EU asylum procedures and the right to an effective remedy

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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 proceedings[2] 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 20 05, p 577. Schwartze derives from the Court of Justice's case-law that the protection of fundamental, constitutional rights is inextricably linked to correct administrative procedure. Schwartze 2004, p 97.

3 Accetto and Zlepnig 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 & Zlepnig 2005, p 380. See also Kañska 2004, p 301.

4 Kañska 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, Kañska 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

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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 be 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 Preable 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

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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 law[50] 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 remedy[54] and Article 41 on the right to good administration are particularly relevant.

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49 See for example Case C-555/07, *Kücüdeveci* [2010], para 22 and Case C-578/08, *Chakroun* [2010], para 44.
50 See Case C-555/07, *Kücüdeveci* [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 Regulation[55] 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 law[60]
- Measures adopted under an EU derogation in order to justify a measure which restricts one of the fundamental freedoms protected by the Treaty[61]
- Measures which otherwise fall within the scope of EU law[62]

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 an 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, *Kücükdeveci* [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 in 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 Charter[69] 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 legislation[78] and EU soft law[79] 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:

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78 See Case T-228/02, *Organization des Modhahedines 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. Tesauro 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 ICCPR[88] 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 Charter[90] 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]

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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.

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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 internet[100] 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]

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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.