4.3 THE EU RIGHT TO AN EFFECTIVE REMEDY

Article 47 of the Charter states: ‘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’. Furthermore according to Article 19 (1) TEU: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.⁴² These articles codify the general principle of effective judicial protection which has been considered a principle of EU law and a fundamental right by the Court of Justice.⁴³ According to the Court of Justice the right to an effective remedy⁴⁴ reflects a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR.⁴⁵

It follows from the text of Article 47 of the Charter and the case-law of the Court of Justice that the EU right to an effective remedy comprises the right to a fair trial.⁴⁶ Article 47 states:

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The objective of the right to an effective remedy is to secure for the individual effective protection of the (fundamental) rights granted by EU law.⁴⁷ The Court of Justice has held that it is particularly important for judicial protection to be effective, when the measures challenged by the individual have serious consequences.⁴⁸

⁴² Haapaniemi states that this provision gives a solid legal basis to interfere, under EU law, with national law of remedies and therefore, cures the problem that such a firm basis for intervention that was missing before. Haapaniemi 2009, p 120.

⁴³ See Case T-111/96, *ITT Promedia v Commission* [1998], para 60 (the right of access to the Court), Case C-105/03, *Pupino* [2005] para 58 and Case C-305/05, *Ordre des barreaux francophones et germanophones* [2007] para 29 (the right to a fair trial) and Case C-28/05, *Dokter* [2006], para 75 (rights of the defence).

⁴⁴ The Court uses different terminology for the same principle such as ‘the right to an effective judicial remedy’ (Case 222/84, *Johnston* [1986]), ‘the principle of effective judicial control’ (Case C-185/97, *Coote* [1998]), ‘the requirement for judicial review’ (Case C-459/99, *MRAX* [2002]) or the requirement of judicial control (Case C-269/99, *Kühne* [2001]).

⁴⁵ Case 222/86, *UNECTEF v Heylens and others* [1987], para 14.

⁴⁶ The Court of Justice often refers to the right to a fair trial guaranteed by Art 6 ECHR when applying the principle of effective judicial protection.

⁴⁷ Case 222/86, *UNECTEF v Heylens and others* [1987] and Case C-340/89, *Vlassopoulou* [1991].

⁴⁸ Case C-229/05 P, *PKK/KNK v Council* [2006], para 110.

4.3.1 Provisions of international law inspiring the EU right to an effective remedy

The (case-law concerning) various provisions of international law may inspire the EU right to an effective remedy and fair trial in the context of CEAS. Obviously these are provisions containing a right to an effective remedy or a right to a fair trial. Furthermore the procedural guarantees derived from the principle that the prohibition of *refoulement* and other substantive rights should be effectively protected and those derived from the subsidiary role of human rights mechanisms should be considered sources of inspiration. In the following sections the procedural requirements following from these sources of inspiration will be further elaborated on.

The right to an effective remedy

Article 13 ECHR and Article 2 (3) ICCPR require State parties to provide an effective remedy to any person whose rights included in the Convention and the Covenant respectively are violated.⁴⁹ The Committee against Torture has derived a right to an effective remedy from Article 3 CAT.⁵⁰ According to the ECtHR the right to an effective remedy serves two purposes. The first is comparable to the objective of the EU principle of effective judicial protection: to secure for the individual effective protection of the rights granted by the treaties concerned.⁵¹ Secondly the right to an effective remedy aims to preserve the subsidiary nature of the treaty system.⁵² It gives direct expression to the States' obligation to protect human rights first and foremost within their own legal system.⁵³

The right to a fair trial

Article 6 (1) ECHR and Article 14 (1) ICCPR guarantee the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The right to a fair trial is intended to secure the interests of the parties

49 Art 5 (4) ECHR and Art 9 (4) ICCPR require judicial review of detention measures. Article 5 (4) ECHR provides a *lex specialis* in relation to Art 13 ECHR. Sometimes an Art 5 (4) ECHR procedure should be attended by the same guarantees as those required under Art 6 ECHR. Such procedure must always have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. Art 5 (4) ECHR and Art 9 (4) ICCPR only play a minor role in this study. Therefore the specific requirements set by these provisions will not further be addressed.

50 See ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003.

51 See ECtHR (GC) 26 October 2000, *Kudla v Poland*, no 30210/96, para 152.

52 See for example ECtHR 5 February 2002, *Conka v Belgium*, no 51564/99, para 33.

53 ECtHR (GC) 26 October 2000, *Kudla v Poland*, no 30210/96, para 152 and ECtHR (GC) 10 May 2001, *Z and others v UK*, no 29392/95, para 103, where the ECtHR emphasised that Art 13 takes on a crucial function in ensuring the supervisory role of the ECtHR.

and those of the proper administration of justice.⁵⁴ According to the ECtHR the right to a fair trial holds a prominent place in a democratic society.⁵⁵

Effectiveness of the prohibition of refoulement and other substantive rights

Not only under EU law, but also under international law, procedural safeguards have been derived from the principle that substantive rights must be effectively protected. Procedural safeguards may be derived from the principle that the prohibition of *refoulement* laid down in Article 33 Refugee Convention must be effectively protected.⁵⁶ Hathaway for example states that ‘a fair assessment of refugee status is the indispensable means by which to vindicate Convention rights’.⁵⁷ The EXCOM and UNHCR have developed procedural guidelines which seek to promote the fair determination of refugee status. These may inspire the EU procedural rights and principles in the asylum context.

The Committee against Torture has applied the principle of effectiveness to the principle of *non-refoulement* by recognising that Article 3 CAT entails a right to an effective remedy. In *Agiza v Sweden* the Committee against Torture observed

that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory.[...] In the Committee’s view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof. [...]The nature of refoulement is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.⁵⁸

The ECtHR has derived procedural guarantees directly from Article 3 ECHR. The clearest example of the application of the principle of effectiveness can

⁵⁴ ECtHR 27 January 1997, *Nideröst-Huber v Switzerland*, no 18990/91, para 30. According to HRC General Comment No 32 (2007), CCPR/C/GC/32, para I sub 2, Art 14 ICCPR ‘aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights’.

⁵⁵ ECtHR 9 October 1979, *Airey v Ireland*, no 6289/73, para 24.

⁵⁶ See for example EXCOM Conclusion no 71 ((XLIV), 1993, para (i) which *reiterates* the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection.

⁵⁷ Hathaway 2005, p 630. See also Wouters 2009, pp 164-165, Goodwin Gill & McAdam 2007, pp 530-531, Boeles 1997, pp 66-69.

⁵⁸ ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003.

be found in *Jabari v Turkey*. In this case the complainant was denied any scrutiny of the factual basis of her fears about being removed to Iran, because she failed to comply with the requirement to submit her asylum application within five days of her arrival in Turkey. The Court considered that the automatic and mechanical application of this time-limit for submitting an asylum application was 'at variance with the protection of the fundamental value embodied in Article 3 of the Convention'.⁵⁹

The ECtHR has also derived procedural rules from other substantial provisions of the Convention, notably Article 8 ECHR on the right to private and family life. An important procedural issue addressed under Article 8 ECHR is the use of secret evidence in the context of measures affecting national security.⁶⁰ In asylum cases similar procedural issues as those addressed under Article 8 may arise.⁶¹ The case-law concerning the procedural safeguards which follow from Article 8 should therefore also be considered relevant in asylum cases.⁶²

The subsidiary role of human rights mechanisms

It is first and foremost up to the State Parties, including their national courts, to guarantee the rights included in international human rights treaties.⁶³ The ECtHR, Human Rights Committee and Committee against Torture cannot be regarded as courts of fourth instance; they only play a subsidiary role. As President Costa stated in 2011 in his statement concerning requests for interim measures:

[T]he Court is not an appeal tribunal from the asylum and immigration tribunals of Europe, any more than it is a court of criminal appeal in respect of criminal convictions. Where national immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly and with respect for human rights, the Court should only be required to intervene in truly exceptional cases.⁶⁴

59 ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 40. See also ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 115.

60 See for example ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04 and ECtHR 6 December 2007, *Liu and Liu v Russia*, no 42086/05. See further Chapter 10 on the use of secret information.

61 Chapter 10 will discuss the use of secret information. In this context references will be made to ECtHR's case-law regarding the right to adversarial proceeding under Art 8 ECHR.

62 The procedural requirements for Art 3 ECHR cases are normally stricter than those for Art 8 ECHR cases. See ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 150.

63 The ECtHR states that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. ECtHR (GC) 28 July 1999, *Selmouni v France*, no 25803/94, para 74.

64 Statement Issued by the President of the ECtHR concerning Requests for Interim Measures (Rule 39 of the Rules of Court), 11 February 2011, available at www.echr.coe.int.

It follows from this subsidiary role that national authorities must provide for effective remedies against expulsion measures.⁶⁵ These remedies must be exhausted by applicants before they turn to the ECtHR or the UN Committees.⁶⁶ This means in general that the complainant must have appealed until the highest national authority and that the complaint must have been made before the national authority at least in substance.⁶⁷ Only the ineffectiveness of the domestic remedy,⁶⁸ the fact that this remedy was bound to fail⁶⁹ or the particular circumstances of the case may absolve a person from the obligation to exhaust domestic remedies. In the light of their assessment whether domestic remedies have been exhausted the ECtHR and UN Committees thus regularly examine the effectiveness of those remedies. Their case-law with regard to the requirement to exhaust domestic remedies in asylum cases is therefore relevant in order to discover what procedural guarantees are necessary in such cases.

Secondly it may be argued that it follows from the subsidiary role of supervising bodies that the way in which those bodies assess claims under the substantive provisions of the treaties is indicative for the way in which the national courts should assess such claims. In particular it is contended that the scope and intensity of judicial review performed by national courts should not be more limited than the review performed by the supervising bodies. Spijkerboer argues with regard to the ECtHR that in asylum cases national authorities 'should operate in such a way as to ensure that the national remedy provides scrutiny of at least as good a quality as that provided by the Court'.⁷⁰ The same may be true for the scrutiny applied by the Human Rights Committee or Committee against Torture. For this reason the case-law under Article 3 ECHR, Article 7 ICCPR and Article 3 CAT will be used as a source of inspiration for the EU right to effective judicial protection, in particular when assessing its meaning and content for the scope and intensity of judicial review by national courts in asylum cases in Chapter 9.

65 See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 286-287.

66 Art 35 (1) ECHR, Art 2 and 5 (2) (b) of the Optional Protocol to the ICCPR and Art 22 (5) (b) CAT.

67 ECtHR (GC) 16 September 1996, *Akdivar v Turkey*, no 21893/93, para 66. HRC 28 April 2009, *Moses Solo Tarlue v Canada*, no 1551/2007, para 7.5. See for application of this rule in an asylum case: ECtHR 19 February 1998, *Bahaddar v the Netherlands*, no 25894/94.

68 The requirement to exhaust domestic remedies is applied by the ECtHR while making due allowance for the context of the case and with some degree of flexibility and without excessive formalism. ECtHR (GC) 28 July 1999, *Selmouni v France*, no 25803/94, para 77. See also HRC 5 April 1995, *Griffin v Spain*, no 493/1992, para 6.1 and ComAT 9 June 1995, *Parot v Spain*, no 6/1990, para 6.1.

69 See for example ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 50, HRC 28 April 2008, *Lnenicka v Czech Republic*, no 1484/2006, para 6.3 and ComAT 22 February 1996, *R.K. v Canada*, no 42/1996, para 7.2.

70 Spijkerboer 2009-II, p 52.

4.3.2 Application to asylum cases

The scope of application of the EU right to an effective remedy and the right to a fair trial is broader than the same rights guaranteed by international treaties. The right to an effective remedy and the right to a fair trial recognised by the ECHR and other treaties do inspire the Court of Justice when applying the EU right to an effective remedy and fair trial in all cases falling within the scope of EU law.⁷¹ This means that indirectly, via EU law, the scope of application of the right to a fair trial recognised under international law is extended. Most important for the purpose of this study is that, even in asylum cases, the EU right to an effective remedy and a fair trial may be inspired by the ECtHR's case-law concerning Article 6 ECHR. It would not make sense if in migration cases the EU right to a fair trial is inspired by Article 6 ECHR, but not by the ECHR's case-law in which this provision is interpreted. Widdershoven argues that the Court of Justice in the asylum case of *Samba Diouf* indeed (implicitly) interpreted the EU right to an effective remedy in the light of the ECtHR's case-law under Article 6 which requires a court or tribunal to have full jurisdiction.⁷²

Asylum procedures must comply with the EU right to a fair trial

The EU right to a fair trial applies to all claims under EU law, including asylum cases. The explanations with Article 47 of the Charter state:

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.⁷³

⁷¹ Case C-327/02, *Panayotova* [2004], para 27, a migration case in which the Court considered 'that Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law, and that this principle of effective judicial protection constitutes a general principle which stems from the constitutional traditions common to the Member States and is enshrined by the [ECHR] in Articles 6 and 13 of the Convention.' See Peers & Rogers 2006, pp 120-121.

⁷² Widdershoven 2011, para 4. It should furthermore be noted that some important rights following from Article 6, such as the right of *access* to a remedy and the right to legal assistance have also been brought within the scope of Art 13 ECHR by the ECtHR. See ECtHR 10 January 2012, *G.R. v the Netherlands*, no 22251/07, para 49-50 and ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 151.

⁷³ See the Explanations relating to the Charter of Fundamental Rights, OJ 14 December 2007, C 303/17. See also Ward, who writes that the Court of Justice has never applied the existence of a civil right or obligation or criminal charge as a threshold to the application of the right of access to an effective judicial remedy. The EC right thus appears to extend to all forms of administrative decision making. What Community law requires is 'effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provision of Community law'. Ward 2007, p 174.

Articles 6 ECHR and Article 14 ICCPR are limited to cases which concern the determination of a person's civil rights and obligations or any criminal charge.⁷⁴ Both the ECtHR and the Human Rights Committee ruled that the right to a fair trial does not apply to proceedings concerning the entry, stay and deportation of aliens.⁷⁵

No need for an arguable claim

The EU right to an effective remedy has a broader scope of application than the right to an effective remedy guaranteed by Article 13 ECHR, Article 2 (3) ICCPR and Article 3 CAT, because it does not require an 'arguable claim' of a violation of an EU fundamental right. The EU right to an effective remedy implies the right to effective judicial scrutiny of the decisions of the EU Institutions⁷⁶ or national authorities⁷⁷ taken pursuant to the applicable provisions of EU law. Article 39 PD shows that the EU right to an effective remedy applies also to asylum claims which were rejected as inadmissible or manifestly unfounded.

The right to an effective remedy guaranteed by Article 13 ECHR and Article 2 (3) ICCPR can only be invoked in conjunction with one of the substantive rights included in those treaties.⁷⁸ There must be an *arguable claim* of a treaty violation.⁷⁹ Both the ECtHR and the Human Rights Committee recognised that a State party cannot be reasonably required to make an effective remedy available no matter how unmeritorious a claim of such violation may be.⁸⁰ Also the scope of application of the right to an effective remedy

74 The applicability of the right to a fair trial guaranteed in Art 14 ICCPR is limited to 'rights and obligations in a suit at law'.

75 They referred to the fact that a provision exists which contains guarantees specifically concerning proceedings for the expulsion of aliens (Art 1 of Protocol 7 ECHR and Art 13 ICCPR) and considered that the States thus clearly intimated their intention not to include such proceedings within the scope of Artt 6 (1) ECHR and 14 ICCPR. ECtHR (GC) 5 October 2000, *Maaouia v France*, no 39652/98, para 40, HRC 4 April 2007, *Ernst Zundel v Canada*, no 1341/2005, para 6.8 and HRC 28 April 2009, *Moses Solo Tartue v Canada*, no 1551/2007, para 7.8.

76 Case T-228/02, *Organization des Modhahedines du peuple d'Iran v Council* [2006], para 110.

77 Case C-226/99, *Siples* [2001], para 17 and Case C-327/02, *Panayotova* [2004], para 27.

78 Van Dijk a.o 2006, p 998. According to the ECtHR, Art 13 guarantees the availability at national level of a remedy 'to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order'. ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 48.

79 See with regard to the ECHR *Spijkerboer* 2009-II, p 50. The HRC has considered that the right to an effective remedy would be void, if it were not available where a violation of the Covenant had not yet been established. See HRC 19 September 2003, *George Kazantzis v Cyprus*, no 972/2001, para 6.6.

80 ECtHR (Plen) 27 April 1988, *Boyle and Rice v the United Kingdom*, no 9659/82, para 52 and HRC 19 September 2003, *George Kazantzis v Cyprus*, no 972/2001, para 6.6.

under Article 3 CAT is limited, namely to a 'plausible allegation' of a violation of Article 3 CAT.⁸¹

Only applicable to decisions with legal effect

The EU right to an effective remedy does not apply where the contested decision is without legal effect and therefore not capable of infringing any rights guaranteed by EU law.⁸² Furthermore the Court of Justice held in *Samba Diouf* specifically with regard to asylum procedures that decisions that are preparatory to the decision on the substance or decisions pertaining to the organisation of the procedure are not covered by the right to an effective remedy laid down in Article 39 PD.⁸³ In that case it concerned the decision to process an asylum claim in an accelerated procedure. The Court considered that it follows from the EU right to effective judicial protection that asylum applicants should be able to effectively challenge the reasons for the decision to accelerate the procedure in the context of the appeal against the decision to reject the asylum application.⁸⁴

4.3.3 Effectiveness

According to the Court of Justice's case-law EU law requires 'that national legislation does not undermine the right to effective judicial protection'.⁸⁵ In its case-law the Court of Justice has tested national procedural rules, including technical rules which affect the accessibility of a remedy, against the principle of effectiveness. This principle prohibits national procedural rules which render virtually impossible or excessively difficult the exercise of rights conferred by EU law.⁸⁶ The principle of effectiveness seeks to ensure the effective enforcement of EU law in national courts. As Accetto and Zleptnig state:

81 ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003, para 13.7. The ComAT has not explained when an allegation or claim is plausible. Wouters p 517.

82 Case T-276/02, *Forum 187 v Commission* [2003], para 50.

83 Case C-69/10, *Samba Diouf* [2011], para 43.

84 Case C-69/10, *Samba Diouf* [2011], para 58.

85 See for example Case C-87/90, *Verholen* [1991], para 24, Case C-13/01, *Safalero* [2003], para 50 and Case C-12/08, *Mono Car Styling* [2009] para 49.

86 The standard consideration used by the Court of Justice is: 'In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).' Case 33/76, *Rewe* [1976], para 5 and Case C-13/01, *Safalero* [2003], para 49.

Effectiveness may [...] be eroded by specific substantive and procedural hurdles at the national level that are not immediately apparent: subtle procedural rules, administrative practices adopted by national authorities, or systemic failures in the institutional set-up of authorities in charge of ensuring the proper application of Community law.⁸⁷

When assessing whether a national procedural rule renders the exercise of an EU right excessively difficult 'a comprehensive review in which all particularities of national legal systems must be taken into account' is required.⁸⁸ The Court of Justice considered:

Each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.⁸⁹

The Court of Justice has assessed many types of national procedural rules in the light of the principle of effectiveness. In Chapters 6 to 10 the content and meaning of the principle with regard to certain procedural issues in the context of CEAS will be examined.

Effectiveness of remedies under international law

The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant.⁹⁰ The remedy concerned must be able to prevent the alleged violation or its continuation, or to provide adequate redress for any violation that had already occurred.⁹¹ Article 13 does not go so far as to require any particular form of remedy.⁹² The Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under Article 13.⁹³ In cases concerning the expulsion of asylum applicants the ECtHR's main concern is whether effective guarantees exist that protect the applicant

⁸⁷ Accetto & Zlepzig 2005, p 376.

⁸⁸ Trstenjak & Beysen 2011, p 102.

⁸⁹ See for example Case C-312/93, *Peterbroeck* [1995], para 14 and Case C-276/01, *Steffensen* [2003], para 66.

⁹⁰ See for example ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 122.

⁹¹ ECtHR (GC) 26 October 2000, *Kudla v Poland*, no 30210/96, para 158, ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 48. Van Dijk ao 2006, p 1006.

⁹² ECtHR, 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 122.

⁹³ See for example ECtHR (GC) 10 May 2001, *Z and others v the United Kingdom*, no 29392/95, para 163.

against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled.⁹⁴

The obligation to exhaust domestic remedies is limited to making use of those remedies which can be considered effective and available.⁹⁵ The requirement of effectiveness for domestic remedies under the requirement to exhaust domestic remedies and the right to an effective remedy are very similar. This follows most clearly from the ECtHR's case-law, which states that Article 35 has 'a close affinity' with Article 13 ECHR.⁹⁶ The ECtHR's case-law on Articles 35 (1) and 13 ECHR run to a certain extent parallel.⁹⁷ In order to be considered effective domestic remedies must offer sufficient safeguards.⁹⁸ The ECtHR has for example held under Article 35 (1) ECHR that the domestic remedy must be accessible for the person concerned⁹⁹ and that the remedy must have automatic suspensive effect in case of a claim of a risk of *refoulement*.¹⁰⁰

4.3.4 Institutions responsible for providing effective remedies

It is the national courts which need to provide natural or legal persons with an effective remedy against a decision by the EU Institutions or national authorities taken pursuant to the applicable provisions of EU law.¹⁰¹ Therefore 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.'¹⁰² The Court of Justice held that the principle of effective judicial protection 'affords

94 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 286.

95 ECtHR (GC) 28 July 1999, *Selmouni v France*, no 25803/94, para 75. For the ICCPR see for example HRC 26 August 2004, *Madaffer v Australia*, no 1011/2001, para 8.4. Art 22 (5) (b) CAT provides that the requirement to exhaust domestic remedies shall not apply where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of the Convention. See also Nowak & McArthur 2008, p 796.

96 See for example ECtHR (GC) 28 July 1999, *Selmouni v France*, no 25803/94, para 74.

97 Spijkerboer 2009, p 51, Harris, O' Boyle & Warbrick 2009, p 562. In some cases the preliminary objection regarding the alleged non exhaustion of domestic remedies and the complaint of a violation of Art 13 ECHR are assessed together by the ECtHR. See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 336-337. Arguably a clear parallel also exists between the right to an effective remedy and the obligation to exhaust domestic remedies included in the ICCPR and CAT.

98 ECtHR 23 October 2008, *Soldatenko v Ukraine*, no 2440/07, para 49.

99 ECtHR 8 January 2004, *Sardinas Albo v Italy*, no 56271/00.

100 ECtHR (Adm) 20 September 2007, *Sultani v France*, no 45223/05, para 51. According to the HRC the fact that a remedy must be effective and available entails that procedural guarantees for a fair and public hearing by a competent, independent and impartial tribunal must be scrupulously observed. HRC 1 November 1985, *Arzuaga Gilboa v Uruguay*, no 147/1983

101 See section 2.5.

102 Case C-50/00, *Union de Pequeños* [2002], para 41.

an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction'.¹⁰³

The EU right to an effective remedy provides broader protection than Article 13, Article 2 (3) ICCPR and Article 3 CAT. These provisions require an effective remedy before an independent and impartial authority, which does not need to be a judicial authority.¹⁰⁴ Both Article 6 (1) ECHR and Article 14 (1) ICCPR do require a fair trial before an independent and impartial court or tribunal.

Criteria court or tribunal

When examining whether a national body can be regarded a court or tribunal the Court of Justice takes several factors into account, such as whether the body concerned is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes* and whether it applies rules of law. Furthermore a court or tribunal is independent and impartial.¹⁰⁵

The factors used by the ECtHR and the Human Rights Committee in order to establish whether a national body should be considered a court or tribunal are similar to those used by the Court of Justice.¹⁰⁶ Article 6 (1) ECHR furthermore demands that the court or tribunal have 'full jurisdiction'. This means that it must be able to quash the challenged decision in all respects, on questions of fact and law.¹⁰⁷

¹⁰³ Case C-69/10, *Samba Diouf* [2011], para 69.

¹⁰⁴ See for example ECtHR 11 January 2007, *Musa e.a. v Bulgaria*, no 61259/00, HRC 10 November 2006, *Alzery v Sweden*, no 1416/2005, para 11.8. Art 13 ECHR speaks of a 'national authority', Art 2 (3) requires a competent judicial, administrative or legislative authority, or any other competent authority provided for by the legal system of the State. The ComAT decided in *Agiza v Sweden*, 20 May 2005, no 233/2003, para 13.7 that the review required under Art 3 CAT can be provided by a judicial or independent administrative authority.

¹⁰⁵ See for example Case C-506/04, *Wilson* [2006], paras 47-53.

¹⁰⁶ Whether a body can be regarded as independent depends on 'the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence'. The requirement of impartiality entails that the court or tribunal be subjectively free of personal prejudice or bias and that it be impartial from an objective viewpoint. ECtHR (GC) 6 May 2003, *Kleyn and others v the Netherlands*, nos 39343/98, 39651/98, 43147/98 and 46664/99, paras 190-191. See with regard to Art 14 ICCPR for example: HRC 10 November 1993, *Oló Bahamonde v Equatorial Guinea*, no 468/1991, para 9.4 and HRC 3 November 2008, *Castedo v Spain*, no 1122/2002, paras 9.5-9.8 and General Comment No 32 (2007), CCPR/C/GC/32, para III, sub 19-21.

¹⁰⁷ See for example ECtHR 28 September 1995, *Schmautzer v Austria*, no 15523/89, para 36. See further Chapter 9 on judicial review of the establishment and qualification of the facts.

4.3.5 Effect in the national legal order

What needs to be done if a national procedural rule does not comply with EU right to an effective remedy? First of all the national court should try to interpret national procedural rules in conformity with EU rules.¹⁰⁸ This may avoid a breach of the right to effective judicial protection. The Court considered in *Unibet*:

[I]t is for the national courts to interpret the procedural rules governing actions brought before them [...] in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective [...] of ensuring effective judicial protection of an individual's rights under Community law.¹⁰⁹

If consistent interpretation is not possible a national procedural rule which breaches the EU right to effective judicial protection should be set aside.¹¹⁰

No new remedies?

An important question is whether EU law requires a Member State to introduce new remedies, if no effective remedy is available. The Court of Justice's judgment in *Rewe-Handelsgesellschaft Nord v Hauptzollamt Kiel* suggested that the Court is of the opinion that no such requirement exists. The Court considered that 'the EC-Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law'.¹¹¹

For a long time it remained uncertain whether Member States could be obliged to introduce new remedies under EU law. Several judgments seemed to undermine the no new remedies statement in *Rewe*.¹¹² In *Unibet* the Court finally made clear that Member States are exceptionally required to create new national remedies if this is necessary to ensure the EU fundamental right to effective judicial protection.¹¹³ This right thus entails negative as well as positive obligations.¹¹⁴ In *Unibet* the Court considered:

108 Haapaniemi 2009, pp 96-97. Arnulf 2011, p 55.

109 Case C-432/05, *Unibet* [2007], para 44. See also Case C-50/00, *Union de Pequeños* [2002], para 42 and Case C-69/10, *Samba Diouf* [2011], para 60.

110 Haapaniemi 2009, pp 96-97. He states: 'Only if it is not possible to attain the conformity of national law with EU law by virtue of consistent interpretation, the national court can set aside a national provision conflicting with it.'

111 Case 158/80, *Rewe-Handelsgesellschaft Nord v Hauptzollamt Kiel* [1981], para 6.

112 Craig & de Búrca 2003, pp 237-238. They refer amongst others to the *Factortame* case (see further section 6.3.1.1). Groussot refers to Case C-424/99, *Commission v Austria* [2001], paras 39-47 and Case C-97/91, *Borelli* [1991], para 13. Groussot 2006, p 338.

113 Arnulf 2011, p 56, Haapaniemi 2009, pp 107-108 and Trstenjak & Beysen 2011, pp 105-106.

114 Prechal & Widdershoven 2011, pp 41-42.

Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law [..]. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law [..].¹¹⁵

Applicants cannot insist on a particular remedy where alternative remedies exist in the national legal system, which comply with the principles of effectiveness and equivalence.¹¹⁶

4.3.6 The right of access to a court or tribunal

Article 19 (1) EU Treaty and Article 39 PD require the *existence* of an effective remedy before national courts, but do not explicitly demand that such remedy is accessible for the individual. It should however be derived from Article 47 of the Charter and the Court of Justice's case-law that the EU right to an effective remedy includes a right of *access* to such a remedy.¹¹⁷ Article 47 requires that free legal aid be provided when necessary to ensure effective access to justice.¹¹⁸ This implies that the remedy required by Article 47 should be accessible. In *DEB* the Court of Justice explicitly mentioned 'the right of access to the courts'.¹¹⁹ In *Union de Pequeños* the Court ruled that, in accordance with the principle of sincere cooperation,

national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.¹²⁰

Furthermore the Court of Justice has ruled in several cases that national procedural rules limiting access to a remedy were contrary to the principle

¹¹⁵ Case C-432/05, *Unibet* [2007], paras 40-41.

¹¹⁶ Case C-69/10, *Samba Diouf* [2011], para 54, Case C-432/05, *Unibet* [2007], para 65 and Case C-326/96, *Levez* [1998], para 53. See also on this issue Arnall 2011, p 58-62.

¹¹⁷ See also Dougan 2004, p 4-5.

¹¹⁸ See also Case C-279/09, *DEB* [2010], para 29, where the Court of Justice considered that the question referred, concerned the right of a legal person to effective access to justice and, accordingly, in the context of EU law, concerned the principle of effective judicial protection.

¹¹⁹ Case C-279/09, *DEB* [2010], para 60.

¹²⁰ Case C-50/00, *Union de Pequeños* [2002], para 42.

of effectiveness as they rendered the right to an effective remedy virtually impossible or excessively difficult.¹²¹

Access to court under international law

It also follows from the sources of inspiration for the interpretation of the EU right to an effective remedy that access to court should be guaranteed. The ECtHR and the Human Rights Committee have ruled that the remedy required by Article 13 ECHR¹²² and Article 2 (3) ICCPR must be accessible for the individual.¹²³ According to the ECtHR this means in particular that the exercise of the remedy must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.¹²⁴ This follows from the fact that the remedy required by Article 13 must be effective in practice as well as in law. Furthermore both Article 6 (1) and Article 14 ICCPR include a right of access to court.¹²⁵ According to the ECtHR this implies for example that free legal assistance should be granted to a person if, without the assistance of a lawyer, this person would not be able to present her case properly and satisfactorily before the court.¹²⁶ It also prohibits that access to a court is blocked because of short time-limits for lodging the appeal¹²⁷ or procedural rules which amount to excessive formalism.¹²⁸

4.3.7 The right to equality of arms and adversarial proceedings

The principle of equality of arms and the right to adversarial proceedings are often linked to each other and to other elements of the right to a fair trial or the right to an effective remedy such as the right of the defence, the right to

121 See eg Case C-459/99, *MRAX* [2002], paras 102-103, where the Court held that the requirement for judicial review of the refusal of a residence permit or the decision to expel by a national authority would be rendered largely ineffective if entitlement to this remedy were excluded in the absence of an identity document or visa or where one of those documents has expired. See also Case C-78/98, *Preston and Fletcher* [2000] and Case C-255/00, *Grundig Italiana* [2002], in which the Court held that national time-limits for bringing proceedings were contrary to EU law.

122 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 318.

123 The HRC ruled that Art 2 (3) ICCPR requires State parties to ensure that individuals have accessible, effective and enforceable remedies to uphold the rights protected by the Covenant. HRC 16 August 2007, *Kimouche v Algeria*, no 1328/2004, para 7.10 and HRC 19 September 2003, *George Kazantzis v Cyprus*, no 972/2001, para 6.6.

124 Van Dijk a.o. 2006, p 1006. See for example ECtHR 12 April 2005, *Shamayev and others v Georgia and Russia*, no 36378/02, para 447.

125 ECtHR (Plen) 21 February 1975, *Golder v the United Kingdom*, no 4451/70 and HRC 10 November 1993, *Oló Bahamonde v Equatorial Guinea*, no 468/1991, para 9.4. See also HRC General Comment No 32 (2007), CCPR/C/GC/32, para II sub 9.

126 ECtHR 9 October 1979, *Airey v Ireland*, no 6289/73, para 24.

127 ECtHR 28 October 1998, *Pérez de Rada Cavanilles v Spain*, no 28090/95.

128 See for example ECtHR 28 June 2005, *Zednik v Czech Republic*, no 74328/01, para 29.

be heard or the duty to give reasons for a decision.¹²⁹ The principle of equality of arms and the right to adversarial proceedings are also guaranteed by the right to a fair hearing or fair trial included in Article 6 ECHR and Article 14 ICCPR. Chapter 10 discusses the meaning of the principle of equality of arms and the right to adversarial proceedings in cases where the (asylum) decision is based on secret evidence. Here some general remarks will be made concerning these rights

The right to equality of arms

The Court of Justice has recognised the principle of equality of arms as a general principle of EU law.¹³⁰ Although this EU principle is based on Article 6 ECHR, which only applies to procedures before courts, it seems to apply also to administrative proceedings.¹³¹ The Court of Justice has derived procedural guarantees from this principle, in particular in competition cases. These rights often relate to the right of access to the file. The Court held for example that the principle presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission.¹³² In its case-law the Court has not provided a clear definition of the principle of equality of arms.

According to Article 6 ECHR and Article 14 ICCPR the right to equality of arms requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent.¹³³ According to the Human Rights Committee this principle implies that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, which, in turn, requires access to the documents necessary to prepare such arguments.¹³⁴

129 See for example Case T-36/91, *Imperial Chemical Industries v Commission* [1995].

130 See for example Case T-30/91, *Solvay v Commission* [1995] and Case C-341/04, *Eurofood IFSC* [2006], paras 65-66.

131 See for example Case C-63/01, *Evans* [2003], paras 74-78, where the Court of Justice held that the principle of effectiveness may require national authorities to grant legal assistance to persons because of their less advantageous position in which they find themselves vis-à-vis the decision-making authority and the conditions under which they are able to submit their comments on matters that may be used against them. Case T-9/99, *HFB and others v Commission* [2002], para 330 and Case T-232/00, *Chef Revival USA v OHIM* [2002], para 42, where it concerned translation of documents in the administrative phase before an EU Institution.

132 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 93.

133 ECtHR 27 October 1993, *Dombo beher v the Netherlands*, no 14448/88, para 33. See with regard to the ICCPR: HRC 28 July 1989, *Morael v France*, no 207/86, para 9.3. and General Comment No 32 (2007), CCPR/C/GC/32, para II, sub 8 and 13.

134 See for example HRC 20 August 2004, *Perterer v Austria*, no 1015/2001, para 10.6

The right to adversarial proceedings

Closely linked to the principle of equality of arms is the right to adversarial or *inter partes* proceedings. The Court of Justice has referred also to this right particularly in competition cases. The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court.¹³⁵ It also requires that in proceedings before (EU) courts, the parties be appraised of and be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings.¹³⁶

These requirements are very similar to those following from the right to adversarial proceedings means guaranteed by Articles 6 ECHR and Article 14 ICCPR.¹³⁷ Also the right to an effective remedy guaranteed by Article 13 ECHR includes the right to adversarial proceedings.¹³⁸

4.4 THE EU RIGHT TO GOOD ADMINISTRATION

Article 41 of the Charter includes the right to have his or her affairs handled impartially, fairly and within a reasonable time (the right to good administration). This right includes amongst others the right to be heard, the right of access to the file and the duty to state reasons for a decision. Kaňska mentions that this provision is the first official attempt at a positive definition of the meaning of 'good administration'.¹³⁹ Part of the rights of Article 41 of the Charter are based on rights which were already included in the former EC Treaty (the duty to state reasons, the right to reparation of damages and the right to write the institutions). However, Article 41 is mainly inspired by the case-law of the EU Courts.¹⁴⁰ The EU principle of good administration is an umbrella principle which comprises more rights and obligations than those included in Article 41 of the Charter, such as the duty of care¹⁴¹ and the right to transparency other than the right of access to the file.¹⁴²

¹³⁵ Case C-450/06, *Varec* [2008], para 47.

¹³⁶ Case C-89/08 P, *Commission v Ireland and others* [2009], para 56.

¹³⁷ According to the ECtHR this right requires in principle, the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision. ECtHR (GC) 22 January 1996, *Lobo Machado v Portugal*, no 15764/89, para 31. See also HRC 28 July 1989, *Moraël v France*, no 207/1986, para 9.3 and General Comment No 32 (2007), CCPR/C/GC/32, para II.

¹³⁸ See ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, para 137.

¹³⁹ Kaňska 2004, p 303. See also Dutheil de la Rochère 2008, p 168.

¹⁴⁰ Kaňska 2004, pp 303-304.

¹⁴¹ See for example Joined Cases T-3/00 and T-337/04, *Pitsiorias v Council and ECB* [2007], para 163 where it is stated that the principle of sound administration entails that the competent institution is under a duty to examine carefully and impartially all the relevant aspects of the individual case.

¹⁴² Kaňska 2004, pp 305 and 322-323, Dutheil de la Rochère 2008, p 169.

Applicability to national administrative proceedings

It follows from the text of Article 41 that it does not apply to pure national administrative proceedings. However the Court of Justice does impose procedural obligations for the administrative phase on the Member States.¹⁴³ It requires amongst others that national authorities state the reasons for their decisions and that persons adversely affected by a decision be heard during the administrative phase. A.G. Kokott wrote in an opinion of 2009 that for that reason 'Article 41 of the Charter of Fundamental Rights does not just contain rules of good administration by the institutions but documents a general principle of law, which authorities of the Member States too must observe when applying Community law'.¹⁴⁴ Some aspects of the principle of good administration are codified in the Procedures Directive. Article 8 (2) PD for example contains a duty for the decision-making authorities to conduct an appropriate examination of the asylum claim. This could be regarded as a codification of the duty of care. Article 16 (1) PD guarantees the applicant's lawyer's access to the applicant's file.

Several rights included in Article 41 of the Charter play a role in this study. In the following sections the right to be heard and the duty to state reasons will be introduced more in detail.

4.4.1 Provisions of international law inspiring the EU right to good administration

Although according to its text Article 13 ECHR only applies to proceedings before an independent and impartial authority, the ECtHR has also derived guarantees for administrative proceedings from this provision. In *M.S.S. v Belgium and Greece* the ECtHR concluded that Article 13 ECHR had been violated amongst others as a result of the deficiencies in the Greek authorities' examination of the applicant's asylum request (insufficient information about the asylum procedure, difficult access to the asylum procedure, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid and excessively lengthy delays in receiving a decision). Furthermore it took into account the risk the applicant faced of being returned to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.¹⁴⁵

¹⁴³ Kaňska 2004, p 309, Dutheil de la Rochère 2008, p 170.

¹⁴⁴ Opinion of A.G. Kokott with Case C-75/08, *Mellor* [2009], para 33.

¹⁴⁵ ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 301-320. See also ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, paras 111-117.

Arguably also the case-law regarding Article 6 ECHR and Article 14 ICCPR may inspire the EU right to good administration laid down.¹⁴⁶ As was mentioned in section 4.3.7 the Court of Justice for example seems to apply the principle of equality of arms to the administrative phase.

4.4.2 The right to be heard

According to Article 41 of the Charter the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.¹⁴⁷ The right to be heard (also seen as part of the rights of the defence) is not only applicable to decisions by EU Institutions, but also to decisions taken by national authorities.¹⁴⁸ It may be assumed that the EU Courts' case-law regarding the right to be heard on decisions by EU Institutions is also relevant for the interpretation of the right to be heard in the national context. This case-law will therefore be briefly discussed in this section.

According to the standing case-law of the EU Courts the right to be heard is, in all proceedings initiated against a person which are able to culminate in a measure adversely affecting that person, a fundamental principle of EU law.¹⁴⁹ The right to be heard must be guaranteed even in absence of any rules governing the procedure in question¹⁵⁰ or where legislation existed, but did not take sufficient account of that right.¹⁵¹ A violation of the right to be heard will only lead to the annulment of the contested decision if, in the absence of this irregularity, the procedure could have led to a different decision.¹⁵²

The right to be heard requires that the addressees of decisions which significantly affect their interests be placed in a position in which they may effectively make known their views on the evidence on which the decision is based¹⁵³ and the relevant facts and circumstances.¹⁵⁴ This implies that

146 See also Kaňska 2004, p 306, who states that 'the right to good administration, as expressed by the Charter, mirrors the principles of fair trial (or due process) guaranteed by the Convention'.

147 Schwartz mentions that the right to be heard is probably the most important principle of administrative procedure. Schwartz 2004, p 91.

148 C-28/05, *Dokter* [2006], paras 74. This case concerned a decision by national authorities to impose measures on breeders in order to control foot-and-mouth disease on their holdings. See also Reichel 2008, p 266.

149 See for example Case C-28/05, *Dokter* [2006], para 74. A.G. Bot stated in para 32 of his opinion in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland* that the right to be heard also applies to asylum procedures.

150 See for example Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 91 and Joined cases C-379/08 and C-380/08, *ERG and Others* [2010], para 55.

151 Craig 2006, p 519.

152 Case T-372/00, *Campolargo v Commission* [2002], para 39.

153 See for example Case C-28/05, *Dokter* [2006], para 74 and Case C-32/95P, *Commission v Lisrestal and others* [1996], para 21.

the parties concerned must be informed of the evidence adduced against them¹⁵⁵ or that a draft decision is submitted to this party.¹⁵⁶ According to the EU Courts' settled case-law the right of access to the file is one of the procedural safeguards which ensure that the right to be heard can be exercised effectively.¹⁵⁷ The right of every person to have access to his or her file is laid down in Article 41 (2) of the Charter.

The safeguarding of the right to be heard in the context of the administrative procedure itself is to be distinguished from that resulting from the right to an effective judicial remedy against the act having adverse effects which may be adopted at the end of that procedure.¹⁵⁸ The party must generally be able to exercise the right to be heard before the administrative decision is adopted¹⁵⁹ and a reasonable period should be afforded to effectively put forward his views.¹⁶⁰ The Court of Justice considered in *Hercules Chemicals NV* that an infringement of the right to be heard had not been remedied by the mere fact that access to the relevant files was made possible after the decision, in particular during the judicial proceedings relating to an action in which annulment of the contested decision is sought.¹⁶¹

The right to be heard may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.¹⁶² The EU Courts have for example accepted that the right to be heard may be restricted in the context of measures against foot and mouth disease¹⁶³ and decisions to freeze funds of persons

154 Case C-269/90, *Technische Universität München* [1991], para 25 and Case C-458/98 P, *Industrie des Poudres Sphériques v Council* [2000], para 99.

155 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 93. Case C-32/95P, *Commission v Lisrestal and others* [1996], para 41. See also T-49/88, *Al-Jubail Fertilizer v Council* [1991], para 17.

156 Case C-462/98 P, *Mediocruso v Commission* [2000], para 42. The right to be heard does not extend to the final decision which an administrative authority intends to adopt. See for example Case T-262/09, *Safariland v OHIM* [2011], para 80.

157 See for example Case T-170/06, *Alrosa v Commission* [2007], para 197. It also follows from this judgment that the relevant documents should be made accessible to the party concerned at a moment where the right to be heard can still be exercised. See para 201. See also Kaňska 2004, p 318.

158 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 94 and Case T-372/00, *Campolargo v Commission* [2002], para 36.

159 See for example Case C-269/90, *Technische Universität München* [1991], para 25, Joined cases C-379/08 and C-380/08, *ERG and Others* [2010], paras 54-56 and Case C-28/05, *Dokter* [2006], para 74.

160 Case C-462/98 P, *Mediocruso v Commission* [2000], para 38.

161 Case C-51/92 P, *Hercules Chemicals v Commission* [1999], paras 78-79. See also section 4.5.2.

162 Case C-28/05, *Dokter* [2006], para 75.

163 Case C-28/05, *Dokter* [2006], para 76.

groups or entities identified as being involved in terrorist acts.¹⁶⁴ In such cases the authorities who took the decision may be obliged to hear this party as soon as possible after the adoption of the decision¹⁶⁵ or in subsequent proceedings.¹⁶⁶

The right to be heard will play a significant role in Chapter 7 on the asylum applicant's right to be heard on his asylum motives and Chapter 10 on the use of secret information.

4.4.3 The duty to state reasons

According to Article 296 TFEU¹⁶⁷ and Article 41 (2) of the Charter the bodies of the EU have the obligation to state reasons for their legal acts or decisions. The Court of Justice regards this obligation as an essential procedural requirement,¹⁶⁸ which may be derogated from only for compelling reasons.¹⁶⁹ The plea of absence of or inadequate statement of reasons is a plea involving a matter of public policy which may, and even must, be raised by the EU judiciary of its own motion.¹⁷⁰

Article 296 TFEU and Article 41 (2) of the Charter are directed towards the Institutions of the EU. It follows however from the case-law of the Court of Justice that the duty to state reasons also applies to the national authorities taking a decision on the basis of EU legislation.¹⁷¹ The duty of national authorities to state reasons is also laid down in Article 9 PD.

The Court of Justice has not ruled whether the requirements under the duty to state reasons are the same for national authorities and EU Institutions.¹⁷² However, it may be assumed that the Courts' case-law under Article 296 TFEU and Article 41 of the Charter is relevant for the interpretation of the duty to state reasons in the national context. This is supported by the fact that

164 The Court stated that an initial measure to freeze funds must be able to benefit from a surprise effect and to be applied with immediate effect. Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 127. See also Case C-111/02 P *Parliament v Reynolds* [2004], paras 57-60.

165 See for example Case T-211/98, *F v Commission* [2000], para 34.

166 Case C-28/05, *Dokter* [2006], para 76, and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 130.

167 Art 253 of the former EC Treaty.

168 Case C-17/99, *France v Commission* [2001], para 35.

169 See for example Case T-390/08, *Bank Melli Iran v Council* [2009], para 80.

170 Case C-89/08 P, *Commission v Ireland and Others* [2009], para 34.

171 Case 222/86, *UNETEF v Heylens and others* [1987], para 15 and Case C-239/05, *BVBA Management, Training en Consultancy* [2007], para 36. Reichel states that *Heylens* shows the function of the principle of good administration as 'a vehicle to strengthen private parties' possibilities to bring about an effective application of their Community rights before national authorities'. Reichel 2008, p 265.

172 See Reichel 2008, pp 265-267.

several EU measures seem to have codified the case-law of the EU Courts regarding the EU Institutions' duty to state reasons in EU legislation containing requirements for national authorities.¹⁷³

The duty to state reasons is closely connected to the right to an effective remedy.¹⁷⁴ This right can only be effectively exercised if the person concerned knows the reasons underlying the negative decision.¹⁷⁵ Compliance with the obligation to state reasons is all the more important, if the party concerned is not afforded the opportunity to be heard before the adoption of the initial decision. In that situation the obligation to state reasons constitutes the sole safeguard enabling the party concerned, especially after the adoption of that decision, to make effective use of the legal remedies available to it to challenge the lawfulness of that decision.¹⁷⁶ Furthermore the statement of reasons must enable the court to review the decision.¹⁷⁷ Finally the statement of reasons serves transparency and may raise the quality of decision-making.¹⁷⁸

The duty to state reasons must ensure that the party concerned can defend an EU right under the best possible conditions and that this person has the possibility to decide with a full knowledge of the relevant facts whether there is any point in his applying to the court.¹⁷⁹ The statement of reasons for a decision required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the EU institution which adopted the measure in question.¹⁸⁰ Reasons of a general, stereotype nature, which do not contain any specific information

173 See for example Art 30 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

174 See also section 4.2.

175 Ponce writes: 'The record and the reasons stated are similar to the black box in planes, but in relation to administrative procedures: a place where everybody (including the judge in event of controls) can check what has happened, what was well done, and what was overlooked, or done badly.' Ponce 2005, p 574.

176 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 140 and Case T-237/00, *Reynolds v Parliament* [2004], para 95.

177 The statement of reasons must enable the EU judiciary to exercise its power of review. See Case T-111/96, *ITT Promedia v Commission* [1998], Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council* [2005], para 59 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 89. See Kaňska 2004, p 320.

178 See also Reichel 2008, p 252 and A.G. Kokott's opinion with Case C-75/08, *Mellor* [2009]: 'The giving of reasons is not exclusively in the interest of the citizen, moreover: it also effects an initial self-check on the part of the administration and can pacify relations with the citizen, since if the reasons are convincing they put an end to existing conflicts and prevent superfluous legal disputes.'

179 Case 222/86, *UNECTEF v Heylens and others* [1987] para 15 and Case C-70/95, *Sodemare* [1997], para 19.

180 Case C-41/00 P, *Interporc v Commission* [2003], para 55.

relating to the case at issue do not suffice.¹⁸¹ The EU institutions are not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their case¹⁸² nor on all the relevant facts and points of law.¹⁸³ It is sufficient if they set out the facts and legal considerations having decisive importance in the context of the decision.¹⁸⁴ This includes the factual and legal elements which provide the legal basis which have led to the adoption of the decision¹⁸⁵ and the assessment of the essential complaints made by the parties.¹⁸⁶

The requirements under the duty to state reasons vary according to the circumstances of the case. In *France v Commission* the Court of Justice stated that the duty to state reasons

must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.¹⁸⁷

The degree of precision of the statement of the reasons for a decision must moreover be weighed against practical realities and the time and technical facilities available for making the decision.¹⁸⁸

The statement of reasons must be notified to the person concerned, as far as possible, at the same time as the act adversely affecting him, or as swift as possible after the decision has been taken.¹⁸⁹ According to the CFI the failure to state the reasons of a decision cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceeding before the judicature.¹⁹⁰ The possibility of remedying the total absence of a statement of reasons after an action has been brought would prejudice the rights of the defence because the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after

181 Case T-132/03, *Casini v Commission* [2005], para 35.

182 Case T-111/96, *ITT Promedia v Commission* [1998], para 79 and Case T-387/94, *Asia Motor France v Commission* [1996], para 104.

183 Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council* [2005], para 59.

184 Case T-111/96, *ITT Promedia v Commission* [1998], para 79 and Case T-387/94, *Asia Motor France v Commission* [1996], para 104.

185 Joined Cases T-346/02 and T-347/02, *Cableuropa and others v Commission* [2003], para 232.

186 Joined Cases T-371/94 and T-394/94, *British Airways and British Midland Airways v Commission* [1998], para 64.

187 Case C-17/99, *France v Commission*, para 36 and Case T-70/05, *Evropaiki Dynamiki v EMSA* [2010], para 171. See also Reichel 2008, p 253.

188 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 141 and Case T-237/00, *Reynolds v Parliament* [2004], para 102.

189 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 336.

190 See for example Case T-390/08, *Bank Melli Iran v Council* [2009], para 80 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 139.

he had lodged his application. The principle of equality of the parties before the EU judicature would accordingly be adversely affected.¹⁹¹

The EU duty to state reasons plays an important role in Chapter 10 of this study on the use of secret information.

4.5 THREE BASIC NOTIONS

For the purpose of this study a large number of judgements of the Court of Justice's and the ECtHR was assessed. It is contended here that from this case-law three what could be called 'basic notions' emerge:

- 1 When assessing whether EU procedural rights have been infringed (often) interests must be balanced against each other
- 2 When determining whether a procedure should be considered fair, regard should be had to all aspects and instances of this procedure: the overall fairness of a procedure must be examined
- 3 The subject matter of the procedure influences the level of procedural protection which must be offered to the applicant.

These notions seem to play a role in many of the cases in which procedural rules are tested against procedural rights and principles. Therefore they may be helpful on the one hand to explain some of the choices made by the Court of Justice and the ECtHR and on the other hand to predict these courts' approach in new situations. These notions will therefore be used as a tool to analyse the case-law examined in the thematic chapters and to develop a set of EU procedural standards for the procedural topics discussed in those chapters. The three 'basic notions' will be further explained in this section.

4.5.1 Balancing of interests

The EU Courts have recognised that Member States are allowed to limit EU procedural rights, such as the right to an effective remedy, the right to be heard or the duty to state reasons. In that situation often the interest of the party concerned must be balanced against the interests of the State or other parties

¹⁹¹ Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 101, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 139, 165 and Case T-132/03, *Casini v Commission* [2005], para 33. The last mentioned case the Court admits however that 'l'insuffisance initiale de la motivation puisse être palliée par des précisions complémentaires apportées, même en cours d'instance, lorsque, avant l'introduction de son recours, l'intéressé disposait déjà d'éléments constituant un début de motivation.' In Case T-237/00, *Reynolds v Parliament* [2004], para 97 and 101, the Court stated however that this applies only in exceptional cases.

in such limitations. The right of access to court for example may be limited by the imposition of time-limits for bringing proceedings in the interest of legal certainty.¹⁹² The right to be heard of one company may be limited in order to ensure the right of protection of business secrets of another company.¹⁹³ The State's interest to assess an asylum claim as quick as possible in order to remove persons who have no right to stay may result in lesser procedural guarantees for the applicant.¹⁹⁴

The Court of Justice has held that in the assessment of the effectiveness of national procedural rules 'the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.'¹⁹⁵ The Court examines which aim is underlying the national procedural rule which limits a party's procedural right. Often these underlying aims, such as legal certainty, are also recognised as EU general principles. The Court then strikes a balance between this underlying aim of the national procedural rule on the one hand and the need for effectiveness on the other.¹⁹⁶ Some authors call this the "procedural rule of reason" test.¹⁹⁷

The procedural rule of reason test has been criticised because it leads to a lack of predictability and legal certainty, as it is applied on a case by case basis. Using case-law as guidelines is therefore complicated.¹⁹⁸ Haapaniemi remarks that in its case-law the Court of Justice has not in every case where it applied the principles of effectiveness and equivalence repeated the procedural rule of reason test, but has referred to it from time to time. He states however that 'reconciliation of the interests the national provision represents and the exigencies of EU law are at any rate intrinsic in the *Rewe/Comet* jurisprudence' also without any explicit reference to the balancing test.¹⁹⁹ Prechal and Widdershoven argue that the balancing test performed by the Court of Justice under the principle of effectiveness is less intense than that applied when the EU right to an effective remedy is at stake.²⁰⁰

Balancing of interests in the ECtHR's case-law

The ECtHR has held with regard to Article 13 ECHR that the context in which an alleged violation occurs may entail inherent limitations on the conceivable

192 See for example Case C-63/08, *Pontin* [2008], para 48.

193 See for example Case C-450/06, *Varec* [2008], para 51 and Case C-438/04, *Mobistar* [2006], para 40. See also Schwartz 2004, p 96.

194 Case C-69/10, *Samba Diouf* [2011], para 65.

195 Case C-312/93, *Peterbroeck* [1995], para 14.

196 Engström 2008, p 68. See also Trstenjak & Beysen 2011, p 103.

197 Engström 2008, p 68. Prechal & Shelkopyas 2004, p 593.

198 Engström 2008, p 71. See also Prechal & Shelkopyas 2004, p 593.

199 Haapaniemi 2009, p 98.

200 Prechal & Widdershoven 2011, p 43-44.

remedy.²⁰¹ The ECtHR has for example accepted limitations to the right to an effective remedy in circumstances where national security considerations did not permit the divulging of certain sensitive information.²⁰² Furthermore the right to a court guaranteed by Article 6 ECHR, of which the right of access is one aspect, is not absolute. It is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. Lastly, such limitations will not be compatible with Article 6 (1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim pursued.²⁰³ Furthermore the right to a public hearing may in exceptional circumstances be dispensed with.²⁰⁴ Finally the ECtHR has recognised that the right to adversarial proceedings may be limited for example in order to preserve the fundamental rights of another individual or to safeguard an important public interest, which justifies a limitation of this right.²⁰⁵

4.5.2 Assessing the overall fairness of a procedure

Asylum procedures and other procedures usually consist of several phases, for example an administrative phase, an appeal phase and a higher appeal phase. Within those phases several procedural steps may be taken. The administrative phase of an asylum procedure for example may consist of several interviews with the asylum applicant, the gathering of additional evidence or information, contacts between the applicant and his lawyer and taking the decision. Generally shortcomings in one phase or step of the procedure may be compensated or repaired in another step or phase of the same procedure or even in a subsequent procedure. Shortcomings in the assessment of evidence during the administrative phase may for example be repaired by a full judicial review of the facts. In such a situation a violation of a procedural right or

201 ECtHR (GC) 26 October 2000, *Kudla v Poland*, no 30210/96, para 151.

202 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99. See also HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, where the HRC considered that in the circumstances of national security involved, it was not persuaded that the process was unfair to the author. See further section 10.3.3.

203 See for example ECtHR 15 February 2000, *Garcia Manibardo v Spain*, no 38695/97, para 36 and ECtHR 10 July 1998, *Tinnelly & sons v the United Kingdom*, no 20390/92 and 21322/92, para 72. See also HRC General Comment No 32 (2007), CCPR/C/GC/32, para II, sub 9.

204 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 41 and ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 47.

205 See for example ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45.

principle may be prevented. It is therefore the fairness of a procedure as a whole which should be assessed.

The Court of Justice has considered in cases where it assesses national procedural rules in the light of the principle of effectiveness that:

each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.²⁰⁶

This implies that the fairness of a national procedural rule should not be assessed in a vacuum but in the context of the national procedure as a whole.²⁰⁷ Recital 27 of the Preamble of the Procedures Directive reflects this case-law, while stating that the effectiveness of a national remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.²⁰⁸

Overall fairness in the ECtHR's case-law

According to the ECtHR 'even if a single remedy does not by itself entirely satisfy the requirements under Article 13, the aggregate of remedies provided for under domestic law may do so'.²⁰⁹ Furthermore the ECtHR has explicitly considered under Article 6 that it 'always tries to take into account the "proceedings as a whole" before deciding whether or not there has been a violation of the Convention in respect of a specific episode'.²¹⁰ Guarantees offered in one instance of the procedure may justify lesser safeguards in further instances. Article 6 applies to appeal and cassation procedures. In its assessment of the fairness of such proceedings, the ECtHR takes into account the guarantees offered in first instance proceedings.²¹¹ Furthermore the possibility exists that a higher or the highest tribunal may, in certain circumstances, make

206 See for example Case C-63/01, *Evans* [2003], para 46 and Case C-312/93, *Peterbroeck* [1995], para 14.

207 See also Accetto & Zlepzig 2005, p 391, who state that the Court of Justice confirmed in *Evans* that the negative impact of a national procedural provision on the application of EU law must be analysed in the light of the domestic judicial system as a whole.

208 Recital 27 Preamble PD.

209 See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 289 and ECtHR 26 March 1987, *Leander v Sweden*, no 9248/81, para 84.

210 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 164. See also ECtHR 13 October 2009, *Salontaji-Drobnjak v Serbia*, no 36500/05, para 128 and ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91, paras 45-46 and Harris, O' Boyle & Warbrick 2009, p 246.

211 According to the ECtHR 'the manner in which Article 6 applies to courts of appeal or of cassation must depend on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them.' See for example ECtHR 22 March 2007, *Sialkowska v Poland*, no 8932/05, para 104.

reparation for an initial violation of Article 6 ECHR. Such a violation cannot be remedied in a later stage of the procedure if any prejudice suffered in the meantime has become irreversible.²¹² On the other hand, the ECtHR may rule that domestic proceedings had been unfair 'because of the cumulative effect of various procedural defects'. In such a situation each defect, taken alone, would not have convinced the ECtHR that the proceedings were unfair, but their coexistence is the factor that leads to a finding of a violation of Article 6.²¹³

No possible reparation for procedural flaws

It is however also possible that a procedural rule or practice on its own amounts to a violation of a procedural right or principle. The CFI has for example held that a violation of the right to be heard during the administrative procedure cannot be repaired during the appeal phase.²¹⁴ In *Hercules Chemicals* the Court of Justice considered that the disclosure during the appeal phase of relevant documents underlying a Commission decision to impose a fine or penalty, cannot remedy a breach of the rights of the defence caused by the non-disclosure of those documents during the administrative phase.²¹⁵ The Court stated:

Although belated disclosure of documents in the file allows the undertaking that has support of the forms of order it is seeking, it does not put the undertaking back into the situation it would have been in if it had been able to rely on those documents in presenting its written and oral observations to the Commission.²¹⁶

Furthermore procedural rules which effectively block access to a court or tribunal often in themselves violate the right to effective judicial protection or fair trial.²¹⁷

212 ECtHR 14 June 2011, *Mercieca and others v Malta*, no 21974/07, para 49.

213 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 165.

214 Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 101 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 139.

215 Case C-51/92 P, *Hercules Chemicals v Commission*, paras 77-79.

216 Case C-51/92 P, *Hercules Chemicals v Commission*, para 79.

217 See for example Case 222/84, *Johnston* [1986] and ECtHR 28 October 1998, *Pérez de Rada Cavanilles v Spain*, no 28090/95, where the ECtHR held that the particularly strict application of a procedural rule by the domestic courts deprived the applicant of the right of access to a court.

4.5.3 The subject matter of the procedure

When assessing procedural matters the Court of Justice and the ECtHR often take the individual circumstances of the case into account.²¹⁸ Factors which may influence the level of procedural protection which should be granted are amongst others the nature of the rights claimed by the applicant and the personal circumstances of the applicant. Arguably the required level of procedural protection depends on the interests at stake for the party concerned. Furthermore the characteristics of the person concerned may require more or less procedural guarantees. As a result one must be careful not to apply judgments of the EU Courts and the ECtHR mechanically to other fields of (EU) law.²¹⁹

Asylum cases have a few characteristics which distinguish them from most other cases falling within the scope of EU law. These relate first of all to the fundamental and even absolute nature of the rights claimed and secondly to the special and often vulnerable situation in which asylum applicants find themselves. The Court should take these characteristics into account when interpreting the Procedures Directive and assessing national procedural rules in the light of EU procedural rights and principles. Also other factors may influence the level of procedural guarantees offered. Both the Court of Justice and the ECtHR have for example accepted that the level of discretion left to the decision-making authorities determines the standard of judicial review which is required.²²⁰

4.5.3.1 The nature of the rights claimed

As opposed to State aid, mergers or agriculture, asylum is not an economic, but very much a human rights issue, in which the absolute EU prohibition of *refoulement* and the right to asylum play a crucial role. The fact that the principle of *non-refoulement* is absolute will potentially play an important role in

218 Barbier de la Serre states for example that the rights of the defence will be acknowledged and or increased in their intensity: where (i) the institution enjoys a wide margin of appreciation, (ii) the party's participation may contribute substantially to the overall quality of the decision; (iii) the procedure concerns a field in which the institution enjoys strong investigative powers; (iv) the decision to be taken involves an appreciation of the party's behaviour and/or could be injurious to that party's reputation; (v) the exercise of the rights of the defence entails no excessive material costs; and to a lesser extent (vi) failure to exercise the rights of the defence would entail significant moral costs. Barbier de la Serre 2006, pp 248-249.

219 In Case C-473/00, *Cofidis* [2002], para 37 the Court of Justice stated that the *Rewe* and *Palmisani* decisions cited by Cofidis and the French Government were merely the result of assessments on a case by case basis, taking account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made.

220 See further Chapter 9 on judicial review of the establishment and qualification of the facts

cases regarding procedural guarantees for asylum applicants. A lack of procedural guarantees or the balancing of interests may never lead to a violation of this principle. Therefore, it is not unlikely that in asylum cases the Court of Justice will require more procedural guarantees than in cases involving fundamental rights, which allow for derogations and demand a balance of interests.²²¹ The Court of Justice has held that the assessment of the extent of the risk of *refoulement* 'must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union'.²²² The fundamental nature of the right to asylum, although not absolute, will potentially also require high procedural standards.²²³

The Court of Justice has also shown in its case-law regarding other fields of EU law that it takes into account what is at stake for an individual when deciding on the effectiveness of national procedural rules. In *Visciano* for example the Court of Justice took into account, when assessing a time-limit set by national law in the light of the principle of effectiveness that the case concerned a claim for payment of salary. According to the Court such claims are by their very nature, of great importance to the individual concerned.²²⁴ The Court of Justice also held that the duty to state reasons must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.²²⁵

The same approach can be found in the case-law of the ECtHR. This court has considered that the scope of the obligation to provide an effective remedy under Article 13 ECHR varies according to the nature of the applicant's complaint under the Convention.²²⁶ The absolute nature of the right safeguarded under Article 3 has implications for Article 13 ECtHR.²²⁷ It held that '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

221 Staffans states that the vast interests embedded in asylum procedures on the side of the State as well as the applicant require real, objective and effective possibilities for review and remedy. Staffans 2010, pp 273-297.

222 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 90.

223 See also the opinion of A.G. Bot in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, para 43.

224 Case C-69/08, *Visciano* [2009], para 44. See also Case C-28/05, *Dokter* [2006], para 74.

225 Case C-17/99, *France v Commission*, para 36 and Case T-70/05, *Evropaiki Dynamiki v EMSA*, para 171.

226 According to the ECtHR the scope of the obligation under Art 13 varies according to the nature of the applicant's complaint under the Convention. See ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, para 136.

227 See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 288.

of Article 13 imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and access to a remedy with automatic suspensive effect.²²⁸ The Human Rights Committee considered in *Ahani v Canada* that ‘where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture.’²²⁹ When assessing the fairness of the proceedings under Article 6 ECHR the ECtHR also takes into account what is at stake for the person concerned. The Court allows greater latitude when dealing with civil cases than when dealing with criminal cases.²³⁰ In several cases in which the right to adversarial proceedings was limited as a result of the use of secret evidence the Court stressed the need for procedural safeguards while referring to the serious consequences of the contested decision for the applicant.²³¹

4.5.3.2 Special vulnerability of the person concerned

Apart from the nature of the rights claimed, also specific circumstances in asylum cases may require more procedural guarantees than in other cases governed by EU law. Many asylum applicants do not speak the language of the Member State, are not familiar with the legal system in the Member State and do not have any resources to pay for legal aid. Therefore interpreters, information on the asylum procedure or free legal aid may be essential in order to guarantee a fair asylum procedure.²³² According to the UNHCR Handbook:

It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application

228 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 293.

229 HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, para 10.6. See also HRC 19 August 1997, *Vincente et al. v Colombia*, no 612/1995 where the Committee considered in the context of the requirement to exhaust domestic remedies ex Art 5 (2) (b), of the Optional Protocol that, if the alleged offence is particularly serious, as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary remedies cannot be considered adequate and effective. Joseph states that this consideration applies also to allegations of torture, cruel, inhuman or degrading treatment or punishment given the grave nature of such abuses. Joseph & others 2006, p 66.

230 See for example ECtHR 27 October 1993, *Dombo beheer v the Netherlands*, no 14448/88, para 32.

231 ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 59, ECtHR 31 October 2006, *Aksoy v Turkey*, no 59741/00, para 27 and ECtHR 19 October 2010, *Özpınar v Turkey*, no 20999/04, para 78.

232 See for example ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 304-311, 319.

should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.²³³

Furthermore most asylum applicants have no documents or other proof to substantiate their asylum claim. The assessment of their asylum claim consists for the largest part of an examination of the credibility of their asylum account.²³⁴ Finally certain groups of specifically vulnerable asylum applicants are in need of extra procedural safeguards.²³⁵ This applies for example to (unaccompanied) minor asylum applicants.²³⁶ Victims of torture may be afraid to speak freely to the authorities of the State of refuge.²³⁷ Asylum applicants may have psychological or physical problems, which impede a normal examination of their case.²³⁸ These circumstances may require for example that the burden of proof normally incumbent upon the applicant be lightened, or 'different techniques of examination' be used by the authorities.²³⁹

The Court of Justice takes into account the personal circumstances of the party concerned when assessing national procedural rules in the light of the principle of effectiveness. In several consumer law cases the Court concluded for example that national courts must assess the fairness of a contract term of their own motion in order to ensure consumer protection envisaged by the relevant directive. It had regard to the fact that the consumer may be unaware of his rights or may encounter difficulties in enforcing them. The Court considered:

In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of

233 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 190. See with regard to children also ComRC General Comment No 6 (2005), CRC/GC/2005/6, para 1, 68 and General Comment No 12 (2009), CRC/C/GC/12, para 123. The ECtHR considered in ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 251 that asylum applicants constitute 'a particularly underprivileged and vulnerable population group in need of special protection'.

234 UNHCR Handbook, para 196. See further Chapter 8.5.

235 Note that Art 17 RCD and Art 20 (3) QD mention as vulnerable persons: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

236 According to recital 14 Preamble PD 'specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability.'

237 UNHCR Handbook, para 198.

238 UNHCR Handbook, para 207.

239 UNHCR Handbook, paras 207 and 210.

the law, will not challenge the term pleaded against him on the grounds that it is unfair.²⁴⁰

Trstenjak and Beysen state that the Court of Justice resorted to ‘a consumer-oriented interpretation’ of the concepts of procedural and remedial autonomy of the Member States. ‘By emphasizing the weak position of the consumer the ECJ implicitly raised the effectiveness threshold which national procedural rules for the enforcement of rights under the consumer protection directives must meet.’²⁴¹

In *Pontin* the Court considered that a 15-day period for bringing an action for nullity of a dismissal and reinstatement of a pregnant woman, must be regarded as being particularly short and appeared to infringe the principles of effectiveness ‘in view inter alia of the situation in which a woman finds herself at the start of her pregnancy’. It also took into account that it would be ‘very difficult for a female worker dismissed during her pregnancy to obtain proper advice and, if appropriate, prepare and bring an action within the 15-day period’.²⁴²

The Court of Justice generally assesses in the abstract whether a procedural rule, taken into account the rights claimed by the party concerned and the specific features of the procedure, is reasonable and proportionate. The Court of Justice has made clear however that the application in a particular case of a procedural rule, which was generally considered reasonable and proportionate, may violate the EU right to an effective remedy. In *Samba Diouf* for example the Court of Justice considered a time-limit of fifteen days to bring an appeal against the rejection of the asylum application in the accelerated procedure sufficient in the light of the EU right to an effective remedy. The Court did not exclude however that, while a time-limit may be considered reasonable in general, it may be insufficient in the individual circumstances of the case. Whether this is the case, is up to the national court to decide.²⁴³

240 See for example Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores* [2000], para 26.

241 Trstenjak & Beysen 2011, p 121.

242 Case C-63/08, *Pontin* [2008], paras 62 and 65.

243 Case C-69/10, *Samba Diouf* [2011], paras 66-68. See also Case C-349/07, *Sopropé* [2008], para 44.

5 Preliminary conclusions and methodology used for the following chapters

In order to be able to understand the potential significance of the right to an effective remedy and related procedural rights for the asylum context, it was necessary to address several preliminary issues in the previous chapters. The following conclusions are most important for the purpose of this study:

- Asylum procedures are now governed by the Procedures Directive and thus fall within the scope of EU law.
- The Court of Justice and national courts may test the validity of the minimum standards of the Procedures Directive against the EU right to an effective remedy. Those standards should be considered invalid if they require or expressly or impliedly authorise the Member States to adopt or retain legislation which does not respect the EU right to an effective remedy.
- The Court of Justice and national courts may also use the EU right to an effective remedy to interpret the provisions of the Procedures Directive.
- Member States are bound by the EU right to an effective remedy when acting within the scope of EU law. They should observe this right even when making use of the discretionary powers afforded to them by the Procedures Directive. As a result the discretion left to the Member States to design their asylum system may be limited to an important extent. The Court of Justice has shown in its case-law concerning other fields of EU law that the EU right to an effective remedy considerably limits the procedural autonomy of the Member States.
- Asylum legislation is a relatively new phenomenon within the EU and case-law concerning the meaning of the EU right to an effective remedy for asylum procedures is still scarce. However, the Court of Justice has developed an important body of case-law concerning the EU right to an effective remedy in its judgments concerning other fields of EU law. The principles emerging from this case-law are applicable in all fields of EU law, including asylum law.
- The EU right to an effective remedy includes rights such as the right to a fair trial, the right of access to court, the right to equality of arms and the right to adversarial proceedings. Furthermore it is closely linked to the right to good administration, which embodies the right to be heard and the duty to state the reasons of a decision. The exact relationship between the EU right to an effective remedy and the principle of effectiveness, which also sets standards for national procedures, remains unclear.

For the purpose of this study the EU Courts' case-law regarding all these rights and principles will be taken into account.

- The interpretation of EU fundamental rights is inspired by international treaties. In the context of asylum the ECHR, Refugee Convention, CAT, ICCPR and CRC are particularly relevant. The EU right to an effective remedy is inspired by Articles 6 and 13 ECHR, Article 3 CAT, Articles 2 (3) and 14 ICCPR. The Court of Justice attaches by far most weight to the ECHR and the ECtHR's judgments as a source of inspiration. However also the authoritative but non-binding views of other supervising bodies such as UNHCR, the Committee against Torture, the Human Rights Committee and the Committee on the Rights of the Child should be taken into account. For the purpose of this study the ECtHR's case-law plays a prominent role, while the non-binding views of other monitoring bodies are used as complementary sources of inspiration.
- EU fundamental rights such as the right to an effective remedy may not offer a lower level of protection than international treaties. the Court of Justice has shown in its case-law that it scrupulously interprets EU fundamental rights in full conformity with the ECtHR's case-law. It follows from the text of the Charter as well as the case-law of the Court of Justice that EU fundamental rights may offer broader protection than international treaties.
- The EU right to a fair trial applies to all cases falling within the scope of EU law including asylum cases. Even though the ECtHR has ruled that Article 6 ECHR does not apply to asylum cases falling within the scope of application of the ECHR, its case-law concerning Article 6 ECHR may very well inspire the EU right to a fair trial, also when it is applied in the asylum context.
- From the EU Courts' and the ECtHR's case-law concerning the right to an effective remedy and fair trial three basic notions emerge, which may be helpful to explain the choices made by these courts when deciding on procedural issues and to predict these courts' approach in new situations:
 - 1 Procedural rights may be limited. Often it is necessary to balance conflicting interests of the parties involved in the procedure
 - 2 The overall fairness of a procedure should be assessed
 - 3 The courts should have regard to the subject matter of the procedure, in particular the nature of the rights claimed and special vulnerability of the person concerned.

5.1 METHOD FOR DEFINING THE MEANING OF THE EU RIGHT TO AN EFFECTIVE REMEDY

The next chapters will examine the potential meaning of EU fundamental rights and general principles for an number of key issues of asylum procedures: The

right to remain on the territory during first instance and appeal asylum proceedings (Chapter 6), the asylum applicant's right to be heard on his asylum motives in first instance and appeal proceedings (Chapter 7) and questions relating to evidence in asylum procedures (Chapters 8 to 10).

With regard to most of these topics the Procedures Directive does not provide for minimum standards, the applicable standards leave the Member States wide discretion or these standards are in need of interpretation. It is examined whether the EU right to an effective remedy sets additional standards, limits the Member States' discretion or prescribes a certain interpretation of the Procedures Directive. With regard to some minimum standards the question is raised (and answered) whether they violate the EU right to an effective remedy and should be considered invalid.

The following method is used in order to define the meaning of the EU right to an effective remedy:

- Most of the topics which will be discussed are not specifically addressed by Articles 47 and 41 of the Charter. The meaning of the EU right to an effective remedy is therefore derived from the case-law of the EU Courts and from relevant sources of inspiration, in particular the ECtHR's case-law.
- The case-law of the Court of Justice with regard to the specific meaning of the EU right to an effective remedy for asylum procedures is still very scarce. However the EU Courts have addressed many of these topics in the context of other fields of EU law, such as competition law, equal treatment law or EU sanctions. As was concluded above the procedural principles emerging from this case-law are applicable to asylum procedures.
- The ECtHR's case-law regarding Articles 6 and 13 ECHR with regard to non asylum cases is taken into account when examining which procedural principles follow from the EU right to an effective remedy. With regard to some topics, such as the use of secret information, the standards set out in the ECtHR's case-law complement the principles emerging from the EU Courts' case-law.
- When applying these procedural principles to the asylum context the special features of asylum procedures should be taken into account (see the three basic notions mentioned above). The ECtHR in its case-law under Articles 3 and 13 ECHR concerning asylum cases and the UNHCR and the UN Committees in their views concerning asylum procedures provide important guidance for the way in which the EU right to an effective remedy should be interpreted in the asylum context.
- With regard to some issues discussed in the following chapters, such as the assessment of the credibility of the asylum applicant's asylum account or the right to an oral hearing before a court or tribunal, no relevant case-law of the EU Courts is available. In such situation the meaning of the EU right to an effective remedy is largely defined on the basis of the ECtHR's case-law and (complementary) the views of UNHCR and the UN Committees concerning this issue.

For the purpose of this method in each of the following chapters the following steps will be taken:²⁴⁴

- 1 Identification of the provisions of the Procedures Directive applicable to the specific procedural issue discussed
- 2 Assessment of the existing case-law of the EU courts concerning the specific topic.
- 3 Examination of the case-law of the ECtHR and the non-binding views of the UNHCR, ComAT, Human Rights Committee and the ComRC, which inspire the EU right to an effective remedy
- 4 Conclusion as to the meaning of the EU right to an effective remedy for the specific aspect of the asylum procedure
- 5 Application to the provisions of the Procedures Directive

The result of this exercise is a set of EU procedural standards with regard to the key issues discussed in the following chapters.

²⁴⁴ See also section 1.4.

PART II

Key issues of asylum procedures

6 | The right to remain on the territory of the Member State¹

This chapter addresses three questions which relate to the asylum applicant's right to remain on the territory of the Member State during the asylum procedure:

- 1 Should an asylum seeker be allowed to stay in the State where he applied for asylum during first instance proceedings?
- 2 Are Member States required to grant applicants the time and opportunity to lodge an appeal against this expulsion before being expelled?
- 3 Must the Member State refrain from expelling the applicant until the decision on the appeal against the asylum decision has been taken?

Several international monitoring bodies have addressed these questions over the past years. Most importantly, the ECtHR ruled that Article 13 ECHR requires State Parties to provide for a remedy with automatic suspensive effect, in the case of an arguable claim that the person concerned will be subjected to torture or ill-treatment upon return to his country of origin.

It is argued in this chapter that the effective protection of the prohibition of *refoulement* and the right of (access to) an effective remedy require Member States to refrain from expulsion while asylum proceedings (first instance and appeal) are still pending. Expulsion of an asylum applicant while the determining authorities and/or the court or tribunal in the meaning of Article 39 PD have not yet decided on the risk of *refoulement* entails a risk of irreparable harm: the asylum applicant may be subjected to persecution or serious harm upon expulsion. Furthermore the EU right of access to a court or tribunal requires that the asylum applicant be offered sufficient time and opportunity to lodge an appeal against a negative asylum decision.

The right to remain during first instance proceedings

According to Article 7 (1) PD Member States must allow asylum applicants to remain on their territory for the sole purpose of the procedure, until the determining authority has made a decision on the asylum application. However, the second limb of Article 7 PD permits Member States to make an exception to this rule in certain situations. It will be argued in section 6.1 that

1 Part of this chapter has been published as: A.M. Reneman, *An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?*, 12 *European Journal of Migration and Law* (2010), pp 407-434

the effective protection of the principle of *non-refoulement* requires that the applicant will not be expelled before the determining authority has decided on the potential risk of *refoulement*.

Access to a remedy before expulsion

The Procedures Directive does not provide asylum applicants with a right to remain on the territory for the time needed to lodge an appeal against the asylum decision. Section 6.2 contends however that such a right is guaranteed by the EU right of *access* to a court. Expulsion of an asylum applicant, whose asylum claim has been rejected, may therefore only take place if he has had reasonable time and opportunity to lodge an appeal against this decision.

The right to remain during appeal proceedings

The main part of this chapter addresses the right to remain in the Member State during appeal procedures. This issue was heavily discussed by the Member States during the drafting of the Procedures Directive.² The result of these discussions was a clear compromise: the Directive does not oblige the Member States to attach suspensive effect to the asylum appeal required by Article 39 PD. Article 39(3) PD leaves this issue to the discretion of the Member States, while explicitly stating that national rules concerning interim protection need to comply with international law.³ It is argued in section 6.3 that Article 39(3) PD, interpreted in the light of the EU right to an effective remedy, requires a judicial remedy with automatic suspensive effect in all asylum cases, including those which are deemed manifestly unfounded.

6.1 THE RIGHT TO REMAIN DURING THE EXAMINATION OF THE ASYLUM CLAIM

According to Article 7 (1) PD Member States must allow asylum applicants to remain on their territory, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III of the directive.⁴ However, the second limb of Article 7 permits Member States to make an exception to this rule in

² Michelogiannaki 2008, p 25.

³ In this chapter “interim protection” is used as a general term covering both the question whether an appeal should have suspensive effect and the question whether an applicant should be able to request interim relief (in asylum cases usually the suspension of the expulsion measure).

⁴ See also Council resolution regarding minimum guarantees for asylum procedures of 20 June 1995, para 12. The European Commission reported in 2010 that the right to remain in the Member State pending the outcomes of first instance procedures is generally recognised in national legislation. Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final, p 4.

two situations. First of all the right to remain does not apply where, in accordance with Articles 32 and 34, a subsequent application will not be further examined. According to these provisions such further examination does not need to take place if no new elements or findings relating to the examination of whether he/she qualifies for an asylum status have arisen or have been presented by the asylum applicant.⁵

Secondly the applicant may be expelled during the first instance asylum procedure where the Member State will surrender or extradite a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, to a third country, or to international criminal courts or tribunals. The Commission reported in 2010 that Member States adopt divergent approaches with respect to these surrender or extradition related exceptions. In some Member States such exceptions are allowed.⁶

Although the Court of Justice has not yet addressed the matter, it is clear that expulsion or extradition before an assessment of the merits of the asylum claim has taken place would seriously undermine the effectiveness of the (absolute) EU principle of *non-refoulement*.

It follows from the case-law under Articles 3 and 13 ECHR that an asylum applicant may not be expelled or extradited to his country of origin or a third country before his claim that he will be subjected to a treatment contrary to Article 3 ECHR in that country has been scrutinised closely and rigorously by the national authorities.⁷ According to the ECtHR effective guarantees must exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled.⁸ This means that the applicant must (also) be granted the opportunity to have the 'arguability' of his claim of a risk of *refoulement* assessed by an independent and impartial

5 According to UNHCR many Member States provide for a right to remain during subsequent asylum procedures. UNHCR mentioned Belgium, Bulgaria, Czech Republic, France, Germany, Greece, Italy, Slovenia, Spain, the UK and implicitly in Finland. In Germany and the Netherlands the right to remain is not guaranteed by law or the status of persons awaiting the decision on a subsequent application is unclear UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, Geneva: March 2010, s 14, pp 42-43.

6 The Commission mentioned Austria, Cyprus, the Czech Republic, Germany, France, Ireland, Italy, Luxembourg, Malta, Poland, Sweden and Romania (only in cases of terrorism). Commission Report COM (2010) 465 final, p 4-5.

7 See for example ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, para 205, ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 293, ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 113, ECtHR 13 April 2010, *Charahili v Turkey*, no 46605/07, paras 57-58 and ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, paras 122-127

8 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 286.

authority in the meaning of Article 13 ECHR before being expelled or extradited.⁹

In *M.S.S v Belgium and Greece* the ECtHR was concerned because of the risks of *refoulement* the applicant faced in practice before any decision was taken on the merits of his case. The applicant, who had lodged an asylum claim with the Greek authorities, was detained and subjected to an administrative expulsion procedure after an attempt to leave the country with false papers. Furthermore he claimed to have barely escaped an attempt by the police to deport him to Turkey when he tried to leave Greece a second time, while his asylum application was still pending. The ECtHR considered that the fact that the applicant had been trying to leave Greece could not be held against him when examining the conduct of the Greek authorities with regard to the Convention and when the applicant was attempting to find a solution to his situation,¹⁰ which the Court considered contrary to Article 3.¹¹

The Committee against Torture in 2010 expressed its concerns with regard to the Austrian asylum law which provided that persons basing their repeat applications for international protection on new grounds cannot be granted a stay of their expulsion if they lodge their application within two days prior to the date set for deportation. According to the Committee those asylum applicants may, consequently, be at risk of *refoulement*.¹²

It also follows from the effective protection of the principle of *non-refoulement* under the Refugee Convention that States should determine whether a person qualifies as a refugee before expelling this person.¹³ The principle of effectiveness requires that during the determination process this person be allowed to remain on the territory.¹⁴ According to the UNHCR Handbook and EXCOM Conclusion No 8 the asylum applicant's right to remain in the country pending a decision on his initial request for a refugee status is a 'basic requirement' of an asylum procedure. Only if it is established that this request is clearly abusive, may the applicant be expelled before a decision on the request has been taken.¹⁵

It should be concluded that the effective protection of the EU prohibition of *refoulement* requires that all asylum applicants be allowed to stay on the territory of the Member States until their claim of a risk of *refoulement* has been

9 See for example ECtHR 19 November 2009, no 41015/04, *Kaboulov v Ukraine*, para 119. See further section 6.3.

10 No reception facilities were offered to the applicant. As a consequence he slept on the streets of Athens.

11 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 315.

12 ComAT Concluding Observations on Austria, 20 May 2010, CAT/C/AUT/CO/4-5, para 13.

13 See for example Goodwin Gill & McAdam 2007, p 528, Hathaway 2005, pp 158-160, Wouters 2009, p 164.

14 Hathaway 2005, pp 303-304.

15 EXCOM Conclusion no 8 (XXVIII), 1977, para (e) and UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992), para 192.

closely and rigorously assessed by the determining authority. Subsequent asylum applications should first be assessed in the light of all facts or evidence supporting the existence of a risk of *refoulement*, which have not been taken into account in the previous asylum procedure(s).¹⁶ If an asylum applicant claims to risk *refoulement* or onward removal to a country where he risks *refoulement* as a result of his surrender or extradition to another Member State, a third country, or to an international criminal court or tribunal, Member States should thus always rigorously assess this claim. This does not mean however that the applicant may be expelled or extradited right after a rigorous assessment of the risk of *refoulement* has been made by the determining authority, before a decision has been taken. The EU right to an effective remedy requires that an applicant be able to appeal the outcome of this assessment and the decision to expel or extradite him before a court or tribunal. This implies that the Member State should offer the applicant sufficient time and opportunity to lodge an appeal in accordance with Article 39 PD (see section 6.2). Furthermore, as will be argued in section 6.3 this appeal should have automatic suspensive effect.

Should Article 7 (2) of the Procedures Directive then be declared invalid? This is hard to determine. Potentially there are situations in which the the EU principle of *refoulement* and the EU right to an effective remedy does not prohibit expulsion or extradition an applicant during first instance asylum proceedings, even though such situations will be rare. It is not excluded for example that an asylum applicant claims to fear persecution or to risk serious harm upon return to his country of origin, but does not oppose to expulsion or extradition to a third country or an international court or tribunal.

6.2 THE RIGHT TO REMAIN DURING THE TIME NECESSARY TO LODGE THE APPEAL

The Procedures Directive does not regulate the right to remain in the Member State in order to exercise the right of appeal. Swift expulsion after the asylum decision may render the right of access to court illusory or excessively difficult. First of all, the applicant may have no opportunity at all to file the appeal, for example because he is not informed that he is going to be deported and is not able to reach his lawyer in time. Secondly when expulsion is imminent the applicant may be forced to immediately lodge an appeal and, if necessary, a request for interim protection. This may not allow him to take all required procedural steps in order to submit the appeal, such as consulting a lawyer. UNHCR mentioned in 2010 that in Finland the expulsion order may be executed immediately upon the decision being taken. According to UNHCR this means

16 See also section 9.3.

that the appellant does not have an effective opportunity to apply to the Helsinki District Court to suspend enforcement.¹⁷

The Court of Justice has not yet addressed the question whether an asylum applicant should be allowed to stay on the territory of the Member State for the time necessary to lodge an appeal against the negative asylum decision. However the Court of Justice seems to recognise in *Pecastaing* that such right to remain should be accorded to EU citizens who are going to be expelled. The Court of Justice considered that expulsion of an EU citizen may take place immediately after the expulsion order has been taken 'subject always to the right of this person to stay on the territory for the time necessary to avail himself of the remedies accorded to him'.¹⁸ The accessibility of the remedy should thus be guaranteed. It follows from the ECtHR's case-law and the views of the UN Committees that the same should apply to asylum cases

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

[W]here the authorities of a State hasten to hand over an individual to another State two days after the date on which the order was issued, they have a duty to act with all the more promptness and expedition to enable the person concerned to have his or her complaint under Articles 2 and 3 submitted to independent and rigorous scrutiny and to have enforcement of the impugned measure suspended. The Court finds it unacceptable for a person to learn that he is to be extradited only moments before being taken to the airport, when his reason for fleeing the receiving country has been his fear of treatment contrary to Article 2 or Article 3 of the Convention.¹⁹

The Court concluded that Article 13 ECHR had been violated because neither the applicants nor their lawyers were informed of the extradition orders issued in respect of the applicants and the competent authorities unjustifiably hindered the exercise of the right of appeal that might have been available to them, at least theoretically.²⁰

17 UNHCR, *Improving Asylum Procedures*, s 16, p 42.

18 Case 98/79, *Pecastaing* [1980], para 4. A right to a remedy was provided in this case in Art 8 of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 056/850.

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

20 ECtHR 12 April 2005, *Shamayev and others v Georgia and Russia*, no 36378/02, para 461. See also ECtHR 7 June 2007, *Garabayev v Russia*, no 38411/02 and ECtHR 10 August 2006, *Olaechea Chuas v Spain*, no 24668/03, where the court took into account with regard to exhaustion of domestic remedies that the applicant 'fut extradé le premier jour du délai

The UN Committees also ruled in a few cases that expulsion before a person could avail himself of an effective remedy violated the right to an effective remedy.²¹ The Human Rights Committee considered in *Alzery* that by the nature of *refoulement*, effective review of a decision to expel to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.²² In *Judge v Canada* the Human Rights Committee was even of the opinion that the State had to give the applicant the opportunity to lodge a further appeal before being expelled.²³ Finally UNHCR stated that access to an effective remedy is best guaranteed by ensuring by law that deportation orders are not issued or cannot be executed within the time-limit to lodge an appeal.²⁴

The right of access to an effective remedy following from Article 39 PD, read in the light of the *Pecastaing* judgment, the ECtHR's judgment in *Shamayev* and the UN Committees' views requires that an asylum applicant be allowed to stay on the territory for the time necessary to avail himself of this remedy. This means that the applicant is informed of the imminent expulsion in time, leaving him sufficient opportunity to consult his lawyer. Arguably the time-limit for lodging the appeal indicates the time necessary for lodging the appeal. That would imply that the applicant may not be deported before the time-limit for filing the appeal has expired.

6.3 THE RIGHT TO REMAIN DURING APPEAL PROCEEDINGS

Once the appeal against the negative asylum decision has been lodged, the question arises whether the asylum applicant is allowed to await the decision of the court or tribunal on the territory of the Member State. This question will be addressed in this section.

The Procedures Directive does not demand that the asylum appeal procedure automatically suspends the expulsion of the asylum applicant. Article 39

dont il disposait pour faire appel'. Furthermore the available remedy did not have suspensive effect. Therefore this remedy could not be considered effective.

21 ComAT 5 June 2000, *Josu Arkauz Arana v France*, no 63/1997, para 11.5. See also ComAT 3 May 2005, *Iratxe Sorzábal Díaz v France*, no 194/2001, para 6.1. The ComAT also stated in its Annual Report 2006 that "the requirement of exhaustion of domestic remedies can be dispensed with, if [...] there is a risk of immediate deportation of the complainant after the final rejection of his or her asylum application". ComAT, Annual Report 2006, A/61/44, para 61.

22 HRC 10 November 2006, *Alzery v Sweden*, no 1416/2005, para 11.8.

23 HRC 20 October 2003, *Judge v Canada*, no 829/1998, para 10.8-10.9. In this case the complainant challenged his deportation to the United States, where he was under a death sentence. The Committee held that the decision to deport the author to a State where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of Art 6, together with Art 2 (3) ICCPR.

24 UNHCR, *Improving Asylum Procedures*, s 16, p 38.

(3) PD provides that the Member States shall, where appropriate, provide for rules *in accordance with their international obligations* dealing with the question of whether the remedy shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome. If the remedy does not have suspensive effect, the Member States shall provide for rules dealing with the possibility of legal remedy or protective measures.

According to the Commission report concerning the implementation of the Procedures Directive of 2010 automatic suspensive effect is attached to all first instance appeals against asylum decisions in Bulgaria, Hungary, Ireland, Lithuania, Luxembourg and Portugal. In Spain and Greece, automatic suspensive effect was not afforded to any appeals.²⁵ In other Member States, applicable exceptions are widely divergent and concern decisions not to further examine a subsequent application, a refusal to reopen the examination, decisions taken in border procedures, inadmissibility decisions, decisions taken in an accelerated procedure, applications deemed manifestly unfounded and decisions concerning applicants in detention. Where an appeal does not have suspensive effect, interim measures are generally available. However, the right to remain pending the outcome of the procedure for interim measures is not guaranteed by law in the Czech Republic, Greece and Sweden. In other Member States the request for an interim measure does not have suspensive effect in certain categories of cases.²⁶

UNHCR mentioned in its report of 2010 that many refugees are recognised only following an appeal process. UNHCR estimated that in 2007 around 14% of the total of persons, who were recognised as refugees or received a complementary form of protection initially received a negative decision, which was subsequently overturned during the appeal stage. In some States, such as the United Kingdom the percentage of asylum decisions overturned in appeal lies around 20%.²⁷ These figures indicate the need to allow asylum applicants to remain on the territory of the Member State during appeal proceedings, in order to prevent irreparable harm.

This section will first argue that EU law requires that the appeal in the meaning of Article 39 PD have automatic suspensive effect (in 5.3.1). Section 6.3.2 will examine the required form of the interim protection which should be offered. Should the lodging of the appeal automatically entail that the asylum applicant is allowed to stay on the territory of the Member State? Or

25 Commission Report COM (2010) 465 final, p 14. See also UNHCR, *Improving Asylum Procedures*, s 16, p 38.

26 Commission Report COM (2010) 465 final, pp 14-15. See also UNHCR, *Improving Asylum Procedures*, s 16, p 44. In Finland and the Netherlands removal may immediately be enforced with respect to decisions on subsequent claims and in the Netherlands also where a person poses a danger to public order or national security. In the United Kingdom, where an in-country right of appeal does not apply, a decision may only be either challenged by seeking a leave for judicial review or appealed against from abroad.

27 UNHCR, *Improving Asylum Procedures*, s 16, pp 36-37.

is a system allowed in which the asylum applicant needs to apply to the national court for interim relief?

6.3.1 The right to interim protection

6.3.1.1 The Court of Justice's case-law

The Court of Justice ruled on the right to interim protection in a number of cases. In some of them, such as the *Siples* case, which will be discussed below, the Court was asked to interpret EU legislation which specifically addressed the right to interim protection. In the most important cases however no relevant EU legislation existed with regard to this issue. In those cases the Court judged that the principle of effectiveness²⁸ or the right to effective judicial protection²⁹ may nevertheless oblige national courts to provide interim protection. Important examples of the latter category are the judgments in *Factortame* and *Zuckerfabrik*, which will be discussed at greater length in this section. In all cases the Court has recognised the significance of the right to interim protection. It held that interim protection should be provided by the national court if necessary to ensure the full effectiveness of its judgment on the existence of a right guaranteed by EU law.

The Court of Justice has not yet ruled on interim protection in issues of *asylum*. Taking into account the fundamental nature of the rights claimed during asylum proceedings, there is no reason to believe that the *Factortame* standards will not apply in asylum cases. Thus, it may be assumed that Article 39 PD read in the light of the EU right to an effective remedy, demands that interim protection be granted in asylum cases if necessary to ensure the full effectiveness of the judgment by the national court regarding the question whether the applicant's expulsion would violate the prohibition of *refoulement*. It is therefore important to examine whether and if so under which circumstances, interim protection is necessary in asylum cases to ensure the effectiveness of the remedy available and to avoid irreparable harm to the applicant. For this purpose the case-law of the Court of Justice in cases concerning expulsion of EU citizens and the requirements following from the ECHR, ICCPR and CAT should be considered relevant. The Court of Justice's case-law with regard to the necessity of interim protection against expulsions EU citizens during the proceedings against the expulsion measure will be discussed in

28 Case C-213/89, *Factortame* [1990], paras 20-21. See Sinaniotis 2006, p 65, where he states: 'It should be emphasized that the essential legal basis for which interim relief was acknowledged in the instant case is the principle of effectiveness of Community law'.

29 Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991], paras 16-17 and Case C-432/05, *Unibet* [2007], para 72.

this section, while the case-law of the ECtHR and the views of the UN Committees and UNHCR will be examined in section 6.3.1.2 below.

Factortame, Zuckerfabrik and Siples

According to the Court of Justice interim protection must be provided, if it is necessary to ensure the effectiveness of EU law. The most fundamental case in this respect was *Factortame*.³⁰ In *Factortame*, fishing companies questioned the compatibility with Community law of a British act which prohibited them from fishing. They asked for interim relief until such time as final judgment was given on their application for judicial review. The question put before the Court of Justice by the House of Lords was whether Community law obliges the national court to grant interim protection of the rights claimed. Under national law the English courts had no power to grant interim relief in a case such as the case before it. The Court of Justice referred to its judgment in *Simmenthal* where it held that

any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law [...].³¹

Then the Court of Justice went on to consider 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.³²

The Court left the conditions for granting interim relief up to the national courts. It considered however, in line with the *Rewe* judgment,³³ that these national procedural rules should not be less favourable than those for the

30 Case C-213/89, *Factortame* [1990]. See also Case C-432/05, *Unibet* [2007].

31 Case C-213/89, *Factortame* [1990], para 20. The Court of Justice referred to Case 106/77, *Amministrazione delle finanze dello Stato v Simmenthal* [1978], paras 22-23.

32 Case C-213/89, *Factortame* [1990], para 21.

33 Case 33/76, *Rewe* [1976].

enforcement of national law rights, nor should they render the exercise of the right to get interim protection practically impossible or excessively difficult.³⁴ According to Sinaniotis the judgment in *Factortame* is revolutionary, because it established interim protection as part of the principle of effectiveness of Community rights, by imposing on the national judge dealing with interim relief the task of acting as a Community judge.³⁵ Toth wrote that as a result the national courts are able to 'provide immediate protection to individuals by "freezing" [...] national laws, whose compatibility with Community law is challenged, thereby saving them from irreparable loss, and possibly from economic ruin, which might otherwise occur while their Community rights are being determined.'³⁶ According to Toth the obligation to grant interim relief had been implicitly present in some fundamental principles of Community law, namely the principle of supremacy of Community law, the principle of complete and effective judicial protection and the principles of effectiveness and equivalence.³⁷

Factortame also did not explicitly answer the question whether the Court requires a national court to *create* a new remedy in order to be able to grant interim relief.³⁸ The Court only obliged the national court to *set aside* a national procedural rule which precludes the national court from granting interim relief. However, the problem in *Factortame* was that in the United Kingdom no legal basis for granting interim relief was available under national law. Therefore, the national court could comply with the Court's judgment only by creating a new remedy. According to Craig and De Búrca, *Factortame* weakened the force of the Court's previous statement that, in the absence of harmonisation, EC law does not oblige national courts to create new remedies

34 Sinaniotis 2006, p 95. In Case C-432/05, *Unibet* [2007], the Court also refrained from providing the national courts with conditions for granting interim relief. The Court followed the opinion of A.G. Sharpston that in cases which concern the validity of a national measure, there is no reason to depart from the general rule of procedural autonomy. See Arnulf 2007, pp 1777-1778.

35 Sinaniotis 2006, p 61.

36 Toth 1990, p 583.

37 Toth 1990, pp 583-584.

38 A.G. Tesauro wrote in his opinion regarding *Factortame* that provision for interim protection of a right pending the final determination of a case is made in the United Kingdom. Therefore it is simply a question of using the already existing procedure in order to protect a right claimed on the basis of a provision of Community law having direct effect. However Tesauro did not seem to exclude that Community law may oblige a Member State to introduce the possibility for the courts to grant interim relief. Sinaniotis is of the opinion that the Court neglected the fact that national law did not provide a legal basis to grant interim relief. In his view the Court did not answer the question whether the national court should create a new remedy. Sinaniotis 2006, p 61. See also Trstenjak & Beysen 2011, supra footnote 38.

which would not be available under national law.³⁹ In its later judgment in *Unibet* the Court of Justice made clear that Member States are exceptionally required to create new national remedies if this is necessary to ensure the EU fundamental right to effective judicial protection.⁴⁰

In *Zuckerfabrik*⁴¹ it was not the deficiency of national law but of Community law which was at issue. In this case the Court accepted that, under certain conditions, interim relief can be granted by a national court in a case in which the applicant's claim is based on the alleged invalidity of Community legislation. The applicants contested a decision, before the national court, which required them to pay an amount of money in respect of a special elimination levy for the 1986/87 sugar-marketing year. The applicants argued that this levy was based on a Community regulation, which was in their opinion contrary to Community law. They asked the national court for suspension of the contested decision.

The national court asked the Court of Justice whether national courts may suspend by way of an interim measure an administrative measure, based on a regulation, and if so, under what conditions. The possible barrier against the interim measure was not national law, as in *Factortame*, but Community law itself. By temporarily not applying a rule of Community law by way of interim measure the national court could violate the principle of priority of Community law and the monopoly of the Court to decide upon its legality.

The Court considered that interim legal protection, which Community law ensures for individuals before national courts, must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself. Because of the fact that, by granting interim relief in a case where the validity of a Community measure is contested, the national court temporarily disapplies a Community measure, the Court in *Zuckerfabrik* set conditions to the national courts for granting interim relief in such cases.⁴² The national courts may grant interim relief only if the conditions applied by the Court of Justice when deciding on applications to it for interim measures pursuant to Articles 278 and 279 TFEU, are satisfied.⁴³ First of all, the national court should entertain

39 Craig & de Búrca 2003, pp 237-238. Toth stated however in his comment on *Factortame* that the Court does not require the courts to devise an interim relief where none exists. Toth 1990, p 586.

40 Case C-432/05, *Unibet* [2007], paras 40-41. See further section 4.3.5.

41 Joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991], paras 16-33.

42 According to A.G. Sharpston, there is a clear Community interest in having uniform strict criteria for granting interim relief in this situation. See also Arnall 2007, pp 1777-1778.

43 Jans and others 2007, p 278. The Court uses four criteria when it examines an application for interim relief: there must be a *prima facie* case, which means that the applicant's argument must be serious and not clearly untenable, the case must be urgent: the interim measure must be necessary to avoid serious and irreparable harm and the interim measure should

serious doubts as to the validity of the Community measure. It must furthermore refer the question on the validity of the Community measure to the Court of Justice for preliminary ruling. Finally there should be urgency and a threat of serious and irreparable damage to the applicant⁴⁴ and the national court should take due account of the Community's interests.

In *Zuckerfabrik* the Court expressly accepted the national judiciary's role in Community legal protection. Schermers considers the *Zuckerfabrik* case a landmark, for the reason that it so clearly placed the protection of the individual in the foreground, even before the question of priority of Community law.⁴⁵

Provisions of secondary EU law may not prevent national courts from providing interim protection, in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law. This was decided in the *Siples* judgment.⁴⁶ In this case the Court was asked to interpret Article 244 of the Customs Code,⁴⁷ which confers power to suspend implementation of the contested decision exclusively on the customs authorities. The Court ruled, while referring to *Factortame*, that this provision meant that both the customs authorities and the courts have the power to suspend a customs decision.

The right to interim protection in cases concerning EU citizens

The Court of Justice seems to be of the opinion that the fact that a person is expelled before a decision on the appeal against the expulsion measure has been given, does not automatically render his right to an appeal ineffective. This may be derived from a few expulsion cases concerning nationals of other Member States and their family members, falling within the scope of former Directive 64/221/EEC.⁴⁸ According to this directive the general rule was that the court deciding on the appeal against the expulsion measure had suspensive effect. However, Article 9 of this directive provided for a possibility to omit suspensive effect of this appeal on the condition that the expulsion decision would not be taken by the administrative authority until an opinion had been

be intended to preserve the positions of the parties to a dispute. Finally, the Court takes into account the relevant interests. See Jans and others 2007, p 248.

44 This should be examined on the basis of the circumstances of the case. According to the court, purely financial damage cannot be regarded in principle as irreparable. Joined cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991], para 29.

45 Schermers 1992, pp 136-137. See also Sinaniotis 2006, p 68.

46 Case C-226/99, *Siples* [2001], paras 16-19, see also Case C-1/99, *Kofisa Italia* [2001], paras 48-49.

47 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L 302/1.

48 Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 056/850.

obtained from a competent authority⁴⁹ of the host country. In cases of urgency this opinion could be omitted. In *Dörr and Ūnal* the Court seemed to accept that these provisions provided sufficient legal protection. Expulsion of the person concerned before the decision on the appeal against the expulsion measure had been taken was thus allowed, if the opinion of the competent authority had been obtained⁵⁰ or in cases of urgency.⁵¹

Article 31 of Directive 2004/38/EC, which replaced Directive 64/221/EEC gives as the general rule:

Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken.⁵²

The request for interim relief should thus have suspensive effect. There are a few possibilities of deviating from this general rule, namely where the expulsion decision is based on a previous judicial decision, where the person concerned has had previous access to judicial review or where the expulsion decision is based on imperative grounds of public security.

It should be concluded that the general rule which follows from Directive 64/221/EEC and Directive 2004/38/EC is that EU citizens should be allowed to await the decision on their appeal against the expulsion decision or their request to suspend the expulsion measure for the duration of the appeal proceedings. These Directives as well as the Court of Justice in *Dörr and Ūnal*, allow under certain conditions expulsion before the decision on the appeal regarding the expulsion measure. However, it is not excluded that, even if these conditions were fulfilled, the Court would have required suspensive effect of the appeal, if an applicant could show that his expulsion would render his right to an appeal ineffective.

Neither does *Dörr and Ūnal* exclude that the Court may require that a national court be able to grant interim relief or that a remedy have (automatic)

49 The Directive did not set any requirements for this competent authority, except that it shall not be the same as the authority empowered to take the decision refusing renewal of the residence permit or ordering expulsion. According to the Court of Justice, the independent authority, mentioned in Art 9 of Directive 64/221/EEC, needed to examine all the facts and circumstances and the expediency of the expulsion measure before the final decision was adopted. See Case C-136/03, *Dörr and Ūnal* [2005], paras 48-51 and 55.

50 Case C-136/03, *Dörr and Ūnal* [2005].

51 Case 98/79, *Pecastaing* [1980], para 19, referred to in Case C-136/03, *Dörr and Ūnal* [2005], para 55. Whether there was a case of urgency was for the administrative authority to decide.

52 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

suspensive effect in *asylum* cases.⁵³ The fact that expulsion of an asylum seeker to his country of origin may lead to irreparable harm (torture or ill-treatment), should urge the Court of Justice to require more safeguards regarding interim protection in asylum cases than in cases of EU citizens. Furthermore, it is conceivable that while EU citizens may be able to exercise their right to an effective remedy from abroad, this is often more problematic in asylum cases.

6.3.1.2 Obligations stemming from the ECHR, ICCPR, CAT and Refugee Convention

This section will assess the national court's obligations regarding interim protection by examining the ECtHR's case-law as well as the UN Committees' views regarding the right to an effective remedy and the obligation to exhaust national remedies. Furthermore the interim measures granted by the ECtHR, the Committee against Torture and the Human Rights Committee will be briefly examined, as these give an indication of the situations in which these bodies consider interim protection against expulsion to be essential. It will be argued on the basis of this case-law and these views that in an asylum case a judicial remedy without automatic suspensive effect cannot be considered effective.

The right to remain under the right to an effective remedy and the obligation to exhaust domestic remedies

The ECtHR has laid down rather clear standards with regard to suspensive effect of asylum appeals in asylum cases under Articles 13 and 35 ECHR. In the case *Gebremedhin v France* the ECtHR ruled for the first time that Article 13 ECHR requires that an asylum seeker have access to a remedy with automatic suspensive effect, if a State decides to expel him to a country where he runs a real risk of becoming a victim of treatment contrary to Article 3 ECHR.⁵⁴ The ECtHR incorporated the principle of automatic suspensive effect as an absolute safeguard based upon the possible irreversible consequences of a deportation in violation with Article 3 ECHR.⁵⁵ Even if, after expulsion, a

⁵³ See also Council resolution regarding minimum guarantees for asylum procedures of 20 June 1995, which includes in para 17 the general principle that the asylum seeker may remain in the territory of the Member State concerned until a decision has been taken on the appeal.

⁵⁴ ECtHR 26 April 2007, *Gebremedhin v France*, no 25389/05. See also ECtHR 11 December 2008, *Muminov v Russia*, no 42502/06, para 100 and ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 108. Automatic suspensive effect only needs to be guaranteed in one instance. See ECtHR 22 September 2011, *H.R. v France*, no 64780/09, paras 78-80.

⁵⁵ Byrne 2005, p 80. The ECtHR considered that 'given the irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialised and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires [...] a remedy with automatic suspensive effect'. See ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 108.

violation of Article 3 ECHR is found, it is according to the ECtHR hard to see how this court can still offer the asylum applicant suitable redress as required by Article 13 ECHR.⁵⁶

The applicant in the *Gebremedhin* case had been refused access to France at the airport Charles de Gaulle upon arrival in June 2005. The French authorities deemed his application for permission to enter France for asylum reasons manifestly unfounded, because of inconsistencies in his asylum account. He appealed to the urgent applications judge of the Administrative Court. During the appeal procedure, France tried but failed to expel him. The Administrative Court dismissed his appeal. Less than a week later the ECtHR accepted the applicant's request for an interim measure and indicated to the French Government that it was not desirable to remove the applicant to Eritrea prior to the forthcoming meeting of the appropriate Chamber. Following this interim measure, the French authorities granted the applicant leave to enter France and granted the applicant a refugee status in November 2005.⁵⁷

The two judicial remedies at the applicant's disposal (an appeal against the refusal of entry and a request for interim relief), which provided according to the ECtHR, 'solid guarantees',⁵⁸ both lacked automatic suspensive effect. The applicant could be legally expelled before the judgment by the court. The ECtHR concluded that *Gebremedhin* did not have access to a remedy with automatic suspensive effect in the transit zone and that therefore Article 13 ECHR had been violated.

The judgment by the ECtHR in *Gebremedhin* was affirmed by many later cases, among which *Sultani v France* in which the effectiveness of the remedy was assessed in the light of Article 35 (1) ECHR.⁵⁹ The Court stated, even more explicitly than in *Gebremedhin* that a remedy without suspensive effect cannot be considered effective⁶⁰:

56 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 393. The ECtHR considered that 'it failed to see how, without its decision having suspensive effect, the Belgian Aliens Appeals Board could still offer the applicant suitable redress even if it had found a violation of Article 3 after the applicant's removal'. The Belgian Government contended before the ECtHR that the applicant could have continued his proceedings before the Aliens Appeal Board after his transfer to Greece.

57 The fact that the Court decided on the complaint regarding Art 13 ECHR, while the complaint regarding Art 3 ECHR had been declared inadmissible because of the granting of a refugee status, shows that the Court apparently deemed the complaint regarding the lack of interim protection very serious. See differently ECtHR 31 January 2008, *Mir Isfahani v the Netherlands*, no 31252/03, which was declared inadmissible because the applicant received a status. The applicant complained under Art 13 ECHR about the limited scope of judicial review by the national court.

58 ECtHR 26 April 2007, *Gebremedhin v France*, no 25389/05, para 65.

59 ECtHR (Adm) 20 September 2007, *Sultani v France*, no 45223/05, paras 50-52. See also ECtHR 4 December 2008, *Y v Russia*, no 20113/07, para 70 and ECtHR 18 November 2010, *Boutaghi v France*, no 42360/08, paras 35-37.

60 See Spijkerboer 2008.

[L]orsqu'un individu se plaint de ce que son renvoi l'exposerait à un traitement contraire à l'article 3 de la Convention, les recours sans effet suspensif ne peuvent être considérés comme efficaces au sens de l'article 35 § 1 de la Convention [...].⁶¹

It should be noted that the Court does not seem to consider the existence of an arguable claim of a violation of Article 3 ECHR a prerequisite for the applicability of this rule. The ECtHR may therefore be of the opinion that in all cases in which an applicant complains of a violation of Article 3 ECHR, a national remedy without automatic suspensive effect cannot be regarded as effective. Important reasons for the ineffectiveness of remedies without suspensive effect, other than the risk of irreparable harm, are that after being expelled, (ex)-asylum applicants may not be able to keep in touch with their lawyer or the authorities in the Member State.⁶² This makes it complex, if not impossible, to substantiate their case.⁶³ Furthermore, it might be impossible to trace asylum applicants in their country of origin, which prevents their return to the Member State when the remedy turns out to be successful.⁶⁴

The Court established in *Sultani* that the remedies pending did not have suspensive effect and concluded that they did not need to be exhausted in order for the complaint to be admissible.⁶⁵ Asylum applicants who do not have a remedy with automatic suspensive effect at their disposal thus can complain directly at the ECtHR and request an interim measure in order to prevent expulsion during the proceedings before this court. In 2011 the President of the ECtHR requested the State Parties to the ECHR to provide national remedies with suspensive effect in the context of the high numbers of requests for interim measures which were submitted to the ECtHR in the previous years.⁶⁶

61 ECtHR (Adm) 20 September 2007, *Sultani v France*, no 45223/05, para 50.

62 See by analogy ECtHR 17 January 2006, *Aoulmi v France*, no 50278/99, where the ECtHR considered with regard to the effectiveness of its interim measure: 'In the present case, as the applicant was expelled by France to Algeria, the level of protection that the Court was able to afford the rights which he was asserting under Article 3 of the Convention was irreversibly reduced. In addition, as the applicant's lawyer has lost all contact with him since his expulsion, the gathering of evidence in support of the applicant's allegations has proved more complex.' See also ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, para 206 and ECtHR 5 April 2011, *Toumi v Italy*, no 25716/09, paras 72-76.

63 See also the decision of the German Bundesverfassungsgericht to grant interim protection to an asylum seeker who would be transferred to Greece under the Dublin Regulation. The court took into account that the asylum seeker substantiated that it would be impossible for him to register in Greece and that he would become homeless. In this situation it would be very difficult to contact him during the proceedings before the court. Bundesverfassungsgericht 8 September 2009, BvQ 56/09.

64 This happened for example in ECtHR 23 June 2011, *Diallo v Czech Republic*, no 20493/07, para 44.

65 See also ECtHR 10 August 2006, *Olaechea Chuas v Spain*, no 24668/03, para 35 and ECtHR 23 October 2008, *Soldatenko v Ukraine*, no 2440/07, para 49.

66 Statement Issued by the President of the ECtHR concerning Requests for Interim Measures (Rule 39 of the Rules of Court), 11 February 2011, available at www.echr.coe.int.

In their views in individual cases, the Committee against Torture and the Human Rights Committee have not explicitly addressed the question whether the right to an effective remedy guaranteed by Article 3 CAT and Article 2 (3) ICCPR requires that an asylum applicant should be allowed to remain on the territory of the State during appeal proceedings. However both Committees in their Concluding Observations with regard to several State Parties did stress that remedies against expulsion orders should have suspensive effect⁶⁷ or even automatic suspensive effect.⁶⁸

In *Alzery v Sweden* the Human Rights Committee considered that effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and render the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of Article 7, read in conjunction with Article 2 of the Covenant.⁶⁹ One may conclude from this consideration that there must be a possibility for interim protection during the proceedings before a national court reviewing the decision regarding the risk of *refoulement*.⁷⁰

Both the Committee against Torture and the Human Rights Committee have considered, in the light of the requirement to exhaust domestic remedies, that a remedy which does not suspend the asylum seeker's expulsion cannot be deemed effective.⁷¹ In some of these cases, national proceedings were still pending,⁷² in others the complainant had been deported before the decision on the remedy had been concluded.⁷³ The reason for the ineffectiveness is

67 ComAT Concluding Observations on Austria (15 December 2005, CAT/C/AUT/CO/3), Belgium (27 May 2003, CAT/C/CR/30/6), Finland (29 June 2011, CAT/C/FIN/CO/5-6), France (3 April 2006, CAT/C/FRA/CO/3 and 20 May 2010, CAT/C/FRA/CO/4-6.) Ireland (17 June 2011, CAT/C/IRL/CO/1), Slovenia (20 June 2011, CAT/C/SVN/CO/3) and Switzerland (25 May 2010, CAT/C/CHE/CO/6). HRC Concluding Observations on Belgium (12 August 2004, CCPR/CO/81/BEL) and Finland (2 December 2004, CCPR/CO/82/FIN).

68 ComAT Concluding Observations on Austria (20 May 2010, CAT/C/AUT/CO/4-5) and Monaco, (28 May 2004, CAT/C/CR/32/1).

69 HRC 10 November 2006, *Alzery v Sweden*, no 1416/2005, para 11.8.

70 In *Weiss* the HRC found a violation of the right to equality before the courts as laid down in Art 14 (1) taken together with the right to an effective and enforceable remedy under Art 2 (3) ICCPR because the author was extradited to the United States in violation of a national administrative court's stay of execution. HRC 15 May 2003, *Weiss v Austria*, no 1086/2002, para 9.6.

71 The ComAT stated in its Annual Report 2006 that 'the requirement of exhaustion of domestic remedies can be dispensed with, if the only remedies available to the complainant are without suspensive effect, i.e. remedies that do not automatically stay the execution of an expulsion order [...].' ComAT Annual Report 2006, A/61/44, para 61.

72 See ComAT 16 May 2007, *Nadeem Ahmad Dar v Norway*, no 249/2004, paras 6.2-6.5 and ComAT 17 December 2004, *Falcon Rios v Canada*, no 133/1999, para 7.3.

73 See also ComAT 11 May 2007, *Adel Tebourski v France*, no 300/2006, para 7.3 and ComAT 15 May 2001, *Z.Z. v Canada*, no 123/1998, para 8.2.

that irreparable harm cannot be averted if the domestic remedy subsequently yields a decision favourable to the complainant.⁷⁴

The Refugee Convention does not provide for a right to a remedy with suspensive effect. However, such a right may be derived from the principle that the rights granted by the Convention should be effectively protected. UNHCR is of the opinion that an applicant for refugee status should in principle be permitted to remain in the country while an appeal to a higher administrative authority or to the court is pending.⁷⁵ If an applicant is not permitted to await the outcome of an appeal against a negative decision at first instance in the territory of the Member State, the remedy against a decision is ineffective according to UNHCR.⁷⁶

Interim protection by the ECtHR, the Committee against Torture and the Human Rights Committee

The ECtHR has not only stressed the importance of interim protection to prevent irreparable harm in asylum cases in its case-law, but also by calling for (binding) interim measures called in a large number of expulsion and extradition cases pending before it.⁷⁷ In cases where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court's determination of the justification for the measure. Indications of interim measures given by the Court permit it to carry out an effective examination of the application and to ensure that the protection afforded to the applicant by the Convention is effective.⁷⁸ The ECtHR has considered that although the assessment of a real risk of ill-treatment is to some degree speculative, the Court has always been very cautious, examin-

74 ComAT 24 May 2005, *Maftoud Brada v France*, no 195/2002, para 7.7. The HRC stated in HRC 15 May 2003, *Weiss v Austria*, no 1086/2002, para 8.2, in which it ordered an interim measure, that 'a remedy, which is said to subsist after the event which the interim measures sought to prevent occurred is by definition ineffective, as the irreparable harm cannot be reversed by a subsequent finding in the author's favour by the domestic remedies considering the case.'

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

76 UNHCR Observations on the European Commission's Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, December 2005.

77 In 2008-2010 the ECtHR in total granted 2,842 interim measures. See ECtHR statistics interim measures 2008-2010, available at www.echr.coe.int. Usually interim measures are granted in expulsion or extradition cases. See ECtHR statistics, interim measures by respondent State and country of destination from 1 January to 30 June 2011, available at www.echr.coe.int.

78 ECtHR (GC) 4 February 2005, *Mamatkulov and Askarov v Turkey*, nos 46827/99 and 46951/99, para 108, ECtHR (Adm) 20 February 2007, *Al-Moayad v Germany*, no 35865/03, paras 119-120 and 125 and ECtHR 5 April 2011, *Toumi v Italy*, no 25716/09, paras 69-71.

ing carefully the material placed before it in the light of the requisite standard of proof before indicating an interim measure under Rule 39.⁷⁹

In practice the Court has granted requests for interim measures in many asylum cases to prevent expulsion to the asylum seeker's country of origin. The Court has even called for interim measures for certain groups of asylum applicants, such as Somali asylum applicants in 2004,⁸⁰ Tamils from Sri Lanka in 2007⁸¹ and Afghan asylum applicants⁸² and applicants who were to be transferred to Greece in 2008.⁸³

Like the ECtHR, the Committee against Torture⁸⁴ and the Human Rights Committee⁸⁵ regularly request the State Party concerned not to deport or extradite the complainant while his complaint is being considered. They call for an interim measure, when they consider that there is a risk of irreparable harm if the complainant were to be expelled.

The ECtHR,⁸⁶ the Committee against Torture⁸⁷ and the Human Rights Committee⁸⁸ have ruled that interim measures are binding for the State Party concerned. It is their view that, by ignoring a request for an interim measure, the State Party undermines the protection offered by the ECHR, CAT or ICCPR and therefore commits a breach of its obligations under those treaties.

6.3.1.3 Subconclusion: the right to interim protection

The Court of Justice attaches great importance to the effectiveness of a judgment on the existence of the rights claimed under EU law. The national court should be able to grant interim relief if this is necessary to ensure this effective-

79 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 142.

80 The Court granted interim measures in at least 11 complaints against the Netherlands in Somalian cases.

81 By October 2007 the Court had applied Rule 39 in 22 cases where Tamils sought to prevent their removal to Sri Lanka from the United Kingdom. ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 21.

82 In a press release of 18 November 2008 the ECtHR announced that it indicated interim measures in 11 cases to the French Government in order to prevent removal to Afghanistan.

83 ECtHR (Adm) 2 December 2008, *K.R.S. v the United Kingdom*, no 32733/08 mentions that between 14 May 2008 and 16 September 2008, the acting President of the Fourth Section of the ECtHR applied Rule 39 in a total of eighty cases.

84 ComAT 24 May 2005, *Maftoud Brada v France*, no 195/2002, para 7.7. See also Annual Report of the ComAT 2006, A/61/44, para 61, which states that 'a complaint must have a substantial likelihood of success on the merits for it to be concluded that the alleged victim would suffer irreparable harm in the event of his or her deportation.'

85 See for example HRC 15 May 2003, *Weiss v Austria*, no 1086/2002, HRC 15 June 2004, *Ahani v Canada*, no 1051/2002.

86 ECtHR (GC) 4 February 2005, *Mamatkulov and Askarov v Turkey*, nos. 46827/99 and 46951/99.

87 ComAT 24 May 2005, *Maftoud Brada v France*, no 195/2002 and ComAT 29 May 2007, *Elif Pelit v Azerbaijan*, no 281/2005.

88 HRC 15 May 2003, *Weiss v Austria*, no 1086/2002, HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, paras 8.1-8.2.

ness, even if the court does not have the power to grant interim relief under national law. Whether interim relief should be considered necessary depends on the nature of the case lying before the court. Furthermore the Court accepted that under strict conditions the national court may grant an interim measure which involves the (temporary) disapplication of EU legislation. EU legislation may further not prevent a national court from granting interim relief, if this is necessary to ensure the effectiveness of its judgment.

In cases concerning the expulsion of EU citizens the general rule is that the EU citizens should be allowed to await the decision on the appeal against the expulsion measure or his request for interim relief on the territory of the Member State. Article 31 of Directive 2004/38/EC as well as the Court of Justice allow under certain conditions that EU citizens are expelled before the decision on the appeal regarding the expulsion measure has been taken. Apparently it is accepted that the expulsion of an EU citizen while the remedy against the expulsion measure is still pending, does not automatically render this remedy ineffective. The Court seems to be of the opinion that the person concerned can pursue the proceedings from abroad.

It follows from the case-law of the ECtHR and the views of the Human Rights Committee, the Committee against Torture and UNHCR that the Court of Justice's approach should be different in asylum cases than in cases concerning the expulsion of EU citizens. It follows from the ECtHR's case-law as well as the views of the Human Rights Committee, the Committee against Torture and UNHCR that a remedy before a national authority cannot be considered effective if the expulsion of an asylum seeker takes place before the final decision of this authority, mainly because this expulsion may lead to irreparable harm.⁸⁹ The need for interim protection in cases in which a risk of *refoulement* is claimed is also underlined by the fact that the ECtHR, the Human Rights Committee and the Committee against Torture deemed it necessary to grant requests for interim measures in many expulsion and extradition cases in order to protect the applicant against irreparable harm and to ensure the effectiveness of their judgment or view.

The ECtHR's case-law and the views of the UN Committees also indicate that the effectiveness of the judgment on the expulsion measure against an asylum seeker can never be ensured if expulsion takes place prior to this judgment, even if no arguable claim is present. In *Sultani* the ECtHR stated in general terms that a remedy without suspensive effect cannot be regarded as effective. Moreover the Committee against Torture and Human Rights Committee did not limit their recommendation to attach (automatic) suspensive effect to remedies against expulsion orders to *arguable claims*. The reason for this may be that the applicant is not able to effectively proceed the appeal procedure from the country to which he has been expelled.

89 It is much less likely that the expulsion of an EU citizen during appeal proceedings will lead to irreparable harm.

It should be reiterated that the EU right to an effective remedy guaranteed by Article 39 PD applies to all asylum cases, including asylum applications deemed inadmissible or manifestly unfounded.⁹⁰ It is therefore conceivable that also the obligation to provide for a remedy with automatic suspensive effect applies in all asylum cases.

The next section will examine whether a specific form of interim protection is required under EU law. Article 13 ECHR requires a remedy with *automatic suspensive effect*. Does that mean that the appeal itself must automatically suspend the expulsion of the asylum seeker? Or could a system in which the asylum seeker can request interim relief and is allowed to remain in the country until the decision on this request is taken by the national authority, also be sufficient? And how should interim protection be guaranteed? Does it need to be provided by law or do practical arrangements suffice?

6.3.2 The meaning of automatic suspensive effect

Interim protection can be provided in a national legal order in several ways. Two important characteristics of the national system determine the level of protection offered to an asylum seeker. The first is whether the lodging of the appeal in itself has suspensive effect or whether the asylum seeker has to apply to the national court for interim relief. A system in which national law provides for an appeal against an asylum decision, which automatically suspends the expulsion decision, offers most guarantees. Potentially less protection is offered by a system in which interim relief may be granted on request by the national court, while the mere fact that such a request has been lodged suspends the expulsion decision. Often the judge deciding on the request for interim relief does not perform a test of the risk of *refoulement* which is as rigorous as the test performed in the appeal, time-limits are shorter and the applicants has fewer procedural rights. Article 39 (3) PD refers to both systems mentioned above.

Even fewer guarantees are offered by a system in which the asylum seeker is not protected against expulsion while the request for interim relief is pending. It follows from the ECtHR's judgment in *Gebremedhin v France* that such a system violates the (EU) right to an effective remedy.

The second characteristic of the national system which determines the level of protection offered to an asylum seeker relates to the way in which interim protection is provided. If national authorities have only agreed in practice to await the decision on the request for interim relief, this offers fewer guarantees than where the suspensive effect of such request is provided for by law. The question is what level of protection is required in asylum cases by EU law.

⁹⁰ See also section 4.3.2.

In order to answer this question the case-law by the Court of Justice and the ECtHR will be examined in this section. The Human Rights Committee and the Committee against Torture have not addressed this question.

6.3.2.1 *The Court of Justice's case-law*

It cannot be derived from the Court of Justice's case-law whether in asylum cases Member States are required to attach suspensive effect to the appeal itself or whether they may demand from the applicant to lodge a request for interim relief. The judgment of the Court of Justice in *Dörr and Ünal* does seem to imply that, according to the Court, an appeal with automatic suspensive effect provides for more protection than a system in which interim relief should be requested. It held that the safeguard of the right of appeal with suspensive effect guaranteed by Article 9 of Directive 64/221/EEC in cases of expulsion of EU citizens, required – in principle – automatic suspensive effect:

In order to be regarded as having a suspensory effect in terms of that article, the appeal available to persons covered by Directive 64/221 must have an automatic suspensory effect. It is not sufficient for the court having jurisdiction to have the authority, upon application by the person concerned and under certain conditions, to stay implementation of the decision ending that person's residence. The assertion by the Austrian Government that suspension of such a decision may in fact be obtained as a matter of course from the Austrian courts is not such as to vitiate that conclusion.⁹¹

As was pointed out in section 6.3.1.1 the Court of Justice did allow that no automatic suspensive effect was attached to the appeal if an opinion had been obtained from a competent authority in the meaning of Article 9 of the Directive 64/221/EEC or in cases of urgency.⁹²

Article 31 of Directive 2004/38/EC, which replaced Directive 64/221/EEC, does not guarantee a remedy with suspensive effect in cases of expulsion of EU citizens. It does provide that, if the appeal against an expulsion decision is accompanied by a request for application for an interim order to suspend enforcement of this decision, no removal from the territory may take place until the decision on this application has been taken. The request for application of interim relief thus needs to have suspensive effect.

⁹¹ Case C-136/03, *Dörr and Ünal* [2005], para 51. Austrian law stated that the Verfassungsgerichtshof shall, at the request of the appellant, grant suspensory effect by order in so far as this is not precluded by overriding public interests and, following consideration of all the affected interests, the enforcement or exercise by a third party of the right granted by the decision would involve disproportionate detriment to the appellant. See para 23 of the judgment.

⁹² Case C-136/03, *Dörr and Ünal* [2005], paras 48-51 and 55.

6.3.2.2 Obligations stemming from the ECHR

The term ‘automatic suspensive effect’ suggests that suspensive effect should be attached to the appeal against the asylum or expulsion decision. However the ECtHR’s case-law seems to indicate that the Court is of the opinion that a system in which automatic suspensive effect is attached to the applicant’s request for interim relief (suspension of the expulsion decision) is also allowed under Article 13 ECHR.⁹³ In *Grebmedhin v France*, the Court not only examined whether the appeal, but also whether the possibility of requesting the administrative court for interim relief could be regarded as an effective remedy. This would have been unnecessary if Article 13 could only be complied with if the appeal itself had automatic suspensive effect. Likewise in *M.S.S. v Belgium and Greece* the ECtHR examined the effectiveness of the Belgian extremely urgent procedure in which the applicant could have applied for a stay of execution of the order to leave the country.⁹⁴

In *M.S.S. v Belgium and Greece* the ECtHR made clear that the judge who is examining the request for interim relief should apply close and rigorous scrutiny to the claim of a risk of *refoulement*. Furthermore it showed that important procedural rights such as the rights of the defence should be respected in such procedure and that the burden to prove the need to suspend the expulsion decision may not be set too high. The ECtHR considered that

the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure, that is, without regard being had to the requirements concerning the scope of the scrutiny. The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible.⁹⁵

⁹³ The judgment in ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08 seems to indicate that the ECtHR requires that the appeal itself has automatic suspensive effect. The ECtHR concluded in para 108 that Art 13 was violated ‘since an application for annulment of a deportation order does not have suspensive effect, unless the administrative court specifically orders a stay of execution of that order’. Peers and Rogers write that if a system of separate applications (one for appeal and one for interim relief) is compatible at all with the ECHR ‘it must confer a fully automatic suspensive effect immediately following an application’. Peers & Rogers 2006, p 408.

⁹⁴ ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 386-396. See for the procedure paras 138-140 of the judgment. Also in ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 154, arguments can be found which support the opinion that such systems suffice. The Court concluded that the applicant was provided with an effective remedy as regards the manner in which his expulsion was to be carried out, although the objection which the applicant lodged did not automatically suspend that expulsion. However, he was able to apply to the provisional-measures judge requesting the expulsion be stayed pending a decision on his objection. This judge ruled that the expulsion would not be in breach of Art 3 ECHR.

⁹⁵ ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 387-388. See further with regard to the standard of judicial review Chapter 9.

The Belgian extremely urgent procedure did not comply with the requirements of Article 13 ECHR because it reduced the rights of the defence and the examination of the case to a minimum. According to the ECtHR the examination of the complaints under Article 3 carried out by the Aliens Appeals Board in the extremely urgent procedure was not thorough. The Alien Appeals Board limited its examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3. According to the ECtHR it thereby increased the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation.⁹⁶ It follows from this judgment that Member States cannot circumvent the requirement of a rigorous scrutiny and other important procedural safeguards, by choosing for a system in which interim relief should be requested, instead of an appeal with automatic suspensive effect. Furthermore the ECtHR's judgment in *I.M. v France* makes clear that short time-limits for preparing a remedy and receiving legal and linguistic assistance may seriously affect the accessibility of this remedy.⁹⁷ If the applicant is expected to lodge a fully substantiated request for interim relief within a very short period of time this would thus be problematic under Article 13 ECHR.

Furthermore it follows from the fact that the requirements of Article 13 take the form of a guarantee and not of a mere statement of intent or a practical arrangement that suspensive effect of a remedy must be provided for by law or other clear rules. Practical arrangements with regard to interim protection in asylum cases are thus not sufficient.⁹⁸ In *Čonka v Belgium* the ECtHR held that the extremely urgent procedure before the *Conseil d'Etat*, which existed in Belgium before 2006 did not comply with Article 13 ECHR, because it was not guaranteed in fact and in law that an application for interim relief would suspend the enforcement of the expulsion measure. A few factors lead to this conclusion. First of all the authorities were not required to stay the deportation while an application under the extremely urgent procedure was pending, not even for a minimum reasonable period to enable the Council of State to decide on the application. Further, in practice it was up to the Council of State to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly. However, the Council of State did not appear to be obliged to do so. Lastly, it was merely on the basis of internal directions that the registrar of the Council of State, acting on the instructions of a judge, contacted the authorities for that purpose, and there was no indication of what the consequences might be should he omit to do so. Ultimately, the alien had no guarantee that the Council of State and the authorities would comply in every case with that practice, that the Council of State would deliver

96 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 389-390.

97 ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 150.

98 ECtHR 5 February 2002, *Čonka v Belgium*, no 51564/99, para 83.

its decision, or even hear the case, before his expulsion, or that the authorities would allow a minimum reasonable period of grace.⁹⁹

6.3.2.3 Subconclusion: the meaning of automatic suspensive effect

On the basis of the Court of Justice's and the ECtHR's case-law it is conceivable that Article 39 (3) PD read in the light of the EU right to an effective remedy allows for two systems. The first is a system in which the remedy mentioned in Article 39 (1) PD itself has suspensive effect. This option generally offers most protection and would be in line with the Court of Justice's interpretation of the term remedy with 'suspensory effect' in *Dörr and Ünal*.

The second system entails that a national system in which provisional measures may be taken by national courts on request. Such a system is only compatible with Article 39 (3) PD if the fact that the asylum applicant must apply separately for interim protection does not put up hurdles which render the exercise of the EU right to an effective remedy virtually impossible or excessively difficult. Furthermore it may be derived from the ECtHR's case-law that the following important procedural guarantees must be put in place:

- this request has automatic suspensive effect
- sufficient time is offered to the applicant to prepare the request for interim relief, if necessary with the help of a lawyer and/or interpreter
- the burden to prove the need to suspend the expulsion decision is not set too high
- the judge deciding on the request performs close and rigorous scrutiny of the claim of a risk of *refoulement*.

Giving the Member States the opportunity to choose between those two systems would be respectful of the procedural autonomy of the Member States. However, given the fact that both systems should offer similar procedural guarantees, a system in which interim relief is granted on request does not seem to enable Member States to process asylum cases much more expeditiously than a system in which the appeal has automatic suspensive effect.

On the basis of the ECtHR's judgment in *Čonka v Belgium* it is contended that Article 39 (3) PD requires that Member States provide for clear entitlements regarding interim protection. Practical arrangements which allow asylum applicants to await the appeal in the territory of the receiving Member State do not provide sufficient guarantees.

⁹⁹ ECtHR 5 February 2002, *Čonka v Belgium*, no 51564/99, para 83. See also ECtHR 7 June 2011, *R.U. v Greece*, no 2237/08, para 77.

6.4 SYNTHESIS OF FINDINGS

The effectiveness of the EU prohibition of *refoulement* would be seriously undermined if an asylum applicant is expelled or extradited before he has had the opportunity to have his asylum claim closely and rigorously assessed by the determining authority as well as the national court or tribunal. Early expulsion could result in the asylum applicant being subjected to irreparable harm (persecution or serious harm). Furthermore expulsion during the appeal proceedings will render the judgment of the national court concerning the existence of an EU right to be protected against *refoulement* or a right to asylum ineffective. Therefore the asylum applicant should be allowed to remain on the territory of the Member State:

- Until the determining authority in first instance has carried out a close and rigorous assessment of the asylum claim.¹⁰⁰ This means that in practice the possibility to derogate from the right to remain during first instance asylum proceedings provided for in Article 7 (2) PD can only be applied in exceptional circumstances.
- For the time necessary to avail himself of the effective remedy before a court or tribunal in the meaning of Article 39 (1) PD. Access to this remedy may not be blocked as a result of the swift expulsion of the asylum applicant after the negative asylum decision. The applicant should be informed of the imminent expulsion in time, leaving him sufficient opportunity to consult his lawyer.¹⁰¹
- During the course of the appeal proceedings, until rigorous scrutiny of the claim of a risk of *refoulement* has been performed by the court or tribunal.

Specifically with regard to the right to interim protection during the appeal proceedings the following conclusions should be drawn:

- It should be considered very unlikely that Article 39 (3) PD will be declared invalid by the Court of Justice because of violation of the EU right to effective judicial protection, as this provision expressly requires national legislation concerning interim protection to be in accordance with international law.¹⁰²
- It follows from the case-law of the Court of Justice and the ECtHR as well as the views of the UN Committees that a remedy cannot be considered effective when irreparable harm may be done before the final judgment has been reached. In asylum cases expulsion of the asylum seeker before

¹⁰⁰ See ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, para 205 and ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 286 and 293.

¹⁰¹ Case 98/79, *Pecastaing* [1980], para 4, and ECtHR 12 April 2005, *Shamayev and others v Georgia and Russia*, no 36378/02, paras 460-461.

¹⁰² See also section 2.4.1.

the court has reached a final judgment against the expulsion order or negative asylum decision may lead to such irreparable harm.¹⁰³ The remedy is also rendered ineffective by the real chance that asylum applicants who are expelled to their country of origin lose contact with their lawyers and disappear or face difficulties substantiating their case. Granting interim protection against expulsion during the proceedings before the court is therefore essential.

- Article 39 (3) PD, read in the light of the EU right to an effective remedy, thus requires that interim protection against expulsion be granted *in all asylum cases*, including for example manifestly unfounded cases.

As to the required form of interim protection it was concluded that:

- Article 39 PD read in the light of the EU right to an effective remedy requires that automatic suspensive effect be attached to either the appeal itself or to a request for interim relief.¹⁰⁴
- It follows from the ECtHR's judgment in *M.S.S. v Belgium and Greece* that the procedure in which interim relief may be granted by the national court or tribunal on request, can only be considered an effective remedy if it complies with important procedural guarantees. These include the rights of the defence, a reasonable burden of proof and a rigorous scrutiny of a claim of a risk of *refoulement*.¹⁰⁵
- Article 39 (3) PD, read in the light of the EU right to an effective remedy, requires that Member States provide for clear entitlements regarding interim protection. Practical arrangements which allow asylum applicants to await the appeal in the territory of the receiving Member State do not suffice.¹⁰⁶

103 See notably Case C-213/89, *Factortame* [1990], paras 20-21, ECtHR 26 April 2007, *Gebremedhin v France*, no 25389/05, para 66, ComAT 24 May 2005, *Mafloud Brada v France*, no 195/2002, para 7.7 and HRC 15 May 2003, *Weiss v Austria*, no 1086/2002, para 8.2.

104 This may be derived from the fact that the ECtHR assessed in *Gebremedhin v France* and *M.S.S. v Belgium and Greece* whether the request for interim relief had automatic suspensive effect.

105 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 387-388.

106 ECtHR 5 February 2002, *Čonka v Belgium*, no 51564/99, para 83.

7 | The asylum applicant's right to be heard on his asylum motives

The asylum applicant should be allowed to remain in the territory of the Member State until his asylum claim has been closely and rigorously assessed, in order to effectively guarantee the prohibition of *refoulement*. At the same time a rigorous assessment of the asylum claim is not possible without the presence of the asylum applicant in the Member State. The statements of the asylum applicant play an essential role in the assessment whether he runs a risk of *refoulement* upon return to his country of origin. This is due to the fact that in many asylum cases there is a lack of documentary evidence supporting the asylum claim. The assessment of the credibility of the applicant's asylum account is often decisive for the outcome of the case.¹ It is therefore crucial that claimants are offered sufficient opportunity to present their case to the determining authorities. For this purpose a personal interview is often indispensable. Furthermore it may be considered necessary that the applicant is able to respond to allegations against him and the evidence underlying the (concept) asylum decision.

In Chapter 9 it will be argued that the judicial review required by Article 39 PD must cover the establishment and qualification of the facts. In this light it is relevant to examine whether EU law also demands that the national courts hear the applicant and/or his legal representative at a public hearing.

This chapter addresses the EU standards with regard to the asylum applicant's right to be personally heard on his asylum motives in first instance and appeal proceedings.

The right to a personal interview

It is generally recognised that asylum applicants should have the right to a personal interview. The Commission stated for example that since the right to a personal interview is a basic procedural safeguard, the very possibility of taking a decision without interviewing an applicant makes procedures vulnerable to error and consequent *refoulement*.² Furthermore, given the weight

¹ See also Chapter 8.

² Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM(2009) 554, SEC(2009) 1377, of 21 October 2009, p 13. See also Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ 19 September 1996, C 274, para 14, which provides

of the applicant's statements, it is considered of utmost importance that this interview is conducted in a profound, patient and objective manner³ and in a language which the applicant understands.⁴ In 2009 the Commission pointed at the fact that due to the circumstances of the interview in some cases information collected in a personal interview is clearly insufficient to correctly apply the provisions of the Qualification Directive.⁵ Finally the asylum applicant's statements should be carefully recorded in a report as it is on the basis of this report that the asylum decision is taken.⁶

The Procedures Directive allows for a number of exceptions to the right to a personal interview. It is to a large extent silent on the required conditions of the personal interview. The Court of Justice has not addressed the right to a personal interview or the right to be heard during asylum proceedings yet. This chapter contends mainly on the basis of the ECtHR's case-law and non-binding sources of inspiration that the EU right to be heard and the full effectiveness of the principle of *non-refoulement* set additional standards to those laid down in the Procedures Directive. In section 7.1. it is argued on the basis of these principles that a personal interview may only be omitted in exceptional circumstances. Section 7.2. discusses the requirements as to the way the interview is conducted.

The right to be heard following the personal interview

The Procedures Directive does not require Member States to offer the asylum applicant the opportunity to comment on the contents of the report of the interview and to respond to the determining authority's conclusions as to the fact-finding and the assessment of the risk of *refoulement*. Section 7.3. addresses the applicant's right to be heard following the personal interview. It examines in particular whether the applicant has the right to comment on the report

that, before a final decision is taken on the asylum application, the asylum-seeker must be given the opportunity of a personal interview with an official qualified under national law.

- 3 See Doornbos 2005, p 104. See also Commission Staff Working Document COM(2009) 554, SEC(2009) 1377, p 13, where it is stated that the awareness of the applicant about the purpose of the interview, the preparedness of the personnel, and the content of and conditions in which the interview takes place may be decisive for the outcomes of the examination.
- 4 See for example UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, March 2010, s 4, p 9.
- 5 It stated that the length of interviews varies significantly between Member States (from 0,5 hour to 3 hours) and that in the UK, a quality control audit found that in about 13 % of 1,085 cases sampled applicants were refused asylum based on decisions and/or interviews that were rated as poor or not fully effective. Furthermore legal advisors indicated that factual mistakes or misunderstandings are common in the reports of interviews having direct impacts on the outcomes of the examination. Commission Staff Working Document, COM(2009) 554, SEC(2009) 1377, p 13.
- 6 See also UNHCR, *Improving Asylum Procedures*, s 6, p 1.

of the interview and on the conclusions of the determining authority concerning the merits of the asylum claim.

The right to be heard by the national court

Does EU law require that the asylum applicant and/or his legal representative be heard by the court during a public hearing, or may the appeal against the asylum decision in the meaning of Article 39 PD also be decided on the basis of written documents only? As case-law of the EU Courts on this issue is (almost) non-existent, this question will be addressed in this chapter mainly on the basis of the ECtHR's case-law regarding Article 6 ECHR, which incorporates the right to an oral hearing before a court. It is contended that an oral hearing of the asylum applicant before the court can only be omitted in exceptional circumstances, given the fact that the credibility of the asylum applicant's account and the applicant's personal fear for persecution or serious harm are generally crucial for the asylum decision and the fundamental rights at stake for the applicant.

7.1 THE RIGHT TO A PERSONAL INTERVIEW IN FIRST INSTANCE PROCEEDINGS

The Procedure Directive as a general rule provides for a right to a personal interview in all asylum cases including those assessed in border procedures.⁷ However the Directive allows Member States to omit an interview on several grounds in the asylum procedure. The absence of a personal interview in asylum cases may limit the applicant's ability to substantiate his asylum claim.⁸ Article 12 (4) PD states that the absence of a personal interview in accordance with Article 12 PD shall not prevent the determining authority from taking a decision on an application for asylum. Some applicants may thus only get the opportunity to submit written information to substantiate their asylum claim.

The first ground for making an exception to the right to a personal interview is that the determining authority is able to take a positive decision on the basis of the evidence available.⁹ The absence of an interview in such cases may prove problematic if the asylum status is withdrawn in a later stage. In cases of withdrawal of an asylum status a personal interview is not obligatory. The person concerned may also only be given the opportunity to submit the reasons as to why his/her refugee status should not be withdrawn in a written

⁷ See Art 12 PD in normal asylum cases and Art 35 (3) (d) PD in border procedures.

⁸ The fact that Art 12 (5) PD provides that the absence of a personal interview pursuant to Art 12 (2) (b) and (c) and (3) shall not adversely affect the decision of the determining authority, does not prevent that. Costello states that if the apparent discretion afforded by Art 12 of the directive were exploited by decision-makers, it would lead to *refoulement*. Costello 2006, p 24.

⁹ Art 12 (2) (a) PD.

statement.¹⁰ It is thus possible that an asylum status is granted and withdrawn, while the asylum applicant has not been given the opportunity to explain his asylum motives in an interview.

Secondly Member States may refrain from conducting a personal interview, if the competent authority has already had a meeting with the applicant for the purpose of assisting him with completing his application and submitting the essential information regarding the application.¹¹ Thirdly an interview may be omitted if the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded where certain circumstances apply which may also be reason to accelerate the procedure. The applicant:

- only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee;
- is considered to be from a safe country of origin;
- can be returned to a safe third country;
- has made inconsistent, contradictory, improbable or insufficient representations;
- has submitted a subsequent application which does not raise any relevant new elements or;
- is making an application merely in order to delay or frustrate his removal.¹²

According to Article 34 (2)(c) PD the preliminary examination in subsequent asylum applications may be conducted on the sole basis of written submissions without a personal interview.

The fourth ground to omit a personal interview is that the interview is not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control.¹³ In that situation reasonable efforts shall be made to allow the applicant or the dependant to submit further information. Finally the Member States have discretion to omit an interview in the case of dependent adults and minors. The right to an interview of these two groups will be addressed separately in sections 7.1.1 and 7.1.2.

According to information of the Commission of 2009, ten Member States have provided for a possibility to derogate from the right to a personal inter-

¹⁰ Art 38 (1) (b) PD.

¹¹ Art 12 (2) (b) PD.

¹² Art 12 (2) (c) jo Art 23(4)(a), (c), (g), (h) and (j) PD.

¹³ Art 12 (3) PD states that when in doubt, Member States may require a medical or psychological certificate.

view in asylum cases in their national legislation.¹⁴ Also UNHCR mentions in its report of 2010 concerning the implementation of the Procedures Directive that several of the Member States surveyed allow that a personal interview be omitted in specific cases.¹⁵ Slovenia for example usually omits a personal interview when an asylum application is assessed in the accelerated procedure.¹⁶ In France a personal interview may be omitted amongst others in cases in which the asylum applicant is a national of a country to which Article 1C of the Refugee Convention applies, where the elements underlying the asylum claim are manifestly unfounded or where medical reasons prevent the interview.¹⁷

The question should be raised whether the absence of a personal interview undermines the effectiveness of the right to asylum or the principle of *non-refoulement*. The Court of Justice has not addressed this issue yet. As the right to a personal interview is the general rule, it may be expected that the Court will interpret the exceptions allowed to the right of a personal interview restrictively and in the light of the principle of effectiveness.¹⁸

The right to an interview should be considered essential to ensure an appropriate examination of a claim of *refoulement* in the meaning of Article 8 (2) PD and therefore for the effective exercise of the right to asylum or the prohibition of *refoulement* for the following reasons. It will be shown in Chapter 8 that EU law requires that the claim of *refoulement* be assessed on an individual basis and be subjected to rigorous scrutiny. This means that claimants must be able to submit relevant information and to substantiate their claim of *refoulement*. In exceptional cases it may be possible to do so by submitting written statements and evidence only. This may for example be the case where the asylum applicant has submitted only that he fears for serious harm as a result of the general human rights situation in his country of origin. Such a case may be decided on the basis of country of origin information provided by governments, UN bodies or NGO's. However, generally the asylum applicant himself will be the most important source of information, at least with regard to the personal risk of persecution or serious harm. This is particularly the case when this person does not have sufficient evidence supporting his claim. Furthermore, as is recognised in Article 4 (3) QD the individual position and personal circumstances of the applicant, including factors such as background

14 Commission Staff Working Document, COM(2009) 554, SEC(2009) 1377, p 13. According to the Commission up to 111 650 applicants (40 % of the total asylum applicants' population) might be potentially targeted by this derogation. See also Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final, p 6.

15 UNHCR mentions Finland, France, Greece, Slovenia and the United Kingdom. UNHCR, *Improving Asylum Procedures*, s 4, pp 33-39

16 UNHCR, *Improving Asylum Procedures*, s 4, p 6 and s 9 p 27.

17 UNHCR, *Improving Asylum Procedures*, s 4, p 37, s 9, p 25.

18 See for example Case C-578/08, *Chakroun* [2010], para 43.

and gender should be taken into account in the assessment whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm. This information is best obtained by a personal interview of the person concerned. Moreover an interview is necessary to test the credibility of the applicant's account. As was stated in the explanations with the amended proposal for the Procedures Directive:

Since in most if not all asylum cases the determining authorities must assess the credibility of statements and/or of the applicant on the basis of all available facts, it is imperative for a proper assessment that applicants have, as much as possible, the opportunity to bring these forward in a personal manner, i.e. in an interview.¹⁹

Finally a personal interview may be necessary to allow the applicant to exercise his EU right to be heard. The applicant may for example clarify any alleged discrepancies, inconsistencies or omissions in an initial written or oral account,²⁰ give his view on evidence relied on by the determining authorities or rebut the presumption of safety of his country of origin or a third country.²¹

A meeting as mentioned in Article 12 (2) (b) PD should not be considered an appropriate alternative for a personal interview. This meeting serves to assist the applicant with completing his application and to submit the essential information regarding the application mentioned in Article 4 (2) QD. Battjes noted that this meeting does not address the assessment of the applicant's credibility. The interview allows the applicant to present the grounds for their applications in a comprehensive manner and the determining authority to assess the credibility of the asylum account.²²

Obligations stemming from the ECHR, the CAT and the Refugee Convention

The ECtHR has stressed the importance of the personal interview in several asylum cases. The ECtHR attaches much weight to the assessment of the credibility of the applicant's asylum account by an authority who heard the applicant in person. In *R.C. v Sweden* the ECtHR held that as a general principle the national authorities are best placed to assess not just the facts, but, more particularly, the credibility of witnesses 'since it is they who have had an opportunity to see, hear and assess the demeanour of the person concerned'.²³

¹⁹ Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 18 June 2002, COM (2002) 326 final, pp 7-8.

²⁰ Costello 2006, p 24. See also UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 109.

²¹ Battjes 2006, p 313.

²² See Art 13 (3) PD. See also Battjes 2006, p 313.

²³ ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 52.

In *E.G. v the United Kingdom* the Secretary of State had in a subsequent asylum procedure disregarded the fact that the Adjudicator had accepted in the first asylum procedure that the applicant had been detained and ill-treated in the past. The ECtHR considered: 'It is unfortunate, in the Court's view, that the Secretary of State did not consider the findings of the Adjudicator who had had the opportunity to see the applicant give evidence in person.' As a result the Secretary of State did not take into account an important risk factor in this case.²⁴ In cases in which the national authorities failed to assess the asylum claim of the applicant and thus to conduct a personal interview, the ECtHR relied heavily on the opinion of UNHCR. It stressed that UNHCR interviewed the person concerned and thus had the opportunity to test the credibility of his fears and the veracity of his account of the circumstances in her home country.²⁵

When assessing the quality of the national decision-making process the Court takes into account that the applicant was interviewed by the national authorities or was granted 'ample opportunity to state his case and to submit whatever he found relevant for the outcome'.²⁶ On the other hand in *Charahili v Turkey* the Court referred to the fact that the Turkish Government failed to submit any document to the Court demonstrating that the applicant had been interviewed in relation to his asylum request.²⁷ In *I.M. v France* the ECtHR took into account when assessing the quality of the French accelerated procedure that the personal interview with the applicant only lasted half an hour. The ECtHR noted in this context that it concerned a first asylum application.²⁸

The significance of the personal interview is also recognised in several non-binding views of human rights bodies. In its Concluding Observations on France of 2006, the Committee against Torture recommended for example

that the situations covered by article 3 of the Convention should be the subject of a more thorough risk assessment in accordance with the provisions of article 3,

²⁴ ECtHR 31 May 2011, *E.G. v the United Kingdom*, no 41178/08, para 72.

²⁵ See for example ECtHR 15 June 2010, *M.B. and others v Turkey*, no 36009/08, para 33, ECtHR 15 June 2010, *Ahmadpour v Turkey*, no 12717/08, para 39, ECtHR 13 April 2010, *Charahili v Turkey*, no 46605/07, para 59, ECtHR 19 January 2010, *Z.N.S. v Turkey*, no 21896/08, para 48, ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 82.

²⁶ See for example ECHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02, ECtHR (Adm) 24 June 2004, *Kandomabadi v the Netherlands*, no 6276/03, ECtHR (Adm) 1 October 2002, *Tekdemir v the Netherlands*, nos 46860/99 and 49823/99.

²⁷ ECtHR 13 April 2010, *Charahili v Turkey*, no 46605/07, para 57, See also ECtHR 15 June 2010, *Ahmadpour v Turkey*, no 12717/08, para 38, where the Court considered that 'there is nothing in the case file which shows that the applicant was actually interviewed and that the national authorities indeed examined her request, taking into account the requirements of Article 3 of the Convention'.

²⁸ ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 155.

including by systematically holding individual interviews to better assess the personal risk to the applicant, and by providing free interpretation services.²⁹

Both the Committee of Ministers and the Parliamentary Assembly of the Council of Europe have recommended the governments of the Member States of the Council of Europe to ensure the right of all asylum applicants to a personal interview when accelerated procedures are applied.³⁰ Finally UNHCR EXCOM conclusion No 30 requires a complete personal interview by a fully qualified official in cases deemed manifestly unfounded or abusive.³¹ UNHCR states in its Handbook that basic information, frequently given, in the first instance, by completing a standard questionnaire, will normally not be sufficient to enable the examiner to reach a decision, and that one or more personal interviews will be required.³²

Subconclusion: the right to a personal interview

Article 12 PD read in the light of the principle of effectiveness as well as the right to be heard requires in principle that a personal interview is held in each first asylum procedure. It precludes that whole categories of cases are excluded from a right to a personal interview on the basis of the possibilities for derogation mentioned in this article. The absence of a personal interview is only justified in exceptional cases, where it is established that this absence does not make it impossible for the claimant to substantiate his case and for the examining authorities to take a careful decision. Where the interview is omitted, the examining authorities should ensure that sufficient information is gathered to accurately assess the risk of *refoulement*, in particular when the person concerned is not able to be interviewed because of his mental situation.

7.1.1 Dependent adults

If Member States provide that an application may be made by an applicant on behalf of his/her dependants,³³ they may give the opportunity of a per-

²⁹ ComAT Concluding Observations on France, 3 April 2006, CAT/C/FRA/CO/3, para 6.

³⁰ Committee of Ministers of the Council of Europe, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, under IV 1.d and Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, para 8.10.2.

³¹ EXCOM Conclusion no 30 (XXXIV), 1983, on the problem of manifestly unfounded or abusive applications for refugee status or asylum.

³² UNHCR Handbook, para 199.

³³ See Art 6 (3) PD. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

sonal interview to each dependant adult, but are not obliged to do so.³⁴ Persons (mostly women), on whose behalf an asylum application is made by another person, may have independent asylum motives. If an interview of these persons is omitted, there is a risk that these motives will not come to the fore. The woman may be afraid to talk about her experiences, such as sexual abuse, to her husband or he may not want to mention those experiences to the determining authorities.³⁵ She may be willing to express her personal fear for persecution or serious harm in a confidential interview with the authorities.

The ECtHR and the UN Committees have not addressed the right to an interview of dependent adults specifically. UNHCR is of the opinion that the determining authority should meet with each dependant adult individually to ensure that they understand the grounds for protection and their procedural rights.³⁶ In order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process, women asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right.³⁷

It may thus be argued that the determining authorities should investigate whether the dependent adult has an independent claim of *refoulement*. This is best done during a personal meeting with the dependent adult without the presence of family members. Where an independent claim is present, the omission of a personal interview may undermine the effectiveness of the right to asylum or the prohibition of *refoulement*.

7.1.2 Accompanied and unaccompanied minor asylum applicants

Article 12 (1) PD leaves it to the discretion of the Member States to determine in which cases a minor shall be given the opportunity of a personal interview. This applies both to accompanied and unaccompanied minors.³⁸ Thus, even though in an asylum procedure an unaccompanied minor is often the most

34 According to the UNHCR report of 2010 there was an opportunity for adult dependants to have a personal interview in 10 of the 12 Member States of focus. UNHCR, *Improving Asylum Procedures*, s 4, p 16.

35 See for an example ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005.

36 UNHCR, *Improving Asylum Procedures*, s 4, p 15.

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

38 Art 17 PD on unaccompanied minors does not provide whether such a minor should get a personal interview, but does set out minimum standards in the case such an interview is conducted.

important source of information,³⁹ the Procedures Directive does not provide him with a right to a personal interview.

The Commission reported in 2010 that applications made by parents generally cover dependent minors. It mentions that in three Member States (Greece, the Netherlands and Germany), the right to lodge an application is recognised for minors of a certain age. Furthermore in a number of Member States a guardian or other representative is competent to lodge an application for an unaccompanied minor.⁴⁰

The asylum claim of an accompanied child will often be directly related to the claims of their parents or other accompanying family members. In such a case the parents may well be able to represent the child in the asylum procedure and to present their and their child's asylum motives in their personal interview. This may be different however if the accompanied child has independent asylum motives. It may for example fear for persecution because of its sexual orientation or religious beliefs. Furthermore it may fear child specific forms of persecution such as under-age recruitment, child trafficking, female genital mutilation, family and domestic violence, forced or underage marriage, bonded or hazardous child labour, forced labour, forced prostitution and child pornography.⁴¹ Potentially the child's parents are not aware of such independent asylum motives or are unwilling to mention them to the determining authorities. The child may for example conceal its homosexual feelings, because it fears to be disowned. Or the parents may be involved in practices such as forced marriage, female genital mutilation or forced labour. In such cases a personal interview with the child will be the only way for the determining authorities to be informed about his asylum motives.⁴² Furthermore even if the asylum claim of the child is directly related to the claim of his parents, it is possible that a child has important additional information which supports these asylum claims. The child may for example have personally experienced persecution or serious harm in his country or origin as a result of the political activities of his parent(s).

It is argued in this section that Article 12 PD read in the light of Article 24 of the Charter requires that each child which is sufficiently mature be informed

39 UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva 22 December 2009, para 70.

40 Commission Report COM (2010) 465 final, p 4.

41 See UNHCR EXCOM Conclusion no 107 (LVIII), 2007, para (g) (viii) and UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva 22 December 2009, para 18.

42 UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva 22 December 2009, para 70, which stated that 'A child's own account of his/her experience is often essential for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information'.

on the asylum process and in particular options to present its own asylum claim. This would also be in line with asylum seeker's right to information guaranteed by Article 10 (1) PD. If the child wants to be interviewed personally on his asylum motives he must be given this opportunity.

Article 12 PD and Article 24 of the Charter

Article 12 (1) PD should be read in the light of Article 24 (1) and (2) of the Charter and Article 12 CRC.⁴³ According to Article 24 (1) of the Charter children may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. Furthermore Article 24 (2) provides that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. The best interests principle is also mentioned in Article 17 (6) PD concerning the rights of unaccompanied minors.

The child's right to be heard according to the Court of Justice

The Court of Justice has made clear in *Aguirre Zarraga* that Article 24 of the Charter requires that a child be able to express its views in legal proceedings. However it must be assessed in each individual case how the right to be heard should be exercised, taking account of the age and maturity of the child as well as its best interests. This case concerned a child which illegally remained with her mother in Germany instead of with her father in Spain. According to EU law the German court was bound by the Spanish court's judgment which awarded the sole custody over the child to the Spanish father and ordered the return of the child to Spain.⁴⁴ One of the preliminary questions put before the Court of Justice was whether the German court should enforce the Spanish judgment even though the Spanish court had not heard the child's opinion on the case before rendering its judgment. In this context the Court of Justice considered that it is for the court which has to rule on the return of a child to assess whether an oral hearing of the child is appropriate. The Court noted that the conflicts which lead to child custody cases and the associated tensions

create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly,

⁴³ See also UNHCR, *Improving Asylum Procedures*, s 4, pp 19-20.

⁴⁴ Art 42 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L 338/1. This provision also states that the court deciding on the custody of the child should give the child an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights.⁴⁵

According to the Court of Justice it is not a necessary consequence of the right of the child to be heard that a hearing before the court of the Member State of origin take place. However that right does require that there are made available to that child the legal procedures and conditions which enable the child to express his or her views freely and that those views are obtained by the court.⁴⁶

Obligations stemming from the Convention on the Rights of the Child

Article 24 of the Charter is based on several provisions of the CRC, amongst others Article 12 CRC⁴⁷ which provides that the child 'shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'. Article 12 CRC applies, according to its text, to all judicial and administrative proceedings affecting the child, and thus also to asylum procedures.⁴⁸

The Committee on the Rights of the Child is of the opinion that Article 12 CRC requires that in the case of an asylum claim, 'the child must [...] have the opportunity to present her or his reasons leading to the asylum claim'.⁴⁹ It also stated with regard to unaccompanied and separated children that 'where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made'.⁵⁰ In order to be able to exercise its right to be heard the child must be informed on the asylum process.⁵¹ According to the Committee on the Rights of the Child there can be no correct application of the best interests

45 Case C-491/10 PPU, *Aguirre Zaraga* [2010], para 64.

46 Case C-491/10 PPU, *Aguirre Zaraga* [2010], para 65.

47 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/25.

48 Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, para 32 states that Art 12 'applies to all relevant judicial proceedings affecting the child, without limitation, including, for example [...] unaccompanied children, asylum-seeking and refugee children [...].'

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

50 Committee on the Rights of the Child, General Comment No 6 (2005), CRC/GC/2005/6, para 71. See also UNHCR, *Improving Asylum Procedures*, s 4, p 18.

51 Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, General Comment No 6 (2005), CRC/GC/2005/6, para 25.

of the child principle laid down in Article 3 CRC if the components of Article 12 are not respected.⁵²

Article 12 CRC applies to all minors capable of forming their own views, irrespective of their age.⁵³ The Committee on the Rights of the Child stated that States parties are obliged:

to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity.⁵⁴

The Committee points at the fact that children are able to form views from the youngest age, even when they are unable to express them verbally. It states that consequently, full implementation of Article 12 CRC 'requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences'.⁵⁵ Furthermore States parties are under the obligation to ensure the implementation of the right to be heard for children experiencing difficulties in making their views heard. For instance, efforts must be made 'to recognise the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language'.

According to the Committee on the Rights of the Child children should never be coerced into expressing views against their wishes.⁵⁶ If the child has decided to be heard, he or she will have to decide how to be heard, either directly, or through a representative or appropriate body. The representative can be the parent(s), a lawyer, or another person (inter alia, a social worker). The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.⁵⁷ The Committee emphasises that that a child should not be interviewed more often than necessary, in particular when harmful events are explored. According to the Com-

52 Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, para 74. See also UNHCR EXCOM Conclusion no 107 (LVIII), 2007, on Children at risk: 'States, UNHCR, and other relevant agencies and partners shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

53 See Art 12 (1) CRC and ComRC General Comment No 12 (2009), CRC/C/GC/12, para 21.

54 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 20.

55 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 21.

56 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 134 (b).

57 ComRC General Comment No 12 (2009), CRC/C/GC/12, paras 35-36.

mittee the hearing of a child is a difficult process that can have a traumatic impact on the child.⁵⁸

Subconclusion: minor's right to a personal interview

It should be concluded that Member States do not have full discretion when setting out rules regarding interviewing minors. It follows from Article 12 PD read in the light of Article 24 of the Charter which should in turn be interpreted in conformity with Article 12 CRC that each child must in some way be put in the position to present its asylum claim. For that purpose children should be informed on the asylum process in conformity with Article 10 (1) PD.

If the child is unaccompanied or if it has individual asylum motives or important information in support of his and his parents asylum claim, it should be decided whether the age and maturity of the child permits that the child is interviewed on its asylum motives. If this is the case the child should in principle be personally interviewed if it wishes so. However it should always be noted that an interview in an asylum procedure can be stressful for a child, as it may be asked to talk about traumatic events it experienced in its country of origin. Like in child abduction cases as *Aguirre Zarraga* it should therefore be assessed whether an asylum interview is inappropriate, or even harmful to the psychological health of the child. If interviewing the child would indeed be inappropriate or harmful the interview should be omitted. In analogy with Article 12 (3) PD then reasonable efforts shall be made to allow the child to submit further information, for example via his guardian or legal representative.

7.2 REQUIREMENTS AS TO THE CONDUCT OF THE INTERVIEW

According to Article 13 (2) PD personal interviews should take place under conditions which ensure appropriate confidentiality. Furthermore Article 13 (3) PD requires Member States to take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner.⁵⁹ Important guarantees in this regard are amongst others that the interview is conducted in a language which the person concerned understands or that he is assisted by an interpreter. Furthermore it is essential that the interviewer is competent and able to gain the trust of the applicant. The Procedures Directive does not guarantee these safeguards in all asylum cases. Therefore these issues will be addressed in this section. Other circumstances which also determine the quality of the interview, which will not be discussed in this section are the con-

⁵⁸ ComRC General Comment No 12 (2009), CRC/C/GC/12, para 24.

⁵⁹ This provision also applies to interviews in border procedures and in case the refugee status is withdrawn. See Artt 35 (3) (d) and 38 (1) (b) PD.

fidentiality of the interview, the time and assistance available for the asylum applicant to prepare for the interview, the environment in which the interview takes place and the time allocated for and duration of the personal interview.⁶⁰

In 2010 UNHCR pointed out that in several Member States the quality of the personal interviews was not guaranteed. It observed for example that in some Member States the confidentiality of the interview was not ensured⁶¹ and that interviews were conducted by officers who were not properly trained. Furthermore the UNHCR research revealed widespread misconduct involving interpreters in personal interviews, such as a lack of competence and impartiality. Finally UNHCR noted that in some Member States interviews may not take place in a language the applicant actually understands as a result of a shortage of interpreters in a certain language.⁶² Conditions such as those described by UNHCR may impede the applicant to fully present his asylum claim and thus undermine the effectiveness of the right to a personal interview.

7.2.1 Language of the interview

Article 13 (3) (b) PD states that communication during the personal interview need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he *may reasonably be supposed to understand* and in which he is able to communicate. According to UNHCR's research of 2010 most interviews were conducted in the mother-tongue of the applicant or in another language chosen by the applicant. However, in some cases the applicant was interviewed in a language he was supposed to, but did not actually understand, mostly as a result of a shortage of interpreters in particular languages.⁶³

It may be argued that the effectiveness of the right to a personal interview and consequently the right to asylum or the prohibition of *refoulement* are undermined when it is not ensured that the person concerned is actually able to explain his asylum motives or objections against transfer or expulsion in an interview.⁶⁴ It should be remembered that the credibility of the account of the person concerned is assessed on the basis of, often very detailed informa-

⁶⁰ UNHCR, *Improving Asylum Procedures*, s 5.

⁶¹ UNHCR states in its report of 2010 that it observed interviews in Greece, Spain and Italy which took place in conditions which breached Art 13 (2) PD. It occurred for example that three personal interviews were conducted simultaneously in one room. UNHCR, *Improving Asylum Procedures*, s 5, p 10. See also Commission Report COM (2010) 465 final, 2010, p 6.

⁶² UNHCR, *Improving Asylum Procedures*, s 5.

⁶³ UNHCR, *Improving Asylum Procedures*, s 5, p 45. See also Commission Report COM (2010) 465 final, p 7.

⁶⁴ Doornbos notes in her research that asylum applicants often hesitate to let the interviewer know that they do not understand the interviewer or the interpreter. Doornbos 2006, p 274.

tion, gathered during the interview. If a person does not understand exactly what the interviewer is asking him or is not able to respond to questions in detail, this may work to his detriment and lead to the conclusion that the account should be deemed not credible.

The Court of Justice, the ECtHR and the UN Committees have not addressed this issue. Both the Parliamentary Assembly of the Council of Europe and UNHCR stress that Member States must ensure the right of all asylum applicants to a personal interview in a language they understand.⁶⁵ UNHCR is of the opinion that an interview in the language the applicant understands is a prerequisite for a fair procedure and when it is not fulfilled any evidence gathered in the course of the personal interview may be unreliable.⁶⁶ Furthermore UNHCR stresses that there is a difference between the basic ability to make oneself understood in a language and the ability to present a complex account which may include difficult or painful events in that language.⁶⁷ UNHCR notes that assumptions that an asylum-seeker speaks or understands the official language of his or her country of origin may be incorrect. As a matter of principle, bearing in mind the need to prevent deliberate obstruction, every effort should be undertaken in this regard by the countries of asylum.⁶⁸

Arguably the principle of effectiveness thus requires Member States to ascertain that the person concerned is actually able to understand the language chosen for the interview and that he can express himself effectively in this language. If the claimant does not understand the interviewer, an interpreter should be used to facilitate communication. If such an interpreter is not available (for example because of the rareness of the language spoken by the claimant) the authorities should take this into account when examining the case and taking a decision on the credibility of the claimant's account.

7.2.2 The right to a free and competent interpreter

If the language chosen for the interview is not understood by the person concerned free interpretation services should be provided, in a language this person understands. This follows from Article 10 (1) (b) PD, which grants asylum applicants a right to an interpreter for submitting their case to the competent authorities whenever this is necessary.⁶⁹ According to this pro-

65 Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, para 8.10.2.

66 UNHCR, *Improving Asylum Procedures*, s 5, p 29.

67 UNHCR, *Improving Asylum Procedures*, s 5, p 44.

68 UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), p 13.

69 Note that this right also applies in border procedures in the meaning of Art 35 PD. See Art 35 (3) (c) PD.

vision Member States shall consider it necessary to give the services of an interpreter at least when the determining authority calls upon the applicant to be interviewed and appropriate communication cannot be ensured without such services. Interpreters used at the interview and in other cases where the competent authorities call upon the applicant, shall be paid for out of public funds.⁷⁰ Article 13 (3) (b) PD requires Member States to select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview.⁷¹ It may be derived from this provision that the Member States need to ensure that interpreters are competent⁷² and qualified and that the languages spoken by the interpreter are understood by the person who is interviewed and the interviewer.⁷³

UNHCR mentions in its report of 2010 that a number of Member States face shortages of interpreters in particular languages or in particular regional locations. This problem is sometimes solved by using interpreters in other Member States via a video-conference call.⁷⁴ UNHCR also states that in some Member States no specific professional qualifications are required for interpreters and that in the twelve Member States of focus the provision of training for interpreters is at best limited and in many cases non-existent.⁷⁵ Finally UNHCR's research revealed widespread misconduct involving interpreters in personal interviews, and serious shortcomings in the ability of interviewers to work effectively with or manage the conduct of interpreters.⁷⁶

The right to an interpreter is considered an important procedural safeguard in asylum proceedings by several sources of inspiration.⁷⁷ In *M.S.S. v Belgium and Greece* the ECtHR took into account a number of deficiencies in the Greek asylum procedure which together lead to a violation of Article 13 ECHR. One

70 See Art 10 (1) (b) PD. See also Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ 19 September 1996, C 274, pp 13-17, para 13.

71 See also recital 13 Preamble PD.

72 See also UNHCR, *Improving Asylum Procedures*, s 5, p 42. According to UNHCR the interviewer should confirm that the applicant and the interpreter understand each other and that the applicant is comfortable with the interpretation arrangement.

73 UNHCR understands the clause 'appropriate communication to also require that the interpreter possesses competent interpreting skills, is neutral in his interpretation, is impartial, does not provide any kind of supplementary information as a contribution to the case he is interpreting and does not provide procedural or legal advice to the applicant'. UNHCR, *Improving Asylum Procedures*, s 5, pp 28-29.

74 UNHCR, *Improving Asylum Procedures*, s 5, pp 32-33.

75 UNHCR, *Improving Asylum Procedures*, s 5, pp 35-36.

76 UNHCR, *Improving Asylum Procedures*, s 5, p 38. UNHCR mentions examples on pp 38-40.

77 See for example Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, adopted on 7 October 2005, para 7 and Parliamentary Assembly of the Council of Europe Recommendation 1236 (1994) on the right of asylum, adopted on 12 April 1994, where the Parliamentary Assembly recommended the Committee of Ministers to insist that asylum-seekers shall be informed, if appropriate, of their right to linguistic assistance.

of those deficiencies was the shortage of interpreters.⁷⁸ In *I.M. v France* the ECtHR recognised that a lack of linguistic aid may affect the asylum applicant's ability to present his asylum claim.⁷⁹ The Committee against Torture in its Concluding Observations regarding France of 2006, recommended 'that the situations covered by article 3 of the Convention should be the subject of a more thorough risk assessment in accordance with the provisions of article 3, including by systematically holding individual interviews to better assess the personal risk to the applicant, *and by providing free interpretation services*' (emphasis added).⁸⁰

With regard to the competence of the interpreter it is interesting to note that the ECtHR has recognised that in order for the right of every defendant to the free assistance of an interpreter of Article 6 (3) (e) ECHR 'to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided'.⁸¹ On the basis of this judgment it may be argued that in order to comply with their obligation under Article 13 (3) (b) PD, the Member State authorities should control the quality of the interpretation offered by the State.

7.2.3 The competence of the interviewer

A personal interview should be conducted by a person competent under national law and not necessarily by the determining authority. Article 13 (3) (a) PD states that Member States must ensure that the person who conducts the interview is *sufficiently competent* to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so. These are not particularly high standards.

Arguably Article 13 PD does entail that Member States should ensure that interviewers receive proper training. UNHCR observed in its report of 2010 that Greece, Spain and Italy did not provide for formal and compulsory specialist training for all interviewers upon recruitment.⁸²

The ECtHR recognised the importance of training for interviewers in asylum cases in *M.S.S. v Belgium and Greece*. In this case it considered the 'lack of training of the staff responsible for conducting the individual interview' to

78 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 301.

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

80 ComAt Concluding Observations on France, 3 April 2006, CAT/C/FRA/CO/3, emphasis added.

81 ECtHR (GC) 18 October 2006, *Hermi v Italy*, no 18114/02, para 70.

82 UNHCR, *Improving Asylum Procedures*, s 5, pp 12-25.

be one of the deficiencies in the Greek asylum procedure which lead to a violation of Article 13 ECHR.⁸³ UNHCR stresses that the task of the interviewer is 'hugely challenging and complicated'.⁸⁴ According to the UNHCR Handbook it will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings.⁸⁵

UNHCR specified the minimum knowledge and skills any interviewer should have, which may provide useful guidance for the interpretation of Article 13 (3) (a). In UNHCR's view Member States should ensure amongst others that interviewers have knowledge and understanding of the applicable national, international refugee and human rights law. Furthermore interviewers should have knowledge of and be able to use appropriate interviewing and questioning techniques and must be competent to take account of the applicant's vulnerabilities. They must be able to work with interpreters and to ensure effective communication and a complete record of the personal interview. Finally they must be impartial and objective.⁸⁶

7.2.4 Gender-sensitive interviews

Some persons claiming a risk of *refoulement*, in particular victims of sexual violence, may feel apprehensive to talk about their experiences. According to the Committee against Torture: 'It is well-known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary'.⁸⁷ It may be argued that Article 13 (3) PD requires the use of an interviewer and interpreter of the same sex as the claimant, if this is necessary to (better) allow the applicant to present the grounds for his application in a comprehensive manner. When interpreters of the same sex are not available the examining authorities should arguably take this into account when taking the decision and/or when assessing the value of late statements in first or subsequent asylum procedures.⁸⁸

Several non-binding sources of inspiration have stressed the importance of the involvement of female interviewers and interpreters in interviews with women. The Council resolution on minimum guarantees for asylum procedures provides that Member States must endeavour to involve skilled female

83 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 301.

84 UNHCR, *Improving Asylum Procedures*, s 5, p 12.

85 UNHCR Handbook, para 200.

86 UNHCR, *Improving Asylum Procedures*, s 5, pp 12-13.

87 ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8.

88 See with regard to late statements also section 8.5.

employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin.⁸⁹ The Human Rights Committee in its Concluding Observations regarding Austria noted with concern that asylum-seeking women were not automatically interviewed by female asylum officers and assisted by female interpreters. The Committee recommended that the State party should adopt a gender-sensitive approach to refugee status determination by automatically assigning female interviewers and interpreters to asylum-seeking women.⁹⁰ Furthermore UNHCR stressed the importance of the use of female interpreters in interviews with female asylum applicants in EXCOM conclusion No 64.⁹¹

7.2.5 Child-friendly interviews

Article 17 provides for special provisions concerning the interview of unaccompanied minors. Article 17 (1) (b) PD states that the Member States should ensure that the minor's representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Furthermore it requires Member States to allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Article 17 (4) (a) PD demands that if an unaccompanied minor has a personal interview on his application for asylum, that interview be conducted by a person who has the necessary knowledge of the special needs of minors.

Such special guarantees do not apply to the interviews with accompanied minors. It may be argued on the basis of the Court of Justice's judgment in

⁸⁹ Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ 19 September 1996, C 274, pp 13-17, para 28.

⁹⁰ HRC Concluding Observations on Austria, 30 October 2007, CCPR/C/AUT/CO/4, para 18. See also ComAT Concluding Observations on Austria, 15 December 2005, CAT/C/AUT/CO/3 and Parliamentary Assembly of the Council of Europe Recommendation 1374 (1998) on the situation of refugee women in Europe, where it is recommended that the Committee of Ministers urge the member states to ensure that female medical and social staff (including interpreters) are available for refugee women.

⁹¹ EXCOM Conclusion no 64 (XLI) 1990, on Refugee Women and International Protection (1990) states that, wherever necessary, skilled female interviewers should be provided in procedures for the determination of refugee status. See also UNHCR Guidelines of International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para 36, which even states that Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves and that they should be provided automatically for women claimants.

Aguirre Zarraga as well as the views of the Committee on the Rights of the Child and UNHCR that Article 17 (4) PD should be applied by analogy to such interviews. Such application would be in line with the requirement included in Article 13 (3) PD that personal interviews must be conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner and that the person who conducts the interview should be sufficiently competent to take account of the personal circumstances of the applicant including his vulnerability.

UNHCR reported in 2010 that several Member States did not provide special training for interviewing children.⁹² Only four of the twelve Member States of focus in UNHCR's research of 2010 had specific guidelines on interviewing children.⁹³

Interviewing in a child-friendly manner

The Court of Justice has recognised that Article 24 of the Charter requires that the State authorities should ensure that a hearing of the child should be conducted in a child-friendly manner. In *Aguirre Zarraga* it considered that where a court decides to hear the child, Article 24 of the Charter requires the court 'to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views'.⁹⁴

According to the Committee on the Rights of the Child interviews with children should take place in a friendly and safe atmosphere.⁹⁵ 'A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age'.⁹⁶ Furthermore it stated that 'the context in which a child exercises her or his right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has

⁹² UNHCR, *Improving Asylum Procedures*, s 5, pp 22-23.

⁹³ UNHCR, *Improving Asylum Procedures*, s 5, p 61.

⁹⁴ Case C-491/10 PPU, *Aguirre Zaraga* [2010], para 66.

⁹⁵ ComRC General Comment No 6 (2005), CRC/GC/2005/6, para 20. See also UNHCR, *Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, Geneva 22 December 2009, para 72, which states that interviewing children 'may require involving experts in interviewing children outside a formal setting or observing children and communicating with them in an environment where they feel safe, for example, in a reception centre'.

⁹⁶ ComRC General Comment No 6 (2005), CRC/GC/2005/6 para 34.

decided to communicate'.⁹⁷ In order to be able to express its views effectively the child should according to the Committee be well-prepared for the interview. The decision maker 'should provide explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard'.⁹⁸

Training of interviewers

The Committee on the Rights of the Child is of the view that officials working with separated and unaccompanied children and dealing with their cases should be trained in amongst others 'appropriate interview techniques'.⁹⁹ According to the Committee interviews of unaccompanied minors in the context of the asylum procedure should be conducted by representatives of the refugee determination authority who will take into account the special situation of unaccompanied children in order to carry out the refugee status assessment and apply an understanding of the history, culture and background of the child.¹⁰⁰

It is UNHCR's position that 'personal interviews of children – whether they are accompanied, unaccompanied or separated – should be carried out by an interviewer who has special training and knowledge regarding the psychological and emotional development and behaviour of children'.¹⁰¹ UNHCR mentions that the training of the personnel of the determining authority charged with conducting the personal interview of children should include relevant human rights norms, standards and principles, including the rights of the child, the impact and consequences of persecution, serious harm and trauma on children and understanding of the effect of the child's age and stage of development on the child's recall of events and knowledge of conditions in the country of origin. Interviewers should furthermore have appropriate adult-child communication skills and must be able to use interview techniques that minimise trauma to the child while maximising the quality of information received from the child. Interviewees must finally have the skills to deal with children in a sensitive, understanding, constructive and reassuring manner.¹⁰²

97 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 42. See also para 23 which states: 'States parties must ensure conditions for expressing views that account for the child's individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions.'

98 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 41.

99 ComRC General Comment No 6 (2005), CRC/GC/2005/6 para 96.

100 ComRC General Comment No 6 (2005), CRC/GC/2005/6 para 72.

101 UNHCR, *Improving Asylum Procedures*, s 5, p 21.

102 UNHCR, *Improving Asylum Procedures*, s 5, pp 21-22.

7.3 THE ASYLUM APPLICANT'S RIGHT TO BE HEARD FOLLOWING THE PERSONAL INTERVIEW

The question which will be addressed in this section is whether the asylum applicant's right to be heard under EU law is completely fulfilled with the personal interview. Should he also be offered the opportunity to add information to the report of the interview or to correct mistakes? Must he be able to comment on conclusions of the determining authority with regard to the credibility of his account, the value of other evidence underlying the assessment of the asylum claim and the risk of *refoulement* before the decision on the asylum application will be taken?

It is argued in this section that, although the Procedures Directive does not require the determining authorities to give the asylum applicant such opportunity, the EU right to be heard does. It follows from the EU right to be heard that the addressees of decisions which significantly affect their interests, such as asylum decisions, be placed in a position in which they may effectively make known their views on the evidence on which the decision is based¹⁰³ and the relevant facts and circumstances.¹⁰⁴¹⁰⁵ This implies that the asylum applicant should not only be able to present his asylum motives during the personal interview, but also to express his views regarding the fact-finding and assessment of the risk of *refoulement* by the determining authorities.

7.3.1 The right to comment on the report of the interview

Article 14 (1) PD requires the Member States to ensure that a written report of the personal interview be made 'containing at least the essential information regarding the application, as presented by the applicant'.¹⁰⁶ In this context the provision refers to Article 4(2) QD, which mentions the elements needed to substantiate the asylum claim: statements concerning the applicant's age, background, including that of relevant relatives, identity, nationality, country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection. In many cases this report forms, together with the evidence

103 See for example Case C-28/05, *Dokter* [2006], para 74 and Case C-32/95P, *Commission v Lisrestal and others* [1996], para 21.

104 Case C-269/90, *Technische Universität München* [1991], para 25 and Case C-458/98 P, *Industrie des Poudres Sphériques v Council* [2000], para 99.

105 See section 4.4.2.

106 This provision also applies to interviews held in the context of border procedures (Art 35 (3) (d) PD) or procedures in which a refugee status is withdrawn (Art 38 (1) (b) as well as in cases in which a meeting was held with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application referred to in Art 12 (2)(b) PD (see Art 14 (4) PD).

submitted by the asylum applicant and the determining authorities as well as country of origin information, the basis of the decision on the asylum claim.¹⁰⁷ The Procedures Directive does not give the applicant the right to comment on the contents of the report of the interview.¹⁰⁸ Article 14 (3) PD only states that Member States may request the applicant's approval of the contents of the report of the personal interview. Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant's file.

UNHCR stated in 2010 that practice with regard to the possibility to check the accuracy and change the content of the report of the personal interview is divergent among the Member States.¹⁰⁹ In some Member States the report is printed out immediately after the interview and read back to the applicant before he is asked his signature of approval. In other Member States applicants are asked to sign the report, although they had not had the opportunity to read it or to have it read back to them.¹¹⁰ In several Member States the written report of the interview is provided after the asylum decision has been taken.¹¹¹ The Commission noted in 2010 that the accuracy of records therefore varies.¹¹²

In the light of the crucial role of the statements of the asylum applicant as evidence in the asylum procedure, it is of utmost importance for the quality of the decision that the written report of the personal interview is complete and that the information contained in it is accurate.¹¹³ Gaps or mistakes in the report may occur as a result of disturbed communication, faults or omissions by interpreters or the person drawing the report.¹¹⁴ In order to ensure the accuracy and completeness of the report and thus an adequate examination of the case in the meaning of Article 8 PD, it may be considered necessary that the person concerned or his representative be able to examine this report and to correct mistakes or fill in gaps.

107 See further on evidentiary assessment sections 8.6-8.7.

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

109 UNHCR, *Improving Asylum Procedures*, s 6, p 11.

110 UNHCR, *Improving Asylum Procedures*, s 6, pp 12-17.

111 The Commission mentions Belgium, Cyprus, France, Greece and Romania. Commission Report COM (2010) 465 final, p 7. See also UNHCR, *Improving Asylum Procedures*, s 6, pp 19-20.

112 Commission Report COM (2010) 465 final, p 7. See also UNHCR, *Improving Asylum Procedures*, s 6.

113 See also UNHCR, *Improving Asylum Procedures*, s 6, p 2.

114 Doornbos 2006, p 45. She states that also researches from other States than the Netherlands are critical of the quality of reports of the interview. UNHCR in its 2010 expressed grave concerns about the quality of the reports of interviews in Greece. It found during its observations of interviews in Athens that the written summary reports made of personal interviews did not reflect the oral evidence given by the applicant at all. UNHCR, *Improving Asylum Procedures*, s 6, pp 7-9.

Arguably Article 14 (3) PD read in the light of the EU right to be heard requires that the applicant is granted the opportunity to comment on the report of the interview, in particular when the determining authority intends to reject the asylum application on the basis of the information included in the report. If for example the determining authority finds the statements of the applicant as written down in the report inconsistent, contradictory, vague or incomplete and thus not credible, the applicant should be able to respond to those allegations.

This also implies that the report of the personal interview(s) should be provided to the applicant before the decision on the asylum application is taken.¹¹⁵ The EU right to be heard requires that the parties concerned must be informed of the evidence adduced against them.¹¹⁶ Article 14 (2) PD demands that Member States ensure that applicants have timely access to the report of the personal interview. However, this provision allows that access to the report is only granted after the decision on the application. If the Member State chooses to make use of this option, access must be made possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.¹¹⁷ Such late provision of the report of the interview may infringe the EU right to be heard, as the person concerned must, according to the standing case-law of the Court of Justice, in principle be able to exercise this right before the administrative decision is adopted.¹¹⁸ Furthermore it should be derived from this case-law that the person concerned must be afforded a reasonable period to effectively put forward his views.¹¹⁹ The content of the report of the interview should thus be made known to the applicant at a moment that it is still possible to effectively exercise his right to be heard.

115 See also UNHCR, which recommends that in all cases the applicant must be granted the right to rectify, clarify or provide additional information for inclusion in the transcript. For that purpose the content of the report must have been read by, or to the applicant, in a language s/he understands. UNHCR, *Improving Asylum Procedures*, s 6, pp 12-17.

116 Case T-228/02, *Organisation des Modjahedines du peuple d' Iran v Council* [2006], para 93. Case C-32/95P, *Commission v Lisrestal and others* [1996], para 41. See also T-49/88, *Al-Jubail Fertilizer v Council* [1991], para 17.

117 According to the explanations of the Commission with the amended proposal for the Procedures Directive this provision reflects the principle of a fair and effective procedure. It is meant to enable the applicant to exercise his appeal rights properly and to enable appellate bodies, when appropriate, to verify whether the decision is based on relevant information. Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 18 June 2002, COM (2002) 326 final, pp 8-9.

118 See for example C-269/90, *Technische Universität München* [1991], para 25, Joined cases C-379/08 and C-380/08, *ERG and Others* [2010], paras 54-56 and Case C-28/05, *Dokter* [2006], para 74.

119 Case C-462/98 P, *Mediocurso v Commission* [2000], para 38.

7.3.2 The right to comment on the fact-finding and risk assessment

After the personal interview(s) the determining authority will establish the facts and assess the credibility of the asylum account. Following the establishment of the facts, it is decided whether there is a real risk of *refoulement* upon return to the country of origin or transfer to a third country. The determining authority may include evidence in these assessments on which the applicant has not had the opportunity to comment. The question rises whether the claimant should be heard on the conclusions of the decision-making authority concerning the fact-finding and risk assessment. This could be done for example by offering the claimant the opportunity to comment on these conclusions (and the evidence on which they are based) in an oral hearing or by submitting written observations.

The Procedures Directive does not provide for a right to be heard on the conclusions reached by the determining authority. Such a right may be derived from Article 4 (1) QD, which states that the Member State has the duty to assess the relevant elements of the application in cooperation with the applicant.¹²⁰ According to Noll this provision entails far-reaching obligations to communicate, for both the Member State and the applicant. The Member State should allow the applicant to participate in the assessment of the evidence.¹²¹ This interpretation of Article 4 (1) QD has not yet been confirmed by the Court of Justice.¹²²

On the basis of the EU Courts' case-law concerning the EU right to be heard discussed in section 4.4.2 it should be concluded that the addressee of an asylum decision has a right to effectively make known his views on the evidence on which this decision is based and the relevant facts and circumstances taken into account, before the decision is taken. The EU right to be heard may require that a draft decision is submitted to the party concerned.¹²³ Article 4 (1) QD should be interpreted in the light of this case-law and must therefore be considered to include a right to be heard on important evidence relied on and the main conclusions reached by the determining authority. If the applicant did not have the opportunity to comment on such evidence and conclusions during the personal interview, in response to the written report of the personal

¹²⁰ It concerns a duty to assess the elements underlying the asylum claim together with the applicant. Battjes 2006, p 226.

¹²¹ Noll 2005-II, p 4.

¹²² This question will probably be answered in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, which was pending when this study was finalised. A.G. Bot concluded in his opinion that the duty to cooperate laid down in Art 4 (1) QD has the sole objective of assisting the applicant to complete his application and to assemble the elements deemed essential for that purpose. It does in his view not entail an obligation for the determining authority to seek the applicant's observations on the elements on which it intends to base a negative decision before such decision is taken.

¹²³ Case C-462/98 P, *Mediocruso v Commission* [2000], para 42.

interview or otherwise, he should be granted this opportunity before the negative decision is taken. This is in particular the case if the applicant's comments concerning the fact-finding or credibility assessment cannot be fully taken into account in the appeal-phase as a result of a limited judicial review of the fact-finding by the national court.¹²⁴

This view is supported by the ECtHR's judgment in *I.M. v France*. In this case the applicant's asylum application was rejected in essence because his statements during the interview were very imprecise and wrong with regard to his ethnic origin as well as his family's origin from the Darfur region. According to the French determining authority the applicant's origin could therefore not be established. Furthermore it was stated in the decision that the applicant's statements regarding the applicant's involvement in a student movement, the circumstances of his arrest, the conditions of his detention, and the reasons for his release were not sufficiently precise and credible. The fact that the applicant was not granted the opportunity to dispute these allegations was one of the factors leading to a violation of Article 13 ECHR in this case. The ECtHR considered that

le caractère accéléré de la procédure n'a pas permis au requérant d'apporter des précisions sur ces points, éventuellement par écrit ou au cours d'un second entretien, alors même qu'il a pu, par la suite, dissiper les incohérences supposées et fournir les documents manquants.¹²⁵

Furthermore the ECtHR has held that asylum applicants must be put in the position to effectively comment on the decision-making authority's conclusions as to the credibility of the asylum account or the authenticity of the documents submitted by the applicant. According to the ECtHR the individual must provide a satisfactory explanation for the alleged discrepancies, when the examining authorities present information which gives strong reason to question the veracity of an asylum-seeker's submissions.¹²⁶ Furthermore it ruled that when the authorities examined documents adduced by the applicant and give detailed reasons why they consider these documents to be forgeries, the applicant has to contest these allegations.¹²⁷ This implies that the applicant must be put in the position to present its views on the authority's conclusions during the asylum proceedings.

On the basis of the ECtHR's case-law potentially Article 4 (1) QD read in the light of the EU right to be heard should be considered to include a right to contest the decision-making authorities' main conclusions as to the credibil-

124 See section 9.2. It is argued in this section that Art 39 PD requires a thorough judicial review of the asylum decision.

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

126 See ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 50, ECtHR (Adm) 8 March 2007, *Collin and Akaziebie v Sweden*, no 23944/05.

127 ECtHR (Adm) 21 June 2005, *Matsiukhina and Matsiukhin v Sweden*, no 31260/04.

ity of the asylum account, the assessment of the evidence and the existence of a risk of *refoulement* upon return. The EU right to be heard also requires that the determining authority's conclusions be made available to the applicant and that the applicant have access to the evidence underlying the (concept) asylum decision.

7.4 THE RIGHT TO AN ORAL HEARING BEFORE A COURT OR TRIBUNAL

In Chapter 9 it will be concluded that the right to an effective remedy guaranteed by Article 39 PD requires a thorough judicial review of the asylum decision. This entails that the national courts review asylum decisions on points of fact as well as points of law. Furthermore it implies as a minimum that the national court or tribunal assesses the claim of a risk of *refoulement* on its merits. It should carefully examine the facts and evidence underlying the asylum claim.

The question which will be addressed in this section is whether the national court is obliged to hear the asylum applicant in the context of his appeal against the refusal of his asylum claim. It will be argued that Article 39 PD read in the light of Article 47 of the Charter requires that the asylum applicant is heard in an oral hearing by the court or tribunal in the sense of Article 39 PD, if this court decides on factual issues, including the credibility of the applicant's asylum account. According to the UNHCR report of 2010 in several Member States the national court may decide on the appeal against the negative asylum decision without holding an oral hearing.¹²⁸

Article 39 PD does not contain standards with regard to the right to a public and oral hearing. Article 47 of the Charter provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal. The Court of Justice has not yet interpreted the EU right to a public hearing yet. No judgments were found in the context of this study which addressed the right to an oral hearing in the light of the general principle of effective judicial protection. However, the ECtHR has developed an extensive body of case-law regarding the right to an oral hearing under Article 6. It is argued here that Article 47 of the Charter should be interpreted in conformity with this case-law.

Obligations stemming from the ECtHR

The ECtHR has not ruled on the question whether Article 13 requires that asylum applicants be heard by an independent authority. However it should be reiterated that the ECtHR has recognised the importance of an oral hearing in particular for the assessment of the credibility of the asylum applicant's statements.¹²⁹

128 UNHCR, *Improving Asylum Procedures*, s 16, pp 58-60.

129 See further section 7.1.

Like Article 47 of the Charter, Article 6 ECHR provides for a right to a 'fair and public hearing'. According to the standing case-law of the ECtHR the right to a public hearing includes the right to an oral hearing before a court or tribunal.¹³⁰ The Court is of the opinion that the right to a public hearing, which applies both in criminal and in civil cases, is a right of a fundamental nature.¹³¹

The obligation to hold a hearing is not absolute. A hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary.¹³² Furthermore the ECtHR assesses the overall fairness of the procedure. An oral hearing does not have to take place in every instance before a court or tribunal. The absence of a hearing before a second or third instance may be justified by the special features of the proceedings at issue,¹³³ in particular the fact that the appellate or Cassation court is only competent to review questions of law.¹³⁴ Absence of an oral hearing may however not undermine the right to adversarial proceedings and the principle of equality of arms.¹³⁵

The complete absence of an oral hearing before a court or tribunal in a procedure can only be justified in exceptional circumstances.¹³⁶ The character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court. The frequency of such situations is not relevant: Article 6 (1) ECHR does not mean that the absence of an oral hearing may only be justified in rare cases.¹³⁷ The Court has accepted exceptional circumstances in cases where proceedings concerned exclusively legal or highly technical questions. The ECtHR held for example 'that disputes concerning benefits under social-security schemes are generally rather technical and their outcome usually

130 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 40.

131 ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 46, ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 40.

132 A waiver can be done explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing. See for example ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 37.

133 See for example ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 39.

134 According to the ECtHR 'proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even where the appellant was not given an opportunity of being heard in person by the appeal or cassation court'. ECtHR (GC) 26 July 2002, *Meftah and others v France*, nos 32911/96, 35237/97 and 34595/97, para 41. See also ECtHR (Plen) 26 May 1988, *Ekbatani v Sweden*, no 10563/83, para 32.

135 ECtHR 25 March 1998, *Belziuk v Poland*, no 23103/93, para 39. In this case the public prosecutor attended the hearing before the Court of Cassation and submitted oral statements while the applicant was not allowed to be present.

136 See for example ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 39.

137 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 42.

depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument.¹³⁸

Furthermore an oral hearing may be dispensed with when a case 'raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties' written observations.'¹³⁹ As an example of such cases the ECtHR mentions cases 'where there are no issues of credibility or contested facts'.¹⁴⁰ In *Jussila v Finland* the ECtHR considered that 'checking and ensuring that the taxpayer has given an accurate account of his or her affairs and that supporting documents have been properly produced may often be more efficiently dealt with in writing than in oral argument.' It was not persuaded by the applicant that in this particular case any issues of credibility arose in the proceedings which required oral presentation of evidence or cross-examination of witnesses.¹⁴¹

If factual questions are at issue in the first instance or second instance appeal procedure, the ECtHR is generally of the opinion that an oral hearing should be held.¹⁴² The ECtHR ruled on the necessity of an oral hearing in several cases in which the applicant had claimed compensation before the national court for damage suffered as a result of alleged unlawful detention. In these cases, when deciding on the level of compensation, the national court had regard to a series of personal factors, namely the financial and social status of the applicant and, in particular, the extent of the emotional suffering which he endured during the period of his detention. According to the ECtHR an oral hearing could not be dispensed with in these cases because of 'the essentially personal nature of the applicant's experience, and the determination of the appropriate level of compensation'. It considered:

While it is true that the fact of the applicant's detention and the length of that detention as well as his financial and social status could be established on the basis of the report drawn up by the judge rapporteur and without the need to hear the applicant [...], different considerations must apply to assessment of the emotional suffering which the applicant alleged he endured. In the Court's opinion, the

138 ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 41. In this case the ECtHR considered that no oral hearing was necessary in a social security case as the appeal concerned the correct interpretation of written medical evidence. According to the ECtHR the appellate court could adequately resolve this issue on the basis of the medical certificates in question and the applicant's written submissions.

139 See for example ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 37.

140 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 41.

141 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 47.

142 ECtHR (GC) 12 July 2001, *Malhous v the Czech Republic*, no 33071/96, para 60, ECtHR 25 April 1995, *Fischer v Austria*, no 16922/90, para 44 and ECtHR 26 January 2006, *Brugger v Austria*, no 7693/01, para 23. See for examples in which an oral hearing was considered necessary before an appellate court, which considered both questions of fact and law: ECtHR (Plen) 29 October 1991, *Helmerts v Sweden*, no 11826/85, para 38 and ECtHR (Plen) 26 May 1988, *Ekbatani v Sweden*, no 10563/83, para 32.

applicant should have been afforded an opportunity to explain orally to the Karşıyaka Assize Court the moral damage which his detention entailed for him in terms of distress and anxiety.¹⁴³

In the ECtHR's view the administration of justice and the accountability of the State would have been better served in the applicant's case by affording him the right to explain his personal situation in a hearing before the domestic court subject to public scrutiny.¹⁴⁴

When deciding whether the omission of an oral hearing is justified the ECtHR takes into account the interests at stake for the applicant. In *Fischer v Austria* for example it had due regard 'to the importance of the proceedings in question for the very existence of Mr Fischer's tipping business'.¹⁴⁵ However the ECtHR also held that 'the fact that proceedings are of considerable personal significance to the applicant, as in certain social insurance or benefit cases, is not decisive for the necessity of a hearing'.¹⁴⁶

Furthermore the ECtHR has acknowledged that the national authorities may have regard to the demands of efficiency and economy.¹⁴⁷ Systematically holding hearings could for instance be an obstacle to the particular diligence required in social-security cases.¹⁴⁸ In determining the necessity of a public hearing at stages in the proceedings subsequent to the trial at first instance considerations such as the right to trial within a reasonable time and the related need for expeditious handling of the courts' case-load must be taken into account.¹⁴⁹ In the cases mentioned above in which compensation was claimed for damage suffered as a result of unlawful detention the ECtHR held that the interests served by an oral hearing outweighed the considerations of speed and efficiency on which the absence of an oral hearing was based.¹⁵⁰

Finally it is relevant to note that the ECtHR has ruled in criminal cases that Article 6 ECHR also includes the right of the person concerned to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them. 'Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in subparagraphs (c), (d) and (e) of paragraph 3 of Article 6 [...], – "to defend himself in person", "to examine or have examined witnesses", and "to have the free

143 ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 51.

144 ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 51, ECtHR 20 October 2005, *Ozata v Turkey*, no 19578/02, para 36.

145 ECtHR 25 April 1995, *Fischer v Austria*, no 16922/90, para 44. See also ECtHR (Plen) 29 October 1991, *Helmers v Sweden*, no 11826/85, para 38, where the ECtHR referred to the seriousness of what was at stake for the applicant, namely his professional reputation and career.

146 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 44.

147 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 42.

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

149 ECtHR (Plen) 29 October 1991, *Helmers v Sweden*, no 11826/85, para 36.

150 ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 51.

assistance of an interpreter if he cannot understand or speak the language used in court”¹⁵¹. The ECtHR considered that in the case of a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.¹⁵² The right to adversarial proceedings also applies in civil law cases as well as cases falling within the scope of Articles 5 and 13 ECHR.¹⁵³ It is therefore conceivable that the right to participate effectively in a hearing before a court or tribunal also applies in such cases.

Application to asylum cases

On the basis of the ECtHR’s case-law it may be argued that the right to a public hearing in the meaning of Article 47 of the Charter should include a right to an oral hearing. The absence of an oral hearing, in particular in first instance appeal proceedings is only allowed in exceptional cases. The ECtHR’s case-law indicates in particular that an oral hearing is necessary in cases in which a court or tribunal needs to decide on factual issues, in which the credibility of the person concerned is disputed or in which the personal experiences of the person concerned play an important role.

As was mentioned before, asylum cases often hinge on the credibility of the applicant’s asylum account. Furthermore the personal experiences of the asylum applicant in the country of origin in the past are important for the assessment of his individual risk of *refoulement* upon return.¹⁵⁴ It should be derived from the ECtHR’s case-law that a court which reviews the asylum decision on such factual grounds should in principle hold an oral hearing. The fact that in asylum cases the fundamental nature of the EU right to asylum and the prohibition of *refoulement* are at stake adds to the need for an oral hearing. An oral hearing is less crucial if the disputed facts do not concern the individual asylum seeker, but for example only the seriousness of the general human rights situation in his country of origin. The court may include in its decision whether to hold an oral hearing, the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum.¹⁵⁵

It should thus be concluded that there are strong arguments that Article 39 PD read in the light of Article 47 of the Charter generally requires an oral hearing before the (first instance) court or tribunal hearing the appeal against the rejection of the asylum claim. Furthermore it should be derived from the

¹⁵¹ ECtHR 23 February 1994, *Stanford v the United Kingdom*, no 16757/90, para 26.

¹⁵² ECtHR 16 December 1999, *V. v the United Kingdom*, no 24888/94, para 86. ECtHR 15 June 2004, *S.C. v the United Kingdom*, no 60958/00, para 28.

¹⁵³ See further section 10.3.2.

¹⁵⁴ See further sections 8.2 and 8.3.1.

¹⁵⁵ Recital 11 Preamble PD.

ECtHR's case-law under Article 6 ECHR that the right to an oral hearing can only be effectively exercised if the person concerned is able to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them. Therefore arguably the EU right to a fair trial requires for example that in asylum cases free interpretation services are available for asylum applicants who do not understand the language spoken in the court.¹⁵⁶

7.5 SYNTHESIS OF FINDINGS

Asylum applicants must be granted sufficient opportunity to substantiate their claim that their return will violate the prohibition of *refoulement*. Often these persons are themselves the most important source of information as to the risk of *refoulement*, for example because there is no evidence supporting the claim and/or because their personal experiences play an important role in the assessment of this risk. With regard to the asylum applicant's right to be heard the following conclusions were drawn in this chapter.

The right to a personal interview

- A personal interview is indispensable in order to fulfil the requirement to carry out an appropriate examination of the asylum claim in the meaning of Article 8 (2) PD. The ECtHR's case-law indicates that a personal interview with the applicant is crucial for the assessment of the credibility of the applicant's asylum account. According to the ECtHR the absence of such interview is a factor which may contribute to a violation of Articles 3 and 13 ECHR.¹⁵⁷ Also other sources of inspiration have pointed at the importance of a personal interview in all asylum cases, including cases considered manifestly unfounded and/or examined in an accelerated procedure.¹⁵⁸

¹⁵⁶ See also ComAT Concluding Observations on France, 20 May 2010, CAT/C/FRA/CO/4-6, para 15, where the Committee expressed its concerns regarding the fact that the administrative judge may reject the appeal against the decision refusing entry for the purposes of asylum by court order, thereby depriving the applicant of a hearing at which he may defend his case, and of procedural guarantees such as the right to an interpreter and a lawyer. The Committee recommended that any appeal relating to an asylum application submitted at the border be subject to a hearing at which the applicant threatened with removal can present his case effectively, and that the appeal be subject to all basic procedural guarantees, including the right to an interpreter and counsel.

¹⁵⁷ ECtHR 13 April 2010, *Charahili v Turkey*, no 46605/07, para 57 and ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 155.

¹⁵⁸ See notably Committee of Ministers of the Council of Europe, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, under IV 1.d and Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, para 8.10.2, EXCOM Conclusion no 30 (XXXIV), 1983, on the problem of manifestly unfounded or abusive applications for refugee status or asylum.

- Therefore the exceptions to the right to a personal interview allowed for by Article 12 of the Procedures Directive may only be applied in exceptional cases.
- The determining authority of the Member State should ensure that the EU right to *refoulement* will not be undermined as a result of the absence of an interview. The asylum applicant should be given sufficient opportunity to substantiate his asylum claim, for example by submitting written information.
- The determining authorities should arguably investigate whether dependent adults have independent asylum motives which could best be explained in a personal interview.¹⁵⁹

Article 24 of the Charter limits the Member State's discretion to interview minor asylum applicants.

- A minor asylum applicant should in principle be interviewed if he wishes so and if the age and maturity of the child permits. Only if an interview is not considered to be in the best interests of the child, for example because it would cause harm to the child, should an interview be omitted.¹⁶⁰

Requirements as to the conduct of the interview

- It follows from Article 13 PD as well as several (non-binding) sources of inspiration that the right to a personal interview can only be exercised effectively if the conditions, under which interviews are conducted, allow applicants to present the grounds for their applications in a comprehensive manner.
- This means that the interviewer should be able to communicate effectively with the applicant. The principle of effectiveness requires the determining authority to ascertain that the applicant is actually able to understand the language chosen for the interview and that he can express himself effectively in this language.¹⁶¹
- If the applicant does not understand the language of the interview the Member State should provide free of charge for a competent and qualified

¹⁵⁹ UNHCR, *Improving Asylum Procedures*, s 4, p 15, UNHCR Guidelines of International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para 36.

¹⁶⁰ Case C-491/10 PPU, *Aguirre Zaraga* [2010], paras 64-65, Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, para 123 and General Comment No 6 (2005), CRC/GC/2005/6, para 71.

¹⁶¹ Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, para 8.10.2, UNHCR, *Improving Asylum Procedures*, s 5, pp 29 and 44 and UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), p 13.

interpreter who facilitates communication. If no such interpreter is available the determining authority should take this into account when examining the case.¹⁶²

- The interviewer must be competent and properly trained to interview asylum applicants.
- On the basis of several non-binding sources of inspiration it may be argued that Article 13 PD entails that interviews be conducted in a gender-sensitive manner.¹⁶³
- It follows from the Court of Justice's judgment in *Aguirre Zarraga* as well as the views of the Committee on the Rights of the Child and UNHCR that Article 24 of the Charter requires that minors be heard in a child-friendly manner.¹⁶⁴

The asylum applicant's right to be heard following the personal interview

- The fact that the applicant was interviewed on his asylum motives does not necessarily suffice for the Member State to comply with the EU right to be heard.
- It is conceivable that the EU right to be heard requires that the applicant be granted the opportunity to comment on the report of the personal interview. This is particularly so if the determining authority intends to reject the asylum application on the basis of the information contained in the report and the applicant was not able to comment on this information during the interview. The applicant should have timely access to the report of the interview in order to be able to exercise his right to be heard.¹⁶⁵
- The EU right to be heard obliges the Member States at one stage of the administrative procedure to hear the asylum applicant on its main conclusions regarding the fact-finding (including the assessment of the credibility of the asylum account) and the assessment of the risk of *refoulement* as well as important pieces of evidence on which these conclusions are based. This is in particular so if the applicant's comments concerning the

162 Artt 10 (1) (b) and 13 (3) (b) PD. See also ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 301 and ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 145.

163 Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ 19 September 1996, C 274, pp 13-17, para 28, EXCOM Conclusion no 64 (XLI) 1990, on Refugee Women and International Protection (1990), HRC Concluding Observations on Austria, 30 October 2007, CCPR/C/AUT/CO/4, para 18 and ComAT Concluding Observations on Austria, 15 December 2005, CAT/C/AUT/CO/3.

164 Case C-491/10 PPU, *Aguirre Zaraga* [2010], para 66, ComRC General Comment No 6 (2005), CRC/GC/2005/6, paras 20 and 34, UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva 22 December 2009, para 72.

165 The EU right to be heard requires that the parties concerned be informed of the evidence adduced against them. See for example Case T-228/02, *Organisation des Modjahedines du peuple d' Iran v Council* [2006], para 93.

fact-finding or credibility assessment cannot be fully taken into account in the appeal-phase as a result of a limited judicial review of the fact-finding by the national court.¹⁶⁶

The right to a hearing before a court or tribunal

- It follows from the ECtHR's case-law under Article 6 ECHR that the right to a public hearing guaranteed by Article 47 includes the right to an oral hearing before a court or tribunal.¹⁶⁷
- Article 39 PD read in the light of Article 47 of the Charter arguably requires that in principle an oral hearing be held before the first instance court or tribunal reviewing the negative decision on the asylum claim.
- The ECtHR's case-law indicates that an oral hearing is especially indispensable when the court decides on important questions of fact or the credibility of the applicant and where the applicant's personal experiences play an important role.¹⁶⁸
- It should be derived from the ECtHR's case-law under Article 6 ECHR that Article 47 of the Charter requires the Member States to ensure that the applicant is able to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them.¹⁶⁹

¹⁶⁶ The EU right to be heard may require that a draft decision is provided to the parties concerned. See Case C-462/98 P, *Mediobanca v Commission* [2000], para 42. See with regard to asylum procedures ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 147.

¹⁶⁷ ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 40.

¹⁶⁸ ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, paras 41 and 47. ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 51.

¹⁶⁹ ECtHR 23 February 1994, *Stanford v the United Kingdom*, no 16757/90, para 26.

8 | The burden and standard of proof and evidentiary assessment

On the basis of the applicant's statements made during the personal interview and the other evidence available the determining authority shall assess whether the applicant is in need of international protection and whether he qualifies as a refugee or as a person eligible for subsidiary protection. Establishing the facts in asylum cases is not easy. In most asylum cases there is a lack of documentary evidence with regard to the asylum applicant's personal situation. Often the applicant's statements are the only evidence available. The assessment of the credibility of the applicant's asylum account therefore usually takes up an important part of the decision-making process. Cultural and linguistic differences between the applicant and the examining authorities may complicate the establishment of the facts.¹ Furthermore the determining authorities need to assess whether there is a *future risk of refoulement*. This means that there are no certainties which can be established.²

Evidentiary rules for asylum cases vary considerably among Member States of the European Union, in particular between common law and civil law systems.³ Rules concerning the standard and burden of proof and evidentiary assessment are decisive for the outcome of the asylum proceedings. It is argued in this chapter that evidentiary rules or practices which make unreasonable demands on the asylum applicant undermine the effective exercise of the EU right to asylum and the prohibition of *refoulement*. A standard of proof which is set too high, the authorities' refusal to apply the benefit of the doubt, their unwillingness to share the burden of proof, the use of presumptions which are (practically) impossible for the applicant to rebut, a credibility assessment on the basis of details which are not part of the core of the asylum account or a failure to take into account or to recognise the value of certain types of evidence are all examples of such rules or practices.

This chapter examines which standards with regard to the standard and burden of proof and evidentiary assessment follow from EU law. In particular in Article 4 QD (concerning assessment of facts and circumstances) and Article 8 (2) PD (requirement of an appropriate and careful examination of the asylum claim, aim to harmonise the Member State's legislation as regards evidence

1 See Staffans 2008, pp 621-622 and Thomas 2006, p 84.

2 See Thomas 2006, p 84.

3 See for example UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 3, Gorlick 2003, p 361.

to a certain extent. However, they leave many important evidentiary issues untouched. It may be assumed in the light of the importance of evidentiary rules for the effective exercise of the prohibition of *refoulement* that also evidentiary issues which are not explicitly governed by the Qualification or Procedures Directive fall within the scope of EU law. They may therefore be addressed by the Court of Justice in the light of the principle of effectiveness. It follows from the Court of Justice's case-law that any requirement of proof which has the effect of making it virtually impossible or excessively difficult to exercise a right granted by EU law would be incompatible with EU law.⁴ The Court of Justice has assessed national evidentiary rules in the light of this principle in several fields of EU law, such as equal treatment, State aid and the Member State's duty to repay charges levied contrary to EU law. The underlying principles emerging from this case-law should be considered relevant in asylum cases.

It is conceivable however, that the specific nature of asylum cases requires special evidentiary rules. Therefore in this chapter relatively important weight is attached to the case-law of the ECtHR and other supervising bodies, which specifically address evidentiary issues in asylum cases. The ECtHR has held that Article 6 (1) ECHR does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.⁵ For this reason no attention is paid to the ECtHR's case-law under that provision.

The issues addressed in this chapter are all linked together and sometimes overlap. Therefore it is useful to make some preliminary remarks as to their mutual relationship. Section 8.1 on the standard of proof addresses the question what needs to be proved. In asylum cases the most important question is how likely the risk of future harm should be in order to qualify as a refugee or a person in need of subsidiary protection. Section 8.2 regarding the burden of proof examines who bears the risk (the applicant or the State) if the standard of proof is not met and who bears the burden of producing evidence in support of the asylum claim. A particular heavy burden of proof is placed on the applicant when the Member State makes use of certain presumptions. In section 8.3 the use of such presumptions is examined in the light of the duty to conduct an individual examination of the asylum claim. Finally sections 8.4. and 8.5 address the assessment of the evidence produced by the applicant and the State in the context of the asylum application. They examine which types of evidence should be taken into account and what value should be attributed to them. Section 8.5. particularly concerns the statements of the applicant. It addresses amongst other the question when the determining authority should grant the applicant the benefit of the doubt in the assessment of the credibility

4 Case C-199/82, *SpA San Giorgio* [1983], para 14.

5 ECtHR 18 March 1997, *Mantovanelli v France*, no 21497/93, para 34.

of the asylum account. Section 8.6. regards other types of evidence such as documentary evidence and expert reports. Some aspects of the asylum claim may have consequences for several of the issues mentioned. The fact that the applicant was persecuted or subjected to serious harm in the past for example makes that the standard of proof is (nearly) met and at the same time causes a shift of the burden of proof from the applicant to the State. Furthermore the importance which should be attributed to this fact arguably requires that evidence, such as medical reports supporting past torture or ill-treatment, may not be ignored by the determining authority.

8.1 THE STANDARD OF PROOF: WHAT NEEDS TO BE PROVED?

This section examines the standard of proof which should be met in order to qualify for an asylum status or to be protected from *refoulement*. The central questions with regard to the standard of proof in asylum cases is first of all how likely the risk of persecution or serious harm must be⁶ and secondly which indicators should be taken into account in order to assess this risk.

The Qualification Directive does not provide standards with regard to the question regarding the likeliness of the risk.⁷ Therefore Member States are in principle allowed to maintain or introduce their own national requirements regarding the standard of proof. However it is submitted in this section that EU law prohibits Member States to set the standard of proof too high, because this will undermine the full effectiveness of the EU prohibition of *refoulement* and the right to asylum.⁸ It follows from the principle of effectiveness that Member States cannot require asylum applicants to prove something which is impossible or excessively difficult to prove.⁹ In particular it is argued that

6 Noll 2005-II, p 3. Gorlick states that 'the term 'standard of proof' means the threshold to be met by the claimant in persuading the decision-maker of the truth of his or her factual assertions'. Gorlick 2003, p 367.

7 Noll 2005-II, p 3. The proposal for the Directive provided that there had to be a 'reasonable possibility' of persecution or serious harm. This was however deleted during the negotiations because the Member States could not agree on a risk criteria. Hailbronner 2010, pp 1026-1027.

8 See also Trstenjak and Beysen who state that national rules of evidence may provide for specific requirements concerning the standard of proof, as long as those rules do not make it impossible or excessively difficult to secure the enforcement of the rights at issue. Trstenjak & Beysen 2011, p 101.

9 See Case C-435/03, *British American Tobacco and Newman Shipping* [2005], para 28. In this case the Court of Justice assessed a national rule according to which the victim of a theft of goods could obtain repayment of VAT only if he succeeded in showing that the goods had indeed been stolen and that they had not been put on the market after the theft. The Court held that a requirement of proof of a negative, which is moreover outside the knowledge of the person concerned, makes it virtually impossible to make use of the right to repayment. See also the opinion of A.G. Sharpston with Case C-31/09, *Bolbol* [2010],

Member States may not require that a future risk of persecution or serious harm be *proved*. Also the standard of proof cannot be raised in cases where the applicant is considered a danger to national security.

It is also submitted in this section that the principle of effectiveness requires that all relevant risk factors be taken into account individually as well as in coherence. Furthermore Member States may not always expect an asylum applicant to substantiate that he runs an *individual* risk of serious harm as such risk can (in exceptional circumstances) also emanate from the *general situation* in the country or origin alone. The individual risk should always be assessed in the light of the general situation in the country of origin.

Relevant provisions of the Qualification Directive

According to the Qualification Directive a person must have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group' in order to be considered a refugee.¹⁰ This definition refers directly to the refugee definition in the Refugee Convention.¹¹ For this reason it is conceivable that the interpretation of the standard of proof under the Refugee Convention will inspire the Court of Justice when addressing the standard of proof for qualification as a refugee under the Qualification Directive.¹² For this purpose UNHCR's view as well as legal doctrine will be examined in this section.

According to Article 2 (e) QD a person is eligible for subsidiary protection when 'substantial grounds have been shown' for believing that he, if returned to his country of origin 'would face a real risk of suffering serious harm'. Article 15 QD defines the term serious harm as: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. These provisions refer to the standard of proof following from the ECtHR's case-law¹³ and the views of the Committee against Torture and the Human Rights Committee. It may therefore be assumed that the standard of proof required under EU law may not be set higher than the standard of proof applied by these bodies.¹⁴ This also follows from the Court of Justice's judgment in *Elgafaji* where it considered that the fundamental right guaranteed under Article 3 ECHR forms part of the general

para 95, where she stated that 'the State may not lay down unrealistic standards for the evidence required'.

10 Art 2 (c) QD.

11 See also Hailbronner 2010, p 1026.

12 See also Staffans 2008, p 638.

13 See also Hailbronner 2010, p 1026.

14 It should however be noted that the case-law of the ECtHR, ComAT and HRC only regards the principle of *non-refoulement*, while, the fact that a person is eligible for subsidiary protection (also) gives him a right to an asylum status.

principles of EU law, observance of which is ensured by the Court and that the ECtHR's case-law is taken into consideration in interpreting the scope of that right in the EU legal order.¹⁵

Applicants who risk persecution or serious harm upon return may be excluded from the right to an asylum status, for example because they constitute a danger to the community of the Member State.¹⁶ Such applicants will however be protected against expulsion by the EU prohibition of *refoulement*, laid down in Article 21 (1) QD. This provision does not mention the requirements which should be met in order to be protected by this prohibition. It only states that States should respect the principle of *non-refoulement* in accordance with their international obligations. This provision should be interpreted in the light of Article 19 of the Charter, which provides that no one may be removed, expelled or extradited to a State where there is a 'serious risk' that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. On first sight this provision seems to require a higher degree of foreseeability of the risk of *refoulement* (serious risk) than the ECtHR (real risk) does.¹⁷ However, it follows from Article 52 (3) of the Charter as well as the explanations with Article 19 of the Charter that the EU prohibition of *refoulement* incorporates the ECtHR's case-law regarding Article 3 ECHR.¹⁸ Furthermore, as was mentioned above, the Court of Justice has recognised the principle of *non-refoulement* guaranteed by Article 3 ECHR as a principle of EU law. This implies that the standard of proof under Article 21 (1) QD is the same, or at least not more restrictive, than the standard of proof required under Articles 2 (c) and 15 QD.

Likelihood of the risk of persecution or serious harm

It is argued by UNHCR as well as legal scholars that an applicant should not be required to *prove* a well-founded fear of persecution in order to qualify as a refugee. According to the UNHCR Handbook an applicant's fear of persecution 'should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the [refugee] definition, or would for the same reasons be intolerable if he returned there' (emphasis added).¹⁹ In its 'Note on Burden

15 Case C-465/07, *Elgafaji* [2009], para 28.

16 Artt 12, 14, 17 and 19 QD.

17 Battjes 2006, p 115.

18 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/24.

19 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 42. See also UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 17. Gorlick states that 'the flexibility which the decision-maker must take into account in assessing evidence on a refugee application as well as the concern that placing too high an evidentiary burden on refugee applicants is inconsistent with the humanitarian nature of refugee law, supports the view that the standard of proof is satisfied if an applicant has demonstrated a 'serious

and Standard of Proof in Refugee Claims' UNHCR states that a substantial body of jurisprudence 'largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not.²⁰ Furthermore several scholars contend that the 'reasonable possibility test' is the appropriate test for assessing the risk of persecution.²¹ In their view the more restrictive 'balance of probabilities standard', which requires the applicant to establish that persecution will probably take place or is reasonable likely or more likely than not to occur, should be rejected.²²

On the basis of the foregoing it may be argued that the full effectiveness of the EU right to a refugee status would be undermined if Member States require applicants to prove a well-founded fear of persecution in stead of granting refugee status when such a fear is established to a reasonable degree. As will be shown below the binding judgments of the ECtHR confirm the non-binding view of UNHCR that an asylum applicant should not be required to prove a future risk of a certain treatment.

Article 3 ECHR,²³ Articles 6 and 7 ICCPR²⁴ and Article 3 CAT²⁵ prohibit expulsion by a Contracting State where *substantial grounds* have been shown for believing that the person in question, if deported, would face a treatment contrary to these provisions in the receiving country. The applicant is not expected to *prove* that he will be treated in violation with the prohibition of *refoulement*.²⁶ The ECtHR is of the opinion that to demand direct documentary

possibility', good reason', valid basis' or 'real or reasonable chance or likelihood' of persecution'. Gorlick 2003, pp 369-370.

20 See on the standard of proof in several countries, Norman 2007, pp 279-280.

21 Hathaway states that 'the "reasonable possibility" test is the appropriate compromise between respect for the Convention's commitment to anchor protection decisions in objectively observable risks and the need simultaneously to avoid the establishment of an inappropriately high threshold of concern'. Hathaway 1991, pp 79-80. See also Wouters 2009, pp 84-85.

22 Wouters 2009, p 85, Hathaway 1991 p 79, Goodwin Gill & McAdam 2007, p 234.

23 See for example ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 125. In several cases the ECtHR applied a higher standard of proof, namely 'beyond reasonable doubt'. See Wouters pp 269-270. He refers to ECtHR 12 April 2005, *Shamayev and others v Russia*, no 36378/02, para 338 and ECtHR 7 June 2007, *Garabayev v Russia*, no 38411/02, para 76. More recent examples are ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05 and ECtHR 23 September 2010, *Iskandarov v Russia*, no 17185/05. The 'beyond reasonable doubt' standard is used by the Court in cases under Art 3 ECHR, which do not involve *refoulement*.

24 HRC General Comment No 31 (2004), CCPR/C/21/Rev1/Add. 13, para 12.

25 See Art 3 CAT.

26 See ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, where the United Kingdom argued that Mr Soering could be extradited to the United States although there was "some risk", which was "more than merely negligible", that the death penalty would be imposed on him upon extradition. The ECtHR concluded that there were substantial grounds for believing that the applicant faced a real risk of being sentenced to death.

evidence proving that the applicant is wanted for any reason by the authorities of his country of origin ‘may well present even an applicant whose fears are well-founded with a probatio diabolica’.²⁷ In *M.S.S v Belgium and Greece* the ECtHR held that persons engaged in an extremely urgent procedure before the Belgian Aliens Appeals Board were prevented from establishing the arguable nature of their complaints under Article 3 of the Convention because they were required to produce ‘concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3’.²⁸

Article 3 ECHR requires the decision-maker to focus on the ‘foreseeable consequences of removal’ for each individual applicant.²⁹ The mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3.³⁰ The Committee against Torture is of the opinion that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The risk of torture must be foreseeable, real and personal. However, the risk does not have to meet the test of being highly probable.³¹

It is not always easy to predict on the basis of the facts whether the ECtHR will consider the standard of proof to be met. In some cases the ECtHR seems to apply a higher standard of proof than in others. In *S.H. v UK* the Court accepted that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to ill-treatment if returned to Bhutan, although the existence of this risk was supported by little evidence. The Court considered that none of the experts who had written reports on the applicant’s request were able to predict precisely what would happen to the applicant on return. It took into account that there was no evidence that the situation of the ethnic Nepalese in Bhutan had improved following the adoption of the Constitution.³² In *B.A. v France* on the other hand the Court seems to apply a rather high standard of proof. The Court held that there was no real risk of *refoulement* although it accepted that the applicant was a deserter and that deserters were severely repressed in Chad, the applicant’s country

According to the ECtHR the likelihood of the feared exposure of the applicant to the “death row phenomenon” had been shown to be such as to bring Art 3 ECHR into play.

27 ECtHR (Adm) 27 January 2005, *Mawajedi Shikpohkt and Makkamat Shole v the Netherlands*, no 39349/03. See also ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, para 49.

28 According to the ECtHR thereby the Aliens Appeal Board increased the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation. ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 389.

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

30 See for example ECtHR 10 February 2011, *Dzhaksybergenov v Ukraine*, no 12343/10, para 35.

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

32 ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, para 71.

of origin. The Court reproached the applicant for not having submitted any documents which concerned him personally and which proved that the authorities in Chad were still looking for him six years after he left the country.³³

Likelihood of a risk of refoulement in cases of danger of national security

The United Kingdom has argued that in cases in which an asylum status was refused on national security grounds a higher standard of proof should apply in order for the person concerned to be protected under the prohibition of *refoulement*. This entails that, if the State adduces evidence that there is a threat to national security, the individual concerned must prove that it is “more likely than not” that he would be subjected to treatment prohibited by Article 3.³⁴ The ECtHR has ruled that such an approach is contrary to Article 3 ECHR. As a result it should also be considered to undermine the full effectiveness of the EU prohibition of *refoulement*.

The ECtHR observed that requiring a higher standard of proof in cases in which national security concerns are involved is not compatible with the absolute nature of the protection afforded by Article 3 ECHR.³⁵ It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The ECtHR therefore sees

no reason to modify the relevant standard of proof [...] by requiring in cases like the present that it be proved that subjection to ill-treatment is more likely than not.’ The Court ‘reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary and sufficient for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3.’³⁶

Indicators of a future risk of persecution or serious harm

There are various factors which may indicate that a future risk of persecution or serious harm exists. It is argued here that the duty to perform an appropriate and careful examination of the asylum claim laid down in Article 8 (2)

33 ECtHR 2 December 2010, *B.A. v France*, no 14951/09, para 44. The arrest warrant submitted by the applicant only stated that he committed a grave fault and not that he was a deserter.

34 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 122.

35 The Court considered that the prospect that the person concerned may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill-treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

36 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 140.

PD requires that all relevant factors be taken into account.³⁷ It should be prevented that such factors are examined only in isolation and are not taken together.

A very important indicator of a future risk of persecution or serious harm is the fact that an applicant was persecuted or suffered serious harm in the past on the condition that such past persecution or serious harm is connected to the grounds on which the applicant claims to fear persecution or risk serious harm in the future.³⁸ This follows from Article 4 (4) QD, which applies to the assessment of both refugee and subsidiary protection status. This provision states that the fact that an applicant has already been subject to persecution or to direct threats of such persecution is a serious indication of the applicant's well-founded fear of persecution, unless there are *good reasons* to consider that such persecution will not be repeated. Several authors mention that this provision implies that previous (threats of) persecution or serious harm gives rise to a refutable presumption that the applicant qualifies for refugee or subsidiary protection.³⁹

The importance of the fact that a person was persecuted, tortured or ill-treated in the past when assessing a future risk of such treatment is confirmed in the case-law of the ECtHR and the Committee against Torture.⁴⁰ In *Salah Sheekh* for example the ECtHR established that the applicant suffered inhuman treatment in the past. It considered:

Having regard to the information available [...], the Court is far from persuaded that the situation has undergone such a substantial change for the better that it could be said that the risk of the applicant being subjected to this kind of treatment anew has been removed or that he would be able to obtain protection from the (local) authorities. There is no indication, therefore, that the applicant would find himself in a significantly different situation from the one he fled.⁴¹

37 The ECtHR emphasises in *NA v the United Kingdom* that the assessment of whether there is a real risk must be made on the basis of all relevant factors which may increase the risk of ill-treatment. ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 130. See also ECtHR 31 May 2011, *E.G. v the United Kingdom*, no 41178/08, para 72.

38 In Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 94 the Court of Justice considered that 'the evidential value attached by Article 4(4) of the Directive to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) of the Directive, that those acts and threats are connected with the reason for persecution relied on by the person applying for protection'. Also in the assessment of a risk of serious harm past ill-treatment is only relevant if it is connected to the reasons why the applicant claims to risk serious harm in the future. See also Hailbronner 2010, p 1037.

39 See Battjes 2006, p 227, Hailbronner 2010, p 1037, Staffans 2008, p 638.

40 See for example ComAT 30 November 2010, *Said Amini v Denmark*, no 339/2008, para 9.8 and ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005. See also General Comment No 1 (1997), A/53/44, para 8 (b).

41 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, paras 146-147. See also ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 55.

The fact that past persecution is an important indicator for a well-founded fear of persecution in the future is recognised by the UNHCR Handbook⁴² as well as legal scholars.⁴³

In the case-law of the ECtHR and the Committee against Torture past torture or ill-treatment does not automatically make the existence of a future risk of such treatment plausible. An important change of the conditions in the country of origin,⁴⁴ the fact that the abuses were applied by individuals and not condoned by the authorities⁴⁵ and in some cases the fact that the past persecution or torture occurred a long time ago,⁴⁶ may warrant the conclusion that no such future risk exists. Arguably these factors may be considered 'good reasons' that no risk of future persecution or serious harm exists in the meaning of Article 4 (4) QD.

Also other factors such as the applicant's high profile,⁴⁷ the fate of his family members, friends or members of the same racial or social group⁴⁸ or the existence of systematic human rights violations in the country of origin⁴⁹ are indicators of a future risk of persecution or serious harm. On the basis of the ECtHR's case-law, the UNHCR Handbook as well as the view of the Committee against Torture it should be concluded that the duty to perform an appropriate examination of the asylum claim laid down in Article 8 (2) PD requires that risk factors should be taken together and not (only) be assessed in isolation.⁵⁰ According to the ECtHR:

42 UNHCR Handbook, para 45. See also UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 19.

43 According to Grahl-Madsen the fact that a person has experienced previous persecution 'should be considered prima facie proof to the effect that he may again become a victim of persecution should he return to his home country, so long as the regime which persecuted him prevails in that country'. Grahl-Madsen 1966, p 176. See also Hathaway 1991, p 88.

44 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 147, which implies that a substantial change for the better, could have taken away the future risk of inhuman treatment and ECtHR, 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 71. In ComAT 27 March 2002, *Y.H.A. v Australia*, no 162/2000, para 7.4, for example the ComAT took into account that a new Transitional government was formed, which included members of the clan to which the applicant belonged. See also UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 19 and Hailbronner 2010, pp 1037-1038.

45 ECtHR (Adm) 27 March 2008, *Hakizimana v Sweden*, no 37913/05.

46 See for example ComAT 16 May 2008, *Z.K. v Sweden*, no 301/2006, para 8.4 and ComAT 19 May 2008, *R.K. v Sweden*, no 309/2006, para 8.5. In ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 71, the ECtHR considered that the passage of time did not diminish the risk of *refoulement*.

47 See for example ECtHR (GC) 25 October 1996, *Chahal, v the United Kingdom*, no 22414/93, para 106 and ComAT 7 July 2011, *Harjinder Singh Khalsa et al v Switzerland*, no 336/2008, para 11.5.

48 See for example ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 73.

49 See for example ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 130.

50 UNHCR Handbook, paras 53 and 201.

[D]ue regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk.⁵¹

In the ECtHR's view both the need to consider all relevant factors taken together and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case.⁵²

Individual risk or general risk

The determining authorities in Member States may be inclined to expect an asylum applicant to substantiate that he has a well-founded fear of persecution or faces a real risk of suffering serious harm on individual grounds. Furthermore they may assess the risk emanating from the individual situation of the applicant and that emanating from the general situation in the country of origin separately, instead of taking them together.⁵³

It is true that applicants who fear to become the victim of the general situation of (indiscriminate) violence in their country of origin will not qualify as a refugee under the Qualification Directive, in the absence of a persecution ground.⁵⁴ However members of a particular group, which is systematically persecuted because of its race, religion, ethnicity or another persecution ground should be considered refugees, without being further singled out.⁵⁵

It follows from the Court of Justice's and the ECtHR's case-law that requiring individual grounds for a risk of serious harm in each case undermines the full effectiveness of the EU right to subsidiary protection and the *prohibition of refoulement*. This case-law shows that a real risk of suffering serious harm may also emanate from the fact that a person belongs to a special vulnerable group or, in exceptional situations, even from the general situation in the applicant's country or region of origin. In the assessment of the risk of serious harm individual factors as well as the general situation in the country of origin should be taken into account. This case-law will now be further examined.

The Court of Justice held in *Elgafaji* that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of

51 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 130. See for an example where the ComAT considered that cumulative factors established a real and foreseeable risk of torture: ComAT 7 July 2011, *Mondal v Sweden*, no 338/2008, para 7.7.

52 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 130. See also ECtHR 20 July 2010, *N. v Sweden*, no 23505/09, para 62 and UNHCR Handbook, para 201.

53 Spijkerboer & Vermeulen 1995, pp 91-93.

54 Wouters 2009, p 71.

55 Hathaway states that 'the historical framework of the Convention makes clear that it was designed to protect persons within large groups whose fear of persecution is generalized, not merely those who have access to evidence of particularized risk.' Hathaway 1991, pp 90-94. Wouters 2009, p 88, Goodwin Gill & McAdam 2007, pp 128-129.

an applicant in the country of origin', used in Article 15(a) and (b) QD cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm. Article 15 (c) QD on the other hand covers a more general risk of harm.⁵⁶ This provision covers

harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.⁵⁷

According to the Court collective factors play a significant role in the application of Article 15(c) of the Directive, 'in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict'.⁵⁸ In order to meet the standard of proof required under Articles 2 (e) and 15 QD, the grounds substantiating the risk of suffering the serious harm in the meaning of Article 15 (c) may thus focus (at least to a large extent) on the general situation in the country of origin. According to the Court the system of Article 15 QD entails a sliding scale: 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.⁵⁹ It may be assumed that the opposite is also true: the higher the level of indiscriminate violence in the country of origin, the less important it is for the applicant to show that he is specifically affected by reason of his individual circumstances.

The Court of Justice's approach resembles to the approach taken by the ECtHR.⁶⁰ The ECtHR accepted that, if the existence of a real risk of treatment contrary to Article 3 ECHR is established, 'the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two'.⁶¹ In *Sufi and Elmi v the United Kingdom* the ECtHR

⁵⁶ Case C-465/07, *Elgafaji* [2009], paras 32-33.

⁵⁷ Case C-465/07, *Elgafaji* [2009], para 35.

⁵⁸ Case C-465/07, *Elgafaji* [2009], para 38.

⁵⁹ Case C-465/07, *Elgafaji* [2009], para 39. See also paras 36 and 41 of the opinion of A.G. Maduro in this case.

⁶⁰ In ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 225, the ECtHR considered that it was not persuaded that Art 3 ECHR does not offer comparable protection to that afforded under the QD. Art 3 CAT does not cover cases of risk of harm because of indiscriminate violence. See for example ComAT 19 May 2008, *R.K. v Sweden*, no 309/2006, para 8.2.

⁶¹ ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 218.

held that the level of violence in Mogadishu was of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in that city. In its assessment of the situation in Mogadishu, the ECtHR took into account the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons displaced within and from the city, and the unpredictable and widespread nature of the conflict.⁶²

The Court also recognised that persons belonging to a group systematically exposed to a practice of ill-treatment, face a real risk of *refoulement*. The protection of Article 3 ECHR enters into play when an applicant establishes that there are *serious reasons to believe* in the existence of such practice of ill-treatment and establishes (proves) that he is a member of the group concerned.⁶³ To insist in such cases that the applicant show the existence of special distinguishing features would render the protection offered by Article 3 illusory. Moreover, such a finding would call into question the absolute nature of Article 3.⁶⁴ Only if the level of violence in the country is not sufficiently intense to and an individual is not a member of a vulnerable group, the applicant must show the existence of 'further special distinguishing features'. Then the focus lies on the individual asylum account of the applicant, which should be assessed in the light of the general situation in the country of origin.⁶⁵

8.2 THE BURDEN OF PROOF: WHO NEEDS TO MAKE PLAUSIBLE?

In this section it is examined which party in asylum proceedings (the asylum applicant or the determining authority) bears the burden of proof. The concept 'burden of proof' has different meanings. First of all it may refer to the *objective burden of proof* which determines which party bears the negative consequences if the required standard of proof for the matter to be proved in the individual case is not met.⁶⁶ It may also refer to a *subjective burden* of proof which determines the responsibility to produce evidence.⁶⁷ In this section both issues will be addressed. It is assumed for the purpose of this section that for the

62 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 248.

63 Zahle calls these two evidentiary aspects of a refugee case 'risk-group existence' and 'risk-group affiliation'. Zahle 2005, p 18.

64 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 217.

65 ECtHR (GC) 4 February 2005, *Mamatkulov and Askarov v Turkey*, no 46827/99, para 67.

66 See Staffans 2008, p 629. See also Popovic 2005, p 36.

67 See Staffans 2008, p 630. See also UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 5, which states that the duty to produce evidence in order affirmatively to prove the alleged facts is termed "burden of proof".

assessment whether a person qualifies as a refugee or as a person eligible for subsidiary protection, the same EU standards regarding the burden of proof apply. This also follows from the fact that Article 4 QD, which concerns the assessment of facts and circumstances, applies to both assessments. Therefore the standards which may be derived from the Refugee Convention and those which follow from the ECHR, ICCPR and CAT are discussed in coherence.

8.2.1 Adducing evidence and dispelling doubts

The Qualification Directive does not explicitly mention that the asylum applicant bears the risk if the standard of proof for qualification as a refugee or person eligible for subsidiary protection is not met.⁶⁸ However, it may be assumed in particular on the basis of the Court of Justice's case-law,⁶⁹ State practice and principles of international law⁷⁰ that the objective burden of proof is on the applicant.⁷¹ This section only addresses the general burden of proof with regard to the risk of *refoulement* upon return. The burden of proof with regard to more specific aspects of the assessment of the asylum claim, such as the reliance on a safe country of origin, a safe third country, an internal flight alternative or the effectiveness of diplomatic assurances will not be examined.⁷²

The case-law of the Court of Justice, which will be addressed below shows that the principle of full effectiveness of EU law may require a shift of the burden of proof from the applicant to another party, even if no EU legislation with regard to the burden of proof exists. Furthermore the ECtHR's recent case-law has made clear that in *refoulement* cases the burden of proof needs to shift to the determining authority if the applicant has adduced evidence capable of proving that there are substantial grounds for believing that there is a real risk of treatment in violation with Article 3 ECHR upon return. Also the Committee against Torture and the Human Rights Committee apply such a shift of the burden of proof when the applicant has substantiated (an important part) of the asylum claim. On the basis of this case-law it is argued in this section that the full effectiveness of the EU right to asylum and the prohibition

68 See also Noll 2005-II, p 5.

69 See for example Case C-381/99, *Brunhofer* [2001], para 52, Case C-127/92, *Enderby* [1993], para 13.

70 See for example ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 129, ComAT General Comment No 1 (1997), A/53/44, para 5 and UNHCR Handbook, para 196.

71 See Staffans 2008, p 629. She states that 'both customary law, international law and also regional law quite without hesitation allocate the objective burden of proof to the applicant in the asylum procedure. It is thus commonly agreed that it indeed, as a starting point, is the task of the applicant to prove his or her status as a refugee'.

72 See with regard to safe countries of origin Art 31 (1) PD, with regard to safe third countries and first countries of asylum Art 27 (1) PD and Art 26 PD (which refers to Art 27 (1) PD) and with regard to internal flight alternatives, Art 8 QD.

of *refoulement* require a shift of the burden of proof to the determining authority in a number of specific situations.

Shifting the burden of proof in EU equal treatment cases

The Court of Justice has recognised in several cases that national rules concerning the burden of proof are capable of undermining the full effectiveness of EU law. According to the Court, Member States may be obliged to apply and interpret their national rules on the burden of proof in the light of the purpose of the applicable EU legislation.⁷³ In equal treatment cases (mostly concerning equal pay between men and women) the Court requires a shift of the burden of proof from the applicant (the worker) to the defending party (the employer) in order to guarantee the full effectiveness of the right to equal treatment, where there is a *prima facie* case of discrimination.⁷⁴ The employer then has to show that there are objective reasons for the difference in pay. There is a *prima facie* case of discrimination for example when significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men.⁷⁵

When establishing whether a *prima facie* case of discrimination has been made out, the Court of Justice takes into account difficulties encountered by the applicant in adducing evidence of discrimination. In *Danfoss* for example the employer applied a system of pay which was wholly lacking in transparency, which made it very difficult for female employees to prove that they were paid less than their male colleagues, who were doing the same work and that this was at variance with the Equal Pay Directive.⁷⁶ Female employees could establish differences only so far as average pay was concerned. The Court therefore required a shift of the burden of proof to the employer, if a female worker established, in relation to a relatively large number of employees, that the average pay for women was less than that for men. The employer had to prove that the differentiation in pay between men

73 Joined Cases C-253/96 to C-258/96, *Kampelmann and others* [1997], paras 32-34 and Case C-350/99, *Lange* [2001], paras 31-32. Note that in these cases Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ 288/32 provided that the Directive shall be without any prejudice to national law and practice concerning proof as regards the existence and content of a contract or employment relationship.

74 Case C-127/92, *Enderby* [1993], para 18, Case C-381/99, *Brunnhöfer* [2001], para 58. In Case C-54/07, *Feryn* [2008], para 31, which concerned discrimination on the grounds of racial or ethnic origin a 'presumption of a discriminatory recruitment policy' caused the shift of the burden of proof.

75 Case C-127/92, *Enderby* [1993], para 19.

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

and women was not the result of discrimination.⁷⁷ The Court considered that the concern for effectiveness which underlies the Equal Pay Directive 'means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality'.⁷⁸ The Court's case-law in equal treatment cases has been codified in EU legislation, in particular in a special directive on the burden of proof in cases of discrimination based on sex.⁷⁹

Cases before the ECtHR, Committee against Torture and Human Rights Committee
In the case-law of the ECtHR, the Committee against Torture and the Human Rights Committee it is accepted that the burden of proof should shift from the asylum applicant to the determining authority when the applicant has made out a *prima facie* case of a risk of *refoulement*.⁸⁰ The burden of proof shifts back to the applicant if these authorities have sufficiently disputed the evidence or arguments submitted by the applicant. The ECtHR uses the following standard as regards the burden of proof:

It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. [...] Where such evidence is adduced, it is for the Government to dispel any doubts about it.⁸¹

It is impossible to point out exactly when the burden of proof needs to shift to the determining authority. In most *refoulement* cases the ECtHR, Committee against Torture or Human Rights Committee did not indicate that the burden

77 See also Case C-196/02, *Nikoloudi v Organismos Tilepikionion Ellados AE* [2005], para 74 and Case C-400/93, *Specialarbejderforbundet i Danmark* [1995], paras 24-27. In Case C-381/99, *Brunnhöfer* [2001], para 58 the normal burden of proof applied because there were no special circumstances such as those established in *Danfoss*. The worker had to prove that the pay she received was less than that of her chosen comparator and that she did the same work or work of equal value comparable to that performed by him.

78 Case C-109/88, *Danfoss* [1989], para 14. Art 6 of the Equal Pay Directive provides that Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed.

79 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1997] OJ L 14/6. See also Art 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 and Art 10 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

80 See also Spijkerboer 2009-II, pp 61-62.

81 See for example ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 129.

of proof had shifted and for which reasons.⁸² However on the basis of their judgments several circumstances can be identified which may trigger a shift of the burden of proof.

Past persecution or serious harm

A first example is the fact that the applicant was subjected to ill-treatment in the past. In the previous section it was already submitted that past ill-treatment or torture is an important factor which indicates that a future risk of persecution or serious harm exists. It follows from Article 4 (4) QD⁸³ as well as the ECtHR's and Committee against Torture's case-law that this factor also requires a shift of the burden of proof to the decision-making authorities. In *R.C. v Sweden* the ECtHR considered:

Having regard to its finding that the applicant has discharged the burden of proving that he has already been tortured, the Court considers that the onus rests with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeds.⁸⁴

The Court then assessed the future risk of a treatment in violation with Article 3 ECHR in the light of the very tense situation in Iran at the time. Furthermore the Court considered that the applicant would face a specific risk upon return as he could not produce evidence of his having left that country legally. The Court observed that the Government had not rebutted the applicant's claim that he left Iran illegally. Therefore the Court found it probable that the applicant, being without valid exit documentation, would come to the attention of the Iranian authorities and that his past was likely to be revealed. The Court concluded that the expulsion of the applicant to Iran would violate Article 3.

82 In non-asylum cases under Artt 2 and 3 ECHR the ECtHR did set out more precisely which circumstances lead to a shift of the burden of proof to the State authorities. It considered for example that where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of the death of a person within their control in custody, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person's death. See for example ECtHR (GC) 6 July 2005, *Nachova and others v Bulgaria*, nos 43577/98 and 43579/98, para 157. See similarly HRC 16 August 2007, *Kimouche v Algeria*, no 1328/2004.

83 See also Noll 2005-II, p 8. He states that the Member State must show on an individual basis, why earlier persecution or harm will not entail renewed persecution or harm after rejection of the application and *refoulement*.

84 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 55. See also ECtHR 10 December 2009, *Koktysh v Ukraine*, no 43707/07, para 64.

Plausible statements and reliable proof

The burden of proof may also shift to the determining authority if the applicant substantiated to a certain extent that there is a future risk of *refoulement* by submitting credible statements and/or documents in support of their asylum account. In *S.H. v the United Kingdom* for example the applicant had adduced several expert reports (Amnesty International, the Human Rights Council of Bhutan, Human Rights Watch and two individual experts) which supported his claim that he would be at risk of imprisonment and ill-treatment upon return to Bhutan. Furthermore human rights reports indicated that the ethnic Nepalese in Bhutan were afforded discriminatory treatment on account of their ethnicity. The Court was satisfied that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to ill-treatment contrary to Article 3 if returned to Bhutan. It noted that the Government had not adduced any evidence capable of dispelling the Court's concerns. In particular the Government had accepted that there was no evidence that the situation of the ethnic Nepalese had improved following the adoption of the Constitution in Bhutan.⁸⁵ In *Chedli Ben Ahmed Karoui v Sweden* the Committee against Torture found it impossible to verify the authenticity of some of the documents provided by the complainant. 'However, in view of the substantive reliable documentation he has provided, including medical records, a support letter from Amnesty International Sweden, and an attestation from the Al-Nahdha chairman, the complainant [...] has provided sufficient reliable information for the burden of proof to shift'.⁸⁶

Serious human rights violations in the country of origin

When reports of human rights organisations submitted by the applicant or taken into account by the ECtHR of its own motion, show the existence of serious human rights violations, it is up to the determining authority to dispute that information. The burden of proof with regard to the risks emanating from the general situation in the country of origin thus shifts to the State. In *Garayev* for example the applicant claimed that he would be tortured in prison upon extradition to Uzbekistan. The ECtHR considered that the Government had not adduced any evidence or reports capable of rebutting the credible reports by human rights organisations of torture, routine beatings and use of force against criminal suspects or prisoners by the Uzbek law-enforcement authorities. No evidence had been produced of any fundamental improvement in the protection against torture in Uzbekistan in recent years.⁸⁷

⁸⁵ ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, paras 69-71.

⁸⁶ ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, no 185/2001, para 10. See also ComAT 15 February 2001, *A.S. v Sweden*, no 149/1999, para 8.6 and HRC 9 December 2004, *Jonny Rubin Byahuranga v Denmark*, no 1222/2003, paras 11.2-11.4.

⁸⁷ ECtHR 10 June 2010, *Garayev v Azerbaijan*, no 53688/08, para 73. See also ECtHR 19 November 2009, *Kaboulov v Ukraine*, no 41015/04, para 111. ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 98.

The applicant belongs to a group at risk

It follows from *Sufi and Elmi v the United Kingdom* that the determining authority should prove that an individual is not at risk, when it is established on the basis of human rights reports that the violence in a country or region of origin is of such a level of intensity that in principle anyone in that region or country would be at real risk of treatment prohibited by Article 3 of the Convention. In this case the Court concluded that such a situation occurred in Mogadishu. It accepted that some persons who were exceptionally well-connected to “powerful actors” could find protection in Mogadishu. However it was for the Government to show that a person could find protection for such reasons.⁸⁸ On the basis of this judgment it is conceivable that, if it is established that a person belongs to a group systematically exposed to a practice of ill-treatment (such as the Ashraf minority in the case of Salah Sheekh⁸⁹), it is up to the determining authorities to prove that this person can find protection against persecution or serious harm.

No burden of proving negative facts

Potentially it should be derived from *M and others v Bulgaria* that the asylum applicant should not be expected to prove negative facts. In this case the Bulgarian Supreme Court acknowledged the existence of a risk of death and ill-treatment of the applicant, who converted to Christianity, upon return to Afghanistan. However it refused the applicant’s claim because the applicant had not proved that those risks stemmed from the Afghan authorities and that those authorities would not guarantee his safety. The ECtHR considered under Article 13 ECHR:

[B]y dealing with such a serious issue summarily and by placing on the first applicant, without any explanation, the burden of proving negative facts, such as the lack of State guarantees in Afghanistan, the court practically deprived Mr M. of a meaningful examination of his claim under Article 3.⁹⁰

88 ECtHR 28 June 2011, *Sufi and Elmi v United Kingdom*, nos 8319/07 and 11449/07, paras 249-250. See similarly ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 359 where the Court held that the State authorities should have concluded on the basis of the available human rights reports that the applicant faced a real and individual risk of *refoulement*.

89 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04.

90 ECtHR 26 July 2011, *M. and others v Bulgaria*, no 41416/08, para 127. See also ECtHR 24 May 2011, *Abou Amer v Romania*, no 14521/03, para 58, where the State placed on the applicant the burden of proving that he had not been involved in any activities threatening national security. According to the ECtHR such proof seems impossible to produce, notably because the applicant was not informed of the concrete suspicions against him.

This case is quite specific because of the number of deficiencies in the Supreme Court's review of the asylum claim.⁹¹ However, it does show that, in particular when a risk of treatment contrary to Article 3 is found real, no burden to prove negative facts can be placed on the applicant.

Shifting the burden of proof back to the applicant

If the examining authorities provide well-founded reasons to contest the statements or the evidence submitted by the applicant, the burden of proof shifts back to the applicant.⁹² The determining authority may for example have submitted good reasons to consider that past ill-treatment will not be repeated, by showing that the situation in the country of origin has improved to an important extent.⁹³ Furthermore the burden of proof may shift back to the applicant if the determining authority gave strong reasons to question the information submitted by the applicant⁹⁴ or the authenticity of documents provided by him.⁹⁵

Subconclusion: the objective burden of proof

It should be derived from the Court of Justice's case-law in equal treatment cases that the principle of effectiveness requires a shift of the burden of proof from the applicant to the State if this is necessary to ensure the purpose of the Procedures and Qualification Directive, namely respect for the right to asylum and the prohibition of *refoulement* and the full and inclusive application of the Refugee Convention.⁹⁶ It is contended on the basis of the ECtHR's case-law that such a shift of the burden of proof is necessary if the applicant adduced evidence capable of proving that he has a well-founded fear of persecution or that there are substantial grounds for believing that he faces a real risk of suffering serious harm. It may be derived from the ECtHR's case-law that this condition is met in the following situations:

91 The Supreme Administrative Court failed to carry out a proper examination of the executive's assertion that the applicant presented a national security risk. According to the ECtHR this undermined the effectiveness of this remedy with regard to the requirements of Art 13 in conjunction with Art 3. Furthermore the Court placed excessive reliance on the question whether the ill-treatment risked in the receiving State would emanate from State or non-State sources. Finally the remedy before the Supreme Court did not have suspensive effect.

92 See also Zahle 2005, pp 19-20.

93 See Art 4 (4) QD, ECtHR (Adm) 4 July 2006, *Karim v Sweden*, no 24171/05 and ComAT 27 March 2002, *Y.H.A. v Australia*, no 162/2000, para 7.4.

94 See for example ECtHR (Adm) 8 July 2008, *A.J. v Sweden*, no 13508/07, para 56, ECtHR (Adm) 2 September 2008, *A.A. v Sweden*, no 8594/04, para 66, ECtHR (Adm) 27 March 2008, *Hakizimana v Sweden*, no 37913/05.

95 ECtHR (Adm) 21 June 2005, *Matsiukhina and Matsiukhin v Sweden*, no 31260/04, ComAT 26 November 2008, *M.F. v Sweden*, no 326/2007, para 7.7.

96 According to Recital 8 of the Preamble PD and Recital 10 Preamble QD, the Qualification Directive and the Procedures Directive aim to ensure these rights. See also section 2.1.2.

- it is established that the applicant was subjected to torture or ill-treatment in the past.
- the applicant has substantiated to a certain extent that there is a future risk of *refoulement* by submitting credible statements and or documents in support of the asylum account.
- human rights organisations report the existence of serious human rights violations in the applicant's country of origin. The burden of proof shifts to the State authorities with regard to the risk emanating from the general situation in the country of origin.
- it is established that in the applicant's country or region of origin the violence is of such intensity that anyone is at risk of torture or ill-treatment or that the applicant belongs to a special vulnerable group

Finally the ECtHR's judgment in *M and others v Bulgaria* may indicate that the applicant may not be required to prove negative facts.

8.2.2 Producing evidence: a shared duty

Most Member States impose upon the applicant the duty to produce evidence in support of his asylum claim.⁹⁷ This is allowed by Article 4 (1) QD, which provides that the Member States may consider it the duty of the applicant 'to submit as soon as possible all elements needed to substantiate the application for international protection'.⁹⁸ Also according to the ECtHR's case-law⁹⁹ and the views of the Committee against Torture,¹⁰⁰ the Human Rights Committee¹⁰¹ and UNHCR¹⁰² the applicant bears the burden of providing evidence in support of his asylum claim.

97 According to the Commission in 2010 Art 4 (1) first sentence was transposed by all Member States except for Belgium, the Czech Republic, Cyprus, Finland, Hungary, Lithuania and Romania. Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final, p 4.

98 Note that the Member States are not *required* to place the burden of proof on the applicant. This also follows from Art 4 (5) QD, where rules are provided for the situation where Member States apply Art 4 (1) first sentence. See also Hailbronner 2010, pp 1027-1028.

99 According to the ECtHR it is 'incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail'. ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, para 49.

100 See for example ComAT 2 May 2007, *E.R.K. and Y.K. v Sweden*, no 270 & 271/2005, para 7.4 and ComAT 5 May 2009, *X v Australia*, no 324/2007, para 7.4.

101 The HRC has declared several cases inadmissible because the person concerned failed to substantiate his claims under Art 7 ICCPR. See for example: HRC 28 April 2009, *Moses Solo Tarlue v Canada*, no 1551/2007, para 7.4.

102 UNHCR Handbook, para 195.

This section argues however that the duty to conduct an appropriate examination of the asylum claim prescribed by Article 8 (2) PD read in the light of the principle of full effectiveness of EU law entails a positive obligation for the Member States to investigate certain aspects of the asylum claim. Potentially the Member States' duty to assess the relevant elements of the application in cooperation with the applicant laid down in Article 4 (1) QD also entails such a positive obligation.¹⁰³

This interpretation of Articles 8 (2) PD and 4 (1) QD would be in line with the ECtHR's case-law concerning Article 3 ECHR. According to the ECtHR Article 3 ECHR entails an obligation for the State to carry out a meaningful or adequate assessment of the applicant's claim of a risk of *refoulement*.¹⁰⁴ It follows from this obligation that the State authorities must address the applicant's allegations of past torture and the future risk of *refoulement*.¹⁰⁵ In a number of complaints against Turkey the ECtHR concluded that the State authorities failed to carry out a meaningful assessment of the risk of *refoulement*. The ECtHR took into account amongst others that the State authorities did not interview the applicants. In these cases the ECtHR concluded on the basis of the evidence submitted by the applicants and the fact that UNHCR recognised the applicants as refugees that expulsion would violate Article 3 ECHR.¹⁰⁶

It will be argued in this section that it follows in particular from the duty to an adequate assessment of the asylum claim that Member States are obliged to gather reliable country of origin information from different sources. Furthermore the State is required to request a medical report by an expert, if the applicant makes out a *prima facie* case that the scars on his body or other medical problems suffered by him are caused by ill-treatment in his country of origin. Finally it is argued that the determining authority should gather evidence which is only obtainable by this authority and not by the asylum applicant. The authority examining the asylum claim is thus not allowed to

103 According to Boeles and others the Member States' duty to assess the asylum application in cooperation with the asylum applicant laid down in Art 4 (1) QD implies that the Member State must actively contribute in gathering the necessary evidence for status determination and allow the asylum applicant to participate in that process as soon as the applicant has provided the initial necessary elements in support of his asylum claim. Boeles and others 2009, p 338. Under the ECtHR such positive obligation follows from the duty of a 'close scrutiny' of the asylum claim following from Artt 3 and 13 ECHR. See ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 293.

104 See for example ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 122, ECtHR 15 June 2010, *Ahmadpour v Turkey*, no 12717/08, para 38, ECtHR 19 January 2010, *Z.N.S. v Turkey*, no 21896/08, para 48 and ECtHR, 11 July 2000, *Jabari v Turkey*, no 40035/98, para 40.

105 ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 123.

106 See for example ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, ECtHR 13 April 2010, *Tehrani and others v Turkey*, nos. 32940/08, 41626/08, 43616/08, ECtHR 13 July 2010, *Dbouba v Turkey*, no 15916/09.

sit back and limit itself to the assessment of the statements and evidence adduced by the applicant.¹⁰⁷

The duty to gather reliable country of origin/transit country information of different sources.

Article 8 (2) (b) PD states that in the context of their duty to conduct an appropriate examination of the asylum claim Member States must ensure that 'precise and up-to-date information is obtained from various sources', such as the UNHCR, 'as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited'. Such information should be made available to the personnel responsible for examining applications and taking decisions'.¹⁰⁸ The duty to gather relevant country of origin information is important in all asylum cases and in particular in the context of the assessment of the right to subsidiary protection on the basis of Article 15(c) QD. In this assessment collective factors play a significant role. The determining authority should examine whether the person concerned 'belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict'.¹⁰⁹

It also follows from the ECtHR's case-law that the determining authority should carry out an adequate assessment of the situation in the country of origin which is sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources.¹¹⁰ The ECtHR has reproached Governments because they failed to include any country of origin information in the assessment of the asylum claim or to refer to such information in their asylum decision.¹¹¹ In *M.S.S v Belgium and Greece* the ECtHR considered that the Belgian Governments should have been aware of the general situation in Greece and therefore of the applicant's fears in the event of his transfer back to this country, although the applicant failed to voice those fears at his interview. The Court in this context referred to the numerous reports concerning the situation in Greece. According to the Court the applicant should in this situation not be expected 'to bear the entire burden of proof'.

107 See also Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures, para 5, which states that 'when examining an application for asylum the competent authority must, of its own initiative take into consideration and seek to establish all the relevant facts.'

108 See also Art 4 (3) QD.

109 Case C-465/07, *Elgafaji* [2009], para 38.

110 See ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136.

111 ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 70, ECtHR 21 October 2010, *Gafarov v Russia*, no 25404/09, para 125. See also ComAT Concluding Observations on Hungary, 6 February 2007, CAT/C/HUN/CO/4, para 10, where it recommended that Hungary should expand and update its country of origin (COI) information database and take effective measures to certify that the internal regulation about the obligatory use of the COI system is respected.

The ECtHR did not explain which part of the burden of proof still rested on the applicant.¹¹² It did address however what was expected of the Belgian authorities: the reports concerning the general situation in Greece should have urged them to verify how the Greek authorities applied their legislation on asylum in practice. They could not assume that the applicant would be treated in conformity with the ECHR's standards.¹¹³ The Court concluded that the Belgian authorities knew or ought to have known that the applicant had no guarantee that his asylum application would be seriously examined by the Greek authorities.¹¹⁴

It should be concluded that it follows from Article 8 (2) (b) PD read in the light of the ECtHR's case-law that the determining authority should gather and assess of its own motion reports concerning the general situation in the country of origin (or transit). The value which should be attached to country of origin or transit country information, in particular reports issued by human rights organisations will be examined in section 8.6.2. below.

The duty to request medical expert reports

EU legislation does not explicitly require the determining authority of the Member States to request an expert to write a medical report if the applicant claims to have scars or other medical problems as a result of past torture or ill-treatment. However it is submitted here that the duty to conduct an adequate examination of the asylum claim following from Article 8 (2) PD read in the light of the ECtHR's judgment in *R.C. v Sweden* does entail such a duty. The ECtHR held in this case that the State authorities have a duty to direct that an expert opinion be obtained as to the probable cause of the applicant's scars, if the applicant submitted a medical certificate, which makes out a *prima facie* case as to the origin of scars on the body of the applicant (namely torture or ill-treatment).¹¹⁵ In section 8.6.3. it will be contended that medical reports should be considered very important evidence for the assessment of the asylum claim.

The duty to gather evidence obtainable by the State authorities, but unavailable to the applicant

It may be contended on the basis of the case-law of the Court of Justice and the ECtHR that the duty to conduct an appropriate examination of the asylum

¹¹² See also Battjes 2011, sub 6.2.1.

¹¹³ ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 359.

¹¹⁴ ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 358. See also ECtHR 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, paras 131-133 and 156-157.

¹¹⁵ ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 53. See also ComAT 23 October 1997, *A. v the Netherlands*, no 91/1997, para 6.6 where the Committee considered that the State party had failed to explain why the applicant's claims were considered insufficiently substantial as to warrant a medical examination.

claim as well as the principle of full effectiveness of EU law entails a positive obligation for the determining authority to investigate aspects of the asylum claim, where it has access to the relevant information and the asylum seeker has not. Arguably State authorities are better placed than the applicant to produce for example decisions on the asylum claims of relatives of the applicant in other Member States, information of judicial proceedings against the applicant pending in the country of origin or information on the fate of returnees to the applicant's country of origin, who are monitored by the State authorities.¹¹⁶

The Court of Justice accepted in its case-law that requiring a party to produce evidence which it cannot obtain is contrary to the principle of effectiveness.¹¹⁷ The national court should instead use all the procedures available to it, including ordering measures of inquiry, in order to obtain the evidence for example from third parties. This was decided in the judgment in *Laboratoires Boiron*. In this case Laboratoires Boiron, a pharmaceutical laboratory, claimed the reimbursement of taxes, arguing that wholesale distributors, which were the laboratory's direct competitors, were not liable to pay those taxes. Laboratoires Boiron claimed that this constituted State aid. According national law it was Laboratoires Boiron's duty to prove this claim. At the same time, the national courts had wide (discretionary) powers to order of its own motion all measures of inquiry permissible in law. The question before the Court was whether these rules of evidence were in compliance with the principle of effectiveness. The Court considered:

[I]f the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.¹¹⁸

The ECtHR has not explicitly considered that the burden of producing evidence should rest with the authorities of the State when they are better placed to obtain certain relevant information in an asylum case. However the Court seems to suggest that a duty to investigate certain aspects of the asylum claim

116 E.g. in the context of Art 8 (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

117 Case C-310/09, *Accor* [2011], para 100.

118 Case C-526/04, *Laboratoires Boiron SA* [2006], para 55. See also para 57 of this judgment. See also Case C-264/08, *Direct Parcel Distribution Belgium* [2010], paras 31-37.

may indeed exist in *Bader v Sweden*. In this case the ECtHR found it surprising that the first applicant's defence lawyer in Syria was not contacted by the Swedish embassy during their investigation into the case, even though the applicants had furnished the Swedish authorities with his name and address and he could, in all probability, have provided useful information about the case. In this case the applicant had submitted an original judgment of a Syrian Court in which he was sentenced to death in absentia on account of murder.¹¹⁹

The UNHCR Handbook states that, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.¹²⁰ UNHCR here seems to refer to cases of minors¹²¹ and mentally disturbed or traumatised persons.¹²²

8.3 INDIVIDUAL ASSESSMENT AND THE USE OF PRESUMPTIONS

According to Article 4 (3) QD and Article 8 (2) (a) PD the assessment of an application for international protection is to be carried out on an individual basis.¹²³ When assessing asylum claims the determining authority of the Member States sometimes applies certain presumptions to groups of asylum applicants. An important example of such presumption is: persons originating from a certain country (a safe country of origin) do not have protection needs.¹²⁴

119 ECtHR 8 November 2005, *Bader v Sweden*, no 13284/04, para 45. See also Wouters p 274.

120 UNHCR Handbook, para 196. See also Zahle 2005, p 26.

121 UNHCR states in its annotated comments on the QD that in the case of asylum seeking children the burden of proof should be applied flexibly and liberally, by fact-finding and gathering supporting evidence in any manner possible. UNHCR Annotated Comments on the Directive 2004/83/EC, UNHCR January 2005, p 16.

122 See UNHCR Handbook, para 210, which states that in case of a mentally disturbed person it will 'be necessary to lighten the burden of proof normally incumbent upon the applicant'. Information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.

123 See also Art 19 (4) QD, which requires that the State authorities demonstrate on an individual basis that the person concerned has ceased to be or is not eligible for subsidiary protection.

124 Other presumptions applied in asylum cases which do not fall within the scope of this study are: all Member States operate equivalent protection systems which comply with human rights standards (the presumption underpinning the Dublin Regulation), all Members of a certain organisation are individually responsible for actions giving rise to exclusion from an asylum status according to Artt 12 and 17 QD or all persons convicted to a certain sentence for a particular offence are a danger to the security or community of the Member State. See also Noll 2005-II, p 8.

The Procedures Directive allows for the use of a presumption of safety of countries of origin or third countries under certain conditions.¹²⁵ Member States are for example allowed to designate a country as a safe country of origin where it can be shown that there is generally and consistently no persecution as defined in Article 9 QD, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.¹²⁶ If a country is designated a safe country of origin it is presumed that asylum applicants originating from this country do not have a well-founded fear of persecution or face a real risk of serious harm. According to the Procedures Directive the presumption of safety of the country of origin may be rebutted by the applicant. The third country designated as a safe country of origin may only be considered as a safe country of origin for a particular applicant if he has not submitted any serious grounds for considering the country not to be a safe country of origin in his particular circumstances and in terms of his qualification as a refugee. If the country of origin is considered safe for the individual applicant, this has some serious consequences. According to Article 23 (4)(c)(i) PD the application may be dealt with in an accelerated procedure and Article 28 (2) PD provides that the application may be considered manifestly unfounded. This will generally reduce the asylum applicant's chances of rebutting the presumption of safety.

Asylum applicants may in practice find it (almost) impossible to prove that a presumption, such as the one mentioned above, does not apply in his particular case. In several cases the Court of Justice has held that the use of a presumption which is impossible or excessively difficult to rebut, is contrary to the principle of effectiveness. It is argued in this section on the basis of this case-law as well as the case-law of the ECtHR and the views of the Committee against Torture and UNHCR that in asylum cases the use of presumptions is permissible, but only if it is possible to rebut them and if the asylum applicant is granted sufficient opportunity to do so.¹²⁷ It should be examined on a case-by-case basis whether such presumption must be considered rebutted. The use of conclusive (irrebuttable) presumptions should be considered contrary to the duty of an individual assessment of the asylum claim laid down in Article 4 (3) QD and Article 8 (2) (a) PD. Furthermore such practice should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*.

¹²⁵ Artt 26, 27, 30-31, 36 PD.

¹²⁶ See Art 30 (1) PD and Annex II to the PD.

¹²⁷ Noll states that the requirement of an assessment on an individual basis means that 'if a Member State applies presumptions in the procedure, it must be possible to confute the presumption in the asylum procedure'. Noll 2005-II, p 8. See also Hailbronner 2010, p 1031.

Case-law by the Court of Justice

The Court of Justice's case-law shows that the principle that asylum claims should be assessed on an individual basis does not preclude the use of presumptions. However the use of irrebuttable presumptions violates this requirement as well as the principle of effective judicial protection. In *Samba Diouf* the Court of Justice held that in order for the right to an effective remedy to be exercised effectively,

the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons.¹²⁸

In this case the Luxembourg authorities and the Luxembourg court disagreed on the extent to which the reasons for rejecting an asylum claim in an accelerated procedure could be reviewed by the national court in the context of the appeal against the final rejection of the claim.

In *NS and ME and others* the Court of Justice recognised the importance of the presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights in the context of the European Union as well as CEAS. However it considered that an application of the Dublin Regulation 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 the Dublin Regulation in a manner consistent with fundamental rights. The asylum applicant must, according to the Court of Justice, be able to submit evidence in order to rebut this presumption.¹²⁹

The Court of Justice addressed the use of a presumption of responsibility for certain crimes which give rise to the exclusion from an EU asylum status on the basis of Article 12 QD in its judgment in *B and D*. The Court established that the exclusion from refugee status of a person who has been a member of a terrorist organisation is conditional on an individual assessment of the specific facts.¹³⁰ The Court accepted that any authority which finds in the course of this assessment that the person concerned has occupied a prominent

¹²⁸ Case C-69/10, *Samba Diouf* [2011], para 61.

¹²⁹ Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], paras 99-105. The Court considered that Art 36 PD 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. See also opinion of A.G. Trstenjak with this case of 22 September 2010.

¹³⁰ The Court considered that it follows from the wording of Art 12 QD that the determining authority should carry out an assessment of the specific facts within their knowledge with a view to determining whether there are serious reasons for considering that the acts committed by the person in question are covered by the exclusion clauses.

position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period. Nevertheless the Court deems it necessary that all the relevant circumstances be examined before a decision excluding that person from refugee status can be adopted.¹³¹ It should thus be derived from this judgement that the requirement of an individual assessment laid down in Article 4 (3) QD and Article 8 (2) (a) PD does not preclude the use of presumptions. However, such presumption may not prevent the determining authority to assess the specific circumstances of the case. This implies that the individual must be able to rebut the presumption while referring to his individual circumstances.

Cases concerning the repayment of charges levied by a Member State contrary to EU law

In several cases concerning the repayment of charges levied by a Member State contrary to EU law the Court of Justice reached the conclusion that a presumption used by State authorities violated the principle of effectiveness, because this presumption could in practice not be rebutted by an individual party. In *SpA San Giorgio* a company brought an action before the Italian court, reclaiming amounts unduly paid. In these proceedings the State invoked Italian law, which stated that import duties or taxes would not be repaid, when the charge in question had been passed on in any way whatsoever to other persons. This charge was presumed to have been passed on, whenever the goods, in respect of which the payment was effected, had been transferred, in the absence of documentary proof to the contrary. *SpA San Giorgio* questioned the compatibility of these provisions with principles of EU law. The question put before the Court of Justice was whether the requirement of negative documentary proof rendered the exercise of rights, which national courts are under a duty to protect, virtually impossible. The Court of Justice considered that the conditions for repayment of charges levied by a Member State contrary to EU law, may not be contrary to the principles of equivalence and effectiveness. The Court recognised that the Member States may take certain measures to prevent unjust enrichment of the recipients. The Court considered however:

[A]ny requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons [...].¹³²

131 Joined Cases C-57/09 and C-101/09, *B and D* [2010], paras 94 and 98. See also para 77 of the opinion of A.G. Mengozzi with this case.

132 Case C-199/82, *SpA San Giorgio* [1983], para 14. See also Case C-147/01, *Weber's wine world* [2003], paras 109-117.

The Court thus held that a presumption that the duties and charges unlawfully levied or collected, have been passed on to third parties and the requirement for the plaintiff to rebut that presumption, are contrary to EU law.¹³³

Presumptions in the ECtHR's case-law and the views of the Committee against Torture and UNHCR

The ECtHR and the Committee against Torture have accepted in its case-law that certain rebuttable presumptions may be used in asylum cases. Like the Court of Justice the ECtHR held that it needs to be presumed that States comply with their obligations under international treaties.¹³⁴ In the context of the Dublin Regulation it must be presumed in the absence of any proof to the contrary, that the Member States of the EU will comply with their obligations under the ECHR and under EU law.¹³⁵ However according to the ECtHR State parties are required to assess on a case-by-case basis whether there is evidence which rebuts the presumption that the State party will comply with its obligations stemming from international or EU law.¹³⁶ The ECtHR held in several cases that the presumption that a State Party with the ECHR complies with its obligations under this Convention should be considered rebutted. The most important example of such as case is the judgment in *M.S.S. v Belgium and Greece*. In this case the Court based its judgment on numerous reports issued by human rights organisations which pointed at human rights violations by Greece (see further section 8.3.1 above).¹³⁷ Furthermore the ECtHR has held in the context of the assessment of the reliability of diplomatic assurances that 'the existence of domestic laws and accession to international treaties guar-

133 See for comparable judgments: Case C-343/96, *Dilexport* [1999], para 48, Joined Cases C-441/98 and C-442/98, *Kapniki Michailidis* [2000], paras 36-37 and Case C-129/00, *Commission v Italy* [2003] paras 36-40.

134 ECtHR (Adm) 1 September 2009, *Harutioenyan and Others v the Netherlands*, no 43700/07 and ComAT 3 September 2000, *S.C. v Denmark*, no 143/199 and ComAT 28 November 2003, *E.J.V.M. v Sweden*, no 213/2002.

135 ECtHR (Adm) 2 December 2008, *K.R.S. v Greece*, no 32733/08. ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 345.

136 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 341-343, ECtHR (Adm) 7 March 2000, *T.I. v the United Kingdom*, no 43844/98. The judgment in *R.U. v Greece* made clear that the ECtHR itself assesses on a case-by-case basis whether such a presumption is rebutted: 'Il n'en reste pas moins que la Cour ne peut pas fonder son appréciation sur le seul fait que le renvoi du requérant peut se produire vers une Haute Partie contractante à la Convention. Elle doit en même temps se pencher sur les éléments concrets du dossier pour évaluer s'il existe des moyens sérieux de penser qu'un danger de torture ou de peines ou de traitements inhumains ou dégradants menace l'intéressé en cas de renvoi en Turquie.' ECtHR 7 June 2011, *R.U. v Greece*, no 2237/08, para 79.

137 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09. See also ECtHR 12 April 2005, *Shamayev and others v Georgia and Russia*, no 36378/02, where the Court concluded that expulsion from Georgia to Russia amounted to a violation of Art 3 ECHR and ECtHR 7 June 2011, *R.U. v Greece*, no 2237/08, para 82 where the Court held that there was a *prima facie* serious risk that the applicant would become the victim of a treatment contrary to Art 3 ECHR upon return to Turkey.

anteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where [...] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention'.¹³⁸ It may thus not be presumed that a country complies with national law and human rights treaties where reliable sources show the contrary.

Both the Committee against Torture and the UNHCR have criticised the use of presumptions of safety of countries in asylum procedures. They stress the need for an effective opportunity to rebut this presumption and for an individual assessment of the case.¹³⁹ UNHCR states that

given the need for an individual assessment of the specific circumstances of the case and the complexities of such a decision, best State practice does not apply any designation of safety in a rigid manner or use it to deny access to procedures. Rather, it bases any presumption of safety on precise, impartial and up-to-date information and admits the applicant to the regular asylum procedure, so that s/he has an effective opportunity to rebut any general presumption of safety based on his/her particular circumstances.¹⁴⁰

8.4 ASSESSING THE CREDIBILITY OF THE APPLICANT'S STATEMENTS

Most asylum applicants arrive in the EU Member States without documents or evidence supporting their asylum account. In most cases therefore, the asylum application should be examined largely on the basis of the statements of the asylum applicant and his family members made during interviews or in writing, in the light of the available country of origin information.¹⁴¹ In these cases the assessment of the credibility of the asylum account is often decisive.¹⁴² Once the credibility of the individual asylum account is (seriously) called in question, it is usually concluded that there is no well-founded fear of persecution or that no substantial grounds have been shown for believing

138 ECHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 147. See also ECtHR 24 March 2009, *O. v Italy*, no 37257/06, para 40 and ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 98.

139 See ComAT Concluding Observations on Estonia (19 February 2008, CAT/C/EST/CO/4, p 3) and France (3 April 2006, CAT/C/FRA/CO/3, p 4). and UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005, p 40.

140 UNHCR Global Consultations on international protection Asylum Processes (Fair and efficient asylum procedures), 31 May 2001, paras 39-40.

141 This follows from Art 4 (2) and (3) QD, which state that the applicant's statements and relevant facts as they relate to the country of origin at the time of taking a decision on the application are elements which should be taken into account in the assessment of the asylum claim. See also for example Herlihy, Gleeson & Turner 2010, pp 351-352.

142 See for example Popovic 2005, p 18 and Thomas 2006, p 79.

that there is a real risk of serious harm.¹⁴³ It is argued below that if the *general credibility* of the applicant is established, the Member States should, according to Article 4 (5) QD, be required to consider the facts stated by the applicant established, even if no evidence is submitted in support of these facts (apply the benefit of the doubt).

Assessing the credibility of asylum applicant's account is a very complex and difficult task.¹⁴⁴ EU legislation does not contain any specific standards with regard to the credibility assessment. However some guidance as to the factors which should be taken into account when performing such assessment, may be derived from Article 23 (4) PD. This provision mentions the circumstances in which an asylum application may be processed in an accelerated procedure and may be deemed manifestly unfounded. Member States and human rights bodies such as the ECtHR, Human Rights Committee and the Committee against Torture often take these circumstances into account when examining the credibility of an asylum account:

- the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his identity and/or nationality that could have had a negative impact on the decision
- the applicant has filed another application for asylum stating other personal data
- the applicant has not produced information establishing with a reasonable degree of certainty his identity or nationality
- it is likely that, in bad faith, he has destroyed or disposed of an identity or travel document that would have helped establish his identity or nationality
- the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his having been the object of persecution.

It is argued in this section that national procedural rules or practices which have as a consequence that it is concluded too easily that an asylum account is not credible, undermine the full effectiveness of the EU right to asylum and the principle of *non-refoulement*. From the ECtHR's case as well as the views of the Human Rights Committee and the Committee against Torture several standards emerge which should be complied with in order to ensure the effectiveness of the prohibition of *refoulement*. It follows from this case-law,

143 UNHCR stated in 2010 that 'a common trend identified through the audit of decisions in several states was that negative decisions were often made on credibility grounds, and did not apply the criteria of the Qualification Directive to facts'. UNHCR, *Improving Asylum Procedures, Comparative Analysis and Recommendations for Law and Practice*, Geneva: March 2010, p 14.

144 See for example Thomas 2006, p 96.

which will be examined more extensively below in this section that the determining authority should focus on the credibility of the essence of the asylum account and that asylum applicants should be granted the opportunity to provide a reasonable explanation for the alleged shortcomings in their account.

Credibility assessment by the ECtHR, Human Rights Committee and Committee against Torture

An asylum account is usually deemed credible when the applicant's statements are coherent, detailed and plausible and consistent with information concerning his country of origin.¹⁴⁵ Human rights bodies often consider an asylum account credible when the State authorities have not presented any information which rebuts the applications allegations.¹⁴⁶

There are many factors which affect the credibility of the asylum account.¹⁴⁷ Often it is a combination of such factors which lead to the conclusion that the asylum account is insufficiently substantiated. First of all contradictions or inconsistencies in the asylum seeker's statements, which are not satisfactory explained by the applicant¹⁴⁸ or a lack of detail in the asylum applicant's account are generally considered to undermine the credibility of the applicant's statements.¹⁴⁹ In *S.M. v Sweden* the applicant had claimed to have been a courier for the Congolese ambassador in Sweden and a friend, transferring money between them. The Court observed in this case that she had only given very general information about this activity and had failed to specify, for example, how she came to be entrusted with such a secret and dangerous task and the circumstances surrounding her arrest, as well as how exactly she had been able to escape from a hospital where she was guarded by a soldier. This was one of the reasons why the ECtHR concluded in this case that the asylum account was not sufficiently substantiated.¹⁵⁰

145 See for example ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 52 and 54, ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09 para 135, ECtHR 10 June 2010, *Garayev v Azerbaijan*, no 53688/08, para 72. See also UNHCR Handbook, para 204.

146 See for example ECtHR, 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 68, HRC 9 December 2004, *Jonny Rubin Byahuranga v Denmark*, no 1222/2003, para 11.3.

147 See Thomas 2006, p 81.

148 See for example ECtHR (Adm) 8 July 2008, *A.J. v Sweden*, no 13508/07, paras 59-60 and ECtHR 5 March 2002, *Hemat Kar v Sweden*, no 62045/00. See also ComAT General Comment No 1 (1997), A/53/44, para 8 (g) and ComAT 21 June 1999, *M.B.B. v Sweden*, no 104/1998, para 6.6.

149 See ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05, where the Court considered that no specific details had been provided amongst others regarding the alleged ill-treatment to which the applicants maintained that they were subjected. See also ECtHR 20 January 2011, *N.S. v Denmark*, no 58359/08, para 94.

150 ECtHR (Adm) 10 February 2009, *S.M. v Sweden*, no 47683/08, para 33.

Furthermore it is accepted that the use of a false name or false identity documents without explanation¹⁵¹ or the applicant's failure to submit identity documents or information on the travel route may undermine the credibility of the asylum account.¹⁵² In *E.N. v Sweden* the ECtHR considered that the applicant gave a false name and date of birth and submitted a forged identity card to the Swedish authorities. Moreover, he alleged that he had used a fake passport and did not know the travel route while, in reality, he had travelled legally to France on his own passport and with a valid entry visa to study in France. 'These untruths clearly affect the applicant's general credibility negatively in the eyes of the Court.'¹⁵³

The applicant is often reproached for a total absence of evidence supporting the asylum claim or of crucial parts of it, in particular when there are already doubts as to the credibility of the asylum account.¹⁵⁴ In *Achmadov and Bagurova v Sweden* the ECtHR for example took into account that the applicants were not in possession of any receipts of police reports or any copies of letters to or from public authorities, lawyers or human rights organisations relating to harassment allegedly suffered by them. Nor did they present any medical statements, despite the fact that one of the applicants visited a doctor after an assault, just weeks before the applicants entered Sweden. The ECtHR found this rather remarkable. It particularly referred to the fact that one of the applicants and her adult son had experience with the German and Italian immigration authorities as a result of an earlier asylum application. Therefore the ECtHR found that they must have been aware that any kind of evidence would have been of significant value to the asylum proceedings.¹⁵⁵

The Committee against Torture has reproached applicants for a lack of medical evidence supporting an account of past torture or ill-treatment.¹⁵⁶ Also when documents submitted by the applicant, such as arrest warrants,

151 ECtHR (Adm) 8 July 2008, *A.J. v Sweden*, no 13508/07, para 59 and ECtHR (Adm) 8 December 2009, *E.N. v Sweden*, no 15009/09, para 30.

152 ECtHR (Adm) 10 February 2009, *S.M. v Sweden*, no 47683/08, para 33.

153 ECtHR (Adm) 8 December 2009, *E.N. v Sweden*, no 15009/09, para 30.

154 ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05, ComAT 21 November 2007, *K.A. and others v Sweden*, no 308/2006, para 7.3. and ComAT 26 November 2008, *L.J.R. v Australia*, no 316/2007, para 7.5.

155 ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05

156 ComAT 15 May 2008, *M.X. v Sweden*, 311/2007, paras 9.4-9.6, ComAT 2 May 2007, *E.V.I. v Sweden*, no 296/2006, para 8.6, ComAT 2 May 2007, *E.R.K. and Y.K. v Sweden*, no 270 & 271/2005, para 7.4 and ComAT 19 May 1998, *A.L.N. v Switzerland*, no 90/1997, para 8.4. The absence of physical evidence of torture should however not be (automatically) held against the applicant. See the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) paras 161 and 172.

court summons or judgments, turn out to be forgeries, this is generally held against the applicant.¹⁵⁷

Finally an important factor which is generally considered to undermine the credibility of the asylum account is the fact that the asylum applicant submitted new statements or evidence in a late stage of the asylum proceedings. The ECtHR noted for example in *A.A. v Sweden* that the applicant did not mention being threatened by the LLTE in his first two interviews with the migration authorities although one of the interviews lasted approximately six hours. It was not until after the Migration Board had refused to grant him asylum that the applicant claimed to be in danger of revenge from the LLTE. More than two years later after the refusal of the Swedish authorities to reassess the asylum claim, the applicant submitted some documents which allegedly concerned the threats that he had received from the LLTE. The Court stated that, taking these circumstances into account, it could not but endorse the national authorities' observations as to the applicant's credibility. In the same judgment the Court also took into account that the applicant further extended his reasons for seeking asylum, adding that he would be punished as a deserter upon return to Sri Lanka after his asylum application had been rejected twice.¹⁵⁸

The ECtHR's judgment in *Hilal v the United Kingdom* shows that the ECtHR does not base its conclusion that the applicant's asylum account is not credible only on the fact that statements or evidence were submitted in a late stage of the procedure. In this case the applicant mentioned that he was tortured in his second interview, which took place more than a month after the initial interview. Furthermore he waited almost two years to submit significant evidence, such as the death certificate of his brother, medical reports and a police summons. The ECtHR found no reasons to reject these documents as forged or fabricated, referring to an expert opinion submitted by the applicant which concluded that the documents were genuine. On the basis of these documents and the applicant's statements the ECtHR concluded that there was a real risk of *refoulement*.¹⁵⁹

Focus on the core of the asylum account

Inconsistencies, vaguenesses or lack of documents and evidence supporting the asylum account cannot always lead to the conclusion that the asylum account should not be believed. The determining authority sometimes puts too much weight on minor defects and refuse to recognise that the asylum

157 See for example ECtHR (Adm) 21 June 2005, *Matsiukhina and Matsiukhin v Sweden*, no 31260/04 and ComAT 21 June 1999, *M.B.B. v Sweden*, no 104/1998, para 6.6.

158 ECtHR (Adm) 2 September 2008, *A.A. v Sweden*, no 8594/04, paras 66-68. See also ECtHR 4 December 2008, *Y v Russia*, no 20113/07, ECtHR (Adm) 27 March 2008, *Hakizimana v Sweden*, no 37913/05 and ECtHR 20 January 2011, *T.N. v Denmark*, no 20594/08, para 101.

159 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99.

applicant's basic story is credible and provides substantial grounds for believing that there is a real risk of *refoulement*.¹⁶⁰ The case-law of the ECtHR and Committee against Torture show that the *general credibility* of the asylum account should be assessed, while attaching less weight to inconsistencies, vaguenesses or uncertainties in less relevant parts of the account.¹⁶¹

In particular in the ECtHR's case-law some important examples can be found in which the Court found a violation of Article 3 ECHR although there were doubts about certain parts of the applicant's asylum account.¹⁶² In *Said v the Netherlands* for example the Dutch authorities found the applicant's account of his arrest, of the reasons for it, and of his escape, so implausible as to invalidate his claim of having deserted from the army. The Court proceeded however to an assessment of the general credibility of the statements made by the applicant before the Netherlands authorities and during the proceedings before the Court. The Dutch authorities had not disputed that the applicant had served in the Eritrean army following a general mobilisation. The Court considered that a strong indication that the applicant was indeed a deserter lied in the fact that he applied for asylum in the Netherlands at a time when demobilisation had not yet begun and would not begin for another year. It considered that it was difficult to imagine by what means other than desertion the applicant might have left the army. 'Even if the account of his escape may appear somewhat remarkable [...] it does not detract from the overall credibility of the applicant's claim that he is a deserter'. The Court concluded that being a deserter, Said faced a real risk of *refoulement* upon return to Eritrea.¹⁶³

In *R.C. v Sweden* the Court also ignored inconsistencies in the applicant's escape story, although in this case this part of the asylum account could easily be considered essential for the asylum claim. The applicant claimed that friends had helped him to escape from the revolutionary court, where he would be tried for his participation in demonstrations against the Iranian regime. The Government questioned this story while referring to international sources which stated that there was very little public control of these courts, that the proceedings were only open to the parties and, exceptionally, to some family members, and that people who entered and exited the court building were carefully checked. The ECtHR found however that 'the applicant's basic story was consistent throughout the proceedings and that notwithstanding some

160 See for example Wouters pp 268-269 and Gorlick 2003, p 371-372.

161 ComAT 3 June 2010, *Njamba and Balikosa v Sweden*, no 322/2007, para 9.5, CAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97 and ComAT 8 May 1998, *A.F. v Sweden*, no 89/1997. See also ComAT General Comment No 1 (1997), A/53/44, para 8 (g) and UNHCR Handbook, para 204, which also speaks of the 'general credibility' of the applicant.

162 See also Spijkerboer 2009-II, p 59.

163 ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, paras 50-53. See also ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 69.

uncertain aspects, such as his account as to how he escaped from prison, such uncertainties did not undermine the overall credibility of his story'.¹⁶⁴

Also in *N v Finland* the Court held that the applicant's basic story was credible although it had 'certain reservations' about the applicant's own testimony before the Delegates of the ECtHR which it considered to have been evasive on many points.¹⁶⁵ The Court was not prepared to accept every statement of his as fact. It found in particular the applicant's account of his journey to Finland not credible. The Finnish authorities had rejected the asylum claim amongst others because of inconsistencies in the applicant's asylum account, which was not supported by documents.¹⁶⁶ Furthermore the applicant's identity could not be ascertained as the applicant used several names and had not presented any identity documents.¹⁶⁷

It should furthermore be noted that when the risk of *refoulement* follows from the general situation in the country of origin the credibility of the individual asylum account (except for the person's nationality or State of habitual residence) is of no importance.¹⁶⁸ If a person claims to face a real risk of *refoulement* because he belongs to a vulnerable group, it is sufficient to substantiate that there are serious reasons to believe in the existence of a systematic practice of ill-treatment of that group and that he is a member of the vulnerable group concerned to fall within the scope of Article 3 ECHR.¹⁶⁹ In those situations inconsistencies regarding other elements of the asylum account (e.g. past experiences, age, travel route) cannot lead to refusal of protection.

Explanations for alleged inconsistencies or late statements

If the examining authorities present information which gives strong reason to question the veracity of an applicant's submissions, the individual must

164 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 44 and 52.

165 The Court considered credible that the applicant belonged to President Mobutu's and the *Division Spéciale Présidentielle* (DSP) commander's inner circle. Furthermore the Court found sufficiently credible the applicant's statement that as an official in the DSP he took part in various events during which dissidents seen as a threat to President Mobutu were singled out for harassment, detention and possibly execution.

166 The applicant's statements made during the Finnish asylum procedure differed from his statements made in the context of an earlier asylum procedure in the Netherlands. According to the Finnish authorities the applicant's statements concerning his role during the overthrow of President Mobutu and his escape to Finland had been inconsistent and imprecise.

167 ECtHR 26 July 2005, *N v Finland*, no 38885/02, paras 152-157. Wouters states that in *N v Finland* elements could have seriously undermined the claim. Wouters 2009, p 268.

168 See ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07 paras 301-304. In this case the ECtHR did not consider relevant whether the applicant made plausible that he belonged to a minority clan.

169 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 132.

provide a satisfactory explanation for the alleged discrepancies.¹⁷⁰ This implies that the applicant must be offered the opportunity to rebut the determining authority's findings and that his explanations must be seriously assessed. In *Hilal v the United Kingdom* for example the applicant failed to mention the fact that he was tortured in his first interview. The ECtHR accepted the applicant's explanation for his failure, namely that that he did not think he had to give all the details until the full interview a month later. The ECtHR considered that this explanation had become far less incredible in the light of the medical report submitted by the applicant which confirmed that the applicant was tortured.¹⁷¹

Psychological trauma

Notably, it is accepted by the Committee against Torture that inconsistencies or vaguenesses in the asylum account may be the result of psychological problems caused by past torture. In that case these inconsistencies and vaguenesses may not be held against the asylum applicant. The Committee against Torture has held in many cases that 'complete accuracy is seldom to be expected by victims of torture'.¹⁷² This applies in particular when the asylum seeker is suffering of a post traumatic stress syndrome.¹⁷³ Also the fact that it has been claimed or established that a person was tortured or detained, is taken into account by the Committee.¹⁷⁴ In this regard the Committee against Torture attaches importance to medical evidence provided by the author.¹⁷⁵ In *Falcon Ríos v Canada* for example the national authorities concluded that the complainant's testimony contained significant gaps. The Committee noted that, according to the psychologist's report, the complainant displayed 'great psychological vulnerability' as a result of the torture to which he had allegedly been subjected. The same report stated that Mr. Falcon Ríos was 'very destabilized by the current situation, which presents concurrent difficulties', and that he was 'bruised, weakened by the torture he had undergone and

170 See ECtHR (Adm) 8 March 2007, *Collin and Akaziebie v Sweden*, no 23944/05, ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 50. See also Gorlick 2003, p 371.

171 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 64.

172 See for example ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.6, ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, no 185/2001, para 10, ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, para 6.6, ComAT 8 May 1996, *Kisoki v Sweden*, no 41/1996, para 9.3 and ComAT 8 May 1995, *Alan v Switzerland*, no 21/1995, para 11.3.

173 In ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, para 6.6 and ComAT 15 November 1996, *Kaveh Yaragh Tala v Sweden*, no 43/1996, para 10.3.

174 ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, paras 7.5-7.6.

175 ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, para 6.6 and ComAT 8 May 1998, *A.F. v Sweden*, no 89/1997, para 6.5. In ComAT 3 June 1999, *N.P v Australia*, no 106/1998, para 6.6 the ComAT held against the applicant that he failed to submit medical evidence, which could have explained the important inconsistencies in the author's statements before the Australian authorities.

events associated with trauma'. In the Committee's view, the vagueness referred to by the State party could be seen as a result of the psychological vulnerability of the complainant mentioned in the report; moreover, the vagueness was not so significant as to lead to the conclusion that the complainant lacked credibility.¹⁷⁶ Also the ECtHR acknowledged that complete accuracy as to dates and events cannot be expected in all circumstances from a person seeking asylum.¹⁷⁷ However, the Committee against Torture and ECtHR do not accept that major inconsistencies can be explained by the fact that the person concerned is a victim of torture or ill-treatment.¹⁷⁸

Also the late submission of statements or evidence may be the result of psychological trauma. In that case the tardiness of the submissions does not affect the credibility of the asylum account.¹⁷⁹ The ECtHR has considered that 'it may be an ordeal to talk about experiences of torture'¹⁸⁰ and that it 'would not deny that symptoms of post-traumatic stress disorder may indeed materialise years after events'.¹⁸¹ However, the ECtHR has decided in several cases that late statements could not be explained by the applicant's psychological problems. In *Cruz Varas v Sweden* the Court stated that:

[E]ven if allowances are made for the apprehension that asylum-seekers may have towards the authorities and the difficulties of substantiating their claims with documentary evidence, the first applicant's complete silence as to his alleged clandestine activities and torture by the Chilean police until more than eighteen months after his first interrogation by the Växjö Police Authority casts considerable doubt on his credibility in this respect.¹⁸²

The applicant in this case stated two years after the asylum application that he was subjected to sexual abuse. He said that he tried to suppress this event and that he found it very painful to talk about. Furthermore he submitted a medical report which concluded that nothing had been established which contradicted the assumption that Cruz Varas had been subjected to such torture and sexual abuse as he alleged and that there were strong indications that

176 ComAT 17 December 2004, *Enrique Falcon Ríos v Canada*, no 133/99, para 8.5.

177 ECtHR (Adm) 17 January 2006, *Bello v Sweden*, no 32213/04.

178 See ECtHR (Adm) 17 January 2006, *Bello v Sweden*, no 32213/04, where the ECtHR was 'struck by the number of major inconsistencies in the applicant's story' and ComAT 22 November 2004, *S.U.A. v Sweden*, no 223/2002, para 6.5. The ComAT considered however in ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, para 6.7, 'that the principle of strict accuracy does not necessarily apply when the inconsistencies are of a material nature'. See also Wouters 2009, p 267.

179 See with regard to this issue Bruin & Reneman 2006, pp 87-109. See on the potential influence of psychological factors on a person's ability to recount past events: Bloemen, Vloeberghs & Smits 2006, pp 43-85, Herlihy 2005, p 123-137 and Rhys Jones, p 383. See also UNHCR, *Improving Asylum Procedures*, s 5, pp 23-24.

180 ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02.

181 ECtHR (Adm) 10 November 2005, *Paramsothy v the Netherlands*, no 14492/03.

182 ECtHR (Plen) 20 March 1991, *Cruz Varas v Sweden*, no 15576/89, para 78.

he suffered from post traumatic stress syndrome. Also in more recent cases the ECtHR refused to recognise that psychological trauma provided an acceptable explanation for new statements which were made considerable time (a year or more) after the first asylum application. In those cases the Court considered that the applicant had not substantiated that his mental problems were caused by experiences in the country of origin.¹⁸³

The Committee against Torture seems to be more sensitive to the circumstances which may prevent victims of sexual violence to talk about their experiences to the authorities examining the asylum claim.¹⁸⁴ In *V.L. v Switzerland* the Committee against Torture stated in a case of a woman who submitted almost two years after her arrival in Switzerland that she was raped in her country of origin:

The complainant's explanation of the delay in mentioning the rapes to the national authorities is totally reasonable. It is well-known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family members.¹⁸⁵

The Committee considered in this case that the complainant's allegation that her husband reacted to the complainant's admission of rape by humiliating her and forbidding her to mention it in their asylum proceedings added credibility to her claim. It noted that as soon as her husband left her, the complainant who was then freed from his influence immediately mentioned the rapes to the national authorities. The Committee against Torture considered further evidence of her psychological state or psychological obstacles, as called for by the State party, unnecessary. The Committee concluded:

The State party's assertion that the complainant should have raised and substantiated the issue of sexual abuse earlier in the revision proceedings is insufficient basis upon which to find that her allegations of sexual abuse lack credibility, particularly in view of the fact that she was not represented in the proceedings.¹⁸⁶

183 ECtHR (Adm) 10 November 2005, *Paramsothy v the Netherlands*, no 14492/03, ECtHR (Adm) 31 May 2005, *Ovdienko v Finland*, no 1383/04, ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02.

184 See also UNHCR Handbook, para 198, which states that a person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.

185 ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8.

186 ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8.

The minor age of the applicant

It was argued in sections 7.1.2 and 7.2.5 that Article 12 read in the light of Article 24 of the Charter requires that unaccompanied as well as accompanied minors have the right to a personal interview in order to present their asylum claim. It also follows from Article 24 (1) of the Charter that the statements made by a minor in such an interview should be taken into consideration in accordance with the age and maturity of the child. On the basis of the views of the Committee on the Rights of the Child and UNHCR it is argued here that account should be taken of the age and maturity of the child when assessing the credibility of the minor's statements. Inconsistencies or vaguenesses in the child's asylum account may well be explained by the child's young age or immaturity.

According to the Committee on the Rights of the Child the requirement that due weight must be given to the child's views in accordance with his age and maturity means that 'the views of the child have to be seriously considered when the child is capable of forming her or his own views'.¹⁸⁷ This capacity should be assessed on a case by case basis. In the context of Article 12 CRC concerning the right to be heard, 'maturity' is 'the capacity of a child to express her or his views on issues in a reasonable and independent manner'.¹⁸⁸ The Committee states: 'The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child'.¹⁸⁹

UNHCR in its Guidelines on Child Asylum Claims points at the fact that children recount their experiences differently than adults and that this has implications for the assessment of the credibility of their statements:

Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions, such as time or distance. Thus, what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child. It is, therefore, essential that examiners have the necessary

187 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 28.

188 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 30.

189 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 30.

training and skills to be able to evaluate accurately the reliability and significance of the child's account.¹⁹⁰

Applying the benefit of the doubt

As was stated above a (total) lack of evidence can undermine the credibility of the applicant's asylum account, in particular if no reasonable explanation is offered for such a lack of evidence. However, Member States should not require proof of each and every statement submitted by the applicant.¹⁹¹ This follows from Article 4 (5) QD, which only applies if the Member State has made use of the option provided for by Article 4 (1) QD to place the burden of producing evidence in support of the asylum claim on the asylum applicant.¹⁹² Under certain conditions the applicant should be granted 'the benefit of the doubt' and his statements should be accepted as fact although no or insufficient proof is available.¹⁹³ Article 4 (5) QD states that where Member States place the burden of proof on the applicant and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, if the following conditions are met:

- a) the applicant has made a genuine effort to substantiate his application;
- b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
- c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- e) the general credibility of the applicant has been established.

It is submitted here that a strict application of the conditions mentioned in 4 (5) QD is capable of undermining the effectiveness of the EU right to asylum and the prohibition of *refoulement*. It was argued above that the principle of effectiveness requires Member States to focus on the credibility of the core or the asylum account (general credibility of the asylum applicant). The con-

190 UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva: 22 December 2009, para 72.

191 See also Boeles and others 2009, p 338.

192 According to Battjes this provision means that if the credibility of the applicant's statements has been established, these statements should be accepted as facts for the purpose of the assessment of the asylum claim. If the conditions listed in Art 4 (5) QD are not met 'the relevant aspect of the claim may be regarded as not "substantiated" [...]'. Battjes p 228.

193 According to Gorlick the application of the benefit of the doubt has been widely adopted in national determination procedures and as part of UNHCR's practices in the field. Gorlick 2003, p 366.

ditions mentioned in Article 4 (5) (a) -(d) QD may affect the general credibility of the asylum applicant, but this is not necessarily the case. The clearest example of a condition which on its own cannot undermine the credibility of the core of the asylum account is the condition mentioned under (d). The fact that the asylum application was not lodged at the earliest possible time in itself does not exclude that a person has a well-founded fear of persecution or runs a real risk of serious harm.¹⁹⁴ It would be contradictory if the Member States are allowed to refuse the benefit of the doubt on (one of) the conditions mentioned under (a)- (d), while they did not consider them to undermine the general credibility of the asylum applicant. Therefore the only condition which should be considered a self-standing ground to refuse the benefit of the doubt is the fact that the general credibility of the applicant could not be established.

Such explanation would be in line with the views of the ECtHR,¹⁹⁵ the Committee against Torture and UNHCR. They seem to be of the opinion that the benefit of the doubt should be applied if the asylum account is generally credible or 'sufficiently substantiated and reliable'.¹⁹⁶ UNHCR points at the fact that, even if the applicant made genuine efforts to substantiate his story, there may still be a lack of evidence of some of his statements. According to UNHCR

it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.¹⁹⁷

UNHCR states that the benefit of the doubt should only be given if all available evidence has been obtained and checked. This seems to be a procedural requirement, which ensures that a careful examination has been carried out before the benefit of the doubt is applied. The only material condition which must be fulfilled is that the examiner is satisfied as to the applicant's general credibility. 'The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.'¹⁹⁸ UNHCR mentions that there

194 See for example ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 101.

195 The ECtHR acknowledged that, owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt in assessing the credibility of their statements and the supporting documents. See for example ECHR (Adm) 8 March 2007, *Collin and Akaziebie v Sweden*, no 23944/05 and ECtHR (Adm) 8 July 2008, *A.J. v Sweden*, no 13508/07, para 56.

196 ComAT 29 May 1997, *Aemei v Switzerland*, no 34/1995, para 9.6. See also ComAT 3 June 1999, *H.D. v Switzerland*, no 112/1998, para 6.4.

197 UNHCR Handbook, para 203.

198 UNHCR Handbook, para 204. See also para 196 of the Handbook. UNHCR's Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 12 states that the benefit of the doubt should be granted 'where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim'. See also Gorlick 2003, pp 364 and 366.

may be 'good reasons' to refuse the benefit of the doubt even though the applicant's account appears to be credible. It does not explain however what could be considered such good reasons. UNHCR is of the opinion that a liberal application of the benefit of the doubt may be called for in cases of unaccompanied minors.¹⁹⁹

An example of a judgment in which the ECtHR seems to have granted the benefit of the doubt is *NA v the United Kingdom*. In this case the Court accepted that the detention of the applicant was recorded by the authorities in Sri Lanka (one of the risk factors identified by the Court) although there were many uncertainties about this record. The document signed by the applicant's father in order to secure his son's release was not available to the parties and therefore its precise nature was not known. The Court held that, whatever the nature of that document, at the very least it amounted to a record of the applicant's detention. The Court took into account in its assessment that the credibility of the applicants account was not disputed by the government of the State Party.²⁰⁰ In *Gaforov v Russia* the Court accepted as a fact the applicant's submission that he had already experienced ill-treatment at the hands of the Tajikistani law enforcement officials. The Court observed that the applicant did not adduce certain evidence to support his submission, but it considered nonetheless that the applicant's account of events was consistent and detailed.²⁰¹ In *N v Sweden* finally the Government contended that the applicant's claim that her family had rejected her and that she had no social network or male protection in her home country was unsubstantiated. The Court noted, however, that although there were divergences as to whether the applicant's last contact with her family was in the summer of 2005 or in October 2005, no information had been presented which gave strong reasons to question the veracity of her submissions that she had had no contact with her family for almost five years, which did support her claim that she no longer had a social network or adequate protection in Afghanistan.²⁰²

Subconclusion: assessing credibility

It should be concluded on the basis of the case-law examined above that Member States may refuse an asylum claim in case of a lack of evidence and major deficiencies in an applicant's asylum story. However the full effectiveness of the EU right to asylum and the prohibition of *refoulement* is seriously undermined if Member States focus on marginal issues such as non-compliance

199 UNHCR Handbook, para 218 and UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva: 22 December 2009, para 73.

200 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 143.

201 ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 135.

202 ECtHR 20 July 2010, *N. v Sweden*, no 23505/09, para 61.

with procedural rules or inconsistencies in parts of the applicant's account which do not relate to the essence of the asylum claim.

Asylum applicants should be granted the opportunity to explain the alleged deficiencies in their asylum account. It follows from the ECtHR's case-law and the Committee against Torture's views that inconsistencies in an asylum account or late statements by the applicant, which are caused by psychological trauma should not be held against the applicant. However, the ECtHR is reluctant to accept that inconsistencies and in particular late statements are the result of psychological problems, while the Committee against Torture is more ready to accept such problems as an explanation. It was explained in chapter 4 that more weight should be attached to the ECtHR's case-law as a source of inspiration of EU fundamental rights than the view of the Committee against Torture. However arguably this should be different if it concerns the weight which should be attached to the late statements of persons suffering from psychological problems. The Committee against Torture is specialised in the examination of cases of victims of torture, and therefore potentially more sensitive to the potential difficulties encountered by such persons when talking about their experiences. Furthermore it should be noted that the ECtHR does not deem an asylum account not credible, only because of the fact that the applicant made new statements concerning his asylum motives or provided evidence in a late stage of the procedure. In the case of *Hilal* the ECtHR was convinced that there was a risk of *refoulement*, even though the applicant did not mention that he was tortured in his first interview and provided crucial evidence his asylum claim considerable time after the asylum application had been lodged. It follows from the views of the Committee on the Rights of the Child and UNHCR that account should be taken of the age and maturity of the child when assessing the credibility of the minor's statements.

As soon as the general credibility of the asylum applicant is established, his statements should according to Article 4 (5) QD be accepted as facts, without requiring further evidence. Refusing the benefit of the doubt in such a situation, for example because the applicant did not comply with certain procedural requirements, should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*.

8.5 EVIDENTIARY ASSESSMENT

Asylum applicants may submit all kinds of documents or evidence in order to support their asylum claim. In this section the question is addressed which types of evidence should be taken into account in the assessment of the asylum claim and how this evidence must be valued. The determining authority of the Member States may regard certain types of evidence as irrelevant or attach very limited weight to them. According to Dutch case-law for example statements of the applicant's family members or friends who are still residing in

his country of origin are considered to be of no value because they do not originate from an 'objective source'.²⁰³ Documents of which the authenticity cannot be established by the Dutch authorities, because of a lack of reference documents, are not taken into consideration in subsequent asylum applications as they are not considered to be new facts or circumstances.²⁰⁴

In this section it is argued that the automatic exclusion of specific types or forms of evidence or the fact that very little weight is attributed to them, may violate the duty to conduct an appropriate examination of the asylum claim, which follows from Article 8 (2) PD read in the light of the principle of full effectiveness of EU law.

Section 8.6.1 addresses the weight which must be granted to expert reports. In this section two types of expert reports are specifically addressed: country of origin information and medical reports.

EU standards regarding evidentiary assessment

Article 4 QD mentions the elements which should be taken into account in the assessment of the asylum claim and therefore also gives some general indications as to which types of documents or other evidence should be considered relevant. It may be derived from Article 4 (2), (3) and (4) QD that evidence concerning the following elements should be into consideration: the position and personal circumstances of the applicant,²⁰⁵ in particular the reasons for applying for asylum including previous persecution to which he was exposed,²⁰⁶ the situation in the country of origin,²⁰⁷ the applicant's activities in the country of refuge, which may lead to a risk of *refoulement* upon his return to the country of origin²⁰⁸ and the availability of safe third countries.²⁰⁹ As the Qualification Directive does not address which specific types of evidence should be included or excluded from the assessment of the asylum claim, the determining authority has wide discretion in the evaluation of all materials adduced by the applicant. However it is conceivable that the ex-

203 These statements may regard their own observations or experiences or concern the risk the applicant faces upon return. See for example Administrative Jurisdiction Division of the Council of State 18 November 2008, no 200805862/1, where the Council of State considered that the statements made by the applicant's father could not be regarded as new facts as they did not originate from an objective source and were not supported by any other concrete evidence.

204 See for example Administrative Jurisdiction Division of the Council of State 26 May 2009, no 200902200/1/V2.

205 Art 4 (3) and (4) refer to background, gender and age, identity, nationality, country(ies) and place(s) of previous residence and previous asylum applications.

206 See Art 4 (4) QD.

207 See Art 4 (2) and (3) QD.

208 Art 4 (3) QD mentions 'the applicant's activities since leaving the country of origin' as a relevant element.

209 Art 4 (3) QD mentions 'whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship' as a relevant element.

clusion of relevant evidence from the assessment of the asylum claims or the fact that little value is attributed to this evidence is capable of undermining the effectiveness of the EU right to asylum and the principle of *non-refoulement*. Such exclusion should therefore be considered contrary to the duty to conduct an appropriate examination of the asylum claim following from Article 8 (2) PD and the effectiveness of the EU prohibition of *refoulement* and the right to asylum.

The Court of Justice has ruled in several cases that the requirement of a particular type of evidence in support of a claim may undermine the effectiveness of EU law. In *Bolbol* the Court held that in order to prove that a person availed himself of the assistance of UNRWA, registration with UNRWA is sufficient proof. However, as such assistance can be provided even in the absence of such registration, the beneficiary must be permitted to adduce evidence of that assistance by other means.²¹⁰ A.G. Sharpston in her opinion with this case stated that 'the State is entitled to insist on some evidence, but not on the best evidence that might be produced in an ideal world'.²¹¹

The principle that national authorities are not allowed to accept only the best possible evidence in support of a claim under EU law can also be found in the case-law concerning other fields of EU law, in particular tax law. In *SpA San Giorgio*, the Court of Justice considered that requirements of proof having the effect of making it virtually impossible or excessively difficult to exercise a Community right may include 'special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence'.²¹² In *Meilicke* the Court of Justice held under the principle of sound administration and the principle of proportionality²¹³ that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided

210 Case C-31/09, *Bolbol* [2010], para 52. See also the opinion of A.G. Sharpston with this case, in which she stated that UNRWA sometimes provides assistance without registering a person. Sometimes, the administrative records may lag behind the event; or may themselves have been destroyed during hostilities. She therefore rejected the French Government's submission that only actual proof of UNRWA registration will suffice (para 98).

211 A.G. Sharpston, opinion with Case C-31/09, *Bolbol* [2010], para 102.

212 Case C-199/82, *SpA San Giorgio* [1983], para 14. See section 8.4. for a description of the case. See also Case C-228/98, *Dounias* [2000], paras 71-72, where the Court of Justice held that Community law does not preclude a provision of national law under which, in judicial proceedings in which it is sought to establish State liability with a view to obtaining compensation for damage caused by a breach of Community law, witness evidence is admissible only in exceptional cases, provided that such a provision does not prevent individuals from asserting rights which they derive from the direct effect of Community law.

213 The case concerned a measure ensuring the effectiveness of fiscal supervision which restricted free movement of capital. Such measure is only justified if the principle of proportionality is observed. See paras 40-42 of the judgment.

for in the legislation applicable to the case at issue have been met and, consequently, whether or not to grant that advantage. However according to the Court such assessment must not be conducted too formalistically. The tax authorities of the Member State of taxation should accept documentary evidence which enables them to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage are met. Evidence should be taken into account even if it lacks the degree of detail and is not presented in the form of a corporation tax certificate, which is usually required. Only if no such evidence is produced may the relevant tax authorities refuse the tax advantage sought.²¹⁴ It follows from these judgments that the (automatic) exclusion of particular forms of evidence may be contrary to the principle of effectiveness.²¹⁵

Evidentiary assessment in asylum cases before the ECtHR, Committee against Torture and Human Rights Committee

More specific guidance as to the relevance and value of certain types of evidence is offered by the case-law of the ECtHR, Committee against Torture and Human Rights Committee. These bodies have not excluded specific types of evidence when ruling in *refoulement* cases.²¹⁶ Documents which they considered particularly relevant are for example: court summons,²¹⁷ police summons,²¹⁸ judgments entailing a criminal conviction of the applicant²¹⁹ and death certificates of family members.²²⁰ Letters written by representatives of political parties or other organisations of which the applicant claims to have been a member or for which he claims to have been active have also been taken into account.²²¹ The same applies to statements by human rights organisations²²² or relatives²²³ regarding the position of the applicant. In *Klein v*

214 Case C-262/09, *Meilicke and others* [2011], paras 43-47. See also Case C-310/09, *Accor* [2011], paras 99-101.

215 See also Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures, para 4, which states that 'recognition of refugee status is not dependent on the production of any particular formal evidence'.

216 ComAT General Comment No 1 (1997), A/53/44, para 7 states that all pertinent information may be introduced by either party in order to establish whether the applicant would be in danger of being tortured.

217 ComAT 11 May 2007, *A.A. v Switzerland*, no 268/2005, para 8.5.

218 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 65.

219 ECtHR 8 November 2005, *Bader v Sweden*, no 13284/04, para 44, ECtHR 22 June 2006, *D and others v Turkey*, no 24245/03, para 48.

220 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 64.

221 ComAT 22 January 2007, *El Rgeig v Switzerland*, no 280/2005, para 7.4, ComAT 5 December 2005, *Dadar v Canada*, no 258/2004, para 8.6 and ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, 185/2001, para 10.

222 ECtHR, 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 68, ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 71 and 144, ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, paras 4.7, 5.8 and 7.6, ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, 185/2001, para 10.

Russia important weight was attached to a statement of the Vice-President of Colombia printed in a Russian news paper, although the source of the information was unknown.²²⁴ In *Hilal v the United Kingdom* and *N. v Finland* the ECtHR took into account the statements of the applicant's wife.²²⁵

Documents are only considered relevant if they contain information relating to the applicant personally²²⁶ and support the risk of *refoulement*.²²⁷ In *Mawajedi Shikpohkt and A. Makkamat Shole v the Netherlands*, the ECtHR noted that the documents which had been submitted in support of the applicant's allegations contained little of any direct relevance to the applicant herself. In so far as they expressed any fears on her behalf, they were, in the ECtHR's view, vague and speculative.²²⁸ In *Minani v Canada* the Committee against Torture took into consideration that the letter of the President of a Burundian human rights organisation only mentioned the risk of being detained and not the real and personal risk of the applicant being tortured upon return to Burundi. It concluded that the applicant did not submit objective elements of such real and personal risk.²²⁹

The ECtHR seems to consider copies of documents less valuable than original documents.²³⁰ However copies have been taken into account by the supervising bodies.²³¹ The fact that there is no official translation of a document may also work to the applicant's detriment.²³² As was explained in section 8.5

223 ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 135.

224 ECtHR 1 April 2010, *Klein v Russia*, no 24268/08, para 54.

225 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 66. In this case the applicant's wife applied for asylum in the United Kingdom several years after the applicant had applied for asylum there. In ECtHR 26 July 2005, *N v Finland*, no 38885/02 the ECtHR took statements from the applicant's common law wife, who he met in Finland in a reception centre for asylum applicants.

226 ECtHR (Adm) 6 September 2007, *M. v Sweden*, no 22556/05, para 92.

227 ECtHR (Adm) 16 June 2009, *A.M. and others v Sweden*, no 38813/08. See also ECtHR (Adm) 6 September 2007, *M. v Sweden*, no 22556/05, para 59, where the Court considered a letter issued by the chairman of a political party insignificant because it was issued three years after the applicant had left Tunisia, it contained no information as to what political activities the applicant had engaged in, when, or how the issuer knew each sympathiser and member of the party, or the applicant for that matter.

228 ECtHR (Adm) 27 January 2005, *Mawajedi Shikpohkt and Makkamat Shole v the Netherlands*, no 39349/03. See also ComAT 19 May 1998, *K.N. v Switzerland*, no 94/1997, para 10.3.

229 ComAT 10 December 2009, *Minani v Canada*, no 331/2007, para 7.7. See also ECtHR (Adm) 20 October 2008, *M.H. v Sweden*, no 10641/08, para 39. where the ECtHR considered that the alleged death threats appeared to be letters informing the applicant's family that he should be careful rather than actual threats.

230 ECtHR (Adm) 10 February 2009, *S.M. v Sweden*, no 47683/08, para 34.

231 ComAT 18 November 1994, *Khan v Canada*, no 15/1994, para 12.4. See also ECtHR (Adm) 10 July 2007, *Achmadow and Bagurova v Sweden*, no 34081/05, where the ECtHR held against the applicants that they were not in possession of any receipts of police reports or any copies of letters to or from public authorities, lawyers or human rights organisations relating to the harassment at issue.

232 ECtHR (Adm) 12 October 2010, *A.M. v France*, no 20341/08.

if a document submitted by the applicant turns out to be a forgery, this is taken into account in the assessment of the credibility of the asylum account. The ECtHR and Committee against Torture attach important weight to the findings by the examining authorities, often the embassy in the country of origin, as to the veracity of documents. This applies in particular when these findings are not addressed by the asylum applicants.²³³ In *Mehdi Zare v Sweden* the Committee against Torture noted that the complainant had adduced what he alleged were two summonses to attend a court. According to the Committee the State party had provided extensive reasons, based on expert evidence obtained by its consular services in Tehran, why it questioned the authenticity of each of the documents. In reply the complainant argued that, apparently, the criminal procedure was not applied in this case. The Committee considered that the complainant had failed to disprove the State party's findings in this regard, and to validate the authenticity of any of the documents in question.²³⁴

Also the fact that documents are submitted late in the asylum proceedings without valid explanation, generally reduces their value as evidence.²³⁵ In *Nasimi v Sweden* for example the ECtHR took into account that a copy of purported revolutionary court summons were submitted to the Swedish Aliens Appeals Board one year and eight months after its date of issuance. The Court stated that 'notwithstanding the difficulties of obtaining a copy of such a document in Iran, the applicant has acknowledged, in his submissions to the ECtHR, that he was aware of the existence of the summons long before he received a copy of it'. In these circumstances, the ECtHR found it remarkable that he apparently failed to even mention the document to the immigration authorities earlier. It also noted, that the applicant submitted the summons at a time when he had already had two asylum applications rejected.²³⁶ In *Chahin v Sweden* the Committee against Torture considered that the complain-

233 See for example ECtHR (Adm) 21 June 2005, *Matsiukhina and Matsiukhin v Sweden*, no 31260/04, where the ECtHR considered that the Swedish authorities had given a very detailed account of alleged inaccuracies in the content of the document submitted by the applicants and that the applicants had not responded to these allegations except to state that the findings consisted of disinformation from the Belarusian authorities.

234 ComAT 17 May 2006, *Mehdi Zare v Sweden*, no 256/2004, para 9.5. See also ComAT 8 July 2011, *M. S. G. et al. v Switzerland*, no 352/2008, para 11.4 and ComAT 2 May 2007, *E.V.I. v Sweden*, no 296/2006, para 8.6, ComAT 2 May 2007, *E.R.K and Y.K. v Sweden*, no 270 & 271/2005, para 7.5. In ComAT 16 December 1998, *J.U.A. v Switzerland*, no 100/1997, the ComAT noted that it had not been clearly established that the arrest warrant furnished by the applicant was an authentic document, although the applicant was acquitted by a Swiss criminal court for falsifying documents.

235 ECtHR (Adm) 6 September 2007, *M. v Sweden*, no 22556/05, para 92, where the ECtHR considered a letter issued by the chairman of a political party insignificant, amongst others because it was issued three years after the applicant had left his country of origin. See also ComAT 16 May 2003, *H.B.H. et. al v Switzerland*, no 192/2001, para 6.8.

236 ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02.

ant had provided satisfactory explanations for the delay in submitting a translation of a court judgment and medical reports.²³⁷ The Committee took into account that the complainant's asylum application had been prepared by a non-lawyer and that it was only after receiving funds that he was able to obtain the translation and the medical reports.²³⁸

Subconclusion: evidentiary assessment

It should be concluded that Articles 8 (2) PD and 4 QD, read in the light of the principle of effectiveness require that the determining authority of the Member State take into account all documents or other evidence which concern:

- the position and personal circumstances of the applicant
- the reasons for applying for asylum, including previous persecution
- the situation in the country of origin
- the applicant's activities in the country of refuge, which may lead to a risk of *refoulement*
- the availability of safe third countries.

It follows from the Court of Justice's case-law that the principle of effectiveness precludes that the assessment of the evidence submitted in an asylum case be conducted formalistically. The (automatic) exclusion of certain types of relevant and reliable evidence or the fact that they are only given very limited weight should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*. The case-law of the ECtHR and the views of the Committee against Torture and the Human Rights Committee show that a wide variety of documents and (witness) statements should be considered capable of substantiating an applicant's claim of a risk of *refoulement*. Only documents, which according to an expert report submitted by the State authorities, are considered forgeries can be excluded from the assessment of the asylum claim. The late submission of documents may undermine their credibility, but may never lead to their automatic exclusion.

8.5.1 Expert reports

In asylum proceedings the determining authority as well as the asylum applicant may submit expert reports in order to support or refute the applicants' claims. Examples of such expert reports are language analysis reports, reports in which the authenticity of documents, such as passports or arrest warrants is assessed, country of origin information reports and medical reports. Some Member States refuse to take certain expert reports adduced by the asylum

²³⁷ The medical reports were dated September 2004, while the asylum application was lodged in May 2003.

²³⁸ ComAT 8 July 2011, *Chahin v Sweden*, nr 310/2007, para 9.5.

applicant into account, or attach very little value to them. It is contended in this section that the exclusion from the assessment of the asylum claim of an expert report containing relevant and reliable information in support of the applicant's asylum claim, may render the applicant's EU right to asylum and the prohibition of *refoulement* ineffective.

It is generally recognised that only expert reports which are of sufficient quality should be taken into consideration. EU asylum legislation does not provide any standards for the quality of expert reports.²³⁹ However the CFI's judgment in *Pfizer* provides for some useful standards which can also be applied in asylum cases. These standards will be assessed in this section.

In sections 8.6.2 and 8.6.3. two specific types of expert reports are addressed: country of origin information reports and medical reports. The status and value of these reports seem to cause discussion in several Member States. It is argued on the basis of the ECtHR's case-law and the views of the Committee against Torture that country of origin information reports and medical reports which are reliable and of sufficient quality should be taken into account in the assessment of the asylum claim. Standards for the quality of these reports can be derived from the *Pfizer* judgment. As will be shown below, the ECtHR and the Committee against Torture use similar standards as those laid down by the CFI in *Pfizer* when examining the quality and/or value of country of origin information and medical reports in asylum cases.

The Court of First Instance's case-law regarding expert evidence

In *Pfizer* a regulation was contested, by which the authorisation of an additive in feeding stuffs was withdrawn, because of the (potential) risk of this additive for human health. In this context a risk assessment had to be carried out in order to assess the degree of probability of the additive having adverse effects on human health and the seriousness of any such adverse effects. For this purpose the Community Institution had to entrust a scientific risk assessment to experts who would provide it with scientific advice. In *Pfizer* the Commission asked the advice of a committee of experts. However in its decision it disregarded this committee's opinion, while it did use part of this opinion in support of its decision.

In *Pfizer* the CFI gave standards for reviewing the quality of scientific advice. It held that on matters relating to consumer health expert advice must be based on the principles of excellence, independence and transparency.²⁴⁰ Where experts carry out a scientific risk assessment, the competent public authority must be given sufficiently reliable and cogent information to allow it to understand the ramifications of the scientific question raised and decide upon a policy in full knowledge of the facts. The scientific assessment must enable the competent public authority to take its decision on the basis of the best

²³⁹ See also Noll 2006, p 298.

²⁴⁰ Case T-13/99, *Pfizer* [2002], paras 158-159.

available scientific data and the most recent results of international research.²⁴¹

The CFI stated in *Pfizer* that the competent public authority in its turn is required to ensure that any measures that it takes be based on as thorough a scientific risk assessment as possible, account being taken of the particular circumstances of the case at issue. The competent Community institution first has to prepare for the committee of experts the factual questions which need to be answered before it can adopt a decision and, second, assess the probative value of the opinion delivered by the committee. The CFI considered that the Community institution further has to ensure that the reasoning in the opinion is 'full, consistent and relevant'.

The CFI considered that the Community Institutions are allowed to disregard the expert the opinion requested by them. However, in such a case the institution needs to provide specific reasons for its findings by comparison with those made in the opinion and its statement of reasons must explain why it is disregarding the latter. The statement of reasons must be of a scientific level at least commensurate with that of the opinion in question. In such a case, the institution may take as its basis either a supplementary opinion from the same committee of experts or other evidence, whose probative value is at least commensurate with that of the opinion concerned. In the event that the Community institution disregards only part of the opinion, it may also avail itself of those parts of the scientific reasoning which it does not dispute. In *Pfizer* the CFI concluded that the Community institutions did not make an error when they decided not to accept the conclusions of the committee of expert's opinion.²⁴²

Arguably the requirements of excellence, independence and transparency mentioned in *Pfizer* apply to all expert reports, including those used in asylum procedures. Expert reports should be of sufficient quality in order to ensure that the decision is taken on the basis of reliable information and to prevent arbitrariness.²⁴³ In this context it does not matter whether these reports are requested by the examining authority or submitted by the asylum applicant. If the examining authorities request the expert opinion it must pose the right questions to the expert and it has the duty to ascertain that the expert report is of sufficient quality. If the determining authority decides to disregard information in the expert report they have to motivate this decision thoroughly.

241 Case T-13/99, *Pfizer* [2002], para 162.

242 Case T-13/99, *Pfizer* [2002], paras 193-210.

243 The CFI stated in para 172 of the *Pfizer* judgment that in the relevant case a scientific risk assessment, carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures.

8.5.2 Country of origin information reports

It was concluded in section 8.3.2 that Article 8 (2) (b) PD requires the determining authority of the Member States to gather and assess of their own motion country of origin information reports. Determining authorities often use country or origin information reports produced by their own Ministries. The quality and status of those reports has been under discussion in several Member States.²⁴⁴ Asylum applicants often submit reports of (inter)national human rights organisations and UN bodies concerning the general situation in their country of origin in support of their asylum claim. With these reports they sometimes seek to dispute the conclusions made in the report produced by the State. Member States may however disregard country of origin information submitted by the asylum applicant or attach limited weight to it. In the Netherlands for example the country of origin reports issued by the Ministry of Foreign Affairs are considered to be expert reports. According to the standing case-law the determining authority may rely on information laid down in such a report, if this report provides information in an impartial, objective and transparent manner. This is only different if the applicant has submitted specific reasons which cast doubt on the reliability or the completeness of the information contained in the report. Generally country of origin information reports issued by human rights organisation do, according to the Dutch courts, not provide such specific reasons.²⁴⁵

It is argued in this section that EU law requires that the determining authority take into account and attach weight to country of origin information provided by different sources, including reputable human rights organisations. The exclusion of relevant and reliable country of origin information from the assessment of the asylum claim is contrary to EU law. Furthermore the asylum-decision should be based on country of origin information which is of sufficient quality. Quality standards are derived from the *Pfizer* judgment as well as the ECtHR's case-law.

Taking into account country of origin information from different sources

Article 8 (2)(b) PD explicitly requires the determining authority to take into account country of origin information provided by different sources, among which UNHCR. Furthermore it follows from Article 4 (3) QD that *all relevant facts* as they relate to the country of origin at the time of taking a decision on the application should be taken into account in the assessment of the asylum claim. Asylum decisions should thus not only be based on information

244 See with regard to the United Kingdom: Thomas 2006, pp 85-86 and Good 2004, pp 360-361. See with regard to the Netherlands: ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, paras 80-84.

245 See for example Administrative Jurisdiction Division of the Council of State 12 October 2001, no 200103977/1. See also Spijkerboer & Vermeulen 2005, pp 275-276.

gathered by the State itself, but also on information or reports issued by other organisations. Furthermore these provisions imply that country of origin information reports submitted by the asylum applicant, which contain relevant and reliable information should not be excluded from the assessment of the asylum claim.

The ECtHR's recent case-law confirms that in asylum cases the determining authority should base its decision on reliable and objective country of origin information and cannot rely only on reports issued by their own Ministry of Foreign Affairs. It needs to include other country of origin information such as reports by human rights organisations in its assessments. The Court considered in *Salah Sheekh v the Netherlands* that

given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources.²⁴⁶

The Court itself does not hesitate to compare information included in country of origin reports used by the determining authority of the State with other information provided by the complainant or gathered by the Court itself. In *Salah Sheekh* the Court considered that it will gather material of its own motion, in particular where the applicant – or an intervening party – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government.²⁴⁷

The quality of country of origin information reports

Asylum decisions should be based on country of origin information which is of sufficient quality. This follows from Article 8 (2) (b) PD according to which the country of origin information taken into account by the determining authority should be 'precise and up-to-date'. Furthermore it may be derived from the CFI's judgment in *Pfizer* that country of origin information reports should also meet the requirements of excellence, independency and transparency. The reports must contain sufficiently reliable and cogent information. Determining authorities requesting a country of origin information report must pose the right questions to the expert and they have the duty to ascertain that the expert report is of sufficient quality. Furthermore it may be concluded from *Pfizer* as well as the more general EU duty to state reasons that if the deter-

246 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136. See also Wouters p 275.

247 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136, see also ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, para 120, ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 96 and ECtHR 21 October 2010, *Gafarov v Russia*, no 25404/09, para 129.

mining authority decides to disregard country of origin information contained in an expert report it has to motivate this decision thoroughly.

The ECtHR has shown in its case-law that it only takes into account country of origin information which meets certain quality criteria. These criteria resemble to a certain extent to the *Pfizer* criteria of excellence, independence and transparency. In *N.A. v the United Kingdom* the Court stated:

[C]onsideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.²⁴⁸

When assessing the reliability of certain country of origin information reports the ECtHR takes into account whether their conclusions are consistent with each other, whether those conclusions are corroborated in substance by other sources²⁴⁹ and whether the information has been refuted by the Government of the State party.²⁵⁰ The consistency of a report with information supplied by other sources is particularly important where this report is based on anonymous sources.²⁵¹

Furthermore consideration must be given to the presence and reporting capacities of the author of the material in the country in question. The Court observed in this respect that States 'through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it'. It finds that the same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do. The Court held in *Sufi and Elmi* that it

appreciates the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on. The Court will not, therefore, disregard

248 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 120.

249 See for example ECtHR 23 October 2008, *Soldatenko v Ukraine*, no 2440/07, para 71 and ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 143. In ECtHR 31 May 2011, *E.G. v the United Kingdom*, no 53688/08, para 70, the ECtHR attached limited weight to an expert report because it differed greatly from the rest of the background evidence.

250 See for example ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, para 71.

251 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, paras 233-234.

a report simply on account of the fact that its author did not visit the area in question and instead relied on information provided by sources.²⁵²

The Court moreover attaches greater importance to reports which consider the human rights situation in the country of destination and directly address the grounds for the alleged real risk of ill-treatment in the case before the Court. The weight to be attached to independent assessments must inevitably depend on the extent to which those assessments are couched in terms similar to Article 3. The Court states that it has therefore given due weight to the UNHCR's own assessment of an applicant's claims when it determined the merits of a complaint under Article 3.²⁵³ Conversely, where the UNHCR's concerns are focussed on general socio-economic and humanitarian considerations, the Court has been inclined to accord less weight to them, since such considerations do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3.²⁵⁴

The ECtHR has in its case-law considered several human rights organisations, most importantly Amnesty International²⁵⁵ and Human Rights Watch²⁵⁶ sufficiently independent, reliable and objective.²⁵⁷ Furthermore it has taken into account information provided by UNHCR²⁵⁸ and other UN agencies, such as the United Nations Secretary General,²⁵⁹ United Nations High Commissioner for Human Rights,²⁶⁰ the United Nations Special Rappor-

252 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 232.

253 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 122. The Court referred to ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 41. See also ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 82.

254 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 122. The Court referred to ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 141. See also ECtHR 20 January 2009, *F.H. v Sweden*, no 32621/06, para 92.

255 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 143 and ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, paras 51 and 54.

256 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 143 and ECtHR 17 July 2008, *NA v United Kingdom*, no 25904/07, para 127.

257 The Court has also referred to reports issued by other human rights organisations, such as the Norwegian Organisation for Asylum Seekers, the Norwegian Helsinki Committee, Greek Helsinki Monitor (ECtHR (Adm) 2 December 2008, *K.R.S. v the United Kingdom*, no 32733/08) and Helsinki Federation for Human Rights (ECtHR 19 November 2009, *Kaboulov v Ukraine*, no 41015/04, para 111).

258 In ECtHR (Adm) 2 December 2008, *K.R.S. v the United Kingdom*, no 32733/08 the Court stated that UNCHR's independence, reliability and objectivity are, in its view, beyond doubt. See also for example ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, paras 80-81 and 85-86.

259 ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, para 121.

260 ECtHR 17 July 2008, *NA v United Kingdom*, no 25904/07, para 132 and ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, para 122.

teur on Torture²⁶¹ and the United Nations Independent Expert on Minority Issues.²⁶² Finally it has referred to governmental sources²⁶³ including the US State Department,²⁶⁴ the Immigration and Refugee Board of Canada²⁶⁵ and the United Kingdom Border Agency.²⁶⁶ Sometimes the ECtHR also attaches important weight to individual experts.²⁶⁷ The ECtHR has reproached responding Governments for not including relevant human rights reports into the assessment of the claim of a risk of *refoulement*.²⁶⁸

Subconclusion: country of origin information reports

Article 8 (2) (b) PD and Article 4 (3) QD read in the light of the ECtHR's case-law require that Member States do not only rely on the information provided by their own Ministries but also take into account reports issued by reputable human rights organisations, UN agencies and authorities of other States.

It follows from Article 8 (2) (b) PD that country of origin information reports taken into account by the determining authority should meet certain quality standards. This provision explicitly mentions that such reports should be precise and up-to-date. Further useful standards for the examination of the quality and relevance of country of origin information reports may be derived from the Court of Justice's judgment in *Pfizer* as well as the ECtHR's case-law. Such reports should be independent, reliable and objective. The weight which should be attached to a country of origin information report depends on the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources. Reports which specifically address potential violations of Article 3 ECHR should be considered most relevant. On the basis of the ECtHR's case-law Member States are allowed to accord less

261 See ECtHR 17 July 2008, *NA v United Kingdom*, no 25904/07, paras 124 and 132 and ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, paras 121-122. See also ComAT 7 July 2011, *Harminder Singh Khalsa et al v Switzerland*, no 336/2008, para 11.3.

262 ECtHR (Adm) 13 October 2009, *Haililova and others v Sweden*, no 20283/09.

263 These are sources other than the State party in the case lying before the Court and may be Contracting or non-Contracting States. ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, para 120.

264 ECtHR 19 June 2008, *Ryabikin v Russia*, no 8320/04, para 113 and ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 93.

265 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 135, ECtHR 8 April 2008, *Nnyanzi v the United Kingdom*, no 21878/06, para 64.

266 ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 79.

267 In ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, paras 69-71, the ECtHR noted that there was a 'general unavailability of information concerning the human rights situation' in the applicant's country of origin (Bhutan). The Court in this case attached important weight to the reports of a Professor of Nepali and Himalayan Studies and the Coordinator of the Bhutanese Refugee Support Group, both residing in the UK, although they were not able to predict precisely what would happen to the applicant on return.

268 ECtHR 21 October 2010, *Gafarov v Russia*, no 25404/09, para 125, ECtHR 1 April 2010, *Klein v Russia*, no 24268/08, para 56.

weight to reports focusing on the general socio-economic and humanitarian situation in the country of origin.

8.5.3 Medical evidence

It was already set out in section 8.2 that the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm should, according to Article 4 (4) QD, be considered a serious indication of the applicant's future risk of persecution or serious harm. Asylum applicants often submit medical reports to support their allegations of past torture. However, some Member States refuse to admit such reports as evidence in asylum procedures. They argue for example that no causal link can be established between scars or medical problems and past torture.²⁶⁹ It is submitted in this section on the basis of the ECtHR's case-law and the views of the Committee against Torture that medical expert reports, should be considered relevant or even very important in the assessment of the asylum claim.²⁷⁰ Therefore Article 8 (2) PD and Article 4 (4) QD read in the light of the requirement to ensure the full effectiveness of the EU right to asylum and the prohibition of *refoulement* require that such reports be taken into account in this assessment.

The importance of medical reports according to the ECtHR and the Committee against Torture

The ECtHR's recent case-law shows that States should attach important weight to medical reports submitted by the applicant which support the applicant's account of past torture or ill-treatment. In *R.C. v Sweden* the Court even held that the State is obliged to direct that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he has made out a *prima facie* case as to their origin. In this case the applicant submitted a medical certificate, which according to the Court 'gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture'. It is important to note that this certificate was not written by an expert specialising in the assessment of torture injuries. In the State authorities' view this medical certificate provided insufficient proof of torture injuries, as it could not be ruled out that (part of) the injuries found could be caused by other events than torture or ill-treatment

269 See for example ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8. Some State parties argued before the ECtHR or the ComAT that the applicant's scars could have been caused by other events than torture. See for example ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, ComAT 18 November 1994, *Khan v Canada*, no 15/1994 and ComAT 22 November 2006, *M.N. v Switzerland*, no 259/2004.

270 See with regard to this issue also Bruin & Reneman 2006.

of the applicant. The Swedish Government in this context pointed to the fact that the medical examination had been performed more than seven years after the alleged torture took place and that the applicant had failed to inform the doctor of other possible causes for some of the injuries. The ECtHR in this case requested the applicant to submit a forensic medical report. This report documented numerous scars on the applicant's body. The ECtHR recognised that some injuries may have been caused by means other than by torture. However it accepted the report's general conclusion that the injuries, to a large extent, were consistent with having been inflicted on the applicant by other persons and in the manner in which he described, thereby strongly indicating that he had been a victim of torture. The medical evidence thus corroborated the applicant's story. According to the ECtHR the applicant's account was also consistent with the information available from independent sources concerning Iran. The Court considered therefore that the applicant had substantiated his claim that he was detained and tortured by the Iranian authorities.²⁷¹

In several other cases the ECtHR has attributed important or even decisive weight to medical reports submitted by the applicant.²⁷² The Committee against Torture has recognised the importance of medical evidence for the assessment of claims of *refoulement* in its General Comment no 1,²⁷³ its Concluding Observations²⁷⁴ as well as in its views in individual cases.²⁷⁵ It is of the opinion that State parties should take into account medical reports in their assessment of a claim under Article 3 CAT.²⁷⁶ Both the ECtHR and the Committee against Torture are inclined to follow the conclusions of a medical report if the State party has failed to contest them.²⁷⁷

271 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 53-54.

272 ECtHR 7 June 2011, *RU v Greece*, no 2237/08, paras 81-82, ECtHR, 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 68, ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 64 and ECtHR (Adm) 7 March 2000, *T.I. v the United Kingdom*, no 43844/98.

273 ComAT General Comment No 1 (1997), A/53/44, para 8 (c) states that medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past should be taken into account when assessing the claim under Art 3 CAT.

274 ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8.

275 ComAT 17 December 2004, *Enrique Falcon Ríos v Canada*, no 133/99, para 8.4, ComAT 21 March 1997, *I.A.O. v Sweden*, no 65/1997, para 14.3, ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, 185/2001, ComAT 12 November 1998, *Ayas v Sweden*, no 97/1997.

276 In its views in individual cases the ComAT sometimes remarks that the authorities failed to take into account medical reports. See for example ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.5. See also ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8.

277 ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.5, ComAT 17 December 2004, *Enrique Falcon Ríos v Canada*, no 133/99, ECtHR 14 October 2008, *Mehmet Eren v Turkey*, no 32347/02.

Quality of medical reports

The ECtHR and the Committee against Torture have not set any standards as to the quality of medical reports. The ECtHR's judgment in *R.C. v Sweden* shows that also medical reports issued by persons who cannot be considered an expert can establish a *prima facie* case as to the origin of scars on the body of the applicant. In such a situation the State party should request an expert to write a medical report. In several cases the ECtHR did refer to the expertise and experience of the physician who drafted the report²⁷⁸ or the way in which the medical examinations were conducted when assessing the weight which had to be attached to the report.²⁷⁹ Both the ECtHR (in non-asylum cases under Article 3 ECHR)²⁸⁰ and the Committee against Torture²⁸¹ have indicated that the 'Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or Istanbul Protocol)' could be used as a tool to examine the quality of a medical report.²⁸² This protocol provides clear guidelines for the impartial and objective documentation of torture and is applicable to asylum procedures.²⁸³ Several bodies which issue medical certificates that are used in asylum procedures to support allegations of past torture work according to the guidelines of this protocol.²⁸⁴ The Istanbul Protocol provides useful standards in order to assess the quality of a medical report, which may be used to fill in the *Pfizer* criteria of excellence, independence and transparency. The Istanbul Protocol states that medical evaluation for legal purposes should be conducted with objectivity and impartiality and that the evaluation should be based on the physician's clinical expertise and professional experience. The clinicians who conduct an evaluation must be properly trained. The medical

278 ECtHR (Plen) 20 March 1991, *Cruz Varas and others v Sweden*, no 15576/89, paras 39 and 77.

279 The Court noted that the report 'was drafted following very detailed medical examinations which were conducted over five days. It included not only physical but psychological findings, and an interpretation as to the probable relationship of these findings to possible torture or ill-treatment.' ECtHR 14 October 2008, *Mehmet Eren v Turkey*, no 32347/02, para 43.

280 See for example ECtHR 1 February 2011, *Desde v Turkey*, no 23909/03, para 98, ECtHR 14 October 2008, *Mehmet Eren v Turkey*, no 32347/02, para 41 and ECtHR 3 June 2004, *Bati v Turkey*, no 33097/96 and 57834/00, para 133.

281 ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8, where it stated that it 'encourages the application of the Istanbul Protocol in the asylum procedures and the provision of training regarding this manual to relevant professionals'.

282 The protocol is not binding on States, but it may serve as a means of interpretation of State's obligations under the ECHR, CAT or ICCPR. See Battjes 2006-II, pp 20-21 and 27. It was adopted by the UN General Assembly (UNGA Resolution 55/89 of 4 December 2004) and the UN High Commissioner for Human Rights (Resolution 200/43 of 25 January 2001, E/CN.4/2001/66).

283 The introduction of the protocol states that documentation methods contained in the manual are applicable to amongst others 'political asylum evaluations'.

284 Examples are the Medical Foundation for the Care of Victims of Torture in the United Kingdom and the Amnesty International medical examination group in the Netherlands.

report needs to be factual and carefully worded. Jargon should be avoided and all medical terminology should be defined so that it is understandable to lay persons. Furthermore it is the physician's responsibility to discover and report upon any material findings that he or she considers relevant, even if they may be considered irrelevant or adverse to the case of the party requesting the medical examination.²⁸⁵

Conclusiveness of medical reports

It should be derived from the ECtHR's case-law and the views of the Committee against Torture that the medical report should be sufficiently detailed and conclusive as to the origin of the injuries found on the applicant's body.²⁸⁶ Usually medical reports contain conclusions as to the degree of consistency between a physical or psychological after-effect and the attribution given to it by the patient.²⁸⁷ In *R.C. v Sweden* the ECtHR attached much weight to the forensic medical report submitted on its request, which concluded that alternative causes for the origins of the scars than torture could not be completely excluded but that experience showed that self-inflicted injuries and injuries resulting from accidents normally had a different distribution to those showed by the applicant. The findings in that case favoured the conclusion that the injuries had been inflicted on the applicant completely or to a large extent by other persons and in the manner claimed by him. According to the report the findings strongly indicated that the applicant had been tortured.²⁸⁸ In *Elmuratov* the ECtHR considered that the medical expert examination report submitted by the applicant was not conclusive as to the date the injuries were inflicted and could not in itself serve as evidence of ill-treatment.²⁸⁹ The Com-

285 Paragraph 162 of the Protocol. See also Rhys Jones 2004, p 385.

286 ECtHR 3 March 2011, *Elmuratov v Russia*, no 66317/09, paras 71 and 86. In ComAT 3 June 2010, *A.M. v France*, no 302/2006, para 13.5, the Committee noted that the two medical certificates produced by the complainant referred to a number of scars and fractures on various parts of the body, but did not contain any evidence confirming or refuting that they were the result of torture inflicted in the past. See also ComAT 4 July 2011, *R.T-N v Switzerland*, no 350/2008, para 8.7.

287 According to para 187 of the Istanbul Protocol the following terms are generally used: (a) Not consistent: the lesion could not have been caused by the trauma described; (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes; (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes; (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes; (e) Diagnostic of: this appearance could not have been caused in any way other than that described.

288 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 25 and 53. See also ComAT 15 November 1996, *Kaveh Yarah Tala v Sweden*, no 43/1996.

289 The medical report concluded that the applicant had numerous scars which were the result of injuries sustained at least eighteen months before the examination and that it was impossible to establish the date the injuries had been incurred more precisely. ECtHR

mittee against Torture has held that past torture cannot be made plausible on the basis of a medical report which lacks detail or conclusiveness alone. However in several cases the Committee did not exclude such reports as evidence of past torture.²⁹⁰

Subconclusion: medical evidence

Past experiences of torture or ill-treatment are a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm. The ECtHR's case-law and the views of the Committee against Torture show that medical reports which assess the degree of consistency between a physical or psychological after-effect and the applicant's asylum account should be regarded important evidence in support of such past torture or ill-treatment. It should therefore be concluded that the requirement of an appropriate assessment of the asylum application of Article 8 (2) PD and Article 4 (4) QD require that Member States take such medical reports into account. The refusal to take medical reports supporting an account of past torture into consideration or to attach important weight to them undermines the effectiveness of the EU right to asylum and the principle of *non-refoulement*. The weight which should be accorded to a medical report depends on its quality and conclusiveness. However it may be derived from *R.C. v Sweden* that even medical reports issued by a physician who is not an expert specialising in the assessment of torture injuries can make out such a *prima facie* case as to the origin of scars. In such a *prima facie* case EU law requires State authorities to request an expert report.²⁹¹

8.6 SYNTHESIS OF FINDINGS

Any requirement of proof which has the effect of making it virtually impossible or excessively difficult to exercise the EU right to asylum or the prohibition of *refoulement* would be incompatible with EU law.²⁹² In the absence of EU asylum legislation specifically governing a certain evidentiary issue, national evidentiary rules should be tested against this general rule. In this chapter several evidentiary issues were discussed in the light of this principle of effectiveness as well as Article 4 QD concerning the assessment of facts and

3 March 2011, *Elmuratov v Russia*, no 66317/09, paras 71 and 86. See differently ComAT 8 July 2011, *Chahin v Sweden*, nr 310/2007, para 9.5.

290 ComAT 16 May 2008, *Z.K. v Sweden*, no 301/2006, ComAT 19 May 2008, *R.K. v Sweden*, no 309/2006. In ComAT 22 November 2006, *M.N. v Switzerland*, no 259/2004 the ComAT was not prepared to accept that the applicant had been tortured (partly) because of a lack of conclusiveness of the medical report.

291 See also section 8.3.2.

292 Case C-199/82, *SpA San Giorgio* [1983], para 14.

circumstances and Article 8 (2) PD which contains a duty to conduct an appropriate examination of the asylum claim.

In asylum cases in principle the normal evidentiary rules, which govern all sorts of (administrative) procedures, may be applied. Article 4 QD allows Member States to require the asylum applicant to make plausible that he is in need of international protection and to produce evidence substantiating his asylum claim. However the special nature of the EU fundamental rights at issue, which require a careful and vigilant assessment²⁹³ as well as the special characteristics of asylum cases (the lack of documentary evidence and the emphasis on the credibility assessment) demand that the determining authority adopts an active, flexible and open-minded approach and focuses on the core of the asylum account. Sometimes this authority may be expected to assist the applicant in gathering relevant evidence or to ignore his shortcomings or mistakes. No unrealistic evidentiary requirements should be imposed on the asylum applicant. Otherwise, the applicant's effective exercise of the EU right to asylum or the prohibition of *refoulement* may be undermined.

In particular the following conclusions were drawn in this chapter:

The standard of proof

- It follows from the principle of effectiveness that the standard of proof should not be set too high. It may be expected of the applicant to show that there is a 'reasonable possibility' of future persecution or that there are substantial grounds for believing that he faces a real risk of serious harm.²⁹⁴ Member States may not require the applicant to *prove* that he will be subjected to persecution or serious harm in the future or that such treatment is more probable than not.²⁹⁵ This also applies when examining whether an applicant, who poses a risk to the national security of the Member State, is in need of subsidiary protection.²⁹⁶
- In the examination of the asylum claim all relevant indicators, with regard to the individual applicant as well as the general situation in the country of origin, should be taken into account.²⁹⁷ The fact that a person was persecuted or subjected to serious harm in the past is an important indicator for the existence of a future risk of such treatment.²⁹⁸

293 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 90.

294 See with regard to refugee status UNHCR Handbook, para 42 and Gorlick 2003, pp 369-370 and with regard to subsidiary protection ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 125.

295 ECtHR (Adm) 27 January 2005, *Mawajedi Shikpohkt and Makkamat Shole v the Netherlands*, no 39349/0.

296 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 140.

297 Case C-465/07, *Elgafaji* [2009], paras 38-40, ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 218 and ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 130.

298 Art 4 (4) QD, ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, paras 146-147, ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 55, UNHCR Handbook, para 45.

The burden of proof

- Member States are allowed to place the burden of proof on the asylum applicant.²⁹⁹
- It should be derived from the Court of Justice's case-law in equal treatment cases³⁰⁰ as well as the ECtHR's case-law that certain circumstances should make the burden of proof shift from the applicant to the determining authority. This is particularly so if:
 - 1 The applicant made plausible that he was persecuted or subjected to serious harm in the past.³⁰¹
 - 2 The applicant substantiated that there is a risk of *refoulement* by submitting credible statements and/or documents.³⁰²
 - 3 Country of origin information reports show that serious human rights violations occur in the applicant's country of origin.³⁰³
 - 4 The applicant made plausible that he belongs to a group which is at risk.³⁰⁴
- The duty to produce evidence is shared between the applicant and the determining authority.
- The determining authority has a positive obligation to gather precise and up-to-date country of origin information.³⁰⁵
- The determining authority must direct that a medical expert report be written if the applicant makes out a *prima facie* case as to the origin of the scars on his body.³⁰⁶
- The determining authority may also be required to gather evidence which is accessible to it, but not to the applicant.³⁰⁷

299 Under EU law the claimant normally bears the burden of proof. See for example Case C-381/99, *Brunhofer* [2001], para 52. See with regard to asylum cases ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 129, ComAT General Comment No 1 (1997), A/53/44, para 5 and UNHCR Handbook, para 196.

300 Case C-109/88, *Danfoss* [1989], para 14, Case C-127/92, *Enderby* [1993], para 18 and Case C-381/99, *Brunhofer* [2001], para 58.

301 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 55.

302 ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, paras 69-71 and ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, no 185/2001, para 10.

303 ECtHR 10 June 2010, *Garayev v Azerbaijan*, no 53688/08, para 73.

304 ECtHR 28 June 2011, *Sufi and Elmi v United Kingdom*, nos 8319/07 and 11449/07, paras 249-250.

305 Art 8 (2) (b) PD, ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 358-359.

306 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 53.

307 This may be derived from Case C-310/09, *Accor* [2011], para 100 and Case C-526/04, *Laboratoires Boiron SA* [2006], paras 55-57.

Individual assessment and the use of presumptions

- The use of presumptions is permissible even though an individual assessment of the case is required according to Articles 4 (3) QD and 8 (2) (a) PD.
- However it follows in particular from the Court of Justice's judgment in *N.S. and M.E. and others, B. and D.* and *San Giorgio* that presumptions, which are excessively difficult to rebut are capable of undermining the effectiveness the EU right to asylum and the prohibition of *refoulement*.³⁰⁸

Assessing the credibility of the applicant's statements

- When assessing the credibility of the applicant's asylum account, the determining authority should focus on the core of the asylum account and should not put decisive weight on marginal issues such as non-compliance with procedural rules or inconsistencies in parts of the applicant's account which do not relate to the essence of the asylum claim.³⁰⁹
- Asylum applicants should be granted the opportunity to explain the alleged deficiencies in the asylum account.³¹⁰
- Inconsistencies in an asylum account or late statements by the applicant, which are caused by psychological trauma or by the minor age of the applicant should not be held against the applicant.³¹¹
- As soon as the general credibility of the asylum applicant is established, his statements should according to Article 4 (5) QD be accepted as facts, without requiring further evidence. Refusing the benefit of the doubt in such a situation should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*.

Evidentiary assessment

- When examining the (documentary) evidence submitted by the asylum applicant, the determining authority should not take a formalistic approach, requiring or excluding specific forms of evidence. All relevant and reliable evidence should be taken into account in the assessment of the asylum claim. This may be derived from the Court of Justice's case-law in tax law

308 Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], paras 99-105, Joined Cases C-57/09 and C-101/09, *B and D* [2010], paras 94 and 98 and Case C-199/82, *SpA San Giorgio* [1983], para 14.

309 See for example ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 44 and 52, ECtHR 26 July 2005, *N v Finland*, no 38885/02, paras 152-157 and ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, paras 50-53.

310 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 50.

311 See with regard to trauma notably the views of ComAt such as ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.6, ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8. See with regard to children ComRC General Comment No 12 (2009), CRC/C/GC/12, paras 28 and 30 and UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva 22 December 2009, para 72.

cases³¹² as well as the ECtHR's case-law and the views of the Committee against Torture and the Human Rights Committee, which show that a wide variety of evidence is capable of substantiating an applicant's claim of a risk of *refoulement*.

- It should be derived from the CFI's judgment in *Pfizer* that expert reports must fulfil the requirements of excellence, independence and transparency.³¹³

Country of origin information reports and medical reports are expert reports which should, according to Articles 4 QD and 8 (2) PD and the ECtHR's case-law, be accorded important weight in asylum cases.

- Member States may not only rely on country of origin information provided by their own Ministries but should also take into account reports issued by reputable human rights organisations, UN agencies and authorities of other States. It follows from the ECtHR's case-law that the weight which should be attached to a country of origin information report depends on the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources.³¹⁴
- The weight which should be accorded to a medical report depends on its quality and conclusiveness.³¹⁵ However it may be derived from the ECtHR's judgment in *R.C. v Sweden* that medical reports issued by a physician who is not an expert specialising in the assessment of torture injuries can make out a *prima facie* case as to the origin of scars.³¹⁶

312 Case C-199/82, *SpA San Giorgio* [1983], para 14, Case C-262/09, *Meilicke and others* [2011], paras 43-47.

313 Case T-13/99, *Pfizer* [2002], paras 158-159.

314 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136, ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 120-122.

315 This follows from the *Pfizer* criteria. See for quality criteria the Istanbul Protocol (section 8.5.3). See with regard to conclusiveness ECtHR 3 March 2011, *Elmuratov v Russia*, no 66317/09, paras 71 and 86 and ComAT 3 June 2010, *A.M. v France*, no 302/2006, para 13.5.

316 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 53.

9 | Judicial review of the establishment and qualification of the facts

The establishment and qualification (assessment) of the facts is generally considered in the first place the task of the determining (administrative) authorities. National rules concerning the standard of the judicial review of the facts, including the credibility assessment, depend on the Member State's vision on the division of tasks between the legislator, administration and judiciary. Spijkerboer notes that the national courts 'will generally avoid taking substantive decisions, and merely supervise (a) correct interpretation of the law; (b) the reasonableness of decisions; and (c) conformity with procedural requirements'.¹ However, there are significant differences in the standard (scope and intensity)² of judicial review applied by the national courts in the Member States.³ Greece for example provides for judicial review by the Council of State on points of law only. The (first instance) courts of some Member States consider the determining authorities best placed to establish the facts and therefore pay (more or less) deference to these authorities' decision. The courts of other Member States apply a full judicial review to the asylum decision and replace their own findings of fact for those of the determining authorities.⁴

The Procedures Directive does not provide for minimum standards concerning the standard of judicial review. However the Court of Justice considered in *Samba Diouf* that in order for the EU right to an effective remedy to be exercised effectively, 'the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith'.⁵ The legality of the final decision adopted in an accelerated asylum procedure,

1 Spijkerboer 2009-II, p 52.

2 The *scope* of judicial review determines which issues are included by the court in its assessment of the case. The review may for instance be limited to questions of law and leave out questions of fact. The *intensity* of judicial review relates to how rigorous the court scrutinises a certain issue. Does the court for example pay deference to the part of the decision in which the credibility of the asylum account is assessed or does it carry out its own credibility assessment?

3 See also Costello, who states that the deferent standard of judicial review in the Netherlands is incompatible with Art 13 ECHR and EC law while the 'most anxious scrutiny test', which is the standard for the UK judiciary appears to meet those standards. Costello 2006 p 30.

4 UNHCR, *Improving asylum procedures, Comparative Analyses and Recommendations for Law and Practice*, Geneva: March 2010, pp 461-463.

5 Case C-69/10, *Samba Diouf* [2011], para 61.

and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded, should be the subject of a 'thorough review' by the national court.⁶ The Court of Justice has not explained what is exactly meant by a 'thorough review'.

In this chapter it is argued that Article 39 PD read in the light of the EU right to an effective remedy sets limits to the Member States' discretion with respect to the standard of judicial review of the fact-finding in asylum cases. The right to an effective remedy precludes that the appeal against the first instance asylum decision is limited to points of law. Furthermore this chapter contends that potentially EU law requires *rigorous* and *ex nunc* judicial scrutiny of the facts by the national courts in asylum cases. This is based on an examination of the EU Courts' as well as the ECtHR's case-law and the views of the UN Committees.

This chapter limits itself to the standard of judicial review of the assessment of the facts in asylum cases. Other issues with regard to the standard of judicial review, such as the possible obligation of national courts to apply EU law *ex officio* or the judicial review of points of law will not be addressed in this chapter. The question whether EU law requires that the asylum applicant be heard by the national court was examined in Chapter 7 on the asylum applicant's right to be heard on his asylum motives in first instance and appeal proceedings.

The set up of this chapter is as follows. Section 9.1 argues that Article 39 PD read in the light of the EU right to effective judicial protection requires the national court or tribunal to address both of points of law and points of fact. Section 9.2 then addresses the required intensity of judicial review of the fact-finding, including the assessment of the credibility of the asylum claim, by the court or tribunal in the meaning of Article 39 PD. Finally section 9.3 examines whether the national court or tribunal is obliged to carry out an *ex nunc* or an *ex tunc* assessment of the case. In other words it is assessed whether the national court should or may restrict itself to a review of the contested decision and its underlying facts or whether it should take into account facts or circumstances which emerged or were submitted after the issuing of an asylum decision. Conclusions will be drawn in section 9.4.

9.1 LIMITATION OF JUDICIAL REVIEW TO POINTS OF LAW?

This section addresses the question whether EU law allows the Member States to maintain or introduce a system in which the facts underlying the asylum decision are assessed by a non-judicial body, while the appeal before the court or tribunal in the meaning of Article 39 PD will be limited to points of law.

⁶ Case C-69/10, *Samba Diouf* [2011], para 56.

UNHCR's research of 2010 shows that in a majority of the Member States surveyed the judicial body, competent to review negative decisions on applications for international protection, has jurisdiction to review questions of both fact and law.⁷ However in Belgium as well as the United Kingdom the appeal body does not have full jurisdiction over some categories of decisions.⁸ In such cases the judicial review is limited to the legality of the decision. In Greece the appeal body, the Council of State, has jurisdiction only to review the legality of the decision by the determining authority and does not review the facts. Also in Slovenia the facts of an asylum case are not reviewed by a court or tribunal.⁹

9.1.1 The Court of Justice's case-law

The Court of Justice held in *Samba Diouf* that the national court in the meaning of Article 39 PD should be able 'to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith'.¹⁰ In *Samba Diouf* the national court was potentially prevented from reviewing the reasons underlying the decision to process an asylum claim in an accelerated procedure, in the context of the appeal against the decision to reject the asylum application.¹¹ In that case the reasons for processing the asylum claim in accelerated procedure were identical to the reasons for rejecting the asylum claim. As a result the national court was potentially not allowed to review the reasons underlying the rejection of the asylum claim. According to the Court of Justice such a situation 'would render review of the legality of the asylum decision impossible, as regards both the facts and the law'.¹² It should be concluded from this consideration that in asylum cases the national court or tribunal is expected to review factual issues such as whether the applicant has presented false information.

The conclusion that a court or tribunal in the meaning of Article 39 PD should review the facts is reinforced by the fact that the Court of Justice in

7 UNHCR, *Improving Asylum Procedures*, s 16, p 461.

8 UNHCR, *Improving Asylum Procedures*, s 16, pp 461-462. In Belgium this applies to decisions of the Aliens office relating to the preliminary examination of subsequent applications or asylum applications from EU citizens.

9 UNHCR, *Improving Asylum Procedures*, s 16, p 463.

10 Case C-69/10, *Samba Diouf* [2011], para 61.

11 The referring court was of the opinion that a review of the decision to rule on the merits of an application for asylum under an accelerated procedure through the remedy available against the final decision, appeared to be contrary to the intention of the legislature to exempt that decision from any judicial review. The representative of the Luxembourg Government disagreed with this opinion.

12 Case C-69/10, *Samba Diouf* [2011], para 57.

Samba Diouf referred to its judgment in *Wilson*.¹³ It follows from this judgment that under EU law a ‘court of tribunal’ should be able to review both fact and law. In *Wilson* the Court was asked by a national court to interpret Article 9 of Directive 98/5,¹⁴ which requires a remedy before a court or tribunal in accordance with the provisions of domestic law.¹⁵ In the *Wilson* case the facts were reviewed in first and second instance by non-judicial bodies, which could, according to the Court of Justice not be considered impartial. Therefore they did not fulfil the requirements for a court or tribunal as defined by Community law.¹⁶ The Court of Justice established that the jurisdiction of the *Cour de Cassation*, deciding in last instance, was limited to questions of law, so that it did not have full jurisdiction. The Court of Justice ruled that the *Cour de Cassation* could not be considered a court or tribunal as required by Article 9 of the said directive.¹⁷ It is important to note that the Court of Justice in *Wilson* referred to the ‘full jurisdiction test’ applied by the ECtHR in cases concerning Art 6 ECHR, which will be discussed in the next section.¹⁸

9.1.2 Obligations stemming from the ECHR, CAT and ICCPR.

The Court of Justice’s rulings in *Samba Diouf* and *Wilson* are in line with the ECtHR’s interpretation of the term ‘court or tribunal’ under Article 6 ECHR. Under Article 6 (1) ECHR the starting point is that a body can only be considered a court or tribunal in the meaning of Article 6 (1) ECHR if it addresses both questions of fact and questions of law.¹⁹ In *Le Compte, Van Leuven and De Meyere v Belgium* the ECtHR considered that questions of fact and questions of law

‘are equally crucial for the outcome of proceedings relating to “civil rights and obligations”. Hence the right to a court and the right to a judicial determination of the dispute cover questions of fact just as much as questions of law.’²⁰

The ECtHR assesses the overall fairness of the procedure. It accepts that the procedure does not need to be conducted at each of its stages before tribunals

¹³ Case C-69/10, *Samba Diouf* [2011], para 57.

¹⁴ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998], OJ L 77/36.

¹⁵ Case C-506/04, *Wilson* [2006], para 60.

¹⁶ In this case: the Disciplinary and Administrative Committee in first instance the Disciplinary and Administrative Appeals Committee in appeal.

¹⁷ Case C-506/04, *Wilson* [2006], paras 61-62.

¹⁸ Widdershoven states that the Court of Justice in *Samba Diouf* implicitly applied the ‘full jurisdiction test’ by setting requirements to judicial review. Widdershoven 2011 under para 4.

¹⁹ ECtHR 7 November 2002, *Veeber v Estonia*, no 37571/97, para 70.

²⁰ ECtHR (Plen) 23 June 1981, *Le Compte, Van Leuven, De Meyere v Belgium*, no 6878/75, para 51.

meeting the requirements of Article 6 (1) ECHR. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative, professional or judicial bodies which do not fully satisfy the requirements set by Article 6 ECHR in every respect.²¹ If the proceedings before a certain body do not comply with those requirements, no violation of Article 6 will be found if another remedy is available which does provide the safeguards required by Article 6 (1) ECHR and has full jurisdiction.²² Courts which only have jurisdiction to assess the lawfulness of a decision do not comply with the full jurisdiction test. In *Zumtobel v Austria* the Court considered for example that the Constitutional Court which could inquire into the contested proceedings only from the point of view of the conformity with the Constitution and could not examine all the relevant facts, did not have full jurisdiction.²³

The ECtHR found violations of Article 6 ECHR in cases where the domestic courts or tribunals were precluded from determining a central issue in dispute and had considered themselves bound by the prior findings of administrative bodies.²⁴ In *Terra Woningen v the Netherlands* for example the Dutch District Court decided to set the rent for an apartment owned by the applicant at the legal minimum on the ground that the Provincial Executive had designated the area as one where soil cleaning was required. The Court did not go into the question whether the Provincial Executive acted correctly in making this decision. According to the ECtHR the court, by doing so, deprived itself of jurisdiction to examine facts which were crucial for the determination of the dispute. It therefore found a violation of Article 6 ECHR.²⁵ In *Chevol v France* a violation of Article 6 ECHR was found because the French Conseil d'Etat considered itself to be bound by an opinion of the Minister of Foreign Affairs concerning the applicability of a treaty between France and Algeria. It was 'thereby voluntarily depriving itself of the power to examine and take into account factual evidence that could have been crucial for the practical resolution of the dispute before it'.²⁶

The ECtHR's case-law under Article 13 ECHR indicates that in asylum cases an independent body should review both facts and law. According to the ECtHR 'the notion of an effective remedy under Article 13 requires independent and

21 ECtHR (Plen) 23 June 1981, *Le Compte, Van Leuven, De Meyere v Belgium*, no 6878/75, para 51.

22 See for example ECtHR 25 October 1995, *Bryan v United Kingdom*, no 19178/91, para 40.

23 ECtHR 21 September 1993, *Zumtobel v Austria*, no 12235/86, para 30. See also ECtHR 7 November 2002, *Veeber v Estonia*, no 37571/97, para 71, ECtHR 20 June 2002, *Koskinas v Greece*, no 47760/99, para 30.

24 ECtHR 21 July 2011, *Sigma Radio Television*, nos 32181/04 and 35122/05, para 157, ECtHR 31 July 2008, *Družstevní Záložna Píra and others v the Czech Republic*, no 72034/01, para 111. See also ECtHR 28 June 1990, *Obermeier v Austria*, no 11761/85.

25 ECtHR 28 November 1998, *Terra Woningen v the Netherlands*, no 20641/92, paras 52-55. See also ECtHR 24 November 2005, *Capital Bank AD v Bulgaria*, no 49429/99.

26 ECtHR 13 February 2003, *Chevol v France*, no 49636/99, para 82.

rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3'.²⁷ It is hard to imagine that 'rigorous scrutiny' can be provided by an authority, which is only competent to rule on points of law. The ECtHR's case-law under Articles 3 and 13 ECHR which will be discussed in section 9.2.2, clearly shows that the national authority must review the facts underlying the decision on the claim based on Article 3 ECHR.²⁸

Furthermore it may be derived from the subsidiary role of the ECtHR and the UN Committees that national courts should assess the facts underlying a claim based on the principle of *refoulement*.²⁹ The ECtHR has stated in its case-law that it 'is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case'.³⁰ Likewise, the Committee against Torture and the Human Rights Committee have considered in many cases that it is for the courts of the State parties to the Convention, and not the Committee, to evaluate facts and evidence in a particular case.³¹

9.1.3 Subconclusion: limitation of judicial review to points of law?

It follows from the Court of Justice's judgments in *Samba Diouf* and *Wilson* that a court or tribunal as required by Article 39 PD should review both points of law and points of fact. This view is supported by the ECtHR's case-law under Article 6 ECHR, which requires a court or tribunal to have 'full jurisdiction'. Furthermore a judicial review which is limited to points of law only cannot be considered a rigorous scrutiny as required by the ECtHR in *refoulement* cases. A system in which the facts are established by the administrative authorities

27 See for example ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 50. See also Council of Ministers of the Council of Europe, Twenty Guidelines on Forced Return, September 2005, guideline no 5 (2).

28 The view of the ComAT on this issue is not clear. In ComAT 6 December 2006, *S.P.A. v Canada*, no 282/2005, para 7.4 and ComAT 15 November 2007, *L.Z.B. v Canada*, no 304/2006, para 6.6 the ComAT seems to accept that national courts only review the legality of asylum decisions. However, in a more recent case the Committee required a judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds or believing that the person faces a risk of torture. ComAT 8 July 2011, *Nirmal Singh v Canada*, no 319/2007, para 8.9.

29 Bruin 2003, Wildhaber 2002, p 3.

30 ECtHR 21 February 2002, *Matyar v Turkey*, no 23423/94, para 108, where the ECtHR also stated that it is not its task to substitute its own assessment of the facts for that of the domestic courts. See also Wildhaber 2002, p 2, where he states that 'European control is a fail-safe device designed to catch the ones that get away from the rigorous scrutiny of the national bodies'.

31 See for example ComAT 6 December 2006, *S.P.A. v Canada*, no 282/2005, para 7.6 and HRC 18 November 1993, *Kindler v Canada*, no 470/1991, para 6.6. See also Bruin 2003, p 574.

and cannot be reviewed by a court or tribunal should therefore be considered contrary to Article 39 PD.

9.2 THOROUGH REVIEW OF THE ASSESSMENT OF THE FACTS

The Court of Justice considered in *Samba Diouf* that Article 39 PD read in the light of the EU right to effective judicial protection requires that the reasons which led the competent authority to reject the asylum application as unfounded, should be the subject of a 'thorough review' by the national court.³² The Court of Justice has thus brought the intensity of judicial review within the scope of the EU right to an effective remedy and with regard to this aspect limited the procedural autonomy of the Member States.³³

In this section it will be examined what a 'thorough review' should actually entail. Does it require that the national court substitute its own assessment of the facts for that of the determining authority? Or is a reasonability test of the determining authority's establishment of the facts, including its credibility assessment, sufficient? These questions will be addressed taking into account the Court of Justice's case-law in other fields of EU law as well as the ECtHR's case-law under Articles 3 and 13 ECHR in *non-refoulement* cases and with regard to the 'full jurisdiction' test under Article 6 ECHR.

This section addresses the required intensity of the judicial review of two elements of the asylum decision: (1) the establishment of the facts and (2) the question whether, on the basis of these facts, the asylum seeker qualifies for protection following the criteria of the Qualification Directive. The intensity of review of these two elements may differ in theory. The Dutch courts for example are of the opinion that a limited (marginal) judicial review needs to be applied to the establishment of the facts, while a more rigorous judicial review should be applied to the qualification question.³⁴ However in practice these two aspects of the asylum decision often overlap.³⁵ In the case-law of national and international courts they have regularly not been clearly distinguished. Therefore the required intensity of judicial review of both aspects will be assessed together.

In most asylum cases, fact-finding is difficult due to a lack of evidence. In many asylum cases the establishment of the facts consists for a large part

32 Case C-69/10, *Samba Diouf* [2011], para 56.

33 See also Widdershoven 2011, under para 3.

34 See for example Administrative Jurisdiction Division of the Council of State 27 January 2003, no 200206297/1.

35 For example the questions whether it is plausible that an asylum seeker attracted the special, negative attention of the authorities of the country of origin may be regarded a factual question, but also a qualification question. The same applies to the question whether the alleged discrimination would cause such a severe restriction of the means of existence that it would disable the asylum seeker to function socially.

of an assessment of the credibility of the asylum applicant's statements.³⁶ Some courts may be of the opinion that the determining authority is better equipped to evaluate the evidence and assess the credibility of an asylum account than the court.³⁷ Therefore the determining authority should be granted wide discretion and judicial review should be limited to the reasonableness of its decision. The Dutch Council of State for example has considered that the determining authority has a margin of appreciation in assessing the credibility of the asylum account.

It [the decision making authority] assesses the credibility of the asylum account on the basis of extended interviews and a comparison with all it knows of the situation in the country of origin on the basis of country reports and other objective sources and the research done, and the considerations made before in connection with the interviews of other asylum seekers in a comparable situation. This overview enables him to make this assessment in a comparing and therefore objective way. The court is not capable to assess the credibility in a comparable manner. That does not mean that the minister's considerations are not subjected to a judicial review. The standard in the assessment that has to be made is, however, not the judge's own opinion on the credibility of the asylum seekers narrative, but the question whether there is ground for the opinion that the minister [...] reasonably could not have come to his opinion about the credibility of the narrative. This is irrespective of the fact that the process of decision-making should meet the demands of due process and motivation as required by law, and that the judge must assess the decision by these standards.³⁸

However some judges think differently on the intensity of the judicial review required in asylum cases. A judge of the English Court of Appeal for example considered that the court should subject the State Secretary's decision to rigorous examination. In this judge's opinion this examination must include consideration of the underlying factual material to see whether it compels a different conclusion to that arrived at by the Secretary of State. He stated:

[T]his is not an area in which the Court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here – the right not to be exposed to a real risk of Article 3 treatment – is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the Court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the

³⁶ See section 8.5.

³⁷ See also Schuurmans, who states that a reasonableness test is (also) advocated for cases where it is inherently difficult to objectify the facts, as in asylum cases. Schuurmans 2008, p 9.

³⁸ Administrative Jurisdiction Division of the Council of State 27 January 2003, no 200206297/1. This text is translated from Dutch into English by the author. See also UNHCR, *Improving Asylum Procedures*, s 16, p 49-50.

relevant material is before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the 'discretionary area of judgment' – the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal ... – is decidedly a narrow one.³⁹

This judge is of the opinion that the court is as well placed as the determining authority to evaluate the risk of *refoulement* on the basis of the facts. Furthermore this judge mentioned two other reasons why judicial scrutiny of the facts should be rigorous: the fact that an absolute and fundamental right, the prohibition of *refoulement* is involved and the risk that the determining authority does not approach the case open-mindedly.

As will be shown in section 9.2.2.2, the ECtHR has accepted that, as a general principle, the national authorities are best placed to assess the facts and, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned. However this does not withhold the ECtHR from making its own credibility assessment if necessary.⁴⁰ Before turning to the ECtHR's case-law concerning the intensity of judicial review under the right to an effective remedy and the right to a fair trial the relevant case-law of the EU Courts will be examined.

9.2.1 The EU Court's case-law

As was mentioned above the Court of Justice considered in *Samba Diouf* that the EU right to effective judicial protection requires a thorough judicial review by a national court of the reasons underlying the decision to reject the asylum decision.⁴¹ Such reasons for rejection may include issues relating to the establishment of the facts, notably the fact that the applicant's asylum account is considered to be implausible. This would imply that the requirement of a 'thorough judicial review' also applies to the evaluation of the evidence and the credibility assessment made by the determining authority.

39 Court of Appeal 28 January 2000, *R. v Home Secretary, ex parte Turgut* [2000] Imm LR 306. This consideration was cited in ECtHR 6 February 2001, *Bensaid v the United Kingdom*, no 44599/98, para 28.

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

41 Case C-69/10, *Samba Diouf* [2011], para 56.

How the term ‘thorough judicial review’ must be interpreted, cannot be derived from the case-law concerning national decisions in other fields of EU law. The Court of Justice has directly addressed the required intensity of judicial review by the national courts in a very limited number of cases. Generally it is assumed that the intensity of judicial review falls within the procedural autonomy of the Member States.⁴² It should be remembered however that the way in which national decisions are reviewed by the national court may not render the exercise of a right granted by EU law impossible or excessively difficult.⁴³

Some indications for the requirements regarding the intensity of judicial review which follow from the EU right to an effective remedy may be derived from the case-law concerning appeals against decisions of the EU Institutions before the EU Courts. In such cases the General Court (like the former CFI) has exclusive jurisdiction to find the facts. The Court of Justice only assesses points of law and examines whether the clear sense of the evidence is distorted.⁴⁴ Arguably the General Court and the Court of Justice in this case-law show the level of intensity of judicial review which is required in order to guarantee effective judicial protection. A method of judicial review applied by a national court which is much more restrictive than the method applied by the General Court in similar cases may lead to a violation of the EU right to an effective remedy.⁴⁵

The Court of Justice has recognised that the case-law concerning the intensity of judicial review of decisions of the EU Institutions may be considered relevant for the national context.⁴⁶ In *Upjohn* the Court of Justice held with regard to the principle of effectiveness that the national courts are not required to apply a more extensive judicial review than that carried out by the Court of Justice in similar cases. As a result the national court was not required to substitute its assessment of the facts and, in particular, of the scientific evidence relied on in support of the decision for the assessment made by the national determining authority.⁴⁷ It is questionable whether the reasoning in *Upjohn* can be applied *a contrario*, meaning that the national courts are not allowed to apply a less rigorous judicial review than the EU Courts in similar cases.⁴⁸ This does not follow from the judgment in *Upjohn*. Some authors derived from

⁴² Schuurmans 2008, p 30. Delicostopoulos 2003, p 602.

⁴³ Case C-120/97, *Upjohn Ltd* [1999], para 32, Case C-467/01, *Eribrand* [2003], para 62. See also Schuurmans 2008, pp 30 and 32.

⁴⁴ Schuurmans 2008, p 16. See for the jurisdiction of the General Court Art 256 TFEU.

⁴⁵ See also Schuurmans 2008, p 34.

⁴⁶ Tridimas states: ‘*Upjohn* illustrates a tendency to view Community and national authorities as part of one and the same constitutional structure and subject them to equivalent standards of accountability.’ Tridimas 2006, p 449.

⁴⁷ Case C-120/97, *Upjohn Ltd* [1999], paras 35-37. See Schuurmans 2008, p 16 and Jans and others 2007, p 91.

⁴⁸ Schuurmans 2008, p 32.

the judgment in *Upjohn* that judicial review on the merits is not required by EU law and that a legality review should be considered sufficient.⁴⁹ Nevertheless it should not be ruled out that the intensity of judicial review applied by the EU courts may be relevant in order to establish the minimum level of intensity of judicial review which the national courts are required to apply in similar cases according to the right to an effective remedy.⁵⁰

It is contended here that in particular the case-law of the CFI and the Court of Justice concerning the intensity of judicial review of the establishment of the facts in cases concerning complex assessments should be considered relevant. Complex assessments by the EU Institutions take place in various fields of law and can have a different character.⁵¹ They may for example concern medical issues or complex economic assessments as in the cases of *Pfizer* and *Tetra Laval* which will be extensively discussed in this section.⁵²

Asylum cases and EU decisions involving complex assessments have in common that it is difficult to find the facts objectively.⁵³ In asylum cases this is due to the general lack of (documentary) evidence. In cases involving complex assessments this is a result of the fact that the decision is based on (often contradicting) scientific data or experts reports. In both sorts of cases it is accepted (with regard to asylum cases at least by some national courts) that because of the difficulties in establishing the facts, determining authorities should enjoy discretion and that judicial review should be limited.⁵⁴ The determining authorities are considered to be better placed to establish and evaluate the facts than the court, because they have the specific expertise necessary for this task.⁵⁵

The Court of Justice's settled case-law entails that, where an EU authority is required to make complex assessments in the performance of its duties, it has wide discretion, which also applies, to some extent, to the establishment

49 Jans states: 'From this judgment it can be deduced that any form of 'normal' judicial review is, in principle permissible. Community law generally only requires a legality review, a merits review is not usually required.' Jans and others 2007, pp 93-94. See also Delicostopoulos 2003, p 602.

50 Schuurmans 2008, pp 16 and 32. Schuurmans recognises however that such a violation will not easily be established. She also notes on p 34 that a very limited review of fact-finding may involve the risk of the courts making an error in reviewing the facts and evidence, for which the Member State may be held liable.

51 Schuurmans states that 'an assessment of the facts is complex, for example, where complicated economic or social assessments must be made, or where an assessment is otherwise based on specific scientific data.' Schuurmans 2008, p 19.

52 Case T-13/99, *Pfizer Animal Health SA v Council* [2002] and Case C-12/03 P, *Commission v Tetra Laval* [2005]. See also Barbier de la Serre and Sibony 2008, p 953.

53 Schuurmans 2008, p 27.

54 See for criticism on the limited judicial review of technical issues Barbier de la Serre and Sibony 2008, p 894.

55 Barbier de la Serre and Sibony 2008, p 955, Schwartz 2004, p 95, Craig 2006, p 469.

of the factual basis of its action.⁵⁶ The EU judiciary must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the boundaries of its discretion.⁵⁷ In cases involving complex assessments the EU Courts thus apply a limited judicial review of the fact finding by the EU Institutions. How can the case-law concerning this limited review be relevant for the interpretation of the required 'thorough judicial review' in asylum cases?

The CJF's case-law concerning cases involving complex assessments shows that in practice this limited form of judicial review is rather rigorous.⁵⁸ Furthermore the EU Courts have tested the EU Institutions' decisions against procedural safeguards. The Court of justice may use this method of judicial review as a source of inspiration for the interpretation of the term 'thorough judicial' review in asylum cases. Arguably judicial review which offers a lower intensity of judicial review than the limited review performed by the EU-Courts in cases involving complex assessments cannot be considered a thorough judicial review. One must be very cautious to apply the case-law concerning complex assessments directly to asylum cases. However, it is possible to draw some general guidelines from this case-law which should be considered relevant for asylum cases.⁵⁹

Here below first of all the method of review of the facts in cases involving complex assessments will be addressed. The final part of this section will examine the judicial review by the EU Courts of the procedural guarantees offered during the proceedings.

Judicial review of the facts in cases involving complex assessments

In cases involving complex assessments judicial review by the General Court of the way in which the EU Institutions assessed and evaluated the facts is limited. The EU judiciary is not entitled to substitute its assessment of the facts for that of the EU institutions.⁶⁰ Instead, it must confine itself to ascertain-

56 Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 168 and Case 138/79, *SA Roquette Frères* [1980], para 25. See also Schuurmans 2008, p 19. See for criticism on this case-law Barbier de la Serre and Sibony 2008, p 956-957.

57 Case C-120/97, *Upjohn Ltd* [1999], para 34.

58 Schuurmans 2008, p 25.

59 The intensity of judicial review that national courts are required to supply is influenced directly by the degree of discretion Member States enjoy in their implementation of the EC measure in question. Ward 2007, p 175. Also the importance of the interests at stake may influence the required intensity of judicial review. Schuurmans 2008, p 33.

60 See for example Case C-120/97, *Upjohn Ltd* [1999], para 34 and Case T-201/04, *Microsoft* [2007], para 88. Barbier de la Serre and Sibony explain the fact that EU Courts shows reluctance to ask for an expert report in cases involving complex assessments from a fear that relying on expert evidence will lead them to substitute their appreciation to that of the EU Institution. Barbier de la Serre and Sibony 2008, pp 953-955.

ing whether the exercise by the institutions of their discretion in that regard is vitiated by a manifest error or a misuse of powers or whether the institutions clearly exceeded the bounds of their discretion (a reasonableness test).⁶¹ This does not mean however, that the review by the EU judiciary does not closely examine the fact-finding.⁶² Several authors have argued that although the wording of the reasonableness test has remained the same, the EU Courts have entered into more rigorous scrutiny of the facts.⁶³ The Courts have shown to be more readily prepared to accept a manifest error.⁶⁴ In this section two judgments will be examined in which the EU Courts have applied the intensified reasonableness test. These cases do not necessarily represent the view of the EU Court in general.⁶⁵ However they have been mentioned in literature as leading cases,⁶⁶ which should be considered to provide important guidance for national administrative proceedings.⁶⁷

Pfizer Animal Health SA v Council

The first striking example of an intensive review applied by the Court of First Instance in the context of the reasonableness test is the judgment in *Pfizer*, which was already discussed in section 8.6.1 on expert reports. In this case a regulation was contested, by which the authorisation of an additive in feeding stuffs (viginiamycin) was withdrawn. The Council took the view that the use of viginiamycin, which was produced by Pfizer, involved a risk to human health. Therefore it was necessary to withdraw the authorisations relating to the use of the product. The Council had drawn attention in its arguments to the fact that the decision to withdraw the authorisation of a certain additive was based on extremely complex scientific and technical assessments, over which scientists had widely diverging views. Pfizer argued that the contested regulation should be annulled, since the Community institutions had made errors in the analyses of the risks to human health and their application of the precautionary principle. In its view the Community Institu-

61 See for example Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 169.

62 Schuurmans 2008, p 30.

63 Craig 2006, pp 446-447. Craig describes the early case-law by the Court of Justice regarding judicial review of fact and discretion in pp 439-444. See also Schuurmans 2008, p 20 and Schwartz 2004, p 100.

64 Craig 2006, p 447, Schuurmans 2008, p 20.

65 Craig shows that judicial review of fact in recent cases concerned with common policies, State aids and structural funds are more far-reaching than the early case-law, but is still significantly less intensive than in the risk regulation and merger cases like *Pfizer* and *Tetra Laval*. Craig 2006, p 458

66 Craig considers *Pfizer* and *Tetra Laval* to be 'prominent examples' of the EU Court's modern approach. Craig 2006, p 447.

67 Schuurmans uses *Pfizer* and *Tetra Laval* because these cases in her view include the court's specification of how it reviews an opinion of the facts by the administration. She states that decisions in cases like *Tetra Laval* appear to be formulated in such a manner that they may be used as a guideline for future cases. Schuurmans 2008, p 25.

tions made errors in their analysis of the various items of scientific evidence, amongst others by disregarding part (the conclusion) of an expert opinion which was in favour of Pfizer.

The CFI recognised that the Council enjoyed broad discretion in taking the decision⁶⁸ and that therefore judicial review of the findings of fact had to be limited to the reasonableness test.⁶⁹ However the CFI set out rather detailed requirements against which expert evidence should be tested. These requirements follow from the principles of excellence, transparency and independence.⁷⁰ The CFI held for example that the competent Community institution must prepare for the expert the factual questions which need to be answered before it can adopt a decision and assess the probative value of the opinion delivered by the committee.⁷¹ Furthermore it set out the conditions in which the Community Institution may disregard (part of) an expert opinion. Subsequently the Court reviewed the reasons why the Community Institutions chose to use certain (parts of) expert reports and to disregard others in detail. Furthermore it tested whether the Institution took into account the fact that certain expert reports had methodological limitations and were therefore of less value. The CFI concluded that the Community institutions did not make manifest errors when they made findings in respect of the relevant facts.⁷²

Commission v Tetra Laval

In *Tetra Laval* the Court of Justice indicated specifically what the reasonableness test of the facts in cases involving complex assessments actually entails. The Court considered that the fact that a decision must be subject to a limited form of judicial review, does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information. Not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn

68 The Council enjoyed a broad discretion in this case for three reasons: the case concerned the common agricultural policy, the Community institutions had to determine the level of risk deemed unacceptable for society and the Community authority was required to make complex assessments in the performance of its duties.

69 Case T-13/99, *Pfizer Animal Health SA v Council* [2002], paras 166-169 and 323.

70 See also section 8.6.1.

71 Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 198.

72 Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 311. See on this case also Craig 2006, pp 447-452.

from it.⁷³ This consideration was also used by the CFI and the General Court in later cases concerning other fields of EU law.⁷⁴

In *Tetra Laval* the Court of Justice rejected the Commission's complaint that the CFI had exceeded the limits of its power of review.⁷⁵ The Court concluded that the CFI did not err in law when it set out the tests to be applied in the exercise of its power of judicial review or when it specified the quality of the evidence, which the Commission is required to produce in order to demonstrate that the requirements set by Community legislation are satisfied.⁷⁶

The Commission had declared the merger of Tetra Laval BV with another company incompatible with the common market as the new entity would obtain a dominant position in the PET market.⁷⁷ The CFI held that the Commission had committed manifest errors of assessment in its findings as to leveraging and the strengthening of Tetra's dominant position and therefore annulled the contested decision. It took into account that the Commission admitted that its forecast in the contested decision with regard to the increase in the use of PET for packaging UHT milk was exaggerated. Furthermore it found that the evidence produced by the Commission was unfounded by stating that, of the three independent reports cited by the Commission, only one contained information on the use of PET for milk packaging. It also showed that the evidence produced by the Commission was unconvincing by pointing out that the increase forecast in the report relied on by the Commission was of little significance and that the Commission's forecast was inconsistent with the undisputed figures in other reports. According to the

73 Case C-12/03 P, *Commission v Tetra Laval* [2005], para 39. Costello states that with this requirement, the Court of Justice emphasised the need for intensive review. Costello 2006, p 31.

74 See Case C-525/04 P, *Spain v Lenzing* [2007], para 57 (State Aid), Case T-284/08, *People's Mojahedin Organization of Iran v Council* [2008], para 55 (EU measures freezing the funds of persons or organisations suspected of involvement in terrorist activities), Case T-187/06, *Schröder v CPVO* [2008], para 61 (Intellectual Property) and Case T-475/07, *Dow AgroSciences Ltd v Commission* [2011], para 153 (Agriculture).

75 The Commission argued before the Court of Justice that the Court of First Instance required it, when adopting its decision, to satisfy a standard of proof and to provide a quality of evidence in support of its line of argument, which are incompatible with the wide discretion, which it enjoys in assessing economic matters.

76 Case C-12/03 P, *Commission v Tetra Laval* [2005], paras 42-45. See with regard to this case also Craig 2006, pp 453-457.

77 The Commission's decision was based on Art 2 of Council Regulation (EEC) no 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1, corrected version in OJ L 257/13, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 OJ L 180/1. This provision states that a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market. The regulation gives a rather detailed list of circumstances, which the Commission has to take into account in its assessment.

CFI, the Commission's analysis was incomplete, which made it impossible to confirm its forecasts, given the differences between those forecasts and the forecasts made in other reports.⁷⁸

In the context of asylum cases the Court of Justice's considerations in *Tetra Laval* regarding the intensity of judicial review of prospective analysis are interesting.⁷⁹ The Court of Justice stressed that in case of a prospective analysis a judicial review of the evidentiary assessment performed by the EU Institution is all the more necessary.⁸⁰ According to the Court a prospective analysis of the kind necessary in merger control must be carried out with great care. The reason for that is that it does not entail the examination of past events – for which often many items of evidence are available, which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in the future. The prospective analyses makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely. However the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important. After all, that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.

One may argue that asylum cases also involve a prospective analysis: does the asylum seeker have a well-founded fear of persecution or does he run a real risk of torture or inhuman or degrading treatment, if expelled to his country of origin. The argument that decisions involving prospective analysis require a more strict judicial review, may therefore also be used in asylum cases. Costello states that 'the asylum process, with 'essays in prediction' at its core, is similarly fraught', and that the reasoning in *Tetra Laval* 'suggests that a strict standard of review should be demanded as a matter of EC law'.⁸¹ It should be noted that in asylum cases also the chains of cause of past events are 'dimly discernible, uncertain and difficult to establish'. Often is it not

78 Case C-12/03 P, *Commission v Tetra Laval* [2005], para 46. Schwartz writes that the Court's thorough and detailed analysis of all the facts and legal arguments used in the Commission's decisions, despite the complexity of the issue, was especially remarkable because, usually, an issue's high complexity results in significant administrative discretion and reduced judicial review. Schwartz 2004, p 99. Schwartz mentions two other merger cases in which the CFI concluded that the Commission made manifest errors in the establishment of the facts: Case T-310/01, *Schneider Electric v Commission* [2002] and Case T-342/99, *Airtours v Commission* [2002]. The *Airtours* judgment is also mentioned by Craig as a prominent example of the modern approach by the EU Courts. Craig 2006, pp 452-453.

79 Costello remarks that the Court's reasoning here has a striking, if unexpected, parallel with the asylum context. Costello 2006, p 31.

80 Case C-12/03 P, *Commission v Tetra Laval* [2005], para 39.

81 Costello 2006, p 31.

exactly clear by whom or for what reason applicants were subjected to (threats of) persecution or serious harm in their country of origin. This could be a further argument for a thorough judicial review of the fact-finding in asylum cases.

Judicial review of the procedural guarantees offered during the proceedings

The EU Courts have recognised that a limited judicial review should be (partly) compensated by procedural guarantees granted during the administrative proceedings, such as the right to be heard and the right to know the reasons for the decision.⁸² Schwartz notes that 'today, allowing the administration discretionary powers appears permissible only if discretion is exercised in strict observance of procedural guarantees.'⁸³ In *Technische Universität München* the CFI held that in cases entailing complex technical evaluations, where the Commission has a power of appraisal in order to be able to fulfil its tasks:

Respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.⁸⁴

The CFI thus only considers itself able to perform its judicial review effectively when certain procedural guarantees in the administrative phase have been respected.⁸⁵ In *Technische Universität München* the procedural guarantees in this sense included rules on investigation, the right to be heard, and the duty to state reasons for the decision.⁸⁶ Also in later cases in which a limited judicial review was applied the CFI referred to the importance of procedural

82 See for example Case C-269/90, *Technische Universität München* [1990], para 14, Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 171, Case C-525/04 P, *Spain v Lenzing* [2007], para 58, Case T-228/02, *Organization des Modjahedines du peuple d'Iran v Council* [2007], paras 154-155 and Case T-306/01, *Yusuf and Al Barakat International Foundation v Council and Commission* [2005], paras 326-327. See also Schwartz 2004, pp 94-96, Ponce 2005, p 583 and Barbier de la Serre and Sibony 2008, pp 955-956, who state that the EU Courts 'generally prefer to limit their review and compensate the applicant with increased procedural guarantees, thereby avoiding the technical issue and imposing a rule the application of which they can control easily on their own'.

83 Schwartz 2004, pp 95-96.

84 Case C-269/90, *Technische Universität München* [1990], para 14.

85 See also Schuurmans 2008, p 28. She states that: 'by setting clear and strict requirements on the administration's investigation of the facts and the statement of reasons underlying the factual assessment, the Community courts are able to guarantee that their test of reasonableness actually provides legal protection'.

86 Case C-269/90, *Technische Universität München* [1990], paras 22-26. See also Schwartz 2004, p 95.

guarantees including the obligation to state reasons, the obligation for the competent institution to examine carefully and impartially all the relevant elements of the individual case⁸⁷ and the right to a fair hearing.⁸⁸

Subconclusion: EU Courts' case-law

The Court of Justice ruled in *Samba Diouf* that Article 39 PD requires 'thorough' judicial review of the reasons for rejecting an asylum claim. The Court has not addressed the question whether such review requires the national court or tribunal to carry out its own assessment of the facts or allows a reasonableness test of the determining authority's establishment of the facts. It was argued in this section that the EU Courts' case-law with regard to complex assessments may provide guidance in finding an answer to this question. Asylum cases and EU decisions involving complex assessments have in common that it is difficult to find the facts objectively and that therefore the determining authority is considered to be better placed to establish and evaluate the facts than the court. The Court of Justice has itself recognised in *Upjohn* that the intensity of review carried out by the EU Courts is to a certain extent normative for the intensity of the review which carried out by national courts in similar cases.

On the basis of the EU Courts' judgments concerning EU decisions involving complex assessments it is impossible to define exactly the level of intensity of judicial scrutiny of the assessment of the facts which should be applied in asylum cases. It can certainly not be derived from this case-law that national courts are obliged to substitute their assessment of the facts underlying the asylum claim for that of the determining authority. In cases involving complex assessments the EU institutions have wide discretion which also applies, to some extent, to the fact-finding. As a result the EU judiciary restricts itself to examining the accuracy of the findings of fact and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error. This section showed however that in practice, in particular in the cases of *Pfizer* and *Tetra Laval*, this limited form of judicial review turns out to be rather rigorous. The General Court establishes whether the evidence relied on is factually accurate, reliable and consistent and whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. In *Tetra Laval* the Court of Justice held that judicial review of the evidentiary assessment by an EU institution is all the more necessary in cases requiring a prospective analyses in which the chains of cause or dimly discernible, uncertain and difficult to establish. This consideration may also be considered relevant for asylum cases, because in these cases the causes of

87 Case C-525/04 P, *Spain v Lenzing* [2007], para 58, Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 171, Case C-16/90, *Nölle* [1991], para 13.

88 Case T-228/02, *Organization des Modjahedines du peuple d'Iran v Council* [2006], paras 154-155. See further section 10.2.2.4.

future as well as past events are often difficult to establish. Furthermore the EU Courts have held that a limited form of judicial review, such as that applied in cases involving complex assessment, should be compensated by procedural guarantees granted during the administrative proceedings.

It is argued here that a form of judicial review which offers a lower intensity of review than the limited review performed by the EU-Courts in cases involving complex assessments cannot be considered a thorough judicial review. It should be remembered in this context that EU fundamental rights are involved in asylum cases, which require a high level of procedural protection. On the basis of the case-law concerning complex assessments it is contended that the court or tribunal in the meaning of Article 39 PD should at least establish whether the evidence relied on in the asylum decision is factually accurate, reliable and consistent, whether that evidence contains all the information, which must be taken into account in order to assess the risk of *refoulement* and whether it is capable of substantiating the conclusions drawn from it. Furthermore this court or tribunal should ensure that the procedural rights of the applicant guaranteed by the Procedures Directive have been respected. As will be shown in section 9.2.2, such (minimum) level of intensity of judicial review would also comply with the requirement of 'close and rigorous' scrutiny which follows from Articles 3 and 13 ECHR.

9.2.2 Obligations stemming from the ECHR, CAT and ICCPR

More specific guidelines for the intensity of judicial review of the facts in asylum cases may be derived from the ECtHR's case-law and the views of the Committee against Torture and the Human Rights Committee. Two strands of case-law should be considered important. First of all the case-law regarding the right to an effective remedy and the right to a fair trial which directly addresses the level of intensity of judicial review which should be applied by the national court, should be examined. The case-law concerning Articles 3 and 13 ECHR sets out standards as to the intensity of judicial review required in asylum cases specifically. The case-law under Article 6 ECHR, which concerns the intensity of judicial review in other sorts of administrative cases is also of importance. It is relevant to know whether this case-law sets higher standards as to the required level of intensity of judicial review than the case-law under Articles 3 and 13 ECHR. If that is the case, those higher standards may inspire the EU right to an effective remedy, even if applied in asylum cases.⁸⁹

Secondly the case-law which reveals the way in which in particular the ECtHR itself reviews *non-refoulement* cases should be addressed. It is contended that the subsidiary role of the ECtHR precludes that the review performed by

⁸⁹ See further section 4.3.2.

the national courts in *non-refoulement* cases be (much) more limited than the review performed by those bodies.⁹⁰ It would undermine the subsidiary role of the ECtHR if asylum applicants would feel obliged to complain before that court, because the national court gives fewer guarantees for conformity of deportations with Article 3 than the ECtHR.⁹¹ The ECtHR would then become 'an appeal tribunal from the asylum and immigration tribunals of Europe'.⁹²

In that context it is important to note that the ECtHR itself seems suggest that the standard of review performed by the Court itself is normative for the standard of review, which is constituted by the national courts. The ECtHR uses the same term 'rigorous scrutiny' for the standard of review which it applies itself in Article 3 cases, as well as for the standard of review it requires domestic courts to apply in Article 3 cases.⁹³ Furthermore in *Smith and Grady v the United Kingdom* the ECtHR explicitly established a link between the standard of review applied by the court itself and that which should be applied by the national courts. In that case it considered that in the cases of *Soering v the United Kingdom* and *Vilvarajah v the United Kingdom* 'the Court found that the test applied by the domestic courts in applications for judicial review of decisions by the Secretary of State in extradition and expulsion matters *coincided with the Court's own approach under Article 3 of the Convention*' (emphasis added). Therefore *Soering v the United Kingdom* and *Vilvarajah v the United Kingdom* could be contrasted to the applications in *Smith and Grady v the United Kingdom*, in which the national court did not test the contested decision against the requirements set by Article 8 ECHR.⁹⁴ In *Soering* and *Vilvarajah* the Court did not find a violation of Article 13 ECHR while it did in *Smith and Grady*.

In this section first the case-law regarding the right to an effective remedy and the subsidiary role of the supervising bodies will be discussed, as this case-law specifically concerns asylum cases. Finally the requirements under Article 6 ECHR will be briefly discussed.

⁹⁰ See also Spijkerboer 2009-II, pp 68-69. See with regard to the case-law concerning the subsidiary role of the ECtHR and the UN Committees as a source of inspiration also section 4.3.1.

⁹¹ Spijkerboer 2009-II, p 68.

⁹² This is according to former President of the ECtHR Costa exactly what the ECtHR is not. See Statement Issued by the President of the ECtHR concerning Requests for Interim Measures (Rule 39 of the Rules of Court), 11 February 2011, available at www.echr.coe.int. See also High Level Conference on the Future of the European Court of Human Rights, Izmir 26-27 April 2011, Izmir Declaration, p 3.

⁹³ Spijkerboer 2009-II, pp 63-64. He states that the fact that the Court uses the term 'rigorous scrutiny' both for its own scrutiny and for the scrutiny it requires from domestic courts, suggests that these should be identical.

⁹⁴ ECtHR 27 December 1999, *Smith and Grady v the United Kingdom*, no 33985/96, para 138.

9.2.2.1 Intensity of judicial review under the right to an effective remedy

According to the ECtHR the effectiveness of a remedy within the meaning of Article 13 imperatively requires 'close scrutiny by a national authority and independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3'.⁹⁵ These requirements follow from the importance which the Court attaches to Article 3 ECHR and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises.

In *M.S.S v Belgium and Greece* the ECtHR concluded for the first time that the standard of judicial review applied by a national court did not comply with the requirements of close and rigorous scrutiny. The judgment concerned the extremely urgent procedure before the Belgian Aliens Appeal Board, in which the execution of an expulsion measure could be stayed. In this procedure the Aliens Appeal Board verified that the administrative authority's decision relied on facts contained in the administrative file, that in the substantive and formal reasons given for its decision it did not, in its interpretation of the facts, make a manifest error of appreciation, and that it did not fail to comply with essential procedural requirements or with statutory formalities required on pain of nullity, or exceed or abuse its powers.⁹⁶

The ECtHR considered that the extremely urgent procedure had to comply with the requirements concerning the scope of the scrutiny following from Article 13 ECHR. 'The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible.'⁹⁷ According to the ECHR the extremely urgent procedure did not comply with the requirement of rigorous scrutiny for several reasons. First of all, as was also recognised by the Belgian Government, this procedure reduced the rights of the defence and the examination of the case to a minimum. The examination of the complaints under Article 3 by the Aliens Appeal Board could, according to the ECtHR, not be considered 'thorough'. The examination was limited to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3.⁹⁸ Thereby the burden of proof was increased to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore the

95 See for example ECtHR (GC) 21 January 2011, *M.S.S v Belgium and Greece*, no 30696/09, para 293 and ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 50.

96 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 141.

97 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 388.

98 In some judgments the Aliens Appeal Board considered that general information submitted by the applicant did 'establish no concrete link showing that the deficiencies reported would result in Greece violating its *non-refoulement* obligation vis-à-vis aliens who, like the applicant, were transferred to Greece'. See ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 148.

Aliens Appeals Board did not always take into account new material submitted by the applicant.⁹⁹

It follows from this judgment that the national authority in the meaning of Article 13 ECHR should examine the alleged risk of a violation of Article 3 ECHR on the merits, including the evidence underlying the asylum decision. It cannot limit its examination to the compliance with procedural requirements and the existence of manifest errors.

In several cases against the United Kingdom the ECtHR held that that the appeal against an extradition order, a deportation order or a refusal to grant asylum provided by the British court did meet the requirements of Article 13 ECHR.¹⁰⁰ The British national court could review the exercise of the Secretary of State's discretion on the basis that it is tainted with illegality, irrationality or procedural impropriety. Irrationality was determined on the basis of the *Wednesbury* principles, administrative principles set out in the United Kingdom's case-law. The test in an extradition or expulsion case would be that no reasonable Secretary of State could have made an order for return in the circumstances.

In its judgments the ECtHR stressed that, although the domestic courts would not reach findings of fact for themselves, the judicial review by the English court was careful, detailed and rigorous. In *Soering v the United Kingdom* the Court considered that 'it was satisfied that the English courts can review the "reasonableness" of an extradition decision in the light of the kind of factors relied on by Mr Soering before the Convention institutions in the context of Article 3'.¹⁰¹ The ECtHR was of the opinion that an application for judicial review arguing "*Wednesbury* unreasonableness" on the basis of much the same material that he adduced before the court in relation to his treatment while staying in death row 'would have been given "the most anxious scrutiny" in view of the fundamental nature of the human right at stake.' Therefore Article 13 ECHR had not been violated.¹⁰²

In *Vilvarajah v the United Kingdom* the ECtHR took into account that the English courts had stressed their special responsibility to subject administrative

99 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 389-390.

100 ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, ECtHR, 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, ECtHR 2 May 1997, *D v the United Kingdom*, no 30240/96, ECtHR (Adm) 7 March 2000, *T.I. v United Kingdom*, no 43844/98, ECtHR 6 February 2001, *Bensaid v the United Kingdom*, no 44599/98, ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99. See also Spijkerboer 2009-II, pp 66-68.

101 ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 121.

102 ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 122.

decisions in asylum cases to the most anxious scrutiny where an applicant's life or liberty may be at risk.¹⁰³ It stated:

While it is true that there are limitations to the powers of the courts in judicial review proceedings the Court is of the opinion that these powers, exercisable as they are by the highest tribunals in the land, do provide an effective degree of control over the decisions of the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13.¹⁰⁴

The ECtHR based its conclusion that the judicial review of asylum cases in England is in fact a rigorous one on several decisions by the House of Lords and other national courts. In *Soering v the United Kingdom* for example the ECtHR referred to a judgment by the House of Lords, in which Lord Bridge stated that within the limitations of the *Wednesbury* principles the court must 'be entitled to subject an administrative decision to the most rigorous examination to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines'.¹⁰⁵ If 'an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.' Lord Templeman argued in the same judgment that 'where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process'.¹⁰⁶ In *Vilvarajah v the United Kingdom* the Court referred to a case in which the High Court judge quashed the decision on the ground that the Secretary of State, in reaching his decision 'took into account matters which ought not to have been taken into account and failed to take into account matters he should'.¹⁰⁷

103 In ECtHR 8 July 2003, *Hatton and others v the United Kingdom*, no 36022/97, para 140, the ECtHR stated that: 'the scope of the domestic review in *Vilvarajah*, which concerned immigration was relatively broad because of the importance domestic law attached to the matter of physical integrity. It was on this basis that judicial review was held to comply with the requirements of Article 13.' See also ECtHR 6 February 2001, *Bensaid v the United Kingdom*, no 44599/98, paras 55-56 and ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, paras 37 and 77-79.

104 ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 126.

105 House of Lords 19 February 1987, *R v Home Secretary, ex parte Bugdaycay* [1987] AC 514, cited in ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 35.

106 Furthermore, according to the British government a court would have jurisdiction to quash a challenged decision to send a person to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one which no reasonable Secretary of State could make. ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 35.

107 ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 91. The ECtHR also mentioned a case in which the judges stressed that in refugee cases the court is entitled to and should, subject administrative decisions to rigorous examination. See also ECtHR 6 February 2001, *Bensaid v the United Kingdom*, no 44599/98, para 28.

The ECtHR has thus accepted that the national authority in the meaning of Article 13 ECHR does not reach findings of fact for itself. However, it follows from *M.S.S. v Belgium and Greece* that the national authority does need to enter into a thorough examination of the evidence underlying the asylum claim. This also follows from the fact that in the cases against the United Kingdom it was only after the ECtHR established that the review performed by the British courts was in fact a rigorous one, that it deemed the complaints under Article 13 ECHR unfounded. By assessing the actual test performed by the British courts in detail, the Court underlined the importance it attached to a rigorous review of Article 3 cases. It is however not possible on the basis of this case-law to define precisely the minimum level of intensity of judicial review which should be applied in *refoulement* cases.¹⁰⁸ In order to get a better understanding of the meaning of a 'rigorous scrutiny' it is therefore useful to take a look at the way the ECtHR itself reviews *refoulement* cases. This will be done in section 9.2.2.2.

The Committee against Torture's view

The view of the Committee against Torture with regard to the required intensity of review of asylum decision has not been consistent. In several cases against Canada the Committee accepted a very limited form of judicial review.¹⁰⁹ However in its more recent view in *Singh v Canada* as well as in its Concluding Observations regarding Canada the Committee was more strict. It held that a State party 'should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds or believing that the person faces a risk of torture'.¹¹⁰ In *Singh* it considered that Article 22 CAT was violated because judicial review by the Canadian Court did not include a review on the merits of the complainant's claim that he would be tortured upon return. The Canadian Federal Court, the only judicial body to which the applicant had access, could only quash a decision of the Immigration Refugee Board 'if

108 See also Spijkerboer 2009-II, p 68, where he states that the ECtHR has 'never stated that the former British review system constitutes the bottom line of what is still acceptable'. He states that there is some room for the view that a judicial review that applies a marginal review on the assessment of credibility still constitutes a rigorous scrutiny in the sense of Strasbourg case-law.

109 See for example ComAT 6 December 2006, *S.P.A. v Canada*, no 282/2005, para 7.4, where it considered that the judicial review procedure, while limited to appeal on points of law, did examine whether there were any irregularities in the asylum determinations. The applicant complained before the Committee that judicial review available to her was an extremely narrow remedy, available only on technical legal grounds. See also ComAT 15 November 2007, *L.Z.B. v Canada*, no 304/2006, para 6.6, where it considered that the appeal by the Federal Court is not a mere formality and that the court may, in appropriate cases, look at the substance of a case.

110 ComAT 8 July 2011, *Nirmal Singh v Canada*, no 319/2007, para 8.9. See also ComAT Concluding Observations on Canada, 7 July 2005, CAT/C/CR/34/CAN, para 5 (c).

satisfied that: the tribunal acted without jurisdiction; failed to observe a principle of natural justice or procedural fairness; erred in law in making a decision; based its decision on an erroneous finding of fact; acted, or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law'.¹¹¹ The standard that the Court applied to the credibility of the findings of the Immigration Refugee Board was that of "patent reasonableness".¹¹² In the case of *Singh* the Federal Court concluded that the decision was not patently unreasonable, largely on grounds of the delay in claiming refugee status after arrival to the country and failure to provide credible or trustworthy evidence as to the complainant's background information in India.¹¹³

In its Concluding Observations regarding the Netherlands of May 2007 the Committee recommended that the appeal procedures entail an adequate review of rejected applications and permit asylum applicants to present facts and documentation which could not be made available, with reasonable diligence, at the time of the first submission.¹¹⁴ This implies that the national court is supposed to review the facts, including new evidence.

9.2.2.2 The subsidiary role of the ECtHR, ComAT and HRC in asylum cases

This section addresses the intensity of review applied by the ECtHR and (briefly) the UN Committees. In this section it will be shown that generally the ECtHR applies a rigorous scrutiny of the facts and evidence relevant to the claim of a risk of *refoulement*. However the ECtHR has not always been consistent in this respect, paying more deference to the assessment of the risk of *refoulement* by the national authorities in some (recent) cases. The Committee against Torture and particularly the Human Rights Committee generally do not interfere in the establishment of the facts by the State authorities. In some cases the Committee against Torture has concluded that the applicant's asylum account should be considered credible, while the State authorities did not. The reason

111 ComAT 8 July 2011, *Nirmal Singh v Canada*, no 319/2007, para 8.8.

112 The applicant contended that the Federal Court had established jurisprudence that if the Immigration Refugee Board decided a refugee claimant is not credible, then their story could not be a base for stopping their deportation, even when there is substantial evidence of an error in judgment. The complainant quoted cases where the Federal Court had consistently decided that the decisions of the Immigration Board are discretionary and that the Court should not intervene except if the immigration officer exercises his discretion pursuant to improper purposes, irrelevant considerations, with bad faith, or in a patently unreasonable manner. He maintained that when the judicial recourse is futile and in cases where there are substantial grounds to intervene the Court does not even hear the case and that this is not a recourse that is effective and efficient following the recognised principles of international law.

113 ComAT 8 July 2011, *Nirmal Singh v Canada*, no 319/2007, para 2.10.

114 ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 7.

for that seems to be that in those cases the State authorities failed to take into account important facts or evidence, notably medical reports.

Rigorous scrutiny of claims of refoulement by the ECtHR

According to the ECtHR's standing case-law the ECtHR itself applies a 'rigorous scrutiny' to claims of a risk of *refoulement*:

The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 (art. 3) at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.¹¹⁵

In *Salah Sheekh v the Netherlands* the ECtHR considered that in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, 'a full and *ex nunc* assessment is called for'.¹¹⁶

In many judgments the ECtHR did not pay deference to the asylum decision made by the national authorities. Instead it established itself whether the applicant's personal situation was such that his expulsion or extradition would contravene Article 3 of the Convention.¹¹⁷ In those judgments the ECtHR assessed the credibility of the applicant's asylum account and the facts and evidence in the case.¹¹⁸ In *R.C. v Sweden* for example there was a dispute between the parties as to the facts of the case and the credibility of the applicant's asylum account. The ECtHR acknowledged that it is often difficult to establish, precisely, the pertinent facts. It accepted that 'as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual con-

115 ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 108. See also ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06 where the Court considered that it 'has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursuing that aim'.

116 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136.

117 In several cases the ECtHR mentioned 'the need to examine all the facts of the case'. See for example ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 113. However, the ECtHR does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. See ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 286.

118 These include cases, in which the Court concluded that Art 3 had been violated (see for example ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02 and ECtHR 26 July 2005, *N v Finland*, no 38885/02) but also cases, which were declared manifestly unfounded (see for example ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02 and ECtHR (Adm) 8 March 2007, *Collin and Akaziebie v Sweden*, no 23944/05).

cerned.¹¹⁹ Nevertheless, the Court did not share the conclusion of the Government that the information provided by the applicant was such as to undermine his general credibility. The ECtHR thus replaced its own assessment of the credibility of the asylum account for that of the Swedish (administrative and judicial) authorities.

In most asylum cases, the Court assesses the credibility of the applicant's asylum account on the basis of the information (for example reports of interviews), which came to light during the national asylum procedure and the statements made by the applicant during the proceedings before the ECtHR.¹²⁰ In *Said v the Netherlands* the ECtHR considered that it 'must proceed, as far as possible to an assessment of the general credibility of the statements made by the applicant before the Netherlands authorities and during the present proceedings'.¹²¹ In *N v Finland*, the Court went as far as to appoint two of its members as delegates in order to take oral evidence from the applicant, his wife, and several other persons. Based on this assessment the Court concluded that the applicant's account of his background in the DRC had, on the whole, be considered sufficiently consistent and credible.¹²² The Court noted that the position of the Court did not contradict in any respect the findings of the Finnish courts. Neither was there any indication that the initial asylum interview was in any way rushed or otherwise conducted in a superficial manner.¹²³

In many cases the Court included country of origin information¹²⁴ or other information in its assessment which it had obtained of its own motion.¹²⁵ The Court considered:

In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting

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

120 See for example ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, ECtHR (Adm) 6 September 2007, *M. v Sweden*, no 22556/05 and ECtHR (Adm) 17 January 2006, *Bello v Sweden*, no 32213/04.

121 ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, para 50.

122 ECtHR 26 July 2005, *N. v Finland*, no 38885/02, paras 152-156. See also ECtHR 9 October 1988, *Hatami v Sweden*, no 32448/96, para 25.

123 ECtHR 26 July 2005, *N. v Finland*, no 38885/02, para 157.

124 See for example ECtHR 8 April 2008, *Nyanzi v the United Kingdom*, no 21878/06, para 63.

125 The Court stated in many judgments that it assesses the existence of a risk of ill-treatment in breach of Art 3, including the conditions in the proposed receiving country in the light of all the material placed before it, or, if necessary, material obtained of its own motion (*proprio motu*). See for example ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 60 and ECtHR 17 July 2008, *NA v United Kingdom*, no 25904/07, para 119.

State concerned, without comparing these with materials from other reliable and objective sources.¹²⁶

When assessing the facts and evidence underlying the case and subsequently the risk of *refoulement* the ECtHR takes into account whether a proper assessment of the asylum claim took place in the national context. However, the fact that the national asylum procedure was fair and entailed a rigorous scrutiny of the risk of *refoulement* does not prevent the ECtHR from carrying out its own assessment of the facts, evidence or credibility of the asylum account.¹²⁷ In *Nasimi* the Court took into account that the authorities conducted several interviews with the applicant, that it was concluded in two instances that the applicant was not credible and that the bodies concerned gave detailed reasons as to why they reached that conclusion. The Court also deemed it important that the authorities were obliged to consider essentially the same factors as are relevant to the Court's assessment under Article 3 of the Convention. However in this case the ECtHR did assess the credibility of the applicant itself.¹²⁸ In *J.E.D. v the United Kingdom* the Court took amongst others into account that the authorities had due regard to the arguments submitted by the applicant as well as to the past and current situation in the receiving country and that the Secretary of State carefully evaluated the evidence, which the applicant submitted in support of his renewed asylum request. Having regard to these factors and to its own careful examination of the arguments and materials submitted by the applicant, the Court considered the complaint under Article 3 ECHR manifestly ill-founded.¹²⁹ The Court declared both *Nasimi* and *J.E.D.* inadmissible.

In several cases the Court attached weight to the fact that national authorities had knowledge and experience in the assessment of asylum applications submitted by certain groups of asylum applicants. This did not mean however that the ECtHR did not apply a rigorous scrutiny by itself.¹³⁰ In *Vilvarajah* the Court considered for example:

The Court also attaches importance to the knowledge and experience that the United Kingdom authorities had in dealing with large numbers of asylum seekers from

¹²⁶ ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136. See also ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 96.

¹²⁷ See also Spijkerboer 2009-II, p 66. He states that in the ECtHR's assessment thoroughness of the national asylum procedure is one factor, but the crucial issue is not a procedural one, but the substance: was the assessment right?

¹²⁸ ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02.

¹²⁹ ECtHR (Adm) 2 February 1999, *J.E.D. v the United Kingdom*, no 42225/98. See also ECtHR (Adm) 26 October 2000, *Damla and others v Germany*, no 61479/00 and ECtHR (Adm) 31 May 2001, *Katani v Germany*, no 67679/01.

¹³⁰ Spijkerboer notes that both in *Vilvarajah* and in *Cruz Varas*, it was only mentioned after the full assessment of the risk of a treatment in violation of Art 3 ECHR by the Court. See also Spijkerboer 2009-II, pp 64-66.

Sri Lanka, many of whom were granted leave to stay, and to the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State in the light of a substantial body of material concerning the current situation in Sri Lanka and the position of the Tamil community within it.¹³¹

It should thus be concluded that the ECtHR has in many cases applied a rigorous scrutiny in claims under Article 3 ECHR, and that it does not hesitate to assess the credibility of an asylum account or to gather evidence of its own motion.¹³² This applies even if the asylum claim was properly assessed by the national determining authority and courts. It follows from the subsidiary role of the court that the national courts should perform a judicial scrutiny, which is at least as rigorous as the ECtHR's review.

Although generally the ECtHR has taken this very active approach, its case-law regarding the intensity of judicial review is not entirely consistent.¹³³ In its judgment in *Husseini v Sweden* and several other recent judgments the ECtHR seems to apply a more distant review. In *Husseini* the ECtHR considered that the Swedish Migration Board and the Aliens Appeals Board

conducted a thorough examination of the applicant's case, which entailed that the applicant was heard three times. Before both instances the applicant was assisted by appointed counsel. The national authorities had the benefit of seeing, hearing and questioning the applicant in person and of assessing directly the information and documents submitted by him, before deciding the case. The Court finds no reason to conclude that their decisions were inadequate or that the outcome of the proceedings before the two instances was arbitrary. Furthermore, there are no indications that the assessment made by the domestic authorities was insufficiently supported by relevant materials or that the authorities were wrong in their conclusion that there were no substantial grounds for finding that the applicant would risk being persecuted upon return to Afghanistan.¹³⁴

131 ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*. nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 114. See also ECtHR (Plen) 20 March 1991, *Cruz Varas and others v Sweden*, no 15576/89, para 81 and ECtHR (Adm) 22 June 2004, *F. v United Kingdom*, no 17341/03 and EComHR 8 April 1993, *M.P.G. v Sweden*, no 20981/92.

132 See also Spijkerboer 2009-II, pp 64-66.

133 In ECtHR (Adm) 26 October 2000, *Damla v Germany*, no 61479/00 and ECtHR (Adm) 22 September 2005, *Kaldik v Germany*, no 28526/05 the ECtHR concluded that nothing in the file suggested that the assessment of evidence by the national authorities was arbitrary. This seems to point in the direction of a marginal scrutiny by the Court. The ECtHR in this decision used a standard text block which is normally used in cases concerning Art 6 ECHR, which implies that the assessment of the facts and the taking of evidence and its evaluation can only be reviewed by the ECtHR in exceptional circumstances. See also ECtHR (Adm) 14 September 2000, *Chentiev and Ibragimov*, no 21022/08; 51946/08.

134 ECtHR 13 October 2011, *Husseini v Sweden*, no 10611/09, paras 86-87.

The ECtHR thus assessed the procedural guarantees offered in this case instead of performing a rigorous scrutiny of the facts itself.¹³⁵ Potentially this and similar recent judgments reflect a new approach of the ECtHR, which is intended to ensure that the ECtHR does not act as a fourth instance court, in conformity with the Izmir Declaration.¹³⁶ However the ECtHR still does enter into a rigorous scrutiny if the State authorities did not carry out an adequate assessment¹³⁷ or if it finds it necessary for some other reason. In *J.H. v the United Kingdom* for example the ECtHR first established that the State authorities conducted a thorough examination of the applicant's case¹³⁸ but proceeded with its own 'overall examination of the applicant's case'.¹³⁹

The potential new approach of the ECtHR does not detract from the conclusion made above that the rigorous scrutiny performed in the *refoulement* cases discussed above serves as a model for the rigorous scrutiny which should be applied by the national courts.¹⁴⁰ Possibly the supposed new approach even entails that the ECtHR will check the intensity of judicial review performed by the national courts more rigorously than before.¹⁴¹

The UN Committees' subsidiary role

The Committee against Torture pays more deference to the findings of the State authorities. It has stressed many times that it is not an appellate, quasi-judicial or administrative body and that therefore it must give considerable weight to findings of fact made by the organs of the State party.¹⁴² While assessing a case, the Committee determines whether the State party's review of the complainant's case was deficient in this respect.¹⁴³ In many cases the Committee against Torture followed the assessment made by the authorities of the State and declared the complaint unfounded.¹⁴⁴ In a view concerning a complaint against the Netherlands, the Committee considered for example:

135 See also ECtHR 20 October 2011, *Samina v Sweden*, no 55463/09, paras 54-55 and ECtHR (Adm) 22 November 2011, *Sibomana v Sweden*, no 32010/09.

136 High Level Conference on the Future of the European Court of Human Rights, Declaration, Izmir: 27 April 2011.

137 See ECtHR 8 November 2011, *Yakubov v Russia*, no 7265/10.

138 ECtHR 20 December 2011, *J.H. v the United Kingdom*, no 48839/09, para 58.

139 ECtHR 20 December 2011, *J.H. v the United Kingdom*, no 48839/09, para 66.

140 See with regard to *Damila* also Spijkerboer 2009-II, pp 64, supra footnote 35.

141 In several recent judgments such as ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, ECtHR 2 February 2012, *I.M. v France*, no 9152/09 and ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, the ECtHR under Art 13 ECHR performed a strict review of the procedural safeguards in place.

142 See for example ComAT 3 July 2011, *T.D. v Switzerland*, no 375/2009, para 7.7. See also ComAT General Comment No 1 (1997), A/53/44, para 9 (a).

143 ComAT 21 November 2003, *A.R. v the Netherlands*, no 203/2002, para 7.6, ComAT 15 May 2008, *M.J.A.M.O. e.a. v Canada*, no 293/2006, para 10.5. The ComAT referred to its General Comment No 1 (1997), A/53/44, para 9.

144 See for example ComAT 14 May 2003, *A.A v the Netherlands*, no 198/2002 and ComAT 11 May 2004, *A.K. v Australia*, no 148/1999.

The relevant evidence regarding the complainant's history in Turkey, together with his activities inside and outside Turkey, has been considered by the Dutch authorities. The Committee is not in a position to challenge their findings of fact, nor to resolve the question of whether there were inconsistencies in the complainant's account. Consistent with the Committee's case law, due weight must be accorded to findings of fact made by government Authorities.¹⁴⁵

Nevertheless, the Committee against Torture stressed in some cases that it has the power of free assessment of the facts arising in the circumstances of each case.¹⁴⁶ It must assess the facts and evidence in a given case, once it has been ascertained that the manner, in which the evidence was evaluated was clearly arbitrary or amounted to a denial of justice.¹⁴⁷ In *Dadar*, the Committee against Torture considered that the argument submitted by the State party that the Committee is not a fourth instance, cannot prevail over the absolute prohibition enshrined in Article 3 of the Convention.¹⁴⁸ Therefore the Committee sometimes does evaluate evidence and assess the credibility of the asylum account itself. It has in some cases indeed reached a different conclusion than the national authorities on these issues.

The Committee does not explain in its views why it is of the opinion that the manner, in which the evidence was evaluated was clearly arbitrary or not. However it is striking that in many of the cases in which the Committee concluded differently with regard to the credibility of the applicant's asylum account than the State authorities, the State authorities had failed to take into account important facts or evidence.¹⁴⁹ In particular in many of those cases medical reports had not been taken into account as evidence in the national procedure or the applicant's medical problems could, according to the Committee, explain inconsistencies in the applicant's statements.¹⁵⁰

145 ComAT 14 May 2004, *S.G. v the Netherlands*, no 135/1999, para 6.6.

146 See for example ComAT 3 July 2011, *T.D. v Switzerland*, no 375/2009, para 7.7. See also ComAT General Comment No 1(1997), A/53/44, para 9 (b).

147 ComAT 6 December 2006, *S.P.A. v Canada*, no 282/2005, para 7.6 and ComAT 12 May 2003, *G.K. v Switzerland*, no 219/2002, para 6.12. In ComAT 15 May 2008, *M.J. .A.M.O. e.a. v Canada*, no 293/2006, para 10.5 the ComAT also required that the domestic courts clearly violated their obligations of impartiality.

148 ComAT 5 December 2005, *Dadar v Canada*, no 258/2004, para 8.8.

149 Wouters 2009, p 492. See also Nowak and McArthur 2008, p 223. They state that 'the more efforts the domestic authorities have made to establish the relevant evidence and to take all available information fully into account, the more the Committee attaches importance to the findings and risk assessment of domestic authorities'.

150 See for example ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, paras 6.6 and 6.7 ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, no 185/2001, para 10, ComAT 17 December 2004, *Enrique Falcon Ríos v Canada*, no 133/99, paras 8.4-8.5, ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.5 and ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8.

Also the Human Rights Committee generally respects the assessment of the facts by the national authorities.¹⁵¹ In *Kindler*, an extradition case, the Human Rights Committee for example 'reiterates its constant jurisprudence that it is not competent to re-evaluate the facts and evidence considered by national courts. The Committee may verify whether the author was granted all the procedural safeguards provided for in the Covenant'.¹⁵² Wouters states that the Human Rights Committee allows itself a prominent role in the assessment of facts and evidence only when there is bad faith, abuse of power or other arbitrariness on the part of the State.¹⁵³ There are very few cases in which the Human Rights Committee concluded that Articles 6 or 7 ICCPR would be violated upon return.¹⁵⁴ *Hamida v Canada* is a rare example of a case in which the Committee assessed the facts and evidence itself and came to another conclusion as to the credibility of the applicant's account than the State authorities.¹⁵⁵ In some cases the Human Rights Committee concluded that expulsion of a person would violate Article 7 ICCPR because insufficient procedural guarantees had been offered by the State authorities,¹⁵⁶ further analysis should have been carried out¹⁵⁷ or because the State authorities failed to comment on the applicant's fairly detailed account on why a risk of *refoulement* in his opinion existed.¹⁵⁸

The deferent position of the UN Committees vis-à-vis the examination of the asylum claim by the State authorities can be explained by their concern to maintain their subsidiary role. It does not mean that they are of the opinion that national courts should not be in the position or are not required to apply a rigorous scrutiny to the facts in an asylum case. Furthermore if necessary in the light of the seriousness of the case, the Committee against Torture and the Human Rights Committee do enter into an assessment of the relevant evidence and the credibility of the asylum account. The prohibition of *refoulement* thus prevails over the need to ensure the subsidiary role of the UN Committees.

151 Wouters 2009, p 397.

152 HRC 18 November 1993, *Kindler v Canada*, no 470/1991, para 6.6. See also HRC 6 December 2002, *Zheludkova v Ukraine*, no 726/1996, para 5.3, HRC 20 August 2004, *Perterer v Austria*, no 1015/2001, para 10.5.

153 Wouters 2009, p 397. He refers among others to HRC 3 April 2007, *P.K. v Canada*, no 1234/2003, para 7.3, where the Committee considered that 'it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice'.

154 Wouters 2009, p 367.

155 HRC 13 April 2010, *Hamida v Canada*, no 1544/2007, para 8.7.

156 HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, para 10.7.

157 HRC 9 May 2011, *Pillai v Canada*, no 1763/2008, para 11.4.

158 HRC 9 December 2004, *Byahuranga v Denmark*, no 1222/2003, para 11.3.

9.2.2.3 The right to a fair trial

When assessing whether a court or tribunal complies with the ‘full jurisdiction’ requirement, the ECtHR tests whether the court considered the submissions of the applicant ‘on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts’.¹⁵⁹ The ECtHR applies this test on a case by case basis,¹⁶⁰ carrying out an examination of both the case file and the relevant provisions of national law.¹⁶¹

Article 6 (1) ECHR does not necessarily require a judicial body to substitute its own decision for that of the administrative authorities; on certain conditions it may pay deference to the administrative decision. The ECtHR considered that in assessing the sufficiency of the judicial review available to the applicant ‘it is necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.’¹⁶² These three factors, to which the ECtHR referred in many cases, will be addressed separately in this section.

The subject-matter of the decision

The ECtHR finds that in areas of law in which the administrative authorities exercise discretion or where special knowledge or experience is needed to take a decision, judicial bodies may limit their review to an assessment of the reasonableness of the decision.¹⁶³ They do not need to substitute their own findings of fact for those of the administrative authorities and are therefore not obliged to hold a full court hearing on both facts and law.¹⁶⁴ Examples of areas of law in which administrative authorities, according to the ECtHR,

¹⁵⁹ See for example ECtHR 21 September 1993, *Zumtobel v Austria*, no 12235/86, para 32.

¹⁶⁰ See for example ECtHR 31 July 2008, *Družstevní Záložna Píra and others v the Czech Republic*, no 72034/01, para 107, ECtHR 4 October 2001, *Potocka and others v Poland*, no 33776/96, para 54, ECtHR 21 September 1993, *Zumtobel v Austria*, no 12235/86, para 32. This makes it difficult to establish the exact purport of judgments and the precise contents of the Court’s doctrine. See the Dissenting opinion of Judge Martens with ECtHR 26 April 1995, *Fischer v Austria*, no 16922/90, para 15.

¹⁶¹ Judge Martens stated that the test requires a scrutiny of the complete file that can reasonably only be made by an experienced lawyer completely conversant with Austrian law and Austrian legal practice and style of litigation. Dissenting opinion of Judge Martens with ECtHR 26 April 1995, *Fischer v Austria*, no 16922/90, para 18.

¹⁶² ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91, para 45.

¹⁶³ In ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91 the ECtHR deemed sufficient that the decision by the Housing and Planning Inspector could have been quashed by the British High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference (see para 44).

¹⁶⁴ See ECtHR (GC) 28 May 2002, *Kingsley v the United Kingdom*, no 35605/97, para 53.

typically exercise discretion are town and country planning¹⁶⁵ and environmental protection.¹⁶⁶ These specialised areas of the law involve the exercise of discretion involving a multitude of local factors inherent in the choice and implementation of policies.¹⁶⁷ Furthermore the issues to be determined in such areas require a measure of professional knowledge or experience.¹⁶⁸

In cases in which no specialised knowledge is required to take the decision and the factual findings cannot be said 'to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take', limited judicial review is not allowed under Article 6 ECHR.¹⁶⁹ *Tsfayo v the United Kingdom* for example concerned the decision by a local authority to refuse a claim for backdated housing and council tax benefit. The reason for the refusal was that the applicant had failed to show "good cause" for her delay in making the claim. According to national case-law the concept of "good cause" involved an objective judgment as to whether the individual claimant with his or her characteristics, such as language and mental health, did what could reasonably have been expected of him or her. The applicant challenged the decision before the Housing Benefit and Council Tax Review Board (HBRB). This body was directly connected to the local authority which refused the claim. The applicant gave evidence to the HBRB as to the moment she realised that anything was amiss with her claim for housing benefit. The HBRB found her explanation to be unconvincing and rejected the claim. The court before which the HBRB's decision could be appealed did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility; it only assessed whether the decision was unreasonable or irrational. According to the ECtHR the dispute in this case concerned a 'simple question of fact' namely whether there was "good cause" for the applicant's delay in making a claim. No specialist expertise was required to determine this issue, nor did the facts fall within the scope of the authorities' discretionary power.¹⁷⁰ As the HBRB lacked independence and essential procedural guarantees, while the intensity of the judicial review before the High Court was limited, Article 6 ECHR had been violated.¹⁷¹ Article 6 ECHR thus requires that simple questions of fact should, in contrast with complex policy assessments, be subjected to full judicial review.

165 ECtHR 25 October 1995, *Bryan v the United Kingdom*, no19178/91, para 47. See also ECtHR (GC) 18 January 2001, *Jane Smith v the United Kingdom*, no 25154/94 and ECtHR (GC) 18 January 2001, *Chapman v the United Kingdom*, no 27238/95.

166 ECtHR 28 July 2005, *Alatulkila v Finland*, no 33538/96, para 52.

167 ECtHR 28 July 2005, *Alatulkila v Finland*, no 33538/96, para 52.

168 ECtHR 27 October 2009, *Crompton v the United Kingdom*, no 42509/05, para 73.

169 ECtHR 27 October 2009, *Crompton v the United Kingdom*, no 42509/05, paras 73 and 77.

170 ECtHR 14 November 2006, *Tsfayo v the United Kingdom*, no 60860/00, para 46.

171 ECtHR 14 November 2006, *Tsfayo v the United Kingdom*, no 60860/00. See also ECtHR 27 October 2009, *Crompton v the United Kingdom*, no 42509/05, para 77.

The manner in which the disputed decision was arrived at

When examining the sufficiency of the review performed by the national court, the ECtHR takes into account the guarantees offered during the administrative proceedings. In several cases the ECtHR found that the proceedings before the administrative body did not fully comply with the requirements of Article 6 (1) ECHR, but could nevertheless be qualified as 'quasi-judicial'. In *Bryan v the United Kingdom* the ECtHR pointed at the uncontested safeguards attending the procedure before the Housing and Planning Inspector, namely

the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality [...]. Further, any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court.¹⁷²

In *Kingsley v the United Kingdom* the ECtHR took into account that a hearing took place, that the applicant could call evidence, consider the various elements of the case against him and comment on the way the proceedings should take place and that the applicant was represented by counsel.¹⁷³ In the *Tsfayo v the United Kingdom* case mentioned above, in which a violation of Article 6 ECHR was found, the ECtHR put much weight on the fact that the determining authority (the HBRB) was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute. According to the ECtHR the safeguards built into the HBRB procedure were not adequate to overcome this fundamental lack of objective impartiality.¹⁷⁴ The notion that the overall fairness should be assessed thus also comes to the fore when assessing whether the intensity of judicial review was sufficient in the light of Article 6 ECHR.

The content of the dispute

Finally the ECtHR assesses whether, in spite of the limited jurisdiction of the court, the grounds of appeal submitted by the applicant were adequately addressed by the national court. In *Bryan v the United Kingdom* for example the ECtHR considered that the applicant's submissions 'went essentially to questions involving "a panoply of policy matters such as development plans, and the fact that the property was situated in a green belt and a conservation area"'. According to the ECtHR the High Court had jurisdiction to entertain the grounds of the applicant's appeal and his submissions were adequately

¹⁷² ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91, para 46.

¹⁷³ ECtHR (GC) 28 May 2002, *Kingsley v the United Kingdom*, no 35605/97, para 54. In this case the ECtHR found a violation of Art 6 ECHR because the court could not quash the impugned decision and remit the case for a new decision by an impartial body.

¹⁷⁴ ECtHR 14 November 2006, *Tsfayo v the United Kingdom*, no 60860/00, para 47.

dealt with point by point.¹⁷⁵ The case *Crompton v the United Kingdom* concerned a dispute regarding the level of compensation which had to be offered to the applicant following his discharge from the army. The level of compensation was decided on by the Army Board, a body composed of members of the armed forces, which could not be considered independent. The ECtHR found that the High Court had sufficiency of review to remedy the lack of independence of the Army Board, although the court could not substitute its own view as to an appropriate award in the circumstances of the case. The ECtHR found it sufficient that the court could and did examine both method of calculation of the compensation and the base figures used for the calculation. In the applicant's case it found the base figure to be inaccurate and required the Army Board to review the calculation.¹⁷⁶ It should be concluded that Article 6 ECHR requires that the grounds for appeal are addressed on the merits by a court or tribunal.

9.2.3 Subconclusion: thorough review of the assessment of the facts

On the basis of the examination of the EU Court's and the ECtHR's case-law it is not possible to define exactly the level of intensity of judicial review, which should be offered by the 'thorough' review required by Article 39 PD. It should be concluded however that the Member States do not have full discretion to determine how intense judicial scrutiny of an asylum decision must be. The term 'thorough' already suggests that national courts cannot pay much deference to the determining authority's assessment of the asylum claim. Furthermore both the case-law of the EU Courts and the ECtHR show that a review of an asylum decision which limits itself to a pure reasonableness test, does not comply with the right to an effective remedy.

It may be derived from the EU Courts' case-law in case involving complex assessments that the right to an effective remedy requires, even in cases in which the determining authority has wide discretion, that a court carries out a meaningful examination of the facts and evidence. It must examine whether the evidence relied on is factually accurate, reliable and consistent and whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substanti-

175 ECtHR 25 October 1995, *Bryan v the United Kingdom*, no19178/91, para 47. The court paid deference to the inspector's decision and concluded that the inspector did not act irrational in concluding that the building erected without permission by Brian was objectionable and had to be demolished. See also ECtHR 4 October 2001, *Potocka and others v Poland*, no 33776/96, para 58.

176 ECtHR 27 October 2009, *Crompton v the United Kingdom*, no 42509/05, paras 78-79. See also ECtHR 26 April 1995, *Fischer v Austria*, no 16922/90, para 34, ECtHR 21 September 1993, *Zumtobel v Austria*, no 12235/86, para 32, EComHR 9 December 1997, *Wickramsinghe v the United Kingdom*, no 31503/96.

ating the conclusions drawn from it. A limited form of judicial review must be compensated by an intensive review of the procedural guarantees offered in the administrative phase, such as the right to be heard or the duty to state reasons. It is hard to imagine that a judicial review which is less intensive than the limited review carried out by the CFI/General Court in cases involving complex assessments can be considered 'thorough'.

The ECtHR's case-law makes clear that the need to prevent irreparable harm, requires rigorous scrutiny by an independent authority of a claim of a risk of *refoulement*. It follows from the ECtHR's judgments in *M.S.S v Belgium and Greece* and the many cases against the United Kingdom that the national authority in the meaning of Article 13 ECHR must enter into a thorough examination of the facts and evidence underlying the asylum claim. This should also be derived from the high level of intensity of the review the ECtHR itself carries out in *refoulement* cases. Notably the ECtHR, if necessary, replaces its own assessment of the credibility of the applicant's asylum account for that of the determining authority and gathers (country of origin) information of its own motion. The subsidiary role of the ECtHR would be seriously undermined if judicial scrutiny by the national court gives fewer guarantees for conformity of an asylum decision with Article 3 ECHR than the ECtHR's own review.¹⁷⁷ The Committee against Torture has confirmed in its recent view in *Singh v Canada* and in its Concluding Observations with regard to Canada that a very limited review of the facts of an expulsion decision, including the credibility of the applicant's asylum account (patent unreasonableness) is not allowed.

Under Article 6 ECHR national courts are not allowed to apply a reasonableness test to simple questions of fact, which do not fall within the scope of the administrative authorities' discretion and for which no special knowledge or experience is required. In such cases the court must have jurisdiction to rehear the evidence or to substitute its own views. It is contended here that the assessment of the credibility of the asylum applicant cannot be considered 'a simple question of fact'.¹⁷⁸ Therefore it cannot be argued on the basis of this case-law that the EU right to an effective remedy requires national courts or tribunals in the meaning of Article 39 PD to substitute their own findings of fact for that of the determining authority. The ECtHR has held under Article 6 ECHR that when the dispute concerns the exercise of discretionary judgment by the administrative authorities, the proceedings before these authorities offer important procedural guarantees, the national court may limit its review to a reasonableness test. However, the grounds of appeal must be addressed on their merits and point by point by this court. This also applies to the review

¹⁷⁷ Spijkerboer 2009-II, p. 68.

¹⁷⁸ See section 8.5. See also the ECtHR's own recognition that the national authorities who had an opportunity to see, hear and assess the demeanour of the applicant are best placed to assess the credibility of the applicant's asylum account.

of findings of fact.¹⁷⁹ It should thus be concluded that Article 6 ECHR does set important standards as to the intensity of judicial review. However these standards do not seem to require a higher level of intensity of judicial review than the rigorous scrutiny required by Articles 3 and 13 ECHR in asylum cases.

How the Member States guarantee the required minimum level of intensity of judicial review falls within their procedural autonomy. They may choose a solution which fits best in their administrative law system and their views on the division of powers between the legislator, administration, and judiciary. The national courts are not obliged to replace their own assessment of the facts or evidence underlying the asylum claim for that of the determining authority. They may also choose to focus on the quality of the asylum decision and to put much weight on the observance of procedural guarantees during the administrative phase.

9.3 THE RELEVANT MOMENT IN TIME: *EX TUNC* OR *EX NUNC* REVIEW?

A final important question relating to the standard of judicial review is whether the national court should or may restrict itself to a review of the contested decision and its underlying facts or whether it should take into account facts or circumstances or evidence which emerged or were submitted after the issuing of an asylum decision.¹⁸⁰ UNHCR noted in 2010 that in some Member States there are no restrictions on the right to submit new elements and evidence during the appeal stage,¹⁸¹ while such restrictions do exist in other Member States.¹⁸²

Article 39 PD does not require the national court or tribunal to take into account facts or evidence which were submitted during the appeal stage. Article 32 PD does give Member States the possibility to examine further representations by the applicant or the elements of a subsequent asylum application in the framework of the examination of the decision under review or appeal, 'insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent

179 ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91, para 47.

180 Spijkerboer notes that 'the issue of which moment in time is relevant is related to the position of courts vis à vis the administration. If the position of courts is not to decide on the merits of asylum claims, but to decide on the legality of the administrative decision, then an ex nunc assessment is problematic, because courts may take into account evidence of which the administration could not have been aware. Only if courts are competent to assess the substantive merit of an asylum application themselves, would an ex nunc assessment be a plausible option'. Spijkerboer 2009-II, p 53.

181 Bulgaria, Finland, France, Germany with regard to regular rejections, Italy and the United Kingdom.

182 Belgium, Czech Republic, Germany with regard to applications rejected as irrelevant or manifestly unfounded, the Netherlands and Slovenia. UNHCR, *Improving Asylum Procedures*, s 16, pp 55-56.

application within this framework'. Article 32 PD also gives the option of a special procedure for subsequent asylum applications, which can be applied after the administrative decision or a final decision on the previous asylum application has been taken. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the decision on the previous asylum application has been reached, new elements or findings relating to the examination of whether he qualifies as a refugee have arisen or have been presented by the applicant.¹⁸³ Only if new elements or findings have been presented which significantly add to the likelihood of the applicant qualifying as a refugee, the Member States are obliged to further examine the application in conformity with the guarantees laid down in Chapter II of the directive.¹⁸⁴ Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the new elements or finding in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39.¹⁸⁵ The Member States may thus require asylum applicants to raise new facts and evidence during the appeal stage if the national court is competent to take into account such facts and evidence.

In this section it is argued on the basis of the case-law of the Court of Justice and the ECtHR that the EU right to effective judicial protection requires that the court or tribunal in the meaning of Article 39 PD perform an *ex nunc* assessment of a claim of a risk of *refoulement* and takes into account evidence which was submitted after the first decision on the asylum application. In the light of the principle of procedural autonomy Member States may choose how they guarantee that such an *ex nunc* assessment is carried out. One possible option is that the court or tribunal in the meaning of Article 39 PD takes into account relevant new facts and evidence in the appeal against the negative decision on the asylum claim. Another option is that Member States allow asylum applicants a full consideration on the merits of a subsequent asylum application on the basis of relevant new facts or evidence. The decision on this application should then be open to review by the national court or tribunal in the meaning of Article 39 PD. Systems in which relevant new facts and evidence cannot be taken into account by the court in the context of the appeal in a first or a subsequent asylum procedure should be considered contrary to EU law.

183 Art 32 (3) PD.

184 Art 32 (4) PD. According to Art 32 (5) PD Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons why a procedure has to be re-opened.

185 Art 32 (6) PD.

9.3.1 The Court of Justice's case-law

The Court of Justice has not yet addressed whether a 'thorough review' by the national court or tribunal should include new facts and evidence submitted during the appeal stage. The only judgment which addresses the relevant moment in time of the assessment of the existence of a fear for persecution is *Salahadin Abdullah*. This case concerned the withdrawal of refugee status. In a procedure in which the refugee status is withdrawn the refugee may rely on a reason for persecution other than that accepted at the time when refugee status was granted. The Court of Justice considered in *Salahadin Abdullah* that Article 4 (4) QD requires determining authorities to take into account acts or threats of persecution connected to this other reason of persecution. The Court seems to be of the opinion that this applies even if the acts or threats of persecution occurred in the country of origin before the asylum application was lodged, but were not mentioned by the applicant in the asylum procedure.¹⁸⁶ This implies that if the Member State authorities intend to withdraw a refugee status an *ex nunc* assessment needs to take place. This judgment does not address the question whether a court should take into account facts or evidence submitted after the decision by the determining authority. However the judgment may indicate that an applicant's statements, in particular those regarding previous persecution, cannot be excluded from the assessment of the risk of future persecution or serious harm on the sole ground that the applicant could and should have submitted them earlier.

A judgment which is particularly relevant for the question whether national courts should take into account new facts or evidence in their examination of the appeal against the rejection of the asylum application, is *Orfanopoulos and Oliveiri*. In this case the Court of Justice addressed the standard of judicial review of expulsion measures against EU citizens on public policy grounds.¹⁸⁷ The Court has held that in order to expel an EU citizen under the exception based on reasons of public policy, the competent national authorities must assess, on a case-by-case basis, whether the measure or the circumstances which gave rise to that expulsion order prove the existence of personal conduct constituting a *present threat* to the requirements of public policy. The Court recognised in *Orfanopoulos and Oliveiri* that in practice, circumstances may arise between the date of the expulsion order and that of its review by the competent court, which point to the cessation or the substantial diminution of the threat which the conduct of the person ordered to be expelled constitutes to the requirements of public policy. According to the Court derogations from the principle of freedom of movement for workers must be interpreted strictly,

¹⁸⁶ Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 97.

¹⁸⁷ Case C-482/01, *Orfanopoulos* [2004], paras 77-82. See also Case C-467/02, *Cetinkaya* [2004], para 47.

and thus the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion. For that reason a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of an EU citizen, factual matters which occurred after the final decision of the competent authorities, which may point to the cessation or the substantial diminution of the present threat to public policy, is liable to adversely affect the right to freedom of movement to which nationals of the Member States are entitled and particularly their right not to be subjected to expulsion measures save in the extreme cases provided for by EU law. According to the Court that is particularly so, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court. The principle of effectiveness thus requires courts to perform an *ex nunc* review of the threat to public policy posed by an EU citizen against whom an expulsion measures was taken.¹⁸⁸

Asylum cases and cases in which an EU citizen will be expelled for reasons of public policy have two important things in common. First of all it needs to be established at the time of expulsion whether there is a *present* threat: in asylum cases it concerns a present threat of *refoulement*, in cases of EU citizens a present threat of a person to the requirements of public policy. Furthermore in both sorts of cases a fundamental EU right is at stake. In *Orfanopoulos* the Court of Justice held that the effective exercise of the freedom of movement requires an *ex nunc* assessment of the present threat by the national court. It is not such a big step to argue in analogy with this judgment that the effective exercise of the EU right to asylum and the EU prohibition of *refoulement* requires an *ex nunc* assessment by the national court of the present threat (the real risk) of *refoulement*. This would imply that developments which took place after the rejection of the asylum claim by the determining authority should be taken into account by the national court or tribunal in the meaning of Article 39 PD. The need for an *ex nunc* assessment of the risk of *refoulement* by the national court is, as will be explained in section 9.3.2, confirmed by the ECtHR's case-law.

It cannot be derived from *Orfanopoulos* however that Member States are not allowed to choose for a system, explicitly allowed by the Procedures Directive in which new elements or findings are considered during a subsequent asylum procedure. The procedural rules governing this subsequent proceedings may however not undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*. This means that the applicant may not be expelled until the national court has ruled on the appeal in the subsequent procedure.¹⁸⁹ Furthermore evidence or grounds which support the existence of a risk of *refoulement* should not be excluded from the assessment of this risk for the sole reason that they could have been submitted earlier in

188 The Court of Justice refers to the principle of effectiveness in para 80 of the judgment.

189 See further Chapter 6.

the procedure.¹⁹⁰ Finally the total duration of the asylum procedures may not violate the right to good administration¹⁹¹ or undermine the effectiveness of the remedy required by Article 39 PD.¹⁹²

9.3.2 Obligations stemming from the ECHR, the CAT and the ICCPR.

The principle of *non-refoulement* requires the ECtHR to carry out a 'full and ex nunc assessment' of the case. In cases in which the applicant has not yet been expelled, the material point in time for the examination of the risk of *refoulement* is that of the Court's consideration of the case. The ECtHR stated that 'even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive. Such *ex nunc* assessment also entails that evidence or information that has come to light after the final decision taken by the domestic authorities should be taken into account.'¹⁹³ In *Salah Sheekh* the Court considered that in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time.¹⁹⁴

In practice the Court indeed takes account of recent information, among others country of origin information.¹⁹⁵ It also includes new statements or evidence adduced by the applicant in its assessment. In *Hilal* for example the Court took into account statements made by the applicant's wife, during asylum proceedings which started after the applicant had lodged a complaint

190 The exclusion from the assessment of evidence which supports the existence of a real risk of *refoulement* on pure procedural grounds undermines the effectiveness of the absolute prohibition of *refoulement*.

191 See Art 23 (2) PD which requires that the asylum procedure is concluded as soon as possible. The Court of Justice considered in Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], para 98 that the Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible for the examination of the asylum claim which takes an unreasonable length of time.

192 Art 47 of the Charter requires a fair and public hearing within a reasonable time.

193 See for example ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, para 48.

194 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136. See also ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 112 and ECtHR 10 February 2011, *Dzhakysybergenov v Ukraine*, no 12343/10, para 36. The ComAT also takes into account changes in the situation in the country of origin which occurred after the complaint had been lodged. See for example ComAT 8 July 2011, *Chahin v Sweden*, nr 310/2007, paras 9.4 and 9.6 and ComAT 1 July 2011, *Jahani v Switzerland*, no 357/2008, para 9.4.

195 See for example ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 119, where the Court considered: 'As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection organisations [...].'

before the Court.¹⁹⁶ Furthermore it included in its assessment several documents which were submitted by the applicant to the British Secretary of State after the first decision on the asylum request. These documents were looked at by the Secretary of State and the national courts, but were not considered relevant because, according to them, there was an 'internal flight solution', where the applicant could safely live.¹⁹⁷

The ECtHR has not explicitly considered that national courts should, like the ECtHR itself, include new facts or circumstances in their review of an asylum or expulsion decision. However in *M.S.S. v Belgium and Greece* the ECtHR did take into account in its assessment of the effectiveness of the extremely urgent procedure before the Aliens Appeals Board that the Aliens Appeal Board did not always take into account materials submitted by applicants after their interviews with the Aliens Office. According to the ECtHR this was one of the reasons why these applicants were prevented from establishing the arguable nature of their complaints under Article 3 of the Convention. In this case the applicant could be transferred to Greece right after the Alien Appeal Board's decision. There was thus no opportunity to submit new evidence in a later stage.

Furthermore, one may argue in the light of the subsidiary role of the ECtHR that the fact that the Court assesses claims under Article 3 ECHR *ex nunc* obliges national courts to do the same. Otherwise applicants would be obliged to lodge a complaint before the ECtHR in order to have the new evidence or facts assessed.¹⁹⁸ The ECtHR's case-law does not exclude however, that States may choose to oblige an applicant to submit a new application on the basis of the new facts, while the decision on this application including the assessment of the new facts and circumstances will be tested by the national court.¹⁹⁹

196 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 66.

197 See also Spijkerboer 2009-II, p 56. It should be noted however that the ECtHR sometimes holds the fact that statements and/or evidence are submitted at a late stage of the procedure against the applicant. See further sections 8.5 and 8.6.

198 See also Spijkerboer 2009-II, p 57. The Netherlands Government seems to be of the opinion that the ECtHR's case-law requires a full and *ex nunc* assessment by the national court. It refers to this case-law in the explanation with a bill which requires an *ex nunc* assessment by the national courts in asylum cases. TK 2008–2009, 31 994, no 3, p 6. The ComAT and HRC often ensure their subsidiary role by refusing to include these new facts and circumstances in their assessment. Instead they grant the State authorities an opportunity to evaluate the new evidence in a new asylum procedure and declare the complaints before the Committees inadmissible. See for example ComAT 2 May 1995, *A.E. v Switzerland*, no 24/1995 and HRC 10 August 2006, *Dawood Khan v Canada*, no 1302/2004.

199 Note that the ECtHR took into account in *Bahaddar* that the applicant could lodge a fresh application to remedy the violation of Art 3 ECHR and therefore did have an effective remedy at his disposal. ECtHR 19 February 1998, *Bahaddar v the Netherlands*, no 25894/94.

9.3.3 Subconclusion: the relevant moment in time

The Procedures Directive allows the national courts or tribunals of the Member States to take into account facts and evidence submitted after the decision by the determining authority, but does not require them to do so. The new facts or evidence may, according to Article 32 of the directive also be assessed in a subsequent asylum procedure. This gives the determining authority the opportunity to first assess the risk of *refoulement* in the light of these new facts or evidence. Both options seem to comply with the case-law of the Court of Justice and the ECtHR, provided that at one stage of the procedure, before the expulsion of the applicant, the national court or tribunal reviews the asylum decision while taking into account all relevant available facts and evidence. Furthermore the examination of new facts or evidence in a subsequent asylum procedure should not lead to considerable delays in the processing of the case.

Both the Court of Justice's judgment in *Orfanopoulos and Oliveiri* and the ECtHR's case-law make clear that the assessment of an actual, present threat at the moment of expulsion requires an *ex nunc* assessment by the national court. The absolute nature of the prohibition of *refoulement* prohibits that relevant facts or evidence cannot be taken into account by the national court on the sole ground that they should have been submitted earlier in the procedure. This may be derived from the Court of Justice's judgment in *Salahadin Abdullah* but also from the EU principle of effectiveness. The effectiveness of the EU prohibition of *refoulement* would be seriously undermined if facts or evidence supporting the existence of a risk of *refoulement* were excluded from the national court's assessment, only because they were submitted in a later stage of the procedure.²⁰⁰ Furthermore the subsidiary role of the ECtHR would be endangered if applicants are obliged to lodge a complaint before the ECtHR in order to have the risk of *refoulement* examined in the light of all available facts evidence, including those submitted in a later stage of the asylum procedure.

9.4 SYNTHESIS OF FINDINGS

National rules and practice regarding the standard of judicial review depend on the vision on the division of roles. The EU legislator, the EU Courts and also the ECtHR are, in the light of the procedural autonomy of the Member States, hesitant to set requirements with respect to the standard of review by national courts. However, the Court of Justice in *Samba Diouf* has brought the scope and intensity of judicial review within the scope of the EU right to an effective remedy. This right requires a thorough judicial review of the reasons

²⁰⁰ See further section 8.6.

which lead the determining authority to reject the asylum claim as unfounded.²⁰¹ In this chapter it was examined how the term ‘thorough’ judicial review should be interpreted. The following conclusions were drawn in this regard:

Scope of judicial review

- It follows from the Court of Justice’s judgments in *Samba Diouf* and *Wilson* that a court or tribunal as required by Article 39 PD should review both points of law and points of fact.²⁰² This view is supported by the ECtHR’s case-law under Article 6 ECHR, which requires a court or tribunal to have ‘full jurisdiction’.²⁰³ A judicial review which is limited to points of law only also cannot be considered a rigorous scrutiny as required by the ECtHR in *refoulement* cases.²⁰⁴
- A system in which the facts are established by the administrative authorities and cannot be reviewed by a court or tribunal should therefore be considered contrary to Article 39 PD.

Intensity of judicial review

- It should be derived from the EU Courts’ and the ECtHR’s case-law that the thorough judicial review demanded by Article 39 PD requires as a minimum that the national court or tribunal assesses the claim of a risk of *refoulement* on its merits. It should carefully examine the facts and evidence underlying the asylum claim. A reasonableness test in which wide discretion is afforded to the determining authority’s fact-finding, including the assessment of the applicant’s credibility is not allowed.
- National courts are not obliged to replace their own assessment of the facts for that of the determining authority. They may choose to focus on the quality of the asylum decision and the procedural fairness of the asylum procedure.
- The EU Courts have shown in cases involving complex assessments that a limited form of judicial review should entail an assessment whether the evidence relied on is factually accurate, reliable and consistent, whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.²⁰⁵ Furthermore the EU Courts make sure that procedural guarantees were strictly observed during

201 Case C-69/10, *Samba Diouf* [2011], paras 56 and 61.

202 Case C-69/10, *Samba Diouf* [2011], para 57, Case C-506/04, *Wilson* [2006], para 60.

203 See for example ECtHR (Plen) 23 June 1981, *Le Compte, Van Leuven, De Meyere v Belgium*, no 6878/75, para 51.

204 The ECtHR mentioned the requirement of a rigorous scrutiny amongst others in ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 50.

205 Case C-12/03 P, *Commission v Tetra Laval* [2005], para 39.

the administrative procedure.²⁰⁶ Arguably the judicial scrutiny carried out by the EU Courts shows the minimum level of intensity of judicial review necessary in order to ensure the EU right to effective judicial protection. This level of intensity of judicial review may therefore be considered to be normative for judicial review by national courts in similar cases.²⁰⁷

- Asylum cases can be considered similar to cases involving complex assessments, in the sense that it is in both kinds of cases difficult to find the facts objectively. Therefore the thorough review required in asylum cases cannot be less intensive than the limited form of judicial review in case concerning complex assessments.
- The ECtHR made clear in *M.S.S v Belgium and Greece* and in several cases against the United Kingdom that the national authority in the meaning of Article 13 ECHR must enter into a thorough examination of the facts and evidence underlying the asylum claim.²⁰⁸ This should also be derived from the high level of intensity of the review the ECtHR itself has carried out in *refoulement* cases.²⁰⁹ If national courts carry out a more limited judicial review than the ECtHR that would undermine the subsidiary role of the ECtHR.²¹⁰

The relevant moment of time

- Article 39 PD interpreted in the light of the EU right to an effective remedy requires that the national court should at one stage of the asylum procedure, before the expulsion of the applicant, review the asylum decision on the basis of all relevant available facts and evidence. This includes all relevant evidence which is submitted in a later stage of the asylum procedure (after the first administrative decision on the asylum application).
- The effectiveness of the EU prohibition of *refoulement* would be undermined if relevant facts or evidence cannot be taken into account by the national court on the sole ground that they should have been submitted earlier in the procedure. This was derived from the Court of Justice's judgment in *Orfanopoulos and Oliveira* and the ECtHR's case-law, which show that the assessment of an actual, present threat at the moment of expulsion requires an *ex nunc* assessment by the national court.²¹¹

206 Case C-269/90, *Technische Universität München* [1990], para 14.

207 See also Schuurmans 2008.

208 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 389-390 and (among others) ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 121-122 and ECtHR, 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 125-126.

209 See for example ECtHR 26 July 2005, *N. v Finland*, no 38885/02 and ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02.

210 See also Spijkerboer 2009-II, pp 68-69.

211 Case C-482/01, *Orfanopoulos* [2004], paras 77-82 and ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136.

10 | The use of secret information in asylum cases

In some asylum cases (part of) the establishment of the facts is based on evidence gathered by the authorities, which is not made available to the asylum seeker concerned or his legal representative. This information may be kept secret for several reasons. State-authorities may refuse to reveal the identity and function of the sources of the information in order to protect those sources or the international relations with the country of origin of those sources.¹ Furthermore States may want to protect the methods they use for assessing the credibility of individual asylum accounts. In some Member States legal advisors may not have access to country of origin information relied on by the determining authority.² Finally information may be kept secret for national security reasons.³ Member States generally do not disclose information regarding investigations into terrorism or organised crime in asylum or expulsion proceedings.

The fact that a person is involved in terrorism may lead to a risk of *refoulement* upon return in his country of origin.⁴ Information concerning this person's terrorist activities may thus be relevant for the assessment of the risk of *refoulement*. However, information regarding the danger of an asylum seeker for national security of the State in which he claimed asylum cannot be included in the question whether a person is in need of protection on the basis of the EU prohibition of *refoulement*. The ECtHR ruled several times that the risk of a violation of Article 3 ECHR upon expulsion cannot be balanced against national security concerns. Therefore, national security concerns and evidence substantiating such concerns cannot lead to the refusal of protection against *refoulement*. Furthermore they cannot justify a limitation of the right to an

1 In the Netherlands the identity of some sources which provided information for country of origin information reports or reports by the Ministry of Foreign Affairs regarding an asylum seeker's life or activities in his country are kept secret.

2 The Commission mentions Lithuania and Spain as examples. Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 8 September 2010, COM(2010) 465 final, p 8.

3 According to the Commission evaluation of the Procedures Directive of September 2010, limitations to the right of access to the file for legal representatives (Art 16 PD) on national security grounds are applicable in Greece, Cyprus, Lithuania, Ireland, Spain, the Netherlands and the United Kingdom. Commission Report COM(2010) 465 final, p 8.

4 See for example ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06.

effective remedy against a decision on the existence of a risk of *refoulement*.⁵ As the Court of Justice respects the ECHR when interpreting EU asylum law, it should be assumed that the same applies to the EU prohibition of *refoulement*.

National security concerns may play a role in the decision whether a person may be excluded from an EU refugee or subsidiary protection status. According to EU law a person may be excluded from such a status, because there are serious reasons for considering that he committed a serious crime or because of his current involvement in terrorist or other criminal activities.⁶ Secret evidence substantiating such serious reasons or such involvement may thus be used in the assessment of a person's EU right to an asylum status and affect his procedural rights.⁷ As decisions regarding the exclusion of a person from an asylum status fall outside the scope of this study, they will not be specifically addressed in this chapter.⁸ However the conclusions drawn in this chapter are also relevant for these decisions.

For the person concerned it is very difficult to challenge a decision, which is based on secret information or on information of which the sources are not known to him. It is therefore often argued that the right to adversarial proceedings and the principle of equality of arms are violated in these cases. Sometimes also the court reviewing the decision does not get access to (all) the information underlying the challenged decision, which affects the effectiveness of judicial review. Under EU law several other rights and principles play a role in cases concerning secret information such as the right of access to the file, the right to be heard and the duty to state reasons, which are all inter-linked.⁹

A separate chapter on the issue of the use of secret evidence is included in this book, because in the case-law regarding this issue the three basic notions discussed in section 4.5 clearly come to the fore. The most apparent aspect in cases concerning secret information is that the interests of the party concerned to adversarial proceedings and equality of arms must be balanced against the interests of the State and/or third parties to keep certain information secret. Secondly it is accepted particularly in the case-law of the ECtHR that limitations to the right to adversarial proceedings may be justified, as long as they are counterbalanced by using compensation techniques such as special advocate proceedings. The question whether the Convention has been violated thus depends on the fairness or effectiveness of the procedure seen as a whole. Finally, the nature of the case seems to determine the level of procedural guarantees required in a case.

5 See ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06 and ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93.

6 Artt 12 (2), 14 (4a) and 17 QD.

7 See for example Bliss 2000, pp 120-123.

8 See section 1.5.

9 See also section 4.2.

In this chapter it will be argued that although EU legislation, in particular the Procedures Directive, allows for the use of secret information in asylum cases, the Member States' discretion is limited by the EU right to be heard, the duty to state reasons and the right to effective judicial protection. The explicit possibility left open by the Procedures Directive to withhold relevant information to the national court deciding the appeal against a negative asylum decision clearly infringes the right to effective judicial protection and should therefore be considered void.

The two main sources addressed in this chapter are the case-law of the Court of Justice and Court of First Instance/General Court and that of the ECtHR. The EU Courts addressed the use of secret evidence mainly in competition cases and cases regarding EU sanctions for persons and entities included in terrorist lists. The ECtHR has ruled on this issue in very different cases, regarding civil rights and obligations, criminal charges, secret surveillance, detention and expulsion. It will be shown that the case-law of these courts on the one hand show clear parallels and at the same time complement each other. In this chapter an attempt is made to derive from this case-law one set of procedural standards for asylum cases in which secret evidence is used.

10.1 THE USE OF SECRET INFORMATION UNDER EU LAW

Article 41 of the Charter includes 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'. The right of access to the file had already been recognised as a general principle of EU law by the EU Courts. According to the EU Courts the right of access to the file is 'one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively'.¹⁰ The right of access to the file is also linked to the obligation to state reasons and the right to an effective remedy as well as to the principles of equality of arms and adversarial proceedings. In all proceedings in which sanctions are imposed the rights of the defence must be respected in administrative as well as appeal proceedings.¹¹

10 Case T-53/03 *BPB v Commission* [2008], para 31, Case T-170/06, *Alrosa v Commission* [2007], para 197 and Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 69.

11 Case T-53/03, *BPB v Commission* [2008], para 40, Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 69, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 94.

EU asylum legislation

Article 16 PD explicitly accepts that the asylum applicant and his legal representative, and in cases concerning national security, also the court or tribunal examining the appeal against a negative asylum decision, may be refused access to (part) of the file underlying the asylum decision. This suggests that the asylum decision may be (partly) based on secret information. Article 16 (1) PD provides that the legal representative may be refused access to information in the asylum seeker's file, where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question shall be available to the authorities (a court or tribunal) which provide the effective remedy required by Article 39 PD. The access of the court or tribunal to this information may however be precluded in cases of national security.

Article 4 QD does not mention the use of evidence which is not or partly disclosed to the asylum applicant. Noll states however that the examining authorities' obligation to assess the relevant elements of the asylum claim in cooperation with the applicant laid down in Article 4 (1) QD, may imply that classified investigative material which cannot be shared with the applicant must be excluded from the basis for a decision in the case.¹²

The EU Courts case-law

The EU Courts have applied the right of access to the file and its related rights and principles in cases concerning several, very different fields of EU law. In all these cases, the EU Courts seems to apply the same standards. The case-law developed under the right of access to the file in one field of EU law should therefore be considered relevant for other fields of EU law, including asylum law.¹³ The CFI for example referred in its judgments concerning EU measures freezing the funds of persons or organisations suspected of involvement in terrorist activities to its earlier case-law in competition law cases. Violations of the right of access to the file and the rights of the defence are assessed on

¹² Noll 2005-II, p 7.

¹³ See also Craig who states with regard to Case T-42/96, *Eyckeler* [1998], which concerned customs decisions: 'The ease with which the CFI reasoned by analogy from competition to customs, signifies the generalization of access to the file as an aspect of the right to be heard, irrespective of the subject-matter area in question, and this is in accord with the formulation in the Charter of Fundamental Rights'. Craig 2006, p 367.

a case by case basis,¹⁴ which gives the EU Courts the opportunity to take the nature of the case into account.¹⁵

Most of the case-law which will be discussed below concerns decisions of the EU institutions which were reviewed by the CFI or the General Court and (in some cases) eventually by the Court of Justice. In asylum cases it is the national courts which are confronted with decisions which are (partly) based on confidential information. It may be assumed that the CFI's case-law regarding the right of access to the file is also relevant for national courts dealing with decisions based on confidential information.¹⁶ The EU rights and principles applied in these cases such as the rights of the defence and the right to an effective remedy also apply in the national context. Furthermore as will be shown in section 10.2.1.4 that the Court of Justice seems to apply similar standards to procedures before the EU courts and the national courts.

The EU Courts have recognised in their case-law that the right of access to the file is not absolute. EU Institutions may refuse to disclose documents containing business secrets, internal documents, and information which should remain confidential in order to protect the sources that provided these documents or this information or for reasons of national security. In those situations the interests in not disclosing relevant information must be balanced against the rights of the defence.

The EU Courts sometimes refer to the case-law of the ECtHR when addressing the right of access to the file and the rights of the defence.¹⁷ Furthermore the CFI and the Court of Justice have indicated that national procedures in which confidential information plays a role must comply with the requirements following from Article 6 ECHR.¹⁸ The references to the ECtHR's case-law are however quite random and incomplete. Nonetheless there exist clear parallels between the EU Courts' case-law and that of the ECtHR. It is conceivable that

14 The CFI states in Case T-53/03, *BPB v Commission* [2008], para 33: 'According to the case-law, an infringement of the rights of the defence cannot be founded on a general argument but must be examined in relation to the specific circumstances of each particular case'.

15 See for example Case T-221/95, *Endemol v Commission* [1999], para 68, where it considered that the principles following from the case-law concerning the right of access to the file in competition cases also apply to concentration cases examined under Regulation 4064/89, 'even though their application may reasonably be adapted to the need for speed, which characterises the general scheme of that regulation'.

16 In her opinion with Case C-450/06, *Varec* [2008], para 61, A.G. Sharpston stated that the pragmatic solution found by the CFI in a case in which confidential evidence was used and the CFI's rules of procedure, cannot constitute any binding precedence for a national court. However she considered 'that they provide helpful practical guidance as to the approach to be taken, which must conform with the rules applicable to that court in so far as they do not conflict with any higher norm'.

17 See for example Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 344 and Case T-228/02, *Modjahedines du peuple d'Iran v Council* [2006], paras 119 and 158.

18 Case C-450/06, *Varec* [2008], paras 44-48 and Case T-47/03, *Sison v Council* [2007], para 166

in the future the ECtHR's case-law will help the EU Courts to fill in some of the existing gaps in their jurisprudence concerning the use of confidential information. Section 10.3 will address the ECtHR's case-law quite extensively, in order to understand which minimum standards are set by this Court.

The case-law which will be addressed in this chapter is divided into two parts. Section 10.2.1 discusses the case-law concerning economical issues, mostly competition law. Section 10.2.2 examines the case-law regarding EU measures freezing the funds of persons and entities suspected of involvement in terrorist activities. Confidential information may also play a role in other fields of EU law such as customs decisions or civil service cases. I chose to limit this chapter to competition cases and terrorism cases. In competition cases the EU Courts developed a comprehensive body of case-law concerning the right of access to the file. In terrorism cases, as in asylum cases, the limitation of the right of access to the file for reasons of national security plays an important role.

10.1.1 Competition cases and the protection of business secrets

In competition cases the EU Courts have set out the general principles with regard to cases in which the protection of confidential information on the one hand and the rights of the defence of the parties concerned on the other hand, collide. Such cases concern for example the imposition by the Commission of a fine on one or more companies for participating in a concerted practice and/or abusing their dominant position or the refusal to give permission for a merger. The Commission's decisions are often (partly) based on information provided by other companies.¹⁹ Those companies may wish to remain anonymous or request the Commission to ensure the confidentiality of documents containing business secrets. The EU Courts have held that in such cases the right to confidentiality must be balanced against and reconciled with the rights of the defence, in particular the right of access to the file and the right to be heard.

The case-law which will be discussed in this section mostly concerns decisions by the Commission and their review by the CFI and subsequently the Court of Justice.²⁰ Two cases however (*Varec* and *Mobistar*) regard preliminary questions concerning the required review of confidential information by national courts. These cases will be addressed in section 10.2.1.4. In both sorts of cases similar principles are used by the EU Courts. Furthermore some

19 See for the special problems which characterise the production of evidence in competition cases the opinion of A.G. Geelhoed in Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], paras 52-59.

20 For the purpose of gathering relevant case-law I used Barents 2007, pp 568-589.

references will be made to the Commission Notice on the rules for access to the Commission file in certain competition cases (the Commission Notice).²¹

10.1.1.1 *The right of access to the file*

In competition cases the legality of the use of confidential information is usually addressed under the right of access to the file and the right to be heard. The purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by it in its statement of objections on the basis of that evidence.²² The right of access to the file is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections raised in that statement.²³ The party concerned must be able during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission.²⁴

When taking a decision adversely affecting a party the EU Institutions are obliged to provide access to the file to this party.²⁵ The 'file' consists of all information relevant to the defence of the interests of the party concerned.²⁶ It thus includes both inculpatory and exculpatory evidence.²⁷ The rights of the defence of the party concerned have been infringed only if the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment.²⁸ The Commission is allowed to preclude from the administrative procedure evidence which has no relation to the allegations of fact and of law in the statement of objections and which therefore has no relevance to the investigation.²⁹ In

21 Commission Notice on the rules for access to the Commission file in cases pursuant to Artt 81 and 82 of the EC Treaty, Artt 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C-325/7 (Commission Notice on the rules for access to the Commission file). See for the procedure before the Commission also Commission decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings [2001] OJ L 162/21.

22 See for example Case C-51/92 P, *Hercules Chemicals v Commission* [1999], para 75.

23 See for example Case T-221/95, *Endemol v Commission* [1999], para 65.

24 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 69.

25 See also Erlandsson 1998, pp 145-146.

26 See for example Case C-49/88, *Al-Jubail* [1991], para 17 (anti-dumping case).

27 Erlandsson 1998, p 146. According to the Commission Notice on the rules for access to the Commission file the parties will in principle be granted to all documents making up the Commission's file. This file consists of all documents which have been obtained, produced and/or assembled by the Commission Directorate for Competition, during the investigation.

28 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 78.

29 This is also called the objective link criterion. See for example Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 126.

order to ascertain whether the non-disclosure of a document could have harmed the defence during the administrative procedure, a distinction should be made between inculpatory and exculpatory evidence.³⁰

Inculpatory evidence

The right of access to the file is not an end in itself, but is intended to protect the rights of the defence.³¹ Therefore the Commission is under no obligation to disclose to the undertakings concerned the inculpatory evidence upon which it does not rely in its decision in support of the complaints.³² 'A document can be regarded as a document that incriminates an applicant only where it is used by the Commission to support a finding of an infringement in which that party is alleged to have participated.'³³ In *BPB* the CFI considered for example that the information provided by an anonymous informant, which was not disclosed to the undertaking concerned, was a factor triggering the Commission's investigations. However, no objection in the statement of objections or the contested decision was based solely on the information provided by this informant. For that reason, and because the confidentiality of the information was justified, the rights of the defence and the principle of equality of arms had not been violated.³⁴

Inculpatory documents that have not been communicated to the undertakings concerned during the administrative procedure are not admissible as evidence. Therefore they must be excluded as evidence, if the Commission relied on them in its decision.³⁵ The decision must only be annulled if the other evidence underlying the decision does not meet the required standard of proof.³⁶ The party concerned must show that the result at which the Commission arrived in its decision would have been different if the document(s) which were not communicated to it, had to be disallowed as evidence.³⁷ A document containing incriminating evidence does not automatically need to be excluded if only part of the information included in it must remain confidential (see further section 10.2.1.3.).³⁸

30 Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 130.

31 Case C-51/92 P, *Hercules Chemicals v Commission* [1999], para 76.

32 Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line and others v Commission* [2003], para 377.

33 Case T-53/03, *BPB v Commission* [2008], para 32.

34 Case T-53/03, *BPB v Commission* [2008], paras 32-38.

35 Case T-53/03, *BPB v Commission* [2008], para 41, Case C-62/86, *AKZO* [1991], paras 21 and 24 and Case 107/82, *AEG* [1983], paras 24-25.

36 Case 107/82, *AEG* [1983], para 30.

37 Case C-407/08 P, *Knauf Gips v Commission* [2010], para 13. See also Case T-410/03, *Hoechst v Commission* [2008], para 146, Case T-53/03, *BPB v Commission* [2008], para 45 and *Erlands-son* 1998, p 172.

38 Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], para 44. See differently Case 107/82, *AEG* [1983], paras 23-24.

Exculpatory evidence

The party concerned must have access to documents which are or might be capable of substantiating its defence. However, according to the CFI the rights of the defence have only been infringed, if it has been established that the non-disclosure of the documents in question

might have influenced the course of the procedure and the content of the decision to the applicant's detriment. The possibility of such an influence can therefore be established if a provisional examination of some of the evidence shows that the documents not disclosed might 'in the light of that evidence' have had a significance which ought not to have been disregarded.³⁹

Thus the undertaking concerned must 'establish not only that it did not have access to certain exculpatory evidence, but also that it could have used that evidence for its defence'.⁴⁰ The CFI in some cases granted the undertaking access to non-confidential versions of the non-disclosed documents and invited it to show how the non-disclosure of these documents could have harmed its defence.⁴¹ The CFI and (in appeal cases) the Court of Justice examine whether a document, which is relevant and therefore should have been disclosed to the undertaking concerned, was of use to this undertaking's defence.⁴² In this examination the strength of the (disclosed) evidence relied on by the Commission and that of the positions of the party concerned are taken into account.⁴³ The CFI concluded in many cases that the evidence could not have been capable of substantiating the undertaking's defence and that

39 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 78. See also Case C-407/08 P, *Knauf Gips v Commission* [2010], para 23, Case C-51/92 P, *Hercules Chemicals v Commission* [1999], para 80 and Case T-161/05, *Hoechst v Commission* [2009], para 166.

40 Case C-407/08 P, *Knauf Gips v Commission* [2010], para 24. See also Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 133. Case T-53/03, *BPB v Commission* [2008], para 55 and Case T-410/03, *Hoechst v Commission* [2008], para 146.

41 See for example Case T-52/03, *Knauf Gips v Commission* [2008], para 68, Case T-410/03, *Hoechst v Commission* [2008], para 150 and Case T-7/89, *Hercules Chemicals v Commission* [1991], para 56.

42 See for example Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 87, where the CFI concluded that some documents which were not disclosed to the undertaking concerned were capable of substantiating its defence. See also Case C-407/08 P, *Knauf Gips v Commission* [2010], para 25.

43 In Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 86 the CFI takes into account the 'weakness of the documentary evidence' relied on by the Commission and the 'strong positions held by the applicant'. The CFI found a violation of the rights of the defence. In Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], paras 156-164, the Commission relied on direct evidence. The applicants had not stated precisely what evidence was distorted by the CFI and had not demonstrated the errors which lead to that distortion. No violation was found.

therefore no violation of the rights of the defence occurred.⁴⁴ If an infringement of the rights of the defence has been established, the decision must be annulled.

According to the EU Courts it cannot be for the Commission alone to decide which documents are useful for the defence of the undertaking.⁴⁵ This follows from the principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission.⁴⁶ In *Imperial Chemical Industries* the CFI considered that where difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed. This is particularly true in proceedings where documents may just as easily be interpreted in a way favourable to the undertakings concerned as in an unfavourable way.⁴⁷ The CFI considered that

in such circumstances any error made by the Commission's officials in categorizing as "neutral" a given document which, as an item of irrelevant evidence, will not then be disclosed to the undertakings, must not be allowed to impair their defence.⁴⁸

Obligation to request for access to the file?

It seems to follow from the CFI's case-law that the Commission is obliged to ensure of its own motion that the rights of the defence are respected and thus that the party concerned has access to the documents included in the investigation file.⁴⁹ The undertaking is thus not required to request the Commission to be granted access to the file.⁵⁰ When the undertaking does request access to documents which were not communicated to it, it must specify which

44 See for example Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], paras 158-164, Case T-151/07, *Kone v Commission* [2011], paras 152-156 and Case T-191/06, *FMC Foret v Commission* [2011], paras 300-314.

45 See for example Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 126 and Case 107/82, *AEG* [1983], para 24

46 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 93.

47 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], paras 91-92 and 111.

48 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 92.

49 See for example Case T-49/88, *Al-Jubail Fertilizer v Council* [1991], para 17, where the CFI held that 'in performing their duty to provide information, the Community institutions must act with all due diligence by seeking [...] to provide the undertakings concerned, as far as is compatible with the obligation not to disclose business secrets, with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information'.

50 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 96. See Erlandsson 1998, p 166.

documents it wishes to have access to and for what reasons.⁵¹ The CFI held that the Commission is not required to make available, of its own initiative, documents which are not in its investigation file and which it does not intend to use against the parties concerned in the final decision. An undertaking which learns during the administrative procedure that the Commission has documents which might be useful for its defence and wishes to inspect them must make an express request to the Commission for access to those documents. If the applicant fails to make such request during the administrative procedure, his right to do so is barred in any action for annulment brought against the final decision.⁵²

Access to the file in practice

According to the Commission Notice access to the file may be provided in several ways: by means of an electronic data storage device, through copies of the accessible file in paper, sent to the parties by mail, by inviting the parties to examine the accessible file on the Commission's premises or a combination of those methods.⁵³

10.1.1.2 The right to confidentiality

The EU courts have accepted that the confidentiality of the following documents or information may be justified in competition cases:

- documents containing other companies' business secrets
- internal documents of the Commission
- other confidential Information disclosed to the Commission subject to an obligation of confidentiality, such as information enabling complainants to be identified.⁵⁴

51 Case T-53/03, *BPB v Commission* [2008], para 33. The CFI held that the applicant may not demand access, in a general and abstract way, to documents or information which have not been communicated to it without stating how the inculpatory evidence relied upon by the Commission in the contested decision was determined by those documents or that information.

52 Case T-186/06, *Solvay v Commission* [2011], para 227, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and others v Commission* [2000], para 383.

53 Commission Notice on the rules for access to the Commission file, para 44.

54 See for example Case T-410/03, *Hoechst v Commission* [2008], para 145, Case T-53/03, *BPB v Commission* [2008], para 36 and Case T-221/95, *Endemol v Commission* [1999], para 66. The Commission Notice on the rules for access to the Commission file also states that access to internal documents, business secrets of other undertakings and other confidential information will be refused. See also Art 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

Protection of business secrets

Article 41 of the Charter explicitly mentions that business secrets must be respected.⁵⁵ The EU Courts have also recognised the protection of business secrets as a general principle of EU law.⁵⁶ According to the Commission a business secret is information about an undertaking's business activity, disclosure of which could result in serious harm to the same undertaking.⁵⁷ The protection of business secrets helps the Commission to achieve the objectives of competition law. It should make it easier for the Commission to obtain information from third undertakings.⁵⁸ The Court of Justice held in *AKZO* that a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets.⁵⁹ However in later cases the EU Courts accepted that the right to confidentiality must be balanced against the rights of the defence (see further section 10.2.1.3).

Internal Commission documents

Internal documents are not to be communicated to the parties concerned unless the circumstances of the case are exceptional and the parties concerned make out for the need to do so. According to the CFI the restriction on access to internal documents is justified by the need to ensure the proper functioning of the institution concerned.⁶⁰ The Commission Notice states that internal documents can be neither inculpatory or exculpatory. The restriction of access to internal documents therefore does not prejudice the proper exercise of the parties' rights of the defence.⁶¹

55 See also Art 339 TFEU, which requires the members of the institutions of the Union, the members of committees, and the officials and other servants of the Union, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

56 See for example Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 98 and for the national context Case C-450/06, *Varec* [2008], para 49.

57 Commission Notice on the rules for access to the Commission file, para 18. Examples of information that may qualify as business secrets are: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold.

58 Erlandsson 1998, p 148.

59 Case 53/85, *AKZO Chemie BV and AKZO Chemie UK v Commission* [1986], para 28. The Court states that any other solution would lead to the unacceptable consequence that an undertaking might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors business secrets.

60 Case T-410/03, *Hoechst v Commission* [2008], para 165, Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999], paras 35-36.

61 Commission Notice on the rules for access to the Commission file, para 12.

Other confidential Information

The CFI has held that 'in the case of information supplied on a purely voluntary basis, accompanied by a request for confidentiality in order to protect the informant's anonymity, an institution which accepts such information is bound to comply with such a condition'.⁶² According to the CFI 'the Commission's ability to guarantee the anonymity of certain of its sources of information is of crucial importance with a view to ensuring the effective prevention of prohibited anti-competitive practices'.⁶³ The EU Courts have recognised 'that an undertaking holding a dominant position on the market might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission.' Therefore third-party undertakings which submit documents to the Commission in the course of its investigations and consider that reprisals might be taken against them as a result can do so only if they know that account will be taken of their request for confidentiality.⁶⁴

10.1.1.3 Confidentiality versus access to the file

It follows from the above that the Commission may face a dilemma: should it keep certain information confidential and therefore refrain from using it as evidence, or should it disclose the information with a risk of seriously harming the interests of the company which provided the information.⁶⁵ The Commission has recognised that in proceedings under Articles 81 and 82 of the former EC Treaty the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement or could be necessary to exonerate a party. In that case the need to safeguard the rights of the defence of the parties may outweigh the concern to protect confidential information of other parties. The Commission assesses whether those circumstances apply to any specific situation, taking into account: the relevance of the information, whether the information is indispensable, the degree of sensitivity involved and the preliminary view of the seriousness of the alleged infringement. When the Commission intends to disclose information the person or undertaking in question gets the opportunity to provide a non-confidential version of the information. The non-confidential information must have the same evidential value as the confidential version.⁶⁶

According to the EU Courts, the rights of the defence must be balanced against the right of other economic operators to the protection of their confi-

62 Case T-53/03, *BPB v Commission* [2008], para 36.

63 Case T-53/03, *BPB v Commission* [2008], para 36.

64 Case C-310/93 P, *BPB and Britisch Gypsum v Commission* [1995], para 26. See also Commission Notice on the rules for access to the Commission file, para 19.

65 See also Erlandsson 1998, p 158.

66 Commission Notice on the rules for access to the Commission file, paras 24 and 25.

dential information and their business secrets.⁶⁷ If an inculpatory or exculpatory document contains genuine business secrets or cannot be disclosed for one of the other reasons mentioned above, a solution must be sought in which the right of confidentiality and the rights of the defence are reconciled.⁶⁸ The communication of a non-confidential version or a summary of the document is the most important solution proposed by the CFI. Furthermore the Commission may provide a list of documents contained in the Commission's file, before granting access to (non-confidential versions) of those documents.

Non-confidential versions or summaries

According to the CFI the Commission can protect the business secrets or other confidential information of third parties by deleting the sensitive passages from the copies of the documents sent to the applicant.⁶⁹ This could also imply that the identity of the source of the information is not disclosed. A non-confidential summary must be sufficiently precise.⁷⁰ According to the Commission Notice 'the non-confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed to be confidential'.⁷¹

The CFI held in several cases that the provision of non-confidential versions of evidence underlying the contested decision did not infringe the rights of the defence. However, the weight of the evidence may be reduced because of the fact that certain information is not communicated to the undertaking concerned. In *Endemol*, a concentration case, the Commission provided non-confidential summaries of some independent television producers' replies to the Commission's questionnaires. These summaries concealed the identity of those producers. The CFI noted that the replies to the questionnaires contained only the views of the third parties on the likely consequences of the concentration. 'The non-confidential summaries made those views clear. It was thus

⁶⁷ Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 98. See for the national context Case C-450/06, *Varec* [2008], para 51 and Case C-438/04, *Mobistar* [2006], para 40.

⁶⁸ See for example Case T-221/95, *Endemol v Commission* [1999], para 67.

⁶⁹ Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 102. It is not clear whether such non-confidential summaries must be provided by the Commission of its own motion, or on the party's request. In Case C-310/93 P, *BPB and British Gypsum v Commission* [1995], para 31 the party's complaint that no non-confidential summaries were provided by the Commission was dismissed, because it had not been established that such summaries were requested by the party concerned or that such a request would have been justified.

⁷⁰ See Case T-410/03, *Hoechst v Commission* [2008], para 154.

⁷¹ Commission Notice on the rules for access to the Commission file, para 38.

not necessary to know the identity of the third parties in question in order to be able to challenge the views expressed.⁷²

In *Salzgitter Mannesmann* the Court of Justice held that the CFI rightly allowed a document as incriminating evidence, while the identity of the author and the person who transmitted it to the Commission were not disclosed to the party concerned. The Court referred to the following three circumstances. First of all it pointed at the fact that the CFI in assessing the credibility of the document took into account the anonymous origin of that document. According to the CFI the credibility of that document was necessarily reduced by the fact that the context in which it was drafted was largely unknown and because the Commission's assertions in that regard could not be verified. Secondly the CFI held that evidence of anonymous origin cannot in itself establish the existence of an infringement of EC competition law. In this case the anonymous statements were supported by other evidence and they were only of ancillary importance. Finally the Court took into account that the party concerned was given opportunity to comment on the document and to put forward its arguments on the probative value of that document in the light of its anonymous origin.⁷³

In *Hoechst* the CFI held that the non-confidential version of relevant documents in the form made available to the undertaking concerned bore 'a close relationship to a failure to disclose' those documents. The Court took into account that the documents consisted of 101 pages virtually all of which were blank and marked 'Business secrets'. No summary of the content of the documents was provided during the administrative proceedings. Only a list setting out the date, sender and addressee of the documents and where appropriate the subject-matter were mentioned.⁷⁴ In *Alrosa* some third party observations submitted to the Commission were essential for the Commission's decision as it changed its initial position on the basis of them. Alrosa only received a summary of the Commission's conclusions drawn from these observations and non-confidential summaries of the observations themselves. The non-confidential version of the third party observations requested by Alrosa were supplied at a moment when it was impossible for Alrosa to provide an effective reply to them. According to the CFI Alrosa was therefore not given the opportunity to fully exercise its right to be heard.⁷⁵

72 Case T-221/95, *Endemol v Commission* [1999], paras 71-72.

73 Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], paras 46-50. These three conditions were also mentioned by A.G. Geelhoed in paras 62-65 of his opinion in this case.

74 Case T-410/03, *Hoechst v Commission* [2008], para 152. The Court did not find a violation of the right of access to the file because the documents concerned could not have changed the Commission's conclusions.

75 Case T-170/06, *Alrosa v Commission* [2007], paras 196-203.

List of documents

If protecting a third company's business secrets or other sensitive information by preparing non-confidential versions of all the documents in question proves difficult, the Commission could send to the party concerned a list of documents contained in the Commission's file.⁷⁶ Then the party concerned can request access to specific documents on the list. Those documents or, if necessary non-confidential versions of them, should be provided to the party concerned. The purpose of having a list as proposed by the CFI is that the information contained in it 'should provide to the applicant information sufficiently precise to enable it to ascertain, with knowledge of the facts, whether the documents described were likely to be relevant for its defence'.⁷⁷ In several cases the Commission sent the party concerned a list of documents contained in the Commissions file. In *Endemol* the CFI held that the table of the file contents presented by the Commission did not infringe the rights of the defence. In that case the Commission had prepared a summary list of all 279 documents which made up the file. That list gave first of all a breakdown of the documents by type (annual reports, internal notes, requests for information and so forth). Secondly, the list indicated, for each document or group of documents, whether it was accessible to the companies concerned, partially accessible to them, confidential or not relevant.⁷⁸

10.1.1.4 *Judicial review*

In appeals against Commission decisions in competition cases the General Court (like the former CFI) may request the Commission to submit its file including all confidential evidence.⁷⁹ In order to enable the CFI to determine whether it is conducive to proper conduct of the procedure to order the production of certain documents, the undertaking should identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the procedure.⁸⁰ The Commission may request the Court not to disclose the confidential information to the applicant undertaking.⁸¹

⁷⁶ See also the Commission Notice on the rules for access to the Commission file, para 45.

⁷⁷ Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 104, See also Case T-410/03, *Hoechst v Commission* [2008], para 154.

⁷⁸ Case T-221/95, *Endemol v Commission* 1999], para 78.

⁷⁹ Art 24 of the Statute of the Court of Justice states that 'the Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal. Protocol (No 3) on the Statute of the Court of Justice of the European Union [2008], OJ C 115/210.

⁸⁰ Case C-185/95 P, *Baustahlgewebe v Commission* [1998], para 93.

⁸¹ See for example the CFI's Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999], para 37, where the CFI considered that the Commission's obligation to submit all relevant documents to the Court does not

The Court first of all carries out a comparative and provisional analysis of the probative value of the documents that were not disclosed and of the evidence that the Commission regards as sufficient to lead to the findings made in its decision.⁸² During this procedure the Court does not disclose the documents concerned to the applicants.⁸³ In its analysis the Court establishes whether the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment.⁸⁴ Documents which are not relevant to the applicant's defence are left out of the Court's file. They remain wholly extraneous to the proceedings and are not taken into consideration by the Court.⁸⁵

In some cases the Court examines whether the (partial) non-disclosure of the relevant evidence is justified.⁸⁶ During this examination the Court guarantees the confidentiality of the evidence submitted by the Commission.⁸⁷ If the confidentiality is not justified, the Court will disclose the confidential evidence to the parties concerned.⁸⁸ If confidentiality is justified, a non-confidential version of the evidence may be made available to the applicant.

The Court then assesses according to the principles set out above whether the rights of the defence are infringed and whether the decision should be annulled. Where a document is not at all disclosed to the applicant, the Court

intend to enable the applicants to peruse the files of the institution concerned as they see fit. Its sole purpose is to assist the Court in the exercise of its power of review of the legality of the contested measure by placing the whole of the administrative file at its disposal.

82 Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 132,

83 Art 67 (3) of the Consolidated Version of the Rules of Court of the General Court (2010/C 177/02) [2010], OJ C 177/37.

84 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 78. See also the CFI's Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999], para 40.

85 See for example the CFI's Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999], para 33 and Case T-410/03, *Hoechst v Commission* [2008], paras 169-171.

86 See for example Case T-221/95, *Endemol v Commission* [1999], para 69 and Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 102. This also follows from Art 67 (3) of the Consolidated Version of the Rules of Court of the General Court (2010/C 177/02) [2010], OJ C 177/37, which states that 'where it is necessary for the General Court to verify the confidentiality, in respect of one or more parties, of a document that may be relevant in order to rule in a case, that document shall not be communicated to the parties at the stage of such verification.' In Case T-44/00, *Mannesmannröhren-Werke v Commission* [2004], paras 81-99 the Court did not assess whether the non-disclosure of the names of the sources of relevant information was justified.

87 See Art 67 (3) of the Consolidated Version of the Rules of Court of the General Court (2010/C 177/02) [2010], OJ C 177/37.

88 See for example CFI's Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999].

does not take that document into account.⁸⁹ The Court examines whether the decision can be based on the non-confidential evidence. If during the administrative proceedings the applicant only had access to a non-confidential version of a document, the Court examines whether this amounts to an infringement of the rights of the defence.⁹⁰ Where possible exculpatory documents were not disclosed to applicant, the rights of the defence are violated and the decision will be annulled.

An infringement of the rights of the defence which occurred during the administrative procedure cannot be regularised during the proceedings before the Court of First Instance or the Court of Justice.⁹¹ According to the Court of Justice the belated disclosure of documents in the file does not put the undertaking back into the situation it would have been in, if it had been able to rely on those documents in presenting its written and oral observations to the Commission.⁹² The CFI notes in this regard that it carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure. If during the administrative procedure the applicant had been able to rely on documents which might exculpate it, it might have been able to influence the Commission's assessment. The Court cannot therefore rule out the possibility that the Commission would have found the infringement to be shorter and less serious and would, consequently, have fixed the fine at a lower amount.⁹³

Application to procedures before national courts

The Court of Justice answered two questions of national courts relating to the meaning of the right of access to the file and the rights of the defence before them.⁹⁴ In *Mobistar* the national court asked the Court of Justice whether EU law required it to have at its disposal all the information necessary for the merits of the case to be duly taken into account including the confidential information on the basis of which the national authority adopted the decision which is the subject-matter of the appeal.⁹⁵ In *Varec* the national court wanted

⁸⁹ Art 67 (3) of the Consolidated Version of the Rules of Court of the General Court (2010/C 177/02) [2010], OJ C 177/37 states that the General Court shall take into consideration only those documents which have been made available to the lawyers and agents of the parties and on which they have been given an opportunity of expressing their views.

⁹⁰ See for example Case T-221/95, *Endemol v Commission* [1999], para 72.

⁹¹ See for example Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 104 and Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 108.

⁹² Case C-51/92 P, *Hercules Chemicals v Commission* [1999], paras 78-79.

⁹³ Case T-36/91, *Imperial Chemical Industries v Commission* [1995], paras 108 and 113.

⁹⁴ The *Varec* judgment concerned the review by a national court of a decision taken by a contracting authority in the context of a contract award procedure. *Mobistar* regarded a dispute concerning a decision fixing the set-up costs payable by a receiving mobile telephone operator for number transfer or portability from one operator to another.

⁹⁵ Case C-438/04, *Mobistar* [2006], para 19.

to know whether EU law required the appeal authority to ensure confidentiality and observance of the business secrets contained in the files communicated to it by the parties concerned, including the determining authority, whilst at the same time being entitled to apprise itself of such information and take it into consideration.⁹⁶

The Court of Justice held in both cases that national courts should have at their disposal all the information necessary in order to decide in full knowledge of the facts on the merits of the appeal, including confidential information.⁹⁷ However it considered in *Varec* that, in the context of national (judicial) review of a decision taken by a contracting authority in relation to a contract award procedure 'the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned, which has been filed with the body responsible for the review.'⁹⁸ It recognised that in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest.⁹⁹ Here the Court referred to the ECtHR's case-law under Article 6 ECHR.¹⁰⁰

Like in competition cases against the Commission discussed above, the Court held that the principles of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the right to effective legal protection and the rights of the defence of the parties to the dispute.¹⁰¹ A national body reviewing a decision which is (partly) based on confidential information, must therefore decide 'to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute.' This implies an objective review of the question whether information is genuinely business sensitive.¹⁰² If this body is a court, the procedure must comply with the requirements of fair trial.¹⁰³

⁹⁶ Case C-450/06, *Varec* [2008], para 21.

⁹⁷ Case C-438/04, *Mobistar* [2006], para 40, Case C-450/06, *Varec* [2008], para 53.

⁹⁸ Case C-450/06, *Varec* [2008], para 51.

⁹⁹ The Court recognised that operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without the fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them. Case C-450/06, *Varec* [2008], paras 36 and 43.

¹⁰⁰ Case C-450/06, *Varec* [2008], para 47. The Court refers to *Rowe and Davis v the United Kingdom* and *V. v Finland*, both cases concerned complaints under the criminal limb of Art 6 ECHR.

¹⁰¹ Case C-450/06, *Varec* [2008], para 52, See also C-438/04, *Mobistar* [2006], para 40.

¹⁰² See Von Papp 2009, p 996.

¹⁰³ Case C-450/06, *Varec* [2008], para 55, see also Case C-438/04, *Mobistar* [2006], para 43.

Having regard to the extremely serious damage which could result from improper communication of certain information to a competitor, that body must, before communicating that information to the dispute, give the economic operator concerned an opportunity to plead that the information is confidential or a business secret.¹⁰⁴

The Court of Justice thus applies principles which are similar to those applied in the context of appeals against Commission decisions in competition cases before the EU Courts. However, it does not refer extensively to its case-law in these cases and it does not provide much guidance to the national court as to how the rights of the defence and the right to confidentiality must be reconciled.¹⁰⁵

It is interesting to note that in her opinion in *Varec* AG Sharpston did propose more detailed criteria which were based on the CFI's practice in competition cases in which confidential evidence played a role, notably its orders in the *Steel beams* cases.¹⁰⁶ She stated that although neither the pragmatic solution adopted by the CFI or the rules of procedure of the CFI

can constitute any binding precedent for a national court, [...] they provide helpful practical guidance as to the approach to be taken, which must conform with rules applicable to that court, in so far as they do not conflict with any higher norm.¹⁰⁷

According to the AG the principles applied must be the following:

- a) 'A party may not refuse to communicate evidence to the review body on the ground of business secrecy
- b) A party communicating evidence to the review body may ask for it to be treated as confidential, in whole or in part, vis-à-vis another party
- c) All principal parties should have access to all evidence relevant to the outcome of the review, in a form adequate to enable them to comment on it
- d) The review body should take care not to use any evidence withheld from one or more principal parties in any way which could infringe those parties' rights to a fair hearing and to equality of arms.¹⁰⁸

The AG is furthermore of the opinion that this assessment needs to be done on a case by case basis and must seek to assure the greatest protection of each interest (confidentiality of business secrecy and the right to a fair hearing)

¹⁰⁴ Case C-450/06, *Varec* [2008], para 54.

¹⁰⁵ See also Von Papp 2009, p 995.

¹⁰⁶ In particular the Order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, *NMH Stahlwerke and others v Commission* [1999].

¹⁰⁷ These higher norms include EU legislation as interpreted in the light of the right to the protection of business secrets and the right to a fair hearing.

¹⁰⁸ Opinion of A.G. Sharpston of 25 October 2007 with Case C-450/06, *Varec* [2008], para 62.

which is achievable without impairing the substance of the other, and to strike as fair a balance as is possible between the two.¹⁰⁹

10.1.1.5 *Subconclusion: the use of secret information in EU competition cases*

In competition cases the EU Courts attach great importance both to the rights of the defence and to the protection of confidential information, in particular business secrets. They have recognised that the disclosure of business secrets or other confidential information may cause an undertaking serious harm. On the other hand they have accepted that the refusal to communicate evidence to the undertaking which is the object of a Commission decision (for example to impose a fine) may harm the rights of the defence. The fact that a relevant document has not been disclosed to the undertaking concerned, has severe consequences. Inculpatory documents which were not communicated to the undertaking should be excluded as evidence. The rights of the defence are infringed when exculpatory documents have not been disclosed which might have influenced the course of the procedure and the content of the decision to the applicant's detriment. The undertaking must be able to assess itself whether information is relevant to its defence. It should substantiate before the CFI that the documents may have changed the Commission's conclusions. In several cases the undertaking did not succeed in doing so. In its assessment the CFI took into account the strength of the (disclosed) evidence relied on by the Commission and that of the undertaking's positions.

The Commission does not necessarily need to choose between the protection of confidential information and the rights of the defence. According to the EU Courts in competition those two interests must be balanced against each other. A compromise, such as the provision of non-confidential versions of documents are permissible. Such summaries must provide sufficiently precise information enabling the party concerned to determine whether the information deleted is likely to be relevant for its defence and to express its views on it.

When reviewing competition decisions in which it is claimed that the rights of the defence have been infringed, because confidential information has not been disclosed to the undertaking concerned, the General Court plays an active role. It assesses whether the information concerned could be relevant for the undertaking's defence. In some cases it examines whether the (partial) non-disclosure of the relevant information is justified. Finally it rules whether the rights of the defence have been infringed because possible exculpatory evidence has not been disclosed. It also decides whether, after exclusion of the inculpatory evidence not disclosed to the undertaking, the remaining non-confidential evidence is sufficient to support the decision.

Also in proceedings before national courts ruling in similar cases, the protection of business secrets must be observed in such a way as to reconcile

109 Opinion of A.G. Sharpston of 25 October 2007 with Case C-450/06, *Varec* [2008], para 63.

it with the right to effective legal protection and the rights of the defence of the parties to the dispute. Therefore the national court should be able to review evidence which has not been disclosed to the party concerned and assess whether the non-disclosure is justified.

10.1.2 EU sanctions and the protection of national security

Since 11 September 2001 the EU has taken measures to combat terrorism. It has engaged in sanctions freezing the funds and assets of persons who commit and/or facilitate terrorist acts and those of groups and entities owned, controlled or acting on behalf of such persons (henceforth EU sanctions).¹¹⁰ EU sanctions are often based on information which is not disclosed to the person or entity concerned. The information may be provided to the EU Institutions by Member States or third countries, on the condition that this information would remain confidential. This information or other information underlying the EU sanction is usually kept confidential in the interest of the security and the conduct of the international relations of the Member States and/or the European Union.

In most cases which have been judged by the CFI and the General Court the party concerned complained about a total lack of reasons for the decision, the fact that the evidence underlying the decision had not been notified to it and that therefore it did not get the opportunity to defend itself. In their case-law regarding EU sanctions, the EU Courts usually refer to three principles in particular: the right to be heard, the obligation to state reasons and the right to an effective remedy. The requirements derived from these three principles will be discussed in sections 10.2.2.2 – 10.2.2.4. The Court of Justice's case-law in *Kadi* will be used as point of departure. However, the CFI's case-law with regard to procedural requirements, of which the judgment in *PMOI I* is leading, is much more detailed and will thus be discussed extensively in this section.¹¹¹

The general principles used in EU sanction cases and in competition cases are the same. As was stated in the introduction to this chapter, the CFI in EU sanction cases referred to relevant case-law in competition cases. However, there are also some important differences between the EU Courts' approach in these cases. This section will show that the limitations to the rights of the defence allowed in EU sanction cases seem to be more far-reaching than in competition cases. The reason for this potentially relates to the nature of the

¹¹⁰ Koedooder & de Lang 2009, p 313.

¹¹¹ Tridimas and Gutierrez-Fons state that in *Kadi* the Court of Justice was preoccupied with asserting the rule of law and the existence of judicial review over Community action dictated by the UN Security Council. The CFI however was preoccupied with the detailed requirements of procedural rights. Tridimas & Gutierrez-Fons 2008, p 730.

case and the grounds for not disclosing relevant evidence. Furthermore the fact that the scope of judicial review of (autonomous) EU sanctions on the EU level is rather limited, as a result of a division of tasks between the national and EU level (see for explanation under 9.2.2.1), may play a role.

The case-law concerning EU sanctions is much less developed than in competition cases, as until now most EU sanctions have been annulled because of the complete absence of a statement of reasons and a total lack of a hearing. The EU Courts therefore have not yet addressed the question how the rights of the defence must be balanced against the protection of the safety and the conduct of the international relations of the Member States and/or the European Union.

10.1.2.1 Legal framework and scope of judicial review

Before turning to the examination of the case-law of the EU Courts, some remarks will be made regarding the relevant legal framework and possibility of judicial review of EU sanctions. There are two strands of EU sanctions¹¹²: those designated to give effect to resolutions issued by the United Nations Security Council¹¹³ and autonomous EU sanctions.¹¹⁴ The EU sanctions are based on several common positions.¹¹⁵ Lists of persons and entities suspected of involvement in terrorism are drawn up by the Council.¹¹⁶ Those lists are regularly reviewed.¹¹⁷ The common positions are given effect by the adoption

112 Murphy 2010, p 301.

113 See for example Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], Case T-318/01, *Othman v Council and Commission* [2009] and Joined Cases C-399/06 P and C-403/06 P, *Hassan and Ayadi v Council and Commission* [2009].

114 See for example Case T-228/02, *Modjahedines du peuple d'Iran v Council* [2006], Case T-47/03, *Sison v Council* [2007].

115 Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism (2001/930/CFSP) [2001, OJ L 344/90, Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP) [2010], OJ L 344/93 (Common Position 2001/931/CFSP), Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (2002/402/CFSP) [2002], OJ L 139/4 (Common Position 2002/402/CFSP).

116 See Annex 1 of Common Position 2001/931/CFSP and Annex 1 of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9 (Council Regulation No 881/2002).

117 According to Art 6 of Common Position 2001/931/CFSP the list must be reviewed at least every six months. Also the list annexed to Council Regulation No 881/2002 is regularly reviewed.

of Council regulations.¹¹⁸ According to the Court of Justice the legal basis for the sanctions could be found in Articles 60, 301 and 308 of the former EC Treaty.¹¹⁹ Since the entrance into force of the Treaty of Lisbon, the sanctions are based on Article 75 TFEU.

Both the procedure for imposing EU sanctions based on UN Security Council resolutions and the procedure for taking autonomous EU sanctions take place on two levels: the UN level and the EU level or the national level and the EU level. As a result the task of the EU Courts in EU sanction cases is limited. It will be argued below that this may explain why in EU sanction cases the scope of the obligation to state reasons and the right to be heard seems to be more limited than in competition cases. I will now briefly describe both procedures and the possibilities for judicial review of the decisions taken on both levels. The required scope and intensity of judicial review will be addressed in section 10.2.2.4 concerning the right to effective judicial protection.

EU sanctions based on UN Security Council resolutions

The EU sanctions which give effect to UN Security Council resolutions are preceded by a Security Council decision to place a person or entity on the terrorist list.¹²⁰ Following this decision the Council draws up a list of suspected terrorists and subsequently issues a regulation which is applied to the individual included in the list.¹²¹

Little is known about the procedure of listing individuals suspected of terrorist activities at the UN level. Suspects must be identified based on information provided by States and regional organisations. Individuals do not have the opportunity to be heard before or after the listing and they have no right to appeal the decision to place them on the UN list.¹²² Furthermore the Security Council does not communicate the reasons and evidence justifying his appearance on the list to the person concerned.¹²³

118 See Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L 344/70, which implements Common Position 2001/931/CFSP and Council Regulation (EC) No 881/2002, which implements Common Position 2002/402/CFSP.

119 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 158-236. See also Murphy 2010, pp 301-304, Tridimas & Gutierrez-Fons 2008, pp 664-679 and Eckes 2007, p 1121.

120 See Art 4 of Common Position 2001/931/CFSP and Art 7 (1) of Council Regulation No 881/2002.

121 Koedooder & de Lang 2009, p 319.

122 Koedooder & de Lang 2009, pp 316-317. See also Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 319-325.

123 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 325. Tzanou and El Droubi mention that in *Othman* the Court of First Instance seems to endorse the applicant's view that the Security Council's decision to include him in the terrorist list is a political decision, taken in a wholly non-judicial manner, without any regard to the rules of evidence or of fairness. Tzanou & El Droubi 2010, p 1240.

In *Kadi* the Court of Justice held that EU sanctions which are directly based on Security Council resolutions can be reviewed by the EU Courts and should comply with EU fundamental rights, such as the rights of the defence and the right to an effective remedy.¹²⁴ The EU Courts also review the question whether the evidence adduced against the persons concerned justifies the inclusion of their names on the EU terrorist list. The EU Courts do not review the legality of the Security Council decision itself.¹²⁵

Autonomous EU sanctions

Autonomous EU sanctions are based on information of the Member States. According to Article 4 (1) of Common Position 2001/931 the list in its annex

shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.

The term “competent authority” shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this provision, an equivalent competent authority in that area.

Before imposing an EU sanction, the EU institutions must decide first of all whether a national decision as mentioned in Article 4 (1) of Common Position 2001/931 (henceforth also: national decision) has been taken. Secondly they must assess whether it is (still) justified to include the person or entity concerned in the EU terrorist list.¹²⁶ When performing this second assessment the EU institutions enjoy broad discretion.¹²⁷ As a result the review by the CFI of this decision is limited.¹²⁸ The CFI has stressed however that it does review the Council’s interpretation of the relevant facts and that review of the observance of certain procedural guarantees is of fundamental importance.¹²⁹

124 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 326.

125 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 286. See on this issue also Tridimas & Gutierrez-Fons 2008, pp 679-702.

126 See for example Case T-284/08, *People’s Mojahedin Organization of Iran v Council* [2008], para 51.

127 Case T-228/02, *Organisation des Mojahedines du peuple d’Iran v Council* [2006], para 159 and Case T-49/07, *Fahas v Council* [2010], para 57.

128 The CFI stressed that this limited review applies, especially, to the Council’s assessment of the factors as to appropriateness on which decisions to freeze funds are based. Case T-228/02 *Organisation des Mojahedines du peuple d’Iran v Council* [2006], para 159

129 Case T-256/07, *People’s Mojahedin Organization of Iran v Council* [2008], paras 138-139.

The Council should generally refrain from testing the legality of the national decision underlying the EU sanction. In the *PMOI I* case the CFI considered:

[I]t is not for the Council to decide whether the proceedings instigated against the party concerned and resulting in that decision as provided for by national law of the Member State were correctly conducted or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the national courts or as the case may be to the European Court of Human Rights.¹³⁰

Also where the EU sanction is based on a national decision concerning investigations or prosecutions, rather than on a conviction or a sentence, the Council should

defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are “serious and credible evidence or clues” on which the decision is based and also in respect of recognition of potential restrictions on access to that evidence or those clues legally justified under national law.¹³¹

This follows from the duty of sincere cooperation which is currently laid down in Article 4 (3) TEU. The CFI only allows the possibility of review of the national decision on the EU level, if the national decision is not taken by a competent authority in the meaning of Article 4 (1) of Common Position 2001/931.¹³² This may also apply if the national decision is a decision to investigate or prosecute (and thus not a conviction and sentence) taken by an authority which is not a judicial authority¹³³ and which is not subject to judicial review on the national level.¹³⁴

As a result the CFI generally only reviews whether the Council’s burden proof is met and the rights of the defence are respected with regard to two aspects of the decision to impose an EU sanction: the establishment that there is (1) a national decision which (2) justifies the inclusion in the EU terrorist

130 Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006], para 121 and Case T-47/03, *Sison v Council* [2007], para 168.

131 Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006], para 124, Case T-47/03, *Sison v Council* [2007], para 171 and Case T-256/07, *People’s Modjahedin Organization of Iran v Council* [2008], para 133.

132 Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006], para 125 and Case T-47/03, *Sison v Council* [2007], para 172.

133 Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006], para 124 (‘at least where it is a judicial authority’) and Case T-47/03, *Sison v Council* [2007], para 171. See also Gattini 2009, p 239.

134 Case T-256/07, *People’s Modjahedin Organization of Iran v Council* [2008], para 145.

list and thus the imposition of an EU sanction.¹³⁵ It does not engage in the question whether the person or entity concerned can be considered to be involved in terrorism. It is for the national determining authority and courts to examine the (confidential) evidence underlying the national decision and to ensure that the rights of the defence are respected in the procedure which lead to the decision mentioned in Article 4 (1) of Common Position 2001/931.¹³⁶ In this context the CFI referred to the ECtHR's judgment in *Tinnally v the United Kingdom* concerning the rights of the defence under Article 6 ECHR, which will be discussed in section 10.3.¹³⁷

10.1.2.2 The right to be heard

The general principles developed in cases regarding other fields of EU law also apply to EU sanctions.¹³⁸ As was mentioned above, the right to be heard has a rather limited purpose in the context of EU sanctions. In the view of the CFI, in case of an initial decision to freeze funds, the right to be heard requires, in principle, first, that the party concerned be informed by the Council of the specific information or material in the file which indicates that a national decision has been taken in respect of it by a competent authority of a Member State, and also, where applicable, any new material which has not yet been assessed by a competent authority at the national level.¹³⁹ Secondly the party concerned must be placed in a position in which it can effectively make known its view on the information or material in the file. In the case of a subsequent decision to freeze funds, observance of the right to be heard similarly requires, first, that the party concerned be informed of the information or material in the file which, in the view of the Council, justifies maintaining it in the disputed lists, and also, where applicable, of any new material which has not yet been assessed by a competent authority at the national level. Secondly it must be afforded the opportunity effectively to make known its view on the matter.¹⁴⁰

According to the CFI the right to be heard does not give the party concerned the right to a formal hearing: it is sufficient that it has the opportunity to

135 See for example Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 146.

136 Case T-256/07, *People's Mojahedin Organization of Iran* [2008], paras 145-146.

137 Case T-47/03, *Sison v Council* [2007], para 166. See for criticism on this case-law Spaventa 2009, pp 1256-1260.

138 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 91-93.

139 Tridimas and Gutierrez-Fons state that the 'CFI appears to leave itself here sufficient margin of manoeuvring to intervene in exceptional circumstances'. They state that it is not clear however whether it is open to the applicant to argue in all cases that the national proceedings was defective. Tridimas & Gutierrez-Fons 2008, pp 712-713.

140 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 126. See also Tridimas & Gutierrez-Fons 2008, p 709.

submit written observations.¹⁴¹ The CFI held that the Council is not obliged to spontaneously grant access to the documents in its file. It is only on the request of the party concerned that the Council is required to provide access to all non-confidential official documents concerning the measure at issue. It is only obliged to communicate sufficiently precise information, enabling the entity concerned to make its point of view on the evidence adduced against it by the Council known to advantage.¹⁴²

Possible limitations to the right to be heard

Both the Court of Justice and the CFI have accepted that far-reaching limitations of the right to be heard may be justified in procedures concerning EU sanctions. These limitations regard the moment in the procedure at which the hearing takes place as well as the disclosure of evidence.

As to the moment of the hearing both Courts held that EU authorities are not obliged to hear the party concerned (and therefore to notify the evidence adduced against it) before imposing an EU sanction. A measure freezing the funds or a person or entity must by its very nature take advantage of a surprise effect and apply with immediate effect.¹⁴³ Therefore the party concerned does not need to be heard before its name is included on the terrorist list.¹⁴⁴ These considerations do not apply to subsequent decisions to impose an EU sanction. Therefore such a decision needs to be preceded by the possibility of a further hearing.¹⁴⁵

Secondly the Court of Justice and the CFI accepted that 'overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters'.¹⁴⁶ According to the CFI such restrictions are

141 Case T-256/07, *People's Mojahedin Organization of Iran v Council* [2008], para 93.

142 Case T-390/08, *Bank Mellat v Council* [2009], para 97. According to the CFI it would be excessive to require spontaneous communication of the matters in the file, given that when a fund-freezing measure is adopted it is not certain that the entity concerned intends to check, by means of access to the file, the matters of fact supporting the allegations made against it by the Council.

143 The Council and the Member States have pointed at the fact that the party concerned could have taken advantage of the time period allowed to it to submit its comments to transfer those funds out of the Union. Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 81.

144 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 338-341.

145 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 131. See also Case T-284/08, *People's Mojahedin Organization of Iran v Council* [2008], paras 38-43 where the CFI held that the Council did by no means establish that the right to be heard could not be respected because a decision had to be taken urgently.

146 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 342 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 133.

consistent with the constitutional traditions of the Member States and the ECtHR's case-law under Article 6 ECHR.¹⁴⁷ The refusal to disclose evidence applies, in the view of the CFI, above all to the 'serious and credible evidence or clues' on which the national decision to instigate an investigation or prosecution is based, in so far as they may have been brought to the attention of the Council. However, the CFI also finds it

conceivable that the restrictions on access may concern the specific content or the particular grounds for that decision, or even the identity of the authority that took it. It is even possible that, in certain, very specific circumstances, the identification of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardise public security, by providing the party concerned with sensitive information which it could misuse.¹⁴⁸

Possible compensation for the absence of a hearing

If the evidence has not been disclosed to the party concerned during the administrative proceedings this evidence must be notified to this party, in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds. A hearing does not need to be conducted immediately after the decision 'in the light of the possibility that the parties concerned also have immediately to bring an action before the CFI, which also ensures that a balance is struck between observance of the fundamental rights of the persons included in the disputed list and the need to take preventive measures in combating international terrorism.'¹⁴⁹ Unlike in competition cases, in cases concerning EU sanctions the absence of a hearing during the administrative phase can thus be compensated during the appeal phase.¹⁵⁰ During the appeal the Court can use techniques which accommodate the rights of the defence and concerns legitimating non-disclosure of evidence.¹⁵¹ If the evidence underlying the contested decision is not disclosed to the EU Courts compensation of an infringement of the rights of the defence during the appeal phase is not possible.¹⁵²

In *Kadi II* the General Court held with regard to EU sanctions based on UN Security Council resolutions that it is not sufficient that a person's rights of defence have been 'observed' only in the most formal and superficial sense. The person concerned must, on the basis of the information provided to him,

147 The CFI here referred to the judgments in *Chahal* (which did not concern Art 6 ECHR) and *Jasper*. Both cases will be discussed in section 10.3.

148 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 136.

149 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 129-130. See also Case T-390/08 *Bank Melli Iran v Council* [2009], para 98.

150 This also follows from Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 337.

151 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 344. See further section 10.2.2.4.

152 Case T-85/09, *Kadi v Commission* [2010], para 182.

be able to launch an effective challenge to the allegations against him so far as his alleged participation in terrorist activities is concerned. Here the Court referred to the ECtHR's judgment in *A and others v the United Kingdom*, which will be discussed in section 10.3.4.

Application to specific cases

As was mentioned before, in most of the cases before the Court of Justice and the CFI the party concerned did not have access to the evidence underlying the contested decision and a violation of the right to be heard was found. In some cases the Council even refused to inform the applicant of the identity of the Member State which was the author of the national decision underlying the EU sanction.¹⁵³ In *Kadi* the Court of Justice considered that the applicable EU legislation on which the EU sanction was based did not provide for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the terrorist list and for hearing those persons, either at the same time as that inclusion or later. Furthermore it took into account that the Council at no time informed the appellants of the evidence adduced against them that allegedly justified the inclusion of their names for the first time in the list. The Court concluded that

because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage.¹⁵⁴

Therefore, the appellants' rights of the defence, in particular his right to be heard, were not respected.¹⁵⁵

In *Kadi II* the person concerned was provided with a summary statement of reasons which set out the allegations against him. According to the General Court however the procedure followed by the Commission, in response to the applicant's request, did not grant him even the most minimal access to the evidence against him. 'The applicant was refused such access despite his express request, whilst no balance was struck between his interests, on the

¹⁵³ Case T-47/03, *Sison v Council* [2007], para 209.

¹⁵⁴ Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 345-348. See also Case T-318/01, *Othman v Council and Commission* [2009], paras 82-85.

¹⁵⁵ See also Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 160-162 and Case T-284/08, *People's Mojahedin Organization of Iran v Council* [2008], paras 36-37, where the CFI held that the right to be heard was violated because the Council adopted a subsequent decision to impose an EU sanction without first informing the applicant of the new information or new material in the file, which in its view, justified maintaining it on the list.

one hand, and the need to protect the confidential nature of the information in question, on the other.¹⁵⁶ The General Court found that

in those circumstances, the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him so far as his alleged participation in terrorist activities is concerned.¹⁵⁷

The Court mentioned as an example the allegation, not otherwise substantiated and thus irrefutable, that the applicant was a shareholder in a Bosnian bank in which planning sessions against a United States facility in Saudi Arabia may have taken place. The Court considered that its conclusion is consistent with the ECtHR's judgment in *A and others v the United Kingdom*.¹⁵⁸

The approach of the General Court applied in *Kadi* which concerned EU sanctions based on UN Security Council resolutions seems to be different than that in several cases concerning autonomous EU sanctions. In those cases the CFI did not seem to set very high standards as regards the right to be heard. This difference may be explained by the fact that in cases regarding autonomous EU sanctions it is up to the national courts to ensure the rights of the defence with respect to the allegations of involvement in terrorist activities, while at the UN level no judicial review of the decision to place a person on a terrorist list takes place.

In *Sison I* the CFI considered that the Council should have communicated the national decisions to Sison as they were official acts adopted at the end of public judicial proceedings to which the applicant had been a party. It was thus not necessary to keep those decisions confidential.¹⁵⁹ In the *PMOI II* judgment however the CFI found with regard to one of the two subsequent decisions to impose an EU sanction that the right to be heard had not been violated. It took first of all into account that the Council communicated to the applicant a number of documents from the file. As regards the documents, which were not notified to the applicant, the Council explained that it was not in a position to forward them to the applicant, because the State which had provided them had not consented to their disclosure. Furthermore the CFI referred to the fact that the applicant had challenged neither that refusal to communicate certain incriminating documents, nor the reasons put forward to justify it. Secondly the CFI held that the Council placed the applicant in a position to make its case properly regarding the evidence incriminating it, an opportunity of which it in fact availed itself on several occasions.¹⁶⁰ In *Bank Melli Iran* the CFI ruled that the obligation to inform the party of the

156 Case T-85/09, *Kadi v Commission* [2010], para 173.

157 Case T-85/09, *Kadi v Commission* [2010], para 174.

158 Case T-85/09, *Kadi v Commission* [2010], paras 175-176.

159 Case T-47/03, *Sison v Council* [2007], para 212.

160 Case T-256/07, *People's Mojahedin Organization of Iran* [2008], paras 91-92.

evidence adduced against it to justify the proposed sanction had been met because sufficient reasons were given for the contested decision. Those reasons were in fact confined to one short paragraph and contained only general allegations. The Council's obligations under the right to be heard were thus also very limited.¹⁶¹

In *PMOI II* the CFI also indicated that the Council's duty to show that it took into account the submissions of the party concerned is limited. The party concerned complained that the Council had not sought in any way to respond to the criticism levelled at it and that it had taken no account at all of the exculpatory material produced by it. The CFI held that the rights of the defence had not been violated on this ground. It derived from the Council's letters and the fact that the applicant's submission had been communicated to the delegations of the Member States before the decision had been adopted, that due account was made of the applicant's submissions. Moreover it stated that the Council was not obliged to reply to the applicant's observations in the light of the documents submitted by the applicant, if it thought that they did not warrant the conclusions that the applicant claimed to infer from them. The fact that the statement of reasons did not address the applicant's submissions, but was rather a word-for-word repetition of the initial statement of reasons 'in itself means only that the Council maintained its point of view'. In the absence of any other relevant evidence, as was the case here, 'such similarity of texts does not establish that the Council failed, when assessing the case, to afford proper consideration to the arguments put forward by the party concerned in arguing its case.' According to the CFI the Council did give a specific reply to the applicant's main argument.¹⁶²

10.1.2.3 *The obligation to state reasons*

In *Kadi* the Court of Justice reiterated its case-law regarding the obligation to state reasons.¹⁶³ It follows from this judgment and the CFI's case-law that in principle the requirements following from the obligation to state reasons recognised by the EU Courts in other fields of EU law, also apply to EU measures freezing funds.¹⁶⁴ The Council had argued in the *PMOI I* case that the material conditions regarding the obligation to state reasons in the fight

161 Case T-390/08, *Bank Mellī Iran* [2009], paras 95-104. See also Case T-49/07, *Fahas v Council* [2010], para 49.

162 Case T-256/07, *People's Mojahedin Organization of Iran* [2008], paras 94-96. See also Case T-49/07, *Fahas v Council* [2010], para 49.

163 The Court however put most weight on the right to be heard and the right to an effective remedy and did not find a separate violation of the statement of reasons. Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 350, where the Court states that the infringement of the rights of the defence had not been remedied in the course of the actions before the Community judiciary.

164 See also Case T-228/02, *Organisation des Modjahedines du peuple d'Iran* [2006], para 109.

against terrorism are not the same as those existing in other areas, such as competition.¹⁶⁵ The Court of Justice and the CFI, which expressly referred to the case-law concerning the obligation to state reasons in other fields of EU law, did not agree with the Council.

The CFI addressed the obligation to state reasons more elaborately in the *PMOI I* case and subsequent case-law. The CFI considered that the obligation to state reasons constitutes an essential principle of EU law which may be derogated from only for compelling reasons. According to the CFI the statement of reasons for a decision to impose an EU sanction which is based on a national decision must show first of all that the conditions for taking the decision, set out in Article 4 of Common Position 2001/931, are met. It must therefore indicate which national decision underlies the decision imposing the EU sanction. If the Council based its decision on information communicated by the Member States, which has not been assessed by a national authority, it must indicate why it considers that this information justifies the inclusion of the person concerned on the list.¹⁶⁶ Secondly the decision must include the actual and specific reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.¹⁶⁷ Subsequent decisions to freeze funds must indicate the actual and specific reasons why, after a re-examination, the Council considered that there were still grounds for the EU sanction.¹⁶⁸

Possible limitations to the statement of reasons

The CFI has recognised that exceptions to the obligation to indicate the actual and specific reasons for the EU sanction are allowed under exceptional circumstances. First of all it has considered that a detailed publication of the complaints put forward against the parties concerned might conflict with the overriding considerations of public interest concerning the security of the EU and its Member States, or the conduct of their international relations. Moreover it may jeopardise the legitimate interests of the persons and entities in question, in that it would be capable of causing serious damage to their reputation. In such a situation, the Court finds, exceptionally, that only the operative part of the decision and a general statement of reasons need be in the version of the decision to freeze funds published in the Official Journal. The actual,

¹⁶⁵ Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 83.

¹⁶⁶ Tridimas & Gutierrez-Fons 2008, pp 716-717. According to them this formulation appears to suggest that the Council is under an obligation to show that it was satisfied that the national authority assessed the evidence.

¹⁶⁷ Case T-341/07, *Sison v Council* [2009], para 60.

¹⁶⁸ Case T-47/03, *Sison v Council* [2007], para 217. If the grounds of a subsequent EU sanction are in essence the same as those already relied on when a previous decision was adopted, a mere statement to that effect may suffice, particularly when the party is a group or entity. See also Case T-341/07, *Sison v Council* [2009], para 60 and Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 97.

specific statements of reasons for that decision must however be formalised and brought to the knowledge of the parties concerned by any other appropriate means.¹⁶⁹

Secondly the CFI has held that the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds. The considerations regarding the restrictions of the right to a fair hearing (set out in section 10.2.2.2) also apply to the restriction of the obligation to state reasons. Furthermore the CFI drew inspiration from Article 30(2) of Directive 2004/38/EC and the case-law applicable to that provision.¹⁷⁰ This provision states that ‘the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision restricting the freedom of movement and residence of a citizen of the Union or a member of his family taken in their case is based, unless this is contrary to the interests of State security’. According to the Court of Justice’s case-law the State concerned must, when notifying an individual of such a restrictive measure give him a precise and comprehensive statement of the grounds for the decision, to enable to take effective steps to prepare his defence.¹⁷¹ The CFI has not explained how the obligation to state reasons can be reconciled with the protection of overriding considerations of public interest.

Possible compensation for a lack of reasons

The statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him or at the very least as swiftly as possible after that decision.¹⁷² In *Kadi* the Court of Justice did not seem to exclude that the infringement of the obligation to state reasons be remedied during the appeal before the EU Courts.¹⁷³ As was pointed out in section 4.4.3 it is the EU Courts’ standing case-law that the failure to state the reasons cannot be remedied by the fact that the person concerned learns

¹⁶⁹ Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006], para 147.

¹⁷⁰ Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006], para 147. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

¹⁷¹ Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006], paras 148-150.

¹⁷² Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 336.

¹⁷³ Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 350. See for critique: Tridimas & Gutierrez-Fons 2008, p 700. They state that if process rights are to have any meaning, it is difficult to see how the requirement of reasoning can be complied with retrospectively.

the reasons for the act during the proceedings before the EU Courts. The CFI has followed this case-law in cases concerning EU sanctions and has held that the possibility of regularising the total absence of a statement of reasons after an action has been started might prejudice the right to a fair hearing. The reason for that is that the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after he had lodged his application. The principle of equality of the parties before the EU Courts would accordingly be affected. In *KONGRA-GEL* the CFI held that the Council did not comply with the obligation to state reasons, by providing a statement of reasons after the adoption of the decision imposing the EU sanction and after the appeal before the CFI had been lodged. According to the Council it provided the statement as soon as reasonably possible after the contested decision in the light of the guidance provided by the *PMOI I* judgment. According to the CFI the Council's argument was based on the mistaken premise that the statement of reasons can be provided after the action before the EU Courts has commenced.¹⁷⁴

Application to specific cases

In several cases the CFI annulled the EU sanction because the decision did not comply with the requirement to state reasons. Sometimes the CFI based its annulment of the EU sanction solely on this ground.¹⁷⁵ In some cases there was a complete absence of a statement of reasons. In *Sison I* the CFI concluded that the contested decision did not comply with the obligation to state reasons

for they do no more than state [...] that it is 'desirable' or that it has been 'decided' to adopt an up-to-date list of the persons, groups and entities to which Regulation (EC) No 2580/2001 applies. Such general and formulaic wording is tantamount to a total failure to state reasons.¹⁷⁶

The CFI held in this case that the decision should have mentioned at the very least the national court judgments on which the decision was based.¹⁷⁷ Furthermore it ought to have indicated, subject to their possibly being of a confidential nature, the main reasons why the Council took the view, in the

¹⁷⁴ Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 100. See also Case T-256/07, *People's Mojahedin Organization of Iran* [2008], para 90 and Case T-341/07, *Sison v Council* [2009], para 182.

¹⁷⁵ Tridimas & Gutierrez-Fons 2008, p 721. They mention *KONGRA-GEL*, *PKK* and *AL-Aqsa*. In their view the severe limitations on the right to a hearing recognised by the CFI and the fact that it may be reduced to no more than the right to be notified of the evidence at the time when the decision is adopted, it is difficult to see what it adds to the requirement to give reasons.

¹⁷⁶ Case T-47/03, *Sison v Council* [2007], para 216. See also Case T-327/03, *Stichting Al Aqsa v Council* [2007], para 55.

¹⁷⁷ See also Case T-327/03, *Stichting Al Aqsa v Council* [2007], paras 60-64 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 166.

exercise of its discretion, that the applicant was to be the subject of such a decision on the basis of those judgments.¹⁷⁸

In later cases in which the Council did state reasons for the EU sanction, the CFI seems to be satisfied rather easily. In *Melli Bank* the CFI deemed sufficient a statement of reasons which was in its own words 'exceptionally concise'.¹⁷⁹ In the *PMOI II* case the CFI found that the Council sent to the applicant 'a statement clearly and unambiguously explaining the reasons which, in its opinion, justified the applicant's continued inclusion in the list at issue [...]'. It took into account that the statement contained specific examples of acts of terrorism as referred to in the relevant EU provisions for which the applicant was said to be responsible. Apparently the Council did not need to explain why these acts made the freezing of funds necessary.¹⁸⁰ Furthermore the CFI referred to the fact that the decision stated that, because of those acts, a decision had been taken by a competent authority of the United Kingdom to proscribe the applicant as an organisation concerned in acts of terrorism and that that decision was subject to review under the applicable United Kingdom legislation and that it was still in force.¹⁸¹ In the same judgment the CFI held however that the statement of reasons with regard to a later decision to continue the EU sanction was obviously insufficient as it did not make it possible to grasp how far the Council took into account a new national decision, in which it was held that the organisation concerned was no longer concerned in terrorism.¹⁸² Moreover the CFI took into account that the decision did not explain the actual specific reasons why the Council took the view in spite of this decision that the continued inclusion of the applicant in the terrorist list remained justified.¹⁸³

178 Case T-47/03, *Sison v Council* [2007], para 217. See also Case T-253/04, *KONGRA-GEL and others v Council* [2008], para 98.

179 Joined Cases T-246/08 and T-332/08, *Melli Bank v Council* [2009], paras 146-151. See also Case T-390/08, *Bank Melli Iran v Council* [2009], paras 12 and 84-85.

180 Case T-256/07, *People's Mojahedin Organization of Iran* [2008], para 90. See also Case T-341/07, *Sison v Council* [2009], paras 65-66 and Case T-49/07, *Fahas v Council* [2010], para 57, where the CFI held that having regard to the broad discretion enjoyed by the Council with regard to taking EU sanctions, the Council does not need to state in what way the freezing of the applicant's funds may in concrete terms contribute to the fight against terrorism or prove that the applicant might use his funds to commit or facilitate act of terrorism in the future.

181 Case T-256/07, *People's Mojahedin Organization of Iran* [2008], para 90. See also Case T-341/07, *Sison v Council* [2009], para 64.

182 The national authority held that there was such a lack of evidence that the decision to proscribe the organisation could be defined as unreasonable and perverse. Case T-256/07, *People's Mojahedin Organization of Iran* [2008], para 90. See also Case T-341/07, *Sison v Council* [2009], para 184.

183 Case T-256/07, *People's Mojahedin Organization of Iran* [2008], para 90. See also Case T-341/07, *Sison v Council* [2009], paras 177-185.

10.1.2.4 The right to an effective remedy

As was already stated in section 10.2.2.1 decisions imposing EU sanctions may be subjected to judicial review by the EU Courts.¹⁸⁴ The CFI has addressed the scope of judicial review in cases regarding autonomous EU sanctions extensively in the *PMOI I* case. The CFI is of the view that it must first of all ensure that the legal conditions for imposing the EU sanction are fulfilled. The judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it and to the evidence and information on which that assessment is based. Secondly the Court must ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied. In this context it must examine whether the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.¹⁸⁵ The restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial. According to the CFI judicial review is, in cases concerning EU sanctions, 'all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights.'¹⁸⁶ It follows from these considerations that the CFI reviews whether the refusal to communicate certain evidence to the party concerned is justified.¹⁸⁷ The General Court derived from the Court of Justice's judgment in *Kadi* that the same extent of judicial review must be applied in cases regarding EU sanctions based on UN Security Council resolutions. It considered in this regard:

It is obvious from [...] the judgment of the Court of Justice in *Kadi* and from the reference made there to the judgment of the European Court of Human Rights in *Chahal v. United Kingdom* [...] that the Court of Justice intended that its review, 'in principle [a] full review', should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in the measure are based.¹⁸⁸

184 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 343 and Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 156.

185 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 153-154.

186 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 155. See also Case C-550/09, *E and F* [2010], para 57.

187 See for example Case T-47/03, *Sison v Council* [2007], paras 212 and 223.

188 Case T-85/09, *Kadi v Commission* [2010], para 135. The General Court derived this from the Court of Justice's judgment in *Kadi*.

The EU Courts have made it very clear that the evidence underlying the contested decision must be sent to them.¹⁸⁹ The CFI held in the *PMOI III* case that

the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.¹⁹⁰

If the Council does refuse to send the relevant confidential evidence the Court is not able to conduct its judicial review.¹⁹¹

The General Court has recognised that in cases regarding autonomous EU sanctions the Council enjoys broad discretion in its assessment of the matters to be taken into account for the purpose of imposing EU sanctions. As a result the intensity of judicial review is limited. The EU Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council.¹⁹² However the Court also held that

that does not mean that the Court is not to review the interpretation made by that institution of the relevant facts [...]. The Community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.¹⁹³

189 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 155, where the CFI held that it must be able to review the lawfulness and the merits of the measures to freeze funds 'without it being possible to raise objections that the evidence and information is secret or confidential. See also for example Case T-47/03, *Sison v Council* [2007], para 202.

190 Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], para 73.

191 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 351.

192 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 159. Here the CFI referred to the ECtHR's case-law in *Leander v Sweden* and *Al-Nashif v Bulgaria*. In other judgments concerning EU sanctions in which the same consideration is used, the CFI referred to its standing case-law concerning the intensity of judicial review in other fields of EU law, such as Case C-525/04 P, *Spain v Lenzing* [2007]. See for example Case T-256/07, *People's Modjahedin Organization of Iran* [2008], paras 138-139 and Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], para 55.

193 Case T-85/09, *Kadi v Commission* [2010], para 142. The General Court referred by analogy to Case C-525/04 P, *Spain v Lenzing* [2007], a State aid case. With regard to the intensity of judicial review performed by the EU Courts see also section 9.2.1.

The existence of a national decision on which the EU sanction should be based, is for example subjected to (more) rigorous review.¹⁹⁴ The Court pays more deference to the EU Institution's assessment of the factors as to appropriateness on which decisions to freeze funds are based.¹⁹⁵ The General Court held that these standards for the intensity of judicial review also apply to cases regarding EU sanctions based on UN Security Council resolutions.¹⁹⁶ It even held that the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned.¹⁹⁷

Possible limitations to the right to an effective remedy

It follows from the EU Courts' case-law that also during appeal overriding considerations to do with safety or the conduct of the international relations of the EU and of its Member States may militate against the communication of certain matters to the parties concerned.¹⁹⁸

Possible compensation for limitations to the rights of the defence during the appeal

In *Kadi* the Court of Justice stated that if certain evidence cannot be communicated to the parties during the appeal phase

it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.¹⁹⁹

The Court has not further explained what kind of techniques could be applied. It only referred to the ECtHR's case-law in *Chahal v the United Kingdom*, in which such techniques were mentioned for the first time. It concerned the use of special advocates who act on behalf of the party to which certain information is not disclosed and who can examine and comment on this information. After

194 See for example Case T-284/08, *People's Mojahedin Organization of Iran v Council* [2008], where the CFI held that the information provided by the Council did not enable either the applicant or the Court to verify that the contested decision was adopted on the basis of a national decision in the meaning of Art 1 (4) of Common Position 2001/93. In Case T-341/07, *Sison v Council* [2009], paras 107-115 the CFI held that the national judgments on which the contested decision was based did not constitute national decisions in the meaning of Art 1 (4) Common Position 2001/931.

195 Case T-256/07, *People's Mojahedin Organization of Iran* [2008], para 138.

196 Case T-85/09, *Kadi v Commission* [2010], para 139.

197 Case T-85/09, *Kadi v Commission* [2010], para 151.

198 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 342-344.

199 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 344.

the judgment in *Kadi* the ECtHR further addressed such techniques as applied in the United Kingdom. This case-law will be discussed below in section 10.3.4. Apparently the Court of Justice finds that it should apply such techniques if necessary to compensate the limitations of the party's right of the defence. The CFI has also mentioned such techniques, but it has not ruled on the question whether they can or should be applied by it.²⁰⁰

Application to specific cases

Because of the strict relationship between the right to be heard, the obligation to state reasons and the right to an effective remedy, the EU Courts found a violation of the right to an effective remedy in all cases in which those first two rights had been infringed. According to the Court the applicants were not able to defend their rights with regard to the evidence underlying the decision in satisfactory conditions before the Court.²⁰¹ In the *Bank Melli Iran* and *Fahas* cases, in which the right to be heard and the obligation to state reasons were not violated, the CFI did not find a violation of the right to an effective remedy.²⁰²

In most cases the Council had taken the opinion that confidential evidence underlying the EU sanction could not be disclosed to the EU Courts. The EU Courts have criticised this 'fundamental position' adopted by the Council.²⁰³ In *PMOI III* the CFI considered that the Council had not explained why the production of relevant information or material in the file would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not.²⁰⁴ In cases in which the confidential evidence was not disclosed to the EU Court the violation of the applicant's right to be heard was not remedied

200 See for example Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 158, Case T-47/03, *Sison v Council* [2007], para 205, where it considered that 'the question whether the applicant and/or his lawyers may be provided with the evidence and information alleged to be confidential, or whether they may be provided only to the Court in accordance with a specific procedure which remains to be defined so as to safeguard the public interest at issue whilst affording the party concerned a sufficient degree of judicial protection, is a separate issue on which it is not necessary for the Court to rule in the present action'.

201 See for example Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 349, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 158, Case T-47/03, *Sison v Council* [2007], para 165, Case T-318/01, *Othman v Council and Commission* [2009], para 86 and Case T-327/03, *Stichting Al Aqsa v Council* [2007], para 64.

202 Case T-390/08, *Bank Melli Iran* [2009], para 106, Case T-49/07, *Fahas v Council* [2010], paras 59-62.

203 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 350.

204 Case T-284/08, *People's Modjahedin Organization of Iran v Council* [2008], paras 72 and 76.

during the appeal proceedings before these Courts.²⁰⁵ Furthermore the EU Courts found that they were not able to undertake the review of the lawfulness of the contested decision.²⁰⁶

10.1.2.5 Subconclusion: the use of secret information in EU sanction cases

The outright refusal of the Council to state reasons for decisions concerning EU sanctions and to disclose any evidence underlying these decisions to the parties concerned and the EU Courts, lead to a series of annulments of such decisions. In their judgments the EU courts made clear that also in cases concerning measures aiming at combating terrorism, EU fundamental rights, such as the rights of the defence and the right to an effective remedy must be respected. Limitations to these rights are only acceptable in exceptional situations. The Courts stressed the importance of judicial review of EU sanctions, as it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Therefore all the evidence underlying the contested EU sanction must be sent to the EU Courts.

The case-law of the EU Courts in the field of EU sanctions is still developing, and there are still few cases in which the EU Courts have applied the obligation to state reasons, the right to be heard and the right to an effective remedy to decisions in which the Council attempted to comply with these principles. Therefore it is not easy to draw conclusions as to the scope of the limitations allowed to these principles by the EU courts. The EU Courts have for example not yet addressed possible methods, such as the provision of non-confidential versions of documents, which aim to reconcile the interests of the Council and the Member States to keep certain information confidential and the rights of the defence. However, the CFI's judgment in *PMOI* indicates that the scope of exceptions for the right to be heard and the obligation to state reasons is wide,²⁰⁷ wider than in competition cases. First of all the right to be heard and potentially the obligation to state reasons do not need to be complied with

205 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 350.

206 See for example Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 351, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 166, Case T-284/08, *People's Mojahedin Organization of Iran v Council* [2008], para 76. See differently Case T-390/08, *Bank Melli Iran* [2009], para 106, where the CFI held that it was in the position fully to carry out its review.

207 See also Tridimas & Gutierrez-Fons 2008 pp 717-718. They state that the scope for exceptions which are recognised as conterminous for both the right to a hearing and the obligation to state reasons is vast. Furthermore they point at the fact that the fact that limitations to those rights may be justified in the interests of the conduct of the international relations of the EU and its Member States 'may provide vital breathing space for the political decision-makers where evidence emanates from intelligence provide by third states.'

during the administrative procedure. Unlike in competition cases, the right to be heard may be exercised only during the appeal procedure before the EU Courts. Secondly at least in cases regarding autonomous EU sanctions the General Court does not seem to set very strict requirements as to the detail of the statement of reasons and the evidence which should be provided to the party concerned. In some cases the General Court seemed to be satisfied with a very concise statement of reasons and very limited access for the parties concerned to the Council's file. In cases regarding EU sanctions based on UN Security Council resolutions the Court has set stricter requirements. The General Court ruled that the information provided to the person concerned must be sufficiently specific, so that this person can contest the allegations against him. In such cases the General Court follows the ECtHR's judgment in *A and others*. The difference in approach between the two sorts of cases may be explained by the fact that in autonomous EU sanction cases it is up to the national courts to assess the evidence substantiating the allegations of involvement in terrorism and guaranteeing procedural rights of the party concerned, while no judicial review exists on the UN level.

A reason to allow more limitations to procedural rights in EU sanction cases than in competition cases may be that the EU Courts deem national security of the EU and its Member States and their relations with third countries worthy of more protection than the interests of businesses in protecting their secrets. The EU Court have however not explicitly stated this in their judgments. Another explanation may be that the task of the Council and the EU Courts in autonomous EU sanction cases is rather limited: the core of the case is decided on the national level. The rights of the defence should thus essentially be ensured by the national administrative authorities and courts.

10.2 THE USE OF SECRET EVIDENCE UNDER INTERNATIONAL LAW

The use of secret information has been addressed by the ECtHR, the Committee against Torture, the Human Rights Committee and UNHCR. The body of case-law under the ECHR provides by far the most developed standards and will therefore be discussed at length in this section. First of all however a brief overview will be given of the views of the other supervising bodies.

The Committee against Torture and the Human Rights Committee have addressed the use of secret information in cases concerning national security in a few views in individual cases. In *Agiza v Sweden* the Committee against Torture considered that national security concerns might justify some adjustments to be made to the particular process of review. However, the mechanism chosen must continue to satisfy the requirements of effective, independent

and impartial review.²⁰⁸ In *Agiza* a violation of the procedural requirements under Article 3 CAT had occurred as no such review was available.²⁰⁹

The Human Rights Committee considered in *Ahani v Canada*, which also concerned a person who was to be expelled for national security reasons, that in the circumstances of national security involved, it was not persuaded that the procedure before the Canadian Federal Court in which the reasonableness of the security certificate was assessed, was unfair to the author. Nor did the Committee 'discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment [...]'. The Committee took into account that, in the Canadian Federal Court's "reasonableness" hearing on the security certification, the author was provided with a summary redacted for security concerns reasonably informing him of the claims made against him. Furthermore the Committee noted that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses.²¹⁰ The Committee did find a violation of Article 13 ICCPR regarding the appeal against the deportation order before the Canadian Supreme Court. The reason was that the Supreme Court did not grant the applicant enhanced procedural protections, including provision of all information and advice the Minister intended to rely on, receipt of an opportunity to address the evidence in writing and to be given written reasons by the Minister, because he had not made out a *prima facie* risk of *refoulement*. Such guarantees were provided in another, similar case before the Supreme Court in which a *prima facie* case risk was apparent.²¹¹

208 In its Concluding Observations on New Zealand of 19 May 2009, CAT/C/NZL/CO/5, ComAT expressed its concerns with regard to the continued issuance of security-risk certificates under the Immigration Act, which could lead to a breach of Art 3 of the Convention, as the authorities may remove or deport a person deemed to constitute a threat to national security, without having to give detailed reasons or disclose classified information to the person concerned.

209 ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003, para 13.8

210 The procedure before the Federal Court is described as follows in para 2.3 of the judgment. The Court assessed whether the Ministers' certificate was "reasonable on the basis of the information available". It examined the security intelligence reports *in camera* and heard other evidence presented by the Solicitor-General and the Minister, in the absence of the plaintiff. The Court then provided the author with a summary of the information, required by statute to allow the affected person to be "reasonably" informed of the circumstances giving rise to the certification while being appropriately redacted for national security concerns, and offered the author an opportunity to respond. The evidence taken into account by the Court in its decision included information gathered by foreign intelligence agencies which was divulged to the Court *in camera* in the author's absence on national security grounds. The Court also heard the author testify on his own behalf in opposition to the reasonableness of the certificate.

211 HRC 15 June 2004, *Ahani v Canada*, no 1051/2002.

In two complaints before the Committee against Torture against Sweden a report was drawn up by the Swedish embassy in Ankara in which it was concluded that part of the applicants' asylum account was not true and/or documents provided by them were not authentic. Both reports were based on information obtained from anonymous sources and the applicants complained that they were therefore unable to effectively challenge the findings contained in the reports. In one case the Committee against Torture refused to take the report into account because it had been submitted by the State authorities after the national proceedings had been concluded. As a result 'the applicant had not had an opportunity either to contest the information provided therein or to challenge the investigator whose name has not been revealed before the domestic authorities'.²¹² In the other case the Committee did not deem the applicants' complaint regarding the use of anonymous sources well-founded. Instead it considered that the applicants had failed to disprove the State's findings regarding the authenticity of the documents adduced by them.²¹³ The Committee thus seems to accept that information provided by anonymous sources is included in the assessment of the credibility of an asylum account.

Finally UNHCR addressed the use of secret information in proceedings in which a person is excluded from refugee status on the basis of Article 1F of the Refugee Convention. According to UNHCR such exclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned. It accepts however that 'exceptionally, anonymous evidence (where the source is concealed) may be relied upon, but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker's ability to challenge the substance of the evidence is not substantially prejudiced'. Furthermore UNHCR states that 'secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude. Where national security interests are at stake, these may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights'.²¹⁴

It should be concluded that the supervising bodies mentioned above find that expulsion measures based on national security should be subjected to judicial review. They accept however that national security reasons or other interests of the State may limit the procedural guarantees offered in asylum or deportation proceedings. It does not follow from these views to what extent

212 ComAT 21 November 2008, *E.J. et al. v Sweden*, no 306/2006.

213 ComAT 2 May 2007, *E.R.K. and Y.K. v Sweden*, nos 270/2005 and 271/2005, paras 2.7, 5.4 and 7.5. The applicants only stated with regard to the Embassy report that the discrepancies in the documents were merely "alleged formal errors" and that they lack the means and necessary legal expertise to make any further comments.

214 UNHCR Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05) 4 September 2003, para 36.

procedural safeguards may be limited. The ECtHR's case-law discussed in the next section provides for much more guidance on this point.

10.2.1 The ECtHR's case-law on secret evidence

The ECtHR has addressed the use of confidential information in complaints under several provisions of the Convention and in very different sorts of cases. Usually the Court examines in such complaints whether the right of adversarial proceedings (and sometimes the right to equality of arms) has been complied with. The right to adversarial proceedings has been recognised under Articles 5 (4), 6 (1) civil and criminal limb, 8, 9, 13 and Article 1 of Protocol 7 ECHR.²¹⁵ Cases falling within the scope of Articles 5 (4), 6 (1) civil limb and 8 ECHR often concern measures, which are intended to protect the national security of the State. Examples are detention of persons suspected of being involved in terrorist activities, secret surveillance of persons, the issuing of certificates by the State relating to a person's danger for national security, which may result in a person losing or not obtaining a job or the expulsion or non-admission of persons on national security grounds. In these cases (some of) the evidence underlying the decision to take such measures are not disclosed to the person concerned for national security reasons. In criminal cases evidence may not be disclosed to the accused in order to protect witnesses or the State's interest in keeping secret police methods of investigation of crime.

The case-law of the ECtHR only concerns the guarantees which should be offered during the (appeal) proceedings before a national court (art. 5 and 6) or a national independent authority (art. 13). This is thus different than the case-law of the EU Courts examined in the previous sections, which also regarded the guarantees required during the administrative proceedings before the EU institutions.

The ECtHR has recognised that the national court or independent authority dealing with an appeal against a decision may need to afford a wide margin of appreciation to the executive in matters of national security. However this does not mean that as soon as the executive has chosen to invoke the term "national security" the decision may escape any review by the court or independent authority.²¹⁶ Under Article 6 ECHR the ECtHR held that the right to

215 This follows from the fact that Art 1 of Protocol 7 requires that the expulsion of an alien lawfully resident is 'in accordance with the law'. The phrase 'in accordance with the law' has a similar meaning throughout the Convention and its Protocols. Under Artt 8 and 9 the Court held that the right to adversarial proceedings flows from this requirement. See ECtHR 24 April 2008, *C.G. and others v Bulgaria*, no 1365/07, para 73. This section will not further address Art 9 ECHR and Art 1 of Protocol 7 ECHR.

216 See for example with regard to Art 13 ECHR: ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 94 and 137. The ECtHR considered with regard to Art 5 ECHR that 'national authorities cannot do away with effective control of lawfulness of detention by

submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive.²¹⁷ Also under Articles 8, 9 and 13 ECHR the Court has held that a national independent authority must be able to review whether invoking national security as the basis for measures against a person is reasonable and not arbitrary.²¹⁸ The existence of a meaningful and independent review of measures is a necessary guarantee against arbitrariness and abuse of power.²¹⁹ In several cases the ECtHR found a violation of Article 6 (1), 8, or 13 ECHR because the national court or independent authority could not review the decision that the person concerned was a danger to national security, did not examine relevant facts and evidence and in some cases confined itself to 'a purely formal examination'.²²⁰

According to the Court the limits of the notion of national security should not be stretched beyond its natural meaning.²²¹ In *C.G. v Bulgaria* the ECtHR held that drugs offences are not capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the conclusion that, if not expelled, the applicant would present a national security risk in the future.²²² The same was considered with regard to allegations of human trafficking in *Raza v Romania*.²²³ In several cases the ECtHR was impeded to

the domestic courts whenever they choose to assert that national security and terrorism are involved.' See also ECtHR 26 July 2011, *Liu v Russia*, no 29157/09, para 88.

217 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 77. See also ECtHR 30 October 2001, *Devlin v the United Kingdom*, no 29545/95, para 31 and ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, para 28.

218 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 124 (Art 8) and 137 (Art 13). See under Art 9 ECtHR 12 February 2009, *Nolan and K. v Russia*, no 2512/04, para 71.

219 See for example ECtHR (Adm) 1 March 2005, *Haliti v Switzerland*, no 14015/02, where the ECtHR held 'qu'on ne se trouve pas dans une situation dans laquelle il n'existait aucune garantie contre l'arbitraire et l'abus du pouvoir d'appréciation laissé aux organes appartenant à l'exécutif de l'Etat.' See also ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04, paras 38 and 42, ECtHR 26 July 2011, *M. and Others v Bulgaria*, no 41416/08, para 102.

220 See for example ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99 and ECtHR 26 July 2011, *Liu v Russia*, no 29157/09 (Arts 8 and 13 ECHR), para 89, ECtHR 24 April 2008, *C.G. v others v Bulgaria*, no 1365/07, paras 47 and 50 (Art 8 and Art 1 of Prot. 7), ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04, para 41 (Art 8), ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, paras 75 and 77 (Art 6).

221 ECtHR 24 April 2008, *C.G. v others v Bulgaria*, no 1365/07, para 43.

222 ECtHR 24 April 2008, *C.G. v others v Bulgaria*, Appl. no 1365/07, para 43.

223 ECtHR 11 February 2010, *Raza v Romania*, no 31465/08, para 53. In *Guliyev v Lithuania* the Court concluded that no objective materials verified by the domestic courts had been presented to the ECtHR to demonstrate that the domestic authorities had good reasons to suspect the applicant of being a threat to national security. ECtHR 16 December 2008, *Guliyev v Lithuania*, no 10425/03, para 46. See also under Art 9: ECtHR 12 February 2009, *Nolan and K. v Russia*, no 2512/04, para 72.

assess whether the measure could be justified in the light of national security because the State failed to provide it with relevant documents.²²⁴

It is important to remember that national security concerns cannot justify expulsion of a person to a country where he runs a real risk of *refoulement*.²²⁵ Secret evidence substantiating that a person poses a risk to national security therefore cannot play a role in the rigorous scrutiny required in Article 3 ECHR cases. In *A v the Netherlands* in which the ECtHR found that the expulsion of the applicant would violate Article 3, secret evidence had been used by the national authorities to justify the refusal of an asylum status. This evidence had not been included in the assessment whether expulsion of the applicant would infringe Article 3 ECHR. The ECtHR did not find a violation of Article 13 ECHR reiterating that the right to political asylum is not explicitly protected by either the ECHR or its Protocols. It considered that the secret materials did not, as such, concern the applicant's fear of being subjected to ill-treatment in Libya but whether he was posing a threat to the Netherlands national security. The fact that this information was disclosed (with the applicant's permission) to the national courts which also reviewed the decision regarding the risk of *refoulement* did not, in the ECtHR's view, compromise the independence of those courts.²²⁶

As was pointed out in the introduction to this chapter secret evidence may also be used by national authorities in order to assess the credibility of the asylum seeker or establish the facts. The ECtHR has ruled in two asylum cases in which the Government relied on country of origin information provided by anonymous sources.²²⁷ These cases will be further discussed in section 10.3.4.

In a way asylum cases in which secret information is used to establish the facts are comparable to criminal cases. In both sorts of cases the national court or authority must review the facts rigorously. In expulsion or other cases falling within the scope of Article 8 the situation is different. In such cases secret evidence is used in order to justify an interference with the right to family life. National authorities enjoy a wide margin of appreciation when deciding whether national concerns exist and whether they justify the interference with the right to private or family life. National courts may therefore pay deference

²²⁴ See for example ECtHR 11 February 2010, *Raza v Romania*, no 31465/08, para 53.

²²⁵ ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 151, where the ECtHR considered that in Art 3 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 [...], the notion of an effective remedy under Article 13 [...] requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 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'.

²²⁶ ECtHR 20 July 2010, *A v the Netherlands*, no 4900/06, para 160.

²²⁷ ECtHR 22 September 2011, *H.R. v France*, no 64780/09, para 61 and ECtHR 2 June 2011, *Sufi and Elmi v the United Kingdom*, nos. 8319/07 and 11449/07, paras 233-234.

to those decisions. It may therefore be expected that the ECtHR will follow its case-law concerning criminal cases under Article 6 in asylum cases in which secret evidence is used in the assessment of the risk of *refoulement*. As will be pointed out in section 10.3.2 the ECtHR has already applied the guarantees required by the criminal limb of Article 6 (1) to detention and administrative cases, taking into account the nature of the case.

10.2.2 The right of adversarial proceedings: level of procedural protection.

The ECtHR has recognised that all procedures governed by Articles 5 (4),²²⁸ 6,²²⁹ 8²³⁰ and 13²³¹ ECHR must be adversarial and that in those proceedings the principle of equality of arms must be respected.²³² The principle of adversarial proceedings entails that the parties to a trial have knowledge of and are able to comment on all evidence adduced or observations filed.²³³ The principle of equality of arms 'requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a

228 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 204.

229 In some cases under Art 6 the ECtHR examined the complaints regarding the use of secret evidence under the right of access to court. See for example ECtHR 10 July 1998, *Timmelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92 and ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94.

230 In Art 8 cases the right to adversarial proceedings is usually derived from the 'quality of law criterion' which follows from the requirement that an interference with the right to family or private life must be 'in accordance with the law'. In ECtHR 19 October 2010, *Özpinar v Turkey*, no 20999/04, the Court took into account the lack of adversarial proceedings in the proportionality test under Art 8.

231 See ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, para 123, where the Court held under Art 8 that 'even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence'. In para 137, under the complaint regarding Art 13 the ECtHR also stated that there must be some form of adversarial proceedings.

232 Trechsel notes that in the ECtHR's case-law, the right to adversarial proceedings is not always clearly separated from the principle of equality of arms. Trechsel 2005, p 90.

233 ECtHR (GC) 22 January 1996, *Lobo Machado v Portugal*, no 15764/89, para 31. In criminal cases the right to an adversarial trial means 'that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party'. See ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 21. Harris and others also considered the requirement that the prosecution must disclose to the defence all material evidence in their possession for or against the accused, whether or not they use it in the proceedings, to be a part of the right to adversarial proceedings. See Harris, O' Boyle & Warbrick 2009, p 254. Trechsel states with regard to criminal cases that the right to adversarial proceedings applies irrespective of whether the material of the other party concerns the establishment of the facts, legal argument on the merits or procedural issues. Trechsel 2005, p 90.

substantial disadvantage vis-à-vis his opponent.²³⁴ The general requirements derived from both principles seem to be the same for all cases (civil, criminal or other) governed by the ECHR.²³⁵ As will be further explained below the specific application of those principles may however differ according to the nature of the case. Practically all case-law examined below addressed the issue of non-disclosure of evidence under the right to adversarial proceedings and not under the right to equality of arms.²³⁶ Therefore in further sections reference will be made to the right to adversarial proceedings only.

Relevance of the nature of the case

The level of procedural protection under the right to adversarial proceedings depends on the nature of the case. Arguably the highest level of protection is offered in criminal cases falling within the scope of Article 6 (1) and (3) ECHR. The ECtHR decided to apply these high standards also in some cases falling within the scope of the civil limb of Article 6 and even other provisions of the Treaty. In *A and others v the United Kingdom* the ECtHR considered that because a suspicion of terrorism was the reason for the detention and

in view of the dramatic impact of the lengthy – and what appeared at the time to be indefinite – deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect.²³⁷

In *Pocius v Lithuania* and *Aksoy v Turkey*, both cases falling within the scope of the civil limb of Article 6 ECHR the Court also applied these guarantees while referring to the circumstances of the case. In *Pocius* the applicant had contested being implicated in criminal activities as a ground for listing his name in an operational records file, as a result of which the applicant's permit to keep and carry a firearm had been revoked.²³⁸ The *Aksoy* case concerned disciplin-

234 ECtHR 27 October 1993, *Dombo beheer v the Netherlands*, no 14448/88, para 33. See also section 4.3.7.

235 In ECtHR 27 January 1997, *Nideröst-Huber v Switzerland*, no 18990/91, the ECtHR explicitly considered that the requirements derived from the right to adversarial proceedings are the same in both civil and criminal cases. See also Van Kempen 2009, p 437.

236 Trechsel states that access to documents is *the* issue which falls to be considered under the heading of the right to adversarial proceedings. He notes however that the ECtHR does not always follow a clear and consistent approach and often combines or mixes the right to adversarial proceedings and the right to equality of arms. Trechsel 2005, p 101.

237 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 217.

238 ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 53. See also ECtHR 6 July 2010, *Užukauskas v Lithuania*, no 16965/04, para 47.

ary proceedings against a nurse who was working for a military academy for medicine in Turkey.²³⁹

With regard to Article 5 (4) ECHR, the Court held that this provision ‘does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. According to the Court the Article 5 (4) procedure does not always need to meet the standards required under the civil and criminal limb of Article 6 ECHR. However, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. The procedure must be adversarial and must ensure equality of arms. In detention on remand cases the detainee must have the opportunity to effectively contest the basis of the allegations against him, which means amongst others that he must have access to documents in the case-file which form the basis of the prosecution case against him.’²⁴⁰ In remand cases as well as other cases in which a suspicion against the detainee is the ground for detention (like in *A and others*) and/or the detention has great impact on the detainee, Article 6 ECHR standards are incorporated into Article 5 (4) ECHR.²⁴¹ It may thus be assumed that in other kinds of detention cases, lower standards may apply.

The lowest standards seem to apply to cases concerning secret surveillance and the use of secret information for screening job candidates who would have access to sensitive information, governed by Article 13 ECHR. In these cases the ECtHR accepted that a remedy must be ‘as effective as can be’. According to the ECtHR it is inherent in any system of secret surveillance or secret checks that there would be a restricted scope for recourse. Such a system can only function if the individual concerned remained unaware of the measures affecting him.²⁴² In those cases the Court did not find a violation of Article 13 ECHR although the available remedies only had limited effectiveness.²⁴³

Level of procedural protection under Article 3 ECHR

The Court suggests in *Chahal* that the procedural safeguards under Article 3 are stronger than those derived from Article 13 in *Klass v Germany* and *Leander v Sweden*. It considered in *Chahal* that:

239 ECtHR 31 October 2006, *Aksoy v Turkey*, no 59741/00, para 27. Also in other cases the Court referred to the important consequences of a measure for the applicants, without that explicitly leading to higher procedural guarantees. See for example ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, para 27 and ECtHR 13 December 2007, *Dagtekin v Turkey*, no 70516/01, para 34.

240 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 203-204.

241 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 217.

242 ECtHR 26 March 1987, *Leander v Sweden*, no 9248/81, paras 78 and 84 and ECtHR (Plen) 6 September 1978, *Klass v Germany*, no 5029/71, para 69. See also ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 136-137.

243 ECtHR 26 March 1987, *Leander v Sweden*, no 9248/81, para 84 and ECtHR (Plen) 6 September 1978, *Klass v Germany*, no 5029/71, paras 70-72.

it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention [...] and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. 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 [...], where the issues concerning national security are immaterial.²⁴⁴

This consideration obviously refers to the fact that Article 3 ECHR is absolute and that national security issues cannot play a role in the assessment whether a person’s expulsion violates this provision. However, it may also be derived from this consideration that a remedy which is “as effective as can be” will never be sufficient in cases concerning Article 3 ECHR. Instead a rigorous scrutiny must take place.²⁴⁵ The ECtHR has never explicitly addressed the level of procedural protection which should be guaranteed in asylum cases in which the assessment of the risk of *refoulement* was partly based on secret evidence. Therefore it remains to be seen which standards apply in such cases and whether for example, taking into account the serious interests at stake for the person concerned, the highest standards developed under the criminal limb of Article 6 (1) ECHR apply.

Limited application of the requirement of a remedy which is ‘as effective as can be’
In *Al-Nashif v Bulgaria*, the ECtHR also distinguished cases regarding the expulsion of aliens on national security grounds falling within the scope of Article 8 ECHR from the cases concerning secret surveillance and the use of secret information for screening job candidates. It considered that in expulsion cases reconciling the interest of preserving sensitive information with the individual’s right to an effective remedy is obviously less difficult than in secret surveillance cases.²⁴⁶ In none of the later expulsion cases the Court applied the ‘as effective as can be’ criteria. It may therefore be assumed that in *expulsion* cases stricter procedural guarantees are required under Articles 8 and 13 than in cases concerning secret surveillance or secret checks.²⁴⁷

Finally in *Tinnelly and others v the United Kingdom* the ECtHR considered that the requirement of a remedy which is ‘as effective as can be’ cannot apply to civil cases falling within the scope of Article 6 (1) ECHR. The Court stressed in this respect ‘that the requirements of an “effective remedy” for the purposes of Article 13 of the Convention are less strict than those of Article 6 (1). For this reason, the Government’s assertion that the access enjoyed by the appli-

244 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 150.

245 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 151.

246 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, para 137.

247 The level of protection guaranteed under Artt 8 and 13 ECHR in expulsion cases seems to be the same.

cants was as effective as could be in the circumstances cannot be sustained'.²⁴⁸ Article 6 (1) ECHR thus offers more protection than Article 13. It does not directly follow from the case-law whether and if so with regard to which aspects the civil limb of Article 6 (1) ECHR offers less protection than its criminal limb with regard to the use of confidential information.

10.2.3 Limitations of the right to adversarial proceedings

In all sorts of cases, the ECtHR has recognised that the right to adversarial proceedings may be limited in special circumstances. In criminal cases the ECtHR held that the entitlement to disclosure of relevant evidence is not an absolute right. There may be reasons, such as the need to preserve the fundamental rights of another individual or to safeguard an important public interest, which justify a limitation of this right.²⁴⁹ Under the civil limb of Article 6 the Court has held that a limitation of the right of access to court is not compatible with the Convention if it does not pursue a legitimate aim.²⁵⁰ In *Al-Nashif* the Court considered in its ruling under Articles 8 and 13 that certain limitations on the type of remedies available to the individual may be justified where national security considerations are involved. Nevertheless, the remedy must remain effective in practice as well as in law.²⁵¹

The ECtHR has identified several interests which may justify limitations of the right to adversarial proceedings. In *Sufi and Elmi v the United Kingdom* the ECtHR recognised with regard to sources providing (country of origin) information for the purpose of the assessment of asylum cases, that 'where there are legitimate security concerns, sources may wish to remain anonymous'.²⁵² Similarly the ECtHR has considered that the need to protect witnesses at risk of reprisals may justify a limitation of the right to adversarial proceedings.²⁵³ The same applies to the need to keep secret police methods of investigation of crime.²⁵⁴ In *van Mechelen and others v the Netherlands*, a criminal case, the ECtHR accepted that it was necessary to preserve the anonymity of an agent deployed in undercover activities for his own or his family's pro-

248 ECtHR 10 July 1998, *Tinelly & sons Ltd and others and McElduff and others v the United Kingdom*, no 20390/92 and 21322/92, para 77.

249 See for example ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45.

250 ECtHR 10 July 1998, *Tinelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 72.

251 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 123 and 137.

252 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 233.

253 ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 70.

254 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45 and ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 52.

tection and so as not to impair his usefulness for future operations.²⁵⁵ In *Mirilashvili v Russia*, also a criminal case, the ECtHR considered that the aim of organising criminal proceedings in such a way as to protect information about the details of undercover police operations could legitimise the limitation to the right to adversarial proceedings.²⁵⁶

Furthermore the ECtHR has accepted under several provisions that limitations may be justified in order to protect national security.²⁵⁷ In *A and others* for example, which concerned the indefinite detention of persons suspected of involvement in terrorist activities, the Court pointed at the fact that ‘the activities and aims of the al’Qaeda network had given rise to a “public emergency threatening the life of the nation”’. According to the ECtHR it had therefore to

be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and [...] a strong public interest in obtaining information about al’Qaeda and its associates and in maintaining the secrecy of the sources of such information [...].²⁵⁸

Necessity of non-disclosure

In cases falling within the criminal limb of Article 6 (1) or in which the standards accepted under that provision were applied, the Court stated that only such measures restricting the rights of the defence which are ‘strictly necessary’ are permissible.²⁵⁹ If a less restrictive measure can suffice then that measure should be applied.²⁶⁰ ‘Relevant and sufficient’ reasons must

255 ECtHR 18 March 1997, *Van Mechelen and others v the Netherlands*, nos 21363/93, 21364/93, 21427/93 and 22056/93, para 57. See also ECtHR (Adm) 17 September 2005, *Haas v Germany*, no 73047/01, where anonymous informants risked becoming the victim of acts of revenge abroad, where German authorities could only protect them to a very limited extent.

256 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 202.

257 See for example under Art 5 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, under Art 6 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, Appl. nos. 20390/92 and 21322/92 and under Artt 8 and 13 ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99.

258 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 216-217. See also for example ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 76, where the Court stated that it was mindful of the security considerations at stake in that case and the need for the authorities to display the utmost vigilance in the award of contracts for work involving access to vital power supplies or public buildings situated in town centers in Northern Ireland. The Court has also accepted that State secrets should only be disclosed to persons who possess the appropriate authorisation. ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 54. However, the State must be able to prove that it is necessary to keep them secret. See for example ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 62.

259 See for example ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45 and ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 52.

260 ECtHR 18 March 1997, *Van Mechelen and others v the Netherlands*, nos 21363/93, 21364/93, 21427/93 and 22056/93, para 58.

be adduced by domestic authorities for the use of anonymous witnesses in criminal cases.²⁶¹ In *A and others v the United Kingdom* the ECtHR considered that 'it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others'.²⁶² This case-law presupposes a very strict test. It does not follow from the ECtHR's case-law whether such a strict test also applies to civil cases decided under Article 6 (1) ECHR.

Under Articles 8 and 13 ECHR the ECtHR has held that 'there must be some form of adversarial proceedings before an independent body competent to review the reasons for the decision, if need be with *appropriate procedural limitations* on the use of classified information' (emphasis added).²⁶³ This also suggests that limitations of the right to adversarial proceedings, such as the non-disclosure of evidence should be necessary.²⁶⁴

Assessment of the necessity of non-disclosure by the national court

The ECtHR has held under Articles 6 (1) and 5 (4) ECHR that the national court should decide whether it is justified to refuse disclosure of evidence to the party concerned.²⁶⁵ The Court found a violation of Article 6 (1) ECHR in several criminal cases in which State authorities (such as the public prosecutor or the security service) alone assessed the necessity of keeping relevant information secret.²⁶⁶ In *Mirilashvili v Russia* the ECtHR made clear that the mere involvement of a court in the decision whether evidence should be disclosed

261 See for example ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 71.

262 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 218.

263 ECtHR 6 December 2007, *Liu and Liu v Russia*, no 42086/05, para 59 and ECtHR 2 September 2009, *Kuashal and others v Bulgaria*, no 1537/08, para 29.

264 In ECtHR 11 February 2010, *Raza v Romania*, no 31465/08, para 55 the ECtHR considered that 'even in indisputable national security cases, such as those relating to terrorist activities, the authorities of countries which have already suffered from and are currently at risk of terrorist attacks have chosen to keep secret only those parts of their decision whose disclosure would compromise national security or the safety of others [...], thus illustrating that there exist techniques which can accommodate legitimate security concerns without fully neglecting fundamental procedural guarantees such as the publicity of judicial decisions'.

265 According to Van Dijk and others the Court attaches great importance to the fact that the need for disclosure is under constant assessment of the judge, who may monitor throughout the trial the fairness or otherwise of the disclosed evidence'. Van Dijk a.o. 2006, p 588. See also ECtHR 24 April 2007, *V. v Finland*, no 40412/98, para 77.

266 See for example ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, paras 63-66, ECtHR 19 June 2001, *Atlan v the United Kingdom*, no 36533/97, para 44 and ECtHR 24 June 2003, *Dowsett v the United Kingdom*, no 39482/98, para 44. In these cases the prosecution decided during the applicants' trial, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. In ECtHR 24 September 2007, *Matyjek v Poland*, no 38184/03, para 57 the Court observed that it has considered the power of the Head of the State Security Bureau to uphold and lift the confidentiality of documents inconsistent with the fairness of lustration proceedings including with the principle of equality of arms.

to a party is not sufficient.²⁶⁷ In this case the Court found that the decision-making process was seriously flawed because the domestic court did not analyse amongst others whether the disclosure of the materials withheld from the applicant would, at least arguably, have harmed any identifiable public interest.²⁶⁸ Finally in several criminal cases, the fact that the national court did review the necessity of the non-disclosure of confidential information, was taken into account in the Court's ruling that Article 6 (1) ECtHR had not been violated.²⁶⁹

In criminal cases the fact that evidence was not revealed to the court of first instance, which as a result could not examine the necessity of the non-disclosure of this evidence to the applicant, can sometimes be compensated during appeal proceedings.²⁷⁰ In *Botmeh and Alami v the United Kingdom* the ECtHR took into account that

given the extend of disclosure to the applicants of the withheld material by the Court of Appeal,²⁷¹ the fact that the court was able to consider the impact of the new material on the safety of the applicant's conviction in the light of detailed argument of their defence council and the fact that the undisclosed material was found by the court to add nothing of significance to what had already been disclosed at trial [...] the failure to place the undisclosed material before the trial judge was in particular circumstances of the case remedied by the subsequent procedure before the Court of Appeal.²⁷²

By contrast in *Rowe and Davis v the United Kingdom* the Court did not find the procedure before the appeal court sufficient to remedy the unfairness of the procedure at first instance. The Court took into account the fact that the Court of Appeal had fewer investigating powers than the court of first instance and the possibility that the Court of Appeal was influenced by the jury's verdict

267 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 197.

268 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, paras 206-208.

269 See for example ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 47 and ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 56.

270 See also Summers 2007, p 120.

271 The Court of Appeal had disclosed to the applicant's a summary of the information contained in one document and it gave an account of the events which had resulted in the fact that the undisclosed material had not been placed before the trial judge.

272 ECtHR 7 June 2007, *Botmeh and Alami v the United Kingdom*, no 15187/03, para 44. See also ECtHR 16 December 1992, *Edwards v the United Kingdom*, no 13071/87, paras 36-39. In this case the Court of Appeal examined the transcript of the trial including the applicant's alleged confession and considered in detail the impact of the new information on the conviction. The applicant's representatives had every opportunity to seek to persuade the court that the conviction should not stand in view of the evidence of non-disclosure. Furthermore it was open to counsel for the applicant to make an application to the Court of Appeal – which they chose not to do – to call witnesses.

of guilty into underestimating the significance of the undisclosed evidence.²⁷³ The ECtHR held that the fact that the Court of Appeal did not examine the non-disclosed material cannot in itself amount to a violation of Article 6 (1) ECHR, in the situation that no deficiencies were found in the first instance procedure.²⁷⁴

Arguably also under the civil limb of Article 6 (1) ECHR the executive cannot decide on its own on the necessity of confidentiality of information. This follows from the fact that the ECtHR has held that an applicant's right to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive.²⁷⁵

The Court has not considered yet whether Article 13 ECHR requires (in expulsion measures) that an independent authority rules on the necessity of the non-disclosure of evidence. In most expulsion cases decided under Articles 8 and 13 the national court had not received the confidential documents and/or had not reviewed the facts, let alone the necessity of the limitations of the right to adversarial proceedings. It may however be expected that the Court does not accept that it is left up to the full discretion of the executive authorities to decide whether national security concerns justify the refusal to disclose documents to the applicant. Such discretion could lead to arbitrariness and would not be in line with the ECtHR's case-law which implies that the national court should assess whether national security reasons justify limitations to the right to family life.

Examination of confidential evidence by the national court

The national court should assess whether invoking national security as a justification for a certain measure has a reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.²⁷⁶ Furthermore it must examine the necessity of the non-disclosure of the evidence. This presupposes that the court receives all the relevant evidence from the State.²⁷⁷ The ECtHR has made clear that the con-

273 ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, para 65 and ECtHR 19 June 2001, *Atlan v the United Kingdom*, no 36533/97, para 45. See also Trechsel 2005, p 93. In ECtHR 24 April 2007, *V. v Finland*, no 40412/98, para 79, the ECtHR held that the appeal could not remedy the defects during the proceedings in first instance, amongst others because there was no possibility of making informed submissions to the court on behalf of the accused as the applicant received the requested information only after the relevant time-limit for the appeal had elapsed.

274 ECtHR 11 January 2011, *McKeaown v the United Kingdom*, no 6684/05, para 54.

275 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 77. In ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para 203 the ECtHR distinguished the case from *Tinnelly* when considering that the decision to withhold certain documents was taken not by the prosecution unilaterally.

276 ECtHR 26 July 2011, *Liu v Russia*, no 29157/09, para 88.

277 ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, paras 63-66.

fidential information used by the State authorities should be disclosed to the national court (Articles 5 and 6 ECHR) or independent authority (Article 13 ECHR) hearing the case. If the court has not received all confidential information in the case-file it is not in the position to monitor the need for (non-) disclosure, but it is also not able to review the facts.²⁷⁸ In *Tinnelly v the United Kingdom* for example the Court considered that any substantive review of the grounds motivating the issues of a national security certificate would have been impaired because the court assessing the case did not have sight of all the materials on which the Secretary of State based his decision.²⁷⁹

Assessment of secret evidence by the ECtHR

In criminal cases in which the identity of witnesses was not disclosed to the applicant, the ECtHR has assessed itself whether the reasons for such non-disclosure were 'relevant and sufficient'.²⁸⁰ In criminal cases where evidence has been withheld from the defence of public interest grounds the ECtHR does not consider it to be its role to decide whether or not such non-disclosure was strictly necessary. As a general rule it is for the national courts to assess the evidence before them. The ECtHR has noted that in many cases it was not even placed in the position to perform a balancing test, as the information concerned was not revealed to it.²⁸¹ The ECtHR thus pays deference to the national decision whether certain evidence should be kept confidential for national

278 See for example ECtHR 24 April 2007, *V. v Finland*, no 40412/98, para 78, where the ECtHR considered that the courts did not, any more than the defence or the public prosecutor, have knowledge of the contents of the telephone metering information and they were not therefore in a position to monitor the relevance to the defence of the withheld information. The ECtHR furthermore held that in case of a plea of incitement, the court's duty to examine this plea and ensure the overall fairness of the trial requires that all relevant information (also information not included in the persecution file) be openly put before the court or tested in an adversarial manner. See ECtHR 4 November 2010, *Bannikova v Russia*, no 18757/06, para 64.

279 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 75. See for cases under Artt 8 and 13 ECHR for example ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04, para 41 and ECtHR 6 December 2007, *Liu and Liu v Russia*, no 42086/05, paras 61 and 63, where the Court considered that 'the domestic courts were not in the position to assess effectively whether the decision had been justified, because the full material on which it had been based was not made available to them'.

280 See for example ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 71 and ECtHR (Adm) 17 September 2005, *Haas v Germany*, no 73047/01, where the Court found that the domestic authorities adduced relevant and sufficient reasons to keep witnesses' identities secret. In that case anonymous informants risked becoming the victim of acts of revenge abroad, where German authorities could only protect them to a very limited extent.

281 See for example ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 53, ECtHR 24 June 2003, *Dowsett v the United Kingdom*, no 39482/98, para 43 and ECtHR 6 July 2010 *Pocius v Lithuania*, no 35601/04, para 53.

security reasons.²⁸² Instead, the ECtHR ensures that, as far as possible, ‘the decision-making process complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused’.²⁸³

In *Mirilashvili v Russia* the Court held that in situations involving “national security” considerations for withholding documentary evidence, the Court has applied a less exacting standard than in cases concerning the use of anonymous witnesses. The Court considered however that ‘that standard of scrutiny should not be applied automatically; the Court retains the power to assess independently whether the case involved national security considerations’.²⁸⁴ In a few cases regarding Article 6 ECHR the Court did indeed examine (at least marginally) whether the non-disclosure of evidence was justified. The Court has held with regard to lustration proceedings in general that, ‘unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes’.²⁸⁵ It is for the Government to prove the existence of a such an interest in maintaining documents secret.²⁸⁶ Furthermore in *Aksoy v Turkey* the Court considered that the case-file did not contain any element which could justify the non-disclosure of the documents on national security grounds or for other relevant reasons.²⁸⁷ In *A. and others v the United Kingdom* on the other hand the Court concluded that on the material before it, the Court had ‘no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants’ appeals or that there were not compelling reasons for the lack of disclosure in each case’.²⁸⁸

282 This is in line with the Court’s opinion that the State’s enjoy a wide margin of appreciation in their assessment whether national security justifies certain measures against a person, such as expulsion measures (see section 10.3.1). Summers states that the reason for the ECtHR’s deference is that the Court is not interested in acting as a Court of fourth instance. Summers 2007, p 118.

283 See for example ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 53, ECtHR 24 June 2003, *Dowsett v the United Kingdom*, no 39482/98, para 43 and ECtHR 6 July 2010 *Pocius v Lithuania*, no 35601/04, para 53. Trechsel notes that the words ‘as far as possible’ are somewhat vague, especially if read in conjunction with the refusal to ascertain whether the non-disclosure was ‘strictly necessary’. Trechsel 2005, p 93. Van Dijk and others state that in this regard it seems crucial whether the defence is informed, can make submissions and can participate in the decision-making process’. Van Dijk a.o. 2006, p 588.

284 ECtHR 11 December 2008, *Mirilashvili v Russia*, no 6293/04, para196.

285 ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 56.

286 ECtHR 14 June 2011, *Mościcki v Poland*, no 52443/07, para 44.

287 ECtHR 31 October 2006, *Aksoy v Turkey*, no 59741/00, para 28. The Court was able to assess the documents withheld to the applicant, as they were sent to the Turkish High Court six years after the (national) proceedings against the applicant were concluded.

288 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 219.

No cases were found in which the ECtHR addressed its own role in the assessment whether the non-disclosure of evidence to the applicant was justified under Articles 6 (1) civil limb and 13 ECHR. In many expulsion cases under Article 13 the State did not send the confidential evidence to the ECtHR, sometimes in spite of its request to do so.²⁸⁹

10.2.4 Confidentiality versus the right to adversarial proceedings

If there is an interest which legitimises a limitation to the right to adversarial proceedings, this interest and the right to adversarial proceedings must be balanced against each other. In *Tinnelly v the United Kingdom* the Court examined for example under Article 6 (1), civil limb

whether there existed a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal.²⁹⁰

In *A and others v the United Kingdom* the Court held that the important public interests of the State to maintain the secrecy of the sources of the information about al'Qaeda and its associates had to be balanced against the applicants' right under Article 5 (4) to procedural fairness.²⁹¹

It follows from the ECtHR's case-law that the State's interest to protect the national security of the State weighs heavily and may justify important limitations to the right to adversarial proceedings. Less weight may be attached to other State interests such as the prosecution or prevention of crimes which do not affect national security. In *C.G. v Bulgaria* the Court considered:

While actions taken in the interests of national security may, in view of the sensitivity of the subject-matter and the serious potential consequences for the safety of the community, attract considerably less in terms of guarantees than might otherwise be the case, an expulsion designed to forestall lesser evils such as run-of-the-mill criminal activities may have to be reviewed in proceedings providing a higher degree of protection of the individual.²⁹²

289 See for example ECtHR 11 February 2010, *Raza v Bulgaria*, no 31465/08, para 5 and ECtHR 16 December 2008, *Gulijev v Lithuania*, no 10425/03, para 45.

290 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 77. See also in the criminal context: ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45.

291 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 216-217.

292 ECtHR 24 April 2008, *C.G. and others v Bulgaria*, no 1365/07, para 45.

In several cases the Court stressed the need for procedural safeguards while referring to what was at stake for the applicant.²⁹³ In this section it will be explained how the balance between interests in keeping information confidential and the right to adversarial proceedings should be struck in practice.

It was already pointed out in sections 10.2.1 and 10.2.3 that national security concerns can never justify that evidence underlying the contested decision is withheld from the national court or independent authority. The court must be informed of the reasons grounding the contested decision and it should assess the merits of the case, including the existence of a threat to national security.²⁹⁴ This assessment by the court or independent authority is not sufficient. Certain procedural guarantees must be offered to the person concerned. The right to adversarial proceedings also requires that the person concerned is (in some way) informed of the decision and the reasons for it.²⁹⁵ In *Raza* the ECtHR regarded the complete concealment from the public of the entirety of a judicial decision in an expulsion case in which (according to the government) national security issues were at stake, not warranted.²⁹⁶

The need for compensation

When performing a balancing test it should be assured that the right to adversarial proceedings of the applicant be sufficiently guaranteed. In this light in several cases under various provisions of the Convention the ECtHR has addressed possibilities for compensation of limitations of the right to adversarial proceedings, notably the use of special advocates. In its assessment whether the right to adversarial proceedings has been infringed, the Court further takes into account the weight of the confidential evidence and the specificity of the open material in the case at hand. The issues of compensation and weight of confidential evidence will be discussed below.

293 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 217-218, ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 59, ECtHR 31 October 2006, *Aksoy v Turkey*, no 59741/00, para 27 and ECtHR 19 October 2010, *Özpınar v Turkey*, no 20999/04, para 78.

294 See for example under Art 6 (1), civil limb ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos. 20390/92 and 21322/92, para 77, ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, and under Artt 8 and 13 ECHR: ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99.

295 See ECtHR 24 April 2008, *C.G. v others v Bulgaria*, no 1365/07, para 46, where the ECtHR considered that lacking even outline knowledge of the facts which had served as a basis for this assessment, the first applicant was not able to present his case adequately in the ensuing appeal to the Minister of Internal Affairs and in the judicial review proceedings. See also ECtHR 8 June 2006, *Lupsa v Romania*, no 10337/04, para 58. See under Art (6) (1) civil limb also ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, para 27.

296 ECtHR 11 February 2010, *Raza v Romania*, no 31465/08, para 53.

In criminal cases and in cases in which the Court applied the guarantees flowing from the criminal limb of Article 6 ECHR,²⁹⁷ the ECtHR held that 'in order to ensure that the accused receives a fair trial any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities'.²⁹⁸ In the Grand Chamber judgments *Jasper v the United Kingdom* and *Fitt v the United Kingdom* the Court was satisfied that the decision-making procedure complied with the requirement of adversarial proceedings, although the defence did not have the opportunity to examine whether the evidence which was not disclosed to it, could be used in its favour. The Court took into account that the national court assessed whether the evidence had to be disclosed to the defence and that this court stated that it would have ordered disclosure if this 'did or might help further the defence'. The national court was in a position to effectively perform this assessment as it was fully versed in all evidence and issues in the case. Furthermore the defence were able during the course of the hearing to argue the case for disclosure and to hear the arguments of the prosecution court's reasons for not ordering complete disclosure. In *Fitt* the defence were also provided with a summary of the witness statement which was kept confidential.²⁹⁹ In these circumstances the Court did not find it necessary that a special counsel would participate in the proceedings.³⁰⁰

It should be noted that in *Jasper* and *Fitt* a substantial minority of the Court found that a violation of Article 6 (1) ECHR occurred and that a special advocate should be introduced in criminal proceedings in which confidential evidence is used. In their opinion in *Jasper* the dissenters took into account that the defence were not aware of the category of material which the prosecution sought to withhold from them and were not informed of the reasons for the judge's decision that the material should not be disclosed. However also in *Fitt*, where the defence were informed of the category of material which the prosecution sought to withhold and received an edited summary of the

297 See ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 218.

298 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45, ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 52, ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, paras 73-73.

299 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 47.

300 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, paras 47-49, ECtHR 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, paras 54-56. See also ECtHR (GC) 11 January 2011, *McKeown v the United Kingdom*, no 6684/05, where the ECtHR found no violation of Art 6 (1) ECHR because evidence was disclosed to a disclosure judge, who was fully aware of the issues in the case and concluded that none of the undisclosed material was relevant to the defence and that he did not anticipate any circumstances which would result in the material becoming of value to the defence. The Court of Appeal had considered and rejected the applicant's submission that fairness required that a special counsel should have been appointed or that the disclosure judge should have been put in the position to monitor the need for disclosure in the course of the proceedings.

material, the dissenters were of the opinion that the unfairness created by the defence's absence from the *ex parte* proceedings³⁰¹ could not be remedied by the fact that the judge monitored the need for disclosure of the evidence during the trial.³⁰² In several other cases the Court did not accept the domestic court's decision that there was no need to disclose evidence to the defence. It found a violation of Article 6 (1) ECHR because potentially exculpatory evidence was withheld from the applicant.³⁰³

Special counsels

The use of special counsels or special advocates as a technique to compensate for limitations of the right to adversarial proceedings in cases in which evidence is not disclosed to a party for national security reasons, was first mentioned by the ECtHR in the *Chahal v the United Kingdom* judgment. In this case intervening parties drew the Court's attention to a system applied in Canada in such cases. The interveners described the system as follows:

[A] Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.³⁰⁴

In its assessment of the complaint under Article 5 (4) ECHR the Court attached significance to the existence of such a system in Canada. In its view this example 'illustrates that there are techniques which can be employed which

301 In *ex parte* proceedings such as were applied in *Jasper*, *Fitt* and *Edwards and Lewis*, the judge examined the evidence which the prosecution wanted to keep secret without the presence of the defence counsel. There are three options in such proceedings: 1. the defence is informed of the category of the materials held by the prosecution and is able to make representations to the court, 2. the defence is not informed of the category of those materials and 3. the defence is not informed of the fact that an *ex parte* application was made. See ECtHR 22 July 2003, *Edwards and Lewis v the United Kingdom*, nos. 39647/98 and 40461/98, para 34.

302 See the dissenting opinions of judges Palm, Fischbach, Vajić, Thomassen, Tsatsa-Nikolovska and Traja, of judge Zupančič and of judge Hedigan with the *Jasper* and *Fitt* cases.

303 ECtHR 22 July 2003, *Edwards and Lewis v the United Kingdom*, nos. 39647/98 and 40461/98, para 58. This judgment was confirmed by the Grand Chamber. ECtHR (GC) 27 October 2004, *Edwards and Lewis v the United Kingdom*, nos. 39647/98 and 40461/98, ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, paras 63-65, where it concerned evidence which could have been used to undermine the credibility of a key prosecution witness.

304 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 144.

both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.³⁰⁵ After the *Chahal* judgment the United Kingdom also introduced a special counsel system.³⁰⁶ In several later cases under Articles 5 (4), 6 (1), 8 and 13 ECHR the Court again referred to the existence of special techniques, without expressing itself on the question whether such system would comply with those provisions.³⁰⁷

In *A and others v the United Kingdom* the ECtHR finally assessed the compatibility with Article 5 (4) ECHR of the special advocate procedure introduced in the United Kingdom. In the United Kingdom the confidential evidence was disclosed only to a special advocate who acted on behalf of the applicant. During the closed sessions before the Special Immigration Appeal Commission (SIAC) the special advocate could make submissions on behalf of the applicant as regards procedural matters, including the need for (further) disclosure of evidence as well as the substance of the case. From the moment the special advocate had sight of the closed material, he could not have any further contact with the applicant or his representative save with the permission of SIAC.³⁰⁸

The ECtHR ruled that it depends on the circumstances of the case, in particular the specificity of the information disclosed to the party concerned whether the use of a special advocate would sufficiently compensate this party's lack of access to documents. It considered that 'the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings'.³⁰⁹ However the Court also noted 'that the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'.³¹⁰ The Court concluded in *A and others* that the right to adversarial proceedings was infringed with regard to several of the applicants. The Court's considerations regarding the nature of the (non)disclosed evidence will be addressed below.

305 ECtHR (GC) 25 October 1996, *Chahal v the United Kingdom*, no 22414/93, para 131.

306 Bonner 2006, p 54.

307 See for example ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, no 50963/99, paras 95-97 and 137, ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 78, ECtHR 19 March 2002, *Devenney v the United Kingdom*, no 24265/94, para 28 and ECtHR 13 December 2007, *Dagtekin v Turkey*, no 70516/01, para 34. See also ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 209 and 211.

308 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 215.

309 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220.

310 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220.

Other compensation techniques

Apart from the use of special counsels, several other compensation techniques were reviewed by the ECtHR. In *Doorson v the Netherlands* the Court found that the limitations of the right to adversarial proceedings were sufficiently counter-balanced as the anonymous witnesses were questioned by an investigating judge, who was aware of their identity. The council for the defence was present at this hearing and was put in the position to ask questions to the witnesses, which were all answered.³¹¹

In several criminal cases the Court took into account that a non-confidential summary of the relevant evidence was sent to the applicant and that the applicant was able to contest the information contained in the summary.³¹² In *Botmeh and Alami v the United Kingdom* the extent of the disclosure to the applicants of the withheld material by the Court of Appeal in a summary was one of the factors which led to the Court's conclusion that the appeal proceedings complied with Article 6 (1) ECHR.³¹³ Also in *Haliti v Switzerland*, a case decided under Articles 8 and 13 ECHR the ECtHR considered that the national court disclosed documents to the applicant and that it provided summaries of the relevant parts of the undisclosed information. Therefore, according to the Court, the applicant was in a position to contest the allegations against him.³¹⁴

In *Matyjek v Poland*, in which the applicant faced lustration proceedings (a criminal charge), the applicant had access to his case file (including confidential information) after the institution of the lustration proceedings. However the applicant could consult the confidential documents only in the secret registry of the lustration court and was not allowed to make copies of the documents or to take notes out of the registry.³¹⁵

[T]he accused's effective participation in his criminal trial must equally include the right to compile notes in order to facilitate the conduct of his defence, irrespective of whether or not he is represented by counsel [...]. The fact that the applicant could not remove his own notes, taken either at the hearing or in the secret registry, in order to show them to an expert or to use them for any other purpose, effectively prevented him from using the information contained in them as he had to rely solely on his memory.³¹⁶

311 ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 73.

312 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 47.

313 ECtHR 7 June 2007, *Botmeh and Alami v the United Kingdom*, no 15187/03, paras 43-44.

314 ECtHR (Adm) 1 March 2005, *Haliti v Switzerland*, no 14015/02.

315 Any notes the applicant took could be made only in special notebooks that were subsequently sealed and deposited in the secret registry. The notebooks could not be removed from this registry and could be opened only by the person who had made them.

316 ECtHR 24 April 2007, *Matyjek v Poland*, no 38184/03, para 59. The Court also found a violation of the principle of equality of arms in this case, because the State party did have unrestricted access to the confidential documents. See also ECtHR 8 June 2010, *Górny v Poland*, no 50399/07, para 37 and ECtHR 31 May 2011, *Zawisza v Poland*, no 37293/09, where

It is important to note that the ECtHR held earlier in this judgment that in illustration proceedings such as in the case at hand it cannot be assumed that there remains a continuing and actual public interest in imposing limited access to materials, unless the contrary is shown in a specific case.³¹⁷ Therefore it may be assumed that limitations to the right to adversarial proceedings were addressed more critically by the ECtHR than in cases in which the non-disclosure was justified. However, this judgment does show that the right to adversarial proceedings is seriously limited by the fact that a party cannot make copies or notes of documents used in his case.

In *Tinnelly v the United Kingdom* the ECtHR rejected the State's argument that mechanisms, such as the Independent Commission for Police Complaints and the statutory controls on the activities of the security services, which assured the accountability of the police and the security services in the performance of their intelligence gathering functions could compensate for the limitations to the applicants' right of access to court.³¹⁸

Limited weight of information supplied by anonymous sources

In *Sufi and Elmi v the United Kingdom* and in *H.R. v France*, both asylum cases decided under Article 3 ECHR, the ECtHR considered that limited weight should be attached to country of origin information, which was obtained by the State from sources whose identity was not disclosed to the ECtHR. In these cases the ECtHR did not mention the right to adversarial proceedings. However, it may be assumed that the ECtHR did have the protection of this right in mind when deciding this case. The ECtHR held that 'in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability'.³¹⁹ In *Sufi and Elmi* the ECtHR found that the description of the sources relied on were vague ("a diplomatic source", or "a security advisor"). According to the ECtHR such descriptions give no indication of the authority or reputation of the sources or of the extent of their presence in the region concerned. In *H.R. v France* the State authorities consulted Algerian lawyers on the consequences of the lifting of the state of emergency in Algeria. The ECtHR considered that the French Government did not give details concerning the circumstances of this consultation or the identity of the lawyers consulted. Therefore the ECtHR could not assess their independence vis à vis the power in place or the reliability of their statements.³²⁰

the restrictions with regard to taking notes and making copies of documents were also applied to the applicant's lawyers.

317 See further under section 10.3.3.

318 ECtHR 10 July 1998, *Tinnelly and McElduff and others v the United Kingdom*, nos 20390/92 and 21322/92, para 77.

319 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos. 8319/07 and 11449/07, para 233.

320 ECtHR 22 September 2011, *H.R. v France*, no 64780/09, para 61.

The ECtHR generally exercises caution when considering information from anonymous sources which is inconsistent with the remainder of the information before it. However 'where the sources' conclusions are consistent with other country information, their evidence may be of corroborative weight'.³²¹ In *Sufi and Elmi* very little other information was available to the ECtHR. Therefore 'it was impossible for the Court to carry out any assessment of the sources' reliability and, as a consequence, where their information is unsupported or contradictory'. Therefore the ECtHR was unable to attach substantial weight to it.³²² In *H.R. v France* the ECtHR did not attach much if any weight to the statements of the anonymous Algerian lawyers. It may be derived from this case-law that national courts who do not know the sources of information supporting the asylum decision, should attach limited weight to this information. Asylum decisions cannot be based to a decisive extent on information provided by anonymous sources alone.

The judgments in *Sufi and Elmi* and *H.R.* are in line with the ECtHR's case-law concerning anonymous witnesses in criminal cases under Article 6 (1) ECHR. In *Doorson* the Court considered 'that even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements'.³²³ In *Haas* the Court was aware that due to the non-disclosure of the informers' identities, the defence lacked information permitting it to test their reliability or cast doubts on their credibility. Furthermore the national Court of Appeal was precluded from forming their own impression on the informers' reliability. 'However given that the evidence obtained had been corroborated with further items of evidence, the Court took the view that the rights of the defence were sufficiently respected'.³²⁴

The weight and specificity of other evidence

In criminal cases under Article 6 (1) ECHR, the ECtHR takes into account the weight of the non-disclosed evidence for the conviction in its assessment whether the right to adversarial proceedings has been violated. In *Jasper v the United Kingdom* and *Fitt v the United Kingdom* the ECtHR not only took into account the guarantees in place in the procedure in which it was decided whether evidence should be disclosed to the defence. An important reason for its refusal to accept that a 'special counsel procedure' was necessary in those cases, was that the material which was not disclosed in those cases did

321 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 233.

322 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 234.

323 ECtHR 20 February 1996, *Doorson v the Netherlands*, no 20524/92, para 73.

324 ECtHR (Adm) 17 September 2005, *Haas v Germany*, no 73047/01.

not form part of the prosecution case whatever and was never put to the jury.³²⁵ In *Botmeh and Alami* the ECtHR took into account that the undisclosed material was found by the domestic court 'to add nothing of significance to what had already been disclosed at trial'.³²⁶

In *Edwards and Lewis v the United Kingdom* and *Rowe and Davis v the United Kingdom* the Court did find a violation of Article 6 ECHR on the basis that (potentially) relevant information was not disclosed to the defence. In *Edwards and Lewis* the Court considered that the undisclosed evidence related or may have related to an issue of fact decided by the trial judge, namely whether the applicants had been the victim of improper incitement by the police. The trial judge had reviewed the undisclosed material and had concluded that he had heard nothing and seen no material which would have assisted the defence in their argument that evidence should be excluded on the basis that the applicant had been entrapped into committing the offence. The ECtHR held that because the applicants were denied access to the evidence, it was not possible for the defence representatives to argue the case of entrapment in full before the judge. Moreover the non-disclosed evidence (potentially) included allegations which may have undermined the applicants' submissions on entrapment. The applicant's and their representatives were not informed on the nature of the evidence and therefore could not defend themselves against these allegations.³²⁷

In *Rowe and Davis* the Court found a violation of Article 6 (1) ECHR on the basis that evidence, which could have been used to undermine the credibility of a key prosecution witness, was withheld by the prosecution from both the defence and the trial judge at first instance, its non-disclosure on grounds of public interest immunity subsequently being ordered by the Court of Appeal following an *ex parte* hearing. According to the ECtHR the procedure before the appeal court was not sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge.³²⁸

325 ECtHR (GC) 16 February 2000, *Jasper v the United Kingdom*, no 27052/95, para 55, ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 48. According to Harris and others the Court was strongly influenced by the fact that the non-disclosed evidence formed no part of the prosecution case and was not put to the jury. Harris, O'Boyle & Warbrick 2009, p 255.

326 ECtHR 7 June 2007, *Botmeh and Alami v the United Kingdom*, no 15187/03, para 44.

327 ECtHR 22 July 2003, *Edwards and Lewis v the United Kingdom*, nos 39647/98 and 40461/98, para 58. This judgment was confirmed by the Grand Chamber. ECtHR (GC) 27 October 2004, *Edwards and Lewis v the United Kingdom*, nos 39647/98 and 40461/98.

328 ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, paras 63-65. See also the summary of this case in ECtHR 7 June 2007, *Botmeh and Alami v the United Kingdom*, no 15187/03, para 38. The undisclosed information concerned amongst others person(s) to whom any reward money had been paid for information given to the police regarding the applicants.

It seems to follow from *Rowe and Davis* and *Edwards and Lewis* that in criminal cases inculpatory evidence and evidence which is potentially relevant to a person's defence should be disclosed. Unlike in *Fitt* and *Jasper* the ECtHR did not follow the domestic court(s)' ruling that the confidential material would not assist the defence.³²⁹

Also in cases in which the requirements flowing from the criminal of Article 6 (1) ECHR were applied such as *Pocius v Lithuania* and *A and others v the United Kingdom* the weight of the non-disclosed evidence for the outcome of the proceedings was taken into account.³³⁰ In *A and others* the Court held that the right to adversarial proceedings would be respected in two situations:

- The evidence was to a large extent disclosed and the open material plays a predominant role in the determination
- All or most of the underlying evidence is not disclosed, but the allegations in the open material are sufficiently specific. It must be possible for the applicant to provide his representatives and the special advocate with information with which to refute these allegations.

The judgment gives several examples of sufficiently specific allegations: the allegation that a person attended a terrorist training camp at a stated location between stated dates, detailed allegations about the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places.³³¹ The ECtHR held also with regard to Article 8 ECHR that the allegations against a person must be sufficiently specific.³³²

The procedural requirements under Article 5 (4) ECHR would not be satisfied when all or most of the evidence underlying the detention decision is not disclosed and the open material consist purely of general allegations. With regard to several applicants the Court found that the right to adversarial proceedings had been infringed. Two applicants were accused of being involved in fund-raising for terrorist groups linked to al'Qaeda. The link between the money raised and terrorism was not disclosed. Therefore the Court

329 This may have to do with the fact that in *Edwards and Lewis* and *Rowe and Davis* the ECtHR knew the nature of the evidence withheld from the defence while it did not in *Fitt* and *Jasper*.

330 ECtHR 6 July 2010, *Pocius v Lithuania*, no 35601/04, para 56, where the Court considered that the information contained in the non-disclosed operational records file was deemed to be essential evidence of the applicant's alleged danger to society. See under Art 8 ECHR, ECtHR 16 December 2008, *Gulijev v Lithuania*, no 10425/03, para 44, where the Court took into account that the "secret" report was not only used as evidence, but, according to the information in the case file, it was also the sole ground for not granting the applicant a temporary residence permit. See also ECtHR 4 November 2010, *Bannikova v Russia*, no 18757/06, para 63.

331 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220

332 ECtHR 26 July 2011, *Liu v Russia*, no 29157/09, para 90.

did not consider that these applicants were in a position to effectively challenge the allegations against them. The Court concluded the same with regard to two other applicants. The open allegations concerning them were of a general nature, principally that they were members of named extremist Islamist groups linked to al'Qaeda.

In *A and others* the Court did not exclude that inculpatory evidence is not disclosed to the detainee, as long as the open allegations are sufficiently precise. The Court also does not address the issue of the potential non-disclosure of exculpatory evidence. The ECtHR seems to be less strict with regard to the actual use of secret information in *A and others* than in criminal cases. This may have to do with the strict standard of proof in criminal cases: a person may only be convicted when a crime is proven beyond reasonable doubt. A detention measure is justified where one of the conditions of Article 5 (1) is fulfilled.

10.2.5 Subconclusion: the use of secret information under international law

The ECtHR has addressed the use of secret evidence principally under the right to adversarial proceedings and the principle of equality of arms. These principles apply to all procedures governed by Articles 5 (4), 6, 8, 9, 13 and Article 1 of Protocol 7 ECHR. The general requirements following from these principles seem to be the same with regard to all these Articles. However the level of procedural protection offered by these principles depends on the nature of the case at issue. Arguably the highest level of protection is required in criminal cases under Article 6 ECHR, while in cases concerning secret surveillance and the screening of job candidates the remedy in the meaning of Article 13 only needs to be 'as effective as can be'. It is argued here that in asylum cases, in the light of the absolute nature of the prohibition of *refoulement* a high level of procedural protection is required.

The ECHR has accepted that the right to adversarial proceedings and the principle of equality of arms are not absolute and that there may be legitimate reasons to limit them. Most of the cases assessed by the court concerned measures aimed at protecting the national security of the State. In those cases national security was often also the reason for not disclosing certain relevant information to the parties involved in the proceedings. The ECtHR has accepted that States enjoy a wide margin of appreciation in their assessment which measures are necessary to protect national security. It also recognised that national security reasons may justify the non-disclosure of evidence to a person affected by such a measure. However, the ECtHR also made clear that State's cannot escape judicial review when invoking national security as the basis for a measure or for its refusal to communicate relevant evidence to the party concerned. Sufficient guarantees must be in place to prevent arbitrariness and

to ensure that the right to adversarial proceedings and the principle of equality of arms are respected.

From the ECtHR's case-law several minimum standards may be withdrawn, which apply to all cases falling within the scope of Articles 5 (4), 6, 8, 9, 13 and Article 1 of Protocol 7 ECHR and therefore also to asylum cases:

- Limitations to the right to adversarial proceedings must pursue a legitimate aim. Interests which may justify such limitations are the protection of national security, the need to protect sources of information or witnesses at risk of reprisals and the need to keep secret police methods of investigation of crime.
- The non-disclosure of relevant evidence should be necessary to pursue this legitimate aim.
- The national court must receive the secret evidence. This court should review whether the non-disclosure of evidence is necessary and review on the basis of that evidence the facts and circumstances of the case. Limited weight should be attached to evidence provided by anonymous sources, whose reliability cannot be examined by the court.
- If a legitimate interest justifies the non-disclosure of the evidence to the party concerned, the interest of the State to keep the evidence secret must be balanced against the right to adversarial proceedings. When carrying out this balancing test the nature of the case at issue must be taken into account. Some form of adversarial proceedings must always be guaranteed. Limitations of the right to adversarial proceedings should be compensated, for example by using a special advocate who assesses and comments on secret evidence on behalf of the party concerned or by using non-confidential summaries.
- When assessing whether the right to adversarial proceedings has been complied with the weight of the non-disclosed evidence and the specificity of the open material should be taken into account. The right to adversarial proceedings will generally not be violated if limited weight was attached to the secret evidence underlying a decision. However, a person is not able to effectively challenge allegations against him if the open material only contains general allegations.

The ECtHR has not yet addressed the use of secret information in asylum cases. It only made clear in *Sufi and Elmi v the United Kingdom*³³³ and *H.R. v France*³³⁴ that limited weight should be attached to information provided by anonymous sources, whose reliability and independence cannot be checked by the Court. The ECtHR has not mentioned the right to adversarial proceedings

333 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 233.

334 ECtHR 22 September 2011, *H.R. v France*, no 64780/09, para 61.

in those cases or addressed the level of procedural protection which should be offered in *refoulement* cases. In the light of the potential severe consequences for the person concerned of expulsion in violation with the prohibition of *refoulement*, it may be argued that the same fair trial guarantees as those required under the criminal limb of Article 6 (1) should apply. This would mean in particular that limitations to the right to adversarial proceedings are only allowed if they are 'strictly necessary'. The ECtHR has applied the fair trial guarantees in other non-criminal cases in the light of the serious nature of the case. An example of such a case is *A and others v the United Kingdom*, where the ECtHR pointed at 'the dramatic impact of the lengthy – and what appeared at the time to be indefinite – deprivation of liberty'.

In the conclusion I will address the question how the ECHR standards relate to and should be incorporated into the relevant general principles of EU law. As the case-law discussed in this chapter only concerns appeal proceedings before national courts, it is most conceivable that it will inspire the interpretation of the EU right to effective judicial protection.

10.3 SYNTHESIS OF FINDINGS

Article 16 PD provides the legal advisor or other counsellor who assists or represents the asylum applicant with a right of access to such information in the applicant's file as is liable to be examined by the court providing an effective remedy against the asylum decision, insofar as the information is relevant to the examination of the application. This provision allows for limitations to the applicant's right of access to the file on several grounds. It also provides that information may be withheld from the court mentioned in Article 39 PD on national security grounds. On the basis of the case-law of the EU Courts discussed in this chapter it should be expected that this provision will be tested against and/or interpreted in the light of the rights of the defence, including the right to be heard during the administrative phase and the right to a reasoned decision (Article 41 of the Charter) and the right to effective judicial protection (Article 47 of the Charter and Article 39 PD). The extensive case-law of the ECtHR regarding the right to adversarial proceedings and the use of secret evidence provides for important guidance as to the interpretation of these EU rights. The following conclusions should be drawn:

The right of access to the file

- According to the case-law of the Court of Justice and the ECtHR the rights of the defence can only be infringed if documents *which are relevant to the case* (inculpatory or exculpatory) are not disclosed to the party concerned.

No access needs to be provided to information which could not have influenced the course of the asylum proceedings.³³⁵

- In asylum proceedings secret evidence may regard the assessment of the credibility of the asylum account or the risk of persecution or serious harm upon expulsion to the country of origin (prohibition of *refoulement*).³³⁶

Legitimate aim and necessity of non-disclosure

- Limitations to the EU right to be heard during the administrative phase, the right to a reasoned decision and the right to effective judicial protection may be justified: the limitation must have a *legitimate aim* and it should be *necessary*.³³⁷
- Article 16 (1) PD mentions several grounds which may justify the use of secret information in asylum cases: the protection of the security of organisations or of person(s) providing the information or the security of the person(s) to whom the information relates, the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States and the international relations or the national security of the Member States. On the basis of the case-law of the Court of Justice and the ECtHR it may be expected that those grounds will be accepted as legitimate aims for keeping information secret in asylum cases.
- Arguably, in the light of the absolute nature of the prohibition of *refoulement* evidence on which the assessment of the risk of persecution or serious harm is based, may only be kept secret if this is 'strictly necessary'. This is the same test as that required by Article 6 ECHR in criminal cases.³³⁸
- It is not solely up to the administrative authorities, but also for the national court in the meaning of Article 39 PD to decide whether non-disclosure of evidence pursues a legitimate aim and is necessary.³³⁹ Furthermore the use of secret evidence may not prevent the national court to review thoroughly whether there is a risk of *refoulement*.³⁴⁰

335 Case T-36/91, *Imperial Chemical Industries v Commission* [1995], para 78. The ECtHR refers to 'the entitlement to disclosure of *relevant* evidence' (emphasis added). See for example ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, para 61.

336 Secret evidence may also be used in order to exclude a person from a refugee status or subsidiary protection status (right to asylum). Exclusion from an asylum status falls outside the scope of this study.

337 Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 68 and Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 342. See for the ECtHR: ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45 and ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 218.

338 ECtHR (GC) 16 February 2000, *Fitt v the United Kingdom*, no 29777/96, para 45.

339 ECtHR (GC) 16 February 2000, *Rowe and Davis v the United Kingdom*, no 28901/95, para 63.

340 Case C-69/10, *Samba Diouf* [2011]. The required standard of judicial review of the establishment and qualification of the facts is discussed in section 9.2.

- The national court must receive all relevant information underlying the asylum decision, including the evidence which was not disclosed to the person concerned.³⁴¹ Article 16 (1) PD which allows authorities to refuse disclosure of relevant information to the national court on national security grounds should thus be considered to be ad variance with the EU right to effective judicial protection and should therefore be declared void.

The need for secrecy of information versus the right of access to the file

- The protection of secret information must be observed in such a way as to reconcile it with the EU right to an effective remedy, the right to be heard and the duty to state reasons. The conflicting interests of the parties concerned must be balanced.³⁴²
- A total lack of disclosure of evidence is never allowed. The (asylum) decision should state sufficiently precise reasons in order to enable the applicant to effectively exercise his right to an effective remedy guaranteed by Article 39 PD.³⁴³
- This does not mean however that all inculpatory or potential exculpatory evidence must be fully disclosed to the asylum applicant. In this light the ECtHR's judgment in *A and others* provides for important guidance.³⁴⁴ It follows from this judgment that the right to adversarial proceedings is not violated where the evidence was to a large extent disclosed to the applicant and the open material plays a predominant role in the determination or when the allegations in the open material are sufficiently specific. A negative asylum decision based on documents in which most or most crucial information is not disclosed thus infringes the right to adversarial proceedings.³⁴⁵

341 Case C-438/04, *Mobistar* [2006], para 40, Case C-450/06, *Varec* [2008], para 53, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 155. See also the ECtHR's judgments under Artt 6 and 8 and 13 ECHR where the ECtHR held that substantive review of the grounds motivating a decision is impaired when the court assessing a case does not have sight of the material on which the decision is based.

342 Case C-450/06, *Varec* [2008], para 51, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], para 344 and ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, paras 216-217.

343 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 150-151.

344 See Case T-85/09, *Kadi v Commission* [2010], para 176.

345 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220. The fact that the EU Courts seem to set rather limited requirements as regards the disclosure of documents underlying EU sanction decisions and the reasoning of such decisions does not mean that such limited requirements are also applicable in asylum cases. First of all it should be questioned whether the case-law of the EU courts complies with the requirements set out by the ECtHR in *A and others* under the right to adversarial proceedings. Furthermore the fact that national security of the Member States was involved, the nature of EU sanction cases and the division of powers between the EU level and the national level in such cases may have influenced the EU Courts case-law in that area.

- It may further be derived from the EU Courts' as well as the ECtHR's case-law that the weight which is attached to the confidential material for the decision should be taken into account when assessing whether the rights of the defence have been infringed in an asylum case.³⁴⁶ A decision that an asylum account is not credible which is based only on the statements of an anonymous source should for example be considered problematic.
- The Court of Justice as well as the ECtHR have recognised that the credibility of evidence of anonymous origin is necessarily reduced by the fact that the context in which it was drafted is largely unknown and because administrative authority's assertions in that regard cannot be verified.³⁴⁷

Using compensation techniques

- Special techniques, such as the use of special counsels, non confidential summaries or a list of all the documents in the file, may be used in order to compensate the use of secret information. Anonymous witnesses may be questioned by an investigative judge.
- In EU sanction cases the EU Courts have referred to the special counsel procedure mentioned by the ECtHR. So far the EU Courts have not applied such techniques or assessed their compatibility with EU procedural rights. It should be derived from the ECtHR's judgment in *A and others* that a special counsel who could test the non-disclosed evidence and put arguments on behalf of the applicant during closed hearings could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing. However the Court also held that the special counsel must be able to perform this function in a useful way. This is only possible if the applicant is provided with sufficiently specific information about the allegations against him (see above) in order to give effective instructions to the special advocate.³⁴⁸
- The information disclosed in non-confidential summaries should be sufficiently precise in order to put the person concerned in the position to determine whether the deleted information is likely to be relevant for his case and to express his view on it.³⁴⁹
- It may be derived from the EU right to be heard that the applicant must be placed in the position to effectively respond to the information underlying the decision before the asylum decision is taken. Therefore compensation techniques such as non-confidential summaries and/or a special counsel system should be provided to the asylum applicant already during

346 See for example Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], para 47, ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 200.

347 Case C-411/04 P, *Salzgitter Mannesmann v Commission* [2007], para 46, ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 233, ECtHR 22 September 2011, *H.R. v France*, no 64780/09, para 61.

348 ECtHR (GC) 19 February 2009, *A. and others v the United Kingdom*, no 3455/05, para 220.

349 Case T-410/03, *Hoechst v Commission* [2008], para 154.

the administrative phase. An infringement of the right to be heard and the duty to state reasons cannot be compensated during the appeal phase.³⁵⁰

350 Joined Cases C-204/00 P etc, *Aalborg Portland and others v Commission* [2004], para 104 and Case C-51/92 P, *Hercules Chemicals v Commission* [1999], paras 78-79. A.G. Bot suggests in his opinion in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, paras 76-78 that this may be different in asylum cases which are quasi-criminal in nature. In EU sanction cases EU authorities are not required to hear the party concerned before the first decision to freeze funds because this would undermine the effectiveness of the sanction. See Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* [2008], paras 338-341.

PART III

Conclusion

11 | Towards a common and fair European asylum procedure?

This study started off by underlining the importance of adequate and fair procedures for the effective exercise of rights granted under EU law. In the following chapters it was shown that the EU Courts have recognised this importance. The Court of Justice's case-law concerning the EU right to an effective remedy has considerably limited the procedural autonomy of the Member States. There is no reason to believe that asylum procedures will escape the influence of the Court of Justice. The need for procedural guarantees is as great in asylum procedures as in any other field of EU law. As A.G. Bot considered with regard to the applicability of the EU right to be heard in asylum cases:

Indeed, in this type of procedure, which inherently entails difficult personal and practical circumstances and in which the essential rights of the person concerned must clearly be protected, the observance of this procedural safeguard is of cardinal importance. Not only does the person concerned play an absolutely central role because he initiates the procedure and is the only person able to explain, in concrete terms, what has happened to him and the background against which it has taken place, but also the decision given will be of crucial importance to him.¹

This concluding chapter will make some final remarks with regard to the methodology used for the purpose of this study. It will argue that this methodology is suitable not only to construct the meaning of the EU right to an effective remedy in the context of asylum, but also in other fields of EU law.

Furthermore this chapter will draw some conclusions as to the achievements of the Procedures Directive up to now and the potential impact it may have in the future. It will be contended that asylum applicants are better off with than without the Procedures Directive. Section 11.3 contains the full set of procedural standards which were derived from the Procedures Directive and Qualification Directive read in the light of the EU right to an effective remedy. Section 11.4 stresses the important task of national courts and asylum lawyers to apply the Procedures Directive and the EU right to an effective remedy in practice and to (encourage the courts to) refer questions for preliminary ruling to the Court of Justice.

¹ Opinion of A.G. Bot in Case 277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, para 43.

This chapter will finally glance into the future. The process of harmonisation of asylum procedures is still ongoing. At the moment of the conclusion of this study a recast of the Procedures Directive was under negotiation and a recast of the Qualification was adopted. Section 11.5 tests the recast proposal and the new Qualification Directive against the conclusions drawn in this study as to the requirements following from the EU right to an effective remedy concerning each of the procedural topics discussed in the previous chapters.

11.1 EU PROCEDURAL LAW: COMMON PRINCIPLES, SPECIFIC APPLICATIONS

The purpose of this study was to discover the meaning of the EU fundamental right to an effective remedy for the legality and the interpretation of EU asylum legislation, in particular the Procedures Directive. The meaning of the EU right to an effective remedy in the context of asylum was derived from the EU Courts' case-law and of relevant sources of inspiration, in particular the ECtHR's case-law. This resulted in a set of procedural standards with regard to several key issues of asylum procedures: the right to remain on the territory of the Member State, the right to be heard and evidentiary issues.

The methodology used in this study in order to find the meaning of the EU right to an effective remedy is based on the following assumptions:

- The EU right to an effective remedy encompasses common procedural principles which are applicable in all fields of EU law. These principles can be distilled from the case-law of the EU Courts' case-law concerning a specific procedural topic, irrespective of the material EU legislation at issue. Furthermore these procedural principles are inspired by international law, in particular the ECHR and the ECtHR's case-law.
- When applying these common procedural principles to a specific field of EU regard should be had to three basic notions:
 - 1 The interests of the parties involved in the proceedings concerned must be balanced against each other
 - 2 The overall fairness of the procedure should be assessed
 - 3 The subject matter of the procedure should be taken into account

The next sections will recapitulate how this method of deriving common principles and applying them to a specific field of EU law works.

11.1.1 Common procedural principles

Article 47 of the Charter applies in its full extent to all cases falling within the scope of EU law. This is also true for the procedural rights closely linked to it, such as the right to be heard and the duty to state reasons. In all fields

of EU law, whether it is competition, EU sanctions, equal treatment or asylum similar aspects of EU or national procedures raise questions as to their compatibility with EU procedural rights. In all kinds of procedures parties may claim that for example a lack of suspensive effect of the appeal, limitations of the right to be heard, evidentiary rules or a limited scope or intensity of judicial review undermines their right to an effective remedy and/or impeded the effective exercise of their rights granted under EU law. The EU Courts' judgments regarding such claims are relevant not only for the specific procedure at issue, but for all procedures in which EU law is invoked. From this case-law procedural principles emerge which are applicable to all fields of EU law. This is how the EU Courts' judgments in for example competition, EU sanction or equal treatment cases become relevant for the interpretation of the EU right to an effective remedy in asylum cases.

A first sign that the Court of Justice will indeed treat asylum cases like all other cases falling within the scope of EU law and apply the same EU procedural principles is the judgment in *Samba Diouf*. The Court of Justice in its judgment referred to its judgment in *Wilson* when addressing the scope of judicial review, which should be performed by a court or tribunal in the meaning of Article 39 PD. The *Wilson* case concerned the practice of the profession of lawyer in a Member State other than that in which the qualification was obtained.² Examples of procedural principles which were derived from the EU Courts' case-law in this study are:

- Interim protection must be provided by the national court if necessary to ensure the effectiveness of EU law.
- The use of presumptions is permissible as long as the parties concerned are able to submit evidence in order to rebut such presumption.
- Authorities are not allowed to accept only the best possible evidence in support of a claim under EU law.
- A court or tribunal should review both points of fact and points of law.
- A court must receive all evidence underlying the contested decision, also if (part of) this evidence was not disclosed to (one of) the parties concerned. This court should assess whether the non-disclosure of evidence pursues a legitimate aim and is necessary and whether the right to adversarial proceedings is sufficiently guaranteed.

Often the procedural principles are of a rather general nature and cannot directly be applied to any EU context. The specific meaning of these principles or the level of protection offered by them varies according to the special features of the field of EU law at issue and the individual circumstances of the case. This is where the three basic notions introduced in section 4.5 of this study come to the fore.

2 Case C-506/04, *Wilson* [2006].

11.1.2 Specific applications: the three basic notions

In this study the ECtHR's case-law and the views of UNHCR, the Committee against Torture and the Human Rights Committee which specifically concerned asylum procedures were used in order to determine how the procedural principles distilled from the EU Courts' case-law should be applied in the asylum context. With regard to some of the issues discussed no case-law of the EU Courts was available. In this situation the interpretation of the EU right to an effective remedy was only based on the ECtHR's case-law and the views of other supervising bodies.

The three basic notions introduced in section 4.5 proved helpful to understand the choices made by the EU Courts when applying procedural rights in a particular case. Moreover they are useful to predict how the EU Courts will interpret the EU right to an effective remedy or related procedural rights and principles in a field of EU law or even a particular case. This will be illustrated in the following sections.

11.1.2.1 *Balancing of interests*

The EU Courts balance the interests of the parties involved in a procedure when assessing whether EU procedural rights have been infringed. A national procedural rule which limits a party's procedural rights, such as the right of access to court or the right to be heard, must serve a legitimate aim and should be necessary and proportional. Therefore also in asylum cases, the Member State must be able to justify a procedural rule which limits an applicant's procedural rights granted under EU law.

In this study, the balancing of interests performed by the EU Courts was most visible in Chapter 10, which discussed their case-law concerning the use of secret information in competition cases and EU sanction cases. The EU Courts in these cases balance the right to be heard, the right to a reasoned decision and the right to an effective remedy of the addressee of the decision against the interest served with the non-disclosure of this information. These interests include the protection of business secrets, the protection of witnesses or the international relations or national security of the Member States.

It is relevant to note in the context of asylum procedures that both the Court of Justice and the ECtHR have recognised that the procedural rights of a party may be balanced against the Member States' interest to process cases efficiently.³ The efficiency of asylum procedures is one of the objectives of

3 See for example Case T-228/02, *Organisation des Modjahedines du peuple d' Iran v Council* [2006], para 141 and Case T-237/00, *Reynolds v Parliament* [2004], para 102, where the Court of Justice held that the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available

the Procedures Directive and (as will be set out below) the amended proposal for the recast of the Procedures Directive.⁴ The Court of Justice recognised in *Samba Diouf* that shorter time-limits in asylum procedures (accelerated asylum proceedings) may be justified to ensure ‘that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently’.⁵ The ECtHR likewise considered in *I.M. v France* that Member States must have the means to cope with large numbers of asylum applicants and that accelerated procedures may facilitate the processing of clearly abusive or manifestly unfounded asylum applications.⁶

In the context of asylum the Member States’ interest to process asylum claims efficiently and to prevent abuse may thus play a significant role. However it is conceivable that this interest may never prevail over the interest of both the Member States and the asylum applicant in good quality decisions.⁷

11.1.2.2 The overall fairness of the procedure

The case-law discussed in this study also confirms that in the context of the EU right to an effective remedy the overall fairness of the asylum procedure should be examined. A limitation to a procedural right may be compensated by using compensation techniques. A lack of procedural guarantees in one stage of the procedure may be redressed in a later stage of the procedure and *vice versa*. In this study it was established for example that both the EU Courts and the ECtHR accepted that a limited form of judicial review may be (partly) compensated by procedural guarantees in the administrative phase, in particular the right to be heard and the right to know the reasons of the decision.⁸ The Court of Justice has held that in EU sanction cases in which secret evidence is used, the absence of a hearing during the administrative phase can be compensated during the appeal phase.⁹ Furthermore both the Court of Justice and the ECtHR have ruled that a limitation of the right to adversarial proceedings can and must be compensated by using compensation techniques

for making the decision. See also ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 41.

4 See recital 3 Preamble PD which refers to the Tampere Conclusions which called for common standards for fair and *efficient* asylum procedures and recital 11 Preamble PD which states: ‘It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum.’

5 Case C-69/10, *Samba Diouf* [2011], para 65.

6 ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 142.

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

8 See sections 9.2.1 and 9.2.2.3.

9 Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v Council* [2006], paras 129-130, Case T-390/08 *Bank Mellat Iran v Council* [2009], para 98 and Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat v Council and Commission* [2008], para 337.

such the appointment of a special advocate or the provision of non-confidential summaries. Section 9.3 argued that the lack of an *ex nunc* examination of the asylum decision by the court or tribunal in the meaning of Article 39 PD may be compensated by a subsequent asylum procedure, in which all relevant new facts and evidence are assessed by the determining authority and may be reviewed by the court or tribunal deciding on the appeal.

Several minor deficiencies in the asylum procedure may reinforce each other and lead to a lack of an effective remedy. Some procedural defects will directly lead to a breach of the right to an effective remedy. The clearest example discussed in this study is the lack of an appeal with automatic suspensive effect against the rejection of the asylum claim. The applicant may be expelled before the appeal court has reached its decision and as a consequence may be exposed to irreparable harm in his country of origin.¹⁰ This deficiency cannot be compensated, for example by a higher appeal with automatic suspensive effect.

The Court of Justice and the national courts should thus assess the compatibility of a procedural rule with the EU right to an effective remedy while having regard to the guarantees offered in the asylum procedure taken as a whole.

11.1.2.3 *The subject matter of the procedure*

Even though the Court of Justice recognised the Member States' interest in efficient asylum procedures, that does not mean that it will allow that Member States systematically provide for less procedural guarantees in asylum cases than in other cases falling within the scope of EU law. To the contrary: both the Court of Justice's case-law and the ECtHR's case-law have made clear that the nature of the fundamental rights at stake in asylum cases, notably the absolute prohibition of *refoulement*, requires a high level of procedural protection. The Court of Justice has considered that the assessment of the extent of the risk of *refoulement* 'must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union'.¹¹

Similarly the ECtHR under Article 13 ECHR obliges States to provide for important procedural guarantees in asylum cases, in view of the importance which the Court attaches to Article 3 ECHR and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises. As was shown in this study Articles 3 and 13 ECHR require a remedy with

¹⁰ See Chapter 6.

¹¹ Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 90. See also A.G. Bot's opinion in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, para 43.

automatic suspensive effect¹² and rigorous scrutiny of the risk of *refoulement* in the administrative phase as well as by an independent authority.¹³ The ECtHR's case-law shows that States should be flexible when applying evidentiary rules in asylum cases, not expecting the asylum applicant to submit a perfectly substantiated and consistent asylum account.¹⁴ The ECtHR imposes a positive obligation on the State to gather certain evidence and expects it to assume the burden of proof in specific situations, for example where the applicant has submitted medical evidence of past torture.¹⁵ Furthermore the ECtHR in asylum cases demands an *ex nunc* review by an independent authority on the merits of the risk of *refoulement*.¹⁶

The case-law of the Court of Justice and the ECtHR thus indicates that, given the fundamental rights at stake in asylum cases, the standard of procedural protection offered should rather be higher than lower than that offered by general administrative law in a Member State.

Specific procedural position of the person concerned.

Not only the rights at stake for the party concerned but also his particular procedural position influences the level of procedural protection which should be offered. The Court of Justice has accepted that the weak position of consumers and dismissed pregnant workers may warrant special procedural guarantees, such as *ex officio* application of EU law and extended time-limits.¹⁷ The Court took into account that these persons lack legal expertise and may therefore be required to pay high lawyers fees or may experience difficulties in obtaining proper advice.

The Court of Justice has not yet addressed the question whether special procedural protection is also necessary in asylum cases. It may however be expected that the Court of Justice also takes into account the difficult position in which asylum applicants generally find themselves. It should be noted in this context that the ECtHR has recognised that the weak procedural position of asylum applicants warrants specific procedural guarantees in recent judgments. It stressed the need for clear information on the asylum procedure and for access to (free) legal assistance and interpretation services in asylum procedures.¹⁸

¹² See section 6.3.1.2.

¹³ See section 9.2.2.1.

¹⁴ See section 8.5

¹⁵ See section 8.3.1.

¹⁶ See Chapter 9.

¹⁷ Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores* [2000], para 26 and Case C-63/08, *Pontin* [2008], paras 62 and 65.

¹⁸ See ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 301, 304 and 319, ECtHR 2 February 2012, *I.M. v France*, no 9152/09, paras 145 and 150 and ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, para 204.

It follows from the Court of Justice's case-law that the compatibility of a procedural rule with the EU right to an effective remedy should not only be examined in the abstract. The application in a particular case of a procedural rule, which is generally considered acceptable, may violate the EU right to an effective remedy, taken into account the specific circumstances of the individual asylum applicant concerned.¹⁹ National courts should thus examine in the abstract as well as when taking account of the specific circumstances of the case whether (the application of) a procedural rule is in conformity with the EU right to an effective remedy.

11.1.3 Wider applicability of the methodology

The methodology applied in this study in order to discover the meaning of the EU procedural rights is not only pertinent in the EU asylum context. It may be used in any field of EU law in order to determine how the EU right to an effective remedy should be interpreted.

In this study common principles were mainly derived from the case-law concerning other fields of EU law than asylum law. This is not surprising as asylum law has only recently become part of EU law. The Court of Justice's case law concerning asylum procedures is therefore still scarce. It may be expected however that in the future this case-law will develop and will itself provide for procedural principles which are relevant to other fields of EU law. Then lawyers working for example in the field of competition law may derive procedural principles from the Court of Justice's judgments concerning asylum procedures and apply them to their specific field. The Court of Justice's judgment in *Samba Diouf* already made clear that the intensity of judicial review is an aspect of the EU right to an effective remedy. This is relevant not only for national courts reviewing asylum decisions, but also for national courts ruling in other cases falling within the scope of EU law.²⁰

The method used in this study is furthermore suited to find the meaning of the EU right to an effective remedy with regard to all thinkable procedural issues. In the asylum context for example it may be used to define the meaning of this right for the application of short time-limits for decision-making or appeal proceedings (accelerated asylum proceedings) or the right to legal assistance.

19 See for example Case C-69/10, *Samba Diouf* [2011], paras 66-68.

20 See also Widdershoven 2011, under para 3.

11.2 THE PROCEDURES DIRECTIVE: UGLY CREATURE OR IMPORTANT STEP FORWARD?

The Procedures Directive played a central role in this study as it provides for minimum standards for many of the procedural issues discussed. There are two ways of looking at the Procedures Directive. First of all the directive may be regarded as an ugly creature. A very complex piece of EU legislation which is the clear result of long and difficult negotiations between Member States, who were unwilling to give up their national solutions for dealing with asylum procedures in an effective manner. A directive which contains more derogation provisions than minimum standards and as a result fails to harmonise the asylum procedures in the Member States. And most importantly a directive which leaves significant protection gaps and consequently creates the risk of violations of international as well as European Law.²¹

Indeed the Commission and UNHCR in their research concerning the implementation of the Procedures Directive ascertained that there were still major differences between the asylum procedures of the Member States.²² As a result asylum applicants still have very different prospects of finding international protection depending on where in the EU their applications are examined.²³ Both the Commission and UNHCR were also concerned about the level of protection offered by those asylum procedures. The Commission noted in 2009 in the proposal for the recast of the Procedures Directive which will be discussed below:

Contributions received by stakeholders in response to the Green Paper consultation have pointed to the proliferation of disparate procedural arrangements at national level and deficiencies regarding the level of procedural guarantees for asylum applicants which mainly result from the fact that the Directive currently allows Member States a wide margin of discretion. Consequently, the Directive lacks the potential to back up adequately the Qualification Directive and ensure a rigorous examination of applications for international protection in line with international and Community obligations of Member States regarding the principle of *non-refoulement*.²⁴

21 UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, Geneva: March 2010, p 91.

22 See for example Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final and UNHCR, *Improving Asylum Procedures*, p 91.

23 Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, summary of the impact assessment, 21 October 2009, COM(2009) 554, SEC(2009) 1377, p 2.

24 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554, explanatory memorandum, p 2.

UNHCR stated in 2010:

There are many areas in which individual's rights are not respected, not only because of non-observance of the APD [the Procedures Directive], but also in the context of the application of its provisions, in line with the low minimum standards it sets.²⁵

In spite of the fact that the Member States are bound by the guarantees contained in the Procedures Directive the ECtHR has recently found violations of the right to an effective remedy in asylum cases with respect to Belgium,²⁶ Bulgaria,²⁷ the Czech Republic,²⁸ France,²⁹ Greece³⁰ and Italy.³¹ The violations were caused by (a combination of) a wide variety of procedural shortcomings, ranging from the lack of access to the asylum procedure, the lack of information about the asylum procedure, the absence of free legal aid and/or interpretation services, the limited nature of the personal interview, the lack of a rigorous scrutiny of the claim of *refoulement*, the speed or the long duration of the procedure, the lack of a remedy with automatic suspensive effect and the limited intensity of judicial review.

Furthermore, in some Member States there is strong political pressure to adopt more restrictive migration policies and legislation. This also results in a lowering of procedural guarantees for asylum procedures. In the Netherlands for example the right to a remedy with suspensive effect was limited and does no longer apply with regard to subsequent asylum procedures in which the applicant failed to submit new facts or circumstances.³² The Dutch Government also aims to reduce the number of subsequent asylum procedures by restricting free legal aid in such procedures.³³ In November 2011 French Interior Minister Claude Guéant announced reforms to the asylum system in France, including a reduction in the asylum budget and a shortening of the time frame during which asylum applications have to be made. Furthermore the number of safe countries of origin would be expanded.³⁴ Belgium intro-

25 UNHCR, *Improving Asylum Procedures*, p 91.

26 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09.

27 ECtHR 11 October 2011, *Auad v Bulgaria*, no. 46390/10 and ECtHR 26 July 2011, *M. ao v Bulgaria*, no 41416/08.

28 ECtHR 23 June 2011, *Diallo v Czech Republic*, no 20493/07.

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

30 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09.

31 ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09.

32 Besluit van de Minister voor Immigratie en Asiel van 8 februari 2011, WBV 2011/1, houdende wijziging van de Vreemdelingen-circulaire 2000, Staatscourant 17 February 2011, No 2838.

33 Gedoogakkoord VVD-PVV-CDA, 30 september 2010, www.rijksoverheid.nl.

34 European Council for Refugees and Exiles (ECRE), weekly bulletin, 9 December 2011, www.ecre.org and Réaction de Forum réfugiés au discours de C. Guéant du 25 novembre 2011, La hausse de la demande d'asile légitime était prévisible, www.forumrefugies.org.

duced a list of safe countries of origin in November 2011. Asylum applicants originating from these countries have to rebut the presumption of safety in their individual case, in a fifteen-day asylum procedure.³⁵

It may be concluded that the Procedures Directive has not lead to harmonisation of asylum procedures and that a fair common European asylum procedure is still far away.

11.2.1 The Procedures Directive's potential

It is contended here however, that the adoption of the Procedures Directive should nevertheless be regarded as an important step forward. In spite of all its shortcomings the directive does provide for important standards for asylum procedures. More importantly the directive has brought national asylum procedures within the scope of EU law. Consequently asylum procedures fall within the reach of the Charter and general principles of EU law.

This study has shown that the EU right to an effective remedy laid down in Article 47 of the Charter and recognised by the Court of Justice as a principle of EU law, may set important limits to the Member States' discretion under the Procedures Directive and potentially provides for additional safeguards. Moreover, this right is an important tool for interpretation of the directive's provisions and may be used to fill in (protection) gaps. The potential impact of the EU right to an effective right of an effective remedy in the field of asylum procedures should therefore not be underestimated.

The EU right to an effective remedy may provide an answer to some of the main deficiencies in the Procedures Directive identified by UNHCR and NGO's. It was concluded in this study that the provisions of the directive read in the light of the EU right to an effective remedy requires that the applicant is allowed to stay on the territory of the Member State during first instance and appeal proceedings. Moreover the applicant must have sufficient time and opportunity to lodge an appeal against the rejection of the asylum claim. The possibilities mentioned in Article 12 PD to derogate from the right to a personal interview, may only be used in exceptional cases.

This study also contended that the EU right to an effective remedy reflected in Article 39 PD contains several 'hidden' guarantees. This right requires a thorough and (at one stage of the procedure) *ex nunc* judicial review which entails as a minimum that the national court or tribunal assesses the claim of a risk of *refoulement* on its merits, carefully examining the facts and evidence underlying the asylum claim. Furthermore the right to adversarial proceedings,

35 Belgische Kamer van Volksvertegenwoordigers, Wetsontwerp tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, No 1825/011, 24 November 2011. The proposal was adopted by the Chamber and the Senate.

which is incorporated by the right to an effective remedy demands that the national court assesses whether the non-disclosure of evidence underlying the asylum decision is justified. Limitations to the right to adversarial proceedings should be compensated, for instance by using non-confidential summaries or special advocates. It was even argued that Article 16 (1) last sentence PD, which allows Member States to withhold relevant information to the national court deciding on the appeal against the asylum decision on national security grounds must be considered *ad variance* with the EU right to effective judicial protection and should therefore be declared void by the Court of Justice.

Not only the Procedures Directive, but also the Qualification Directive may contribute to the procedural protection of asylum applicants. The principle of effectiveness requires that the clear rights for asylum applicants guaranteed by this directive, most importantly the right to an asylum status for those in need of international protection and the prohibition of *refoulement*, are effectively protected. National procedural rules, including evidentiary rules may not render the exercise of those rights impossible or excessively difficult. It was concluded in Chapter 8 that Article 4 QD and the principle of effectiveness set important standards with regard to the standard and burden of proof, the use of presumptions and the assessment of the statements and evidence submitted by the applicant.

11.2.2 Broader protection than the ECHR

The question may be raised whether the Procedures Directive and the fact that asylum procedures are now governed by EU fundamental rights adds anything to the protection regime which had already been developed under the ECHR. In this study the ECtHR's case-law was used as an important source of inspiration for the EU right to an effective remedy and thus indirectly for the interpretation of the Procedures Directive. In fact this study refers to a larger number of judgments of the ECtHR than judgments of the EU Courts.

When approaching this question from a pure legal perspective one may argue that the Procedures Directive provides for broader protection than Articles 3 and 13 ECHR for two reasons. First of all the Procedures Directive covers many procedural issues, such as the right to information, the right to a personal interview, the right to reasoned decision on the asylum claim, the right to (free) legal aid and interpretation services, special guarantees for unaccompanied minors and the right to contact UNHCR, which at the moment of the adoption of the directive had scarcely been addressed by the ECtHR in

its case-law.³⁶ Potentially inspired by the Procedures Directive, the ECtHR's took account of (a lack of) some of these rights in its assessment under Article 13 ECHR in a few recent judgments, such as *M.S.S. v Belgium and Greece* and *I.M. v France*.³⁷

Secondly, it should be remembered that the scope of application of the Procedures Directive and the EU right to an effective remedy is wider than that of Article 13 ECHR. Most importantly the EU right to an effective remedy reflected in Article 39 PD includes the right to a fair trial.³⁸ The right to a fair trial guaranteed by Article 6 ECHR does not apply to asylum procedures. In this study the ECtHR's case-law under Article 6 ECHR was used as a source of inspiration for the EU right to a fair trial. This study shows that notably with regard to the use of secret information and the right to an oral hearing before a court or tribunal the ECtHR's case-law provides for important guidance for the interpretation of the EU right to a fair trial. Moreover the right to an effective remedy guaranteed in Article 39 PD applies to all asylum cases, irrespective of the merits of the case or the procedure in which it was assessed.³⁹ Article 13 ECHR applies only to cases of an arguable claim of *refoulement*. Finally the Procedures Directive and the EU right to an effective remedy apply not only to expulsion decisions which arguably violate the prohibition of *refoulement*, but also to decisions to exclude a person from the right to an asylum status. The ECHR does not include a right to an asylum status. Applicants who are refused an asylum status, but will not be expelled,⁴⁰ cannot appeal to Article 13 ECHR.⁴¹

The Procedures Directive has thus made procedural rights for asylum applicants more visible and provides for broader protection than Articles 3 and 13 ECHR.

36 See for example ECtHR 12 April 2005, *Shamayev and others v Georgia and Russia*, no 36378/02, para 458 and (under Art 5 (1)) ECtHR 5 February 2002, *Čonka v Belgium*, no. 51564/99, para 44.

37 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, ECtHR 2 February 2012, *I.M. v France*, no 9152/09. The ECtHR in these cases referred to the relevant provisions of the Procedures Directive in its description of relevant international and European law or relevant international texts and documents.

38 See section 4.3.2.

39 It applies to manifestly unfounded and inadmissible cases, cases rejected in a standard procedure, an accelerated or border procedure or a preliminary examination (in case of a subsequent asylum procedure).

40 This applies for example to applicants who are refused an asylum status, because there are serious reasons to believe that they committed a serious crime in their country of origin, who face a real risk of persecution upon return. See Art 12 (2) PD.

41 See for example ECtHR 20 July 2010, *A v the Netherlands*, no 4900/06, paras 152-153.

11.2.3 Supervision and practical support for the Member States

The fact that asylum procedures are now governed by EU law has also lead to extra opportunities to supervise the fairness of Member States' asylum procedures. The Commission started infringement procedures against a number of Member States for a failure to implement the Procedures Directive correctly.⁴²

Furthermore the development of CEAS lead to a strengthening of practical cooperation between the Member States in the field of asylum. This cooperation seeks first of all to increase convergence but also envisages to ensure the ongoing quality of Member States' decision-making procedures in that area.⁴³ The most important measure taken in this context was the establishment of the European Asylum Support Office (EASO) in 2010.⁴⁴ The purpose of EASO is 'to facilitate, coordinate and strengthen practical cooperation among Member States on the many aspects of asylum and help to improve the implementation of CEAS'. EASO shall amongst others organise, promote and coordinate activities relating to country of origin information and establish and develop training for officials working in the field of asylum.⁴⁵ Already before the establishment of EASO, common EU Guidelines for the processing of country of origin information⁴⁶ as well as a common European asylum curriculum were developed.⁴⁷

42 The Commission sent a letter of formal notice with regard to the implementation of the Procedures Directive to Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Greece, Ireland, Italy, Lithuania, Malta, Poland, Portugal, Spain and Sweden. In most cases the Commission was satisfied with the information provided by the Member State. The Commission issued a reasoned opinion with regard to Belgium, Cyprus, Ireland, Spain and Sweden. Cases against Belgium and Ireland were referred to the Court of Justice, but were closed before a judgment was rendered. See www.ec.europa.eu/home-affairs/news/infringements/infringements_by_policy_asylum_en.htm (accessed on 19 March 2012).

43 See for example Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum, An Integrated Approach to Protection across the EU, 17 June 2008, COM(2008) 360 final.

44 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11 (Regulation 439/2010).

45 Artt 4 and 6 of Regulation 439/2010.

46 European Union, *Common EU Guidelines for Processing Country of Origin Information (COI)*, April 2008, ARGO project JLS/2005/ARGO/GC/03. These guidelines were developed by a project group, formed by representatives of country of origin information desks from immigration services of several Member States.

47 www.asylum-curriculum.eu/eacweb (accessed on 19 March 2012). The curriculum provides for common vocational training for caseworkers, management officials and policy makers working with asylum matters. The aim of the curriculum is to contribute to the implementation of a Common European Asylum System and to increase the quality of the asylum process in Europe.

EASO must also 'provide effective operational support to Member States subject to particular pressure on their asylum and reception systems'.⁴⁸ Such pressure may be characterised by the sudden arrival of a large number of third-country nationals who may be in need of international protection and may arise from the geographical or demographical situation of the Member State.⁴⁹ EASO may deploy Asylum Support Teams in Member States. These teams shall provide expertise, in particular in relation to interpreting services, information on countries of origin and knowledge of the handling and management of asylum cases.⁵⁰ Asylum Support Teams were sent to Greece and Luxembourg in 2011 and 2012.⁵¹

Finally EASO shall provide 'scientific and technical assistance in regard to the policy and legislation of the Union in all areas having a direct or indirect impact on asylum so that it is in a position to lend its full support to practical cooperation on asylum and to carry out its duties effectively'.⁵²

It may be expected that the European Commission's supervisory role (although of a limited nature), practical cooperation and the support of EASO indeed promote the fairness of the asylum procedures and enhance the quality of asylum decisions.

11.2.4 Subconclusion: the Procedures Directive, an important step forward

It should be concluded that even though the Procedures Directive certainly does not deserve a beauty prize, asylum applicants are better off with than without it. The directive provides for important guarantees for asylum procedures and at the same time activated the EU right to an effective remedy in asylum cases. The previous chapters of this study have shown that the potential impact of the Procedures Directive via the EU right to an effective remedy is more significant than many expected at the time of the adoption of the directive.

11.3 A SET OF EU PROCEDURAL STANDARDS FOR ASYLUM PROCEDURES

The purpose of this study was to derive a set of EU procedural standards for a number of key issues of asylum procedures from EU legislation and the EU

48 Art 2 Regulation 439/2010.

49 Art 8 of Regulation 439/2010.

50 Art 14 of Regulation 439/2010.

51 EASO Work Programme 2012, September 2011 and Operating Plan for the Deployment of Asylum Support Teams to Luxembourg, 26 January 2012, both available at www.ec.europa.eu/home-affairs/policies/asylum/easo_en.htm (accessed 19 March 2012).

52 Art 2 (3) of Regulation 439/2010.

right to an effective remedy and related procedural rights and principles. In Chapters 6 to 10 conclusions were drawn as to the procedural guarantees which should be offered with regard to the right to remain, the right to be heard and evidentiary issues. The main procedural standards should be summarised as follows:

The right to remain on the territory of the Member State during the asylum procedure

- An asylum applicant should be allowed to remain on the territory of the Member State
 - 1 Until the determining authority in first instance has carried out a close and rigorous assessment of the asylum claim.
 - 2 For the time necessary to avail himself of the effective remedy before a court or tribunal in the meaning of Article 39 (1) PD.
 - 3 During the course of the appeal proceedings, until rigorous scrutiny of the claim of a risk of *refoulement* has been performed by the court or tribunal.
- Automatic suspensive effect must be attached by law to either the appeal itself or to a request for interim relief.
- The procedure in which interim relief may be granted by the national court or tribunal on request must comply with important procedural guarantees, such as the rights of the defence, a reasonable burden of proof and a rigorous scrutiny of a claim of a risk of *refoulement*.

The asylum applicant's right to be heard on his asylum motives

- In principle every asylum applicant should be heard in a personal interview. Exceptions to this rule are only allowed in exceptional cases.
- If a personal interview is omitted the asylum applicant should be given sufficient opportunity to substantiate his asylum claim, for example by submitting written statements.
- The determining authorities should investigate whether dependent adults have independent asylum motives which could best be explained in a personal interview.
- Minor asylum applicants should in principle be interviewed if they wish so and if their age and maturity permits. Only if an interview is not considered to be in the best interests of the child should an interview be omitted.
- The conditions, under which interviews are conducted, must allow applicants to present the grounds for their applications in a comprehensive manner.
- The interviewer must ascertain that the applicant is actually able to understand the language chosen for the interview and that he can express himself effectively in this language.
- If the applicant does not understand the language of the interview a competent and qualified interpreter should be provided free of charge. If no

such interpreter is available the determining authority should take this into account when examining the case.

- The interviewer must be competent and properly trained to interview asylum applicants.
- Interviews should be conducted in a gender-sensitive manner.
- Minors should be heard in a child-friendly manner.
- The applicant should be granted the opportunity to comment on the report of the personal interview, particularly if the determining authority intends to reject the asylum application on the basis of the information contained in the report. To that end the applicant should have timely access to the report of the interview,
- Member States should at one stage of the administrative procedure hear the asylum applicant on its main conclusions regarding the fact-finding, credibility assessment and the assessment of the risk of *refoulement* as well as important pieces of evidence on which these conclusions are based.
- An oral hearing should be held before the first instance court or tribunal reviewing the negative decision on the asylum claim, in particular if this court decides on the credibility of the applicant's account and/or where the applicant's personal experiences play an important role.
- The applicant must be able to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them.

The burden and standard of proof and evidentiary assessment

- The standard of proof should not be set too high. It may be expected of the applicant to show that there is a 'reasonable possibility' of future persecution or that there are substantial grounds for believing that he faces a real risk of serious harm.
- The determining authority should In the examination of the asylum claim take into account all relevant indicators of a risk of *refoulement*.
- The burden of proof must shift from the applicant to the determining authority if the applicant adduced evidence capable of proving that there are substantial grounds for believing that there is a risk of *refoulement*. In particular the burden or proof should shift if:
 - 1 The applicant made plausible that he was persecuted or subjected to serious harm in the past
 - 2 The applicant substantiated that there is a risk of *refoulement* by submitting credible statements and/or documents
 - 3 Country of origin information reports show that serious human rights violations occur in the applicant's country of origin
 - 4 The applicant made plausible that he belongs to a group which is at risk
- The applicant should not be expected to prove negative facts
- The duty to produce evidence should be shared between the applicant and the determining authority.

- The determining authority must gather precise and up-to-date country of origin information
- The determining authority should direct that a medical expert report be written if the applicant makes out a *prima facie* case as to the origin of the scars on his body.
- The use of presumptions which are impossible or excessively difficult to rebut is not allowed
- When assessing the credibility of the applicant's asylum account, the determining authority should focus on the core of the asylum account.
- Asylum applicants should be granted the opportunity to explain the alleged deficiencies in the asylum account.
- As soon as the general credibility of the asylum applicant is established, his statements should according to Article 4 (5) QD be accepted as facts, without requiring further evidence.
- All relevant and reliable evidence should be taken into account in the assessment of the asylum claim.
- Expert reports must fulfil the requirements of excellence, independence and transparency.
- Country of origin information reports and medical reports are expert reports, which should be accorded important weight in asylum cases.
- Member States cannot only rely on country of origin information provided by their own Ministries but should also take into account reports issued by reputable human rights organisations, UN agencies and authorities of other States. The weight which should be attached to a country of origin information report depends on the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources.
- The weight which should be accorded to a medical report depends on its quality and conclusiveness.

Judicial review of the establishment and qualification of the facts

- The national court or tribunal which decides on the appeal against the negative asylum decision should review both points of law and points of fact.
- This court or tribunal should assess the claim of a risk of *refoulement* on its merits.
- It should carefully examine the facts and evidence underlying the asylum claim. A reasonableness test in which wide discretion is afforded to the determining authority's fact-finding, including the assessment of the applicant's credibility is not allowed.
- The national court should at one stage of the asylum procedure, before the expulsion of the applicant, review the asylum decision on the basis of all relevant available facts and evidence. This includes all relevant

evidence which is submitted in a later stage of the asylum procedure (after the first administrative decision on the asylum application).

- Relevant facts or evidence cannot be excluded from the assessment by the national court on the sole ground that they should have been submitted earlier in the procedure.

The use of secret information

- Asylum applicants should in principle have access to documents which are relevant to their case (inculpatory or exculpatory)
- The non-disclosure of evidence underlying the asylum decision should have a *legitimate aim* and it should be strictly necessary.
- The national court deciding on the appeal against the negative asylum decision should review whether non-disclosure of evidence pursues a legitimate aim and is necessary.
- The national court must receive all relevant information underlying the asylum decision, including the evidence which was not disclosed to the person concerned.
- The protection of secret information must be observed in such a way as to reconcile it with the EU right to an effective remedy, the right to be heard and the duty to state reasons. The conflicting interests of the parties concerned must be balanced.
- A negative asylum decision based on documents in which most or most crucial information is not disclosed infringes the right to adversarial proceedings. The right to adversarial proceedings is not violated where the evidence was to a large extent disclosed to the applicant and the open material plays a predominant role in the determination or when the allegations in the open material are sufficiently specific.
- The weight which is attached to the confidential material for the decision should be taken into account when assessing whether the rights of the defence have been infringed in an asylum case.
- The credibility of evidence of anonymous origin must be considered reduced by the fact that the context in which it was drafted is largely unknown and because the determining authority's assertions in that regard cannot be verified.
- Special techniques may be used in order to compensate the use of secret information, such as the use of special counsels, non confidential summaries or a list of all the documents in the file. Anonymous witnesses may be questioned by an investigative judge.
- A special counsel who could test the non-disclosed evidence and put arguments on behalf of the asylum applicant during closed hearings could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing. The applicant must be provided with sufficiently specific information about the allegations against him in order to give effective instructions to this special counsel.

- The information disclosed in non-confidential summaries should be sufficiently precise in order to put the applicant in the position to determine whether the deleted information is likely to be relevant for his case and to express his view on it.

11.4 ENFORCING THE EU RIGHT TO AN EFFECTIVE REMEDY IN PRACTICE

This study addressed procedural aspects of asylum procedures which have so far not been decided by the Court of Justice. The conclusions drawn in this study thus need confirmation, first by the national courts of the Member States and ultimately by the Court of Justice. It is foremost up to the national courts to interpret the Procedures Directive in the light of the EU right to an effective remedy and to test the legality of the directive against this right. Whether the questions raised in this study will ever be put before the Court of Justice depends to a large extent on the national courts.⁵³ In this respect the lawyers who are assisting asylum applicants in the EU Member States also play an important role. These lawyers may prompt the national courts to apply the Procedures Directive and the EU right to an effective remedy and urge them to refer questions for preliminary rulings to the Court of Justice.

Reliance on and application of the EU right to an effective remedy is not easy. This study shows that the EU Courts' case-law concerning procedural rights with regard to all fields of EU law is relevant also in the context of asylum procedures. Solid general knowledge of EU law is therefore required in order to be able to interpret this case-law and apply it to asylum procedures. Furthermore it is difficult to disclose relevant case-law concerning the right to an effective remedy and related procedural rights because of the fact that this case-law concerns all fields of EU law as well as the fact that the EU Courts have used various terms for the same procedural rights. Hopefully this study will assist asylum lawyers and national courts to discover the potential of EU (asylum) law and to apply this right in an individual case.

The number of preliminary rulings regarding asylum issues which have been referred to the Court of Justice so far is still limited. Only one judgment regarding the interpretation of the Procedures Directive was rendered by the Court of Justice in the *Samba Diouf* case.⁵⁴ Furthermore a few preliminary rulings which (partly) concern the interpretation of the Procedures Directive were pending before the Court at the moment this study was concluded.⁵⁵

⁵³ The crucial role of the national courts in guaranteeing EU fundamental rights was already stressed in sections 2.5.2 and 2.5.3 of this study.

⁵⁴ Case C-69/10, *Samba Diouf* [2011].

⁵⁵ See notably Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland* concerning the right to be heard in asylum cases and Case C-175/11, which concerns the question whether a Member State is precluded from adopting administrative measures which require that a class of asylum applications defined on the basis of the nationality

The chance that all or even a significant part of the issues discussed in this study will be decided by the Court of Justice in the coming years is thus rather slim.

11.4.1 Incorporating case-law in EU legislation: the recast of the Procedures Directive

A much faster and more effective way to enforce compliance with the EU right to an effective remedy in asylum cases is by incorporating the Court of Justice's and ECtHR's case-law concerning this right in EU legislation. This makes the implications of the right to an effective remedy much more visible and better enforceable.

The Commission recognised that 'in the area of procedural asylum legislation only legislative measures may ensure systemic and durable impacts on the quality and efficiency of examination procedures'.⁵⁶ In the context of the second phase of the Common European Asylum System the Commission issued recast proposals for the Procedures Directive in 2009 and 2011. In these proposals the Commission indeed dedicated itself to raising the level of procedural protection for asylum applicants. It is interesting to note that both the initial and the amended proposal for the recast of the procedures Directive are, according to the Commission 'informed by developing case-law of the Court of Justice of the European Union and the European Court of Human Rights, especially concerning the right to an effective remedy'.⁵⁷ It may therefore be expected that the provisions of the proposals for the recast of the Procedures Directive indeed reflect the conclusions drawn in this study as to the requirements following from the EU right to an effective remedy. Sections 11.5.3-11.5.7 below will test this hypothesis. For this purpose use was made of the amended proposal in the version discussed by the Council in the end of January 2012, which contained the complete text of the proposal.⁵⁸ Furthermore it is examined whether the recast of the Qualification Directive which was adopted in December 2011, incorporates the Court of Justice's and the ECtHR's case-law with regard to the burden and standard of proof and evidentiary assessment.

or country of origin of the asylum applicant be examined and determined according to an accelerated or prioritised procedure and the interpretation of the term court or tribunal in the meaning of Art 39 PD.

56 Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, summary of the impact assessment, COM(2009) 554, SEC(2009) 1377, of 21 October 2009, p 3.

57 P 4 of the amended proposal. See also p 6 of the Initial proposal.

58 Council of the European Union, document 5514/12, 31 January 2012, Asile 11, CODEC 143 (Council document 5514/12).

First of all however sections 11.5.1 and 11.5.2 will briefly discuss the second phase of CEAS and the recast proposals for the Procedures Directive and the new Qualification Directive in general.

11.5 THE RECASTS OF THE PROCEDURES DIRECTIVE AND QUALIFICATION DIRECTIVE PUT TO THE TEST

The European Council in the The Hague Programme of 2004⁵⁹ and the Stockholm Programme of 2009⁶⁰ committed itself to establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection. The deadline for the completion of the second phase of CEAS was initially 2010 and was later changed to 2012.⁶¹

According to the Stockholm Programme CEAS should be based on high protection standards. At the same time it must give due regard to fair and effective procedures capable of preventing abuse. The second phase of CEAS also seeks to achieve a higher level of harmonisation. The European Council stated that 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 amongst others procedural arrangements and status determination. 'The objective should be that similar cases should be treated alike and result in the same outcome.'⁶²

In order to realise the second phase of CEAS the Commission issued proposals for recasts of the asylum directives and regulations. The recast proposals of the Procedures Directive⁶³ and the Qualification Directive were introduced by the Commission in 2009. An amended recast proposal for the Procedures Directive was issued in June 2011.⁶⁴ In March 2012 when this study was

59 Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005], OJ C 53/1.

60 Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizen [2010], OJ C 115/1, para 6.2.1.

61 See also Council of the European Union, Council Conclusions on Borders, Migration and Asylum, Stocktaking and the way forward, 3096th Justice and Home Affairs Council meeting Luxembourg, 9 and 10 June 2011, p 4.

62 Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizen [2010], OJ C 115/1, para 6.2.

63 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554 (the initial proposal).

64 Amended proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection status (Recast) COM(2011) 319 final (the amended proposal).

finalised, the recast of the Qualification Directive had been adopted. The amended recast proposal for the Procedures was still being negotiated.⁶⁵

11.5.1 The proposals for a recast of the Procedures Directive

The main objective of the initial proposal for a recast of the Procedures Directive was to 'ensure higher and more coherent standards on procedures for granting and withdrawing international protection that would guarantee an adequate examination of the protection needs of third country nationals or stateless persons in line with international and Community obligations of Member States.'⁶⁶ Furthermore the proposal aimed at simplifying and consolidating procedural notions and devices and improving coherence between asylum instruments.⁶⁷ The proposal introduced a single asylum procedure with the same minimum guarantees for refugee and subsidiary protection claims. It contained detailed standards with respect to, for instance, the training of the personnel examining applications and taking decisions on international protection, the use of medico-legal reports and the examination of applications of persons with special needs. It also deleted many of the possibilities included in the current directive to derogate from procedural guarantees, such as the right to a personal interview and the right to free legal aid. Furthermore the proposal limited the number of situations in which the asylum proceedings could be accelerated. Finally it provided for a right to an effective remedy with automatic suspensive effect, which provides for a full and *ex nunc* examination of both facts and points of law.

65 Also the recast proposals for the Dublin Regulation and Reception Conditions Directive had not yet been adopted. See 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 (Recast), 3 December 2008, COM(2008) 820 final, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), 3 December 2008, COM(2008) 815 final and Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), 1 June 2011, COM(2011) 320 final.

66 P 4 of the initial proposal.

67 P 5 of the initial proposal.

The proposal was welcomed by UNHCR⁶⁸ and was generally supported by the European Parliament.⁶⁹ However, the discussions in the Council were difficult and the Council was unable to reach a position. In order to boost the work to achieve a Common European Asylum System the Commission issued an amended recast proposal in June 2011.⁷⁰ The amended proposal aims to address the concerns of the Member States by recognising the need for flexibility, cost-effectiveness, simplification of rules and the prevention of abuse. The Commission made changes in the amended proposal to ensure that the proposal was 'more compatible with the variety of legal systems and other arrangements in different Member States'.⁷¹ This necessarily resulted in a lower level of harmonisation than that envisaged by the initial proposal. Provisions were inserted in the amended proposal in order to enable Member States to deal with a large number of simultaneous asylum claims.⁷² In order to prevent abuse of the asylum system, the amended proposal reintroduced amongst others two grounds for applying an accelerated procedure.⁷³ Moreover some of the procedural guarantees introduced in the initial proposal were weakened.⁷⁵

Denmark does not take part in the adoption of the recast of the Procedures Directive and is not bound by it or subject to its application. The United Kingdom and Ireland will not be bound by the recast of the directive

68 UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), UNHCR, Bureau for Europe, August 2010.

69 European Parliament legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) (COM(2009)0554 – C7-0248/2009 – 2009/0165(COD)).

70 P 1 of the amended proposal.

71 P 5 of the amended proposal. See for an overview of the changes the annex to the amended proposal: Detailed Explanation of the Amended Proposal *Accompanying the document* Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast).

72 See for example Art 6 (4) allowing an extension of the time-limit within which an asylum application must be registered and Art 14 allowing the temporary involvement of personnel of another authority than the determining authority in conducting interviews in the situation of a large influx.

73 Art 31 (6) (e) and (g) which reintroduce the possibility to accelerate the proceedings if the applicant has made inconsistent, contradictory, clearly false or obviously improbable or insufficient representations and in cases of a threat to national security or public order.

74 P 5 of the amended proposal.

75 The proposal for example does no longer include a right to free legal assistance in first instance proceedings, but only the right to free legal and procedural information (Art 20 of the amended proposal). It also states that the Member States should make 'a thorough report containing all substantial elements' instead of a 'transcript' of the personal interview (Art 17).

and continue to be bound by the current Procedures Directive as long as they have not notified their wish to accept this new measure.⁷⁶

11.5.2 The recast of the Qualification Directive

In December 2011 a recast of the Qualification Directive was adopted.⁷⁷ The directive should be implemented in the Member States by 21 December 2013.⁷⁸ On this date the current Qualification Directive (2004/83/EC) will be repealed.⁷⁹ The United Kingdom, Ireland and Denmark do not take part in this directive.⁸⁰

The new directive contains a number of changes in comparison with Directive 2004/83/EC. It pays more attention to gender issues and children's rights.⁸¹ Moreover it contains more safeguards with regard to the application of the internal flight alternative,⁸² requires effective and durable protection against persecution or serious harm in the country of origin⁸³ and it has brought several provisions of the directive more in line with the Refugee Convention.⁸⁴ Furthermore persons eligible for subsidiary protection are now granted the same secondary rights as persons who are recognised as refugees according to the Qualification directive.⁸⁵ As will be explained below in section 11.4.5, the recast does not contain any major changes with regard to the burden and standard of proof and evidentiary assessment.⁸⁶

11.5.3 The right to remain on the territory of the Member State

With regard to the right to remain on the territory of the Member State during the asylum procedure the amended proposal contains some improvements. Most importantly Article 46 (5) provides that in principle:

⁷⁶ Recitals 45 and 46 Preamble of the amended proposal.

⁷⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

⁷⁸ Art 39 Directive 2011/95/EU.

⁷⁹ Art 40 Directive 2011/95/EU.

⁸⁰ Note that the United Kingdom and Ireland are bound to Directive 2004/83/EC.

⁸¹ See Artt 9 (2) (f) and 10 (1) (d) as regards gender issues and Recitals 18, 19, 28, 38 Preamble and Art 2 (j), 9 (2) (f), 31 Directive 2011/95/EU.

⁸² Art 8 Directive 2011/95/EU.

⁸³ Art 7 (2) Directive 2011/95/EU.

⁸⁴ Artt 9 (3) and 11 (3) Directive 2011/95/EU.

⁸⁵ Art 20 (2) Directive 2011/95/EU.

⁸⁶ Art 8 Directive 2011/95/EU concerning internal protection newly refers to Art 4 of the directive. Art 4 QD remained unchanged.

Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired or, when this right has been exercised within the time limit, pending the outcome of the remedy.

This provision guarantees that asylum applicants be granted the opportunity to lodge an appeal against the negative asylum decision. Furthermore they are effectively protected against *refoulement* until the decision by the court or tribunal.

However, the proposal allows that Member States make an exception to the rule that applicants are allowed (by law) to remain on the territory of the Member State during the appeal proceedings⁸⁷ in a large number of cases.⁸⁸ It concerns cases rejected in an accelerated procedure,⁸⁹ cases considered manifestly unfounded⁹⁰ or declared inadmissible on the ground that another Member State has granted refugee status,⁹¹ cases which were discontinued and of which reopening is rejected⁹² or cases in which the European safe third country concept was applied.⁹³ If the appeal has no automatic suspensive effect 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. The applicant should be allowed to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory.⁹⁴ Accordingly the amended proposal demands that the appeal itself or (in a limited number of situations) the request for interim relief have automatic suspensive effect. The amended proposal thus complies with the requirement of a remedy with automatic suspensive effect, which follows from the EU right to an effective remedy as well as the ECtHR's case-law.

The right to remain during first instance proceedings

The amended proposal also contains some positive changes with regard to the right to remain on the territory during first instance asylum proceedings. Exceptions to this right are allowed where a person makes a further (third) asylum application after a final decision to consider a previous subsequent application inadmissible or after a final decision to reject that application as

87 The proposal does not seem to allow exceptions to the rule that applicants should be allowed to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired.

88 This exception does not apply to applications rejected in a border procedure. See Art 46 (6) of the amended proposal.

89 See Art 31 (6) of Council document 5514/12.

90 Art 32 (2) of Council document 5514/12.

91 Art 33 (2) (a) of Council document 5514/12.

92 Art 28 of Council document 5514/12.

93 Art 39 of Council document 5514/12.

94 Art 46 (7) of Council document 5514/12.

unfounded.⁹⁵ In the current directive the right to remain does not apply where a subsequent asylum application is not further examined according to Articles 32-34 PD.

The amended proposal still allows Member States to derogate from the right to remain where it will surrender or extradite a person to another Member State, to a third country or to international criminal courts or tribunals. The amended proposal newly clarifies that expulsion or extradition to the *country of origin* of the applicant during first instance asylum proceedings is not allowed.⁹⁶ Another amelioration is that the amended proposal explicitly provides with regard to both third and following asylum applications as well as extraditions to a third country that expulsion or extradition during the asylum proceedings is only allowed if the determining authority is satisfied that this will not lead to direct or indirect *refoulement*.⁹⁷

However as was argued in section 6.2 and is now also recognised in Article 46 of the amended proposal, it follows from the EU right to an effective remedy that a person cannot be expelled or extradited unless he has had reasonable time and opportunity to appeal against the expulsion or extradition before a court or tribunal. Further this appeal should automatically suspend the expulsion or extradition. Therefore the exceptions to the right to remain during first instance proceedings should not be used and could better be deleted.

11.5.4 The asylum applicant's right to be heard on his asylum motives

Also with regard to the right to a personal interview the amended proposal contains several important improvements. The proposal reduces the Member States' discretion to hold a personal interview and allows the omission of an interview only in two situations. The first is that the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available.⁹⁸ This implies that the determining authority should conduct a personal interview if it intends to refuse a refugee status and grant a subsidiary protection status. Secondly a personal interview may be omitted if the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control. When in doubt, the determining authority must consult a medical expert to establish whether the condition that makes the applicant unfit or unable to be interviewed is temporary or of long-term nature. If the determining authority decides to omit the interview on this ground, it shall make

⁹⁵ Art 9 (1) of Council document 5514/12.

⁹⁶ Art 9 (2) of Council document 5514/12.

⁹⁷ Artt 9 (3) and 41 of Council document 5514/12.

⁹⁸ Art 14 (2) (a) of Council document 5514/12.

reasonable efforts to allow the applicant to submit further information.⁹⁹ Furthermore the amended proposal requires Member States to give the opportunity of a personal interview to dependent adults.

The proposal still leaves the Member States discretion to determine in national legislation the cases in which an (un)accompanied minor shall be given the opportunity of a personal interview. As was argued in section 7.1.2 this discretion is limited by Article 24 of the Charter. It follows from this provision that a minor should in principle be given the opportunity to explain its asylum motives in a personal interview, if the age and maturity of the child permits.

Requirements as to the conduct of the interview

The proposal newly requires the determining authority, when conducting a personal interview on the substance of an application for international protection, to ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 QD as completely as possible.¹⁰⁰ The proposal also contains extra guarantees in order to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. First of all it provides that the communication shall take place in the language preferred by the applicant, unless there is another language which he/she understands (in stead of 'is reasonably supposed to understand') and in which he/she is able to communicate *clearly*.¹⁰¹

Secondly the proposal states that interviews should normally be conducted by the personnel of the determining authority.¹⁰² This personnel should receive proper training, which includes amongst others initial and follow-up training concerning international human rights and the EU asylum *acquis*, issues related to the handling of asylum applications from minors and vulnerable persons with specific needs and interview techniques.¹⁰³ Furthermore interviewers shall receive basic training with regard to the awareness of consequences of torture and of medical problems which could adversely affect the applicants' ability to be interviewed.¹⁰⁴ Only in the situation of a large influx of asylum applicants may the personnel of another authority than the determining authority be temporarily involved in conducting interviews. Also

⁹⁹ Art 14 (2) (b) of Council document 5514/12.

¹⁰⁰ Art 16 of Council document 5514/12.

¹⁰¹ Art 15 (3) (c) of Council document 5514/12. The current directive requires that the interview take place in a language which the applicant is reasonably be supposed to understand and in which he/she is able to communicate.

¹⁰² Art 14 (1) of Council document 5514/12.

¹⁰³ Art 4 (3) of Council document 5514/12 jo Art 6 (4) of Regulation 439/2010.

¹⁰⁴ Art 4 (3)

this personnel must receive proper training before they start interviewing.¹⁰⁵ The person who conducts the interview must be competent (in stead of sufficiently competent) to take account of the relevant personal *and* general circumstances surrounding the application.¹⁰⁶

Thirdly the proposal pays more attention to the gender sensitivity of the interview. It requires that the interviewer be competent to take account of the applicant's gender, sexual orientation and gender identity.¹⁰⁷ It also states that wherever possible, Member States should provide for an interviewer and an interpreter of the same sex if the applicant concerned so requests, unless the request is based on discriminatory grounds.¹⁰⁸ Finally the proposal explicitly requires that interviews which (un)accompanied children should be conducted in a child appropriate manner.¹⁰⁹

The introduction of these extra guarantees help to ensure that the asylum applicant is able to bring his asylum motives to the fore.

The asylum applicant's right to be heard following the personal interview

According to the proposal Member States shall ensure that a thorough report containing all substantial elements is made of every personal interview.¹¹⁰ Member States may provide for audio or audio-visual recording of the personal interview. If they do so they must annex the recording of the personal interview to the report.¹¹¹

In line with the EU right to be heard the amended proposal provides the applicant with an opportunity to comment on the report of the interview:

Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarifications with regard to any mistranslations or misconceptions appearing in the report, at the end of the personal interview or within a specified time limit before the determining authority takes a decision.¹¹²

The amended proposal also guarantees that, in order to make use of this opportunity to make comments and clarifications, the applicant is fully informed of the content of the report, with the assistance of an interpreter if necessary. This does not necessarily mean however that the applicant has access to the report and the recording of the interview before the decision on the asylum application is taken. The directive allows that access to the report

105 Art 14 (1) of Council document 5514/12. This provision refers to Art 6(4)(a) to (e) of Regulation (EU) No 439/2010 and in Article 18(5) of Council document 5514/12.

106 Art 15 (3) (a) of Council document 5514/12.

107 Art 15 (3) (a) of Council document 5514/12.

108 Art 15 (3) (b) and (c) of Council document 5514/12.

109 Art 15 (3) (e) of Council document 5514/12.

110 Art 17 (1) of Council document 5514/12.

111 Art 17 (2) of Council document 5514/12.

112 Art 17 (3) of Council document 5514/12.

be granted at the same time as the decision is made, if the application is determined in the framework of an accelerated procedure.¹¹³ This limitation of access to the report of the interview may lead to infringements of the EU right to be heard. This right is only complied with if the information provided to the applicant is sufficiently detailed to put him in the position to comment effectively on the content of the report.

Member States shall request the acknowledgement the applicant on the content of the report, unless the interview is recorded and the recording is admissible as evidence in appeal proceedings. Where an applicant refuses to acknowledge the content of the report, the reasons for this refusal shall be entered into the applicant's file.¹¹⁴

The amended proposal does not provide for a right to be heard on the determining authority's conclusions regarding the fact-finding and the risk assessment. It does state that during the personal interview the applicant must be offered the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in his/her statements.¹¹⁵ This provision reflects the EU right to be heard. It is however questionable whether it is sufficient to enable the applicant to respond effectively to the determining authority's conclusions as to the credibility of the asylum account, the assessment of the evidence and the existence of a risk of *refoulement* upon return.

The right to a hearing before a court or tribunal

The amended proposal does not contain a right to an oral hearing before the court or tribunal hearing the appeal against the negative asylum decision. It was concluded however in section 7.4. that the right to an effective remedy, read in the light of Article 47 of the Charter, generally requires an oral hearing before the (first instance) court or tribunal hearing the appeal against the rejection of the asylum claim. This is particularly the case if the court is asked to review findings of facts. It should be noted in this regard that, according to the amended proposal, the appeal against the rejection of the asylum claim must provide for a full examination of the facts.¹¹⁶

11.5.5 The burden and standard of proof and evidentiary assessment

Article 4 QD regarding the assessment of facts and circumstances has remained unchanged. Therefore the conclusions regarding the burden and standard of proof as well as evidentiary assessment drawn in Chapter 8 remain relevant.

¹¹³ Art 17 (5) of Council document 5514/12.

¹¹⁴ Art 17 (4) of Council document 5514/12.

¹¹⁵ Art 16 of Council document 5514/12.

¹¹⁶ Art 46 (3) of Council document 5514/12.

The amended proposal for a recast of the Procedures Directive contains some relevant new provisions, in particular with regard to the use of expert reports, including country of origin information and medical reports. The amended proposal provides that the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues. Furthermore it requires that country of origin information be obtained from the European Asylum Support Office.¹¹⁷

The amended proposal in line with the conclusions drawn in section 8.6.3, recognises the importance of medical reports for the substantiation of past torture or ill-treatment.¹¹⁸ It provides:

Member States shall subject to the applicant's consent, arrange for a medical examination of him/her concerning signs that might result from past persecution or serious harm where the determining authority deems this to be relevant for an assessment of the applicant's request for international protection in accordance with Article 4 of [the Qualification Directive].¹¹⁹

The examination shall be paid for by the Member State and must be carried out by qualified medical professionals. In this context the proposal acknowledges the authority of the Istanbul Protocol. It states that national measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or mental violence, including acts of sexual violence, in asylum procedures should *inter alia* be based on this protocol.¹²⁰

Member States shall also, on the request of the applicant, permit a medical examination to be arranged by the applicant at his own costs. Member States may prescribe a reasonable deadline from the time the permission is given within which the results of the medical examination shall be submitted to the determining authority.¹²¹ The results of the medical examination shall be

¹¹⁷ See Regulation (EU) No 439/2010. 'The Support Office should be a European centre of expertise on asylum, responsible for facilitating, coordinating and strengthening practical cooperation among Member States on the many aspects of asylum, so that Member States are better able to provide international protection to those entitled, while dealing fairly and efficiently with those who do not qualify for international protection, where appropriate.' See recital 13 Preamble.

¹¹⁸ The Commission argued in the context of Art 18 of the amended proposal 'that the Qualification Directive already provides that facts relevant for the assessment of the application for international protection need to be taken into account and that a medical examination can be such a fact amongst others'.

¹¹⁹ Art 18 (1) of Council document 5514/12.

¹²⁰ Recital 24 Preamble of Council document 5514/12.

¹²¹ Art 18 (2) of Council document 5514/12.

assessed by the determining authority along with other elements of the application.¹²²

Sections 8.3.2 and 8.6.3 addressed the relevance of medical reports in asylum cases and argued that the Member State is obliged to direct that an expert medical report be obtained if the applicant submitted a medical certificate which makes out a *prima facie* case as to the origin of the scars on his body.

11.5.6 Judicial review of the establishment and qualification of the facts

In Chapter 9 it was concluded on the basis of the case-law of the Court of Justice as well as the ECtHR that the court or tribunal in the meaning of Article 39 PD should (at one stage of the procedure) provide for an *ex nunc* review of both points of fact and law. Furthermore it was argued that Article 39 PD requires a thorough judicial review. This implies that the national court or tribunal should as a minimum assess the claim of a risk of *refoulement* on its merits and must carefully examine the facts and evidence underlying the asylum claim. Article 46 (3) of the amended proposal is in conformity with these conclusions. It states that the effective remedy provides for 'a full examination of both facts and points of law, including an *ex nunc* examination of the international protection needs', at least in appeal procedures before a court or tribunal of first instance. The terms 'full examination' and '*ex nunc* examination' still need interpretation. In this light the case-law discussed in Chapter 9 and the conclusions drawn from this case-law are relevant.

11.5.7 The use of secret information in asylum cases

Chapter 10 of this study contended that Article 16 (1) last sentence PD which allows Member States to withhold relevant information to the national court deciding on the appeal against the asylum decision on national security grounds should be considered void. In the amended proposal this sentence has been deleted. As a result all information relevant to the asylum decision should at least be disclosed to the court or tribunal reviewing the rejection of the asylum claim.¹²³ However the directive fails to require that the court or tribunal reviewing the asylum decision decide whether the non-disclosure of the evidence concerned is justified. Such requirement should be read into the EU right to an effective remedy reflected in Article 46 of the amended proposal.¹²⁴

¹²² Art 18 (3) of Council document 5514/12.

¹²³ Art 23 (1) (a) of Council document 5514/12.

¹²⁴ See section 10.4.

The proposal also provides for other extra procedural guarantees in cases where disclosure of information or sources would jeopardise national security or other interests of the State. The amended proposal states that Member States should establish in national law procedures guaranteeing that the applicant's rights of defence are respected. The proposal explicitly mentions the option of disclosing the secret information to a special counsel.¹²⁵ The conclusions drawn in Chapter 10 as to the procedural guarantees which should be put in place in cases in which secret information is used are relevant for the interpretation of this provision.

11.5.8 Subconclusion: the recasts put to the test

The amended proposal for a recast of the Procedures Directive does indeed (partly) reflect the evolving case-law of the Court of Justice and the ECtHR concerning the right to an effective remedy as the Commission claimed. The proposal contains higher procedural standards with regard to several important procedural issues discussed in this study. Notably it grants a right to remain on the territory of the Member State until the time limit for lodging an appeal against the asylum decision has expired as well as a right to a remedy with automatic suspensive effect. Moreover it extends the right to a personal interview and provides important guarantees with regard to the circumstances of the interview. Finally it ensures a full and *ex nunc* judicial review of the negative asylum decision and abolishes the possibility to withhold relevant information to the court or tribunal reviewing the asylum decision.

This does not mean however that an appeal to the EU right to an effective remedy will become unnecessary in future asylum cases. To the contrary. Many of the procedural standards mentioned above are phrased in general terms and still need interpretation. For this purpose the EU right to an effective remedy should remain an important tool. Furthermore it remains to be seen whether the improvements proposed by the Commission will survive the negotiations in the Council. If this is not the case, the procedural safeguards concerned may be enforced by invoking the EU right to an effective remedy before the national courts.

Finally the amended proposal for a recast of the Procedures Directive fails to address some of the shortcomings of the current Procedures Directive found in this study. The proposal for instance does not reduce Member States' discretion to determine the cases in which an (un)accompanied minor shall be given the opportunity of a personal interview. It also lacks a requirement for the national court to review whether it is justified to refuse the disclosure of information relevant to the asylum decision. Moreover the recast of the

125 Art 23 (1) (b) of Council document 5514/12.

Qualification Directive fails to clarify important evidentiary issues, such as the burden and standard of proof. Article 4 (5) concerning the benefit of the doubt has remained unchanged.

11.6 TOWARDS FAIR ASYLUM PROCEDURES IN EUROPE

It does not seem to be realistic to expect that a common and fair European asylum procedure will be established in the near future. Nevertheless EU law should be taken seriously by determining authorities, national courts and lawyers representing asylum applicants. The Procedures Directive and the EU right to an effective remedy have the potential to raise the level of protection offered by the asylum procedures of the Member States and at the same time to harmonise those procedures to a certain extent. It may turn out that EU law sets different or higher standards for asylum procedures than the ECHR and the ECtHR's case-law. A one-sided focus on the ECHR is therefore no longer justified. It is now time for professionals working in the field of asylum to bring the Procedures Directive and the EU right to an effective remedy into action. This study may serve as a source of inspiration for this purpose.

Samenvatting

EU asielprocedures en het recht op een effectief rechtsmiddel

1 INLEIDING

Het toekennen van rechten aan personen is zinloos als zij die niet door middel van adequate en eerlijke procedures kunnen afdwingen. Binnen het EU-recht is dit algemeen erkend. Het Handvest van de Grondrechten van de Europese Unie (het Handvest) kent de status van fundamenteel recht toe aan procedurele rechten, namelijk het EU recht op een effectief rechtsmiddel (artikel 47) en het recht op behoorlijk bestuur (artikel 41). In het geval van asielprocedures kan een gebrek aan procedurele waarborgen leiden tot een schending van de rechten waar asielzoekers meestal een beroep op doen: het recht niet te worden uitgezet of uitgeleverd naar een land waar zij het risico lopen het slachtoffer te worden van ernstige mensenrechtenschendingen (het verbod van refoulement) en het recht op asiel. Beide rechten zijn in het Handvest erkend als fundamenteel recht (artikelen 18 en 19).

In 2005 werd Richtlijn 2005/85/EG betreffende minimumnormen voor de procedures in de lidstaten voor de toekenning of intrekking van de vluchtelingenstatus (de Procedurerichtlijn of PR) aangenomen. Deze richtlijn bevat minimumwaarborgen voor zowel de administratieve fase als de beroepsprocedure in asielzaken. UNHCR en NGO's hadden veel kritiek op deze richtlijn. Sommige bepalingen van de richtlijn zouden in strijd zijn met internationaal recht. Het niveau van harmonisatie was bovendien laag als gevolg van de vele uitzonderingsmogelijkheden die de richtlijn biedt en de vrijheid die de lidstaten wordt gelaten om hun asielprocedure vorm te geven. In dit proefschrift wordt echter betoogd dat de totstandkoming van de Procedurerichtlijn moet worden gezien als een positieve ontwikkeling. Vele aspecten van asielprocedures vallen nu binnen de reikwijdte van het EU-recht. Dit betekent dat EU grondrechten, zoals het recht op een effectief rechtsmiddel, op die procedures van toepassing zijn en de vrijheid van de lidstaten beperken. Hierdoor zou de Procedurerichtlijn asielzoekers wel eens veel meer procedurele waarborgen kunnen bieden dan velen hadden verwacht toen de richtlijn werd aangenomen.

De vraag die in dit proefschrift centraal staat is: wat is de betekenis van het EU recht op een effectief rechtsmiddel voor (1) de rechtmatigheid en (2) de interpretatie van EU regelgeving op het gebied van asielprocedures. Meer

specifiek beoogt het proefschrift de betekenis van het EU recht op een effectief rechtsmiddel vast te stellen voor de volgende belangrijke procedurele aspecten van asielprocedures:

- Het recht om gedurende de asielprocedure (eerste fase en beroepfase) op het grondgebied van de lidstaat te verblijven
- Het recht van de asielzoeker om te worden gehoord in de eerste fase en in beroep.
- Bewijskwesities:
 - 1 bewijsmaatstaf, bewijslast en bewijswaardering
 - 2 rechterlijke toetsing van de vaststelling en waardering van de feiten
 - 3 het gebruik van geheim bewijs

Het beoogde resultaat van deze exercitie is een reeks EU procedurele normen voor deze aspecten.

Het eerste deel van dit proefschrift behandelt een aantal onderwerpen dat van belang is om de betekenis van het EU recht op een effectief rechtsmiddel voor asielprocedures te kunnen vaststellen. Het besteedt aandacht aan het Gemeenschappelijk Asielstelsel, gaat in op de rol van internationale verdragen als bronnen van inspiratie voor EU grondrechten en introduceert het EU recht op een effectief rechtsmiddel en gerelateerde procedurele rechten. Het eerste deel wordt afgesloten met tussenconclusies en een uiteenzetting van de methodologie voor de volgende hoofdstukken. Het tweede deel van het proefschrift gaat in op de drie hierboven genoemde specifieke procedurele aspecten. Het derde deel bevat een aantal conclusies en een blik op de toekomst.

DEEL I – Voorafgaande onderwerpen

2 HET GEMEENSCHAPPELIJK ASIELSTELSEL EN DE TOEPASBAARHEID VAN EU GRONDRECHTEN

De Procedurerichtlijn maakt deel uit van het Gemeenschappelijk Asielstelsel (GEAS). Dat geldt ook voor Richtlijn 2004/83/EG inzake minimumnormen voor de erkenning van onderdanen van derde landen en staatlozen als vluchteling of als persoon die anderszins internationale bescherming behoeft, en de inhoud van de verleende bescherming (de Kwalificatierichtlijn of KR). Deze richtlijn is van belang voor dit proefschrift omdat het asielzoekers die in aanmerking komen voor internationale bescherming een recht op een asielstatus toekent en een refoulementverbod bevat. Bovendien gaat artikel 4 van de richtlijn in op een aantal bewijskwesities. Zowel de Procedurerichtlijn als de Kwalificatierichtlijn bevatten minimumnormen. Dit betekent dat lidstaten in beginsel voor de asielzoeker gunstigere normen mogen hanteren dan door deze richtlijnen is vereist. In dit proefschrift wordt betoogd dat de minimumnormen desondanks in strijd kunnen zijn met EU grondrechten, zoals het recht op een

effectief rechtsmiddel. Dit is het geval wanneer zij de lidstaten verplichten of expliciet of impliciet toestaan om nationale wetten vast te stellen of te handhaven die EU grondrechten schenden. Een dergelijke strekking van een bepaling van de Procedurerichtlijn of de Kwalificatierichtlijn zou echter strijdig zijn met een van de doelen van het GEAS, namelijk het waarborgen van de grondrechten van derdelanders. Het Hof van Justitie van de Europese Unie (het Hof van Justitie) zal daarom waarschijnlijk niet snel tot nietigverklaring van een bepaling van de Procedurerichtlijn of de Kwalificatierichtlijn overgaan. Het zal eerder geneigd zijn deze bepalingen in het licht van de EU grondrechten uit te leggen.

De Procedurerichtlijn kent de lidstaten veel vrijheid toe om hun asielprocedure in te richten. Uit de jurisprudentie van het Hof van Justitie blijkt echter dat lidstaten zijn gebonden aan EU grondrechten wanneer zij gebruik maken van een uitzonderingsmogelijkheid die de Procedurerichtlijn biedt of een vage term uit de richtlijn interpreteren.

Het Hof van Justitie beantwoordt prejudiciële vragen over de rechtmatigheid en de interpretatie van EU regelgeving. De belangrijke rol van de nationale rechter als EU rechter dient echter te worden benadrukt. De nationale rechter heeft een bijzondere verantwoordelijkheid om EU grondrechten te garanderen en prejudiciële vragen aan het Hof van Justitie voor te leggen.

3 DE SUBSIDIAIRE ROL VAN INTERNATIONALE VERDRAGEN ALS BRONNEN VAN INSPIRATIE VOOR EU GRONDRECHTEN

Internationale verdragen zijn belangrijke bronnen van inspiratie voor EU grondrechten. In het kader van asielprocedures zijn de volgende verdragen bijzonder van belang: het Vluchtelingenverdrag, het Europees Verdrag voor de Rechten van de Mens (EVRM), het VN Antifolterverdrag, het Internationaal Verdrag voor Burgerlijke en Politieke Rechten (IVBPR) en het Internationaal Verdrag inzake de Rechten van het Kind (IVRK). Het EVRM heeft op grond van het Handvest en artikel 6 lid 3 van het Verdrag betreffende de Europese Unie (EU-verdrag) bijzondere betekenis. Op basis van de jurisprudentie van het Hof van Justitie is te verwachten dat het Hof zich bij de interpretatie van het EU recht op een effectief rechtsmiddel in de asielcontext vooral zal laten inspireren door de jurisprudentie van het Europees Hof voor de Rechten van de Mens (EHRM). Het zal waarschijnlijk minder waarde toekennen aan de niet-bindende zienswijzen van andere toezichthouders, zoals de Hoge Commissaris voor de Vluchtelingen van de Verenigde Naties (UNHCR) en de diverse VN-Comités. In dit proefschrift wordt daarom het grootste gewicht gegeven aan de jurisprudentie van het EHRM.

4 HET EU RECHT OP EEN EFFECTIEF RECHTSMIDDEL EN GERELATEERDE RECHTEN

Het EU-recht kent verschillende procedurele rechten zoals het recht op een effectief rechtsmiddel, het effectiviteitsbeginsel en het recht op behoorlijk bestuur. Deze rechten zijn allemaal nauw met elkaar verbonden en overlappen elkaar. In dit proefschrift worden deze procedurele rechten aangemerkt als een categorie van normen. Per specifiek onderwerp wordt alle relevante jurisprudentie met betrekking tot al deze rechten onderzocht.

Het EU recht op een effectief rechtsmiddel is neergelegd in artikel 47 van het Handvest en omvat mede het recht op een eerlijk proces. De interpretatie van artikel 47 wordt, ook in de asielcontext, geïnspireerd door zowel artikel 6 als artikel 13 EVRM. Dat is bijzonder omdat het EHRM van oordeel is dat artikel 6 EVRM zelf niet op asielprocedures van toepassing is. Verder kan ook de jurisprudentie van het EHRM die betrekking heeft op de subsidiaire rol van het EHRM (onder meer de verplichting tot uitputting van de nationale rechtsmiddelen) van belang zijn voor de interpretatie van artikel 47 Handvest.

Het effectiviteitsbeginsel verbiedt nationale procedureregels die de uitoefening van door het EU-recht toegekende rechten uiterst moeilijk of praktisch onmogelijk maken. Effectieve rechtsbescherming dient te worden geboden door de nationale rechter. Indien nodig dienen de lidstaten daartoe nieuwe rechtsmiddelen te introduceren. Het recht op een effectief rechtsmiddel en een eerlijk proces eist dat het rechtsmiddel toegankelijk is en dat het recht op *equality of arms* en *adversarial proceedings* wordt gerespecteerd. Nauw gerelateerd aan het EU recht op een effectief rechtsmiddel zijn het recht om te worden gehoord en het recht op een gemotiveerde beslissing. Deze beide rechten worden gegarandeerd door het recht op behoorlijk bestuur van artikel 41 Handvest.

In dit proefschrift wordt betoogd dat uit de jurisprudentie van het Hof van Justitie en het EHRM de volgende drie uitgangspunten (*basic notions*) naar voren komen:

- 1 Wanneer wordt beoordeeld of EU procedurele rechten zijn geschonden moeten (vaak) belangen tegen elkaar worden afgewogen.
- 2 Bij de beoordeling of een procedure eerlijk is, dient rekening te worden gehouden met alle aspecten en instanties van deze procedure: het gaat om de eerlijkheid van de procedure als geheel.
- 3 Het onderwerp van de procedure beïnvloedt het niveau van bescherming dat in een procedure aan de betrokkene moet worden geboden: er dient rekening gehouden te worden met de aard van de rechten die op het spel staan en de bijzondere kenmerken van de betrokken partijen.

5 METHODIEK

Om te kunnen bepalen wat de betekenis van het EU recht op een effectief rechtsmiddel is voor een bepaald aspect van de asielprocedure wordt in dit proefschrift de volgende methodiek gehanteerd. Met betrekking tot de meeste procedurele onderwerpen die in het tweede deel van dit proefschrift worden onderzocht, bevatten Artikel 41 en 47 Handvest geen specifieke normen. Daarom wordt de betekenis van het EU recht op een effectief rechtsmiddel afgeleid uit de jurisprudentie van het Hof van Justitie en bronnen van inspiratie, in het bijzonder de jurisprudentie van het EHRM. Het Hof van Justitie heeft nog maar weinig uitspraken gedaan over asielprocedures. Het heeft echter wel uitspraken gedaan over de betekenis van dit recht in zaken die betrekking hadden op allerlei andere gebieden binnen het EU-recht. Uit deze uitspraken aangevuld met de uitspraken van het EHRM over het betreffende onderwerp worden in dit proefschrift algemene beginselen gedistilleerd. Deze beginselen worden vervolgens toegepast op de asielcontext. Bij de toepassing van die algemene beginselen op asielprocedures wordt rekening gehouden met de specifieke kenmerken van asielprocedures. De drie hierboven genoemde uitgangspunten komen daarbij van pas. De jurisprudentie van het EHRM en de zienswijzen van de VN-comités en UNHCR die specifiek zien op waarborgen in asielprocedures bevatten daarbij belangrijke richtsnoeren. De in dit proefschrift toegepaste methode is ook bruikbaar om de betekenis van het EU recht op een effectief rechtsmiddel vast te stellen in de context van elke andere procedure die door het EU-recht wordt beheerst.

DEEL II – Kernaspecten van asielprocedures

6 HET RECHT OP HET GRONDGEBIED VAN DE LIDSTAAT TE VERBLIJVEN GEDURENDE DE BEHANDELING VAN HET ASIELVERZOEK

De effectiviteit van het EU verbod op refoulement zou ernstig worden ondermijnd wanneer de asielzoeker wordt uitgezet of uitgeleverd voordat hij de kans heeft gehad zijn asielverzoek zorgvuldig te laten onderzoeken door de beslissingsautoriteit en de nationale rechter. Voorbarige uitzetting kan tot gevolg hebben dat de asielzoeker onherstelbare schade oploopt, namelijk vervolging of ernstige schade in de zin van de Kwalificatierichtlijn. Uitzetting tijdens de beroepsprocedure maakt de uitspraak van de rechter bovendien ineffectief. Artikel 39 PR gelezen in het licht van het EU recht op een effectief rechtsmiddel vereist daarom dat een asielzoeker op het grondgebied moet kunnen verblijven:

- totdat de beslissende instantie het asielverzoek zorgvuldig heeft beoordeeld
- gedurende de periode die nodig is om beroep tegen de negatieve beslissing in te stellen.

- gedurende de beroepsprocedure totdat de nationale rechter grondig heeft getoetst of er een risico op refolement is bij uitzetting.

Aan het beroep bij de nationale rechter of aan een verzoek om een voorlopige voorziening dient automatisch schorsende werking te worden verbonden. Deze schorsende werking dient duidelijk te worden vastgelegd in regelgeving en niet afhankelijk te zijn van praktische afspraken. Bovendien moet de procedure waarin wordt geoordeeld over het verzoek om een voorlopige voorziening belangrijke waarborgen bevatten. De rechten van de verdediging dienen te worden gerespecteerd, de bewijslast van de asielzoeker moet redelijk zijn en er moet een grondige toetsing plaatsvinden van het risico op *refoulement*.

7 HET RECHT VAN DE ASIELZOEKER OM TE WORDEN GEHOORD OVER ZIJN ASIELMOTIEVEN

Asielzoekers moeten voldoende gelegenheid krijgen om hun claim dat hun uitzetting het refolementverbod schendt, te onderbouwen. Vaak zijn asielzoekers zelf de belangrijkste bron van informatie in een asielprocedure en is er geen ondersteunend bewijs. Een persoonlijk gehoor is van groot belang om te kunnen voldoen aan het vereiste van een deugdelijk onderzoek van artikel 8 PR. Alleen in uitzonderlijke gevallen mag er daarom een uitzondering worden gemaakt op het recht op een persoonlijk gehoor van artikel 12 PR. In het geval van volwassenen wiens asielverzoek afhankelijk is van dat van de hoofdaanvrager moet worden onderzocht of zij zelfstandige asielmotieven hebben die het best in een persoonlijk gehoor kunnen worden toegelicht. Artikel 24 van het Handvest vereist dat de beslissingsautoriteit aan kinderen wiens leeftijd en volwassenheid dat toestaat, de mogelijkheid biedt te worden gehoord over hun asielmotieven.

De omstandigheden van het persoonlijk gehoor dienen zodanig te zijn dat asielzoekers de gronden voor zijn asielverzoek uitvoerig uiteen kunnen zetten. De communicatie tussen de asielzoeker, de eventuele tolk en de interviewer dient goed te verlopen. Daartoe moeten de tolk en de interviewer voldoende gekwalificeerd en getraind zijn. Gehoren van kinderen dienen op een kindvriendelijke wijze te worden uitgevoerd.

Het EU recht om gehoord te worden vereist verder mogelijk dat de asielzoeker de mogelijkheid krijgt om te reageren op het rapport van het gehoor. Dit geldt zeker als de beslissende instantie van plan is het asielverzoek af te wijzen op basis van de informatie die in het rapport is opgenomen. Op enig moment in de administratieve fase dient de asielzoeker in de gelegenheid gesteld te worden zijn zienswijze te geven over de belangrijkste conclusies met betrekking tot de feitenvaststelling, inclusief de beoordeling van de geloofwaardigheid van het asielrelaas, en de beoordeling van het risico op refolement alsmede

de belangrijkste bewijsstukken waarop die beoordeling is gebaseerd. Dat is van bijzonder belang als de rechterlijke toetsing in beroep beperkt is.

Tenslotte volgt uit het EU recht op een eerlijk proces in beginsel dat de asielzoeker in de beroepsfase wordt gehoord door de rechter. Dat geldt zeker als er feitelijke kwesties, zoals de geloofwaardigheid van het asielrelaas aan de orde zijn.

8 BEWIJSSTANDAARD, BEWIJSLAST EN BEWIJSWAARDERING

Elke bewijsregel die het praktisch onmogelijk of uiterst moeilijk maakt om het recht op asiel of het recht op bescherming tegen refoulement uit te oefenen, is in strijd met het EU-recht. Wanneer er geen EU regelgeving met betrekking tot een bepaalde bewijsrechtelijke kwestie aanwezig is, moet een bewijsregel aan dit effectiviteitsbeginsel worden getoetst.

In asielzaken gelden in beginsel dezelfde bewijsregels als in andere bestuursrechtelijke zaken. Artikel 4 KR staat lidstaten toe om de bewijslast bij de asielzoeker neer te leggen. tegelijkertijd vereist het feit dat de integriteit van de mens en de individuele vrijheden van personen in asielzaken op het spel staat, dat de beoordeling van het risico op refoulement met oplettendheid en voorzichtigheid wordt uitgevoerd. Het gebrek aan bewijs en de nadruk die in veel asielzaken ligt op de beoordeling van de geloofwaardigheid van het asielrelaas vraagt van de beslissingsautoriteit dat hij een actieve, flexibele en open houding aanneemt en zich concentreert op de kern van het asielrelaas. In sommige gevallen mag van deze beslissingsautoriteit verwacht worden dat hij de asielzoeker helpt met het vergaren van relevant bewijs of dat hij bepaalde tekortkomingen of fouten van de asielzoeker negeert. Er mogen geen onrealistische bewijsrechtelijke vereisten aan de asielzoeker worden gesteld, omdat anders zijn recht op asiel of het verbod op refoulement wordt ondermijnd. In dit proefschrift wordt onder meer het volgende betoogd met betrekking tot de bewijsstandaard, bewijslast en bewijswaardering in asielzaken.

De bewijsstandaard mag niet te hoog worden gesteld. Van asielzoeker mag niet worden gevraagd te *bewijzen* dat zij bij terugkeer naar het land van herkomst het slachtoffer zullen worden van vervolging of ernstige schade. Volgende is dat aannemelijk is gemaakt dat er een redelijke mogelijkheid van toekomstige vervolging is of dat er zwaarwegende gronden zijn om aan te nemen dat de asielzoeker een reëel risico loopt op ernstige schade. Bij de beoordeling van het risico op refoulement dienen alle relevante factoren, met betrekking tot de individuele asielzoeker en de algemene situatie in het land van herkomst, (in samenhang) te worden betrokken.

De bewijslast mag bij de asielzoeker worden gelegd. In een aantal situaties dient de bewijslast echter te verschuiven naar de staat. Dit is bijvoorbeeld het geval wanneer de asielzoeker aannemelijk heeft gemaakt dat hij in zijn land van herkomst in het verleden is blootgesteld aan vervolging of ernstige schade.

Hoewel de Kwalificatierichtlijn en de Procedurerichtlijn een individuele beoordeling van asielzaken vereisen, is het gebruik van presumpties toegestaan. Een presumptie die onmogelijk of uiterst moeilijk te weerleggen is, is echter in strijd met het EU-recht.

Bij de beoordeling van de geloofwaardigheid van het asielrelaas van de asielzoeker moet de beslissingsautoriteit zich concentreren op de kern van het asielrelaas. Er mag geen doorslaggevend gewicht gegeven worden aan kwesties die niet behoren tot de kern van het relaas, zoals het feit dat een asielzoeker zich niet aan procedure verplichtingen heeft gehouden. Asielzoekers dienen verder de mogelijkheid te krijgen om de aan hen tegengeworpen gebreken in het asielrelaas uit te leggen. Asielzoekers dienen op grond van artikel 4 lid 5 KR het voordeel van de twijfel te krijgen als de algemene geloofwaardigheid van hun asielrelaas is vastgesteld.

De beslissingsautoriteit mag bij de beoordeling van het asielrelaas geen formalistische houding aannemen, door bepaald bewijs te vereisen of juist uit te sluiten. Al het beschikbare relevante bewijs dient in de beoordeling van het asielverzoek te worden betrokken.

Deskundigenrapporten dienen te voldoen aan de eisen van deskundigheid, onafhankelijkheid en doorzichtigheid. Medische rapporten en landenrapportages zijn deskundigenberichten waaraan groot gewicht toekomt in asielprocedures. Lidstaten moeten naast landeninformatie van hun eigen ministeries ook rapporten van achterswaardige mensenrechtenorganisaties, VN-organisaties en de autoriteiten van andere lidstaten in hun beoordeling betrekken. Het gewicht dat toekomt aan een landenrapport hangt af van de autoriteit en de reputatie van de opsteller ervan, de grondigheid van het verrichte onderzoek, de consistentie van de conclusies en eventuele ondersteuning door andere rapporten. Het gewicht dat aan een medische rapportage moet worden toegekend, hangt af van haar kwaliteit en overtuigingskracht. Echter, ook een medische rapportage van een niet-deskundige kan de herkomst van littekens *prima facie* aannemelijk maken.

9 RECHTERLIJKE TOETSING VAN DE VASTSTELLING EN DE BEOORDELING VAN DE FEITEN

Uit de uitspraak van het Hof van Justitie in *Samba Diouf* volgt dat de rechterlijke instantie die het beroep tegen een negatieve asielbeslissing behandelt, zowel rechtsvragen als de feiten dient te toetsen. Een systeem waarin een administratief orgaan de feiten beoordeelt en de rechter alleen rechtsvragen toetst is in strijd met artikel 39 PR.

Uit *Samba Diouf* volgt ook dat de rechterlijke toetsing grondig moet zijn. In dit proefschrift wordt betoogd dat dit betekent dat de rechterlijke instantie tenminste de feiten en het bewijs dat aan de asielbeslissing ten grondslag ligt zorgvuldig toetst. Een redelijkheidstoetsing, waarbij ruime beoordelingsvrijheid

wordt gelaten aan de beslissingsautoriteit om de feiten, waaronder de geloofwaardigheid van het asielrelaas, vast te stellen, is niet toegestaan. Nationale rechters zijn echter niet verplicht om hun oordeel over de feiten in de plaats te stellen van dat van de beslissingsautoriteit. Zij mogen ervoor kiezen zich te concentreren op de kwaliteit van de asielbeslissing en de zorgvuldigheid van de asielprocedure.

Artikel 39 PR gelezen in het licht van het recht op een effectief rechtsmiddel vereist verder dat de nationale rechter op enig moment in de asielprocedure, voor de uitzetting van de asielzoeker, de asielbeslissing toetst op basis van alle beschikbare relevante feiten en bewijs inclusief feiten en bewijs die na de asielbeslissing zijn opgekomen of overgelegd. De effectiviteit van het EU refoulementverbod zou worden ondermijnd als relevante feiten of bewijs worden uitgesloten van de beoordeling van het risico op refoulement vanwege het enkele feit dat zij eerder in de procedure naar voren hadden moeten worden gebracht.

10 HET GEBRUIK VAN GEHEIME INFORMATIE IN ASIELPROCEDURES

In sommige asielzaken wordt informatie, zoals landeninformatie, die ten grondslag ligt aan de asielbeslissing, niet beschikbaar gemaakt voor de asielzoeker. Artikel 16 PR staat dit op een beperkt aantal gronden (onder meer de bescherming van de nationale veiligheid of de bescherming van bronnen) toe. Deze bepaling geeft de lidstaten ook de mogelijkheid om gronden van nationale veiligheid informatie te onthouden aan de rechterlijke instantie die het beroep tegen de negatieve asielbeslissing behandelt.

Het recht op *adversarial proceedings*, het EU recht te worden gehoord en het recht op een gemotiveerde beslissing geven partijen in beginsel het recht op toegang tot al het relevante bewijs in hun zaak. Beperkingen van dit recht kunnen echter gerechtvaardigd zijn. De beperking moet een legitiem doel dienen en noodzakelijk zijn. Op basis van de jurisprudentie van het Hof van Justitie en het EHRM mag verwacht worden dat de gronden voor beperking van de toegang tot het dossier genoemd in artikel 16 PR kunnen worden aangemerkt als legitieme doelen.

De nationale rechter moet toetsen of de geheimhouding van bewijs inderdaad een legitiem doel dient en in staat worden gesteld om de asielbeslissing grondig te toetsen. De nationale rechter moet daartoe al het relevante bewijs in een zaak, inclusief het bewijs dat niet aan partijen beschikbaar is gesteld, ontvangen. Artikel 16 lid 1 PR dat toestaat dat informatie om redenen van nationale veiligheid aan de rechterlijke instantie wordt onthouden, is daarom in strijd met het EU recht op een effectief rechtsmiddel en moet nietig worden verklaard.

Het belang van de Staat om bepaalde informatie in een asielzaak geheim te houden, moet worden afgewogen tegen het recht van de asielzoeker op een

effectief rechtsmiddel. Volledige geheimhouding van het bewijs dat aan een beslissing ten grondslag ligt, is nooit toegestaan. Bovendien moet de motivering van de asielbeslissing voldoende kenbaar zijn om een effectief beroep tegen deze beslissing te kunnen indienen. Dat betekent niet dat al het relevante bewijs de asielzoeker ter beschikking moet worden gesteld. Uit de uitspraak van het EHRM in *A en anderen tegen het Verenigd Koninkrijk* volgt dat het recht op *adversarial proceedings* niet is geschonden wanneer het grootste deel van het bewijs openbaar is gemaakt en het openbare bewijs een doorslaggevende rol speelde in de beslissing. Dat geldt ook wanneer de aantijgingen in het openbare materiaal voldoende specifiek zijn om deze te kunnen weerleggen.

Bij de beoordeling of het recht op *adversarial proceedings* is geschonden, dient rekening gehouden te worden met het gewicht dat aan het geheime bewijs is toegekend. De geloofwaardigheid van bewijs uit anonieme bron is noodzakelijkerwijs beperkt, omdat de context waarin het tot stand is gekomen grotendeels onbekend is en de beweringen van de beslissingsautoriteit daarover niet te verifiëren zijn.

Speciale technieken zoals het gebruik van speciale advocaten (*special advocates* of *special counsels*), gecensureerde samenvattingen of een lijst van documenten in het dossier kunnen worden gebruikt om beperkingen van procedurele rechten door het gebruik van geheime informatie te compenseren. Speciale advocaten hebben een veiligheidscheck ondergaan en treden namens een partij op. Zij hebben toegang tot de geheime informatie en kunnen daar namens hun cliënt op reageren. Zij moeten echter in staat zijn hun taak goed uit te oefenen. Daartoe moet de betrokkene voldoende specifieke informatie krijgen om effectief instructies aan de speciale advocaat te kunnen geven. Informatie in gecensureerde samenvattingen moet voldoende specifiek zijn om de betrokkene in staat te stellen om te bepalen of de verwijderde informatie mogelijk relevant is voor zijn zaak en om zijn zienswijze daarover te geven.

DEEL III – Conclusies

11 NAAR EEN GEMEENSCHAPPELIJKE EN EERLIJKE ASIELPROCEDURE?

Een gemeenschappelijke en eerlijke asielprocedure voor de lidstaten van de EU lijkt nog ver weg. Ondanks de totstandkoming van de Procedurerichtlijn zijn er nog grote verschillen tussen de asielprocedures in de verschillende lidstaten. Hierdoor zijn de kansen van asielzoekers op internationale bescherming afhankelijk van de lidstaat waar zij hun asielverzoek indienen. Ook over het niveau van bescherming dat door deze asielprocedures wordt geboden, bestaan zorgen. Er bestaat een tendens binnen de lidstaten om de procedurele rechten van asielzoekers te beperken in plaats van uit te breiden.

Dit proefschrift betoogt desalniettemin dat asielzoekers beter af zijn mét de Procedurerichtlijn dan zonder. De richtlijn bevat veel belangrijke waarbor-

gen voor asielzoekers en heeft het EU recht op een effectief rechtsmiddel geactiveerd. Dit proefschrift heeft aangetoond dat de Procedurerichtlijn via het recht op effectieve rechtsbescherming een belangrijke impact kan hebben op de asielprocedures van de lidstaten. Het is in de eerste plaats aan de advocaten van asielzoekers om de richtlijn en het EU recht op een effectief rechtsmiddel in te roepen en aan de nationale rechter om ze toe te passen. Dit is geen gemakkelijke opgave, omdat relevante rechtspraak over het EU recht op een effectief rechtsmiddel betrekking kan hebben op alle rechtsgebieden die binnen de reikwijdte van het EU-recht vallen. Er zijn nog maar weinig prejudiciële vragen over de Procedurerichtlijn aan het Hof van Justitie voorgelegd. De kans dat het Hof de komende jaren zal oordelen over alle kwesties die in dit proefschrift aan de orde zijn gesteld, is dus erg klein.

Een veel snellere en effectievere manier om naleving van het EU recht op een effectief rechtsmiddel af te dwingen is door middel van de incorporatie van de jurisprudentie van het Hof van Justitie en het EHRM in EU regelgeving. Op het moment dat dit proefschrift werd afgerond waren de onderhandelingen voor een herschikking van de Procedurerichtlijn nog gaande. Een herschikking van de Kwalificatierichtlijn is al aangenomen. Het laatste hoofdstuk van dit proefschrift toetst het voorstel voor de herschikking van de Procedurerichtlijn en de herschikte Kwalificatierichtlijn aan het EU recht op een effectief rechtsmiddel. Het voorstel voor de herschikking van de Procedurerichtlijn weerspiegelt op een aantal punten inderdaad de rechtspraak van het Hof van Justitie en het EHRM. Met betrekking tot een aantal procedurele kwesties die in dit proefschrift worden besproken, gaat het niveau van bescherming omhoog. Ook wanneer het herschikkingsvoorstel wordt aangenomen, blijft het EU recht op een effectief rechtsmiddel echter een belangrijk interpretatiemiddel. Bovendien valt te bezien welke verbeteringen uit het herschikkingsvoorstel de onderhandelingen uiteindelijk zullen overleven.

Het lijkt niet realistisch om te verwachten dat het in de nabije toekomst komt tot een gemeenschappelijke en eerlijke asielprocedure. Toch moet het EU-recht serieus genomen worden door beslissingsautoriteiten, nationale rechters en advocaten die asielzoekers bijstaan. De Procedurerichtlijn en het recht op een effectief rechtsmiddel hebben de potentie om het niveau van bescherming dat door asielprocedures geboden wordt, te verhogen en tegelijkertijd deze procedures enigszins te harmoniseren. Mogelijk blijkt dat het EU-recht meer of andere bescherming biedt dan het EVRM. Een eenzijdige gerichtheid op het EHRM is daarom niet langer gerechtvaardigd. Het is nu tijd dat professionals die in het asielrecht werkzaam zijn de Procedurerichtlijn en het EU recht op een effectief rechtsmiddel in stelling brengen. Dit proefschrift kan daarbij als inspiratiebron dienen.

Bibliography

- Accetto & Zlepnig 2005: M Accetto and S Zlepnig, 'The Principle of effectiveness: Rethinking Its Role in Community law', 11 *European Public Law* (2005), p 375
- Ackers 2005: D Ackers, 'The Negotiations on the Asylum Procedures Directive', 7 *European Journal of Migration and Law* (2005), p 1
- Anagnostaras 2008: G Anagnostaras, 'The incomplete state of Community harmonization in the provision of interim protection by the national courts', 33 *European Law Review* (2008), p 586
- Arnulf 2011: A. Arnulf, 'The principle of effective judicial protection in EU law: an unruly horse?', 36 *European Law Review* (2011), p 51
- Arnulf 2007: A Arnulf, 'Case C-432/05 Unibet [2007]', 44 *Common Market Law Review*, (2007), p 1763
- Baratta 2011: R Baratta, 'National Courts as 'Guardians' and 'Ordinary' Courts of EU Law: Opinion 1/09 of the ECJ', 38 *Legal Issues of Economic Integration* (2011), p 297
- Barbier de La Serre 2006: E Barbier de La Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumentalist Trends', 12 *European Public Law* (2006), p 225
- Barbier de la Serre and Sibony 2008: E Barbier de la Serre and A Sibony, 'Expert Evidence Before the EC Courts', 45 *Common Market Law Review* (2008), p 941
- Barents 2007: R Barents, *Directory of EC Case Law on Competition*, Alphen aan den Rijn: Kluwer Law International (2007)
- Barkhuysen & Van Emmerik 2010: T Barkhuysen and ML van Emmerik, 'Ongebonden binding, Verwijzing naar soft law-standaarden in uitspraken van het EHRM', 35 *NTM/NJCM-Bulletin* (2010), p 827
- Battjes 2006: H Battjes, *European Asylum Law and International Law* Leiden/Boston: Martinus Nijhoff (2006)
- Battjes 2011: H Battjes, 'ECtHR 21 January 2011, *M.S.S v Belgium and Greece*, no 30696/09', *Jurisprudentie Vreemdelingenrecht* 2011/68
- Bliss 2010: M Bliss, 'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses', 12 *International Journal of Refugee Law* (2000), p 92
- Bloemen, Vloeberghs & Smits 2006: E Bloemen, E Vloeberghs and C Smits, Psychological and psychiatric aspects of recounting traumatic events by asylum seekers in *Care Full, Medico-legal reports and the Istanbul Protocol*, Pharos/Amnesty International/ Dutch Council for Refugees (2006), p 43
- Boeles 2006: P Boeles, 'Case C-540/03, *Parliament v Council* [2006]', *Jurisprudentie Vreemdelingenrecht* 2006/313
- Boeles 2007: P Boeles, *Fair Immigration Proceedings in Europe*, The Hague/Boston: Martinus Nijhoff (1997)

- Boeles 2008: P Boeles, 'Case Reports of the European Court of Human Rights, the Human Rights Committee and the Committee against Torture', 10 *European Journal of Migration and Law* (2008), p 105
- Boeles and others 2009: P Boeles, M den Heijer G. Lodder and K Wouters, *European Migration Law*, Antwerp-Oxford-Portland: Intersentia (2009)
- Boerefijn 1999: I Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights, Practice and Procedures of the Human Rights Committee*, Antwerpen-Groningen-Oxford: Intersentia-Hart (1999)
- Bonner 2006: D Bonner, 'Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights', 12 *European Public Law* (2006), p 45
- Bronckers 2007: MCEJ Bronckers, 'The relationship of the EC Courts with other international tribunals: non-committal, respectful or submissive?,' 44 *Common Market Law Review* (2007), p 601
- Bruin 2003: R Bruin, 'Geen lijdelijke rechter', 19 *Nieuwsbrief Asiel- en Vluchtelingenrecht* (2003), p 572
- Bulterman 2008: M Bulterman, 'Case C-540/03, *Parliament v Council* [2006]', 45 *Common Market Law Review* (2008), p 245
- Butler & de Schutter 2007, I de Jesús Butler and O de Schutter, 'Binding the EU to International Human Rights Law', 26 *Yearbook of European Law* (2007), p 277
- Byrne 2005: R Byrne, 'Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures', 7 *European Journal of Migration and Law* (2005), p 71
- Van Cleynenbreugel 2012: P Van Cleynenbreugel, 'Case C-69/10, *Samba Diouf* [2011]', 49 *Common Market Law Review* (2012), p 327
- Conte & Burchill 2009: A Conte and R Burchill, *Defining Civil and Political Rights, The jurisprudence of the United Nations Human Rights Committee*, Ashgate (2009)
- Costa 2008: JP Costa, *The relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice* (Lecture at the King's College London, 7 October 2008)
- Costello 2006: C Costello, 'The European asylum procedures directive in legal context, New Issues in Refugee Research, Research Paper No 134', Geneva: UNHCR 2006
- Craig 2006: P Craig, *EU Administrative Law*, Oxford University Press (2006)
- Craig & de Búrca 2003: P Craig and G de Búrca, *EU Law*, Oxford University Press (2003)
- Delicostopoulos 2003: JS Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems', 9 *European Law Journal* (2003), p 599
- Dechamp & Dowd 2008: B Deschamps and R Dowd, 'Review of the use of UNHCR Executive Committee Conclusions on International Protection', Geneva: UNHCR (2008)
- Van Dijk a.o. 2006: P van Dijk, F van Hoof, A van Rijn and L Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, Antwerpen-Oxford: Intersentia (2006)
- Doornbos 2005: N Doornbos, 'On being heard in asylum cases, Evidentiary assessment through asylum interviews', in: G Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Leiden/Boston: Martinus Nijhoff (2005), p 103

- Doornbos 2006: N Doornbos, *Op verhaal komen, Institutionele communicatie in de asielprocedure*, Nijmegen: Wolf Legal Publishers (2006)
- Dougan 2004: M Dougan, *National Remedies Before the Court of Justice, Issues of Harmonisation and Differentiation*, Oxford and Portland Oregon: Hart (2004)
- Douglas-Scott 2006: S Douglas-Scott, 'A Tale of two courts: Luxembourg, Strasbourg and the growing European Rights Aquis', 43 *Common Market Law Review* (2006), p 629
- Dutheil de la Rochère 2008: J Dutheil de la Rochère, 'The EU Charter of Fundamental Rights, Not binding but influential: the Example of Good Administration', in A Arnulf, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU law*, Oxford University Press (2008), p 157
- Eckes 2007: C Eckes, 'Case T-228/02, *Modjahedines du people d'Iran v Council* [2006]', 44 *Common Market Law Review* (2007), p 1117
- Engström 2008: J Engström, 'National Courts' Obligation to Apply Community Law *Ex Officio* – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?', 1 *Review of European Administrative Law* (2008), p 67
- Erlandsson 1998: A Erlandsson, 'The Defendant's right of Access to the Commission's File in Competition Cases', 25 *Legal Issues of Economic Integration* (1998), p 139.
- Gattini 2009: A Gattini, 'Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008], 46 *Common Market Law Review* (2009), p 213
- Gerards 2008: JH Gerards, 'Fundamental Rights and other interests: Should it really make a difference? in E. Brems (ed), *Conflicts between Fundamental Rights*, Antwerp: Intersentia '(2008), p 655
- Gerards 2009: JH Gerards, 'Judicial Deliberations in the European Court of Human Rights', in: N Huls, M Adams, J Bomhof (Eds.), *The Legitimacy of Highest Court's Rulings*, The Hague: T.M.C. Asser Press (2009), p 407
- Good 2004: A Good, 'Expert evidence in Asylum and Human Rights Appeals: an Expert's view', 16 *International Journal of Refugee Law* (2004), p 358
- Goodwin Gill & McAdam 2007: GS Goodwin-Gill and J McAdam, *The Refugee in International Law*, Oxford University Press (2007).
- Gorlick 2003: B Gorlick, 'Common burdens and standards: legal elements in assessing claims to refugee status', 15 *International Journal of Refugee Law* (2003), p 357
- Grahl-Madsen 1966: A Grahl-Madsen, *The Status of Refugees in International Law*, Leiden: Sijthoff (1966)
- Groussot 2003: X Groussot, 'UK Immigration Law under attack and the direct application of article 8 ECHR by the Court of Justice', 3 *Non state actors and International Law* (2003), p 187
- Groussot 2006: X Groussot, *General principles of Community law*, Groningen: Europa Law Publishing (2006)
- Haapaniemi 2009: P Haapaniemi, 'Procedural Autonomy: A misnomer, in L Ervo, M Gräns and A Jokela, *Europeanization of Procedural Law and the New Challenges to Fair Trial*, Groningen: Europa Law Publishing (2009), p 89
- Hailbronner 2010: K Hailbronner (ed), *EU Immigration and Asylum Law, Commentary on EU Regulations and Directives*, München: C.H. Beck/Hart/Nomos (2010)

- Harpaz 2009: G Harpaz, 'The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy', 46 *Common Market Law Review* (2009), p 105
- Harris, O' Boyle & Warbrick 2009: D Harris, M Ó Boyle and C Warbrick (eds), *Law of the European Convention on Human Rights*, Oxford University Press (2009)
- Hathaway 1991: JC Hathaway, *The Law of Refugee Status*, Toronto/Vancouver: Butterworths (1991)
- Hathaway 2005: JC Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005)
- Den Heijer 2008: M Den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights', 10 *European Journal of Migration and Law* 2008, p 277
- Den Heijer 2012: M den Heijer, *Europe and extraterritorial Asylum*, Oxford and Portland Oregon: Hart (2012)
- Herlihy 2005: J Herlihy, 'Evidentiary Assessment and Psychological Difficulties', in G Noll (ed) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Leiden/Boston: Martinus Nijhoff (2005), p 123
- Herlihy, Gleeson & Turner 2010: J Herlihy, K Gleeson and S Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?', 22 *International Journal of Refugee Law* (2010), p 351
- Jans and others 2007: JH Jans, R de Lange, S Prechal and RJGM Widdershoven, *Europeanisation of Public Law*, Groningen: Europe Law Publishing (2007)
- Joseph, Schultz & Castan 2004: S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights, Cases, Material and Commentary*, Oxford University Press (2004)
- Joseph & others 2006: S Joseph, K Mitchell, L Gyorki and C Benninger-Bud, *Seeking remedies for torture victims, A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, Geneva: World Organisation against Torture (2006)
- Kakouris 1997: CN Kakouris, 'Do the Member States Possess Judicial Procedural Autonomy?', 34 *Common Market Law Review* (1997), p 1389
- Kälin 2003: W Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond', in E Feller, V Türk and F Nicholson (ed), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p 613
- Kaňska 2004: K Kaňska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', 10 *European Law Journal* (2004), p 296
- Van Kempen 2009: E van Kempen, 'De omgang met geheim bewijs in de vreemdelingenrechtelijke procedure', 24 *Migrantenrecht* (2009), p 434
- Kerse 2000: CS Kerse, 'General Principles of Community law: procedural guarantees', in: U Bernitz and J Nergelius (ed), *General Principles of European Community Law*, The Hague etc: Kluwer Law International (2000), p 205
- Koedooder & de Lang 2009: C Koedooder and N de Lang, 'Anti-terrorist Blacklisting in the European Union, The Influence of National Procedures on the Judgments of the Court of First Instance of the European Communities', 36 *Legal Issues of Economic Integration* 2009, p 313

- Kunoy & Mortansson 2010: B Kunoy and B Mortansson, Case C-578/08, *Chakroun* [2010], 47 *Common Market Law Review* (2010), p 1815
- Lauterpacht and Bethlehem 2003: E Lauterpacht and D Bethlehem, 'The scope and content of the principle of *non-refoulement*' in E Feller, V Türk and F Nicholson (eds.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p 87
- Lenaerts & Gutiérrez-Fons 2010: K Lenaerts and JA Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', 47 *Common Market Law Review* 2010, p 1629
- McAdam 2007: J McAdam, 'The Qualification Directive, An Overview', in K Zwaan (ed), *The Qualification Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishers (2007), p 7
- McGoldrick 1991: D McGoldrick, *The Human Rights Committee, Its role in the Development of the International Covenant on Civil and Political Rights*, Oxford: Clarendon (1991)
- Michelogiannaki 2008: M Michelogiannaki, 'The Negotiations of Directive 2005/85/EC' in K Zwaan (ed), *The Procedures Directive, Central Themes, Problem Issues and Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishers (2008), p 21
- Murphy 2010: CC Murphy, 'Fundamental Rights and Security, The Difficult Position of the European Judiciary', 16 *European Public Law* (2010), p 289
- Murray 2008: JL Murray, 'Fundamental Rights in the European Community Legal Order', 32 *Fordham International Law Journal* (2008), p 531
- Noll 2005: G Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Leiden/Boston: Martinus Nijhoff (2005)
- Noll 2005-II: G Noll, 'Evidentiary assessment and the EU Qualification Directive, New Issues in Refugee Research, Working Paper No. 117', Geneva: UNHCR (2005)
- Noll 2006: G Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive', 12 *European Public Law* (2006), p 295
- Nowak & McArthur 2008: M Nowak & E McArthur, *The United Nations Convention against Torture, A Commentary*, Oxford University Press (2008)
- Oliver 2011: P Oliver, 'Case C-279/09, *DEB* [2010]', 48 *Common Market Law Review* (2011), p 2023
- Von Papp 2009: K von Papp, 'Case C-450/06, *Varec* [2008]', 46 *Common Market Law Review* 2009, p 991
- Peers & Rogers 2006: S Peers and N Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary*, Leiden/Boston: Martinus Nijhoff (2006)
- Ponce 2005: J Ponce, 'Good Administration and Administrative Procedures', 12 *Indiana Journal of Global Legal Studies* (2005), p 551
- Popovic 2005: A Popovic, 'Evidentiary Assessment and Non-Refoulement' in: G Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Leiden/Boston: Martinus Nijhoff (2005), p 27
- Prechal 2010: S Prechal, 'Competence Creep and General Principles of Law', 3 *Review of European Administrative Law* (2010), p 5

- Prechal & Shelkopyas 2004: S Prechal and N Shelkopyas, 'National Procedures, Public policy and EC Law. From Van Schijndel to Eco Swiss and Beyond', 5 *European Review of Private Law* (2004), p 589
- Prechal & Widdershoven 2011: S Prechal and RJGM Widdershoven, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection', 4 *Review of European Administrative Law* (2011), p. 31.
- Reichel 2008: J Reichel, 'Between Supremacy and Autonomy', in U Bernitz, J Nergelius and C Cardner (eds.), *General Principles of EC Law in a Process of Development*, Alphen aan den Rijn: Kluwer Law International (2008), p 243
- Reneman 2010: AM Reneman, 'An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?', 12 *European Journal of Migration and Law* (2010), p 407
- Reneman 2011: AM Reneman, 'Access to an Effective Remedy before a Court or Tribunal in Asylum Cases', in: E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law*, Leiden/Boston: Martinus Nijhoff Publishers (2011), p 401
- Rhys Jones 2004: D Rhys Jones, 'Medical Evidence in Asylum and Human Rights Appeals', 16 *International Journal of Refugee Law* (2004), p 381
- Schermers 1992: HG Schermers, Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991], 29 *Common Market Law Review* (1992), p 133
- Schiek 2006: D Schiek, 'The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation', 35 *Industrial Law Journal* (2006), p 329
- Schuurmans 2008: Y Schuurmans, 'Review of Facts in Administrative Law Procedures; A European Community Law Perspective', 1 *Review of European Administrative Law* (2008), p 5
- Schwartz, 2004: J Schwartz, 'Judicial Review of European Administrative Procedure', 68 *Law and Contemporary Problems* (2004), p 85
- Senden 2004: L Senden, *Soft law in Community Law*, Oxford and Portland Oregon: Hart (2004)
- Sinaniotis 2006: D Sinaniotis, *The Interim Protection of Individuals before the European and National Courts*, Alphen aan de Rijn: Kluwer (2006)
- Spaventa 2009: E Spaventa, 'Joined Cases T-256/07, *People's Mojahedin Organization of Iran* [2008] and T-284/08, *People's Mojahedin Organization of Iran* [2008]', 46 *Common Market Law Review* (2009), p 1239
- Spielman 1999: D Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities', in P Alston, MR Bustelo and J Heenan, *The EU and Human Rights*, Oxford University Press (1999), p 757
- Spijkerboer 2008: TP Spijkerboer, 'ECtHR 20 September 2007, *Sultani v France*, no 45223/05, *Jurisprudentie Vreemdelingenrecht* 2008/462
- Spijkerboer 2009: TP Spijkerboer, 'Case C-465/07, *Elgafaji* [2009]', *Jurisprudentie Vreemdelingenrecht* 2009/111
- Spijkerboer 2009-II: TP Spijkerboer, 'Subsidiarity and 'Arguability': the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases', 21 *International Journal of Refugee Law* (2009), p 48

- Spijkerboer & Vermeulen 1995: TP Spijkerboer and BP Vermeulen, *Vluchtelingenrecht*, Amsterdam/Leersum: Nederlands Centrum Buitenlanders 1995.
- Spijkerboer & Vermeulen 2005: TP Spijkerboer and BP Vermeulen, *Vluchtelingenrecht*, Nijmegen: Ars Aequi Libri (2005)
- Staffans 2008: I Staffans, 'Evidentiary Standards of Inquisitorial versus Adversarial Asylum Procedures in the Light of Harmonization', 14 *European Public Law* (2008), p 615
- Staffans 2010: I Staffans, 'Judicial Protection and the New European Asylum Regime', 12 *European Journal of Migration and Law* (2010), p 273
- Summers 2007: S Summers, *Fair Trials, The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford and Portland Oregon: Hart (2007)
- Schwartz 2004: J Schwartz, 'Judicial Review of European Administrative procedures', 68 *Law and Contemporary Problems* (2004), p 85
- Thomas 2006: R. Thomas, 'Assessing the Credibility of Asylum Claims, EU and UK Approaches Examined', 8 *European Journal of Migration and Law* (2006), p 79
- Toth 1990: A.G. Toth, 'Case C-213/89 Factortame I [1990]', 27 *Common Market Law Review* (1990), p 573
- Trechsel 2005: S Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press (2005)
- Tridimas 2006: T Tridimas, *The General Principles of Community Law*, Oxford University Press (2006)
- Tridimas & Gutierrez-Fons 2008: T Tridimas and JA Gutierrez-Fons, 'EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?', 32 *Fordham International Law Journal* (2008), p 660
- Trstenjak & Beysen 2011: V Trstenjak and E Beysen, 'European Consumer Protection Law: Curia Semper Dabit Remedium?', 48 *Common Market Law Review* (2011), p 95
- Türk 2010: V Türk, 'UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate', Geneva: UNHCR 2010
- Tzanou & El Droubi 2010: M Tzanou and S El Droubi, 'Case T-318/01, *Othman v Council* [2009]', 47 *Common Market Law Review* (2010), p 1233
- Vedsted-Hansen 2005: J Vedsted-Hansen, 'Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedures?', 7 *European Journal of Migration and Law* (2005), p 369
- Ward 2007: A Ward, *Judicial review and the rights of private parties in EU law*, Oxford University Press (2007)
- Widdershoven 2011: RJGM Widdershoven, 'Case C-69/10, *Samba Diouf* [2011]', *AB Rechtspraak Bestuursrecht* 2011/304.
- Wildhaber 2002: L Wildhaber, 'The place of the European Court of Human Rights in the European Constitutional Landscape, Address at the Conference of European Constitutional Courts, XIIth Congress' (2002), www.confcoconsteu.org
- De Witte 1999: B de Witte, 'The Role of the ECJ in Human Rights', in P Alston, MR Bustelo and J Heenan, *The EU and Human Rights*, Oxford University Press (1999), p 859
- Wouters 2009: KW Wouters, *International Legal Standards for the Protection from refoulement*, Intersentia 2009

- Young 2005: AL Young, 'The Charter, Constitution and Human Rights: is this the Beginning of the End for Human Rights Protections by Community Law', 11 *European Public Law* (2005), p 219
- Zahle 2005: H Zahle, 'Competing Patterns for Evidentiary Assessments', in: G Noll (ed) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Leiden/Boston: Martinus Nijhoff (2005), p 13
- Zwaan 2005: KM Zwaan, *UNHCR and the European Asylum Law*, Nijmegen: Wolf Legal Publishers (2005)

Table of Cases

1 COURT OF JUSTICE

Aalborg Portland ao v Commission, Joined Cases C-204/00 P etc [2004]
Accor, Case C-310/09 [2011]
Adeneler, Case C-212/04 [2006]
Advocaten voor de Wereld, Case C-303/05 [2007]
AEG, Case 107/82 [1983]
Aguirre Zaraga, Case C-491/10 PPU [2010]
Akrich, Case C-109/01 [2003]
AKZO Chemie BV and AKZO Chemie UK v Commission, Case 53/85 [1986]
AKZO, Case C-62/86 [1991]
Alassini, Joined cases C 317/08, C 318/08, C 319/08 and C 320/08
Al-Jubail, Case C-49/88 [1991]
Antonissen, Case C-393/96 [1997]
B. and D., Joined Cases C 57/09 and C 101/09 [2010]
Baumbast, Case C-413/99 [2002]
Baustahlgewebe v Commission, Case C-185/95 P [1998]
Bolbol, Case C-31/09 [2010]
Borelli, Case C-97/91 [1991]
BPB and Britisch Gypsum v Commission, Case C-310/93 P [1995]
British American Tobacco and and Newman Shipping, Case C-435/03 [2005]
Brunhofer, Case C-381/99 [2001]
BVBA Management, Training en Consultancy, Case C-239/05 [2007]
Carpenter, Case C-60/00 [2002]
Cetinkaya, Case C-467/02 [2004]
Chakroun, Case C 578/08 [2010]
Cofidis, Case C-473/00 [2002]
Commission v Austria, Case C-424/99 [2001]
Commission v Ireland ao, Case C-89/08 P [2009]
Commission v Italy, Case C-129/00 [2003]
Commission v Lisrestal ao, Case C-32/95P [1996]
Commission v Tetra Laval, Case C-12/03 P [2005]
Coote, Case C-185/97 [1998]
Danfoss, Case C-109/88 [1998]
DEB, Case C-279/09 [2010]
Defrenne, Case 149/77 [1978]
Dereci ao, Case C-256/11 [2011]
Deticek, Case C-403/09 PPU [2010]
Deutsche Shell, Case C-188/91 [1993]

Dilexport, Case C-343/96 [1999]
Direct Parcel Distribution Belgium, Case C-264/08 [2010]
Dokter, Case C-28/05 [2006]
Dörr and Unal, Case C-136/03 [2005]
Dounias, Case C-228/98 [2000]
Dynamic Medien, Case C-244/06 [2008]
E and F, Case C-550/09 [2010]
Elgafaji, Case C-465/07 [2009]
Enderby, Case C-127/92 [1993]
ERG ao, Joined cases C-379/08 and C-380/08 [2010]
Eribrand, Case C-467/01 [2003]
ERT, Case C-260/89 [1991]
Eurofood IFSC, Case C-341/04 [2006]
Evans, Case C-63/01 [2003]
Factortame, Case C-213/89 [1990]
Feryn, Case C-54/07 [2008]
Foto-Frost, Case 314/85 [1987]
France v Commission, Case C-17/99 [2001]
Francovich, Case C-6/90 [1991]
Grant, Case C-249/96 [1998]
Grimaldi, Case C-322/88 [1989]
Grundig Italiana, Case C-255/00 [2002]
Hassan and Ayadi v Council and Commission, Joined Cases C-399/06 P and C-403/[2009]
Hauer, Case 44/79 [1979]
Hautala, Case C-353/99 P [2001]
Hercules Chemicals v Commission, Case C-51/92 P [1999]
Hoechst, Joined Cases C-46/87 and C-227/88 [1989]
Humanplasma GmbH, Case C-421/09 [2010]
Impact, Case C 268/06 [2008]
Industrie des Poudres Sphériques v Council, Case C-458/98 P [2000]
Interporc v Commission, Case C-41/00 P [2003]
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Kadi and Al Barakaat v Council and Commission, Joined Cases C-402/05 P and C-415/[2008]
Kadzoev, Case C-357/09 PPU [2006]
Kalanke, Case C-450/93 [1995]
Kampelmann ao, Joined Cases C-253/96 to C-258/96 [1997]
Kapniki Michailidis, Joined Cases C-441/98 and C-442/98 [2000]
Kelly, Case C-104/10 [2011]
Knauf Gips v Commission, Case C-407/08P [2010]
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Lange, Case C-350/99 [2001]
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MRAX, Case C-459/99 [2002]
Mulder, Case 120/86 [1988]
N.S. and M.E. ao, Joined Cases C-411/10 and C-493/10[2011]
Nikoloudi v Organismos Tilepikonion Ellados AE, Case C-196/02 [2005]
Nölle, Case C-16/90 [1991]
Océano Grupo Editorial and Salvat Editores, Joined cases C-240/98 to C-244/98 [2000]
Ordre des barreaux francophones et germanophones, Case C-305/05 [2007]
Orfanopoulos, Case C-482/01 [2004]
Orkem, Case C-347/87 [1989]
Panayotova, Case C-327/02 [2004]
Parliament v Council, Case C-540/03 [2006]
Parliament v Council, Case C-133/06 [2008]
Parliament v Reynolds, Case C-111/02 P [2004]
Pecastaing, Case 98/79 [1980]
Peterbroeck, Case C-312/93 [1995]
PKK/KNK v Council, Case C-229/05 P [2006]
Pontin, Case C-63/08 [2008]
Preston and Fletcher, Case C-78/98 [2000]
Pupino, Case C-105/03 [2005]
Rauh, Case C-314/89 [1991]
Rewe, Case 33/76 [1976]
Rewe-Handelsgesellschaft Nord v Hauptzollamt Kiel, Case C-158/80 [1981]
Rinke, Case C-25/02 [2003]
SA Roquette Frères, Case 138/79 [1980]
Safalero, Case C-13/01 [2003]
Salahadin Abdulla, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 [2009]
Salzgitter Mannesmann v Commission, Case C-411/04 P [2007]
Samba Diouf, Case C-69/10 [2011]
Schmidberger, Case C-112/00 [2003]
Siples, Case C-226/99 [2001]
Sodemare, Case C-70/95 [1997]
Sopropé, Case C-349/07 [2008]
SpA San Giorgio, Case C-199/82 [1983]
Spain v Lenzing, Case C-525/04 P [2007]
Specialarbejderforbundet i Danmark, Case C-400/93 [1995]
Steffensen, Case C-276/01 [2003]
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Technische Universität München, Case C-269/90 [1991]
Tögel, Case C-76/97 [1998]

Trianel Kohlekraftwerk Lünen, Case C 115/09 [2011]
UNECTEF v Heylens ao, Case 222/86 [1987]
Unibet, Case C 432/05 [2007]
Union de Pequeños, Case C-50/00 [2002]
Upjohn Ltd, Case C-120/97 [1999]
van Esbroeck, Case C-436/04 [2006]
Varec, Case C-450/06 [2008]
Verholen, Case C-87/90 [1991]
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Visciano, Case C-69/08 [2009]
Vlassopoulou, Case C-340/89 [1991]
Wachauf, Case 5/88 [1989]
Weber's wine world, Case C-147/01 [2003]
Wells, Case C-201/02 [2004]
Wilson, Case C-506/04 [2006]
X v Commission, Case C-404/92 P [1994]
Z v Parliament, Case C-270/99 P [2001]
Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest, Joined Cases C-143/88 and C-92/89 [1991]

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Airtours v Commission, Case T-342/99 [2002]
Alrosa v Commission, Case T-170/06 [2007]
Asia Motor France v Commission, Case T-387/94 [1996]
Atlantic Container Line ao, Joined Cases T-191/98, T-212/98 to T-214/98 [2003]
Bank Melli Iran v Council, Case T-390/08 [2009]
BPB v Commission, Case T-53/03 [2008]
British Airways and British Midland Airways v Commission, Joined Cases T-371/94 and T-394/94 [1998]
Cableuropa ao v Commission, Joined Cases T-346/02 and T-347/02 [2003]
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Dow AgroSciences Ltd v Commission, Case T-475/07 [2011]
Endemol v Commission, Case T-221/95 [1999]
Evropaïki Dynamiki v EMSA, Case T 70/05 [2010]
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Forum 187 v Commission, Case T-276/02 [2003]
Hercules Chemicals v Commission, Case T-7/89 [1991]
HFB ao v Commission, Case T-9/99 [2002]
Hoechst v Commission, Case T-410/03 [2008]

Hoechst v Commission, Case T 161/05 [2009]
Imperial Chemical Industries v Commission, Case T-36/91 [1995]
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Knauf Gips v Commission, Case T 52/03 [2008]
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KONGRA-GEL ao v Council, Case T-253/04 [2008]
Mannesmannröhren-Werke v Commission, Case T-112/98 [2001]
Mannesmannröhren-Werke v Commission, Case T-44/00 [2004]
Melli Bank v Council, Joined Cases T-246/08 and T-332/08 [2009]
Microsoft v Commission, Case T-201/04 [2007]
NMH Stahlwerke ao v Commission, Joined Cases T-134/94, T-136/94, 'T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 [1999]
Organization des Modjahedines du peuple d'Iran v Council, Case T-228/02 [2006]
Othman v Council and Commission, Case T-318/01 [2009]
People's Mojahedin Organization of Iran v Council, Case T-256/07 [2008]
People's Mojahedin Organization of Iran v Council, Case T-284/08 [2008]
Pfizer Animal Health v Council, Case T-13/99 [2002]
Pitsiorias v Council and ECB, Joined Cases T-3/00 and T-337/04 [2007]
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Schröder v CPVO, Case T-187/06 [2008]
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Sison v Council, Case T-47/03 [2007]
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Sison v Council, Joined Cases T-110/03, T-150/03 and T-405/03 [2005]
Solvay v Commission, Case T-30/91 [1995]
Solvay v Commission, Case T 186/06 [2011]
Stichting Al Aqsa v Council, Case T-327/03 [2007]
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- Aksoy v Turkey*, no 59741/00 (31 October 2006)
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Družstevní Záložna Pria ao v the Czech Republic, no 72034/01 (31 July 2008)
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Edwards and Lewis v the United Kingdom, nos 349647/98 and 40461/98 (27 October 2004)
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Ekbatani v Sweden, no 10563/83 (26 May 1988)
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Fitt v the United Kingdom, no 29777/96 (16 February 2000)
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Garcia Manibardo v Spain, no 38695/97 (15 February 2000)
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Haas v Germany, no 73047/01 (17 September 2005)
Haililova ao v Sweden, no 20283/09 (13 October 2009)
Hakizimana v Sweden, no 37913/05 (27 March 2008)
Haliti v Switzerland, no 14015/02 (1 March 2005)
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Helmert v Sweden, no 11826/85 (29 October 1991)
Hermi v Italy, no 18114/02 (18 October 2006)
Hilal v the United Kingdom, no 45276/99 (6 March 2001)
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Jabari v Turkey, no 40035/98 (11 July 2000)
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Kaboulov v Ukraine, no 41015/04 (19 November 2009)
Kaldik v Germany, no 28526/05 (22 September 2005)
Kandomabadi v the Netherlands, no 6276/03 (24 June 2004)
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- Karner v Austria*, no 40016/98 (24 July 2003)
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Kugler v Austria, no 65631/01 (14 October 2010)
Le Compte, Van Leuven, De Meyere v Belgium, no 6878/75 (23 June 1981)
Leander v Sweden, no 9248/81 (26 March 1987)
Liu and Liu v Russia, no 42086/05 (6 December 2007)
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Lobo Machado v Portugal, no 15764/89 (22 January 1996)
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Said v the Netherlands, no 2345/02 (5 July 2005)
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Sardinas Albo v Italy, no 56271/00 (8 January 2004)
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Sigma Radio Television, nos 32181/04 and 35122/05 (21 July 2011)
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Sufi and Elmi v the United Kingdom, nos 8319/07 and 11449/07 (28 June 2011)
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Tehrani ao v Turkey, no 32940/08, 41626/08, 43616/08 (13 April 2010)
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Van Mechelen ao v the Netherlands, nos 21363/93, 21364/93, 21427/93 and 22056/93, (18 March 1997)
Veeber v Estonia, no 37571/97 (7 November 2002)
Vilvarajah ao v the United Kingdom, nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (30 October 1991)
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Nadeem Ahmad Dar v Norway, no 249/2004 (16 May 2007)
Nirmal Singh v Canada, no 319/2007 (8 July 2011)
Njamba and Balikosa v Sweden, no 322/2007 (3 June 2010)
Parot v Spain, no 6/1990 (9 June 1995)
R.K. v Canada, no 42/1996 (22 February 1996)
R.K. v Sweden, no 309/2006 (19 May 2008)
R.T-N v Switzerland, no 350/2008 (4 July 2011)
S.C. v Denmark, no 143/199 (3 September 2000)
S.G. v the Netherlands, no 135/1999 (14 May 2004)
S.P.A. v Canada, no 282/2005 (6 December 2006)
S.U.A. v Sweden, no 223/2002 (22 November 2004)
Said Amini v Denmark, no 339/2008 (30 November 2010)
T.D. v Switzerland, no 375/2009 (3 July 2011)
V.L. v Switzerland, no 262/2005 (22 January 2007)
X v Australia, no 324/2007 (5 May 2009)

Y.H.A. v Australia, no 162/2000 (27 March 2002)
Z.K. v Sweden, no 301/2006 (16 May 2008)
Z.Z. v Canada, no 123/1998 (15 May 2001)

6 HUMAN RIGHTS COMMITTEE

Ahani v Canada, no 1051/2002 (15 June 2004)
Alzery v Sweden, no 1416/2005 (10 November 2006)
Castedo v Spain, no 1122/2002 (3 November 2008)
Dawood Khan v Canada, no 1302/2004 (10 August 2006)
Ernst Zundel v Canada, no 1341/2005 (4 April 2007)
George Kazantzis v Cyprus, no 972/2001 (19 September 2003)
Gonzales del Rio v Peru, no 263/1987 (28 October 1992)
Griffin v Spain, no 493/1992 (5 April 1995)
Hamida v Canada, no 1544/2007 (13 April 2010)
Hammel v Madagascar, no 155/1983 (3 April 1987)
Jagjit Singh Bhullar v Canada, no 982/2001 (13 November 2006)
Jonny Rubin Byahuranga v Denmark, no 1222/2003 (9 December 2004)
Judge v Canada, no 829/1998 (20 October 2003)
Karttunen v Finland, no 387/1989 (5 November 1992)
Kimouche v Algeria, no 1328/2004 (16 August 2007)
Kindler v Canada, no 470/1991 (18 November 1993)
Lnenicka v Czech Republic, no 1484/2006 (28 April 2008)
Madafferi v Australia, no 1011/2001 (26 August 2004)
Moraël v France, no 207/86 (28 July 1989)
Moses Solo Tarlue v Canada, no 1551/2007 (28 April 2009)
Oló Bahamonde v Equatorial Guinea, no 468/1991 (10 November 1993)
Osivand v the Netherlands, no 1289/2004 (11 April 2006)
P.K. v Canada, no 1234/2003 (20 March 2007)
P.S. v Denmark, no 397/1990 (31 August 1992)
Perterer v Austria, no 1015/2001 (20 August 2004)
Pillai v Canada, no 1763/2008 (9 May 2011)
Silva v Uruguay, no 34/1978 (8 April 1981)
Toonen v Australia, no 488/1992 (31 March 1994)
Vicente ao v Colombia, no 612/95 (19 August 1997)
Weiss v Austria, no 1086/2002 (15 May 2003)
Zheludkova v Ukraine, no 726/1996 (6 December 2002)

7 NATIONAL COURTS

Germany
 Bundesverfassungsgericht 8 September 2009, BvQ 56/09

The Netherlands
 Administrative Jurisdiction Division of the Council of State 12 October 2001, no
 200103977/1

Administrative Jurisdiction Division of the Council of State 27 January 2003, no
200206297/1

Administrative Jurisdiction Division of the Council of State 18 November 2008, no
200805862/1

Administrative Jurisdiction Division of the Council of State 26 May 2009, no
200902200/1/V2

The United Kingdom

Court of Appeal 28 January 2000, *R. v. Home Secretary, ex parte Turgut* [2000] Imm
LR 306

House of Lords 19 February 1987, *R v. Home Secretary, ex parte Bugdaycay* [1987]
AC 514

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‘Access to an Effective Remedy before a Court or Tribunal in Asylum Cases’, in: E. Guild and Paul Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law*, Leiden/Boston: Martinus Nijhoff Publishers 2011, pp 401-436

‘Het Kinderrechtenverdrag krijgt tanden, Over hoe het VN Verdrag inzake de Rechten van het Kind via het EU-recht en het EVRM binnendringt in het Nederlandse vreemdelingenrecht’, *Asiel & Migrantenrecht* (2011), pp 349-362

‘An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?’, *European Journal of Migration and Law* (2010), pp 407-434

‘Het Handvest van de grondrechten van de Europese Unie: mogelijke betekenis voor het vreemdelingenrecht’, *Asiel & Migrantenrecht* (2010), pp 233-244

‘Implementation of the Procedures Directive in the Netherlands’, in: K. Zwaan (ed.), *The Procedures Directive: Central Themes. Problem issues, and Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishers 2008, pp 133-145

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2011 and 2012:

- MI-189 M.R. Bruning, M.P. de Jong, T. Liefwaard, P.M. Schuyt, J.E. Doek & T.A.H. Doreleijers, *Wegwijs in het jeugdsanctierecht. Onderzoek naar het juridisch kader voor de zwaarste jeugdsancties in theorie en praktijk*, Nijmegen: Wolf Legal Publishers 2011, ISBN 978 90 5850 621 4
- MI-190 J.P. van der Leun, E.R. Muller, N. van der Schee, P.M. Schuyt & M.A.H. van der Woude, *De vogel vrij. Liber amicorum prof.dr.mr. Martin Moerings*, Den Haag: Boom Lemma Uitgevers 2011, ISBN 978 90 5961 657 7
- MI-191 M. den Heijer, *Europe and Extraterritorial Asylum* (diss. Leiden) 2011
- MI-192 I. Ievdokymova, *The EU-US SWIFT agreement: which Fate under the Lisbon Data Protection Framework?*, Den Haag: Jongbloed 2011, ISBN 978 90 700 6253 8
- MI-193 R.G. Louw, *Het Nederlands hoger onderwijsrecht*, Leiden: Leiden University Press 2011, ISBN 978 90 8728 132 8, eISBN 978 90 0060 050 8
- MI-194 O.P. van Vliet, *Convergence and Europeanisation. The Political Economy of Social and Labour Market Policies* (diss. Leiden), Leiden: Leiden University Press 2011, ISBN 978 90 8728 145 8, e-ISBN 978 94 0060 063 8
- MI-195 Y.M. van der Vlugt, *De Nationale ombudsman en behoorlijk politieoptreden* (diss. Leiden, Den Haag: Boom Lemma 2011, ISBN 978 90 5931 7 253
- MI-196 D. Allewijn, *Tussen partijen is in geschil... De bestuursrechter als geschilbeslechter*, (diss. Leiden, Den Haag: Sdu uitgevers 2011, ISBN 978 90 12 38728 6
- MI-197 M.L. Koemans, *The war on antisocial behaviour. Rationales underlying antisocial behaviour policies. Comparing British and Dutch discourse analyses*, (diss. Leiden), Amsterdam: Ponsen & Looijen 2011, ISBN 978 90 6464 501 3
- MI-198 M. Hagens, *Toezicht op menswaardige behandeling van gedetineerden in Europa. Een onderzoek naar de verhouding tussen het EHRM en het CPT bij de effectivering van het folterverbod*, (diss. Leiden), Nijmegen: Wolf Legal Publishers 2011, ISBN 978 90 585 0714 3
- MI-199 G.O. Reerink, *Toezicht Tenure security for Indonesia's urban poor, A socio-legal study on land, decentralisation, and the rule of law in Bandung*, (diss. Leiden), Leiden: Leiden University Press 2011, ISBN 978 90 8728 152 6, eISBN 978 94 0060 071 3
- MI-200 F. Schonewille, *Partijautonomie in het relatievevermogensrecht*. (diss. Leiden), Apeldoorn/Antwerpen: Maklu-Uitgevers 2012, ISBN 978 94 466 0492 2
- MI-201 R.P. Orij, *Societal Determinations of Corporate Social Disclosures. An International Comparative Study*, (diss. Leiden), Leiden: Leiden University Press 2012, ISBN 978 90 8728 162 5, e-ISBN 978 94 0060 088 1
- MI-202 K.J.O. Jansen, *Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht*, (diss. Leiden), Kluwer 2012, ISBN 978 90 1310 434 9
- MI-203 T. Barkhuysen, W. den Ouden & M.K.G. Tjepkema (red.), *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiek*, Deventer: Kluwer 2012, 978 90 1310 377 9
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