

# Of Legislative Waves and Case law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy

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## Abstract

*This article explores the multifaceted relationship between the principle of effective judicial protection, the fundamental right to an effective remedy, and secondary EU procedural rules in asylum. Proceduralisation has been an explicit goal of the EU asylum policy since its inception. It has materialised in three legislative waves. The first resulted in the creation of a basic set of procedural guarantees, alongside a plethora of exceptional procedures. The second resulted in modest improvements in terms of harmonisation, and adherence to fundamental rights, but saw exceptional procedural arrangements either retained or introduced. The third, forthcoming wave, aims at further harmonisation that risks, however, being heavily focused on the underlying goal of externalising protection to third countries. Case law of the Court of Justice of the European Union has further refined procedural guarantees shaping national procedural autonomy. Drawing from the Charter rights to good administration and to an effective remedy, the Court has not shied away from adding additional procedural requirements. It has also clarified how the principle of effective judicial protection and the Charter right to an effective remedy relate to each other, finding that the latter reaffirms the principle of effective judicial protection and largely aligning their scope. The emerging procedural landscape is increasingly complex. The Court's nuanced assessments combined with a plethora of exceptional arrangements at national level led to convoluted standards that are increasingly difficult to put in practice.*

## I. Introduction

This article explores the multifaceted relationship between the principle of effective judicial protection, the fundamental right to an effective remedy, and secondary EU procedural rules in asylum. Namely, I ascertain to

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what extent the principle of effective judicial protection and the fundamental right to an effective remedy enhance the procedural position of asylum seekers vis-à-vis the protection offered by secondary law, safeguarding their enjoyment of rights foreseen under the EU asylum *acquis*.

Proceduralisation in asylum, i.e. harmonisation of asylum procedures at a national level, including provisions on the right to an effective remedy and related guarantees, has been an explicit goal of the EU asylum policy since its inception. Several provisions in the EU asylum *acquis* influence the conditions for asylum seekers and refugees to gain access to national courts. This significant development is one of the main advances of the Common European Asylum System (CEAS) since international refugee law lacks both an international judicial instance, and a global level monitoring mechanism with a possibility to deliver opinions in individual cases. The creation of a CEAS carried within it the potential for the Court of Justice of the European Union (CJEU) to shape EU asylum, and by extension international refugee law, as well as to enforce refugees' rights. Strict procedural rules on direct access somewhat circumscribe the CJEU's potential to become an 'asylum Court'. Nevertheless, provisions in the EU asylum *acquis* influence the conditions for asylum seekers and refugees to gain access to national courts and to enforce their rights. The CJEU then comes again into the picture indirectly, influencing national practice through its role as an authoritative interpreter of the EU asylum *acquis*.

I conduct my analysis in two steps. First, I critically assess the level of procedural protection that EU secondary asylum law offers. To that end, I focus on the three waves of EU legislative harmonisation (section 2).<sup>1</sup> Two legislative waves have already taken place, in 2005 and 2013 respectively,<sup>2</sup> while the third legislative wave is forthcoming.<sup>3</sup> Rather than an exhaustive analysis of the instruments point by point, I pay specific attention to the issues of standing, availability of free legal aid, scope of review, and right to an effective remedy that I identify as seminal procedural guarantees. However, I also comment on the quality and implications of these instruments more broadly. As a second analytical step, I explore the impact of the principle of effective judicial protection

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<sup>1</sup> This section partially draws from the following working paper I previously authored: E. Tsourdi, 'Enforcing refugee rights under EU procedural law: the role of collective actors and UNHCR' in E. Muir, C. Kilpatrick, J. Miller and B. de Witte (eds), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum*, EUI Working Papers Law 2017/7 (EUI 2017) 99-112.

<sup>2</sup> Respectively, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13 (hereafter: 2005 Procedures Directive) and Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection (recast) [2013] OJ L180/60 (hereafter: 2013 Procedures Directive).

<sup>3</sup> See Commission, 'Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' COM (2016) 467 final (hereafter: 2016 APR proposal).

and the fundamental right to an effective remedy under EU law (i.e. the EU Charter on Fundamental Rights) on asylum seekers' procedural rights. In order to achieve this, I analyse seminal case law of the CJEU in this area, dividing it into three conceptual categories (section 3). The first category focuses on the sole case that can provide unique insight into the ways that applicants' procedural rights would have been ensured in the absence of procedural harmonisation through secondary law.<sup>4</sup> This is possible through a particularity that existed in the 2005 Asylum Procedures Directive and which is explained in detail below. The second category centres on case law based on the minimum standards legislation, i.e. the 2005 Asylum Procedures Directive. The analysis takes into account all three CJEU cases that relate to the principle of effective judicial protection and the right to an effective remedy as established by the 2005 version of the directive.<sup>5</sup> The third category concentrates on the common standards legislation case law, i.e. case law based on the 2013 Asylum Procedures Directive. Rather than an exhaustive analysis of all relative case law though, I illustrate trends in this area by focusing on two cases that deal with the issue of the type of decision that the second jurisdictional instance can adopt.<sup>6</sup> These trends can nevertheless be confirmed through the rest of the CJEU asylum procedural case law on the 2013 legal instrument. My analysis results in an assessment on whether the principle of effective judicial protection and the fundamental right to an effective remedy, as interpreted by the CJEU, enhance the procedural position of asylum seekers vis-à-vis the protection offered by secondary law (section 4-conclusion).

## 2. Proceduralisation in the EU asylum policy: three legislative waves

One of the distinct features of the EU's harmonisation project on asylum was that it also included harmonisation of national procedural rules. This is an ambitious aspect of the EU asylum policy, given that the 1951 Refugee Convention does not include relevant norms,<sup>7</sup> and no harmonisation of national

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<sup>4</sup> Case C-277/11 *MM v Minister for Justice, Equality and Law Reform* EU:C:2012:744.

<sup>5</sup> Namely, Case C-69/10 *Brahim Samba Diouf v Ministre du Travail* EU:C:2011:524; Case C-175/11 *H. I. D. and B. A. v Refugee Applications Commissioner and Others* EU:C:2013:45 and Case C-239/14 *Abdoulaye Amaidou Tall v Centre public d'action sociale de Huy (CPAS de Huy)* EU:C:2015:824.

<sup>6</sup> Case C-585/16 *Alheto* EU:C:2018:584, para 114, and Case C-556/17 *Torubarov* EU:C:2019:626, para 55.

<sup>7</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), as amended by the 1967 Protocol Relating to the Status of Refugees, 31 January 1967, entered into force 4 October 1967, 606 UNTS 267 (hereafter: 1951 Refugee Convention).

administrative procedures more broadly exists to date.<sup>8</sup> The complexity of the matter, combined with the wish of Member States to see their own national administrative traditions reflected in the relevant EU legislation, led in practice to a cumbersome adoption procedure, and the establishment of highly differentiated standards.

Nevertheless, proceduralisation in the EU asylum policy was not ‘incidental’,<sup>9</sup> but rather an explicit goal of the EU asylum policy under the EU Treaties since its inception. Namely, the initial legal basis for the EU asylum policy included, as part of the substantive measures to be adopted: ‘*minimum standards on procedures in Member States for granting or withdrawing refugee status*’.<sup>10</sup> Minimum harmonisation must not be taken as a term necessarily pointing to a low level of harmonisation. As the CJEU has stated in a different area where minimum harmonisation was foreseen, namely the working time Directive:

that provision does not limit Community action to the lowest common denominator, or even to the lowest level of protection established by the various Member States, but means that Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be.<sup>11</sup>

As a result of this first harmonisation round, Member States adopted the 2005 version of the Asylum Procedures Directive.<sup>12</sup> As where minimum harmonisation was envisaged under the Treaty of Amsterdam, the instruments allowed Member States to adopt more favourable standards.<sup>13</sup> For clarity, the expression ‘more favourable’ refers to standards being more favourable for protection seekers. If they were more favourable for the Member States, i.e. by providing them with the possibility to be more restrictive where no discretion was foreseen in the directives, the standards in question would go against the *effet utile* of the instruments, which was to harmonise standards in this policy area.

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<sup>8</sup> Neither does a single body of procedural rules for executive rule-making in the EU exist. See, however, relevant material developed in the framework of the Research Network on EU Administrative Law (ReNEUAL) at <http://www.reneual.eu> accessed 14 November 2019, and scholarly debate on the importance of establishing a corpus of procedural rules for the EU in: D. Curtin, H. Hofmann and J. Mendes, ‘Constitutionalising EU Executive Rule-making Procedures: A Research Agenda’ [2013] *European Law Journal* 1-21.

<sup>9</sup> Mariolina Eliantonio and Elise Muir conceptualise ‘incidental proceduralisation’ as the ‘insertion of procedural rules in secondary EU law measures adopted on the basis of provisions enabling the EU to develop a substantive policy’. See M. Eliantonio and E. Muir, ‘Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law’ [2015] *Review of European Administrative Law* 177, 178.

<sup>10</sup> See TEC Amsterdam, Article 63(1)(d) (emphasis added).

<sup>11</sup> Case C-84/94 *UK and Ireland v Council (working time directive)* EU:C:1996:431, para 56.

<sup>12</sup> See 2005 Procedures Directive.

<sup>13</sup> See, for example, 2005 Procedures Directive, Article 5.

The ambition expressed in the Lisbon Treaty is higher, calling for the development of: ‘common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status’.<sup>14</sup> The Union is therefore now free to harmonise asylum law fully. On this basis, the co-legislators adopted in 2013 the recast Asylum Procedures Directive.<sup>15</sup> What level of harmonisation does the recast instrument foresee? The 2009 Commission proposal for a recast asylum procedures directive<sup>16</sup> referred to ‘minimum standards’. However, it was issued before the entry into force of the Lisbon Treaty in December 2009. The amended recast proposal that was issued in 2011 referred to ‘common’ procedures reflecting the amended legal basis.<sup>17</sup> What is the legal gravity of this reformulation? The instrument retains a ‘more favourable standards’ clause phrased in identical terms to the one employed in the first-generation instrument.<sup>18</sup> This observation is supported by the analysis I undertake in a subsequent section on the legal quality of the recast instrument.<sup>19</sup> Hence it is clear that, although the level of harmonisation is enhanced compared to the first-generation instruments, there is no exhaustive harmonisation yet. In other areas of EU integration, the Court has checked the actual content of instruments to ascertain whether they do in fact fully harmonise a field.<sup>20</sup>

Aspiring to harmonise EU asylum legislation further, the European Commission announced in April 2016 its intention for ‘a comprehensive harmonisation of procedures across the EU by transforming the current Asylum Procedures Directive into a new regulation establishing a single common asylum procedure in the EU - replacing the current disparate arrangements in the Member States’.<sup>21</sup> It released its proposal in July 2016 promoting the instrument as seeking to establish ‘a common procedure’.<sup>22</sup> The goal of establishing a CEAS is broad enough to encompass further harmonisation as envisaged by the Commission. While a fully federalised system, where processing of individual claims lays in the competence of the Union, would require a Treaty change,

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<sup>14</sup> See Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 78(2)(d) (emphasis added).

<sup>15</sup> See 2013 Procedures Directive.

<sup>16</sup> See Commission, ‘Proposal for a directive on minimum standards on procedures in Member States for granting and withdrawing international protection’ COM (2009) 554 final (hereafter: 2009 APD proposal).

<sup>17</sup> See Commission, ‘Amended proposal for a directive on common procedures for granting and withdrawing international protection status (recast)’ COM (2011) 319 final (hereafter: 2011 APD proposal).

<sup>18</sup> See recast APD, Article 5.

<sup>19</sup> See below, subsection ‘Second wave: tangible progress or lipstick on a pig?’.

<sup>20</sup> See for example the Case C-323/93 *Société Civile Agricole du Centre d’Insemination de la Crespelle et Coopérative d’Élevage et d’Insemination Artificielle du Département de la Mayenne* EU:C:1994:368.

<sup>21</sup> Commission, ‘Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’ COM (2016) 197, part I2, subsection c.

<sup>22</sup> 2016 APR proposal.

this is not the case for ‘a common procedure’, as long as this refers in practice to further harmonisation of procedural rules concerning decision-making performed by national administrations and courts of individual Member States. The legal basis under the Lisbon Treaty could also accommodate joint forms of processing under this common procedure, where national administrators conduct decision-making with the support of officials of other Member States, possibly coordinated through the European Asylum Support Office.<sup>23</sup> These are permissible provided that they do not end up amounting to fully-fledged EU-level processing, i.e. the joint elements disappear as the decision is taken entirely by an EU authority instead of the Member States.<sup>24</sup> The following subsections critically assess the three legislative waves of EU asylum procedural legislation in order to ascertain the level of procedural protection that EU secondary asylum law offers.

### 2.1. First wave, or when the exception became the norm

The 2005 Procedures Directive, as the entire first generation of asylum instruments, was adopted by the Council acting unanimously.<sup>25</sup> As one author characteristically notes, while asylum was no longer subject to an ‘intergovernmental’ system in the legal sense, decision-making was still intergovernmental in the political sense, in that national executives (in practice interior and justice ministers and their officials), retained extensive control over decision-making.<sup>26</sup> Given the nature of the instrument, which was to have wide implications in national administrative and judicial practice, this decision-making technique held back the harmonising effect of legislation. It led to the inclusion of provisions in the instrument that contained ambiguous or contradictory wording, left a wide margin of discretion to Member States, and made numerous references to national law, derogations and exceptions.<sup>27</sup>

The instrument did set out a number of basic principles and guarantees for the examination of asylum applications at first instance and at appeal, including: access to the procedure, right to remain pending the outcome of an application,

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<sup>23</sup> I have developed a conceptual framework on understanding joint processing in asylum decision-making elsewhere. See E. Tsourdi, ‘Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office’ [2016] *European Papers* 997, 1011-1013.

<sup>24</sup> *Ibid.*

<sup>25</sup> See TEC Amsterdam, Article 67.

<sup>26</sup> See S. Peers, ‘Transforming decision-making on EC immigration and asylum law’ [2005] *European Law Review* 285, 286.

<sup>27</sup> For the effect of the use of such techniques in the entire body of immigration and asylum legal instruments see P. de Bruycker, ‘Le Niveau d’harmonisation Législative de la Politique Européenne d’immigration et d’asile’ in F. Julien-Laferriere, H. Labayle and O. Edström (eds), *La politique européenne d’immigration et d’asile: bilan critique cinq ans après le traité d’Amsterdam* (Brussels: Bruylant 2005) 45.

right to a personal interview, various provisions on right to information, communication with UNHCR etc.<sup>28</sup> However, alongside the ‘normal’ procedure, it established a series of ‘exceptional’ procedures, applicable in a variety of cases, which allowed for divergences from the basic principles and guarantees. Hemme Battjes classified the disparate provisions regulating exceptional procedures in the 2005 Directive under four categories: ‘preliminary examination procedure’; ‘normal border procedures’; ‘special border procedures’; and the ‘safe third neighbouring country procedure’.<sup>29</sup> The leeway for Member States to diverge from the basic set of guarantees was such that the criticism of Cathryn Costello that through this instrument ‘exceptional procedures become the norm’ is fully justified.<sup>30</sup> The European Commission thus admitted in 2010 that: ‘some of the Directive’s optional provisions and derogation clauses have contributed to the proliferation of divergent arrangements across the EU, and that procedural guarantees vary considerably between Member States’.<sup>31</sup>

Overall, the 2005 Procedures Directive foresaw that the first instance examination would be undertaken by a national ‘determining authority’, and that processing should abide to several standards, including the characteristics of the determining authority, as well as procedural safeguards.<sup>32</sup> While in most Member States this authority was an independent administrative body, the formulation included in the directive was wide enough to allow for somewhat peculiar arrangements, such as Greece initially assigning first instance decision-making to police directorates.<sup>33</sup> The 2005 Procedures Directive foresaw that all applicants would have ‘the right to an effective remedy before a court or tribunal’ for a decision taken on their application for asylum.<sup>34</sup> The principle of an effective remedy before a court does not preclude Member States from having an administrative body responsible for review preceding an appeal before a court.<sup>35</sup>

<sup>28</sup> See 2005 Procedures Directive, Chapter II and Chapter V.

<sup>29</sup> See for analysis, H. Battjes, *European Asylum Law and International Law* (Boston-Leiden: Brill 2006) 301-304.

<sup>30</sup> C. Costello, ‘The European asylum procedures directive in legal context’, UNCHR New Issues in Refugee Research Series, Research Paper No. 134, 2006, 34, 8 [unhcr.org/4552ficc2.html](http://unhcr.org/4552ficc2.html) accessed 14 November 2019, 8.

<sup>31</sup> See Commission, ‘Report on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States’ COM (2010) 465, 15.

<sup>32</sup> See 2005 Procedures Directive, Chapters II and III.

<sup>33</sup> See Presidential Decree 61/99 on the Recognition of Aliens as Refugees, Official Gazette of the Hellenic Republic, Vol. 1, No. 63 and analysis in P. McDonough and E. Tsourdi, ‘The “Other” Greek Crisis: Asylum and EU Solidarity’ [2012] *Refugee Survey Quarterly* 67-100.

<sup>34</sup> See 2005 Procedures Directive, Article 39(1). The article included a non-exhaustive list of what was to be understood as such as decision; every decision that could be taken at first instance (including decisions on inadmissibility, or decisions to dismiss an application because another Member State is responsible) are included.

<sup>35</sup> T. Spijkeboer and Y. Arbaoui, ‘Council Directive 2005/85/EC’ in K Hailbronner (ed), *EU Immigration and Asylum Law: Commentary* (Munich-Oxford-Baden-Baden: Beck/Hart/Nomos, 1st edn 2010), Article 39, MN 2.

This means that an effective remedy might entail either an appeal before a court, or a review by an administrative body followed by an appeal before a court, an option that several Member States took.<sup>36</sup> The 2005 Directive was not conclusive as to the suspensive effect or not of such a remedy. It stated that this matter should be regulated in accordance with Member States' international obligations.<sup>37</sup>

The 2005 Procedures Directive remained silent as to whether the review should include both facts and points of law. It did include though a set of provisions on legal representation and legal aid. Applicants were able to consult at their own cost a legal advisor or counsellor at first instance procedures; a number of provisions clarified that legal advisors had access to the applicant, the file, and were able to be present at the first instance interview.<sup>38</sup> No free legal aid was foreseen for first instance decision-making. This was to be made available at appeal stage although Member States could restrict it, for example only to procedures before a court or tribunal, or on the basis of financial needs, or to specifically designated advisers or counsellors, or even to subject the appeal to a likelihood of success test.<sup>39</sup> Research undertaken by UNHCR on the application of the 2005 instrument found that in some states 'merits tests', i.e. tests on whether the appeal was likely to succeed, were applied in a manner which led to the arbitrary restriction of access for appellants to legal assistance, as well as that in many states there was a lack of specialised and competent lawyers in refugee law.<sup>40</sup>

Overall, the provisions of the 2005 Asylum Procedures Directive left a wide margin of discretion to Member States, for example remaining silent on the issue of whether the review at appeal stage should include both facts and points of law, or referring to 'international standards' regarding the suspensive effect of the appeal. Even when an issue was regulated, such as free legal aid, the possibility for far reaching exceptions such as 'merits tests' based on the likelihood of success of the appeal were introduced that, at times, led to the nullification of the guarantee. Moreover, the multitude of exceptional procedures led to a mosaic of national arrangements and low harmonizing effects. Some of these issues are addressed in the 2013 recast instrument, while others have been the object of CJEU case law that this article analyses in a next section.<sup>41</sup>

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<sup>36</sup> Ibid.

<sup>37</sup> See 2005 Procedures Directive, art 39(3). In this setting the case law of the European Court of Human Rights (ECtHR) on Article 13 (right to an effective remedy) is of relevance.

<sup>38</sup> See 2005 Procedures Directive, art 15-16.

<sup>39</sup> See 2005 Procedures Directive, art 15 (3)(a)-(d).

<sup>40</sup> UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (UNHCR 2010) 87.

<sup>41</sup> See below section 'The interaction between EU asylum procedural law, effective judicial protection and the right to an effective remedy: lessons from the CJEU case law'.

## 2.2. Second wave: tangible progress or lipstick on a pig?

The Lisbon Treaty reaffirmed the passage to co-decision, already a legal reality since 2005.<sup>42</sup> This entailed the emergence of new institutional dynamics, and the predominance of ‘trialogues’ in the legislative process.<sup>43</sup> Coupled with the introduction of qualified majority voting, this new framework seemed more conducive to achieving higher levels of procedural harmonisation on asylum decision-making, and better safeguarding asylum seekers’ rights.

Nevertheless, the negotiation process of the recast instrument proved cumbersome, with the replacement of the initial 2009 Asylum Procedures Directive (APD) proposal,<sup>44</sup> by an amended recast proposal in 2011.<sup>45</sup> In practice, this led to the watering down of some of the additional guarantees, by, for example, further conditioning access to free legal aid, or reintroducing exceptions to the basic guarantees, and restricting the automatic suspensive effect of appeals. The text was further reformed during two years of negotiations, and by the adoption of the recast instrument in 2013, the level of legal clarity had been considerably diluted, and a great part of the Commission’s efforts to effectively harmonise procedural arrangements had been abandoned.

Overall, the result of the procedural reform could be analysed as follows: modest improvements in terms of the level of harmonisation, as well as in terms of adherence to fundamental rights. Characteristic examples of additional safeguards were: the establishment of several protective guarantees for ‘applicants with special procedural guarantees’,<sup>46</sup> including unaccompanied minors, or LGBTI applicants; and the explicit strengthening of the role of collective actors and UNHCR in information provision and assistance. Parallel to these developments, robust procedural provisions were introduced to other instruments of the EU asylum *acquis*. New provisions in the EU’s responsibility allocation regulation enable applicants to challenge their transfer to a different Member State.<sup>47</sup> In addition, new provisions in EU’s reception conditions direc-

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<sup>42</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, art 78(1)-(2), 289(1) and 294.

<sup>43</sup> Trialogues are tripartite meetings between the European Parliament, the Council and the Commission during which a common position is sought between the amendments of the Parliament and the position of the Council on the Commission proposal. While not formally foreseen by the Treaties, trialogues have become a commonly used tool of pre-negotiation in practice.

<sup>44</sup> See 2009 APD proposal, Explanatory Memorandum.

<sup>45</sup> 2011 APD proposal, Explanatory Memorandum.

<sup>46</sup> See 2013 Procedures Directive, art 2(d) and Recital 29.

<sup>47</sup> See Regulation (EU) No 604/2013 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 [2013] OJ L180/31 (hereafter: 2013 Dublin Regulation), art 27.

tive enable applicants to challenge their detention,<sup>48</sup> or challenge decisions related with the granting, reduction, or withdrawal of reception conditions.<sup>49</sup>

Nonetheless, exceptional procedural arrangements were either retained or introduced, such as the possibility for Member States to prolong the length of border procedures for an undefined period,<sup>50</sup> or the multitude of situations in which Member States could apply exceptional asylum procedures.<sup>51</sup> In addition, several of the newly-introduced additional procedural guarantees were heavily conditioned, such as those around the suspensive effect of appeals that I analyse right below. This somewhat overall disappointing outcome led Steve Peers to describe the amendments as ‘lipstick on a pig’.<sup>52</sup> Finally, Cathryn Costello and Emily Hancox have argued that the focus on vulnerability in the 2013 Asylum Procedures Directive is in itself unhelpful, since it allows for the proliferation of deviations from the basic procedural guarantees aimed at the ‘abusers’, as long as further procedural guarantees are devised to release the ‘vulnerable’ from the rigours of those procedures, compounding the overall level of complexity.<sup>53</sup>

The 2013 Asylum Procedures Directive strengthens guarantees on first instance processing by establishing more stringent rules on the nature of the first instance determining authority, and training obligations for first instance decision-makers.<sup>54</sup> This reflects developments on the ground; for example Greece that had previously assigned the examination of first instance asylum claims to police directorates has since 2011 established an Asylum Service, an autonomous institution in charge of the examination of international protection claims.<sup>55</sup> At the end of 2018, the Greek Asylum Service operated in 23 locations throughout the country, compared to 22 locations at the end of 2017 and 17 locations at the end of 2016.<sup>56</sup> Further procedural guarantees pertain to, for example, the use of country of origin information, the standards around the

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<sup>48</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (hereafter: 2013 Reception Conditions Directive), art 9.

<sup>49</sup> 2013 Reception Conditions Directive, art 26.

<sup>50</sup> See 2013 Procedures Directive, art 43(3).

<sup>51</sup> See 2013 Procedures Directive, art 31(8).

<sup>52</sup> See S. Peers, ‘The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?’ (Statewatch, 08 April 2013) <http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf> accessed 17 November 2019.

<sup>53</sup> C. Costello and E. Hancox, ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee’ in V. Chetail, P. de Bruycker and F. Maiani (eds), *Reforming the Common European Asylum System: the New European Refugee Law* (Boston-Leiden: Brill/Nijhoff 2016) 377.

<sup>54</sup> 2013 Procedures Directive, art 4.

<sup>55</sup> See Law No. 3907/2011 on the Establishment of an Asylum Service and a First Reception Service, Official Gazette of the Hellenic Republic, Vol. 1, No. 7.

<sup>56</sup> See ECRE/Asylum Information Database, *Country Report: Greece*, March 2019, 22 and fn. 16.

personal interview etc.<sup>57</sup> These developments are however conditioned by the number of exceptional procedures that are still retained as analysed above; these exceptional procedures allow the application of lower procedural standards.

The recast directive also enhances the quality of effective remedy that Member States need to make available, by requiring the establishment of an effective remedy which ‘provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs [...]’.<sup>58</sup> Nonetheless, Member States could restrict this to appeals before a court or tribunal,<sup>59</sup> thus not applying this standard of review to appeals before an administrative body responsible for review preceding an appeal before a court. In principle, appeals are suspensive. However, in a great number of circumstances which are exhaustively defined by the 2013 Asylum Procedures Directive,<sup>60</sup> such as, for example, appeals against applications that have been found to be manifestly unfounded, Member States may decide not to grant automatic suspensive effect to the appeals. In such cases, a national judicial instance should decide, either *ex officio* or upon the applicant’s request, whether the appeal will have suspensive effect.<sup>61</sup> Member States should allow the applicant to remain in their territory until the national judicial instance has decided whether or not to vest the appeal with suspensive effect.<sup>62</sup> This leaves Member States with significant discretion to curtail the automatic suspensive effect of appeals, with the ultimate standard being that in every case a national judge must decide on the suspensive effect of an appeal. A finding of non-suspension affects in turn the applicants’ right to remain during the examination of their appeal, and, subsequently, their access to reception conditions during appeal.<sup>63</sup>

The 2013 Asylum Procedures Directive introduces the provision of legal and procedural information at first instance free of charge, on request.<sup>64</sup> Nevertheless, the provision of free legal assistance and representation at first instance remains a possibility, and not an obligation for Member States.<sup>65</sup> Free legal assistance and representation is an obligation at appeal stage and it should include

<sup>57</sup> See 2013 Procedures Directive, Chapter II.

<sup>58</sup> 2013 Procedures Directive, art 46(3). See also analysis in M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford: Hart 2014).

<sup>59</sup> *Ibid.*

<sup>60</sup> See 2013 Procedures Directive, Article 46, para 6. See also 2013 Procedures Directive, art 46, para 7 for the special rules that apply in the case of border procedures.

<sup>61</sup> *Ibid.*

<sup>62</sup> 2013 Procedures Directive, art 46, para 8.

<sup>63</sup> See 2013 Procedures Directive, art 9(1) and 46(6), read together with art 3(1), 2013 Reception Conditions Directive and analysis in M. Peek and E. Tsourdi, ‘Asylum Reception Conditions Directive 2013/33/EU’ in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law* (Munich-Oxford-Baden-Baden: Beck/Hart/Nomos, 2nd edn 2016), Article 3, MN 42-43.

<sup>64</sup> See 2013 Procedures Directive, art 19, para 1.

<sup>65</sup> See 2013 Procedures Directive, art 20, para 2.

at least ‘the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant’.<sup>66</sup> Nonetheless, the recast directive retains the possibility for Member States to apply several conditions to accessing free legal aid and representation at the appeals stage. These include ‘merits tests’, which were defined in this legal instrument as denial of legal aid where a court or tribunal or other competent authority finds that the appeal has ‘no tangible prospects of success’.<sup>67</sup> Where this decision to deny legal aid is not taken by a court or tribunal the applicant has the right to appeal it before a court or tribunal.<sup>68</sup> Research conducted by ECRE has found that in a number of European countries such as Greece and Hungary legal aid is generally not provided at second instance in practice, while other countries such as Germany, France, Italy and the UK apply a strict ‘merits test’ which in practice results in asylum applicants relying entirely on civil society and volunteers for free legal advice and representation at the appeals stage.<sup>69</sup>

Overall, the provisions of the 2013 Asylum Procedures Directive continue to allow a wide margin of discretion for Member States. Even if some issues were further regulated at EU level, such as the fact that the review at appeal stage should include both facts and points of law, or the suspensive effect of appeals, the number of exceptions that the instrument introduces restrain its harmonising effect. This led to several references for a preliminary ruling to the CJEU where national courts refer to the right to an effective remedy under the Charter and which form the object of analysis in a following section.<sup>70</sup> They also led to the introduction of a Commission proposal to reform the currently applicable instrument. Beyond achieving further legal harmonisation, this new instrument seems to be geared to other aims, and notably the underlying goal of externalizing protection obligations to non-EU states.

### 2.3. The forthcoming, third wave: further harmonisation, higher procedural protection?

The third wave of asylum procedural harmonisation is under negotiation revealing deep rifts among the Member States and rendering the fate of the Commission’s proposal uncertain.<sup>71</sup> Nevertheless, some trends can

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<sup>66</sup> See 2013 Procedures Directive, art 20, para 1.

<sup>67</sup> See 2013 Procedures Directive, art 20(3).

<sup>68</sup> Ibid.

<sup>69</sup> ECRE/ELENA, *Legal Note on Access to Legal Aid in Europe*, November 2017, 5-6.

<sup>70</sup> See below section ‘The interaction between EU asylum procedural law, effective judicial protection and the right to an effective remedy: lessons from the CJEU case law’.

<sup>71</sup> See Council of the European Union, ‘Overview of the current legislative proposals under the Romanian Presidency’, Doc. No. 9693/19, 4 June 2019, 8.

be clearly discerned through the 2016 Commission proposal. First, the Commission is seeking to achieve a higher level of harmonisation, and greater uniformity in the outcome of asylum procedures, employing this time additional means. Secondly, the focus on combatting what are considered abusive applications is retained, and, in fact, strengthened by the not explicit but underlying goal of externalising protection obligations to third countries instead of processing the merits of asylum applications, and subsequently providing protection, in the EU territory. These goals are intertwined, with greater harmonisation serving primarily the goal of externalising protection obligations and seeking to combat perceived abuse, rather than a focus on quality of decision-making. I substantiate these points below.

To achieve the first goals, i.e. a higher level of harmonisation, and uniformity in decision-making, the Commission has altered the type of proposed instrument, from a directive to a regulation. This type of instrument, which is directly applicable, and normally provides for less discretion in its application, has the potential to serve this purpose. However, while streamlining the current disparate procedural arrangements is a stated goal, exceptional procedures are not suppressed; in fact, their use is proliferated and enhanced. The proposed regulation establishes the obligation for Member States to accelerate the examination on the merits in a variety of broadly defined cases,<sup>72</sup> including: making ‘clearly inconsistent and contradictory, clearly false or obviously improbable representations’,<sup>73</sup> or misleading the authorities by presenting false information.<sup>74</sup> Apart from acceleration, an optional border procedure,<sup>75</sup> and an obligatory specific procedure for subsequent applications, are retained.<sup>76</sup> These procedures contain less safeguards, such as limited time available to prepare for the examination of the claim, or the additional practical difficulty of gaining access to information and expert representation at border and transit zones. An intricate set of exceptions is foreseen for unaccompanied minors, who are in principle exempted from their application, but could still be subject to those special procedures, when, for example, they come from a safe country of origin.<sup>77</sup> The image that emerges is one of complex procedural arrangements that will, as the previous versions of this instrument, lead to divergent national practice.

This situation is compounded by the underlying aim to externalise protection obligations. The proposed regulation would see the introduction of an obligatory admissibility phase.<sup>78</sup> This would entail an examination, prior to assessing the

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<sup>72</sup> 2016 APR proposal, art 40.

<sup>73</sup> 2016 APR proposal, art 40(1)(b).

<sup>74</sup> 2016 APR proposal, art 40(1)(c).

<sup>75</sup> 2016 APR proposal, art 41.

<sup>76</sup> 2016 APR proposal, art 42.

<sup>77</sup> 2016 APR proposal, art 41(5) and art 42(5).

<sup>78</sup> 2016 APR proposal, art 36.

individual's protection needs, of elements such as whether a third country can be considered a first country of asylum<sup>79</sup> or a safe third country<sup>80</sup> for the applicant.<sup>81</sup> Should this be the case, then the application is to be rejected as inadmissible and the applicant should be transferred to the third country in question. However, since this finding hinges on the cooperation of the third country, this decision would be revoked when it does not admit, or readmit, the applicant to its territory.<sup>82</sup> Apart from the collaboration of third states, the operationalisation of the externalisation imperative is to be supported by harmonising practices. Notably, the proposed regulation foresees, for example, the designation of safe third countries at Union level,<sup>83</sup> and, an increasingly important role for EU's asylum agency, the European Asylum Support Office (EASO),<sup>84</sup> in providing common analysis of country of origin information.<sup>85</sup> These practices will enhance a uniform approach. However, uniformity is not synonymous with higher quality procedural standards. The impact of these envisaged practices on the quality of decision-making depends on whether the designation of third countries as safe, and the inadmissibility finding on an individual level, will be based on a rigorous assessment of information, coming from a multitude of sources, including civil society.

These eventual developments certainly foreshadow a new set of procedural challenges that applicants will have to face, and the importance of the right to an effective remedy as well as expert legal representation and defence. The regulation as proposed marks limited progress in these areas. Namely, free legal aid and representation is to be made available also at the first, administrative, stage of the procedure if requested by the applicant.<sup>86</sup> However, free legal aid may be conditioned, including by a finding on whether the application has 'any tangible prospects of success'.<sup>87</sup> The same limitation is equally retained for free legal aid and representation at appeal stage; in addition, Member States may exclude free legal aid and representation 'at a second level of appeal or higher as provided for under national law, including re-hearings or reviews of

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<sup>79</sup> 2016 APR proposal, art 36(a) and art 44.

<sup>80</sup> 2016 APR proposal, art 36(b) and art 45.

<sup>81</sup> The applicant still retains the possibility to challenge the safety of the third country in their particular circumstances; see, for example, Article 44(3) and Article 45(4).

<sup>82</sup> 2016 APR proposal, art 44(6) and art 45(7).

<sup>83</sup> 2016 APR proposal, art 46.

<sup>84</sup> See for its current mandate: Regulation (EU) No 439/2010 of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L32/11 (hereafter: EASO Regulation). For its envisaged future role in COI see 'Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010' COM (2016) 271, art 10-11.

<sup>85</sup> See for example: 2016 APR proposal, Recitals 30, 49, 50, 52, 54, and Article 33(2)(a), (c), (3).

<sup>86</sup> 2016 APR proposal, art 15(1)-(2).

<sup>87</sup> 2016 APR proposal, art 15(3).

appeal'.<sup>88</sup> As for the right to an effective remedy, the regulation retains the requirement for 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs'.<sup>89</sup> Appeals are still not vested with an automatic suspensive effect but a court or tribunal has to decide on the right of the applicant to remain on the territory.<sup>90</sup> The proposed regulation contains two additional guarantees in this respect: i) that during this process the court or tribunal examines 'the decision refusing to grant international protection in terms of fact and law',<sup>91</sup> as well as that ii) the applicant 'has the necessary interpretation, legal assistance and sufficient time to prepare the request'.<sup>92</sup> This in practice turns the process of the examination of the right to remain into a fully-fledged examination of the merits of the case in both points of law and facts.

### 3. The interaction between EU asylum procedural law, effective judicial protection and the right to an effective remedy: lessons from the CJEU case law

The analysis of the procedural asylum *acquis* revealed that despite significant progress in EU level harmonisation, asylum applicants face several challenges in accessing effective judicial protection. Future EU legislation is likely to compound these challenges rather than alleviate them. After ascertaining what level of protection EU secondary law affords, the next sections critically assess whether the principles of effective judicial protection and the right to an effective remedy<sup>93</sup> play a role in enhancing asylum applicants' position, as well as how they relate to relevant secondary EU law.

#### 3.1. Through the looking glass: MM case or what if the area of asylum had not been proceduralised

The *MM* case provides a rare opportunity to analyse the interrelation between EU fundamental rights and asylum applicants' procedural rights, and in fact to do so as if the area of asylum had not been proceduralised. Namely, the scope of 2005 Asylum Procedures Directive extended only to appli-

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<sup>88</sup> 2016 APR proposal, art 15(5)(b)-(c).

<sup>89</sup> 2016 APR proposal, art 53(3).

<sup>90</sup> 2016 APR proposal, art 54(2).

<sup>91</sup> 2016 APR proposal, art 54(3)(b).

<sup>92</sup> 2016 APR proposal, art 54(3)(a).

<sup>93</sup> See for analysis of the scope of these two concepts in EU law, and for their interrelation, the contributions of Rob Widdershoven, as well as that of Mariolina Eliantonio and Elise Muir in this special issue.

cations for refugee status. Applications for subsidiary protection status<sup>94</sup> were covered by that directive only where Member States had established a single procedure where they examined consecutively eligibility for refugee status followed by eligibility for subsidiary protection status.<sup>95</sup> Most Member States had instated a single examination procedure thus had to apply the standards of the 2005 instrument throughout. Among the guarantees that instrument establishes is the right to a personal interview.<sup>96</sup> Nevertheless, Member States were free to extend the applicability of the Directive to applications for subsidiary protection, even where they were examined through a separate procedure.<sup>97</sup> Ireland had nevertheless instated two separate procedures, and additionally it had opted not to apply the standards of the directive in the examination of applications for subsidiary protection.

This was the background to the *MM* case where the applicant had, after the rejection of his claim for refugee status, filed an application for subsidiary protection status. This was equally rejected, without the applicant ever having the possibility to be heard on that latter application as this was not foreseen under the Irish procedures. In fact, the competent Irish authorities argued that there was a ‘considerable degree of interaction between the applicant and the authorities’, given that an application for subsidiary protection is necessarily assessed following the examination – and rejection – of an asylum application in the course of which the applicant had in fact been heard and had replied to a detailed questionnaire.<sup>98</sup> While the case and the reference also raised broader questions on the duty of cooperation between the applicant and the authorities in the course of the examination of asylum claims, I will focus my analysis on the absence of the possibility for the applicant to be heard.

The CJEU noted that observance of the rights of the defence is a fundamental principle of EU law,<sup>99</sup> and that the right to be heard in all proceedings is inherent

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<sup>94</sup> Subsidiary protection is a new protection status introduced by EU law. As suggested by the name, it is *subsidiary* to refugee status, meaning additional to refugee protection, and concerns individuals who would not qualify as refugees but are still considered to have protection needs. These needs are linked to Member States’ obligations under international and European human rights law, including the prohibition of *refoulement*, i.e. the prohibition of return to a location where the individual faces a real risk of being subjected to torture or inhuman or degrading treatment. For the precise content of subsidiary protection see European Parliament and Council Directive 2011/95/EU, 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 L337, Article 15 (hereafter: 2011 Qualification Directive).

<sup>95</sup> See 2005 Procedures Directive, art 3(1), (3).

<sup>96</sup> See above subsection ‘First wave, or when the exception became the norm’.

<sup>97</sup> See 2005 Procedures Directive, art 3(4).

<sup>98</sup> Case C-277/11 *M. M. v Minister for Justice, Equality and Law Reform and Others* EU:C:2012:744, [52].

<sup>99</sup> See Case C-7/98 *Dieter Krombach v André Bamberski* EU:C:2000:164, [42], and Case C-349/07 *Sopropé - Organizações de Calçado Lda v Fazenda Pública* EU:C:2008:746, [36].

in that fundamental principle.<sup>100</sup> The Court observed that the right to be heard is not only affirmed under Article 47 of the Charter on the right to an effective remedy, but also under Article 41 of the Charter on the right to good administration,<sup>101</sup> a provision of general application. Thereafter, the Court referred to its case law affirming that the right to be heard must apply in all proceedings which are liable to culminate in a measure adversely affecting a person,<sup>102</sup> and that observance of that right is required even where the applicable legislation does not expressly provide for such a procedural requirement.<sup>103</sup> According to the CJEU, the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.<sup>104</sup> It requires authorities to examine carefully and impartially all the relevant aspects of the individual case and to give a detailed statement of reasons for their decision.<sup>105</sup>

On this basis, the CJEU rejected the arguments of the Irish authorities that a hearing is not necessary in the examination of an application for subsidiary protection since this would replicate the hearing that had already taken place in a largely similar context, i.e. the previously examined application for refugee status. Noting that Member States could not rely on an interpretation of their national law which would conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law, the CJEU concluded that the applicant's right to be heard had been infringed.<sup>106</sup>

The *MM* case has been considered as authority for the proposition that the right to be heard in Article 41(2)(a) of the EU Charter is applicable against Member State institutions when they act in the scope of EU law.<sup>107</sup> The CJEU found that the right to be heard was binding on Member States on account of its nature as a general principle of law. The examination of a claim for subsidiary protection had not been harmonised through secondary EU asylum law. Nevertheless, even in the absence of legislative harmonisation, the CJEU established that certain standards should surround this processing, drawing from the fundamental right to be heard.

<sup>100</sup> See Case C-322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* EU:C:1983:313, [7], and Case C-374/87 *Orkem v Commission* EU:C:1989:387, [32].

<sup>101</sup> See Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 41(2).

<sup>102</sup> See Case C-17/74 *Transocean Marine Paint Association v Commission* EU:C:1974:106, [15]; *Krombach* (n 99) [42]; and *Sopropé* (n 99) [36].

<sup>103</sup> See *Sopropé* (n 99) [38].

<sup>104</sup> See Case C-287/02 *Spain v Commission* EU:C:2005:368, [37]; Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware v Council* EU:C:2009:598, [83]; and Case C-27/09 P *France v People's Mojahedin Organization of Iran* EU:C:2011:853, [64]-[65].

<sup>105</sup> See Case C-269/90 *Technische Universität München* EU:C:1991:438, [14], and *Sopropé* (n 99) [50].

<sup>106</sup> *MM* (n 4) [94].

<sup>107</sup> See P. Craig, 'Right to Good Administration' in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014), MN 41.29.

This case gives a good indication on how the CJEU would have proceeded in the absence of EU asylum procedural harmonisation. The standards on the qualification for refugee and subsidiary protection status (i.e. the definition of who qualifies as a refugee or subsidiary protection beneficiary) had been harmonised. Therefore, whenever Member States decide upon such claims, they act within the scope of application of EU law. The CJEU would have therefore scrutinised the adherence of these national procedures with fundamental rights, precisely as it did in the *MM* case. Thereafter, it would have deduced some procedural standards—in the case at point it created the obligation for national authorities to conduct a personal interview. Of course, the CJEU would have had to be seized first by a relevant reference for a preliminary ruling under Article 267 TFEU in order to examine a specific issue, therefore standard setting through this avenue would have been partial and haphazard. In this sense, proceduralisation through secondary law undoubtedly has a greater harmonisation potential. I next examine the interrelation between the minimum standards' secondary norms, which led to a rather low harmonising effect, and EU fundamental rights.

### 3.2. Shaping minimum standards: framing national procedural autonomy through the right to an effective remedy

A recital in the 2005 Asylum Procedures Directive stated that '[t]he organisation of the processing of applications for asylum should be left to the discretion of Member States [...] taking into account the standards of the directive',<sup>108</sup> and a previous section analysed the rather low harmonising effect of that directive.<sup>109</sup> However, CJEU case law on the minimum standards legislation further shapes national procedural autonomy. I focus my analysis on the right to an effective remedy with reference to two cases, notably *Samba Diouf*<sup>110</sup> and *H.I.D. & B.A.*<sup>111</sup> which set out the CJEU's position on the interrelation between secondary asylum EU law and the EU Charter rights, as well as the interrelation between the Charter right to an effective remedy and the principle of effective judicial protection.

The *Samba Diouf* case concerned the operationalisation of accelerated procedures by Luxembourg. This was one type of exceptional processing arrangements that the 2005 directive allowed for. Luxembourg had organised its procedures in such a manner that applicants could not appeal to a national court the decision of the administrative authority to apply an accelerated procedure

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<sup>108</sup> 2005 Procedures Directive, Recital 11.

<sup>109</sup> See above subsection 'First wave, or when the exception became the norm'.

<sup>110</sup> *Samba Diouf* (n 5).

<sup>111</sup> *H. I. D. and B. A.* (n 5).

for determining the merits of the asylum application. The reference for a preliminary ruling concerned the compatibility of this practice with the article of the 2005 Asylum Procedures Directive establishing the right to an effective remedy.<sup>112</sup> Beyond that article though the national Court raised the compatibility of the practice with what it called ‘the general principle of an effective remedy under Community law’.

The CJEU noted, firstly, that the 2005 Asylum Procedures Directive established minimum standards as well as that the Member States have ‘in a number of respects, a margin of assessment with regard to the implementation of those provisions in the light of the particular features of national law’.<sup>113</sup> Nonetheless, it noted that according to Article 39 of that directive Member States should ensure that applicants for asylum have the right to an effective remedy against a decision taken on their application for asylum, including a decision to consider an application inadmissible, a decision taken at the border or in the transit zones and a decision not to conduct an examination of the application, owing to the fact that the competent authority has established that the applicant for asylum is seeking to enter, or has entered, illegally into its territory from a safe third country. It found, however, that the decision to submit the assessment of an application to an accelerated procedure was a preparatory act and therefore the directive did not require national law to provide a remedy against that type of decision.<sup>114</sup>

The CJEU went on to examine whether the lack of the possibility to appeal the determination of acceleration infringed the right to an effective remedy of the applicant since the grounds relied by the authority to accelerate the examination broadly tally with the grounds for the rejection of the asylum claim on its merits. The CJEU noted that this issue should be examined bearing in mind both secondary EU procedural law, i.e. Article 39 of the 2005 Asylum Procedures Directive, as well as the principle of effective judicial protection. According to the CJEU ‘[t]hat principle is a general principle of EU law to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union’.<sup>115</sup> It then examined the Luxembourgish system and assessed its compatibility with the principle of effective judicial protection. The CJEU concluded that the decision to submit an application to an accelerated procedure is a preparatory act and that the principle of effective judicial protection is not violated as long as the individual has a legal remedy against the final decision on the merits of their asylum application.<sup>116</sup> That remedy must allow a thorough review of the reasons which led the competent authority to reject the application

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<sup>112</sup> 2005 Procedures Directive, art 39.

<sup>113</sup> *Samba Diouf* (n 5) [29].

<sup>114</sup> *Samba Diouf* (n 5) [37]-[45].

<sup>115</sup> *Samba Diouf*, *op.cit.*, [49].

<sup>116</sup> Case C-13/01 *Salafero* EU:C:2003:447, [54]-[56].

on its merits, including the reasons justifying the use of an accelerated procedure.

The CJEU assessed the effectiveness of the remedy established under national law against the final decision which rejects the application on its merits, and specifically the fact that submission to an accelerated procedure curtailed the time-limit to bring an appeal to 15 days, instead of the normal 1 month time-limit. It held that the time-limit in question did not seem, 'generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate'.<sup>117</sup> However, it also held that this time-limit should be set aside by the national judges where it proved 'in a given situation, to be insufficient in view of the circumstances'.<sup>118</sup>

Commenting this case Van Cleynenbreughel lamented that the CJEU 'directly interferes with member States' discretion to adapt their national systems in conformity with newly identified EU adequate judicial protection mechanisms', as well as that it therefore 'challenges the classic division of procedural competences between the EU and its Member States'.<sup>119</sup> Rather than unreasonably interfering with Member State discretion though, the CJEU was upholding the standards of its previous case law on the principle of effective judicial protection, applicable even in absence of explicit procedural norms under secondary law.<sup>120</sup> General principles of EU law frame the Member State discretion afforded by the minimum standard legislation, and the Court explicitly found the principle of effective judicial protection to be such a principle.

In terms of the interrelation between the principles of effective judicial protection and the Charter right to an effective remedy, the CJEU seems to equate them. This finding is enhanced by a separate asylum minimum standards legislation case where the CJEU examined the compatibility of the Irish procedural system with the right to an effective remedy, the *H.I.D. & B.A* case. Therein, it held that 'the principle of effective judicial protection, which is a general principle of European Union law, is enshrined in Article 47 of the Charter'.<sup>121</sup> Once again, the CJEU scrutinised the Irish system to ascertain whether the Irish Appeals Tribunal could be understood as a 'court or tribunal' for the purposes of Article 267 TFEU. In doing so, it closely assessed whether its jurisdiction was compulsory, whether the procedure was *inter partes*, as well

<sup>117</sup> *Samba Diouf* (n 5) [67].

<sup>118</sup> *Samba Diouf* (n 5) [68].

<sup>119</sup> P. van Cleynenbreughel, 'Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of the Court of Justice (Second Chamber) of 28 July 2011' [2012] Common Market Law Review 327, 344.

<sup>120</sup> See for analysis the contribution of Rob Widdershoven in this special issue.

<sup>121</sup> *H. I. D. and B. A.* (n 5) [80] and Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* EU:C:2010:811, [29] and [31]. See also restatement in Case C-239/14 *Amadou Tall* (n 5) [51] where the CJEU observed that Article 47 of the Charter 'constitutes a reaffirmation of the principle of effective judicial protection'.

as its independence. National procedural arrangements on asylum are therefore to be sieved through general principles of EU law, and the procedural Charter rights. CJEU case law on the common standards legislation, i.e. the 2013 Asylum Procedures Directive, reaffirms these early trends.

### 3.3. Refining common standards: fine-tuning national procedures through the right to an effective remedy

The 2013 Asylum Procedures Directive whose ambitious goal was the creation of common standards ended up bringing about modest improvements in terms of harmonisation, including in what concerns the right to an effective remedy, its scope, and the suspensive effect of appeals. Harmonisation was far from exhaustive though, and this led to the proliferation of the procedural case law of the CJEU on asylum. The Court is called to fine-tune the contours of the right to an effective remedy, now established under Article 46 of the 2013 Asylum Procedures Directive, and it has done so by drawing from the standards enshrined in Article 47 of the Charter. Time and time again the Court has repeated in this line of case law that Article 47 constitutes a reaffirmation of the principle of effective judicial protection, crystallising, by now, this understanding.<sup>122</sup> The CJEU has sought to retain an amount of national procedural autonomy for Member States, while upholding the Charter right to an effective remedy. The result of this delicate balancing act is nuanced pronouncements, and at times somewhat convoluted standards, which are most likely to prove difficult to apply for national judges. I illustrate these trends through the example of the type of decision that the second jurisdictional instance can adopt.<sup>123</sup>

The backdrop to the *Alheto* case were the particularities around the qualification and processing of refugees from Palestine. The case also raised important questions on procedural standards under the 2013 Asylum Procedures Directive. One of those issues was whether Article 46(3) of that directive,<sup>124</sup> read together with Article 47 of the Charter, should be interpreted as foreseeing that the court or tribunal hearing the appeal should rule itself on the merits of the case if it decides to annul the first instance decision. The CJEU noted that the provision in the recast directive which referred to ‘an examination of the international

<sup>122</sup> See, for example, Case C-348/16 *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano* EU:C:2017:591, para 31, *Alheto* (n 6) [114], and *Torubarov* (n 6) [55].

<sup>123</sup> *Torubarov* (n 6) and *Alheto* (n 6).

<sup>124</sup> This provision reads in full as follows: ‘[i]n order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance’.

protection needs' did not establish common procedural standards on the power of the appeal court or tribunal to adopt a new decision. Rather, it left it open to the Member States to provide that following such an annulment the file would be referred back to the first instance authority for examination.<sup>125</sup> However, in order to retain the practical effect of article 46(3) of the directive, as well as to ensure an effective remedy that responds to the standards of Article 47 of the Charter, national procedures should be arranged in a manner which ensures that in case the file is returned to the first instance authority: i) a new decision is adopted within a short period of time; ii) that decision complies with the assessment contained in the judgment annulling the initial decision.<sup>126</sup>

What happens though if the first instance authority refuses to comply with the assessment of the appeals court or tribunal? This was the factual situation in *Torubarov*. The CJEU noted that the 2013 Asylum Procedures Directive affords some discretion to Member States in the determination of rules relating to the follow up of a decision that has been annulled by a court or tribunal. Nevertheless, this discretion is restrained by Article 47 of the Charter which may be directly relied by individuals,<sup>127</sup> and which would be rendered illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party.<sup>128</sup> The CJEU went on to observe that through the adoption of Article 46(3) the EU legislature intended to confer to the appeal court or tribunal the power to give a binding ruling following a full and *ex nunc* — that is to say exhaustive and up-to-date examination of all elements of fact and law, where it considers that they are all available to it.<sup>129</sup> It thus concluded that where such a decision was then referred back to the first instance authority, that body was bound by the assessment of the appeal tribunal and no longer had a discretionary power as to the decision to grant or refuse the protection sought.<sup>130</sup> In the case at hand though the Hungarian first instance authority did not comply with the previous judgment of the appeal tribunal and the applicant appealed once again the negative decision. The CJEU held that in such circumstances the appeal tribunal must vary the first instance decision which does not respect its previous judgment and it should substitute it, in fact setting aside as necessary the national law that would prohibit it from doing so.<sup>131</sup>

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<sup>125</sup> *Alheto* (n 6) [146].

<sup>126</sup> *Alheto* (n 6) [148].

<sup>127</sup> Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V* EU:C:2018:257, [78].

<sup>128</sup> Case C-205/15 *Toma and Biroul Executorului Judecătoresc Horatiu-Vasile Crudulec* EU:C:2016:499, [43].

<sup>129</sup> *Torubarov* (n 6) [65].

<sup>130</sup> *Torubarov* (n 6) [66].

<sup>131</sup> *Torubarov* (n 6) [78].

Although this is but one example of the wealth of procedural asylum case law, it illustrates well the difficult exercise the CJEU must undertake. An interpretation of the common standards in the directive that would have vested appeals courts or tribunals with the power to adopt decisions on the merits following an annulment would certainly have been more straightforward to implement. It would, however, have significantly reduced the discretion afforded to Member States to organise their national asylum procedures. At the same time appeal courts or tribunals now explicitly conduct a broad examination according to the directive, i.e. a full and *ex nunc* examination of both facts and points of law. If the CJEU did not safeguard the binding force of this assessment, the right to an effective remedy as enshrined in the Charter would have been nullified. This creates procedural limitations on how national first instance authorities should treat such annulled decisions. In case of failure to respect these standards, it entails broad powers for appeals tribunals, including the substitution of a decision by a first instance body, whether national procedural law allows it or not. The common standards are thus significantly refined through a Charter-based interpretation of the right to an effective remedy.

#### 4. Conclusion

EU procedural harmonisation in asylum is an inherently difficult endeavor given the absence of commonly agreed standards at the international law level, combined with the absence of harmonisation of national administrative procedures more broadly. Nevertheless, it is an endeavour that the EU has undertaken in the last two decades in the form of three legislative waves. The first resulted in the creation of a basic set of procedural guarantees, alongside a plethora of exceptional procedures. The second resulted in modest improvements in terms of harmonisation, and adherence to fundamental rights, but saw exceptional procedural arrangements either retained or introduced. The third, forthcoming wave, aims at further harmonisation that risks, however, being heavily focused on the underlying goal of externalising protection to third countries. Asylum procedural legislative harmonisation has resulted in rich CJEU case law. Drawing on fundamental rights as general principles of EU law, the Court has further framed national procedural autonomy, shaping the minimum standards provided by the first version of the directive, and refining the common standards provided by the recast directive. The CJEU has found that the Charter right to an effective remedy reaffirms the principle of effective judicial protection, largely aligning their scope. It is involved in an increasingly delicate balancing exercise between respecting national procedural autonomy and safeguarding the Charter-based right to an effective remedy but even so it has not shied away from adducing additional procedural requirements through the latter. The emerging procedural landscape is increasingly complex. The Court's nuanced assessments combined with a plethora of exceptional arrange-

ments at national level have led to convoluted standards that are increasingly difficult to put in practice.