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EU asylum procedures and the right to an effective remedy

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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 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 Sorzabal 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 *Grebremedhin 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, *Maflouh 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.