

The standard of fundamental rights protection in the field of asylum: The case of the right to an effective remedy between EU law and the Italian Constitution

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Abstract

Asylum is an example of multilevel protection of fundamental rights in the European legal space, where different standards apply at both national and European level. As far as EU law is concerned, the current standard of protection is mainly regulated by secondary legislation. However, the search for compromise-based solutions when adopting EU legislative measures nurtures a decreasing trend in terms of the level of protection guaranteed to the rights of asylum seekers or refugees. The result at the national level, at least in some Member States, is the decrease of the standard deriving from national constitutions in the name of European harmonization. The right to an effective remedy in the field of asylum is an example of this phenomenon, with poor obligations deriving from the relevant EU legislation and an approach of the CJEU that appears to be more restrictive than that of the ECtHR. In order to contain this perverse trend, the EU institutions involved in the law-making process and the Court of Justice should take seriously their duty – now firmly grounded on EU primary law provisions, notably in the Charter – to avoid conflicts with national standards and to ensure the coherence with the standard of protection guaranteed to the right to an effective remedy by the ECHR.

I. Introduction

Asylum is a typical case of multilevel protection of fundamental rights in the European legal space, where multiple sources are relevant to the shaping of the same right. The Charter of Fundamental Rights of the European Union (hereinafter, the Charter) contains some provisions specifically relating to the protection of asylum seekers, notably art. 18 (right to asylum), art. 19 (protection against return), and art. 4 (prohibition of torture and inhuman or degrading treatment or punishment). Moreover, some non-dedicated provisions of the Charter are relevant in the field of asylum law: this is especially the

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case of art. 7 (respect for private and family life), art. 1 (right to dignity), art. 24 (protection of minors), art. 41 (right to good administration) and art. 47 (right to an effective remedy and to a fair trial).

In addition to the Geneva Convention of 1951,¹ which is the cornerstone of the international legal regime for the protection of refugees, these rights are generally protected also under the European Convention on Human Rights (ECHR) and, at the domestic level, under national constitutions. Hence, the applicable standard of fundamental rights protection is a key issue. In fields covered by EU law, regard must be paid to Articles 52(3) and 53 of the Charter. According to the former provision, 'the protection of Charter rights corresponding to those found in ECHR shall be the same as those laid down by the said Convention, without prejudice to the possibility of the European Union to guarantee more extensive protection'. Pursuant to art. 53, the Charter cannot lead to a reduction in the level of protection guaranteed to a right by a different legal source in its respective scope of application.² However, with regard to the relationship between the Charter and national constitutional rights, in the famous *Melloni* case and, more recently, in the *MAS* judgment (also known as *Taricco bis*) the Court of Justice (CJEU) made it clear that the highest constitutional standard can be applied only if two conditions are satisfied: that the EU legislator has not adopted any measures of harmonisation and, additionally, that the application of the national standard does not compromise the primacy, unity and effectiveness of Union law.³

This approach shows a number of critical points when it comes to the right to asylum because, in the European legal system, the specific content of that right is primarily regulated by secondary legislation. This could define in a restrictive way the protection conferred by the above-mentioned provisions of the Charter when they are applied to asylum seekers or refugees.⁴

This article will highlight the divergence in the standards of protection of the right of asylum guaranteed by the Charter, on the one hand, and by the

¹ Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

² N. de Boer, 'Addressing rights divergences under the Charter: Melloni', [2013] *CMLR* 1083-1104; L.F.M. Besselink, 'Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union', [1998] *CMLR* 629-680.

³ CJEU, C-399/11, *Melloni*, 26 February 2013, ECLI:EU:C:2013:107, points 62-63; C-42/17, *M.A.S. and M.B.*, 5 December 2017, ECLI:EU:C:2017:936, points 45-46. N. de Boer, 'Addressing rights divergences under the Charter: Melloni', [2013/4] *CMLR* 1083-1104; A. Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue', [2014/2] *ECLR* 308-331. A similar approach was taken by the CJEU in Opinion 2/13 on Accession of the EU to the ECHR, CJEU, Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454.

⁴ E. Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges', [2014/1] *CMLR* 219-246.

Italian Constitution, on the other hand. Then, taking as an example the reforms recently introduced in the Italian legislation on asylum, the risk of a gradual decrease of the standard of protection of fundamental rights will be addressed. The approach of the CJEU does not seem immune from this sort of ‘race to the bottom’ in the protection of the fundamental rights of asylum seekers. In this regard, the case of the right to an effective remedy will be analysed, with a special attention to cases where the CJEU offered a lower protection than that emerging from the case law of the European Court of Human Rights (ECtHR). Against this background, two concrete proposals to change this trend will be put forward: first of all, EU institutions should take greater account of the fundamental rights enshrined in national constitutions, even in the absence of a request of Parliamentary scrutiny raised by a representative of the Government in the Council or under the control of the subsidiarity principle; second, much attention should be devoted to the ECtHR case law, in order to assure the coherence between the standards developed by the Luxembourg and Strasbourg Courts also in this field.

2. One right, multiple standards

The comparison between the right of asylum as protected in the Charter and as guaranteed under art. 10(3) of the Italian Constitution is a representative example. The latter, which is one of the most characterizing provisions of the Italian Constitution, is formulated in very broad terms and encapsulates a right to asylum that may be directly activated.⁵ In an English translation the paragraph reads as follows: ‘A third-country national, who is prevented in his own country from exercising the democratic freedom and rights guaranteed by the Italian Constitution, has the right to seek asylum in the territory of the Republic, according to the conditions established by law’. Secondary legislation can introduce limits and conditions to the right of asylum guaranteed by the Constitution, but cannot affect the existence of a right of asylum in Italy, as directly recognized by the Constitution.⁶

In the EU Treaties, on the other hand, there is ‘only’ the conferral of competence to the Union to develop an asylum policy in accordance with the 1951 Geneva Convention and not the recognition of a right to asylum stemming directly from the Treaties. A stronger protection is found at art. 18 of the Charter which states that ‘The right to asylum shall be guaranteed with due respect for

⁵ Supreme Court, judgment 26 May 1997 no. 4674; 17 December 1999 no. 907.

⁶ M. Benvenuti, ‘La forma dell’acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità’, [2018/2] *Questionegiustizia.it*, 15-19.

the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'.⁷

While under the Charter the right to asylum is recognized in accordance with the Geneva Convention, based on the risk of individual persecution for an exhaustive list of grounds, according to the Italian Constitution asylum is granted to those who do not enjoy in their own country the same democratic freedoms recognized by the Italian Constitution.

Against this legal framework, secondary legislation plays a relevant role. Both European and national institutions have wide discretion to shape the substance of the right to asylum and its related status. Difficulties would arise if EU secondary legislation, while complying with the Charter, would set a lower standard of protection than that guaranteed by the Italian Constitution. That prospect is far from theoretical, considering that the approval of EU legislation in this field has always been very difficult, probably more than with regard to other EU policies. In many occasions, compromise-based solutions have been reached by Member States within the Council and then between the Council and the European Parliament by means of a decrease in guaranteed rights.⁸ This is what emerges from the regime of revocation of the status of international protection and the subsequent limits to the principle of non-refoulement provided for under Articles 14 and 21 of Directive 2011/95/EU.⁹ These provisions have been the object of criticism because they provide for a stricter protection

⁷ The Court of Justice has had the chance to clarify that the Geneva Convention, to which art. 78 TFEU, art. 18 of the Charter and also EU secondary legislations refer, constitutes 'the minimum level of protection' that may be waived in melius by the European Union. Moreover, the Court has also stated that in both the Union system and the Geneva Convention system, recognition 'has a cognitive and not a constitutive nature with regard to the status of refugee'. CJEU, C-391/16, *M*, 14 May 2019, ECLI:EU:C:2019:403, points 85, 96 and III.

⁸ A statement made by an EU MP is significant in this respect: 'Our common asylum system cannot continue to focus exclusively on how best to hinder fleeing people trying to reach EU territory'. *Report on the regulation proposal of the European Parliament and Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council*, COM (2016/468), 23 October 2017.

⁹ Directive 2011/95/EU 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 (recast), [2011] OJ L 337 at 9-26. Article 14 of that directive allows Member States to revoke, end or refuse to renew the refugee status of a third-country national when there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present. The following Article 21 provides that where not prohibited by the international obligations on non-refoulement, Member States may refoule a refugee considered as a danger to the security of the Member State in which he or she is present.

than Article 3 of the ECHR as interpreted by the ECtHR.¹⁰ It is settled case-law that the protection stemming from that Article is absolute: no derogation is admitted, not even in case of removal of an alien who, because of a final judgment of a particularly serious crime, represents a danger to the security of the State. The CJEU, asked from a referring court to question the validity of Article 14 of Directive 2011/95/EU, has avoided a declaration of invalidity by developing an interpretation that renders that provision (and also Article 21, which is worded in similar terms) consistent with primary law, notably Articles 4 and 19(2) CFREU, rather than an interpretation which leads to their being incompatible with that law and with international obligations binding upon Member States.¹¹ According to the Court, in the event of the revocation of a residence permit or the refugee status, a third-country national is always protected against an expulsion which would expose him to the risk of torture or inhumane or degrading treatment or punishment; given that Directive 2011/95/EU does not explicitly provide for this wide protection, the CJEU derives it directly from the Charter.¹²

The tendency to adopt EU legal acts by lowering the standard of protection of the right guaranteed rights was amplified during the Union's response to the so-called refugee crisis that reached its peak between 2014 and 2017. The European asylum system reform package presented on 2016 is crystal-clear evidence, with the confirmation and the tightening of the criteria put in place by the so-called 'Dublin regulation',¹³ the strengthening of sanction mechanisms for those who do not respect the criteria set forth in the regulation, the mandatory application of safe-country concepts and the consequent application of ac-

¹⁰ A. Saccucci, 'Diritto di Asilo e Convenzione Europea Dei Diritti Umani: Il ruolo della Corte Di Strasburgo Nella Protezione Dello Straniero Da Misure Di Allontanamento Verso Paesi «A Rischio»', in C. Favilli (ed), *Procedure e garanzie del diritto di asilo* (Padova: Cedam 2011), 147-185.

¹¹ CJEU, *M*, cit., point 77.

¹² CJEU, *M*, cit., point 110. In any event, it should be stated that, as the Advocate General noted in points 133 and 134 of his Opinion, and as is confirmed by recitals 16 and 17 of Directive 2011/95, the application of Article 14(4) to (6) of that directive is without prejudice to the obligation of the Member State concerned to comply with the relevant provisions of the Charter, such as those set out in Article 7 thereof, relating to respect for private and family life, Article 15 thereof, relating to the freedom to choose an occupation and the right to engage in work, Article 34 thereof, relating to social security and social assistance, and Article 35 thereof, relating to health protection.

¹³ The 'Dublin regulation' repealed the 'Dublin Convention', an international treaty incorporated into EU law by EU Regulation no. 343/2003, referred to as 'Dublin II', [2003] OJ L 50 at 1. This was followed by Regulation no. 604/2013, or 'Dublin III', still in force at the time of writing of this paper. See EU Regulation no. 604/2013 of the European Parliament and of the Council of 26 June 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 L 180 at 31-59. See also K. Hailbronner & C. Thiery, 'Schengen II and Dublin: Responsibility for Asylum Applications in Europe', [1997] 34 *CMLR* 1047.

celerated and border procedures.¹⁴ All of the above was achieved by means of regulations and no longer of directives, along with the removal of the clause referring to more favourable provisions, which allowed Member States to introduce or maintain in force more favourable provisions than those endorsed by EU directives.¹⁵

It may even happen that a representative of a Government in the Council will be in favour of adopting an act aiming to harmonize national laws that clashes with a fundamental principle of the State's Constitution, such as the Italian constitutional right to asylum. The Union could thus impose the decrease of the standard deriving from national constitutions in the name of the European harmonization.

Moreover, even when no EU measure of harmonization is adopted, the mere existence of a EU measure providing for a standard of protection of fundamental rights lower than the one in force under national law could constitute an incentive to lower that domestic standard, also beyond the scope of application of the relevant EU legislation, producing a sort of race-to-the-bottom spill-over effect.

The Italian example is again highly instructive in this regard. During 2017 and 2018, two law decrees have been adopted, both changing the national asylum system on several points. The Law Decree 2017 no. 13 (adopted when a centre-left Minister was in charge of the Home Office), among other amendments, abolished the second instance in the judicial procedure concerning asylum. This change was not required by EU law, but was allowed by it. Indeed, as in the majority of EU secondary measures, also in the European asylum system Member States are required to provide for effective remedies within the specific obligations as set forth in particular in art. 46 of the so-called 'Procedures Directive' (hereinafter PD).¹⁶ According to art. 46(3) an effective remedy entails '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

¹⁴ Jesuite Refugee Service Europe, 'The CEAS reform package: the death of asylum by a thousand cuts?', [January 2017], WP 6, jrseurope.org/assets/Regions/EUR/media/files/JRS-EuropeCEAS-reformWorkingPaper6.pdf; U. Becker & J. Hagn, 'Reform of the European Asylum System: Why Common Social Standards Are Imperative', [2016/4] CESifo DICE Report, ces-munich.de/DocDL/dice-report-2016-4-becker-hagn-december.pdf.

¹⁵ See for instance Article 3 of 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 (recast), [2011] OJ L 337 at 9-26.

¹⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, [2013] OJ L 180 at 60-95.

Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance'. In the absence of any requirement to provide for further layers of appeals, the abolition of the second instance is perfectly in line with EU law. It is however, an anomaly in the Italian legal order, where in almost any area of law three instances are guaranteed, two on law and facts and the third limited to law.

The subsequent Law Decree 2018 no. 113 has brought about even more radical changes. First of all, it abrogated the so-called humanitarian protection, a kind of protection, complementary to international protection provided by the European Common Asylum System and governed by national law.¹⁷ In the absence of EU rules regulating humanitarian protection, this legislative amendment falls under national competence. EU Directives expressly allow Member States to maintain or introduce more favourable rules provided that they do not breach EU law.¹⁸ However, the public debate supporting this radical change was rich in references to EU law, through the portrayal of humanitarian protection as an anomaly in Europe.¹⁹ Second, the same decree modified the reception system, reducing benefits and services for asylum seekers and leaving the more structured and efficient form of protection only for beneficiaries of international protection. Again this is not prohibited by EU law, since the so-called reception Directive provides for only minimum harmonization, leaving Member States free to choose their preferred system of reception.²⁰

Third, the concept of safe country of origin has been introduced in the Italian legal system. This is particularly interesting, because the safe-country concept are contained in the PD, since the very first text in force.²¹ However, this concept is formulated as optional, leaving Member States free to implement it at domestic level.²² Italian Governments, even of different political background,

¹⁷ The Italian Supreme Court established that the two kind of international protection covered by EU law (refugee status and subsidiary protection) together with the humanitarian protection covered by national law allow to deem the constitutional right to asylum fully implemented: Supreme Court, Order 13 January 2009 no. 19393.

¹⁸ CJEU, C-57/09, *B. D.*, 9 November 2010, ECLI:EU:C:2010:661, points 118-121; C-542/13, *M' Bodj*, 18 December 2014, ECLI:EU:C:2014:2452, points 43-47.

¹⁹ *Relazione illustrativa, Atto Senato n. 840, XVIII legislatura*, page 3, available at www.senato.it.

²⁰ 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 at 9-26.

²¹ See Articles 25-31 of 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 L 326 at 13-34. Directive 2005/85/EC has been repealed by already mentioned Directive 2013/32/EU.

²² See also the Opinion of the French Conseil d'Etat issued on 16 May 2018. The Opinion is confidential, but its general content has been commented by M. Baumard, 'Voulu par l'EU, le principe pays tiers sûr est jugé inconstitutionnel par le Conseil d'Etat. Le renvoi hors d'Europe des demandeurs d'asile ne peut se faire sans examen du dossier par l'Ofpra', [13 June 2018], *Le Monde*, lemonde.fr/international/article/2018/06/13/pour-le-conseil-d-etat-les-pays-tiers.

never implemented this concept, mainly in order not to violate the constitutional right of asylum.²³ A new Government with a new Home Minister, took the opportunity of the European Union directive to introduce this concept, together with the accelerated and border procedures. Once again, a relevant amendment to the national law on asylum was introduced because it was allowed by EU law, and even highly encouraged by the European Commission, although not required as mandatory.²⁴

It is likely that the Italian Constitutional Court will be called to decide upon the lawfulness of these measures, notwithstanding the complexities of the system of access to that Court.²⁵ In the meantime it is necessary to elaborate further on this sort of progressive downgrading of fundamental rights protection in the field of asylum and consider whether the still much unexplored EU standard provided by the Charter in this field is adequately taken into account by EU institutions when adopting legislative measures.

Indeed, in the impact assessments prepared by the European Commission before the submission of a proposal for a legislative act, the impact on human rights appears to be properly considered.²⁶ However, in the following phases of the legislative process and especially during the negotiations between Parliament and Council, the need to find an agreement between the two institutions may prevail over the duty to respect the national standards on fundamental rights. And this may occur even with the support of the representative of the Government of the same country, whose constitutional right may be infringed, lacking any request of a Parliamentary scrutiny reservation.

surs-voulus-par-l-europe-pour-stopper-les-migrants-sont-inconstitutionnels_5313885_3210.html. See also on the same subject, the Opinion of the French Commission National Consultative des droits de l'Homme, 'Avis sur le concept de pays tiers sûr', 19 December 2017, p. 6, cncdh.fr/fr/publications/avis-sur-le-concept-de-pays-tiers-sur.

²³ F. Venturi, 'Il diritto di asilo: un diritto "sofferente". L'introduzione nell'ordinamento italiano del concetto di «Paesi di origine sicuri» ad opera della l. 132/2018 di conversione del c.d. «Decreto Sicurezza» (d.l. 113/2018)', [2019/2], available at dirittoimmigrazionecittadinanza.it.

²⁴ *Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy*, COM(2017)820 of 7 December 2017, page 5.

²⁵ See the Constitutional Court's orders no. 194 and 195 of 20 June 2019, issued after the application by five Italian Regions. The application was declared inadmissible on the merits because the competence related to migration and asylum policy lies upon the central Government and does not affect the prerogatives of Italian Regions. The latter is a condition of admissibility of the direct application to the Constitutional Court by Regions. Available at cortecostituzionale.it.

²⁶ European Commission Staff Working Paper, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessment, SEC(2011)567 of 6 May 2011; Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, [2016] OJ L 123 at point 12.

It is important to stress, in this respect, that the EU institutions must ensure the observance of the Charter in the law-making process. The prevalence of the harmonised EU standard of fundamental rights' protection over the domestic one, in accordance with the *Melloni* approach, is conditional upon the compliance of the relevant EU secondary law provisions with the Charter. This means that, in the construction of the said standard, the EU legislator must take in due account the interpretative rules laid down by the Charter's general provisions. These are, notably, Articles 52(3) and 53, but also Article 52(4), which requires that Charter rights are interpreted 'in harmony' with the constitutional traditions common to the Member States. As the recent '*Taricco* saga' suggests, national courts, including Constitutional Courts, may be more willing than political actors to ensure that a higher domestic standard of fundamental rights' protection is safeguarded, particularly when the national constitutional identity is deemed to be endangered. The CJEU has an important role to play in this respect, by conducting a careful check against the Charter of any restrictions in EU secondary legislation on asylum that is brought to its attention. Such a rigorous control is compelled by the need to ensure the compatibility of the EU secondary law sources with the primary ones, as an expression of the legality principle. Moreover, it can help preventing centrifugal effects, as a consequence of national challenges to the EU harmonised standard.

3. The approach of the Court of Justice to fundamental rights in the field of asylum: the case of the right to an effective remedy

3.1. The application of the right to an effective remedy and to a fair trial in the field of asylum

The CJEU has already given various interpretations of several provisions of the European asylum system in light of the Charter.²⁷ At times, the Court has played a significant role in realigning secondary legislation with fundamental rights as enshrined in the Charter and in the other human rights instruments.²⁸ However, a certain restrictive approach of the CJEU emerges,

²⁷ See the judgements applying the EUCFR available on the website of the Fundamental Rights Agency, catalogued article by article: <http://fra.europa.eu/en/charterpedia/article/18-right-asylum>. See also the ECRE report, *The application of the EU Charter of Fundamental Rights to asylum procedural law, 2014*, www.ecre.org; *ACTIONES*, *Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter*, www.eui.eu.

²⁸ In some cases, the EU institutions have complied with this standard, whereas on other occasions they have departed from it. In the case *MA*, for instance, the CJEU held that, in the case of unaccompanied minors without families in the EU, the Member State in which the minor is based is obliged to examine the application for international protection, even though the minor may have lodged an application in another Member State; CJEU, C-648/11, *M.A., B.T., D.A.*, 6 June 2013, ECLI:EU:C:2013:367.

in particular regarding the right to an effective remedy where an already very low standard is provided for by secondary legislation. As a consequence, inconsistencies with the jurisprudence of the ECtHR may occur, while according to art. 52(3) of the Charter the meaning and scope of the rights which correspond to rights guaranteed by the ECHR should, in principle, be the same as those laid down by that Convention.

This is the case of Article 47 of the Charter, which corresponds to Articles 6 and 13 ECHR. It is true that, since the scope of Article 6 ECHR (the right to a fair trial) is limited to ‘civil rights and obligations’, the ECtHR has not developed a line of case law specifically dealing with effective judicial protection in asylum cases. However, according to the Explanations to the Charter, ‘As for the right to due process, in contrast to art. 6 ECHR, art. 47(2) is of general application and is not limited to “disputes relating to civil rights and obligations”’. Art. 47(2) was deliberately formulated in such an extensive way so that the guarantees of due process are applicable in all cases concerning rights deriving from European Union law. As the Explanations to the Charter make clear, ‘this extension is one of the consequences of the fact that the Union is a community of law ... However, with the exception of the scope, the guarantees offered by the ECHR apply similarly in the Union’.²⁹

The effect of this general application of art. 47(2) of the Charter is that the guarantees recognised under art. 6 ECHR and interpreted by the jurisprudence of the ECtHR are to be applied within the scope of application of the Charter in the field of asylum. This is a rather complicated exercise given the multiplicity of judgements of the ECtHR and the difficulty in extrapolating legal principles applicable also in other contexts. However, this exercise is not only necessary, in light of the interpretative rule laid down by art. 52(3) of the Charter, but also likely to cause a positive interaction between the two systems of fundamental rights protection and an enrichment of the standard guaranteed within the EU. This exercise must be carried out for each legal issue at stake, trying to avoid any discrepancy among the respective case law of the Luxembourg court and the Strasbourg court. However, in at least two cases, which will be analysed below, an inconsistency emerged between the approach of Luxembourg and that followed by Strasbourg.

²⁹ *Explanations Relating to the Charter of Fundamental Rights*, OJEU, C303, 14 December 2007, p. 30.

3.2. The right to a public hearing and the right to be heard

A constituent element of the right to a fair trial is the right to have the case publicly examined, i.e. through a public hearing that, as a rule, also includes the right to be heard.³⁰ The application of these rights in the field of asylum has been explored by the CJEU in the *Sacko* case, decided on 26 July 2017 following a referral by an Italian Court.³¹

The CJEU was requested to clarify whether art. 46 of the Procedure Directive (PD) and art. 47 of the Charter preclude national provisions - such as the Italian one at issue - that allow rejecting a claim without hearing the applicant in the event of a manifestly unfounded application.

According to the CJEU no exemption or limitation of the right to be heard is provided for in the PD. However, according to the CJEU, such a limitation may be allowed when a court decides that a case is manifestly unfounded and is able to rely on written submissions and minutes of the administrative procedure. The CJEU justifies this restrictive interpretation in light of the relevant case law of the ECtHR. Yet, an analysis of this case law reveals that the approach of the CJEU departs from that of the Strasbourg Court. Such a divergence results into lowering the level of protection of the fair trial rights under Article 47 of the Charter, in contrast with the requirements of Article 52(3) of the Charter.

The Strasbourg court indeed takes into account the importance of the protected right, the difficulty in ascertaining facts, the relevance of the individual declarations and the credibility of the claimant. Furthermore, the ECtHR considers the omission of the hearing in the field of social security to be legitimate, where the judgement is based mainly on legal medical reports and a hearing was not requested.³² In the *Jussila* ruling, referred to also by the CJEU in *Sacko*, the ECtHR affirmed: ‘...the obligation to hold a hearing is not absolute... There may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties’ submissions and other written materials.’³³ The ECtHR also

³⁰ ECtHR, 23 November 2006, *Jussila v Finland*, no. 73053/01, para. 40; A.M. Reneman, *EU asylum procedures and the right to an effective remedy*, Leiden, 2013, p. 181.

³¹ CJEU, C-348/16, *Sacko*, 26 July 2017, ECLI:EU:C:2017:591.

³² ECtHR, 23 October 1995, *Schmautzer v Austria*, no. 15523/89, ECLI:CE:ECHR:1995:1023JUD001552389; 23 November 2006, *Jussila v Finland*, no. 73053/01, ECLI:CE:ECHR:2006:1123JUD007305301; 9 October 1979, *Airey v Ireland*, no. 6289/73, ECLI:CE:ECHR:1979:1009JUD00628973. V. Zagrebelsky, R. Chenal & L. Tomasi, *Manuale dei diritti fondamentali in Europa* (Bologna: Il Mulino 2016), 203-204.

³³ ECtHR, *Jussila v Finland*, cit., para 41.

stated that the right to the hearing is satisfied if there is at least one hearing in the context of the judicial review. In other words, there must not necessarily be a hearing at all stages of the proceedings, but there must be at least one.

In light of the criteria set forth by the ECtHR, we can conclude that judicial review of asylum decisions must include at least one oral hearing in one of the stages of the judicial proceedings, and notably when there is doubt about the applicant's credibility.

In the *Sacko* judgment, the CJEU put the emphasis on some procedural aspects, such as the close connection between the appeal procedure and the 'first instance procedure' that precedes it. By contrast, this strict connection between the administrative phase and the jurisdictional one does not emerge as relevant grounds for restrictions in the case law of the ECtHR. The CJEU merely repeats the unfortunate formulation of the PD, which defines the administrative procedure as a 'first instance procedure', even if there is no 'second administrative instance procedure'. Yet, it is erroneous to consider judicial review as a second instance in the administrative procedure:³⁴ judicial protection in the field of asylum also offers an asylum seeker another chance to obtain the recognition (this time, by a court) of the fundamental right to asylum, including the constitutional right to asylum. To this end, hearing the asylum seeker is often of the utmost importance, since the applicant's statements may be the main evidence of the existence of an effective need of protection. Moreover, the emphasis put by the CJEU on the close connection between the appeal procedure and the procedure of first instance that precedes it is not convincing, because such a connection always exists in any appeal against an administrative act. In fact, how could there not be a close link between the appeal and the procedure leading to the adoption of the challenged act?³⁵ Significantly, the ECtHR never stated that the right to a hearing, including the right to an *oral* hearing, is satisfied if such a hearing takes place in the administrative procedure that leads to the adoption of an act that is later challenged before a judicial authority.

This suggests that, in the EU legal system, the limitation of fair trial rights is inspired by the objective of EU institutions, including the CJEU, to reduce the number of pending cases at national level. It is true that decisions on asylum, as well as all decisions and all judgements, must be taken as soon as possible; however, it is equally undeniable that, as the CJEU itself recognises, States and

³⁴ A.M. Reneman, 'Asylum and Article 47 of the Charter: Scope and Intensity of Judicial Review', in A. Crescenzi, R. Forastiero & G. Palmisano (eds), *Asylum and the EU Charter of Fundamental Rights* (Naples: Editoriale scientifica 2018), 59.

³⁵ Recently, the ECJ has affirmed the right to an effective remedy in relation to the refusal to issue a visa by an embassy of a Member State; ECJ 13.12.2017, Case 403/16, El Hassani.

national courts cannot limit the guarantees referred to in art. 47 of the Charter and reduce the effectiveness of judicial protection of aliens for reasons related to the number of appeals and to the need to accelerate administrative and jurisdictional procedures.³⁶ The case law of the ECtHR is clear and coherent in this respect: economic needs and efficiency of the judicial system can be legitimate reasons limiting the exercise of fundamental rights only in exceptional cases.³⁷ Additionally, the right to a reasonable length of judicial procedures is first of all an individual right and only indirectly can be considered as an objective guarantee pursuing the efficiency of the judicial system.

The approach of the CJEU thus appears to be more restrictive compared to that of the ECtHR and this is a cause of concern under Article 52(3) of the Charter.

3.3. The suspensive effect of appeal

Another interesting referral to the CJEU originating from an Italian court adds further evidence to what was argued in the previous section. This is the *FR* case, concerning the suspensive effect of the challenged measure due to judicial appeal proceedings.³⁸ The applicable provisions were modified in Italy in 2017.³⁹ Under the previous regime, the suspensive effect of an appeal was automatic and lasted until the final judgment ending the entire judicial procedure, which could include three instances. With the 2017 reform, the Italian legislator removed the system of automatic suspensive effect and provided that a separate application for suspension of the effects of the challenged measure may be lodged before the same court who pronounced the challenged judgment, if 'justified reasons' exist.⁴⁰

With reference to these new provisions, the Tribunal of Milan referred a question for a preliminary ruling to the CJEU.⁴¹ In the opinion of the Italian court, the lack of an automatic suspensive effect of the appeal before the Supreme Court makes it difficult, if not impossible, to grant an effective right of

³⁶ *Sacko*, cit., point 45.

³⁷ ECtHR (GC), 11 July 2002, *Göç v Turkey*, no. 36590/97, para 51; see Reneman, cit., 183. ECtHR, 23 November 2006, *Jussila v Finland*, no. 73053/01, para 42.

³⁸ CJEU, C-422/18 PPU, *FR*, 27 September 2018, ECLI:EU:C:2018:784.

³⁹ Law Decree no. 13 of 17 February 2017 was adopted, then transposed into Law no. 46 of 13 April 2017.

⁴⁰ Article 35 bis of Legislative Decree no. 25/2008, para 13, introduced by Law Decree no. 13/2017.

⁴¹ Order of the Tribunal of Milan, R.G. n. 44718/2017, *Questionegiustizia.it*. See A. Adinolfi, 'Diritto dell'Ue e soggiorno del richiedente protezione internazionale in attesa dell'esito del ricorso in Cassazione: qualche osservazione a margine dell'ordinanza di rinvio pregiudiziale del Tribunale di Milano (n. 44718/2017)', [2018] *Questionegiustizia.it*.

defence to asylum seekers, because the person, whose presence in the territory is illegal pending the appeal, can be subject to a return measure and cannot, therefore, participate to the proceedings.

In its order, which contains extensive references both to national and EU law, the Tribunal of Milan provides thorough reasons about the possible violation of the right to an effective remedy, the violation of the right to a fair and impartial trial and the principle of equivalence. It explained that the judge called upon to decide on the suspension of the first instance decision is, in fact, the same who issued that decision. Therefore, the impartiality of the judge required by the right to a fair trial is not secured. As for the principle of equivalence, the national court notes that, in all other areas of law, when a negative decision is challenged before the Supreme Court, art. 373 of the Civil Procedure Code (CPC) applies, which provides, as the only requirement for a suspensive effect, the existence of a risk of serious and irreparable harm: in short, according to art. 373 CPC, suspension is granted when the effective execution of the judgment would be endangered, without making any reference to the requirement of *fumus boni iuris* as envisaged in the field of asylum. Arguably, this different regime is not based on any objective reasons other than combatting abuses of the right to asylum, with the consequent application of special rules that are less favourable to the applicant than those generally provided by the Italian legal system.

The CJEU, which had granted the urgent preliminary ruling procedure, decided on the case with an order published on 27 September 2018,⁴² which reiterated the arguments developed in a judgment delivered the day before and originating from a similar question referred by the Council of State of the Netherlands.⁴³ It should be noted that the preliminary ruling in the Dutch case had been notified to the Court of Justice on 7 April 2017, while the Italian one was notified on 28 June 2018. However, in the former case the preliminary ruling followed the ordinary procedure, while in the latter the Court accepted the request of the national court to apply the urgent preliminary ruling procedure. Taking into account also the judicial vacation taking place during the summer period, the CJEU must have viewed this as a good opportunity to rule first on the Dutch case and then, a little later, on the Italian case, by referring *per relationem* to the earlier judgment. The outcome of this choice, which is inspired by an efficiency rationale, is that the reasons developed by the Italian court, which were different from those in the Dutch case, in particular regarding the respect of the principle of equivalence, were not the object of a specific consideration.

⁴² FR, cit.

⁴³ CJEU, C-180/17, X, Y, 26 September 2018, ECLI:EU:C:2018:775.

The Court's ruling contains very limited reasoning, with no space for those extensive arguments, which it nonetheless seems inclined to develop in other areas of law.⁴⁴ The Court reiterates that the PD does not impose any obligation to establish a second level of appeal, or to introduce a specific procedure. Moreover, according to the Court, such an obligation does not arise from the right to an effective remedy as indicated in art. 13 of the ECHR and in line with the established case law of the ECtHR.⁴⁵

No further reasoning emerges with reference to other relevant aspects submitted to the CJEU by the national court in its referral order. The CJEU, in fact, recognises that the introduction of a second level of appeal and the choice of providing it or not with an automatic suspensive effect fall within the scope of the principle of procedural autonomy, hence entailing the duty to respect the principles of equivalence and effectiveness.⁴⁶ However, as regards the principle of effectiveness, the CJEU reiterated what it had already stated about the right to an effective remedy, ruling out, in this specific case, any obligation beyond those deriving from the fundamental right to an effective remedy.⁴⁷

The CJEU also provided a similar and limited opinion on the issue of equivalence. In the case in question, the referring court had extensively analysed national law in order to allow the CJEU to take a decision on this point. After having reaffirmed the principle of equivalence and its relevance in the assessment of national remedies, the CJEU abruptly closed the matter by stating that it is the national court that must assess whether there is a violation of the principle of equivalence, given that the same court is best placed to evaluate the similarity of the remedies as regards the object, cause and essential elements (points 43-44).

With high probability, this outcome was dictated by the CJEU's choice to rule on the case following an urgency procedure and to deliver an order, referring *per relationem* to the 'twin' judgement pronounced the day before. Unfortunately, the Court failed to consider the point on the equivalence, ignoring a substantial part of the arguments submitted by the national court. Furthermore, the CJEU seemed to ignore the sensitivity of the issues underlying this preliminary ruling,

⁴⁴ See CJEU, C-234/17, *XC, YB e ZA*, 24 October 2018, ECLI:EU:C:2018:853.

⁴⁵ ECtHR, 5 July 2016, *A.M. The Netherlands*, CE:ECHR:2016:0705JUD002909409, point 70.

⁴⁶ CJEU, C-169/14, *Sánchez Morcillo and Abril García*, 17 July 2014, ECLI:EU:C:2014:2099, points 31, 36 and 50, as well as the order of C-539/14, *Sánchez Morcillo and Abril García*, 16 July 2015, ECLI:EU:C:2015:508, point 33.

⁴⁷ CJEU, C-180/17, *Staatssecretaris van Veiligheid en Justitie*, 26 September 2018, ECLI:EU:C:2018:775, point 43.

leaving the national court ‘alone’ in the application of the principle of equivalence and in the consequent non-application of the national law considered to be in contrast with the same. Despite the fact that, at an abstract level, the national judge has all the powers to proceed with such a solution, in practice this can prove difficult, not least also because of the media exposure of certain topics such as migration and asylum. In other words, it is highly unlikely that the non-application of an essential part of national procedural remedies, recently introduced by the legislator, could be carried out by a national court ‘only’ on the basis of the reiteration of the established interpretation of the principle of equivalence, without specific references to the peculiarities of the case. This especially since the lack of consideration given by the CJEU to the arguments submitted by the national court could give the impression of the irrelevance of those arguments in the view of the CJEU.

Furthermore, the lack of arguments in the *FR* case in terms of compliance with the principle of equivalence also emerges when comparing it to other judgements issued by the CJEU on the same principle.⁴⁸

4. Concluding remarks

The analysis of the *Sacko* and *FR* judgments of the CJEU on the right to an effective remedy in the field of asylum has shown that the actual content of that right is highly influenced by limited obligations provided for in EU secondary law, and more in particular by the PD, as far as judicial remedies are concerned. In order to be in line with the PD, Member States are required to provide at least for only one layer of judicial control. Since other layers of appeals are not required by art. 13 ECHR either, also art. 47 of the Charter does not require Member States to offer asylum seekers a second or a third instance of judicial remedy. Hence, according to EU legislation and judgments, the right to an effective remedy is fully satisfied when there is one layer of judicial control. Therefore, the *minimum standard* of protection set by the ECHR becomes the *common standard* in EU law, influencing also the interpretation of the Charter by the CJEU. Thus, from the EU perspective, Member States are free to lower the national standard of the right to an effective remedy, provided that the minimum threshold laid down in EU law is respected. In other words, EU law could potentially lead to favouring the decrease of the standards deriving from national constitutions.

Additionally, one could even perceive a certain lack of willingness on the part of the CJEU to play, with respect to the right to effective judicial protection

⁴⁸ CJEU, C-234/17, *XC, YB e ZA*, 24 October 2018, ECLI:EU:C:2018:853.

in the field of asylum, the same role exercised in other areas covered by European Union law.⁴⁹ While acknowledging a certain discretion of the CJEU as to whether and how to address the specific issues submitted by national courts, it would still be preferable for the CJEU to ensure a certain consistency. There seems to be sectors where the CJEU leaves more room to national courts and, more generally, to Member States. The field of asylum is one of this sector.

The divergences between the jurisprudence of the Luxembourg court and that of the Strasbourg court as regards the application of the right to a fair trial in the field of asylum is a symptom of the restrictive approach of EU institutions, including the CJEU. A careful analysis of the ECtHR case law and its extension also to the field of asylum would avoid that the EU standard goes below the minimum standard represented by the ECHR.

Additionally, the protection of fundamental rights recognised by multiple legal sources should be properly considered during the legislative process, by reinforcing those instruments which prevent the adoption of Union acts conflicting with the fundamental rights protected by national constitutions.⁵⁰ Prevention of conflicts through a comprehensive analysis during the legislative procedure should be the major tool. This with a view to reducing clashes of rights belonging to different legal systems and thus avoiding burdening courts with conflicts that maybe very difficult to settle.

⁴⁹ Ibidem.

⁵⁰ N. Lazzarini, 'Le clausole generali della Carta dei diritti fondamentali nel law-making europeo: codificazione e Innovazione nella determinazione del livello di tutela', in A. Annoni, S. Forlati & F. Salerno (eds.), *La codificazione nell'ordinamento internazionale e dell'Unione europea* (Editoriale scientifica 2019), 515-523.