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EU asylum procedures and the right to an effective remedy

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9 | Judicial review of the establishment and qualification of the facts

The establishment and qualification (assessment) of the facts is generally considered in the first place the task of the determining (administrative) authorities. National rules concerning the standard of the judicial review of the facts, including the credibility assessment, depend on the Member State's vision on the division of tasks between the legislator, administration and judiciary. Spijkerboer notes that the national courts 'will generally avoid taking substantive decisions, and merely supervise (a) correct interpretation of the law; (b) the reasonableness of decisions; and (c) conformity with procedural requirements'.¹ However, there are significant differences in the standard (scope and intensity)² of judicial review applied by the national courts in the Member States.³ Greece for example provides for judicial review by the Council of State on points of law only. The (first instance) courts of some Member States consider the determining authorities best placed to establish the facts and therefore pay (more or less) deference to these authorities' decision. The courts of other Member States apply a full judicial review to the asylum decision and replace their own findings of fact for those of the determining authorities.⁴

The Procedures Directive does not provide for minimum standards concerning the standard of judicial review. However the Court of Justice considered in *Samba Diouf* that in order for the EU right to an effective remedy to be exercised effectively, 'the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith'.⁵ The legality of the final decision adopted in an accelerated asylum procedure,

1 Spijkerboer 2009-II, p 52.

2 The *scope* of judicial review determines which issues are included by the court in its assessment of the case. The review may for instance be limited to questions of law and leave out questions of fact. The *intensity* of judicial review relates to how rigorous the court scrutinises a certain issue. Does the court for example pay deference to the part of the decision in which the credibility of the asylum account is assessed or does it carry out its own credibility assessment?

3 See also Costello, who states that the deferent standard of judicial review in the Netherlands is incompatible with Art 13 ECHR and EC law while the 'most anxious scrutiny test', which is the standard for the UK judiciary appears to meet those standards. Costello 2006 p 30.

4 UNHCR, *Improving asylum procedures, Comparative Analyses and Recommendations for Law and Practice*, Geneva: March 2010, pp 461-463.

5 Case C-69/10, *Samba Diouf* [2011], para 61.

and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded, should be the subject of a 'thorough review' by the national court.⁶ The Court of Justice has not explained what is exactly meant by a 'thorough review'.

In this chapter it is argued that Article 39 PD read in the light of the EU right to an effective remedy sets limits to the Member States' discretion with respect to the standard of judicial review of the fact-finding in asylum cases. The right to an effective remedy precludes that the appeal against the first instance asylum decision is limited to points of law. Furthermore this chapter contends that potentially EU law requires *rigorous* and *ex nunc* judicial scrutiny of the facts by the national courts in asylum cases. This is based on an examination of the EU Courts' as well as the ECtHR's case-law and the views of the UN Committees.

This chapter limits itself to the standard of judicial review of the assessment of the facts in asylum cases. Other issues with regard to the standard of judicial review, such as the possible obligation of national courts to apply EU law *ex officio* or the judicial review of points of law will not be addressed in this chapter. The question whether EU law requires that the asylum applicant be heard by the national court was examined in Chapter 7 on the asylum applicant's right to be heard on his asylum motives in first instance and appeal proceedings.

The set up of this chapter is as follows. Section 9.1 argues that Article 39 PD read in the light of the EU right to effective judicial protection requires the national court or tribunal to address both of points of law and points of fact. Section 9.2 then addresses the required intensity of judicial review of the fact-finding, including the assessment of the credibility of the asylum claim, by the court or tribunal in the meaning of Article 39 PD. Finally section 9.3 examines whether the national court or tribunal is obliged to carry out an *ex nunc* or an *ex tunc* assessment of the case. In other words it is assessed whether the national court should or may restrict itself to a review of the contested decision and its underlying facts or whether it should take into account facts or circumstances which emerged or were submitted after the issuing of an asylum decision. Conclusions will be drawn in section 9.4.

9.1 LIMITATION OF JUDICIAL REVIEW TO POINTS OF LAW?

This section addresses the question whether EU law allows the Member States to maintain or introduce a system in which the facts underlying the asylum decision are assessed by a non-judicial body, while the appeal before the court or tribunal in the meaning of Article 39 PD will be limited to points of law.

⁶ Case C-69/10, *Samba Diouf* [2011], para 56.

UNHCR's research of 2010 shows that in a majority of the Member States surveyed the judicial body, competent to review negative decisions on applications for international protection, has jurisdiction to review questions of both fact and law.⁷ However in Belgium as well as the United Kingdom the appeal body does not have full jurisdiction over some categories of decisions.⁸ In such cases the judicial review is limited to the legality of the decision. In Greece the appeal body, the Council of State, has jurisdiction only to review the legality of the decision by the determining authority and does not review the facts. Also in Slovenia the facts of an asylum case are not reviewed by a court or tribunal.⁹

9.1.1 The Court of Justice's case-law

The Court of Justice held in *Samba Diouf* that the national court in the meaning of Article 39 PD should be able 'to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith'.¹⁰ In *Samba Diouf* the national court was potentially prevented from reviewing the reasons underlying the decision to process an asylum claim in an accelerated procedure, in the context of the appeal against the decision to reject the asylum application.¹¹ In that case the reasons for processing the asylum claim in accelerated procedure were identical to the reasons for rejecting the asylum claim. As a result the national court was potentially not allowed to review the reasons underlying the rejection of the asylum claim. According to the Court of Justice such a situation 'would render review of the legality of the asylum decision impossible, as regards both the facts and the law'.¹² It should be concluded from this consideration that in asylum cases the national court or tribunal is expected to review factual issues such as whether the applicant has presented false information.

The conclusion that a court or tribunal in the meaning of Article 39 PD should review the facts is reinforced by the fact that the Court of Justice in

7 UNHCR, *Improving Asylum Procedures*, s 16, p 461.

8 UNHCR, *Improving Asylum Procedures*, s 16, pp 461-462. In Belgium this applies to decisions of the Aliens office relating to the preliminary examination of subsequent applications or asylum applications from EU citizens.

9 UNHCR, *Improving Asylum Procedures*, s 16, p 463.

10 Case C-69/10, *Samba Diouf* [2011], para 61.

11 The referring court was of the opinion that a review of the decision to rule on the merits of an application for asylum under an accelerated procedure through the remedy available against the final decision, appeared to be contrary to the intention of the legislature to exempt that decision from any judicial review. The representative of the Luxembourg Government disagreed with this opinion.

12 Case C-69/10, *Samba Diouf* [2011], para 57.

Samba Diouf referred to its judgment in *Wilson*.¹³ It follows from this judgment that under EU law a ‘court of tribunal’ should be able to review both fact and law. In *Wilson* the Court was asked by a national court to interpret Article 9 of Directive 98/5,¹⁴ which requires a remedy before a court or tribunal in accordance with the provisions of domestic law.¹⁵ In the *Wilson* case the facts were reviewed in first and second instance by non-judicial bodies, which could, according to the Court of Justice not be considered impartial. Therefore they did not fulfil the requirements for a court or tribunal as defined by Community law.¹⁶ The Court of Justice established that the jurisdiction of the *Cour de Cassation*, deciding in last instance, was limited to questions of law, so that it did not have full jurisdiction. The Court of Justice ruled that the *Cour de Cassation* could not be considered a court or tribunal as required by Article 9 of the said directive.¹⁷ It is important to note that the Court of Justice in *Wilson* referred to the ‘full jurisdiction test’ applied by the ECtHR in cases concerning Art 6 ECHR, which will be discussed in the next section.¹⁸

9.1.2 Obligations stemming from the ECHR, CAT and ICCPR.

The Court of Justice’s rulings in *Samba Diouf* and *Wilson* are in line with the ECtHR’s interpretation of the term ‘court or tribunal’ under Article 6 ECHR. Under Article 6 (1) ECHR the starting point is that a body can only be considered a court or tribunal in the meaning of Article 6 (1) ECHR if it addresses both questions of fact and questions of law.¹⁹ In *Le Compte, Van Leuven and De Meyere v Belgium* the ECtHR considered that questions of fact and questions of law

‘are equally crucial for the outcome of proceedings relating to “civil rights and obligations”. Hence the right to a court and the right to a judicial determination of the dispute cover questions of fact just as much as questions of law.’²⁰

The ECtHR assesses the overall fairness of the procedure. It accepts that the procedure does not need to be conducted at each of its stages before tribunals

¹³ Case C-69/10, *Samba Diouf* [2011], para 57.

¹⁴ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998], OJ L 77/36.

¹⁵ Case C-506/04, *Wilson* [2006], para 60.

¹⁶ In this case: the Disciplinary and Administrative Committee in first instance the Disciplinary and Administrative Appeals Committee in appeal.

¹⁷ Case C-506/04, *Wilson* [2006], paras 61-62.

¹⁸ Widdershoven states that the Court of Justice in *Samba Diouf* implicitly applied the ‘full jurisdiction test’ by setting requirements to judicial review. Widdershoven 2011 under para 4.

¹⁹ ECtHR 7 November 2002, *Veeber v Estonia*, no 37571/97, para 70.

²⁰ ECtHR (Plen) 23 June 1981, *Le Compte, Van Leuven, De Meyere v Belgium*, no 6878/75, para 51.

meeting the requirements of Article 6 (1) ECHR. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative, professional or judicial bodies which do not fully satisfy the requirements set by Article 6 ECHR in every respect.²¹ If the proceedings before a certain body do not comply with those requirements, no violation of Article 6 will be found if another remedy is available which does provide the safeguards required by Article 6 (1) ECHR and has full jurisdiction.²² Courts which only have jurisdiction to assess the lawfulness of a decision do not comply with the full jurisdiction test. In *Zumtobel v Austria* the Court considered for example that the Constitutional Court which could inquire into the contested proceedings only from the point of view of the conformity with the Constitution and could not examine all the relevant facts, did not have full jurisdiction.²³

The ECtHR found violations of Article 6 ECHR in cases where the domestic courts or tribunals were precluded from determining a central issue in dispute and had considered themselves bound by the prior findings of administrative bodies.²⁴ In *Terra Woningen v the Netherlands* for example the Dutch District Court decided to set the rent for an apartment owned by the applicant at the legal minimum on the ground that the Provincial Executive had designated the area as one where soil cleaning was required. The Court did not go into the question whether the Provincial Executive acted correctly in making this decision. According to the ECtHR the court, by doing so, deprived itself of jurisdiction to examine facts which were crucial for the determination of the dispute. It therefore found a violation of Article 6 ECHR.²⁵ In *Chevol v France* a violation of Article 6 ECHR was found because the French Conseil d'Etat considered itself to be bound by an opinion of the Minister of Foreign Affairs concerning the applicability of a treaty between France and Algeria. It was 'thereby voluntarily depriving itself of the power to examine and take into account factual evidence that could have been crucial for the practical resolution of the dispute before it'.²⁶

The ECtHR's case-law under Article 13 ECHR indicates that in asylum cases an independent body should review both facts and law. According to the ECtHR 'the notion of an effective remedy under Article 13 requires independent and

21 ECtHR (Plen) 23 June 1981, *Le Compte, Van Leuven, De Meyere v Belgium*, no 6878/75, para 51.

22 See for example ECtHR 25 October 1995, *Bryan v United Kingdom*, no 19178/91, para 40.

23 ECtHR 21 September 1993, *Zumtobel v Austria*, no 12235/86, para 30. See also ECtHR 7 November 2002, *Veeber v Estonia*, no 37571/97, para 71, ECtHR 20 June 2002, *Koskinas v Greece*, no 47760/99, para 30.

24 ECtHR 21 July 2011, *Sigma Radio Television*, nos 32181/04 and 35122/05, para 157, ECtHR 31 July 2008, *Družstevní Záložna Píra and others v the Czech Republic*, no 72034/01, para 111. See also ECtHR 28 June 1990, *Obermeier v Austria*, no 11761/85.

25 ECtHR 28 November 1998, *Terra Woningen v the Netherlands*, no 20641/92, paras 52-55. See also ECtHR 24 November 2005, *Capital Bank AD v Bulgaria*, no 49429/99.

26 ECtHR 13 February 2003, *Chevol v France*, no 49636/99, para 82.

rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3'.²⁷ It is hard to imagine that 'rigorous scrutiny' can be provided by an authority, which is only competent to rule on points of law. The ECtHR's case-law under Articles 3 and 13 ECHR which will be discussed in section 9.2.2, clearly shows that the national authority must review the facts underlying the decision on the claim based on Article 3 ECHR.²⁸

Furthermore it may be derived from the subsidiary role of the ECtHR and the UN Committees that national courts should assess the facts underlying a claim based on the principle of *refoulement*.²⁹ The ECtHR has stated in its case-law that it 'is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case'.³⁰ Likewise, the Committee against Torture and the Human Rights Committee have considered in many cases that it is for the courts of the State parties to the Convention, and not the Committee, to evaluate facts and evidence in a particular case.³¹

9.1.3 Subconclusion: limitation of judicial review to points of law?

It follows from the Court of Justice's judgments in *Samba Diouf* and *Wilson* that a court or tribunal as required by Article 39 PD should review both points of law and points of fact. This view is supported by the ECtHR's case-law under Article 6 ECHR, which requires a court or tribunal to have 'full jurisdiction'. Furthermore a judicial review which is limited to points of law only cannot be considered a rigorous scrutiny as required by the ECtHR in *refoulement* cases. A system in which the facts are established by the administrative authorities

27 See for example ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 50. See also Council of Ministers of the Council of Europe, Twenty Guidelines on Forced Return, September 2005, guideline no 5 (2).

28 The view of the ComAT on this issue is not clear. In ComAT 6 December 2006, *S.P.A. v Canada*, no 282/2005, para 7.4 and ComAT 15 November 2007, *L.Z.B. v Canada*, no 304/2006, para 6.6 the ComAT seems to accept that national courts only review the legality of asylum decisions. However, in a more recent case the Committee required a judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds or believing that the person faces a risk of torture. ComAT 8 July 2011, *Nirmal Singh v Canada*, no 319/2007, para 8.9.

29 Bruin 2003, Wildhaber 2002, p 3.

30 ECtHR 21 February 2002, *Matyar v Turkey*, no 23423/94, para 108, where the ECtHR also stated that it is not its task to substitute its own assessment of the facts for that of the domestic courts. See also Wildhaber 2002, p 2, where he states that 'European control is a fail-safe device designed to catch the ones that get away from the rigorous scrutiny of the national bodies'.

31 See for example ComAT 6 December 2006, *S.P.A. v Canada*, no 282/2005, para 7.6 and HRC 18 November 1993, *Kindler v Canada*, no 470/1991, para 6.6. See also Bruin 2003, p 574.

and cannot be reviewed by a court or tribunal should therefore be considered contrary to Article 39 PD.

9.2 THOROUGH REVIEW OF THE ASSESSMENT OF THE FACTS

The Court of Justice considered in *Samba Diouf* that Article 39 PD read in the light of the EU right to effective judicial protection requires that the reasons which led the competent authority to reject the asylum application as unfounded, should be the subject of a 'thorough review' by the national court.³² The Court of Justice has thus brought the intensity of judicial review within the scope of the EU right to an effective remedy and with regard to this aspect limited the procedural autonomy of the Member States.³³

In this section it will be examined what a 'thorough review' should actually entail. Does it require that the national court substitute its own assessment of the facts for that of the determining authority? Or is a reasonability test of the determining authority's establishment of the facts, including its credibility assessment, sufficient? These questions will be addressed taking into account the Court of Justice's case-law in other fields of EU law as well as the ECtHR's case-law under Articles 3 and 13 ECHR in *non-refoulement* cases and with regard to the 'full jurisdiction' test under Article 6 ECHR.

This section addresses the required intensity of the judicial review of two elements of the asylum decision: (1) the establishment of the facts and (2) the question whether, on the basis of these facts, the asylum seeker qualifies for protection following the criteria of the Qualification Directive. The intensity of review of these two elements may differ in theory. The Dutch courts for example are of the opinion that a limited (marginal) judicial review needs to be applied to the establishment of the facts, while a more rigorous judicial review should be applied to the qualification question.³⁴ However in practice these two aspects of the asylum decision often overlap.³⁵ In the case-law of national and international courts they have regularly not been clearly distinguished. Therefore the required intensity of judicial review of both aspects will be assessed together.

In most asylum cases, fact-finding is difficult due to a lack of evidence. In many asylum cases the establishment of the facts consists for a large part

32 Case C-69/10, *Samba Diouf* [2011], para 56.

33 See also Widdershoven 2011, under para 3.

34 See for example Administrative Jurisdiction Division of the Council of State 27 January 2003, no 200206297/1.

35 For example the questions whether it is plausible that an asylum seeker attracted the special, negative attention of the authorities of the country of origin may be regarded a factual question, but also a qualification question. The same applies to the question whether the alleged discrimination would cause such a severe restriction of the means of existence that it would disable the asylum seeker to function socially.

of an assessment of the credibility of the asylum applicant's statements.³⁶ Some courts may be of the opinion that the determining authority is better equipped to evaluate the evidence and assess the credibility of an asylum account than the court.³⁷ Therefore the determining authority should be granted wide discretion and judicial review should be limited to the reasonableness of its decision. The Dutch Council of State for example has considered that the determining authority has a margin of appreciation in assessing the credibility of the asylum account.

It [the decision making authority] assesses the credibility of the asylum account on the basis of extended interviews and a comparison with all it knows of the situation in the country of origin on the basis of country reports and other objective sources and the research done, and the considerations made before in connection with the interviews of other asylum seekers in a comparable situation. This overview enables him to make this assessment in a comparing and therefore objective way. The court is not capable to assess the credibility in a comparable manner. That does not mean that the minister's considerations are not subjected to a judicial review. The standard in the assessment that has to be made is, however, not the judge's own opinion on the credibility of the asylum seekers narrative, but the question whether there is ground for the opinion that the minister [...] reasonably could not have come to his opinion about the credibility of the narrative. This is irrespective of the fact that the process of decision-making should meet the demands of due process and motivation as required by law, and that the judge must assess the decision by these standards.³⁸

However some judges think differently on the intensity of the judicial review required in asylum cases. A judge of the English Court of Appeal for example considered that the court should subject the State Secretary's decision to rigorous examination. In this judge's opinion this examination must include consideration of the underlying factual material to see whether it compels a different conclusion to that arrived at by the Secretary of State. He stated:

[T]his is not an area in which the Court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here – the right not to be exposed to a real risk of Article 3 treatment – is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the Court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the

³⁶ See section 8.5.

³⁷ See also Schuurmans, who states that a reasonableness test is (also) advocated for cases where it is inherently difficult to objectify the facts, as in asylum cases. Schuurmans 2008, p 9.

³⁸ Administrative Jurisdiction Division of the Council of State 27 January 2003, no 200206297/1. This text is translated from Dutch into English by the author. See also UNHCR, *Improving Asylum Procedures*, s 16, p 49-50.

relevant material is before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the 'discretionary area of judgment' – the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal ... – is decidedly a narrow one.³⁹

This judge is of the opinion that the court is as well placed as the determining authority to evaluate the risk of *refoulement* on the basis of the facts. Furthermore this judge mentioned two other reasons why judicial scrutiny of the facts should be rigorous: the fact that an absolute and fundamental right, the prohibition of *refoulement* is involved and the risk that the determining authority does not approach the case open-mindedly.

As will be shown in section 9.2.2.2, the ECtHR has accepted that, as a general principle, the national authorities are best placed to assess the facts and, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned. However this does not withhold the ECtHR from making its own credibility assessment if necessary.⁴⁰ Before turning to the ECtHR's case-law concerning the intensity of judicial review under the right to an effective remedy and the right to a fair trial the relevant case-law of the EU Courts will be examined.

9.2.1 The EU Court's case-law

As was mentioned above the Court of Justice considered in *Samba Diouf* that the EU right to effective judicial protection requires a thorough judicial review by a national court of the reasons underlying the decision to reject the asylum decision.⁴¹ Such reasons for rejection may include issues relating to the establishment of the facts, notably the fact that the applicant's asylum account is considered to be implausible. This would imply that the requirement of a 'thorough judicial review' also applies to the evaluation of the evidence and the credibility assessment made by the determining authority.

39 Court of Appeal 28 January 2000, *R. v Home Secretary, ex parte Turgut* [2000] Imm LR 306. This consideration was cited in ECtHR 6 February 2001, *Bensaid v the United Kingdom*, no 44599/98, para 28.

40 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 52.

41 Case C-69/10, *Samba Diouf* [2011], para 56.

How the term 'thorough judicial review' must be interpreted, cannot be derived from the case-law concerning national decisions in other fields of EU law. The Court of Justice has directly addressed the required intensity of judicial review by the national courts in a very limited number of cases. Generally it is assumed that the intensity of judicial review falls within the procedural autonomy of the Member States.⁴² It should be remembered however that the way in which national decisions are reviewed by the national court may not render the exercise of a right granted by EU law impossible or excessively difficult.⁴³

Some indications for the requirements regarding the intensity of judicial review which follow from the EU right to an effective remedy may be derived from the case-law concerning appeals against decisions of the EU Institutions before the EU Courts. In such cases the General Court (like the former CFI) has exclusive jurisdiction to find the facts. The Court of Justice only assesses points of law and examines whether the clear sense of the evidence is distorted.⁴⁴ Arguably the General Court and the Court of Justice in this case-law show the level of intensity of judicial review which is required in order to guarantee effective judicial protection. A method of judicial review applied by a national court which is much more restrictive than the method applied by the General Court in similar cases may lead to a violation of the EU right to an effective remedy.⁴⁵

The Court of Justice has recognised that the case-law concerning the intensity of judicial review of decisions of the EU Institutions may be considered relevant for the national context.⁴⁶ In *Upjohn* the Court of Justice held with regard to the principle of effectiveness that the national courts are not required to apply a more extensive judicial review than that carried out by the Court of Justice in similar cases. As a result the national court was not required to substitute its assessment of the facts and, in particular, of the scientific evidence relied on in support of the decision for the assessment made by the national determining authority.⁴⁷ It is questionable whether the reasoning in *Upjohn* can be applied *a contrario*, meaning that the national courts are not allowed to apply a less rigorous judicial review than the EU Courts in similar cases.⁴⁸ This does not follow from the judgment in *Upjohn*. Some authors derived from

⁴² Schuurmans 2008, p 30. Delicostopoulos 2003, p 602.

⁴³ Case C-120/97, *Upjohn Ltd* [1999], para 32, Case C-467/01, *Eribrand* [2003], para 62. See also Schuurmans 2008, pp 30 and 32.

⁴⁴ Schuurmans 2008, p 16. See for the jurisdiction of the General Court Art 256 TFEU.

⁴⁵ See also Schuurmans 2008, p 34.

⁴⁶ Tridimas states: '*Upjohn* illustrates a tendency to view Community and national authorities as part of one and the same constitutional structure and subject them to equivalent standards of accountability.' Tridimas 2006, p 449.

⁴⁷ Case C-120/97, *Upjohn Ltd* [1999], paras 35-37. See Schuurmans 2008, p 16 and Jans and others 2007, p 91.

⁴⁸ Schuurmans 2008, p 32.

the judgment in *Upjohn* that judicial review on the merits is not required by EU law and that a legality review should be considered sufficient.⁴⁹ Nevertheless it should not be ruled out that the intensity of judicial review applied by the EU courts may be relevant in order to establish the minimum level of intensity of judicial review which the national courts are required to apply in similar cases according to the right to an effective remedy.⁵⁰

It is contended here that in particular the case-law of the CFI and the Court of Justice concerning the intensity of judicial review of the establishment of the facts in cases concerning complex assessments should be considered relevant. Complex assessments by the EU Institutions take place in various fields of law and can have a different character.⁵¹ They may for example concern medical issues or complex economic assessments as in the cases of *Pfizer* and *Tetra Laval* which will be extensively discussed in this section.⁵²

Asylum cases and EU decisions involving complex assessments have in common that it is difficult to find the facts objectively.⁵³ In asylum cases this is due to the general lack of (documentary) evidence. In cases involving complex assessments this is a result of the fact that the decision is based on (often contradicting) scientific data or experts reports. In both sorts of cases it is accepted (with regard to asylum cases at least by some national courts) that because of the difficulties in establishing the facts, determining authorities should enjoy discretion and that judicial review should be limited.⁵⁴ The determining authorities are considered to be better placed to establish and evaluate the facts than the court, because they have the specific expertise necessary for this task.⁵⁵

The Court of Justice's settled case-law entails that, where an EU authority is required to make complex assessments in the performance of its duties, it has wide discretion, which also applies, to some extent, to the establishment

49 Jans states: 'From this judgment it can be deduced that any form of 'normal' judicial review is, in principle permissible. Community law generally only requires a legality review, a merits review is not usually required.' Jans and others 2007, pp 93-94. See also Delicostopoulos 2003, p 602.

50 Schuurmans 2008, pp 16 and 32. Schuurmans recognises however that such a violation will not easily be established. She also notes on p 34 that a very limited review of fact-finding may involve the risk of the courts making an error in reviewing the facts and evidence, for which the Member State may be held liable.

51 Schuurmans states that 'an assessment of the facts is complex, for example, where complicated economic or social assessments must be made, or where an assessment is otherwise based on specific scientific data.' Schuurmans 2008, p 19.

52 Case T-13/99, *Pfizer Animal Health SA v Council* [2002] and Case C-12/03 P, *Commission v Tetra Laval* [2005]. See also Barbier de la Serre and Sibony 2008, p 953.

53 Schuurmans 2008, p 27.

54 See for criticism on the limited judicial review of technical issues Barbier de la Serre and Sibony 2008, p 894.

55 Barbier de la Serre and Sibony 2008, p 955, Schwartz 2004, p 95, Craig 2006, p 469.

of the factual basis of its action.⁵⁶ The EU judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the boundaries of its discretion.⁵⁷ In cases involving complex assessments the EU Courts thus apply a limited judicial review of the fact finding by the EU Institutions. How can the case-law concerning this limited review be relevant for the interpretation of the required 'thorough judicial review' in asylum cases?

The CFI's case-law concerning cases involving complex assessments shows that in practice this limited form of judicial review is rather rigorous.⁵⁸ Furthermore the EU Courts have tested the EU Institutions' decisions against procedural safeguards. The Court of justice may use this method of judicial review as a source of inspiration for the interpretation of the term 'thorough judicial' review in asylum cases. Arguably judicial review which offers a lower intensity of judicial review than the limited review performed by the EU-Courts in cases involving complex assessments cannot be considered a thorough judicial review. One must be very cautious to apply the case-law concerning complex assessments directly to asylum cases. However, it is possible to draw some general guidelines from this case-law which should be considered relevant for asylum cases.⁵⁹

Here below first of all the method of review of the facts in cases involving complex assessments will be addressed. The final part of this section will examine the judicial review by the EU Courts of the procedural guarantees offered during the proceedings.

Judicial review of the facts in cases involving complex assessments

In cases involving complex assessments judicial review by the General Court of the way in which the EU Institutions assessed and evaluated the facts is limited. The EU judicature is not entitled to substitute its assessment of the facts for that of the EU institutions.⁶⁰ Instead, it must confine itself to ascertain-

56 Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 168 and Case 138/79, *SA Roquette Frères* [1980], para 25. See also Schuurmans 2008, p 19. See for criticism on this case-law Barbier de la Serre and Sibony 2008, p 956-957.

57 Case C-120/97, *Upjohn Ltd* [1999], para 34.

58 Schuurmans 2008, p 25.

59 The intensity of judicial review that national courts are required to supply is influenced directly by the degree of discretion Member States enjoy in their implementation of the EC measure in question. Ward 2007, p 175. Also the importance of the interests at stake may influence the required intensity of judicial review. Schuurmans 2008, p 33.

60 See for example Case C-120/97, *Upjohn Ltd* [1999], para 34 and Case T-201/04, *Microsoft* [2007], para 88. Barbier de la Serre and Sibony explain the fact that EU Courts shows reluctance to ask for an expert report in cases involving complex assessments from a fear that relying on expert evidence will lead them to substitute their appreciation to that of the EU Institution. Barbier de la Serre and Sibony 2008, pp 953-955.

ing whether the exercise by the institutions of their discretion in that regard is vitiated by a manifest error or a misuse of powers or whether the institutions clearly exceeded the bounds of their discretion (a reasonableness test).⁶¹ This does not mean however, that the review by the EU judiciary does not closely examine the fact-finding.⁶² Several authors have argued that although the wording of the reasonableness test has remained the same, the EU Courts have entered into more rigorous scrutiny of the facts.⁶³ The Courts have shown to be more readily prepared to accept a manifest error.⁶⁴ In this section two judgments will be examined in which the EU Courts have applied the intensified reasonableness test. These cases do not necessarily represent the view of the EU Court in general.⁶⁵ However they have been mentioned in literature as leading cases,⁶⁶ which should be considered to provide important guidance for national administrative proceedings.⁶⁷

Pfizer Animal Health SA v Council

The first striking example of an intensive review applied by the Court of First Instance in the context of the reasonableness test is the judgment in *Pfizer*, which was already discussed in section 8.6.1 on expert reports. In this case a regulation was contested, by which the authorisation of an additive in feeding stuffs (viginiamycin) was withdrawn. The Council took the view that the use of viginiamycin, which was produced by Pfizer, involved a risk to human health. Therefore it was necessary to withdraw the authorisations relating to the use of the product. The Council had drawn attention in its arguments to the fact that the decision to withdraw the authorisation of a certain additive was based on extremely complex scientific and technical assessments, over which scientists had widely diverging views. Pfizer argued that the contested regulation should be annulled, since the Community institutions had made errors in the analyses of the risks to human health and their application of the precautionary principle. In its view the Community Institu-

61 See for example Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 169.

62 Schuurmans 2008, p 30.

63 Craig 2006, pp 446-447. Craig describes the early case-law by the Court of Justice regarding judicial review of fact and discretion in pp 439-444. See also Schuurmans 2008, p 20 and Schwartz 2004, p 100.

64 Craig 2006, p 447, Schuurmans 2008, p 20.

65 Craig shows that judicial review of fact in recent cases concerned with common policies, State aids and structural funds are more far-reaching than the early case-law, but is still significantly less intensive than in the risk regulation and merger cases like *Pfizer* and *Tetra Laval*. Craig 2006, p 458

66 Craig considers *Pfizer* and *Tetra Laval* to be 'prominent examples' of the EU Court's modern approach. Craig 2006, p 447.

67 Schuurmans uses *Pfizer* and *Tetra Laval* because these cases in her view include the court's specification of how it reviews an opinion of the facts by the administration. She states that decisions in cases like *Tetra Laval* appear to be formulated in such a manner that they may be used as a guideline for future cases. Schuurmans 2008, p 25.

tions made errors in their analysis of the various items of scientific evidence, amongst others by disregarding part (the conclusion) of an expert opinion which was in favour of Pfizer.

The CFI recognised that the Council enjoyed broad discretion in taking the decision⁶⁸ and that therefore judicial review of the findings of fact had to be limited to the reasonableness test.⁶⁹ However the CFI set out rather detailed requirements against which expert evidence should be tested. These requirements follow from the principles of excellence, transparency and independence.⁷⁰ The CFI held for example that the competent Community institution must prepare for the expert the factual questions which need to be answered before it can adopt a decision and assess the probative value of the opinion delivered by the committee.⁷¹ Furthermore it set out the conditions in which the Community Institution may disregard (part of) an expert opinion. Subsequently the Court reviewed the reasons why the Community Institutions chose to use certain (parts of) expert reports and to disregard others in detail. Furthermore it tested whether the Institution took into account the fact that certain expert reports had methodological limitations and were therefore of less value. The CFI concluded that the Community institutions did not make manifest errors when they made findings in respect of the relevant facts.⁷²

Commission v Tetra Laval

In *Tetra Laval* the Court of Justice indicated specifically what the reasonableness test of the facts in cases involving complex assessments actually entails. The Court considered that the fact that a decision must be subject to a limited form of judicial review, does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information. Not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn

68 The Council enjoyed a broad discretion in this case for three reasons: the case concerned the common agricultural policy, the Community institutions had to determine the level of risk deemed unacceptable for society and the Community authority was required to make complex assessments in the performance of its duties.

69 Case T-13/99, *Pfizer Animal Health SA v Council* [2002], paras 166-169 and 323.

70 See also section 8.6.1.

71 Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 198.

72 Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 311. See on this case also Craig 2006, pp 447-452.

from it.⁷³ This consideration was also used by the CFI and the General Court in later cases concerning other fields of EU law.⁷⁴

In *Tetra Laval* the Court of Justice rejected the Commission's complaint that the CFI had exceeded the limits of its power of review.⁷⁵ The Court concluded that the CFI did not err in law when it set out the tests to be applied in the exercise of its power of judicial review or when it specified the quality of the evidence, which the Commission is required to produce in order to demonstrate that the requirements set by Community legislation are satisfied.⁷⁶

The Commission had declared the merger of Tetra Laval BV with another company incompatible with the common market as the new entity would obtain a dominant position in the PET market.⁷⁷ The CFI held that the Commission had committed manifest errors of assessment in its findings as to leveraging and the strengthening of Tetra's dominant position and therefore annulled the contested decision. It took into account that the Commission admitted that its forecast in the contested decision with regard to the increase in the use of PET for packaging UHT milk was exaggerated. Furthermore it found that the evidence produced by the Commission was unfounded by stating that, of the three independent reports cited by the Commission, only one contained information on the use of PET for milk packaging. It also showed that the evidence produced by the Commission was unconvincing by pointing out that the increase forecast in the report relied on by the Commission was of little significance and that the Commission's forecast was inconsistent with the undisputed figures in other reports. According to the

73 Case C-12/03 P, *Commission v Tetra Laval* [2005], para 39. Costello states that with this requirement, the Court of Justice emphasised the need for intensive review. Costello 2006, p 31.

74 See Case C-525/04 P, *Spain v Lenzing* [2007], para 57 (State Aid), Case T-284/08, *People's Mojahedin Organization of Iran v Council* [2008], para 55 (EU measures freezing the funds of persons or organisations suspected of involvement in terrorist activities), Case T-187/06, *Schröder v CPVO* [2008], para 61 (Intellectual Property) and Case T-475/07, *Dow AgroSciences Ltd v Commission* [2011], para 153 (Agriculture).

75 The Commission argued before the Court of Justice that the Court of First Instance required it, when adopting its decision, to satisfy a standard of proof and to provide a quality of evidence in support of its line of argument, which are incompatible with the wide discretion, which it enjoys in assessing economic matters.

76 Case C-12/03 P, *Commission v Tetra Laval* [2005], paras 42-45. See with regard to this case also Craig 2006, pp 453-457.

77 The Commission's decision was based on Art 2 of Council Regulation (EEC) no 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1, corrected version in OJ L 257/13, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 OJ L 180/1. This provision states that a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market. The regulation gives a rather detailed list of circumstances, which the Commission has to take into account in its assessment.

CFI, the Commission's analysis was incomplete, which made it impossible to confirm its forecasts, given the differences between those forecasts and the forecasts made in other reports.⁷⁸

In the context of asylum cases the Court of Justice's considerations in *Tetra Laval* regarding the intensity of judicial review of prospective analysis are interesting.⁷⁹ The Court of Justice stressed that in case of a prospective analysis a judicial review of the evidentiary assessment performed by the EU Institution is all the more necessary.⁸⁰ According to the Court a prospective analysis of the kind necessary in merger control must be carried out with great care. The reason for that is that it does not entail the examination of past events – for which often many items of evidence are available, which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in the future. The prospective analyses makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely. However the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important. After all, that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.

One may argue that asylum cases also involve a prospective analysis: does the asylum seeker have a well-founded fear of persecution or does he run a real risk of torture or inhuman or degrading treatment, if expelled to his country of origin. The argument that decisions involving prospective analysis require a more strict judicial review, may therefore also be used in asylum cases. Costello states that 'the asylum process, with 'essays in prediction' at its core, is similarly fraught', and that the reasoning in *Tetra Laval* 'suggests that a strict standard of review should be demanded as a matter of EC law'.⁸¹ It should be noted that in asylum cases also the chains of cause of past events are 'dimly discernible, uncertain and difficult to establish'. Often is it not

78 Case C-12/03 P, *Commission v Tetra Laval* [2005], para 46. Schwartz writes that the Court's thorough and detailed analysis of all the facts and legal arguments used in the Commission's decisions, despite the complexity of the issue, was especially remarkable because, usually, an issue's high complexity results in significant administrative discretion and reduced judicial review. Schwartz 2004, p 99. Schwartz mentions two other merger cases in which the CFI concluded that the Commission made manifest errors in the establishment of the facts: Case T-310/01, *Schneider Electric v Commission* [2002] and Case T-342/99, *Airtours v Commission* [2002]. The *Airtours* judgment is also mentioned by Craig as a prominent example of the modern approach by the EU Courts. Craig 2006, pp 452-453.

79 Costello remarks that the Court's reasoning here has a striking, if unexpected, parallel with the asylum context. Costello 2006, p 31.

80 Case C-12/03 P, *Commission v Tetra Laval* [2005], para 39.

81 Costello 2006, p 31.

exactly clear by whom or for what reason applicants were subjected to (threats of) persecution or serious harm in their country of origin. This could be a further argument for a thorough judicial review of the fact-finding in asylum cases.

Judicial review of the procedural guarantees offered during the proceedings

The EU Courts have recognised that a limited judicial review should be (partly) compensated by procedural guarantees granted during the administrative proceedings, such as the right to be heard and the right to know the reasons for the decision.⁸² Schwartz notes that 'today, allowing the administration discretionary powers appears permissible only if discretion is exercised in strict observance of procedural guarantees.'⁸³ In *Technische Universität München* the CFI held that in cases entailing complex technical evaluations, where the Commission has a power of appraisal in order to be able to fulfil its tasks:

Respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.⁸⁴

The CFI thus only considers itself able to perform its judicial review effectively when certain procedural guarantees in the administrative phase have been respected.⁸⁵ In *Technische Universität München* the procedural guarantees in this sense included rules on investigation, the right to be heard, and the duty to state reasons for the decision.⁸⁶ Also in later cases in which a limited judicial review was applied the CFI referred to the importance of procedural

82 See for example Case C-269/90, *Technische Universität München* [1990], para 14, Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 171, Case C-525/04 P, *Spain v Lenzing* [2007], para 58, Case T-228/02, *Organization des Modjahedines du peuple d'Iran v Council* [2007], paras 154-155 and Case T-306/01, *Yusuf and Al Barakat International Foundation v Council and Commission* [2005], paras 326-327. See also Schwartz 2004, pp 94-96, Ponce 2005, p 583 and Barbier de la Serre and Sibony 2008, pp 955-956, who state that the EU Courts 'generally prefer to limit their review and compensate the applicant with increased procedural guarantees, thereby avoiding the technical issue and imposing a rule the application of which they can control easily on their own'.

83 Schwartz 2004, pp 95-96.

84 Case C-269/90, *Technische Universität München* [1990], para 14.

85 See also Schuurmans 2008, p 28. She states that: 'by setting clear and strict requirements on the administration's investigation of the facts and the statement of reasons underlying the factual assessment, the Community courts are able to guarantee that their test of reasonableness actually provides legal protection'.

86 Case C-269/90, *Technische Universität München* [1990], paras 22-26. See also Schwartz 2004, p 95.

guarantees including the obligation to state reasons, the obligation for the competent institution to examine carefully and impartially all the relevant elements of the individual case⁸⁷ and the right to a fair hearing.⁸⁸

Subconclusion: EU Courts' case-law

The Court of Justice ruled in *Samba Diouf* that Article 39 PD requires 'thorough' judicial review of the reasons for rejecting an asylum claim. The Court has not addressed the question whether such review requires the national court or tribunal to carry out its own assessment of the facts or allows a reasonableness test of the determining authority's establishment of the facts. It was argued in this section that the EU Courts' case-law with regard to complex assessments may provide guidance in finding an answer to this question. Asylum cases and EU decisions involving complex assessments have in common that it is difficult to find the facts objectively and that therefore the determining authority is considered to be better placed to establish and evaluate the facts than the court. The Court of Justice has itself recognised in *Upjohn* that the intensity of review carried out by the EU Courts is to a certain extent normative for the intensity of the review which carried out by national courts in similar cases.

On the basis of the EU Courts' judgments concerning EU decisions involving complex assessments it is impossible to define exactly the level of intensity of judicial scrutiny of the assessment of the facts which should be applied in asylum cases. It can certainly not be derived from this case-law that national courts are obliged to substitute their assessment of the facts underlying the asylum claim for that of the determining authority. In cases involving complex assessments the EU institutions have wide discretion which also applies, to some extent, to the fact-finding. As a result the EU judiciary restricts itself to examining the accuracy of the findings of fact and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error. This section showed however that in practice, in particular in the cases of *Pfizer* and *Tetra Laval*, this limited form of judicial review turns out to be rather rigorous. The General Court establishes whether the evidence relied on is factually accurate, reliable and consistent and whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. In *Tetra Laval* the Court of Justice held that judicial review of the evidentiary assessment by an EU institution is all the more necessary in cases requiring a prospective analyses in which the chains of cause or dimly discernible, uncertain and difficult to establish. This consideration may also be considered relevant for asylum cases, because in these cases the causes of

87 Case C-525/04 P, *Spain v Lenzing* [2007], para 58, Case T-13/99, *Pfizer Animal Health SA v Council* [2002], para 171, Case C-16/90, *Nölle* [1991], para 13.

88 Case T-228/02, *Organization des Modjahedines du peuple d'Iran v Council* [2006], paras 154-155. See further section 10.2.2.4.

future as well as past events are often difficult to establish. Furthermore the EU Courts have held that a limited form of judicial review, such as that applied in cases involving complex assessment, should be compensated by procedural guarantees granted during the administrative proceedings.

It is argued here that a form of judicial review which offers a lower intensity of review than the limited review performed by the EU-Courts in cases involving complex assessments cannot be considered a thorough judicial review. It should be remembered in this context that EU fundamental rights are involved in asylum cases, which require a high level of procedural protection. On the basis of the case-law concerning complex assessments it is contended that the court or tribunal in the meaning of Article 39 PD should at least establish whether the evidence relied on in the asylum decision is factually accurate, reliable and consistent, whether that evidence contains all the information, which must be taken into account in order to assess the risk of *refoulement* and whether it is capable of substantiating the conclusions drawn from it. Furthermore this court or tribunal should ensure that the procedural rights of the applicant guaranteed by the Procedures Directive have been respected. As will be shown in section 9.2.2, such (minimum) level of intensity of judicial review would also comply with the requirement of 'close and rigorous' scrutiny which follows from Articles 3 and 13 ECHR.

9.2.2 Obligations stemming from the ECHR, CAT and ICCPR

More specific guidelines for the intensity of judicial review of the facts in asylum cases may be derived from the ECtHR's case-law and the views of the Committee against Torture and the Human Rights Committee. Two strands of case-law should be considered important. First of all the case-law regarding the right to an effective remedy and the right to a fair trial which directly addresses the level of intensity of judicial review which should be applied by the national court, should be examined. The case-law concerning Articles 3 and 13 ECHR sets out standards as to the intensity of judicial review required in asylum cases specifically. The case-law under Article 6 ECHR, which concerns the intensity of judicial review in other sorts of administrative cases is also of importance. It is relevant to know whether this case-law sets higher standards as to the required level of intensity of judicial review than the case-law under Articles 3 and 13 ECHR. If that is the case, those higher standards may inspire the EU right to an effective remedy, even if applied in asylum cases.⁸⁹

Secondly the case-law which reveals the way in which in particular the ECtHR itself reviews *non-refoulement* cases should be addressed. It is contended that the subsidiary role of the ECtHR precludes that the review performed by

⁸⁹ See further section 4.3.2.

the national courts in *non-refoulement* cases be (much) more limited than the review performed by those bodies.⁹⁰ It would undermine the subsidiary role of the ECtHR if asylum applicants would feel obliged to complain before that court, because the national court gives fewer guarantees for conformity of deportations with Article 3 than the ECtHR.⁹¹ The ECtHR would then become 'an appeal tribunal from the asylum and immigration tribunals of Europe'.⁹²

In that context it is important to note that the ECtHR itself seems suggest that the standard of review performed by the Court itself is normative for the standard of review, which is constituted by the national courts. The ECtHR uses the same term 'rigorous scrutiny' for the standard of review which it applies itself in Article 3 cases, as well as for the standard of review it requires domestic courts to apply in Article 3 cases.⁹³ Furthermore in *Smith and Grady v the United Kingdom* the ECtHR explicitly established a link between the standard of review applied by the court itself and that which should be applied by the national courts. In that case it considered that in the cases of *Soering v the United Kingdom* and *Vilvarajah v the United Kingdom* 'the Court found that the test applied by the domestic courts in applications for judicial review of decisions by the Secretary of State in extradition and expulsion matters *coincided with the Court's own approach under Article 3 of the Convention*' (emphasis added). Therefore *Soering v the United Kingdom* and *Vilvarajah v the United Kingdom* could be contrasted to the applications in *Smith and Grady v the United Kingdom*, in which the national court did not test the contested decision against the requirements set by Article 8 ECHR.⁹⁴ In *Soering* and *Vilvarajah* the Court did not find a violation of Article 13 ECHR while it did in *Smith and Grady*.

In this section first the case-law regarding the right to an effective remedy and the subsidiary role of the supervising bodies will be discussed, as this case-law specifically concerns asylum cases. Finally the requirements under Article 6 ECHR will be briefly discussed.

⁹⁰ See also Spijkerboer 2009-II, pp 68-69. See with regard to the case-law concerning the subsidiary role of the ECtHR and the UN Committees as a source of inspiration also section 4.3.1.

⁹¹ Spijkerboer 2009-II, p 68.

⁹² This is according to former President of the ECtHR Costa exactly what the ECtHR is not. See Statement Issued by the President of the ECtHR concerning Requests for Interim Measures (Rule 39 of the Rules of Court), 11 February 2011, available at www.echr.coe.int. See also High Level Conference on the Future of the European Court of Human Rights, Izmir 26-27 April 2011, Izmir Declaration, p 3.

⁹³ Spijkerboer 2009-II, pp 63-64. He states that the fact that the Court uses the term 'rigorous scrutiny' both for its own scrutiny and for the scrutiny it requires from domestic courts, suggests that these should be identical.

⁹⁴ ECtHR 27 December 1999, *Smith and Grady v the United Kingdom*, no 33985/96, para 138.

9.2.2.1 Intensity of judicial review under the right to an effective remedy

According to the ECtHR the effectiveness of a remedy within the meaning of Article 13 imperatively requires 'close scrutiny by a national authority and independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3'.⁹⁵ These requirements follow from the importance which the Court attaches to Article 3 ECHR and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises.

In *M.S.S v Belgium and Greece* the ECtHR concluded for the first time that the standard of judicial review applied by a national court did not comply with the requirements of close and rigorous scrutiny. The judgment concerned the extremely urgent procedure before the Belgian Aliens Appeal Board, in which the execution of an expulsion measure could be stayed. In this procedure the Aliens Appeal Board verified that the administrative authority's decision relied on facts contained in the administrative file, that in the substantive and formal reasons given for its decision it did not, in its interpretation of the facts, make a manifest error of appreciation, and that it did not fail to comply with essential procedural requirements or with statutory formalities required on pain of nullity, or exceed or abuse its powers.⁹⁶

The ECtHR considered that the extremely urgent procedure had to comply with the requirements concerning the scope of the scrutiny following from Article 13 ECHR. 'The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible.'⁹⁷ According to the ECHR the extremely urgent procedure did not comply with the requirement of rigorous scrutiny for several reasons. First of all, as was also recognised by the Belgian Government, this procedure reduced the rights of the defence and the examination of the case to a minimum. The examination of the complaints under Article 3 by the Aliens Appeal Board could, according to the ECtHR, not be considered 'thorough'. The examination was limited to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3.⁹⁸ Thereby the burden of proof was increased to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore the

95 See for example ECtHR (GC) 21 January 2011, *M.S.S v Belgium and Greece*, no 30696/09, para 293 and ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 50.

96 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 141.

97 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 388.

98 In some judgments the Aliens Appeal Board considered that general information submitted by the applicant did 'establish no concrete link showing that the deficiencies reported would result in Greece violating its *non-refoulement* obligation vis-à-vis aliens who, like the applicant, were transferred to Greece'. See ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 148.

Aliens Appeals Board did not always take into account new material submitted by the applicant.⁹⁹

It follows from this judgment that the national authority in the meaning of Article 13 ECHR should examine the alleged risk of a violation of Article 3 ECHR on the merits, including the evidence underlying the asylum decision. It cannot limit its examination to the compliance with procedural requirements and the existence of manifest errors.

In several cases against the United Kingdom the ECtHR held that that the appeal against an extradition order, a deportation order or a refusal to grant asylum provided by the British court did meet the requirements of Article 13 ECHR.¹⁰⁰ The British national court could review the exercise of the Secretary of State's discretion on the basis that it is tainted with illegality, irrationality or procedural impropriety. Irrationality was determined on the basis of the *Wednesbury* principles, administrative principles set out in the United Kingdom's case-law. The test in an extradition or expulsion case would be that no reasonable Secretary of State could have made an order for return in the circumstances.

In its judgments the ECtHR stressed that, although the domestic courts would not reach findings of fact for themselves, the judicial review by the English court was careful, detailed and rigorous. In *Soering v the United Kingdom* the Court considered that 'it was satisfied that the English courts can review the "reasonableness" of an extradition decision in the light of the kind of factors relied on by Mr Soering before the Convention institutions in the context of Article 3'.¹⁰¹ The ECtHR was of the opinion that an application for judicial review arguing "*Wednesbury* unreasonableness" on the basis of much the same material that he adduced before the court in relation to his treatment while staying in death row 'would have been given "the most anxious scrutiny" in view of the fundamental nature of the human right at stake.' Therefore Article 13 ECHR had not been violated.¹⁰²

In *Vilvarajah v the United Kingdom* the ECtHR took into account that the English courts had stressed their special responsibility to subject administrative

99 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 389-390.

100 ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, ECtHR, 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, ECtHR 2 May 1997, *D v the United Kingdom*, no 30240/96, ECtHR (Adm) 7 March 2000, *T.I. v United Kingdom*, no 43844/98, ECtHR 6 February 2001, *Bensaid v the United Kingdom*, no 44599/98, ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99. See also Spijkerboer 2009-II, pp 66-68.

101 ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 121.

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

decisions in asylum cases to the most anxious scrutiny where an applicant's life or liberty may be at risk.¹⁰³ It stated:

While it is true that there are limitations to the powers of the courts in judicial review proceedings the Court is of the opinion that these powers, exercisable as they are by the highest tribunals in the land, do provide an effective degree of control over the decisions of the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13.¹⁰⁴

The ECtHR based its conclusion that the judicial review of asylum cases in England is in fact a rigorous one on several decisions by the House of Lords and other national courts. In *Soering v the United Kingdom* for example the ECtHR referred to a judgment by the House of Lords, in which Lord Bridge stated that within the limitations of the *Wednesbury* principles the court must 'be entitled to subject an administrative decision to the most rigorous examination to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines'.¹⁰⁵ If 'an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.' Lord Templeman argued in the same judgment that 'where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process'.¹⁰⁶ In *Vilvarajah v the United Kingdom* the Court referred to a case in which the High Court judge quashed the decision on the ground that the Secretary of State, in reaching his decision 'took into account matters which ought not to have been taken into account and failed to take into account matters he should'.¹⁰⁷

103 In ECtHR 8 July 2003, *Hatton and others v the United Kingdom*, no 36022/97, para 140, the ECtHR stated that: 'the scope of the domestic review in *Vilvarajah*, which concerned immigration was relatively broad because of the importance domestic law attached to the matter of physical integrity. It was on this basis that judicial review was held to comply with the requirements of Article 13.' See also ECtHR 6 February 2001, *Bensaid v the United Kingdom*, no 44599/98, paras 55-56 and ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, paras 37 and 77-79.

104 ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 126.

105 House of Lords 19 February 1987, *R v Home Secretary, ex parte Bugdaycay* [1987] AC 514, cited in ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 35.

106 Furthermore, according to the British government a court would have jurisdiction to quash a challenged decision to send a person to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one which no reasonable Secretary of State could make. ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 35.

107 ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 91. The ECtHR also mentioned a case in which the judges stressed that in refugee cases the court is entitled to and should, subject administrative decisions to rigorous examination. See also ECtHR 6 February 2001, *Bensaid v the United Kingdom*, no 44599/98, para 28.

The ECtHR has thus accepted that the national authority in the meaning of Article 13 ECHR does not reach findings of fact for itself. However, it follows from *M.S.S. v Belgium and Greece* that the national authority does need to enter into a thorough examination of the evidence underlying the asylum claim. This also follows from the fact that in the cases against the United Kingdom it was only after the ECtHR established that the review performed by the British courts was in fact a rigorous one, that it deemed the complaints under Article 13 ECHR unfounded. By assessing the actual test performed by the British courts in detail, the Court underlined the importance it attached to a rigorous review of Article 3 cases. It is however not possible on the basis of this case-law to define precisely the minimum level of intensity of judicial review which should be applied in *refoulement* cases.¹⁰⁸ In order to get a better understanding of the meaning of a 'rigorous scrutiny' it is therefore useful to take a look at the way the ECtHR itself reviews *refoulement* cases. This will be done in section 9.2.2.2.

The Committee against Torture's view

The view of the Committee against Torture with regard to the required intensity of review of asylum decision has not been consistent. In several cases against Canada the Committee accepted a very limited form of judicial review.¹⁰⁹ However in its more recent view in *Singh v Canada* as well as in its Concluding Observations regarding Canada the Committee was more strict. It held that a State party 'should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds or believing that the person faces a risk of torture'.¹¹⁰ In *Singh* it considered that Article 22 CAT was violated because judicial review by the Canadian Court did not include a review on the merits of the complainant's claim that he would be tortured upon return. The Canadian Federal Court, the only judicial body to which the applicant had access, could only quash a decision of the Immigration Refugee Board 'if

108 See also Spijkerboer 2009-II, p 68, where he states that the ECtHR has 'never stated that the former British review system constitutes the bottom line of what is still acceptable'. He states that there is some room for the view that a judicial review that applies a marginal review on the assessment of credibility still constitutes a rigorous scrutiny in the sense of Strasbourg case-law.

109 See for example ComAT 6 December 2006, *S.P.A. v Canada*, no 282/2005, para 7.4, where it considered that the judicial review procedure, while limited to appeal on points of law, did examine whether there were any irregularities in the asylum determinations. The applicant complained before the Committee that judicial review available to her was an extremely narrow remedy, available only on technical legal grounds. See also ComAT 15 November 2007, *L.Z.B. v Canada*, no 304/2006, para 6.6, where it considered that the appeal by the Federal Court is not a mere formality and that the court may, in appropriate cases, look at the substance of a case.

110 ComAT 8 July 2011, *Nirmal Singh v Canada*, no 319/2007, para 8.9. See also ComAT Concluding Observations on Canada, 7 July 2005, CAT/C/CR/34/CAN, para 5 (c).

satisfied that: the tribunal acted without jurisdiction; failed to observe a principle of natural justice or procedural fairness; erred in law in making a decision; based its decision on an erroneous finding of fact; acted, or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law'.¹¹¹ The standard that the Court applied to the credibility of the findings of the Immigration Refugee Board was that of "patent reasonableness".¹¹² In the case of *Singh* the Federal Court concluded that the decision was not patently unreasonable, largely on grounds of the delay in claiming refugee status after arrival to the country and failure to provide credible or trustworthy evidence as to the complainant's background information in India.¹¹³

In its Concluding Observations regarding the Netherlands of May 2007 the Committee recommended that the appeal procedures entail an adequate review of rejected applications and permit asylum applicants to present facts and documentation which could not be made available, with reasonable diligence, at the time of the first submission.¹¹⁴ This implies that the national court is supposed to review the facts, including new evidence.

9.2.2.2 *The subsidiary role of the ECtHR, ComAT and HRC in asylum cases*

This section addresses the intensity of review applied by the ECtHR and (briefly) the UN Committees. In this section it will be shown that generally the ECtHR applies a rigorous scrutiny of the facts and evidence relevant to the claim of a risk of *refoulement*. However the ECtHR has not always been consistent in this respect, paying more deference to the assessment of the risk of *refoulement* by the national authorities in some (recent) cases. The Committee against Torture and particularly the Human Rights Committee generally do not interfere in the establishment of the facts by the State authorities. In some cases the Committee against Torture has concluded that the applicant's asylum account should be considered credible, while the State authorities did not. The reason

111 ComAT 8 July 2011, *Nirmal Singh v Canada*, no 319/2007, para 8.8.

112 The applicant contended that the Federal Court had established jurisprudence that if the Immigration Refugee Board decided a refugee claimant is not credible, then their story could not be a base for stopping their deportation, even when there is substantial evidence of an error in judgment. The complainant quoted cases where the Federal Court had consistently decided that the decisions of the Immigration Board are discretionary and that the Court should not intervene except if the immigration officer exercises his discretion pursuant to improper purposes, irrelevant considerations, with bad faith, or in a patently unreasonable manner. He maintained that when the judicial recourse is futile and in cases where there are substantial grounds to intervene the Court does not even hear the case and that this is not a recourse that is effective and efficient following the recognised principles of international law.

113 ComAT 8 July 2011, *Nirmal Singh v Canada*, no 319/2007, para 2.10.

114 ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 7.

for that seems to be that in those cases the State authorities failed to take into account important facts or evidence, notably medical reports.

Rigorous scrutiny of claims of refoulement by the ECtHR

According to the ECtHR's standing case-law the ECtHR itself applies a 'rigorous scrutiny' to claims of a risk of *refoulement*:

The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 (art. 3) at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.¹¹⁵

In *Salah Sheekh v the Netherlands* the ECtHR considered that in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, 'a full and *ex nunc* assessment is called for'.¹¹⁶

In many judgments the ECtHR did not pay deference to the asylum decision made by the national authorities. Instead it established itself whether the applicant's personal situation was such that his expulsion or extradition would contravene Article 3 of the Convention.¹¹⁷ In those judgments the ECtHR assessed the credibility of the applicant's asylum account and the facts and evidence in the case.¹¹⁸ In *R.C. v Sweden* for example there was a dispute between the parties as to the facts of the case and the credibility of the applicant's asylum account. The ECtHR acknowledged that it is often difficult to establish, precisely, the pertinent facts. It accepted that 'as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual con-

115 ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 108. See also ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06 where the Court considered that it 'has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursuing that aim'.

116 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136.

117 In several cases the ECtHR mentioned 'the need to examine all the facts of the case'. See for example ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 113. However, the ECtHR does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. See ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 286.

118 These include cases, in which the Court concluded that Art 3 had been violated (see for example ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02 and ECtHR 26 July 2005, *N v Finland*, no 38885/02) but also cases, which were declared manifestly unfounded (see for example ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02 and ECtHR (Adm) 8 March 2007, *Collin and Akaziebie v Sweden*, no 23944/05).

cerned.¹¹⁹ Nevertheless, the Court did not share the conclusion of the Government that the information provided by the applicant was such as to undermine his general credibility. The ECtHR thus replaced its own assessment of the credibility of the asylum account for that of the Swedish (administrative and judicial) authorities.

In most asylum cases, the Court assesses the credibility of the applicant's asylum account on the basis of the information (for example reports of interviews), which came to light during the national asylum procedure and the statements made by the applicant during the proceedings before the ECtHR.¹²⁰ In *Said v the Netherlands* the ECtHR considered that it 'must proceed, as far as possible to an assessment of the general credibility of the statements made by the applicant before the Netherlands authorities and during the present proceedings'.¹²¹ In *N v Finland*, the Court went as far as to appoint two of its members as delegates in order to take oral evidence from the applicant, his wife, and several other persons. Based on this assessment the Court concluded that the applicant's account of his background in the DRC had, on the whole, be considered sufficiently consistent and credible.¹²² The Court noted that the position of the Court did not contradict in any respect the findings of the Finnish courts. Neither was there any indication that the initial asylum interview was in any way rushed or otherwise conducted in a superficial manner.¹²³

In many cases the Court included country of origin information¹²⁴ or other information in its assessment which it had obtained of its own motion.¹²⁵ The Court considered:

In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting

119 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 52.

120 See for example ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, ECtHR (Adm) 6 September 2007, *M. v Sweden*, no 22556/05 and ECtHR (Adm) 17 January 2006, *Bello v Sweden*, no 32213/04.

121 ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, para 50.

122 ECtHR 26 July 2005, *N. v Finland*, no 38885/02, paras 152-156. See also ECtHR 9 October 1988, *Hatami v Sweden*, no 32448/96, para 25.

123 ECtHR 26 July 2005, *N. v Finland*, no 38885/02, para 157.

124 See for example ECtHR 8 April 2008, *Nyanzi v the United Kingdom*, no 21878/06, para 63.

125 The Court stated in many judgments that it assesses the existence of a risk of ill-treatment in breach of Art 3, including the conditions in the proposed receiving country in the light of all the material placed before it, or, if necessary, material obtained of its own motion (*proprio motu*). See for example ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 60 and ECtHR 17 July 2008, *NA v United Kingdom*, no 25904/07, para 119.

State concerned, without comparing these with materials from other reliable and objective sources.¹²⁶

When assessing the facts and evidence underlying the case and subsequently the risk of *refoulement* the ECtHR takes into account whether a proper assessment of the asylum claim took place in the national context. However, the fact that the national asylum procedure was fair and entailed a rigorous scrutiny of the risk of *refoulement* does not prevent the ECtHR from carrying out its own assessment of the facts, evidence or credibility of the asylum account.¹²⁷ In *Nasimi* the Court took into account that the authorities conducted several interviews with the applicant, that it was concluded in two instances that the applicant was not credible and that the bodies concerned gave detailed reasons as to why they reached that conclusion. The Court also deemed it important that the authorities were obliged to consider essentially the same factors as are relevant to the Court's assessment under Article 3 of the Convention. However in this case the ECtHR did assess the credibility of the applicant itself.¹²⁸ In *J.E.D. v the United Kingdom* the Court took amongst others into account that the authorities had due regard to the arguments submitted by the applicant as well as to the past and current situation in the receiving country and that the Secretary of State carefully evaluated the evidence, which the applicant submitted in support of his renewed asylum request. Having regard to these factors and to its own careful examination of the arguments and materials submitted by the applicant, the Court considered the complaint under Article 3 ECHR manifestly ill-founded.¹²⁹ The Court declared both *Nasimi* and *J.E.D.* inadmissible.

In several cases the Court attached weight to the fact that national authorities had knowledge and experience in the assessment of asylum applications submitted by certain groups of asylum applicants. This did not mean however that the ECtHR did not apply a rigorous scrutiny by itself.¹³⁰ In *Vilvarajah* the Court considered for example:

The Court also attaches importance to the knowledge and experience that the United Kingdom authorities had in dealing with large numbers of asylum seekers from

¹²⁶ ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136. See also ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 96.

¹²⁷ See also Spijkerboer 2009-II, p 66. He states that in the ECtHR's assessment thoroughness of the national asylum procedure is one factor, but the crucial issue is not a procedural one, but the substance: was the assessment right?

¹²⁸ ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02.

¹²⁹ ECtHR (Adm) 2 February 1999, *J.E.D. v the United Kingdom*, no 42225/98. See also ECtHR (Adm) 26 October 2000, *Damla and others v Germany*, no 61479/00 and ECtHR (Adm) 31 May 2001, *Katani v Germany*, no 67679/01.

¹³⁰ Spijkerboer notes that both in *Vilvarajah* and in *Cruz Varas*, it was only mentioned after the full assessment of the risk of a treatment in violation of Art 3 ECHR by the Court. See also Spijkerboer 2009-II, pp 64-66.

Sri Lanka, many of whom were granted leave to stay, and to the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State in the light of a substantial body of material concerning the current situation in Sri Lanka and the position of the Tamil community within it.¹³¹

It should thus be concluded that the ECtHR has in many cases applied a rigorous scrutiny in claims under Article 3 ECHR, and that it does not hesitate to assess the credibility of an asylum account or to gather evidence of its own motion.¹³² This applies even if the asylum claim was properly assessed by the national determining authority and courts. It follows from the subsidiary role of the court that the national courts should perform a judicial scrutiny, which is at least as rigorous as the ECtHR's review.

Although generally the ECtHR has taken this very active approach, its case-law regarding the intensity of judicial review is not entirely consistent.¹³³ In its judgment in *Husseini v Sweden* and several other recent judgments the ECtHR seems to apply a more distant review. In *Husseini* the ECtHR considered that the Swedish Migration Board and the Aliens Appeals Board

conducted a thorough examination of the applicant's case, which entailed that the applicant was heard three times. Before both instances the applicant was assisted by appointed counsel. The national authorities had the benefit of seeing, hearing and questioning the applicant in person and of assessing directly the information and documents submitted by him, before deciding the case. The Court finds no reason to conclude that their decisions were inadequate or that the outcome of the proceedings before the two instances was arbitrary. Furthermore, there are no indications that the assessment made by the domestic authorities was insufficiently supported by relevant materials or that the authorities were wrong in their conclusion that there were no substantial grounds for finding that the applicant would risk being persecuted upon return to Afghanistan.¹³⁴

131 ECtHR 30 October 1991, *Vilvarajah and others v the United Kingdom*. nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 114. See also ECtHR (Plen) 20 March 1991, *Cruz Varas and others v Sweden*, no 15576/89, para 81 and ECtHR (Adm) 22 June 2004, *F. v United Kingdom*, no 17341/03 and EComHR 8 April 1993, *M.P.G. v Sweden*, no 20981/92.

132 See also Spijkerboer 2009-II, pp 64-66.

133 In ECtHR (Adm) 26 October 2000, *Damla v Germany*, no 61479/00 and ECtHR (Adm) 22 September 2005, *Kaldik v Germany*, no 28526/05 the ECtHR concluded that nothing in the file suggested that the assessment of evidence by the national authorities was arbitrary. This seems to point in the direction of a marginal scrutiny by the Court. The ECtHR in this decision used a standard text block which is normally used in cases concerning Art 6 ECHR, which implies that the assessment of the facts and the taking of evidence and its evaluation can only be reviewed by the ECtHR in exceptional circumstances. See also ECtHR (Adm) 14 September 2000, *Chentiev and Ibragimov*, no 21022/08; 51946/08.

134 ECtHR 13 October 2011, *Husseini v Sweden*, no 10611/09, paras 86-87.

The ECtHR thus assessed the procedural guarantees offered in this case instead of performing a rigorous scrutiny of the facts itself.¹³⁵ Potentially this and similar recent judgments reflect a new approach of the ECtHR, which is intended to ensure that the ECtHR does not act as a fourth instance court, in conformity with the Izmir Declaration.¹³⁶ However the ECtHR still does enter into a rigorous scrutiny if the State authorities did not carry out an adequate assessment¹³⁷ or if it finds it necessary for some other reason. In *J.H. v the United Kingdom* for example the ECtHR first established that the State authorities conducted a thorough examination of the applicant's case¹³⁸ but proceeded with its own 'overall examination of the applicant's case'.¹³⁹

The potential new approach of the ECtHR does not detract from the conclusion made above that the rigorous scrutiny performed in the *refoulement* cases discussed above serves as a model for the rigorous scrutiny which should be applied by the national courts.¹⁴⁰ Possibly the supposed new approach even entails that the ECtHR will check the intensity of judicial review performed by the national courts more rigorously than before.¹⁴¹

The UN Committees' subsidiary role

The Committee against Torture pays more deference to the findings of the State authorities. It has stressed many times that it is not an appellate, quasi-judicial or administrative body and that therefore it must give considerable weight to findings of fact made by the organs of the State party.¹⁴² While assessing a case, the Committee determines whether the State party's review of the complainant's case was deficient in this respect.¹⁴³ In many cases the Committee against Torture followed the assessment made by the authorities of the State and declared the complaint unfounded.¹⁴⁴ In a view concerning a complaint against the Netherlands, the Committee considered for example:

135 See also ECtHR 20 October 2011, *Samina v Sweden*, no 55463/09, paras 54-55 and ECtHR (Adm) 22 November 2011, *Sibomana v Sweden*, no 32010/09.

136 High Level Conference on the Future of the European Court of Human Rights, Declaration, Izmir: 27 April 2011.

137 See ECtHR 8 November 2011, *Yakubov v Russia*, no 7265/10

138 ECtHR 20 December 2011, *J.H. v the United Kingdom*, no 48839/09, para 58.

139 ECtHR 20 December 2011, *J.H. v the United Kingdom*, no 48839/09, para 66.

140 See with regard to *Damila* also Spijkerboer 2009-II, pp 64, supra footnote 35.

141 In several recent judgments such as ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, ECtHR 2 February 2012, *I.M. v France*, no 9152/09 and ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, the ECtHR under Art 13 ECHR performed a strict review of the procedural safeguards in place.

142 See for example ComAT 3 July 2011, *T.D. v Switzerland*, no 375/2009, para 7.7. See also ComAT General Comment No 1 (1997), A/53/44, para 9 (a).

143 ComAT 21 November 2003, *A.R. v the Netherlands*, no 203/2002, para 7.6, ComAT 15 May 2008, *M.J.A.M.O. e.a. v Canada*, no 293/2006, para 10.5. The ComAT referred to its General Comment No 1 (1997), A/53/44, para 9.

144 See for example ComAT 14 May 2003, *A.A v the Netherlands*, no 198/2002 and ComAT 11 May 2004, *A.K. v Australia*, no 148/1999.

The relevant evidence regarding the complainant's history in Turkey, together with his activities inside and outside Turkey, has been considered by the Dutch authorities. The Committee is not in a position to challenge their findings of fact, nor to resolve the question of whether there were inconsistencies in the complainant's account. Consistent with the Committee's case law, due weight must be accorded to findings of fact made by government Authorities.¹⁴⁵

Nevertheless, the Committee against Torture stressed in some cases that it has the power of free assessment of the facts arising in the circumstances of each case.¹⁴⁶ It must assess the facts and evidence in a given case, once it has been ascertained that the manner, in which the evidence was evaluated was clearly arbitrary or amounted to a denial of justice.¹⁴⁷ In *Dadar*, the Committee against Torture considered that the argument submitted by the State party that the Committee is not a fourth instance, cannot prevail over the absolute prohibition enshrined in Article 3 of the Convention.¹⁴⁸ Therefore the Committee sometimes does evaluate evidence and assess the credibility of the asylum account itself. It has in some cases indeed reached a different conclusion than the national authorities on these issues.

The Committee does not explain in its views why it is of the opinion that the manner, in which the evidence was evaluated was clearly arbitrary or not. However it is striking that in many of the cases in which the Committee concluded differently with regard to the credibility of the applicant's asylum account than the State authorities, the State authorities had failed to take into account important facts or evidence.¹⁴⁹ In particular in many of those cases medical reports had not been taken into account as evidence in the national procedure or the applicant's medical problems could, according to the Committee, explain inconsistencies in the applicant's statements.¹⁵⁰

145 ComAT 14 May 2004, *S.G. v the Netherlands*, no 135/1999, para 6.6.

146 See for example ComAT 3 July 2011, *T.D. v Switzerland*, no 375/2009, para 7.7. See also ComAT General Comment No 1(1997), A/53/44, para 9 (b).

147 ComAT 6 December 2006, *S.P.A. v Canada*, no 282/2005, para 7.6 and ComAT 12 May 2003, *G.K. v Switzerland*, no 219/2002, para 6.12. In ComAT 15 May 2008, *M.J. .A.M.O. e.a. v Canada*, no 293/2006, para 10.5 the ComAT also required that the domestic courts clearly violated their obligations of impartiality.

148 ComAT 5 December 2005, *Dadar v Canada*, no 258/2004, para 8.8.

149 Wouters 2009, p 492. See also Nowak and McArthur 2008, p 223. They state that 'the more efforts the domestic authorities have made to establish the relevant evidence and to take all available information fully into account, the more the Committee attaches importance to the findings and risk assessment of domestic authorities'.

150 See for example ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, paras 6.6 and 6.7 ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, no 185/2001, para 10, ComAT 17 December 2004, *Enrique Falcon Ríos v Canada*, no 133/99, paras 8.4-8.5, ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.5 and ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8.

Also the Human Rights Committee generally respects the assessment of the facts by the national authorities.¹⁵¹ In *Kindler*, an extradition case, the Human Rights Committee for example 'reiterates its constant jurisprudence that it is not competent to re-evaluate the facts and evidence considered by national courts. The Committee may verify whether the author was granted all the procedural safeguards provided for in the Covenant'.¹⁵² Wouters states that the Human Rights Committee allows itself a prominent role in the assessment of facts and evidence only when there is bad faith, abuse of power or other arbitrariness on the part of the State.¹⁵³ There are very few cases in which the Human Rights Committee concluded that Articles 6 or 7 ICCPR would be violated upon return.¹⁵⁴ *Hamida v Canada* is a rare example of a case in which the Committee assessed the facts and evidence itself and came to another conclusion as to the credibility of the applicant's account than the State authorities.¹⁵⁵ In some cases the Human Rights Committee concluded that expulsion of a person would violate Article 7 ICCPR because insufficient procedural guarantees had been offered by the State authorities,¹⁵⁶ further analysis should have been carried out¹⁵⁷ or because the State authorities failed to comment on the applicant's fairly detailed account on why a risk of *refoulement* in his opinion existed.¹⁵⁸

The deferent position of the UN Committees vis-à-vis the examination of the asylum claim by the State authorities can be explained by their concern to maintain their subsidiary role. It does not mean that they are of the opinion that national courts should not be in the position or are not required to apply a rigorous scrutiny to the facts in an asylum case. Furthermore if necessary in the light of the seriousness of the case, the Committee against Torture and the Human Rights Committee do enter into an assessment of the relevant evidence and the credibility of the asylum account. The prohibition of *refoulement* thus prevails over the need to ensure the subsidiary role of the UN Committees.

151 Wouters 2009, p 397.

152 HRC 18 November 1993, *Kindler v Canada*, no 470/1991, para 6.6. See also HRC 6 December 2002, *Zheludkova v Ukraine*, no 726/1996, para 5.3, HRC 20 August 2004, *Perterer v Austria*, no 1015/2001, para 10.5.

153 Wouters 2009, p 397. He refers among others to HRC 3 April 2007, *P.K. v Canada*, no 1234/2003, para 7.3, where the Committee considered that 'it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice'.

154 Wouters 2009, p 367.

155 HRC 13 April 2010, *Hamida v Canada*, no 1544/2007, para 8.7.

156 HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, para 10.7.

157 HRC 9 May 2011, *Pillai v Canada*, no 1763/2008, para 11.4.

158 HRC 9 December 2004, *Byahuranga v Denmark*, no 1222/2003, para 11.3.

9.2.2.3 The right to a fair trial

When assessing whether a court or tribunal complies with the ‘full jurisdiction’ requirement, the ECtHR tests whether the court considered the submissions of the applicant ‘on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts’.¹⁵⁹ The ECtHR applies this test on a case by case basis,¹⁶⁰ carrying out an examination of both the case file and the relevant provisions of national law.¹⁶¹

Article 6 (1) ECHR does not necessarily require a judicial body to substitute its own decision for that of the administrative authorities; on certain conditions it may pay deference to the administrative decision. The ECtHR considered that in assessing the sufficiency of the judicial review available to the applicant ‘it is necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.’¹⁶² These three factors, to which the ECtHR referred in many cases, will be addressed separately in this section.

The subject-matter of the decision

The ECtHR finds that in areas of law in which the administrative authorities exercise discretion or where special knowledge or experience is needed to take a decision, judicial bodies may limit their review to an assessment of the reasonableness of the decision.¹⁶³ They do not need to substitute their own findings of fact for those of the administrative authorities and are therefore not obliged to hold a full court hearing on both facts and law.¹⁶⁴ Examples of areas of law in which administrative authorities, according to the ECtHR,

¹⁵⁹ See for example ECtHR 21 September 1993, *Zumtobel v Austria*, no 12235/86, para 32.

¹⁶⁰ See for example ECtHR 31 July 2008, *Družstevní Záložna Píra and others v the Czech Republic*, no 72034/01, para 107, ECtHR 4 October 2001, *Potocka and others v Poland*, no 33776/96, para 54, ECtHR 21 September 1993, *Zumtobel v Austria*, no 12235/86, para 32. This makes it difficult to establish the exact purport of judgments and the precise contents of the Court’s doctrine. See the Dissenting opinion of Judge Martens with ECtHR 26 April 1995, *Fischer v Austria*, no 16922/90, para 15.

¹⁶¹ Judge Martens stated that the test requires a scrutiny of the complete file that can reasonably only be made by an experienced lawyer completely conversant with Austrian law and Austrian legal practice and style of litigation. Dissenting opinion of Judge Martens with ECtHR 26 April 1995, *Fischer v Austria*, no 16922/90, para 18.

¹⁶² ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91, para 45.

¹⁶³ In ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91 the ECtHR deemed sufficient that the decision by the Housing and Planning Inspector could have been quashed by the British High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference (see para 44).

¹⁶⁴ See ECtHR (GC) 28 May 2002, *Kingsley v the United Kingdom*, no 35605/97, para 53.

typically exercise discretion are town and country planning¹⁶⁵ and environmental protection.¹⁶⁶ These specialised areas of the law involve the exercise of discretion involving a multitude of local factors inherent in the choice and implementation of policies.¹⁶⁷ Furthermore the issues to be determined in such areas require a measure of professional knowledge or experience.¹⁶⁸

In cases in which no specialised knowledge is required to take the decision and the factual findings cannot be said 'to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take', limited judicial review is not allowed under Article 6 ECHR.¹⁶⁹ *Tsfayo v the United Kingdom* for example concerned the decision by a local authority to refuse a claim for backdated housing and council tax benefit. The reason for the refusal was that the applicant had failed to show "good cause" for her delay in making the claim. According to national case-law the concept of "good cause" involved an objective judgment as to whether the individual claimant with his or her characteristics, such as language and mental health, did what could reasonably have been expected of him or her. The applicant challenged the decision before the Housing Benefit and Council Tax Review Board (HBRB). This body was directly connected to the local authority which refused the claim. The applicant gave evidence to the HBRB as to the moment she realised that anything was amiss with her claim for housing benefit. The HBRB found her explanation to be unconvincing and rejected the claim. The court before which the HBRB's decision could be appealed did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility; it only assessed whether the decision was unreasonable or irrational. According to the ECtHR the dispute in this case concerned a 'simple question of fact' namely whether there was "good cause" for the applicant's delay in making a claim. No specialist expertise was required to determine this issue, nor did the facts fall within the scope of the authorities' discretionary power.¹⁷⁰ As the HBRB lacked independence and essential procedural guarantees, while the intensity of the judicial review before the High Court was limited, Article 6 ECHR had been violated.¹⁷¹ Article 6 ECHR thus requires that simple questions of fact should, in contrast with complex policy assessments, be subjected to full judicial review.

165 ECtHR 25 October 1995, *Bryan v the United Kingdom*, no19178/91, para 47. See also ECtHR (GC) 18 January 2001, *Jane Smith v the United Kingdom*, no 25154/94 and ECtHR (GC) 18 January 2001, *Chapman v the United Kingdom*, no 27238/95.

166 ECtHR 28 July 2005, *Alatulkila v Finland*, no 33538/96, para 52.

167 ECtHR 28 July 2005, *Alatulkila v Finland*, no 33538/96, para 52.

168 ECtHR 27 October 2009, *Crompton v the United Kingdom*, no 42509/05, para 73.

169 ECtHR 27 October 2009, *Crompton v the United Kingdom*, no 42509/05, paras 73 and 77.

170 ECtHR 14 November 2006, *Tsfayo v the United Kingdom*, no 60860/00, para 46.

171 ECtHR 14 November 2006, *Tsfayo v the United Kingdom*, no 60860/00. See also ECtHR 27 October 2009, *Crompton v the United Kingdom*, no 42509/05, para 77.

The manner in which the disputed decision was arrived at

When examining the sufficiency of the review performed by the national court, the ECtHR takes into account the guarantees offered during the administrative proceedings. In several cases the ECtHR found that the proceedings before the administrative body did not fully comply with the requirements of Article 6 (1) ECHR, but could nevertheless be qualified as 'quasi-judicial'. In *Bryan v the United Kingdom* the ECtHR pointed at the uncontested safeguards attending the procedure before the Housing and Planning Inspector, namely

the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality [...]. Further, any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court.¹⁷²

In *Kingsley v the United Kingdom* the ECtHR took into account that a hearing took place, that the applicant could call evidence, consider the various elements of the case against him and comment on the way the proceedings should take place and that the applicant was represented by counsel.¹⁷³ In the *Tsfayo v the United Kingdom* case mentioned above, in which a violation of Article 6 ECHR was found, the ECtHR put much weight on the fact that the determining authority (the HBRB) was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute. According to the ECtHR the safeguards built into the HBRB procedure were not adequate to overcome this fundamental lack of objective impartiality.¹⁷⁴ The notion that the overall fairness should be assessed thus also comes to the fore when assessing whether the intensity of judicial review was sufficient in the light of Article 6 ECHR.

The content of the dispute

Finally the ECtHR assesses whether, in spite of the limited jurisdiction of the court, the grounds of appeal submitted by the applicant were adequately addressed by the national court. In *Bryan v the United Kingdom* for example the ECtHR considered that the applicant's submissions 'went essentially to questions involving "a panoply of policy matters such as development plans, and the fact that the property was situated in a green belt and a conservation area"'. According to the ECtHR the High Court had jurisdiction to entertain the grounds of the applicant's appeal and his submissions were adequately

¹⁷² ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91, para 46.

¹⁷³ ECtHR (GC) 28 May 2002, *Kingsley v the United Kingdom*, no 35605/97, para 54. In this case the ECtHR found a violation of Art 6 ECHR because the court could not quash the impugned decision and remit the case for a new decision by an impartial body.

¹⁷⁴ ECtHR 14 November 2006, *Tsfayo v the United Kingdom*, no 60860/00, para 47.

dealt with point by point.¹⁷⁵ The case *Crompton v the United Kingdom* concerned a dispute regarding the level of compensation which had to be offered to the applicant following his discharge from the army. The level of compensation was decided on by the Army Board, a body composed of members of the armed forces, which could not be considered independent. The ECtHR found that the High Court had sufficiency of review to remedy the lack of independence of the Army Board, although the court could not substitute its own view as to an appropriate award in the circumstances of the case. The ECtHR found it sufficient that the court could and did examine both method of calculation of the compensation and the base figures used for the calculation. In the applicant's case it found the base figure to be inaccurate and required the Army Board to review the calculation.¹⁷⁶ It should be concluded that Article 6 ECHR requires that the grounds for appeal are addressed on the merits by a court or tribunal.

9.2.3 Subconclusion: thorough review of the assessment of the facts

On the basis of the examination of the EU Court's and the ECtHR's case-law it is not possible to define exactly the level of intensity of judicial review, which should be offered by the 'thorough' review required by Article 39 PD. It should be concluded however that the Member States do not have full discretion to determine how intense judicial scrutiny of an asylum decision must be. The term 'thorough' already suggests that national courts cannot pay much deference to the determining authority's assessment of the asylum claim. Furthermore both the case-law of the EU Courts and the ECtHR show that a review of an asylum decision which limits itself to a pure reasonableness test, does not comply with the right to an effective remedy.

It may be derived from the EU Courts' case-law in case involving complex assessments that the right to an effective remedy requires, even in cases in which the determining authority has wide discretion, that a court carries out a meaningful examination of the facts and evidence. It must examine whether the evidence relied on is factually accurate, reliable and consistent and whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substanti-

175 ECtHR 25 October 1995, *Bryan v the United Kingdom*, no19178/91, para 47. The court paid deference to the inspector's decision and concluded that the inspector did not act irrational in concluding that the building erected without permission by Brian was objectionable and had to be demolished. See also ECtHR 4 October 2001, *Potocka and others v Poland*, no 33776/96, para 58.

176 ECtHR 27 October 2009, *Crompton v the United Kingdom*, no 42509/05, paras 78-79. See also ECtHR 26 April 1995, *Fischer v Austria*, no 16922/90, para 34, ECtHR 21 September 1993, *Zumtobel v Austria*, no 12235/86, para 32, EComHR 9 December 1997, *Wickramsinghe v the United Kingdom*, no 31503/96.

ating the conclusions drawn from it. A limited form of judicial review must be compensated by an intensive review of the procedural guarantees offered in the administrative phase, such as the right to be heard or the duty to state reasons. It is hard to imagine that a judicial review which is less intensive than the limited review carried out by the CFI/General Court in cases involving complex assessments can be considered 'thorough'.

The ECtHR's case-law makes clear that the need to prevent irreparable harm, requires rigorous scrutiny by an independent authority of a claim of a risk of *refoulement*. It follows from the ECtHR's judgments in *M.S.S v Belgium and Greece* and the many cases against the United Kingdom that the national authority in the meaning of Article 13 ECHR must enter into a thorough examination of the facts and evidence underlying the asylum claim. This should also be derived from the high level of intensity of the review the ECtHR itself carries out in *refoulement* cases. Notably the ECtHR, if necessary, replaces its own assessment of the credibility of the applicant's asylum account for that of the determining authority and gathers (country of origin) information of its own motion. The subsidiary role of the ECtHR would be seriously undermined if judicial scrutiny by the national court gives fewer guarantees for conformity of an asylum decision with Article 3 ECHR than the ECtHR's own review.¹⁷⁷ The Committee against Torture has confirmed in its recent view in *Singh v Canada* and in its Concluding Observations with regard to Canada that a very limited review of the facts of an expulsion decision, including the credibility of the applicant's asylum account (patent unreasonableness) is not allowed.

Under Article 6 ECHR national courts are not allowed to apply a reasonableness test to simple questions of fact, which do not fall within the scope of the administrative authorities' discretion and for which no special knowledge or experience is required. In such cases the court must have jurisdiction to rehear the evidence or to substitute its own views. It is contended here that the assessment of the credibility of the asylum applicant cannot be considered 'a simple question of fact'.¹⁷⁸ Therefore it cannot be argued on the basis of this case-law that the EU right to an effective remedy requires national courts or tribunals in the meaning of Article 39 PD to substitute their own findings of fact for that of the determining authority. The ECtHR has held under Article 6 ECHR that when the dispute concerns the exercise of discretionary judgment by the administrative authorities, the proceedings before these authorities offer important procedural guarantees, the national court may limit its review to a reasonableness test. However, the grounds of appeal must be addressed on their merits and point by point by this court. This also applies to the review

¹⁷⁷ Spijkerboer 2009-II, p. 68.

¹⁷⁸ See section 8.5. See also the ECtHR's own recognition that the national authorities who had an opportunity to see, hear and assess the demeanour of the applicant are best placed to assess the credibility of the applicant's asylum account.

of findings of fact.¹⁷⁹ It should thus be concluded that Article 6 ECHR does set important standards as to the intensity of judicial review. However these standards do not seem to require a higher level of intensity of judicial review than the rigorous scrutiny required by Articles 3 and 13 ECHR in asylum cases.

How the Member States guarantee the required minimum level of intensity of judicial review falls within their procedural autonomy. They may choose a solution which fits best in their administrative law system and their views on the division of powers between the legislator, administration, and judiciary. The national courts are not obliged to replace their own assessment of the facts or evidence underlying the asylum claim for that of the determining authority. They may also choose to focus on the quality of the asylum decision and to put much weight on the observance of procedural guarantees during the administrative phase.

9.3 THE RELEVANT MOMENT IN TIME: *EX TUNC* OR *EX NUNC* REVIEW?

A final important question relating to the standard of judicial review is whether the national court should or may restrict itself to a review of the contested decision and its underlying facts or whether it should take into account facts or circumstances or evidence which emerged or were submitted after the issuing of an asylum decision.¹⁸⁰ UNHCR noted in 2010 that in some Member States there are no restrictions on the right to submit new elements and evidence during the appeal stage,¹⁸¹ while such restrictions do exist in other Member States.¹⁸²

Article 39 PD does not require the national court or tribunal to take into account facts or evidence which were submitted during the appeal stage. Article 32 PD does give Member States the possibility to examine further representations by the applicant or the elements of a subsequent asylum application in the framework of the examination of the decision under review or appeal, 'insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent

179 ECtHR 25 October 1995, *Bryan v the United Kingdom*, no 19178/91, para 47.

180 Spijkerboer notes that 'the issue of which moment in time is relevant is related to the position of courts vis à vis the administration. If the position of courts is not to decide on the merits of asylum claims, but to decide on the legality of the administrative decision, then an ex nunc assessment is problematic, because courts may take into account evidence of which the administration could not have been aware. Only if courts are competent to assess the substantive merit of an asylum application themselves, would an ex nunc assessment be a plausible option'. Spijkerboer 2009-II, p 53.

181 Bulgaria, Finland, France, Germany with regard to regular rejections, Italy and the United Kingdom.

182 Belgium, Czech Republic, Germany with regard to applications rejected as irrelevant or manifestly unfounded, the Netherlands and Slovenia. UNHCR, *Improving Asylum Procedures*, s 16, pp 55-56.

application within this framework'. Article 32 PD also gives the option of a special procedure for subsequent asylum applications, which can be applied after the administrative decision or a final decision on the previous asylum application has been taken. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the decision on the previous asylum application has been reached, new elements or findings relating to the examination of whether he qualifies as a refugee have arisen or have been presented by the applicant.¹⁸³ Only if new elements or findings have been presented which significantly add to the likelihood of the applicant qualifying as a refugee, the Member States are obliged to further examine the application in conformity with the guarantees laid down in Chapter II of the directive.¹⁸⁴ Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the new elements or finding in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39.¹⁸⁵ The Member States may thus require asylum applicants to raise new facts and evidence during the appeal stage if the national court is competent to take into account such facts and evidence.

In this section it is argued on the basis of the case-law of the Court of Justice and the ECtHR that the EU right to effective judicial protection requires that the court or tribunal in the meaning of Article 39 PD perform an *ex nunc* assessment of a claim of a risk of *refoulement* and takes into account evidence which was submitted after the first decision on the asylum application. In the light of the principle of procedural autonomy Member States may choose how they guarantee that such an *ex nunc* assessment is carried out. One possible option is that the court or tribunal in the meaning of Article 39 PD takes into account relevant new facts and evidence in the appeal against the negative decision on the asylum claim. Another option is that Member States allow asylum applicants a full consideration on the merits of a subsequent asylum application on the basis of relevant new facts or evidence. The decision on this application should then be open to review by the national court or tribunal in the meaning of Article 39 PD. Systems in which relevant new facts and evidence cannot be taken into account by the court in the context of the appeal in a first or a subsequent asylum procedure should be considered contrary to EU law.

183 Art 32 (3) PD.

184 Art 32 (4) PD. According to Art 32 (5) PD Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons why a procedure has to be re-opened.

185 Art 32 (6) PD.

9.3.1 The Court of Justice's case-law

The Court of Justice has not yet addressed whether a 'thorough review' by the national court or tribunal should include new facts and evidence submitted during the appeal stage. The only judgment which addresses the relevant moment in time of the assessment of the existence of a fear for persecution is *Salahadin Abdullah*. This case concerned the withdrawal of refugee status. In a procedure in which the refugee status is withdrawn the refugee may rely on a reason for persecution other than that accepted at the time when refugee status was granted. The Court of Justice considered in *Salahadin Abdullah* that Article 4 (4) QD requires determining authorities to take into account acts or threats of persecution connected to this other reason of persecution. The Court seems to be of the opinion that this applies even if the acts or threats of persecution occurred in the country of origin before the asylum application was lodged, but were not mentioned by the applicant in the asylum procedure.¹⁸⁶ This implies that if the Member State authorities intend to withdraw a refugee status an *ex nunc* assessment needs to take place. This judgment does not address the question whether a court should take into account facts or evidence submitted after the decision by the determining authority. However the judgment may indicate that an applicant's statements, in particular those regarding previous persecution, cannot be excluded from the assessment of the risk of future persecution or serious harm on the sole ground that the applicant could and should have submitted them earlier.

A judgment which is particularly relevant for the question whether national courts should take into account new facts or evidence in their examination of the appeal against the rejection of the asylum application, is *Orfanopoulos and Oliveiri*. In this case the Court of Justice addressed the standard of judicial review of expulsion measures against EU citizens on public policy grounds.¹⁸⁷ The Court has held that in order to expel an EU citizen under the exception based on reasons of public policy, the competent national authorities must assess, on a case-by-case basis, whether the measure or the circumstances which gave rise to that expulsion order prove the existence of personal conduct constituting a *present threat* to the requirements of public policy. The Court recognised in *Orfanopoulos and Oliveiri* that in practice, circumstances may arise between the date of the expulsion order and that of its review by the competent court, which point to the cessation or the substantial diminution of the threat which the conduct of the person ordered to be expelled constitutes to the requirements of public policy. According to the Court derogations from the principle of freedom of movement for workers must be interpreted strictly,

¹⁸⁶ Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 97.

¹⁸⁷ Case C-482/01, *Orfanopoulos* [2004], paras 77-82. See also Case C-467/02, *Cetinkaya* [2004], para 47.

and thus the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion. For that reason a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of an EU citizen, factual matters which occurred after the final decision of the competent authorities, which may point to the cessation or the substantial diminution of the present threat to public policy, is liable to adversely affect the right to freedom of movement to which nationals of the Member States are entitled and particularly their right not to be subjected to expulsion measures save in the extreme cases provided for by EU law. According to the Court that is particularly so, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court. The principle of effectiveness thus requires courts to perform an *ex nunc* review of the threat to public policy posed by an EU citizen against whom an expulsion measures was taken.¹⁸⁸

Asylum cases and cases in which an EU citizen will be expelled for reasons of public policy have two important things in common. First of all it needs to be established at the time of expulsion whether there is a *present* threat: in asylum cases it concerns a present threat of *refoulement*, in cases of EU citizens a present threat of a person to the requirements of public policy. Furthermore in both sorts of cases a fundamental EU right is at stake. In *Orfanopoulos* the Court of Justice held that the effective exercise of the freedom of movement requires an *ex nunc* assessment of the present threat by the national court. It is not such a big step to argue in analogy with this judgment that the effective exercise of the EU right to asylum and the EU prohibition of *refoulement* requires an *ex nunc* assessment by the national court of the present threat (the real risk) of *refoulement*. This would imply that developments which took place after the rejection of the asylum claim by the determining authority should be taken into account by the national court or tribunal in the meaning of Article 39 PD. The need for an *ex nunc* assessment of the risk of *refoulement* by the national court is, as will be explained in section 9.3.2, confirmed by the ECtHR's case-law.

It cannot be derived from *Orfanopoulos* however that Member States are not allowed to choose for a system, explicitly allowed by the Procedures Directive in which new elements or findings are considered during a subsequent asylum procedure. The procedural rules governing this subsequent proceedings may however not undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*. This means that the applicant may not be expelled until the national court has ruled on the appeal in the subsequent procedure.¹⁸⁹ Furthermore evidence or grounds which support the existence of a risk of *refoulement* should not be excluded from the assessment of this risk for the sole reason that they could have been submitted earlier in

188 The Court of Justice refers to the principle of effectiveness in para 80 of the judgment.

189 See further Chapter 6.

the procedure.¹⁹⁰ Finally the total duration of the asylum procedures may not violate the right to good administration¹⁹¹ or undermine the effectiveness of the remedy required by Article 39 PD.¹⁹²

9.3.2 Obligations stemming from the ECHR, the CAT and the ICCPR.

The principle of *non-refoulement* requires the ECtHR to carry out a 'full and ex nunc assessment' of the case. In cases in which the applicant has not yet been expelled, the material point in time for the examination of the risk of *refoulement* is that of the Court's consideration of the case. The ECtHR stated that 'even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive. Such *ex nunc* assessment also entails that evidence or information that has come to light after the final decision taken by the domestic authorities should be taken into account.'¹⁹³ In *Salah Sheekh* the Court considered that in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time.¹⁹⁴

In practice the Court indeed takes account of recent information, among others country of origin information.¹⁹⁵ It also includes new statements or evidence adduced by the applicant in its assessment. In *Hilal* for example the Court took into account statements made by the applicant's wife, during asylum proceedings which started after the applicant had lodged a complaint

190 The exclusion from the assessment of evidence which supports the existence of a real risk of *refoulement* on pure procedural grounds undermines the effectiveness of the absolute prohibition of *refoulement*.

191 See Art 23 (2) PD which requires that the asylum procedure is concluded as soon as possible. The Court of Justice considered in Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], para 98 that the Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible for the examination of the asylum claim which takes an unreasonable length of time.

192 Art 47 of the Charter requires a fair and public hearing within a reasonable time.

193 See for example ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, para 48.

194 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136. See also ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 112 and ECtHR 10 February 2011, *Dzhakysybergenov v Ukraine*, no 12343/10, para 36. The ComAT also takes into account changes in the situation in the country of origin which occurred after the complaint had been lodged. See for example ComAT 8 July 2011, *Chahin v Sweden*, nr 310/2007, paras 9.4 and 9.6 and ComAT 1 July 2011, *Jahani v Switzerland*, no 357/2008, para 9.4.

195 See for example ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 119, where the Court considered: 'As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection organisations [...].'

before the Court.¹⁹⁶ Furthermore it included in its assessment several documents which were submitted by the applicant to the British Secretary of State after the first decision on the asylum request. These documents were looked at by the Secretary of State and the national courts, but were not considered relevant because, according to them, there was an 'internal flight solution', where the applicant could safely live.¹⁹⁷

The ECtHR has not explicitly considered that national courts should, like the ECtHR itself, include new facts or circumstances in their review of an asylum or expulsion decision. However in *M.S.S. v Belgium and Greece* the ECtHR did take into account in its assessment of the effectiveness of the extremely urgent procedure before the Aliens Appeals Board that the Aliens Appeal Board did not always take into account materials submitted by applicants after their interviews with the Aliens Office. According to the ECtHR this was one of the reasons why these applicants were prevented from establishing the arguable nature of their complaints under Article 3 of the Convention. In this case the applicant could be transferred to Greece right after the Alien Appeal Board's decision. There was thus no opportunity to submit new evidence in a later stage.

Furthermore, one may argue in the light of the subsidiary role of the ECtHR that the fact that the Court assesses claims under Article 3 ECHR *ex nunc* obliges national courts to do the same. Otherwise applicants would be obliged to lodge a complaint before the ECtHR in order to have the new evidence or facts assessed.¹⁹⁸ The ECtHR's case-law does not exclude however, that States may choose to oblige an applicant to submit a new application on the basis of the new facts, while the decision on this application including the assessment of the new facts and circumstances will be tested by the national court.¹⁹⁹

196 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 66.

197 See also Spijkerboer 2009-II, p 56. It should be noted however that the ECtHR sometimes holds the fact that statements and/or evidence are submitted at a late stage of the procedure against the applicant. See further sections 8.5 and 8.6.

198 See also Spijkerboer 2009-II, p 57. The Netherlands Government seems to be of the opinion that the ECtHR's case-law requires a full and *ex nunc* assessment by the national court. It refers to this case-law in the explanation with a bill which requires an *ex nunc* assessment by the national courts in asylum cases. TK 2008–2009, 31 994, no 3, p 6. The ComAT and HRC often ensure their subsidiary role by refusing to include these new facts and circumstances in their assessment. Instead they grant the State authorities an opportunity to evaluate the new evidence in a new asylum procedure and declare the complaints before the Committees inadmissible. See for example ComAT 2 May 1995, *A.E. v Switzerland*, no 24/1995 and HRC 10 August 2006, *Dawood Khan v Canada*, no 1302/2004.

199 Note that the ECtHR took into account in *Bahaddar* that the applicant could lodge a fresh application to remedy the violation of Art 3 ECHR and therefore did have an effective remedy at his disposal. ECtHR 19 February 1998, *Bahaddar v the Netherlands*, no 25894/94.

9.3.3 Subconclusion: the relevant moment in time

The Procedures Directive allows the national courts or tribunals of the Member States to take into account facts and evidence submitted after the decision by the determining authority, but does not require them to do so. The new facts or evidence may, according to Article 32 of the directive also be assessed in a subsequent asylum procedure. This gives the determining authority the opportunity to first assess the risk of *refoulement* in the light of these new facts or evidence. Both options seem to comply with the case-law of the Court of Justice and the ECtHR, provided that at one stage of the procedure, before the expulsion of the applicant, the national court or tribunal reviews the asylum decision while taking into account all relevant available facts and evidence. Furthermore the examination of new facts or evidence in a subsequent asylum procedure should not lead to considerable delays in the processing of the case.

Both the Court of Justice's judgment in *Orfanopoulos and Oliveira* and the ECtHR's case-law make clear that the assessment of an actual, present threat at the moment of expulsion requires an *ex nunc* assessment by the national court. The absolute nature of the prohibition of *refoulement* prohibits that relevant facts or evidence cannot be taken into account by the national court on the sole ground that they should have been submitted earlier in the procedure. This may be derived from the Court of Justice's judgment in *Salahadin Abdullah* but also from the EU principle of effectiveness. The effectiveness of the EU prohibition of *refoulement* would be seriously undermined if facts or evidence supporting the existence of a risk of *refoulement* were excluded from the national court's assessment, only because they were submitted in a later stage of the procedure.²⁰⁰ Furthermore the subsidiary role of the ECtHR would be endangered if applicants are obliged to lodge a complaint before the ECtHR in order to have the risk of *refoulement* examined in the light of all available facts evidence, including those submitted in a later stage of the asylum procedure.

9.4 SYNTHESIS OF FINDINGS

National rules and practice regarding the standard of judicial review depend on the vision on the division of roles. The EU legislator, the EU Courts and also the ECtHR are, in the light of the procedural autonomy of the Member States, hesitant to set requirements with respect to the standard of review by national courts. However, the Court of Justice in *Samba Diouf* has brought the scope and intensity of judicial review within the scope of the EU right to an effective remedy. This right requires a thorough judicial review of the reasons

²⁰⁰ See further section 8.6.

which lead the determining authority to reject the asylum claim as unfounded.²⁰¹ In this chapter it was examined how the term ‘thorough’ judicial review should be interpreted. The following conclusions were drawn in this regard:

Scope of judicial review

- It follows from the Court of Justice’s judgments in *Samba Diouf* and *Wilson* that a court or tribunal as required by Article 39 PD should review both points of law and points of fact.²⁰² This view is supported by the ECtHR’s case-law under Article 6 ECHR, which requires a court or tribunal to have ‘full jurisdiction’.²⁰³ A judicial review which is limited to points of law only also cannot be considered a rigorous scrutiny as required by the ECtHR in *refoulement* cases.²⁰⁴
- A system in which the facts are established by the administrative authorities and cannot be reviewed by a court or tribunal should therefore be considered contrary to Article 39 PD.

Intensity of judicial review

- It should be derived from the EU Courts’ and the ECtHR’s case-law that the thorough judicial review demanded by Article 39 PD requires as a minimum that the national court or tribunal assesses the claim of a risk of *refoulement* on its merits. It should carefully examine the facts and evidence underlying the asylum claim. A reasonableness test in which wide discretion is afforded to the determining authority’s fact-finding, including the assessment of the applicant’s credibility is not allowed.
- National courts are not obliged to replace their own assessment of the facts for that of the determining authority. They may choose to focus on the quality of the asylum decision and the procedural fairness of the asylum procedure.
- The EU Courts have shown in cases involving complex assessments that a limited form of judicial review should entail an assessment whether the evidence relied on is factually accurate, reliable and consistent, whether that evidence contains all the information, which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.²⁰⁵ Furthermore the EU Courts make sure that procedural guarantees were strictly observed during

201 Case C-69/10, *Samba Diouf* [2011], paras 56 and 61.

202 Case C-69/10, *Samba Diouf* [2011], para 57, Case C-506/04, *Wilson* [2006], para 60.

203 See for example ECtHR (Plen) 23 June 1981, *Le Compte, Van Leuven, De Meyere v Belgium*, no 6878/75, para 51.

204 The ECtHR mentioned the requirement of a rigorous scrutiny amongst others in ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 50.

205 Case C-12/03 P, *Commission v Tetra Laval* [2005], para 39.

the administrative procedure.²⁰⁶ Arguably the judicial scrutiny carried out by the EU Courts shows the minimum level of intensity of judicial review necessary in order to ensure the EU right to effective judicial protection. This level of intensity of judicial review may therefore be considered to be normative for judicial review by national courts in similar cases.²⁰⁷

- Asylum cases can be considered similar to cases involving complex assessments, in the sense that it is in both kinds of cases difficult to find the facts objectively. Therefore the thorough review required in asylum cases cannot be less intensive than the limited form of judicial review in case concerning complex assessments.
- The ECtHR made clear in *M.S.S v Belgium and Greece* and in several cases against the United Kingdom that the national authority in the meaning of Article 13 ECHR must enter into a thorough examination of the facts and evidence underlying the asylum claim.²⁰⁸ This should also be derived from the high level of intensity of the review the ECtHR itself has carried out in *refoulement* cases.²⁰⁹ If national courts carry out a more limited judicial review than the ECtHR that would undermine the subsidiary role of the ECtHR.²¹⁰

The relevant moment of time

- Article 39 PD interpreted in the light of the EU right to an effective remedy requires that the national court should at one stage of the asylum procedure, before the expulsion of the applicant, review the asylum decision on the basis of all relevant available facts and evidence. This includes all relevant evidence which is submitted in a later stage of the asylum procedure (after the first administrative decision on the asylum application).
- The effectiveness of the EU prohibition of *refoulement* would be undermined if relevant facts or evidence cannot be taken into account by the national court on the sole ground that they should have been submitted earlier in the procedure. This was derived from the Court of Justice's judgment in *Orfanopoulos and Oliveiri* and the ECtHR's case-law, which show that the assessment of an actual, present threat at the moment of expulsion requires an *ex nunc* assessment by the national court.²¹¹

206 Case C-269/90, *Technische Universität München* [1990], para 14.

207 See also Schuurmans 2008.

208 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 389-390 and (among others) ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, para 121-122 and ECtHR, 30 October 1991, *Vilvarajah and others v the United Kingdom*, nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para 125-126.

209 See for example ECtHR 26 July 2005, *N. v Finland*, no 38885/02 and ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02.

210 See also Spijkerboer 2009-II, pp 68-69.

211 Case C-482/01, *Orfanopoulos* [2004], paras 77-82 and ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136.