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EU asylum procedures and the right to an effective remedy

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11 | Towards a common and fair European asylum procedure?

This study started off by underlining the importance of adequate and fair procedures for the effective exercise of rights granted under EU law. In the following chapters it was shown that the EU Courts have recognised this importance. The Court of Justice's case-law concerning the EU right to an effective remedy has considerably limited the procedural autonomy of the Member States. There is no reason to believe that asylum procedures will escape the influence of the Court of Justice. The need for procedural guarantees is as great in asylum procedures as in any other field of EU law. As A.G. Bot considered with regard to the applicability of the EU right to be heard in asylum cases:

Indeed, in this type of procedure, which inherently entails difficult personal and practical circumstances and in which the essential rights of the person concerned must clearly be protected, the observance of this procedural safeguard is of cardinal importance. Not only does the person concerned play an absolutely central role because he initiates the procedure and is the only person able to explain, in concrete terms, what has happened to him and the background against which it has taken place, but also the decision given will be of crucial importance to him.¹

This concluding chapter will make some final remarks with regard to the methodology used for the purpose of this study. It will argue that this methodology is suitable not only to construct the meaning of the EU right to an effective remedy in the context of asylum, but also in other fields of EU law.

Furthermore this chapter will draw some conclusions as to the achievements of the Procedures Directive up to now and the potential impact it may have in the future. It will be contended that asylum applicants are better off with than without the Procedures Directive. Section 11.3 contains the full set of procedural standards which were derived from the Procedures Directive and Qualification Directive read in the light of the EU right to an effective remedy. Section 11.4 stresses the important task of national courts and asylum lawyers to apply the Procedures Directive and the EU right to an effective remedy in practice and to (encourage the courts to) refer questions for preliminary ruling to the Court of Justice.

¹ Opinion of A.G. Bot in Case 277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, para 43.

This chapter will finally glance into the future. The process of harmonisation of asylum procedures is still ongoing. At the moment of the conclusion of this study a recast of the Procedures Directive was under negotiation and a recast of the Qualification was adopted. Section 11.5 tests the recast proposal and the new Qualification Directive against the conclusions drawn in this study as to the requirements following from the EU right to an effective remedy concerning each of the procedural topics discussed in the previous chapters.

11.1 EU PROCEDURAL LAW: COMMON PRINCIPLES, SPECIFIC APPLICATIONS

The purpose of this study was to discover the meaning of the EU fundamental right to an effective remedy for the legality and the interpretation of EU asylum legislation, in particular the Procedures Directive. The meaning of the EU right to an effective remedy in the context of asylum was derived from the EU Courts' case-law and of relevant sources of inspiration, in particular the ECtHR's case-law. This resulted in a set of procedural standards with regard to several key issues of asylum procedures: the right to remain on the territory of the Member State, the right to be heard and evidentiary issues.

The methodology used in this study in order to find the meaning of the EU right to an effective remedy is based on the following assumptions:

- The EU right to an effective remedy encompasses common procedural principles which are applicable in all fields of EU law. These principles can be distilled from the case-law of the EU Courts' case-law concerning a specific procedural topic, irrespective of the material EU legislation at issue. Furthermore these procedural principles are inspired by international law, in particular the ECHR and the ECtHR's case-law.
- When applying these common procedural principles to a specific field of EU regard should be had to three basic notions:
 - 1 The interests of the parties involved in the proceedings concerned must be balanced against each other
 - 2 The overall fairness of the procedure should be assessed
 - 3 The subject matter of the procedure should be taken into account

The next sections will recapitulate how this method of deriving common principles and applying them to a specific field of EU law works.

11.1.1 Common procedural principles

Article 47 of the Charter applies in its full extent to all cases falling within the scope of EU law. This is also true for the procedural rights closely linked to it, such as the right to be heard and the duty to state reasons. In all fields

of EU law, whether it is competition, EU sanctions, equal treatment or asylum similar aspects of EU or national procedures raise questions as to their compatibility with EU procedural rights. In all kinds of procedures parties may claim that for example a lack of suspensive effect of the appeal, limitations of the right to be heard, evidentiary rules or a limited scope or intensity of judicial review undermines their right to an effective remedy and/or impeded the effective exercise of their rights granted under EU law. The EU Courts' judgments regarding such claims are relevant not only for the specific procedure at issue, but for all procedures in which EU law is invoked. From this case-law procedural principles emerge which are applicable to all fields of EU law. This is how the EU Courts' judgments in for example competition, EU sanction or equal treatment cases become relevant for the interpretation of the EU right to an effective remedy in asylum cases.

A first sign that the Court of Justice will indeed treat asylum cases like all other cases falling within the scope of EU law and apply the same EU procedural principles is the judgment in *Samba Diouf*. The Court of Justice in its judgment referred to its judgment in *Wilson* when addressing the scope of judicial review, which should be performed by a court or tribunal in the meaning of Article 39 PD. The *Wilson* case concerned the practice of the profession of lawyer in a Member State other than that in which the qualification was obtained.² Examples of procedural principles which were derived from the EU Courts' case-law in this study are:

- Interim protection must be provided by the national court if necessary to ensure the effectiveness of EU law.
- The use of presumptions is permissible as long as the parties concerned are able to submit evidence in order to rebut such presumption.
- Authorities are not allowed to accept only the best possible evidence in support of a claim under EU law.
- A court or tribunal should review both points of fact and points of law.
- A court must receive all evidence underlying the contested decision, also if (part of) this evidence was not disclosed to (one of) the parties concerned. This court should assess whether the non-disclosure of evidence pursues a legitimate aim and is necessary and whether the right to adversarial proceedings is sufficiently guaranteed.

Often the procedural principles are of a rather general nature and cannot directly be applied to any EU context. The specific meaning of these principles or the level of protection offered by them varies according to the special features of the field of EU law at issue and the individual circumstances of the case. This is where the three basic notions introduced in section 4.5 of this study come to the fore.

2 Case C-506/04, *Wilson* [2006].

11.1.2 Specific applications: the three basic notions

In this study the ECtHR's case-law and the views of UNHCR, the Committee against Torture and the Human Rights Committee which specifically concerned asylum procedures were used in order to determine how the procedural principles distilled from the EU Courts' case-law should be applied in the asylum context. With regard to some of the issues discussed no case-law of the EU Courts was available. In this situation the interpretation of the EU right to an effective remedy was only based on the ECtHR's case-law and the views of other supervising bodies.

The three basic notions introduced in section 4.5 proved helpful to understand the choices made by the EU Courts when applying procedural rights in a particular case. Moreover they are useful to predict how the EU Courts will interpret the EU right to an effective remedy or related procedural rights and principles in a field of EU law or even a particular case. This will be illustrated in the following sections.

11.1.2.1 *Balancing of interests*

The EU Courts balance the interests of the parties involved in a procedure when assessing whether EU procedural rights have been infringed. A national procedural rule which limits a party's procedural rights, such as the right of access to court or the right to be heard, must serve a legitimate aim and should be necessary and proportional. Therefore also in asylum cases, the Member State must be able to justify a procedural rule which limits an applicant's procedural rights granted under EU law.

In this study, the balancing of interests performed by the EU Courts was most visible in Chapter 10, which discussed their case-law concerning the use of secret information in competition cases and EU sanction cases. The EU Courts in these cases balance the right to be heard, the right to a reasoned decision and the right to an effective remedy of the addressee of the decision against the interest served with the non-disclosure of this information. These interests include the protection of business secrets, the protection of witnesses or the international relations or national security of the Member States.

It is relevant to note in the context of asylum procedures that both the Court of Justice and the ECtHR have recognised that the procedural rights of a party may be balanced against the Member States' interest to process cases efficiently.³ The efficiency of asylum procedures is one of the objectives of

3 See for example Case T-228/02, *Organisation des Modjahedines du peuple d' Iran v Council* [2006], para 141 and Case T-237/00, *Reynolds v Parliament* [2004], para 102, where the Court of Justice held that the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available

the Procedures Directive and (as will be set out below) the amended proposal for the recast of the Procedures Directive.⁴ The Court of Justice recognised in *Samba Diouf* that shorter time-limits in asylum procedures (accelerated asylum proceedings) may be justified to ensure 'that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently'.⁵ The ECtHR likewise considered in *I.M. v France* that Member States must have the means to cope with large numbers of asylum applicants and that accelerated procedures may facilitate the processing of clearly abusive or manifestly unfounded asylum applications.⁶

In the context of asylum the Member States' interest to process asylum claims efficiently and to prevent abuse may thus play a significant role. However it is conceivable that this interest may never prevail over the interest of both the Member States and the asylum applicant in good quality decisions.⁷

11.1.2.2 The overall fairness of the procedure

The case-law discussed in this study also confirms that in the context of the EU right to an effective remedy the overall fairness of the asylum procedure should be examined. A limitation to a procedural right may be compensated by using compensation techniques. A lack of procedural guarantees in one stage of the procedure may be redressed in a later stage of the procedure and *vice versa*. In this study it was established for example that both the EU Courts and the ECtHR accepted that a limited form of judicial review may be (partly) compensated by procedural guarantees in the administrative phase, in particular the right to be heard and the right to know the reasons of the decision.⁸ The Court of Justice has held that in EU sanction cases in which secret evidence is used, the absence of a hearing during the administrative phase can be compensated during the appeal phase.⁹ Furthermore both the Court of Justice and the ECtHR have ruled that a limitation of the right to adversarial proceedings can and must be compensated by using compensation techniques

for making the decision. See also ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 41.

4 See recital 3 Preamble PD which refers to the Tampere Conclusions which called for common standards for fair and *efficient* asylum procedures and recital 11 Preamble PD which states: 'It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum.'

5 Case C-69/10, *Samba Diouf* [2011], para 65.

6 ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 142.

7 See ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 147.

8 See sections 9.2.1 and 9.2.2.3.

9 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 129-130, Case T-390/08 *Bank Mellat Iran v Council* [2009], para 98 and Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat v Council and Commission* [2008], para 337.

such the appointment of a special advocate or the provision of non-confidential summaries. Section 9.3 argued that the lack of an *ex nunc* examination of the asylum decision by the court or tribunal in the meaning of Article 39 PD may be compensated by a subsequent asylum procedure, in which all relevant new facts and evidence are assessed by the determining authority and may be reviewed by the court or tribunal deciding on the appeal.

Several minor deficiencies in the asylum procedure may reinforce each other and lead to a lack of an effective remedy. Some procedural defects will directly lead to a breach of the right to an effective remedy. The clearest example discussed in this study is the lack of an appeal with automatic suspensive effect against the rejection of the asylum claim. The applicant may be expelled before the appeal court has reached its decision and as a consequence may be exposed to irreparable harm in his country of origin.¹⁰ This deficiency cannot be compensated, for example by a higher appeal with automatic suspensive effect.

The Court of Justice and the national courts should thus assess the compatibility of a procedural rule with the EU right to an effective remedy while having regard to the guarantees offered in the asylum procedure taken as a whole.

11.1.2.3 *The subject matter of the procedure*

Even though the Court of Justice recognised the Member States' interest in efficient asylum procedures, that does not mean that it will allow that Member States systematically provide for less procedural guarantees in asylum cases than in other cases falling within the scope of EU law. To the contrary: both the Court of Justice's case-law and the ECtHR's case-law have made clear that the nature of the fundamental rights at stake in asylum cases, notably the absolute prohibition of *refoulement*, requires a high level of procedural protection. The Court of Justice has considered that the assessment of the extent of the risk of *refoulement* 'must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union'.¹¹

Similarly the ECtHR under Article 13 ECHR obliges States to provide for important procedural guarantees in asylum cases, in view of the importance which the Court attaches to Article 3 ECHR and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises. As was shown in this study Articles 3 and 13 ECHR require a remedy with

¹⁰ See Chapter 6.

¹¹ Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 90. See also A.G. Bot's opinion in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, para 43.

automatic suspensive effect¹² and rigorous scrutiny of the risk of *refoulement* in the administrative phase as well as by an independent authority.¹³ The ECtHR's case-law shows that States should be flexible when applying evidentiary rules in asylum cases, not expecting the asylum applicant to submit a perfectly substantiated and consistent asylum account.¹⁴ The ECtHR imposes a positive obligation on the State to gather certain evidence and expects it to assume the burden of proof in specific situations, for example where the applicant has submitted medical evidence of past torture.¹⁵ Furthermore the ECtHR in asylum cases demands an *ex nunc* review by an independent authority on the merits of the risk of *refoulement*.¹⁶

The case-law of the Court of Justice and the ECtHR thus indicates that, given the fundamental rights at stake in asylum cases, the standard of procedural protection offered should rather be higher than lower than that offered by general administrative law in a Member State.

Specific procedural position of the person concerned.

Not only the rights at stake for the party concerned but also his particular procedural position influences the level of procedural protection which should be offered. The Court of Justice has accepted that the weak position of consumers and dismissed pregnant workers may warrant special procedural guarantees, such as *ex officio* application of EU law and extended time-limits.¹⁷ The Court took into account that these persons lack legal expertise and may therefore be required to pay high lawyers fees or may experience difficulties in obtaining proper advice.

The Court of Justice has not yet addressed the question whether special procedural protection is also necessary in asylum cases. It may however be expected that the Court of Justice also takes into account the difficult position in which asylum applicants generally find themselves. It should be noted in this context that the ECtHR has recognised that the weak procedural position of asylum applicants warrants specific procedural guarantees in recent judgments. It stressed the need for clear information on the asylum procedure and for access to (free) legal assistance and interpretation services in asylum procedures.¹⁸

¹² See section 6.3.1.2.

¹³ See section 9.2.2.1.

¹⁴ See section 8.5

¹⁵ See section 8.3.1.

¹⁶ See Chapter 9.

¹⁷ Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores* [2000], para 26 and Case C-63/08, *Pontin* [2008], paras 62 and 65.

¹⁸ See ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 301, 304 and 319, ECtHR 2 February 2012, *I.M. v France*, no 9152/09, paras 145 and 150 and ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, para 204.

It follows from the Court of Justice's case-law that the compatibility of a procedural rule with the EU right to an effective remedy should not only be examined in the abstract. The application in a particular case of a procedural rule, which is generally considered acceptable, may violate the EU right to an effective remedy, taken into account the specific circumstances of the individual asylum applicant concerned.¹⁹ National courts should thus examine in the abstract as well as when taking account of the specific circumstances of the case whether (the application of) a procedural rule is in conformity with the EU right to an effective remedy.

11.1.3 Wider applicability of the methodology

The methodology applied in this study in order to discover the meaning of the EU procedural rights is not only pertinent in the EU asylum context. It may be used in any field of EU law in order to determine how the EU right to an effective remedy should be interpreted.

In this study common principles were mainly derived from the case-law concerning other fields of EU law than asylum law. This is not surprising as asylum law has only recently become part of EU law. The Court of Justice's case law concerning asylum procedures is therefore still scarce. It may be expected however that in the future this case-law will develop and will itself provide for procedural principles which are relevant to other fields of EU law. Then lawyers working for example in the field of competition law may derive procedural principles from the Court of Justice's judgments concerning asylum procedures and apply them to their specific field. The Court of Justice's judgment in *Samba Diouf* already made clear that the intensity of judicial review is an aspect of the EU right to an effective remedy. This is relevant not only for national courts reviewing asylum decisions, but also for national courts ruling in other cases falling within the scope of EU law.²⁰

The method used in this study is furthermore suited to find the meaning of the EU right to an effective remedy with regard to all thinkable procedural issues. In the asylum context for example it may be used to define the meaning of this right for the application of short time-limits for decision-making or appeal proceedings (accelerated asylum proceedings) or the right to legal assistance.

19 See for example Case C-69/10, *Samba Diouf* [2011], paras 66-68.

20 See also Widdershoven 2011, under para 3.

11.2 THE PROCEDURES DIRECTIVE: UGLY CREATURE OR IMPORTANT STEP FORWARD?

The Procedures Directive played a central role in this study as it provides for minimum standards for many of the procedural issues discussed. There are two ways of looking at the Procedures Directive. First of all the directive may be regarded as an ugly creature. A very complex piece of EU legislation which is the clear result of long and difficult negotiations between Member States, who were unwilling to give up their national solutions for dealing with asylum procedures in an effective manner. A directive which contains more derogation provisions than minimum standards and as a result fails to harmonise the asylum procedures in the Member States. And most importantly a directive which leaves significant protection gaps and consequently creates the risk of violations of international as well as European Law.²¹

Indeed the Commission and UNHCR in their research concerning the implementation of the Procedures Directive ascertained that there were still major differences between the asylum procedures of the Member States.²² As a result asylum applicants still have very different prospects of finding international protection depending on where in the EU their applications are examined.²³ Both the Commission and UNHCR were also concerned about the level of protection offered by those asylum procedures. The Commission noted in 2009 in the proposal for the recast of the Procedures Directive which will be discussed below:

Contributions received by stakeholders in response to the Green Paper consultation have pointed to the proliferation of disparate procedural arrangements at national level and deficiencies regarding the level of procedural guarantees for asylum applicants which mainly result from the fact that the Directive currently allows Member States a wide margin of discretion. Consequently, the Directive lacks the potential to back up adequately the Qualification Directive and ensure a rigorous examination of applications for international protection in line with international and Community obligations of Member States regarding the principle of *non-refoulement*.²⁴

21 UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, Geneva: March 2010, p 91.

22 See for example Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final and UNHCR, *Improving Asylum Procedures*, p 91.

23 Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, summary of the impact assessment, 21 October 2009, COM(2009) 554, SEC(2009) 1377, p 2.

24 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554, explanatory memorandum, p 2.

UNHCR stated in 2010:

There are many areas in which individual's rights are not respected, not only because of non-observance of the APD [the Procedures Directive], but also in the context of the application of its provisions, in line with the low minimum standards it sets.²⁵

In spite of the fact that the Member States are bound by the guarantees contained in the Procedures Directive the ECtHR has recently found violations of the right to an effective remedy in asylum cases with respect to Belgium,²⁶ Bulgaria,²⁷ the Czech Republic,²⁸ France,²⁹ Greece³⁰ and Italy.³¹ The violations were caused by (a combination of) a wide variety of procedural shortcomings, ranging from the lack of access to the asylum procedure, the lack of information about the asylum procedure, the absence of free legal aid and/or interpretation services, the limited nature of the personal interview, the lack of a rigorous scrutiny of the claim of *refoulement*, the speed or the long duration of the procedure, the lack of a remedy with automatic suspensive effect and the limited intensity of judicial review.

Furthermore, in some Member States there is strong political pressure to adopt more restrictive migration policies and legislation. This also results in a lowering of procedural guarantees for asylum procedures. In the Netherlands for example the right to a remedy with suspensive effect was limited and does no longer apply with regard to subsequent asylum procedures in which the applicant failed to submit new facts or circumstances.³² The Dutch Government also aims to reduce the number of subsequent asylum procedures by restricting free legal aid in such procedures.³³ In November 2011 French Interior Minister Claude Guéant announced reforms to the asylum system in France, including a reduction in the asylum budget and a shortening of the time frame during which asylum applications have to be made. Furthermore the number of safe countries of origin would be expanded.³⁴ Belgium intro-

25 UNHCR, *Improving Asylum Procedures*, p 91.

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

27 ECtHR 11 October 2011, *Auad v Bulgaria*, no. 46390/10 and ECtHR 26 July 2011, *M. ao v Bulgaria*, no 41416/08.

28 ECtHR 23 June 2011, *Diallo v Czech Republic*, no 20493/07.

29 ECtHR 2 February 2012, *I.M. v France*, no 9152/09.

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

31 ECtHR (GC) 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09.

32 Besluit van de Minister voor Immigratie en Asiel van 8 februari 2011, WBV 2011/1, houdende wijziging van de Vreemdelingen-circulaire 2000, Staatscourant 17 February 2011, No 2838.

33 Gedoogakkoord VVD-PVV-CDA, 30 september 2010, www.rijksoverheid.nl.

34 European Council for Refugees and Exiles (ECRE), weekly bulletin, 9 December 2011, www.ecre.org and Réaction de Forum réfugiés au discours de C. Guéant du 25 novembre 2011, La hausse de la demande d'asile légitime était prévisible, www.forumrefugies.org.

duced a list of safe countries of origin in November 2011. Asylum applicants originating from these countries have to rebut the presumption of safety in their individual case, in a fifteen-day asylum procedure.³⁵

It may be concluded that the Procedures Directive has not lead to harmonisation of asylum procedures and that a fair common European asylum procedure is still far away.

11.2.1 The Procedures Directive's potential

It is contended here however, that the adoption of the Procedures Directive should nevertheless be regarded as an important step forward. In spite of all its shortcomings the directive does provide for important standards for asylum procedures. More importantly the directive has brought national asylum procedures within the scope of EU law. Consequently asylum procedures fall within the reach of the Charter and general principles of EU law.

This study has shown that the EU right to an effective remedy laid down in Article 47 of the Charter and recognised by the Court of Justice as a principle of EU law, may set important limits to the Member States' discretion under the Procedures Directive and potentially provides for additional safeguards. Moreover, this right is an important tool for interpretation of the directive's provisions and may be used to fill in (protection) gaps. The potential impact of the EU right to an effective right of an effective remedy in the field of asylum procedures should therefore not be underestimated.

The EU right to an effective remedy may provide an answer to some of the main deficiencies in the Procedures Directive identified by UNHCR and NGO's. It was concluded in this study that the provisions of the directive read in the light of the EU right to an effective remedy requires that the applicant is allowed to stay on the territory of the Member State during first instance and appeal proceedings. Moreover the applicant must have sufficient time and opportunity to lodge an appeal against the rejection of the asylum claim. The possibilities mentioned in Article 12 PD to derogate from the right to a personal interview, may only be used in exceptional cases.

This study also contended that the EU right to an effective remedy reflected in Article 39 PD contains several 'hidden' guarantees. This right requires a thorough and (at one stage of the procedure) *ex nunc* judicial review which entails as a minimum that the national court or tribunal assesses the claim of a risk of *refoulement* on its merits, carefully examining the facts and evidence underlying the asylum claim. Furthermore the right to adversarial proceedings,

35 Belgische Kamer van Volksvertegenwoordigers, Wetsontwerp tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, No 1825/011, 24 November 2011. The proposal was adopted by the Chamber and the Senate.

which is incorporated by the right to an effective remedy demands that the national court assesses whether the non-disclosure of evidence underlying the asylum decision is justified. Limitations to the right to adversarial proceedings should be compensated, for instance by using non-confidential summaries or special advocates. It was even argued that Article 16 (1) last sentence PD, which allows Member States to withhold relevant information to the national court deciding on the appeal against the asylum decision on national security grounds must be considered *ad variance* with the EU right to effective judicial protection and should therefore be declared void by the Court of Justice.

Not only the Procedures Directive, but also the Qualification Directive may contribute to the procedural protection of asylum applicants. The principle of effectiveness requires that the clear rights for asylum applicants guaranteed by this directive, most importantly the right to an asylum status for those in need of international protection and the prohibition of *refoulement*, are effectively protected. National procedural rules, including evidentiary rules may not render the exercise of those rights impossible or excessively difficult. It was concluded in Chapter 8 that Article 4 QD and the principle of effectiveness set important standards with regard to the standard and burden of proof, the use of presumptions and the assessment of the statements and evidence submitted by the applicant.

11.2.2 Broader protection than the ECHR

The question may be raised whether the Procedures Directive and the fact that asylum procedures are now governed by EU fundamental rights adds anything to the protection regime which had already been developed under the ECHR. In this study the ECtHR's case-law was used as an important source of inspiration for the EU right to an effective remedy and thus indirectly for the interpretation of the Procedures Directive. In fact this study refers to a larger number of judgments of the ECtHR than judgments of the EU Courts.

When approaching this question from a pure legal perspective one may argue that the Procedures Directive provides for broader protection than Articles 3 and 13 ECHR for two reasons. First of all the Procedures Directive covers many procedural issues, such as the right to information, the right to a personal interview, the right to reasoned decision on the asylum claim, the right to (free) legal aid and interpretation services, special guarantees for unaccompanied minors and the right to contact UNHCR, which at the moment of the adoption of the directive had scarcely been addressed by the ECtHR in

its case-law.³⁶ Potentially inspired by the Procedures Directive, the ECtHR's took account of (a lack of) some of these rights in its assessment under Article 13 ECHR in a few recent judgments, such as *M.S.S. v Belgium and Greece* and *I.M. v France*.³⁷

Secondly, it should be remembered that the scope of application of the Procedures Directive and the EU right to an effective remedy is wider than that of Article 13 ECHR. Most importantly the EU right to an effective remedy reflected in Article 39 PD includes the right to a fair trial.³⁸ The right to a fair trial guaranteed by Article 6 ECHR does not apply to asylum procedures. In this study the ECtHR's case-law under Article 6 ECHR was used as a source of inspiration for the EU right to a fair trial. This study shows that notably with regard to the use of secret information and the right to an oral hearing before a court or tribunal the ECtHR's case-law provides for important guidance for the interpretation of the EU right to a fair trial. Moreover the right to an effective remedy guaranteed in Article 39 PD applies to all asylum cases, irrespective of the merits of the case or the procedure in which it was assessed.³⁹ Article 13 ECHR applies only to cases of an arguable claim of *refoulement*. Finally the Procedures Directive and the EU right to an effective remedy apply not only to expulsion decisions which arguably violate the prohibition of *refoulement*, but also to decisions to exclude a person from the right to an asylum status. The ECHR does not include a right to an asylum status. Applicants who are refused an asylum status, but will not be expelled,⁴⁰ cannot appeal to Article 13 ECHR.⁴¹

The Procedures Directive has thus made procedural rights for asylum applicants more visible and provides for broader protection than Articles 3 and 13 ECHR.

36 See for example ECtHR 12 April 2005, *Shamayev and others v Georgia and Russia*, no 36378/02, para 458 and (under Art 5 (1)) ECtHR 5 February 2002, *Čonka v Belgium*, no. 51564/99, para 44.

37 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, ECtHR 2 February 2012, *I.M. v France*, no 9152/09. The ECtHR in these cases referred to the relevant provisions of the Procedures Directive in its description of relevant international and European law or relevant international texts and documents.

38 See section 4.3.2.

39 It applies to manifestly unfounded and inadmissible cases, cases rejected in a standard procedure, an accelerated or border procedure or a preliminary examination (in case of a subsequent asylum procedure).

40 This applies for example to applicants who are refused an asylum status, because there are serious reasons to believe that they committed a serious crime in their country of origin, who face a real risk of persecution upon return. See Art 12 (2) PD.

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

11.2.3 Supervision and practical support for the Member States

The fact that asylum procedures are now governed by EU law has also lead to extra opportunities to supervise the fairness of Member States' asylum procedures. The Commission started infringement procedures against a number of Member States for a failure to implement the Procedures Directive correctly.⁴²

Furthermore the development of CEAS lead to a strengthening of practical cooperation between the Member States in the field of asylum. This cooperation seeks first of all to increase convergence but also envisages to ensure the ongoing quality of Member States' decision-making procedures in that area.⁴³ The most important measure taken in this context was the establishment of the European Asylum Support Office (EASO) in 2010.⁴⁴ The purpose of EASO is 'to facilitate, coordinate and strengthen practical cooperation among Member States on the many aspects of asylum and help to improve the implementation of CEAS'. EASO shall amongst others organise, promote and coordinate activities relating to country of origin information and establish and develop training for officials working in the field of asylum.⁴⁵ Already before the establishment of EASO, common EU Guidelines for the processing of country of origin information⁴⁶ as well as a common European asylum curriculum were developed.⁴⁷

42 The Commission sent a letter of formal notice with regard to the implementation of the Procedures Directive to Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Greece, Ireland, Italy, Lithuania, Malta, Poland, Portugal, Spain and Sweden. In most cases the Commission was satisfied with the information provided by the Member State. The Commission issued a reasoned opinion with regard to Belgium, Cyprus, Ireland, Spain and Sweden. Cases against Belgium and Ireland were referred to the Court of Justice, but were closed before a judgment was rendered. See www.ec.europa.eu/home-affairs/news/infringements/infringements_by_policy_asylum_en.htm (accessed on 19 March 2012).

43 See for example Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum, An Integrated Approach to Protection across the EU, 17 June 2008, COM(2008) 360 final.

44 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11 (Regulation 439/2010).

45 Artt 4 and 6 of Regulation 439/2010.

46 European Union, *Common EU Guidelines for Processing Country of Origin Information (COI)*, April 2008, ARGO project JLS/2005/ARGO/GC/03. These guidelines were developed by a project group, formed by representatives of country of origin information desks from immigration services of several Member States.

47 www.asylum-curriculum.eu/eacweb (accessed on 19 March 2012). The curriculum provides for common vocational training for caseworkers, management officials and policy makers working with asylum matters. The aim of the curriculum is to contribute to the implementation of a Common European Asylum System and to increase the quality of the asylum process in Europe.

EASO must also 'provide effective operational support to Member States subject to particular pressure on their asylum and reception systems'.⁴⁸ Such pressure may be characterised by the sudden arrival of a large number of third-country nationals who may be in need of international protection and may arise from the geographical or demographical situation of the Member State.⁴⁹ EASO may deploy Asylum Support Teams in Member States. These teams shall provide expertise, in particular in relation to interpreting services, information on countries of origin and knowledge of the handling and management of asylum cases.⁵⁰ Asylum Support Teams were sent to Greece and Luxembourg in 2011 and 2012.⁵¹

Finally EASO shall provide 'scientific and technical assistance in regard to the policy and legislation of the Union in all areas having a direct or indirect impact on asylum so that it is in a position to lend its full support to practical cooperation on asylum and to carry out its duties effectively'.⁵²

It may be expected that the European Commission's supervisory role (although of a limited nature), practical cooperation and the support of EASO indeed promote the fairness of the asylum procedures and enhance the quality of asylum decisions.

11.2.4 Subconclusion: the Procedures Directive, an important step forward

It should be concluded that even though the Procedures Directive certainly does not deserve a beauty prize, asylum applicants are better off with than without it. The directive provides for important guarantees for asylum procedures and at the same time activated the EU right to an effective remedy in asylum cases. The previous chapters of this study have shown that the potential impact of the Procedures Directive via the EU right to an effective remedy is more significant than many expected at the time of the adoption of the directive.

11.3 A SET OF EU PROCEDURAL STANDARDS FOR ASYLUM PROCEDURES

The purpose of this study was to derive a set of EU procedural standards for a number of key issues of asylum procedures from EU legislation and the EU

48 Art 2 Regulation 439/2010.

49 Art 8 of Regulation 439/2010.

50 Art 14 of Regulation 439/2010.

51 EASO Work Programme 2012, September 2011 and Operating Plan for the Deployment of Asylum Support Teams to Luxembourg, 26 January 2012, both available at www.ec.europa.eu/home-affairs/policies/asylum/easo_en.htm (accessed 19 March 2012).

52 Art 2 (3) of Regulation 439/2010.

right to an effective remedy and related procedural rights and principles. In Chapters 6 to 10 conclusions were drawn as to the procedural guarantees which should be offered with regard to the right to remain, the right to be heard and evidentiary issues. The main procedural standards should be summarised as follows:

The right to remain on the territory of the Member State during the asylum procedure

- An asylum applicant should be allowed to remain on the territory of the Member State
 - 1 Until the determining authority in first instance has carried out a close and rigorous assessment of the asylum claim.
 - 2 For the time necessary to avail himself of the effective remedy before a court or tribunal in the meaning of Article 39 (1) PD.
 - 3 During the course of the appeal proceedings, until rigorous scrutiny of the claim of a risk of *refoulement* has been performed by the court or tribunal.
- Automatic suspensive effect must be attached by law to either the appeal itself or to a request for interim relief.
- The procedure in which interim relief may be granted by the national court or tribunal on request must comply with important procedural guarantees, such as the rights of the defence, a reasonable burden of proof and a rigorous scrutiny of a claim of a risk of *refoulement*.

The asylum applicant's right to be heard on his asylum motives

- In principle every asylum applicant should be heard in a personal interview. Exceptions to this rule are only allowed in exceptional cases.
- If a personal interview is omitted the asylum applicant should be given sufficient opportunity to substantiate his asylum claim, for example by submitting written statements.
- The determining authorities should investigate whether dependent adults have independent asylum motives which could best be explained in a personal interview.
- Minor asylum applicants should in principle be interviewed if they wish so and if their age and maturity permits. Only if an interview is not considered to be in the best interests of the child should an interview be omitted.
- The conditions, under which interviews are conducted, must allow applicants to present the grounds for their applications in a comprehensive manner.
- The interviewer must ascertain that the applicant is actually able to understand the language chosen for the interview and that he can express himself effectively in this language.
- If the applicant does not understand the language of the interview a competent and qualified interpreter should be provided free of charge. If no

such interpreter is available the determining authority should take this into account when examining the case.

- The interviewer must be competent and properly trained to interview asylum applicants.
- Interviews should be conducted in a gender-sensitive manner.
- Minors should be heard in a child-friendly manner.
- The applicant should be granted the opportunity to comment on the report of the personal interview, particularly if the determining authority intends to reject the asylum application on the basis of the information contained in the report. To that end the applicant should have timely access to the report of the interview,
- Member States should at one stage of the administrative procedure hear the asylum applicant on its main conclusions regarding the fact-finding, credibility assessment and the assessment of the risk of *refoulement* as well as important pieces of evidence on which these conclusions are based.
- An oral hearing should be held before the first instance court or tribunal reviewing the negative decision on the asylum claim, in particular if this court decides on the credibility of the applicant's account and/or where the applicant's personal experiences play an important role.
- The applicant must be able to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them.

The burden and standard of proof and evidentiary assessment

- The standard of proof should not be set too high. It may be expected of the applicant to show that there is a 'reasonable possibility' of future persecution or that there are substantial grounds for believing that he faces a real risk of serious harm.
- The determining authority should In the examination of the asylum claim take into account all relevant indicators of a risk of *refoulement*.
- The burden of proof must shift from the applicant to the determining authority if the applicant adduced evidence capable of proving that there are substantial grounds for believing that there is a risk of *refoulement*. In particular the burden or proof should shift if:
 - 1 The applicant made plausible that he was persecuted or subjected to serious harm in the past
 - 2 The applicant substantiated that there is a risk of *refoulement* by submitting credible statements and/or documents
 - 3 Country of origin information reports show that serious human rights violations occur in the applicant's country of origin
 - 4 The applicant made plausible that he belongs to a group which is at risk
- The applicant should not be expected to prove negative facts
- The duty to produce evidence should be shared between the applicant and the determining authority.

- The determining authority must gather precise and up-to-date country of origin information
- The determining authority should direct that a medical expert report be written if the applicant makes out a *prima facie* case as to the origin of the scars on his body.
- The use of presumptions which are impossible or excessively difficult to rebut is not allowed
- When assessing the credibility of the applicant's asylum account, the determining authority should focus on the core of the asylum account.
- Asylum applicants should be granted the opportunity to explain the alleged deficiencies in the asylum account.
- As soon as the general credibility of the asylum applicant is established, his statements should according to Article 4 (5) QD be accepted as facts, without requiring further evidence.
- All relevant and reliable evidence should be taken into account in the assessment of the asylum claim.
- Expert reports must fulfil the requirements of excellence, independence and transparency.
- Country of origin information reports and medical reports are expert reports, which should be accorded important weight in asylum cases.
- Member States cannot only rely on country of origin information provided by their own Ministries but should also take into account reports issued by reputable human rights organisations, UN agencies and authorities of other States. The weight which should be attached to a country of origin information report depends on the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources.
- The weight which should be accorded to a medical report depends on its quality and conclusiveness.

Judicial review of the establishment and qualification of the facts

- The national court or tribunal which decides on the appeal against the negative asylum decision should review both points of law and points of fact.
- This court or tribunal should 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.
- The national court should at one stage of the asylum procedure, before the expulsion of the applicant, review the asylum decision on the basis of all relevant available facts and evidence. This includes all relevant

evidence which is submitted in a later stage of the asylum procedure (after the first administrative decision on the asylum application).

- Relevant facts or evidence cannot be excluded from the assessment by the national court on the sole ground that they should have been submitted earlier in the procedure.

The use of secret information

- Asylum applicants should in principle have access to documents which are relevant to their case (inculpatory or exculpatory)
- The non-disclosure of evidence underlying the asylum decision should have a *legitimate aim* and it should be strictly necessary.
- The national court deciding on the appeal against the negative asylum decision should review whether non-disclosure of evidence pursues a legitimate aim and is necessary.
- The national court must receive all relevant information underlying the asylum decision, including the evidence which was not disclosed to the person concerned.
- The protection of secret information must be observed in such a way as to reconcile it with the EU right to an effective remedy, the right to be heard and the duty to state reasons. The conflicting interests of the parties concerned must be balanced.
- A negative asylum decision based on documents in which most or most crucial information is not disclosed infringes the right to adversarial proceedings. The right to adversarial proceedings is not violated where the evidence was to a large extent disclosed to the applicant and the open material plays a predominant role in the determination or when the allegations in the open material are sufficiently specific.
- The weight which is attached to the confidential material for the decision should be taken into account when assessing whether the rights of the defence have been infringed in an asylum case.
- The credibility of evidence of anonymous origin must be considered reduced by the fact that the context in which it was drafted is largely unknown and because the determining authority's assertions in that regard cannot be verified.
- Special techniques may be used in order to compensate the use of secret information, such as the use of special counsels, non confidential summaries or a list of all the documents in the file. Anonymous witnesses may be questioned by an investigative judge.
- A special counsel who could test the non-disclosed evidence and put arguments on behalf of the asylum applicant during closed hearings could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing. The applicant must be provided with sufficiently specific information about the allegations against him in order to give effective instructions to this special counsel.

- The information disclosed in non-confidential summaries should be sufficiently precise in order to put the applicant in the position to determine whether the deleted information is likely to be relevant for his case and to express his view on it.

11.4 ENFORCING THE EU RIGHT TO AN EFFECTIVE REMEDY IN PRACTICE

This study addressed procedural aspects of asylum procedures which have so far not been decided by the Court of Justice. The conclusions drawn in this study thus need confirmation, first by the national courts of the Member States and ultimately by the Court of Justice. It is foremost up to the national courts to interpret the Procedures Directive in the light of the EU right to an effective remedy and to test the legality of the directive against this right. Whether the questions raised in this study will ever be put before the Court of Justice depends to a large extent on the national courts.⁵³ In this respect the lawyers who are assisting asylum applicants in the EU Member States also play an important role. These lawyers may prompt the national courts to apply the Procedures Directive and the EU right to an effective remedy and urge them to refer questions for preliminary rulings to the Court of Justice.

Reliance on and application of the EU right to an effective remedy is not easy. This study shows that the EU Courts' case-law concerning procedural rights with regard to all fields of EU law is relevant also in the context of asylum procedures. Solid general knowledge of EU law is therefore required in order to be able to interpret this case-law and apply it to asylum procedures. Furthermore it is difficult to disclose relevant case-law concerning the right to an effective remedy and related procedural rights because of the fact that this case-law concerns all fields of EU law as well as the fact that the EU Courts have used various terms for the same procedural rights. Hopefully this study will assist asylum lawyers and national courts to discover the potential of EU (asylum) law and to apply this right in an individual case.

The number of preliminary rulings regarding asylum issues which have been referred to the Court of Justice so far is still limited. Only one judgment regarding the interpretation of the Procedures Directive was rendered by the Court of Justice in the *Samba Diouf* case.⁵⁴ Furthermore a few preliminary rulings which (partly) concern the interpretation of the Procedures Directive were pending before the Court at the moment this study was concluded.⁵⁵

⁵³ The crucial role of the national courts in guaranteeing EU fundamental rights was already stressed in sections 2.5.2 and 2.5.3 of this study.

⁵⁴ Case C-69/10, *Samba Diouf* [2011].

⁵⁵ See notably Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland* concerning the right to be heard in asylum cases and Case C-175/11, which concerns the question whether a Member State is precluded from adopting administrative measures which require that a class of asylum applications defined on the basis of the nationality

The chance that all or even a significant part of the issues discussed in this study will be decided by the Court of Justice in the coming years is thus rather slim.

11.4.1 Incorporating case-law in EU legislation: the recast of the Procedures Directive

A much faster and more effective way to enforce compliance with the EU right to an effective remedy in asylum cases is by incorporating the Court of Justice's and ECtHR's case-law concerning this right in EU legislation. This makes the implications of the right to an effective remedy much more visible and better enforceable.

The Commission recognised that 'in the area of procedural asylum legislation only legislative measures may ensure systemic and durable impacts on the quality and efficiency of examination procedures'.⁵⁶ In the context of the second phase of the Common European Asylum System the Commission issued recast proposals for the Procedures Directive in 2009 and 2011. In these proposals the Commission indeed dedicated itself to raising the level of procedural protection for asylum applicants. It is interesting to note that both the initial and the amended proposal for the recast of the procedures Directive are, according to the Commission 'informed by developing case-law of the Court of Justice of the European Union and the European Court of Human Rights, especially concerning the right to an effective remedy'.⁵⁷ It may therefore be expected that the provisions of the proposals for the recast of the Procedures Directive indeed reflect the conclusions drawn in this study as to the requirements following from the EU right to an effective remedy. Sections 11.5.3-11.5.7 below will test this hypothesis. For this purpose use was made of the amended proposal in the version discussed by the Council in the end of January 2012, which contained the complete text of the proposal.⁵⁸ Furthermore it is examined whether the recast of the Qualification Directive which was adopted in December 2011, incorporates the Court of Justice's and the ECtHR's case-law with regard to the burden and standard of proof and evidentiary assessment.

or country of origin of the asylum applicant be examined and determined according to an accelerated or prioritised procedure and the interpretation of the term court or tribunal in the meaning of Art 39 PD.

56 Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, summary of the impact assessment, COM(2009) 554, SEC(2009) 1377, of 21 October 2009, p 3.

57 P 4 of the amended proposal. See also p 6 of the Initial proposal.

58 Council of the European Union, document 5514/12, 31 January 2012, Asile 11, CODEC 143 (Council document 5514/12).

First of all however sections 11.5.1 and 11.5.2 will briefly discuss the second phase of CEAS and the recast proposals for the Procedures Directive and the new Qualification Directive in general.

11.5 THE RECASTS OF THE PROCEDURES DIRECTIVE AND QUALIFICATION DIRECTIVE PUT TO THE TEST

The European Council in the The Hague Programme of 2004⁵⁹ and the Stockholm Programme of 2009⁶⁰ committed itself to establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection. The deadline for the completion of the second phase of CEAS was initially 2010 and was later changed to 2012.⁶¹

According to the Stockholm Programme CEAS should be based on high protection standards. At the same time it must give due regard to fair and effective procedures capable of preventing abuse. The second phase of CEAS also seeks to achieve a higher level of harmonisation. The European Council stated that it is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards amongst others procedural arrangements and status determination. 'The objective should be that similar cases should be treated alike and result in the same outcome.'⁶²

In order to realise the second phase of CEAS the Commission issued proposals for recasts of the asylum directives and regulations. The recast proposals of the Procedures Directive⁶³ and the Qualification Directive were introduced by the Commission in 2009. An amended recast proposal for the Procedures Directive was issued in June 2011.⁶⁴ In March 2012 when this study was

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

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

61 See also Council of the European Union, Council Conclusions on Borders, Migration and Asylum, Stocktaking and the way forward, 3096th Justice and Home Affairs Council meeting Luxembourg, 9 and 10 June 2011, p 4.

62 Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizen [2010], OJ C 115/1, para 6.2.

63 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554 (the initial proposal).

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

finalised, the recast of the Qualification Directive had been adopted. The amended recast proposal for the Procedures was still being negotiated.⁶⁵

11.5.1 The proposals for a recast of the Procedures Directive

The main objective of the initial proposal for a recast of the Procedures Directive was to 'ensure higher and more coherent standards on procedures for granting and withdrawing international protection that would guarantee an adequate examination of the protection needs of third country nationals or stateless persons in line with international and Community obligations of Member States.'⁶⁶ Furthermore the proposal aimed at simplifying and consolidating procedural notions and devices and improving coherence between asylum instruments.⁶⁷ The proposal introduced a single asylum procedure with the same minimum guarantees for refugee and subsidiary protection claims. It contained detailed standards with respect to, for instance, the training of the personnel examining applications and taking decisions on international protection, the use of medico-legal reports and the examination of applications of persons with special needs. It also deleted many of the possibilities included in the current directive to derogate from procedural guarantees, such as the right to a personal interview and the right to free legal aid. Furthermore the proposal limited the number of situations in which the asylum proceedings could be accelerated. Finally it provided for a right to an effective remedy with automatic suspensive effect, which provides for a full and *ex nunc* examination of both facts and points of law.

65 Also the recast proposals for the Dublin Regulation and Reception Conditions Directive had not yet been adopted. See Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), 3 December 2008, COM(2008) 820 final, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), 3 December 2008, COM(2008) 815 final and Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), 1 June 2011, COM(2011) 320 final.

66 P 4 of the initial proposal.

67 P 5 of the initial proposal.

The proposal was welcomed by UNHCR⁶⁸ and was generally supported by the European Parliament.⁶⁹ However, the discussions in the Council were difficult and the Council was unable to reach a position. In order to boost the work to achieve a Common European Asylum System the Commission issued an amended recast proposal in June 2011.⁷⁰ The amended proposal aims to address the concerns of the Member States by recognising the need for flexibility, cost-effectiveness, simplification of rules and the prevention of abuse. The Commission made changes in the amended proposal to ensure that the proposal was 'more compatible with the variety of legal systems and other arrangements in different Member States'.⁷¹ This necessarily resulted in a lower level of harmonisation than that envisaged by the initial proposal. Provisions were inserted in the amended proposal in order to enable Member States to deal with a large number of simultaneous asylum claims.⁷² In order to prevent abuse of the asylum system, the amended proposal reintroduced amongst others two grounds for applying an accelerated procedure.^{73,74} Moreover some of the procedural guarantees introduced in the initial proposal were weakened.⁷⁵

Denmark does not take part in the in the adoption of the recast of the Procedures Directive and is not bound by it or subject to its application. The United Kingdom and Ireland will not be bound by the recast of the directive

68 UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), UNHCR, Bureau for Europe, August 2010.

69 European Parliament legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) (COM(2009)0554 – C7-0248/2009 – 2009/0165(COD)).

70 P 1 of the amended proposal.

71 P 5 of the amended proposal. See for an overview of the changes the annex to the amended proposal: Detailed Explanation of the Amended Proposal *Accompanying the document* Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast).

72 See for example Art 6 (4) allowing an extension of the time-limit within which an asylum application must be registered and Art 14 allowing the temporary involvement of personnel of another authority than the determining authority in conducting interviews in the situation of a large influx.

73 Art 31 (6) (e) and (g) which reintroduce the possibility to accelerate the proceedings if the applicant has made inconsistent, contradictory, clearly false or obviously improbable or insufficient representations and in cases of a threat to national security or public order.

74 P 5 of the amended proposal.

75 The proposal for example does no longer include a right to free legal assistance in first instance proceedings, but only the right to free legal and procedural information (Art 20 of the amended proposal). It also states that the Member States should make 'a thorough report containing all substantial elements' instead of a 'transcript' of the personal interview (Art 17).

and continue to be bound by the current Procedures Directive as long as they have not notified their wish to accept this new measure.⁷⁶

11.5.2 The recast of the Qualification Directive

In December 2011 a recast of the Qualification Directive was adopted.⁷⁷ The directive should be implemented in the Member States by 21 December 2013.⁷⁸ On this date the current Qualification Directive (2004/83/EC) will be repealed.⁷⁹ The United Kingdom, Ireland and Denmark do not take part in this directive.⁸⁰

The new directive contains a number of changes in comparison with Directive 2004/83/EC. It pays more attention to gender issues and children's rights.⁸¹ Moreover it contains more safeguards with regard to the application of the internal flight alternative,⁸² requires effective and durable protection against persecution or serious harm in the country of origin⁸³ and it has brought several provisions of the directive more in line with the Refugee Convention.⁸⁴ Furthermore persons eligible for subsidiary protection are now granted the same secondary rights as persons who are recognised as refugees according to the Qualification directive.⁸⁵ As will be explained below in section 11.4.5, the recast does not contain any major changes with regard to the burden and standard of proof and evidentiary assessment.⁸⁶

11.5.3 The right to remain on the territory of the Member State

With regard to the right to remain on the territory of the Member State during the asylum procedure the amended proposal contains some improvements. Most importantly Article 46 (5) provides that in principle:

⁷⁶ Recitals 45 and 46 Preamble of the amended proposal.

⁷⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

⁷⁸ Art 39 Directive 2011/95/EU.

⁷⁹ Art 40 Directive 2011/95/EU.

⁸⁰ Note that the United Kingdom and Ireland are bound to Directive 2004/83/EC.

⁸¹ See Artt 9 (2) (f) and 10 (1) (d) as regards gender issues and Recitals 18, 19, 28, 38 Preamble and Art 2 (j), 9 (2) (f), 31 Directive 2011/95/EU.

⁸² Art 8 Directive 2011/95/EU.

⁸³ Art 7 (2) Directive 2011/95/EU.

⁸⁴ Artt 9 (3) and 11 (3) Directive 2011/95/EU.

⁸⁵ Art 20 (2) Directive 2011/95/EU.

⁸⁶ Art 8 Directive 2011/95/EU concerning internal protection newly refers to Art 4 of the directive. Art 4 QD remained unchanged.

Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired or, when this right has been exercised within the time limit, pending the outcome of the remedy.

This provision guarantees that asylum applicants be granted the opportunity to lodge an appeal against the negative asylum decision. Furthermore they are effectively protected against *refoulement* until the decision by the court or tribunal.

However, the proposal allows that Member States make an exception to the rule that applicants are allowed (by law) to remain on the territory of the Member State during the appeal proceedings⁸⁷ in a large number of cases.⁸⁸ It concerns cases rejected in an accelerated procedure,⁸⁹ cases considered manifestly unfounded⁹⁰ or declared inadmissible on the ground that another Member State has granted refugee status,⁹¹ cases which were discontinued and of which reopening is rejected⁹² or cases in which the European safe third country concept was applied.⁹³ If the appeal has no automatic suspensive effect a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or acting on its own motion. The applicant should be allowed to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory.⁹⁴ Accordingly the amended proposal demands that the appeal itself or (in a limited number of situations) the request for interim relief have automatic suspensive effect. The amended proposal thus complies with the requirement of a remedy with automatic suspensive effect, which follows from the EU right to an effective remedy as well as the ECtHR's case-law.

The right to remain during first instance proceedings

The amended proposal also contains some positive changes with regard to the right to remain on the territory during first instance asylum proceedings. Exceptions to this right are allowed where a person makes a further (third) asylum application after a final decision to consider a previous subsequent application inadmissible or after a final decision to reject that application as

87 The proposal does not seem to allow exceptions to the rule that applicants should be allowed to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired.

88 This exception does not apply to applications rejected in a border procedure. See Art 46 (6) of the amended proposal.

89 See Art 31 (6) of Council document 5514/12.

90 Art 32 (2) of Council document 5514/12.

91 Art 33 (2) (a) of Council document 5514/12.

92 Art 28 of Council document 5514/12.

93 Art 39 of Council document 5514/12.

94 Art 46 (7) of Council document 5514/12.

unfounded.⁹⁵ In the current directive the right to remain does not apply where a subsequent asylum application is not further examined according to Articles 32-34 PD.

The amended proposal still allows Member States to derogate from the right to remain where it will surrender or extradite a person to another Member State, to a third country or to international criminal courts or tribunals. The amended proposal newly clarifies that expulsion or extradition to the *country of origin* of the applicant during first instance asylum proceedings is not allowed.⁹⁶ Another amelioration is that the amended proposal explicitly provides with regard to both third and following asylum applications as well as extraditions to a third country that expulsion or extradition during the asylum proceedings is only allowed if the determining authority is satisfied that this will not lead to direct or indirect *refoulement*.⁹⁷

However as was argued in section 6.2 and is now also recognised in Article 46 of the amended proposal, it follows from the EU right to an effective remedy that a person cannot be expelled or extradited unless he has had reasonable time and opportunity to appeal against the expulsion or extradition before a court or tribunal. Further this appeal should automatically suspend the expulsion or extradition. Therefore the exceptions to the right to remain during first instance proceedings should not be used and could better be deleted.

11.5.4 The asylum applicant's right to be heard on his asylum motives

Also with regard to the right to a personal interview the amended proposal contains several important improvements. The proposal reduces the Member States' discretion to hold a personal interview and allows the omission of an interview only in two situations. The first is that the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available.⁹⁸ This implies that the determining authority should conduct a personal interview if it intends to refuse a refugee status and grant a subsidiary protection status. Secondly a personal interview may be omitted if the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control. When in doubt, the determining authority must consult a medical expert to establish whether the condition that makes the applicant unfit or unable to be interviewed is temporary or of long-term nature. If the determining authority decides to omit the interview on this ground, it shall make

⁹⁵ Art 9 (1) of Council document 5514/12.

⁹⁶ Art 9 (2) of Council document 5514/12.

⁹⁷ Artt 9 (3) and 41 of Council document 5514/12.

⁹⁸ Art 14 (2) (a) of Council document 5514/12.

reasonable efforts to allow the applicant to submit further information.⁹⁹ Furthermore the amended proposal requires Member States to give the opportunity of a personal interview to dependent adults.

The proposal still leaves the Member States discretion to determine in national legislation the cases in which an (un)accompanied minor shall be given the opportunity of a personal interview. As was argued in section 7.1.2 this discretion is limited by Article 24 of the Charter. It follows from this provision that a minor should in principle be given the opportunity to explain its asylum motives in a personal interview, if the age and maturity of the child permits.

Requirements as to the conduct of the interview

The proposal newly requires the determining authority, when conducting a personal interview on the substance of an application for international protection, to ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 QD as completely as possible.¹⁰⁰ The proposal also contains extra guarantees in order to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. First of all it provides that the communication shall take place in the language preferred by the applicant, unless there is another language which he/she understands (in stead of 'is reasonably supposed to understand') and in which he/she is able to communicate *clearly*.¹⁰¹

Secondly the proposal states that interviews should normally be conducted by the personnel of the determining authority.¹⁰² This personnel should receive proper training, which includes amongst others initial and follow-up training concerning international human rights and the EU asylum *acquis*, issues related to the handling of asylum applications from minors and vulnerable persons with specific needs and interview techniques.¹⁰³ Furthermore interviewers shall receive basic training with regard to the awareness of consequences of torture and of medical problems which could adversely affect the applicants' ability to be interviewed.¹⁰⁴ Only in the situation of a large influx of asylum applicants may the personnel of another authority than the determining authority be temporarily involved in conducting interviews. Also

⁹⁹ Art 14 (2) (b) of Council document 5514/12.

¹⁰⁰ Art 16 of Council document 5514/12.

¹⁰¹ Art 15 (3) (c) of Council document 5514/12. The current directive requires that the interview take place in a language which the applicant is reasonably be supposed to understand and in which he/she is able to communicate.

¹⁰² Art 14 (1) of Council document 5514/12.

¹⁰³ Art 4 (3) of Council document 5514/12 jo Art 6 (4) of Regulation 439/2010.

¹⁰⁴ Art 4 (3)

this personnel must receive proper training before they start interviewing.¹⁰⁵ The person who conducts the interview must be competent (in stead of sufficiently competent) to take account of the relevant personal *and* general circumstances surrounding the application.¹⁰⁶

Thirdly the proposal pays more attention to the gender sensitivity of the interview. It requires that the interviewer be competent to take account of the applicant's gender, sexual orientation and gender identity.¹⁰⁷ It also states that wherever possible, Member States should provide for an interviewer and an interpreter of the same sex if the applicant concerned so requests, unless the request is based on discriminatory grounds.¹⁰⁸ Finally the proposal explicitly requires that interviews which (un)accompanied children should be conducted in a child appropriate manner.¹⁰⁹

The introduction of these extra guarantees help to ensure that the asylum applicant is able to bring his asylum motives to the fore.

The asylum applicant's right to be heard following the personal interview

According to the proposal Member States shall ensure that a thorough report containing all substantial elements is made of every personal interview.¹¹⁰ Member States may provide for audio or audio-visual recording of the personal interview. If they do so they must annex the recording of the personal interview to the report.¹¹¹

In line with the EU right to be heard the amended proposal provides the applicant with an opportunity to comment on the report of the interview:

Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarifications with regard to any mistranslations or misconceptions appearing in the report, at the end of the personal interview or within a specified time limit before the determining authority takes a decision.¹¹²

The amended proposal also guarantees that, in order to make use of this opportunity to make comments and clarifications, the applicant is fully informed of the content of the report, with the assistance of an interpreter if necessary. This does not necessarily mean however that the applicant has access to the report and the recording of the interview before the decision on the asylum application is taken. The directive allows that access to the report

105 Art 14 (1) of Council document 5514/12. This provision refers to Art 6(4)(a) to (e) of Regulation (EU) No 439/2010 and in Article 18(5) of Council document 5514/12.

106 Art 15 (3) (a) of Council document 5514/12.

107 Art 15 (3) (a) of Council document 5514/12.

108 Art 15 (3) (b) and (c) of Council document 5514/12.

109 Art 15 (3) (e) of Council document 5514/12.

110 Art 17 (1) of Council document 5514/12.

111 Art 17 (2) of Council document 5514/12.

112 Art 17 (3) of Council document 5514/12.

be granted at the same time as the decision is made, if the application is determined in the framework of an accelerated procedure.¹¹³ This limitation of access to the report of the interview may lead to infringements of the EU right to be heard. This right is only complied with if the information provided to the applicant is sufficiently detailed to put him in the position to comment effectively on the content of the report.

Member States shall request the acknowledgement the applicant on the content of the report, unless the interview is recorded and the recording is admissible as evidence in appeal proceedings. Where an applicant refuses to acknowledge the content of the report, the reasons for this refusal shall be entered into the applicant's file.¹¹⁴

The amended proposal does not provide for a right to be heard on the determining authority's conclusions regarding the fact-finding and the risk assessment. It does state that during the personal interview the applicant must be offered the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in his/her statements.¹¹⁵ This provision reflects the EU right to be heard. It is however questionable whether it is sufficient to enable the applicant to respond effectively to the determining authority's conclusions as to the credibility of the asylum account, the assessment of the evidence and the existence of a risk of *refoulement* upon return.

The right to a hearing before a court or tribunal

The amended proposal does not contain a right to an oral hearing before the court or tribunal hearing the appeal against the negative asylum decision. It was concluded however in section 7.4. that the right to an effective remedy, read in the light of Article 47 of the Charter, generally requires an oral hearing before the (first instance) court or tribunal hearing the appeal against the rejection of the asylum claim. This is particularly the case if the court is asked to review findings of facts. It should be noted in this regard that, according to the amended proposal, the appeal against the rejection of the asylum claim must provide for a full examination of the facts.¹¹⁶

11.5.5 The burden and standard of proof and evidentiary assessment

Article 4 QD regarding the assessment of facts and circumstances has remained unchanged. Therefore the conclusions regarding the burden and standard of proof as well as evidentiary assessment drawn in Chapter 8 remain relevant.

¹¹³ Art 17 (5) of Council document 5514/12.

¹¹⁴ Art 17 (4) of Council document 5514/12.

¹¹⁵ Art 16 of Council document 5514/12.

¹¹⁶ Art 46 (3) of Council document 5514/12.

The amended proposal for a recast of the Procedures Directive contains some relevant new provisions, in particular with regard to the use of expert reports, including country of origin information and medical reports. The amended proposal provides that the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues. Furthermore it requires that country of origin information be obtained from the European Asylum Support Office.¹¹⁷

The amended proposal in line with the conclusions drawn in section 8.6.3, recognises the importance of medical reports for the substantiation of past torture or ill-treatment.¹¹⁸ It provides:

Member States shall subject to the applicant's consent, arrange for a medical examination of him/her concerning signs that might result from past persecution or serious harm where the determining authority deems this to be relevant for an assessment of the applicant's request for international protection in accordance with Article 4 of [the Qualification Directive].¹¹⁹

The examination shall be paid for by the Member State and must be carried out by qualified medical professionals. In this context the proposal acknowledges the authority of the Istanbul Protocol. It states that national measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or mental violence, including acts of sexual violence, in asylum procedures should *inter alia* be based on this protocol.¹²⁰

Member States shall also, on the request of the applicant, permit a medical examination to be arranged by the applicant at his own costs. Member States may prescribe a reasonable deadline from the time the permission is given within which the results of the medical examination shall be submitted to the determining authority.¹²¹ The results of the medical examination shall be

117 See Regulation (EU) No 439/2010. 'The Support Office should be a European centre of expertise on asylum, responsible for facilitating, coordinating and strengthening practical cooperation among Member States on the many aspects of asylum, so that Member States are better able to provide international protection to those entitled, while dealing fairly and efficiently with those who do not qualify for international protection, where appropriate.' See recital 13 Preamble.

118 The Commission argued in the context of Art 18 of the amended proposal 'that the Qualification Directive already provides that facts relevant for the assessment of the application for international protection need to be taken into account and that a medical examination can be such a fact amongst others'.

119 Art 18 (1) of Council document 5514/12.

120 Recital 24 Preamble of Council document 5514/12.

121 Art 18 (2) of Council document 5514/12.

assessed by the determining authority along with other elements of the application.¹²²

Sections 8.3.2 and 8.6.3 addressed the relevance of medical reports in asylum cases and argued that the Member State is obliged to direct that an expert medical report be obtained if the applicant submitted a medical certificate which makes out a *prima facie* case as to the origin of the scars on his body.

11.5.6 Judicial review of the establishment and qualification of the facts

In Chapter 9 it was concluded on the basis of the case-law of the Court of Justice as well as the ECtHR that the court or tribunal in the meaning of Article 39 PD should (at one stage of the procedure) provide for an *ex nunc* review of both points of fact and law. Furthermore it was argued that Article 39 PD requires a thorough judicial review. This implies that the national court or tribunal should as a minimum assess the claim of a risk of *refoulement* on its merits and must carefully examine the facts and evidence underlying the asylum claim. Article 46 (3) of the amended proposal is in conformity with these conclusions. It states that the effective remedy provides for 'a full examination of both facts and points of law, including an *ex nunc* examination of the international protection needs', at least in appeal procedures before a court or tribunal of first instance. The terms 'full examination' and '*ex nunc* examination' still need interpretation. In this light the case-law discussed in Chapter 9 and the conclusions drawn from this case-law are relevant.

11.5.7 The use of secret information in asylum cases

Chapter 10 of this study contended that Article 16 (1) last sentence PD which allows Member States to withhold relevant information to the national court deciding on the appeal against the asylum decision on national security grounds should be considered void. In the amended proposal this sentence has been deleted. As a result all information relevant to the asylum decision should at least be disclosed to the court or tribunal reviewing the rejection of the asylum claim.¹²³ However the directive fails to require that the court or tribunal reviewing the asylum decision decide whether the non-disclosure of the evidence concerned is justified. Such requirement should be read into the EU right to an effective remedy reflected in Article 46 of the amended proposal.¹²⁴

¹²² Art 18 (3) of Council document 5514/12.

¹²³ Art 23 (1) (a) of Council document 5514/12.

¹²⁴ See section 10.4.

The proposal also provides for other extra procedural guarantees in cases where disclosure of information or sources would jeopardise national security or other interests of the State. The amended proposal states that Member States should establish in national law procedures guaranteeing that the applicant's rights of defence are respected. The proposal explicitly mentions the option of disclosing the secret information to a special counsel.¹²⁵ The conclusions drawn in Chapter 10 as to the procedural guarantees which should be put in place in cases in which secret information is used are relevant for the interpretation of this provision.

11.5.8 Subconclusion: the recasts put to the test

The amended proposal for a recast of the Procedures Directive does indeed (partly) reflect the evolving case-law of the Court of Justice and the ECtHR concerning the right to an effective remedy as the Commission claimed. The proposal contains higher procedural standards with regard to several important procedural issues discussed in this study. Notably it grants a right to remain on the territory of the Member State until the time limit for lodging an appeal against the asylum decision has expired as well as a right to a remedy with automatic suspensive effect. Moreover it extends the right to a personal interview and provides important guarantees with regard to the circumstances of the interview. Finally it ensures a full and *ex nunc* judicial review of the negative asylum decision and abolishes the possibility to withhold relevant information to the court or tribunal reviewing the asylum decision.

This does not mean however that an appeal to the EU right to an effective remedy will become unnecessary in future asylum cases. To the contrary. Many of the procedural standards mentioned above are phrased in general terms and still need interpretation. For this purpose the EU right to an effective remedy should remain an important tool. Furthermore it remains to be seen whether the improvements proposed by the Commission will survive the negotiations in the Council. If this is not the case, the procedural safeguards concerned may be enforced by invoking the EU right to an effective remedy before the national courts.

Finally the amended proposal for a recast of the Procedures Directive fails to address some of the shortcomings of the current Procedures Directive found in this study. The proposal for instance does not reduce Member States' discretion to determine the cases in which an (un)accompanied minor shall be given the opportunity of a personal interview. It also lacks a requirement for the national court to review whether it is justified to refuse the disclosure of information relevant to the asylum decision. Moreover the recast of the

125 Art 23 (1) (b) of Council document 5514/12.

Qualification Directive fails to clarify important evidentiary issues, such as the burden and standard of proof. Article 4 (5) concerning the benefit of the doubt has remained unchanged.

11.6 TOWARDS FAIR ASYLUM PROCEDURES IN EUROPE

It does not seem to be realistic to expect that a common and fair European asylum procedure will be established in the near future. Nevertheless EU law should be taken seriously by determining authorities, national courts and lawyers representing asylum applicants. The Procedures Directive and the EU right to an effective remedy have the potential to raise the level of protection offered by the asylum procedures of the Member States and at the same time to harmonise those procedures to a certain extent. It may turn out that EU law sets different or higher standards for asylum procedures than the ECHR and the ECtHR's case-law. A one-sided focus on the ECHR is therefore no longer justified. It is now time for professionals working in the field of asylum to bring the Procedures Directive and the EU right to an effective remedy into action. This study may serve as a source of inspiration for this purpose.