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## **The European asylum procedures directive in legal context**

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## Introduction\*

In the Tampere Conclusions, the European Council pledged to develop ‘common standards for a fair and efficient asylum procedure’ in Europe.<sup>1</sup> This chapter considers whether this commitment has been met in the Procedures Directive.<sup>2</sup> In this discussion, fairness is understood in a general sense, as familiar from administrative law, requiring adequate hearing and impartiality, albeit adapted to the specificities of the asylum process. Efficiency is a more difficult concept. It tends to be conceived of in a narrow state-centric manner, as the minimisation of the costs of providing protection, in a manner apt to undermine fairness.<sup>3</sup> The Tampere commitment in contrast implies that the notions must be conceived of as mutually reinforcing.

The particular question addressed is how the highly qualified and differentiated procedural guarantees in the Procedures Directive will interact with the robust procedural standards of the general principles of EC law,<sup>4</sup> which must be respected in the implementation and application of both the Procedures Directive and Qualification Directive.<sup>5</sup>

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<sup>1</sup> Presidency Conclusions, Tampere European Council, 15-16 October 1999, SN 200/99, 3.

<sup>2</sup> 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. See further, S Peers, ‘Key Legislative Developments on Migration’ (2006) *European Journal of Migration and Law* 97, 98-107; C Costello, *ILPA Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (30 April 2004)* (London, ILPA, July 2004), available at [www.ilpa.org.uk](http://www.ilpa.org.uk), follow link for <submissions>; S Craig and M Fletcher, ‘Deflecting Refugees: A Critique of the EC Asylum Procedures Directive’ in P Shah (ed) *The Challenge of Asylum to Legal Systems* (London, Cavendish Publishing, 2005) 53.

<sup>3</sup> See further, A Betts, ‘What does “efficiency” mean in the context of the global refugee regime?’ *Centre on Migration, Policy and Society Working Paper No 5* (Oxford, COMPAS, 2005).

<sup>4</sup> See generally, T Tridimas, *The General Principles of EU Law* (2nd ed, Oxford, OUP, 2006); HP Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, Hart Publishing, 1999); P Craig and G de Burca, *EU Law – Text, Cases and Materials* (3rd ed, Oxford, OUP, 2002) chapters 5 and 6.

<sup>5</sup> Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12. See generally, chapter 7 [in this volume](#) – MT Gil-Bazo ‘Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to be Granted Asylum’; J McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’ (2005) *International Journal of Refugee Law* 461; UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)* (Geneva, UNHCR, January 2005); and ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Doc IN1/10/2004/ext/CN (Brussels, ECRE, October 2004).

To this end, the next section contextualises the harmonisation process, in order to explain Member States' ambivalence towards the exercise, and hence the ambiguous outcomes. Then, I outline the highly qualified and differentiated procedural guarantees in the Procedures Directive, and the contrasting provisions in the Qualification Directive on evidential assessment. The role of various sources of fair procedures and fundamental rights is then explained, focusing in particular on the general principles of EC law. The next section examines four key procedural issues, where the apparent discretion afforded by the Procedures Directive is constrained by these general principles. These are the entitlements to an interview or hearing; a reasoned decision; legal aid; and effective judicial protection. The final section considers likely future procedural developments, as the EU enters a new phase of asylum policy development.

This account of EC general principles reveals a significant transformation of asylum law implicit in its integration into the framework of EC law. EC law is a unique system of law, with many federal features, and strong enforcement mechanisms. With its own supranational court, the EC legal order permeates national ones, bringing well-established legal doctrines which empower national judges and indeed litigants. Many of these doctrines have been honed in different, largely economic contexts. Strategic litigation is required to test their application in the asylum context. The doctrinal analysis in this chapter provides some potentially fruitful arguments that such litigation should employ.

### **European asylum procedures in context**

Asylum decision-making poses unique challenges. At its core is the task of assessing fear of persecution and future risk of certain harms, which requires both sensitive communicative approaches and objective risk assessment. These methods may not sit easily together in that the former privileges the asylum seekers' account and the latter objective country of origin information. Both elements are however, crucial. Moreover, the context necessitates a particular non-adversarial approach to fact-finding, due to the fact that while the asylum seeker alone has the relevant personal knowledge, governmental authorities may be better placed to deal with general country conditions.<sup>6</sup> These may in turn be volatile and variable. In claims that warrant recognition, asylum seekers' testimony may nonetheless be inconsistent, incredible or even untruthful in respects, and the process marred by intercultural and linguistic misunderstanding. Thus, too hasty findings of incredibility are inevitably unfair,<sup>7</sup> and the applicant must be given the benefit of the doubt.<sup>8</sup> Deciding on refugee claims has accordingly been described as 'the single most complex

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<sup>6</sup> See eg, *Secretary of State for the Home Department v RK (obligation to investigate) Democratic Republic of Congo* [2004] UKIAT 00129, para 46, cited in R Thomas, 'Asylum Appeals: The Challenge of Asylum to the British Legal System' in Shah (ed), above n 2, at 201, 204-205.

<sup>7</sup> There is a growing literature on credibility issues in asylum procedures. See eg W Kalin, 'Troubled Communication: Cross Cultural Misunderstandings in the Asylum Hearing' (1986) *International Migration Review* 230; M Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in the Refugee Status Determination' (2003) *Georgetown Immigration Law Journal* 367; J Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2002) *International Journal of Refugee Law* 293 and material at n 9 and n 10 below.

<sup>8</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 (Reedited, Geneva, January 1992), paras 203-204.

adjudication function in contemporary Western societies.’<sup>9</sup> There is no analogous process, although useful lessons may be drawn from other areas of decision-making.<sup>10</sup>

Governments have yet to meet this unique challenge with procedures which are both fair and efficient. This is evidenced in the crude and repeated alterations to asylum processes across Europe over the past two decades, as governments’ primary response to the ‘asylum crisis.’ Recourse to procedural change is at least partly explained by the fact that unlike the substantive guarantee in the Refugee Convention and other fundamental rights instruments, in particular *non-refoulement*, international law leaves room for divergent national procedures. As the UNHCR Handbook indicates:

It is ... left to each Contracting State to establish the procedure that it considers the most appropriate, having regard to its particular constitutional and administrative structure.<sup>11</sup>

So governments have taken this leeway and manipulated asylum procedures in order to pursue manifold objectives, from deterring and deflecting asylum seekers, to ensuring that failed asylum seekers will be deportable.<sup>12</sup> Globally, as Legomsky notes, ‘it is ... procedural issues that ... tend to trigger the most controversial and the most long-lasting debates.’<sup>13</sup> Unsurprisingly, governments still jealously guard this perceived room to manipulate asylum systems through procedural change and, as will be seen, were thus reluctant to agree unequivocal binding standards in the Procedures Directive.<sup>14</sup>

However, institutional dynamics lead to informal convergence of procedural practices, as states share restrictive practices and thereby engage in a procedural race to the bottom. The most enduring and widespread common practices and shared understandings are those based on safe country practices, namely safe third country (STC) and safe country of origin (SCO). The common assumption of both processes

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<sup>9</sup> C Rousseau, F Crépeau, P Foxen, F Houle, ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board’ (2002) *Journal of Refugee Studies* 1, 1-2 citing P Showler, Chair of the Canadian Immigration and Refugee Board (2000).

<sup>10</sup> See G Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston, Martinus Nijhoff Publishers, 2005), in particular the contributions by H Zahle, ‘Competing Patterns for Evidentiary Assessments’ 31; A Popovic, ‘Evidentiary Assessment and Non-refoulement: Insights from Criminal Procedure’ 27; N Doornboos, ‘On Being Heard in Asylum Cases – Evidentiary Assessment through Asylum Interviews’ 103 and G Noll, ‘Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear’ 141.

<sup>11</sup> UNHCR Handbook, above n 8, para 189.

<sup>12</sup> See discussion below concerning national procedural measures which aim to ensure that asylum seekers hand over identity documentation.

<sup>13</sup> S Legomsky, ‘An Asylum Seeker’s Bill of Rights in a Non-Utopian World’ (2000) *Georgetown Immigration Law Journal* 619, 620.

<sup>14</sup> J Vedsted-Hansen, ‘Common EU Standards on Asylum – Optional Harmonisation or Exclusive Procedures?’ (2005) *European Journal of Migration and Law* 369, 374. He suggests the reluctance to fully harmonise procedures reflects ‘a combination of regulatory tradition and calculated evasion’ in particular as procedural commitments are entered into less readily than substantive ones, as the former are more visible and easy to monitor than the latter. A purely rationalist account cannot explain all the features of the common European asylum policy. For instance, the Dublin Regulation (below n 19) defies rationalist explanation. See further, J Aus, ‘Logics of decision-making on Community Asylum Policy: A Case Study in the Evolvement of the Dublin II Regulation’ *ARENA Working Paper No 3* (Oslo, ARENA, 2006).

is that it is possible to make general assumptions of safety, and truncate asylum examinations accordingly. STC also has a clear external dimension, and aims to deflect asylum seekers elsewhere, in a manner which undermines international protection.<sup>15</sup> Over time, the procedural consequences of the application of these practices have deteriorated, for example leading to a denial of an asylum interview or appeal in some countries. STC in particular is often treated as evidence of a weak substantive claim, rather than reflecting the fact that requisite protection is available elsewhere. This reflects the practice becoming unhinged from its original rationale. This phenomenon is reflected in the Procedures Directive, and discussed further in the next section below.

STC developed from the concept of first country of asylum (FCA) which refers to the situation where an asylum seeker has actually been afforded protection in a third country, and hence her application is not examined again. The STC concept emerged in 1986 in Denmark and the practice ‘quickly gained ground ... By the end of the 1990s, virtually every Western European state implemented a safe third country policy to transfer responsibility for receiving an asylum seeker and assessing their claim.’<sup>16</sup> The London Resolution on a harmonised approach concerning host third countries<sup>17</sup> and the 1995 Resolution on minimum guarantees for asylum procedures,<sup>18</sup> allowed derogations from basic procedural guarantees in STC cases. STC was included in the two legally binding European instruments – the Schengen and Dublin Conventions.<sup>19</sup> The erosion of access to protection through STC continues.<sup>20</sup> SCO rules are even more recent and more controversial than STC. SCO has no legal basis in the Refugee Convention, and has been criticised as a violation of the Refugee Convention’s non-

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<sup>15</sup> This issue is more thoroughly dealt with in C Costello, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ (2005) *European Journal of Migration and Law* 30. See further, chapter 9 [in this volume](#), A Baldaccini ‘The External Dimension of the EU’s Asylum and Immigration Policies: Old Concerns and New Approaches’.

<sup>16</sup> R Byrne, G Noll and J Vedsted-Hansen, ‘Understanding Refugee Law in an Enlarged European Union’ (2004) *European Journal of International Law* 355, 360. See also N Lassen and J Hughes (eds), *Safe Third Country Policies in European Countries* (Copenhagen, Danish Refugee Council, 1997).

<sup>17</sup> In 1992, the Council adopted three resolutions, known as the London Resolutions. Council of the European Communities, Conclusions of the Ministers Responsible for Immigration (London, 30 November – 1 December 1992). *Resolution on a Harmonised Approach to Questions Concerning Host Third Countries; Resolution on Manifestly Unfounded Applications for Asylum; Conclusions on Countries in which there is Generally no Risk of Persecution.*

<sup>18</sup> Council Resolution on minimum guarantees for asylum procedures [1996] OJ C274/13.

<sup>19</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990 [1997] OJ C254/1. Article 3(5) provided that ‘Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third States, in compliance with the provisions of the [Refugee Convention].’ This instrument has now been replaced with the Dublin Regulation - Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222. See further Chapter 8 [in this volume](#), A Nicol ‘From Dublin Convention to Dublin Regulation: A Progressive Move?’

<sup>20</sup> See further, J Van Der Klaauw, ‘Towards a Common Asylum Procedure’ in E Guild and C Harlow (eds), *Implementing Amsterdam* (Oxford, Hart Publishing, 2001) 166, 183 and UNHCR, Background Paper No 2, *The Application of the ‘Safe Third Country’ Notion and its impact on the management of flows and on the protection of refugees* (Geneva, UNHCR, May 2001).

discrimination guarantee.<sup>21</sup> The 1990 Swiss asylum law was the first to adopt a SCO rule.<sup>22</sup> Again, the concept spread initially through the administrative policy-sharing interactions characteristic of this field, followed by formal (if non-binding) harmonisation.<sup>23</sup> The 1992 London Resolutions reflected this process, with the Resolution on manifestly unfounded applications allowing applications to be so deemed if the asylum seekers came from a country ‘in which in general terms no serious risk of persecution’ existed.<sup>24</sup>

However, the domestic procedural race to the bottom has been impeded judicially. Generally speaking, the European Court of Human Rights (ECtHR) has thwarted procedural deterioration and insists on careful factual assessment.<sup>25</sup> For instance, the *TI* case<sup>26</sup> illustrates that transfers to third countries without appropriate safeguards will violate the European Convention on Human Rights (ECHR). Strasbourg jurisprudence on Articles 3 and 13 has condemned various procedural practices, from the rigid application of time limits,<sup>27</sup> to non-suspensive appeals.<sup>28</sup> In addition, many national judiciaries have been embroiled in asylum controversies, blunting political attempts to undermine procedural guarantees, based on Strasbourg principles or indeed, more commonly, domestic administrative law. In the UK, few aspects of asylum procedures have been untouched by judicial intervention.<sup>29</sup> For instance, in *Ex p Adan and Aitseguer*,<sup>30</sup> Dublin removals were precluded, when onward removal to unsafe countries was likely. SCO designations have been impugned on ‘irrationality’

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<sup>21</sup> Article 3 Refugee Convention. Amnesty International *Europe: Harmonization of Asylum-Policy, Accelerated Procedures for ‘Manifestly Unfounded’ Claims and the ‘Safe Country’ Concept* (Brussels, Amnesty International, 1992).

<sup>22</sup> Asylum Procedure Law, 22 June 1990.

<sup>23</sup> After Switzerland, many other European countries quickly followed suit: Austria, Finland, Luxembourg (1991); Germany (1992); Portugal (1993); Denmark (1994); Netherlands (1995), UK and France (1996).

<sup>24</sup> Above n 17. The later 1995 Resolution on Minimum Guarantees simply referred back to the latter Resolution as regards manifestly unfounded claims.

<sup>25</sup> For example, recently, the ECtHR has held that the UNHCR erred in its refugee status determination procedures in *D and Others v Turkey*. The case concerned an Iranian couple and their child whose applications for refugee status were refused by UNHCR’s Ankara office. The woman had been sentenced by an Iranian Islamic court to 100 lashes for fornication. UNHCR’s refusal was based on its assessment that she would be subject only to symbolic punishment. The ECtHR held that return would breach Article 3 ECHR, and in effect condemned UNHCR’s risk assessment in the case, on which the Turkish government relied exclusively. The Court noted that there was no actual indication that Iranian authorities intended to reduce the 100 lash punishment. Even if the sentence would be reduced, Iranian law called for an alternative of one single blow with a special whip made of 100 separate woven strips, which would still amount to a violation of Article 3 ECHR. *D and Others v Turkey*, Application No 24245/03, 22 June 2006, in particular para 51.

<sup>26</sup> *TI v UK*, Application No 43844/98, 7 March 2000.

<sup>27</sup> *Jabari v Turkey*, Application No 40035/98, 11 July 2000.

<sup>28</sup> *Ibid*; *Hilal v UK*, Application No 00045276/99, 6 March 2001 (2001) EHRR 2; *Conka v Belgium*, Application No. 51564/99, 5 February 2001 (2002) 34 EHRR 54, discussed in more detail below.

<sup>29</sup> For accounts focusing on the UK, see C Harvey, ‘Judging Asylum’ in Shah, above n 2, at 169; R Thomas, ‘The Impact of Judicial Review on Asylum’ (2003) *Public Law* 479; R Rawlings, ‘Review, Revenge and Retreat’ (2005) *Modern Law Review* 378.

<sup>30</sup> *R v Secretary of State for the Home Dept ex parte Adan and Aitseguer* [2001] 2 AC 477. See further, G Noll, ‘Formalism v Empiricism. Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law’ (2001) *Nordic Journal of International Law* 161; A Nicol and S Harrison, ‘The Law and Practice of the Application of the Dublin Convention in the UK’ (1999) *European Journal of Migration and Law* 465; and from the point of view of international comity, T Endicott, ‘“International Meaning”: Comity in Fundamental Rights Adjudication’ (2002) *International Journal of Refugee Law* 280.

grounds.<sup>31</sup> Similarly, a Belgian court ended Belgium's particularly rigid SCO mechanism as a violation of the right to equality.<sup>32</sup>

However, across Europe, the role of the judiciary in asylum varies considerably. Some national judiciaries employ highly deferential approaches to judicial review in the asylum field, facilitating the erosion of procedural standards.<sup>33</sup> Moreover, the political reaction to judicial interventions also varies. For instance, the UK response to *Adan* was the introduction of an irrebuttable statutory presumption that EU Member States were 'safe' for the purposes of return, thus precluding judicial enquiry into whether those states would provide effective protection.<sup>34</sup> Governments may turn to various indirect means to reduce judicial intervention, such as restrictions on legal aid or strict time limits. Direct and explicit attempts to prevent access to courts tend to provoke judicial ire, with an attempt to oust judicial review altogether leading to a constitutional *furor* in the UK.<sup>35</sup>

The Procedures Directive will inevitably lead to much further litigation. It reflects many controversial domestic practices, and appears to permit widespread acceleration and differentiation of procedures, conflating notions of admissibility and unfoundedness. In this, it apparently accords national administrations discretion that they had in some measure lost due to domestic and ECtHR rulings. However, the new legal context and the general principles it incorporates, as well as the inevitable intervention of another supranational jurisdiction, the European Court of Justice (ECJ), may well thwart the race to the bottom more than the negotiators anticipated. National judges look set to become key actors, with a new set of EC legal tools at their disposal.

Before this new context is considered, some important features of the Procedures Directive are set out in the next section, followed by an analysis of the provisions of the Qualification Directive on evidential assessment.

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<sup>31</sup> *R v Secretary of State for the Home Department ex parte Javed (1) Asif Javed (2) Zulfiqar Ali and Abid Ali* [2001] EWCA Civ 789, cf *R (Balwinder Singh) v Secretary of State for the Home Department and Special Adjudicator* [2001] EWHC Admin 925.

<sup>32</sup> H Martenson and J McCarthy, "In General, No Serious Risk of Persecution": Safe Country of Origin Practices in Nine European States' (1998) *Journal of Refugee Studies* 304, 306.

<sup>33</sup> See, eg, concerning the Netherlands, S Essakkili, 'Marginal Judicial Review in the Dutch Asylum Procedure: An assessment in light of article 3 and 13 of the European Convention on Human Rights' with an afterword by T Spijkerboer, *Migration Law Papers 2* (Amsterdam, Faculty of Law, June 2005) and concerning Denmark, J Vedsted-Hansen, 'The Borderline between Questions of Fact and Questions of Law' in Noll (ed), above n 10, at 57.

<sup>34</sup> Immigration and Asylum Act 1999, section 11(1). As Thomas notes, 'The effect of the 1999 Act has been to nullify the effect of *Adan*', citing cases *R (on the application of Samer and Richi) v Secretary of State for the Home Department* [2001] EWHC Admin 545; *Ibrahim v Secretary of State for the Home Department* [2001] ImmAR 430; *R v Secretary of State for the Home Department ex p Hatim* [2001] EWHC Admin 574; *R v Secretary of State for the Home Department ex p Gashi and Kiche* [2001] EWHC Admin 662; *R (on the application of Yogathas and Thangarasa) v Secretary of State for the Home Department* [2002] UKHL 36. Thomas, above n 29, at 496-497.

<sup>35</sup> For an account of the 'ouster clause' in the Asylum and Immigration (Treatment of Claimants, etc) Bill 2004, see Rawlings, above n 29.



## Introducing the Procedures Directive

The Procedures Directive was the last measure adopted as part of the post-Amsterdam legislative programme in the asylum field. The Commission first proposed a directive on asylum procedures in 2000,<sup>36</sup> but due to lack of political agreement, issued a much diluted revised proposal in 2002.<sup>37</sup> When it came to agreeing binding standards in a directive, national governments, or more accurately, interior ministry officials, legislated for discretion, in a manner which reveals their ambivalence towards the harmonisation exercise.

The negotiations on the Directive were tortuous and the resulting drafts entailed a consistent erosion of procedural standards, such that in March 2004 an NGO Alliance called for the withdrawal of the Procedures Directive, noting that it was likely to lead to denial of access to protection.<sup>38</sup> UNHCR also made two unprecedented interventions, ‘warning that several provisions ... would fall short of accepted international legal standards ... [and] ... could lead to an erosion of the global asylum system, jeopardizing the lives of future refugees.’<sup>39</sup> Nonetheless, the Directive was adopted on 1 December 2005.

There were calls for the European Parliament (EP) to contest the Directive's validity on fundamental rights grounds,<sup>40</sup> as it did in the case of the Family Reunification Directive.<sup>41</sup> However, the Parliament chose to base its annulment action against the Procedures Directive on institutional grounds only.<sup>42</sup> We await a decision in that case. The EP is not the only potential challenger. Indeed, any individual with domestic standing could bring a challenge via a national court of final instance,<sup>43</sup> provided she

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<sup>36</sup> Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status 24 October 2000 [2001] OJ C62 E/231, hereafter the ‘Original Proposal’.

<sup>37</sup> Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status 18 June 2002 [2002] OJ C291 E/143, hereafter the ‘Revised Proposal’.

<sup>38</sup> ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches’ Commission for Migrants, Save the Children in Europe, *Call for withdrawal of the Asylum Procedures Directive* (22 March 2004). Concerns were reiterated by ECRE, Amnesty International and Human Rights Watch Press Release, *Refugee and Human Rights Organisations across Europe Express their Concern at the Expected Agreement on Asylum Measures on breach of International Law* (28 April 2004).

<sup>39</sup> UNCHR Press Release, *Lubbers calls for EU asylum laws not to contravene international law* (29 March 2004); UNCHR Press Release, *UNHCR regrets missed opportunity to adopt high EU asylum standards* (30 April 2004).

<sup>40</sup> See, eg, Costello above n 2.

<sup>41</sup> Case C-540/03 *Parliament v Council and Commission*, 27 June 2006.

<sup>42</sup> Case C-133/06, *Parliament v Council*, Action brought on 8 March 2006. Its main argument is that the procedure set out for agreeing common lists of STCs and SCOs should require co-decision with the EP, rather than mere consultation. Article 67(5) EC Treaty, provides for the passage to co-decision in the asylum field, once legislation defining the basic principles and common rules in respect of the policy on asylum and refugees has been adopted.

<sup>43</sup> A final court is one whose decision is not subject to appeal. Case C-99/00 *Lyckesog* [2002] ECR I-4839. It is arguable that although lower courts are not permitted at present to make preliminary references, they are empowered as a matter of EC law to grant interim relief against EC measures of dubious legality. See further, S Peers, ‘Who’s Judging the Watchmen? The Judicial System of the ‘Area of Freedom, Security and Justice’ (1998) *Yearbook of European Law* 337, 354-356 and Chapter 3 [in this volume](#) ‘The ECJ’s Jurisdiction over EC Immigration and Asylum Law: Time for Change?’

can convince the national court that there are serious grounds to doubt the Directive's validity.<sup>44</sup>

### *Exceptional procedures become the norm*

The Procedures Directive applies to 'applications for asylum'<sup>45</sup> made in the territory, including at the border. Member States are left a choice as to whether to apply the Directive to subsidiary protection applications.<sup>46</sup> In addition, the Directive allows Member States to differentiate procedurally not only between refugee status and subsidiary protection applications, but also on the basis of the level, location and substance of the application. As regards the level of decision-maker, the basic guarantees only apply to 'responsible authorities,'<sup>47</sup> meaning at the first instance stage. There is no requirement to have an administrative appeal, merely access to effective judicial protection.<sup>48</sup>

As regards substantive issues, Member States may siphon applications into different procedures, to be decided in some instances, by different bodies. Outside the mainstream procedure, lower procedural standards may apply.<sup>49</sup> Such other bodies may be established, for instance, for STC cases and preliminary examinations. Special bodies may also be established to deal with national security issues,<sup>50</sup> which is particularly worrying in light of the Qualification Directive's extensive provisions on exclusion from both subsidiary protection and refugee status on such grounds.<sup>51</sup> There are no explicit limits on which procedures may be accelerated.<sup>52</sup> In addition, claims may be regarded as 'manifestly unfounded' on a range of bases, many of which are

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(There is currently a proposal to allow all national courts to make preliminary references under Title IV EC Treaty. Commission Communication on the Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM(2006) 346 final, 28 June 2006).

<sup>44</sup> Case 314/85 *Foto-frost* [1987] ECR 4199.

<sup>45</sup> Article 2(b) Procedures Directive defines 'application for asylum' as 'an application by a third country national or stateless person which can be understood as a request for international protection from a Member States under the [Refugee Convention]. Any application for international protection is presumed to be an application for asylum, unless the person concerned requests another kind of protection that can for applied for separately.'

<sup>46</sup> Article 3(3) and 3(4) Procedures Directive.

<sup>47</sup> Article 4, Article 2(e) Procedures Directive. Thus, it requires all Member States to designate a 'determining authority', defined as 'any quasi-judicial or administrative body in a Member State responsible for examining asylum applications and competent to take decisions at first instance in such cases, subject to Annex I.' Annex I to the Procedures Directive applies only to Ireland, and clarifies that the designated authority is the Refugee Applications Commissioner, not the Refugee Appeals Tribunal, an administrative appellate body.

<sup>48</sup> Article 39 Procedures Directive. See further, discussion below.

<sup>49</sup> Article 4(3) Procedures Directive. Personnel are merely required to 'have the appropriate knowledge or receive necessary training to fulfil their obligations when implementing [the] Directive.'

<sup>50</sup> *Ibid.*, Article 4(2)(b): Member States may provide that another authority is responsible for the purposes of 'taking a decision on the application in light of national security provisions, provided the determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee by virtue of [the Qualification Directive]'

<sup>51</sup> Articles 12 and 17 Qualification Directive. See MT Gil-Bazo, chapter 7 [in this volume](#), for a detailed account of the Qualification Directive's provisions on exclusion.

<sup>52</sup> Article 23(3) Procedures Directive states: 'Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees in Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.'

unrelated to the substance of the claim.<sup>53</sup> While the Original Proposal had the laudable aim of restricting the scope and impact of manifestly unfounded procedures, it now allows applications to be deemed unfounded on any of the 15 permissible grounds for accelerating procedures.<sup>54</sup> The main procedural guarantees still apply to some, but not all, manifestly unfounded claims.<sup>55</sup>

### *Border procedures*

The place of application will also determine the procedure which applies. Most notably, Member States are allowed to maintain special border procedures.<sup>56</sup> This is despite the fact that international law dictates that state responsibility for applicants at the border is the same as for those in-country. In particular, the Refugee Convention's *non-refoulement* guarantee is applicable to rejection at the border.<sup>57</sup>

The border procedure provision also appears to permit detention of asylum seekers without judicial review and without consideration of individual circumstances for a period of up to four weeks.<sup>58</sup>

Border procedures generally run counter to the acknowledged legal requirement to admit asylum seekers to the territory, in order to carry out a proper asylum process. It also defies logic and fairness to treat asylum applicants who apply at the border so differently. The provisions create incentives to enter countries illegally, rather than claim asylum at the frontier. They also discourage prompt application. This looks perverse in light of the fact that although the Directive provides that asylum applications are to be neither 'rejected nor excluded' 'on the sole ground' that the applications have not been made as soon as possible,<sup>59</sup> failure to apply earlier 'without reasonable cause ... having had the opportunity to do so' is one of the grounds upon which Member States may lay down accelerated procedures.<sup>60</sup>

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<sup>53</sup> *Ibid.*, Article 28(2) and Article 23(4)(a) to (o).

<sup>54</sup> *Ibid.*, Article 23(4).

<sup>55</sup> In some cases, the Procedures Directive apparently permits Member States to dispense with the interview. See below.

<sup>56</sup> The safeguards for such border procedures include the right to remain at the border or transit zones; access, if necessary, to an interpreter and to be immediately informed of their rights and obligations. The normal interview guarantees apply, as regards the conduct of the interview, and consultation with legal advisers or counsellors. Any rejection must be reasoned.

<sup>57</sup> See E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law* (Cambridge, Cambridge University Press, 2003), 87, paras 76-86. The ECHR goes even further in that it not only creates obligations vis-à-vis those at the border, but also more broadly. See G Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) *International Refugee Law Journal* 542, in particular 564-570.

<sup>58</sup> Article 35(4) provides: 'Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 [decisions about granting access to territory from border or transit zones] is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.' (emphasis added). Of course, the legality of detention raises complex legal questions which are outside the scope of this chapter, but see further, D Wilsher, chapter 13 in this volume. 'Greeting Asylum Seekers with Lock and Key: Immigration Detention and the Common European Asylum System'.

<sup>59</sup> Article 8(1) Procedures Directive.

<sup>60</sup> *Ibid.*, Article 23(4)(i).

### *Safe third country (STC)*

The Procedures Directive enshrines three forms of STC practice, namely STC *simpliciter*, first country of asylum (FCA) and supersafe third country. Each of these practices is based on the assumption that protection was available (in the case of STC and supersafe third country) or availed of (in the case of FCA) elsewhere.<sup>61</sup> As such, conceptually, they do not cast any doubts on the merits of the asylum claim, but rather assume that any protection required will or has been afforded elsewhere.

However, the Procedures Directive conflates admissibility and unfoundedness. It expands the grounds upon which applications may be deemed inadmissible, introducing eight categories of applications which may be so regarded, on the basis that protection is either available<sup>62</sup> or has been granted<sup>63</sup> elsewhere, or that the application is already in effect under consideration.<sup>64</sup> The categorisation of even Dublin transfers as ‘inadmissible’ is problematic, as it runs counter to the ECtHR jurisprudence in *TI*,<sup>65</sup> which requires an examination of the individual claim in light of the standards applicable in the receiving state before such transfer is permissible. Nonetheless, at least it reflects the notion that under Dublin and STC, it is foreseen that the application will undergo a full examination elsewhere. However, the Procedures Directive also includes STC as a ground for regarding claims as unfounded, ‘if [they are] so defined under national legislation.’<sup>66</sup> The Original Proposal did include SCO as a basis for regarding applications as unfounded, but not STC.<sup>67</sup>

The generalised assessment of safety inherent in safe country practices is always likely to be controversial. Moreover, no matter how rigorous this general assessment, in all instances, the key to the permissibility of the practice under fundamental rights rules is whether the third country is safe for the individual applicant, usually conceived of in terms of whether the third country will provide effective protection.<sup>68</sup>

Concerning the basic STC rule, the generalised assessment of safety is based on minimal criteria, namely that ‘life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion’;

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<sup>61</sup> See generally UNHCR’s EXCOM Conclusions Nos 15 (Refugees without an Asylum Country (1979)) and 58 (The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which they had already found protection (1989)). Legomsky, in contrast, has argued that STC and FCA returns should be regarded as ‘two points on the same continuum’ as in both cases, the acceptability of the return depends on the effectiveness of protection available at the time of return. S Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) *International Journal of Refugee Law* 567, 570. However, he acknowledges that from the point of view of the practicality of returns, there are significant differences.

<sup>62</sup> Dublin transfers (Article 25(1)); where a non-EU country is a ‘safe third country’ (Articles 25(2)(c) and 27).

<sup>63</sup> Another Member State has granted refugee status (Article 25(2)(a)); another Member State is examining an application for protection; a non-EU country is the ‘first country of asylum’ (Articles 25(2)(b) and 26); the Member State concerned has granted an analogous status (Article 25(2)(e)).

<sup>64</sup> An applicant has lodged an identical application after a final decision (Article 25(2)(f)); under certain conditions, where a relative has lodged an application on the applicant’s behalf (Article 25(2)(g)).

<sup>65</sup> Above n 26.

<sup>66</sup> Article 23(4)(c) Procedures Directive.

<sup>67</sup> Article 28(1)(e) Original Proposal.

<sup>68</sup> See further Legomsky, above n 61, and Costello, above n 15, at 57-59.

respect of the principle of *non-refoulement* under the Refugee Convention and other international instruments; and the possibility to request refugee status and, if found to be a refugee, ‘to receive protection in accordance with the [Refugee] Convention.’<sup>69</sup> There is thus no explicit requirement to demonstrate that the protection standards under the Refugee Convention are actually adhered to, merely that the possibility exists to seek and be accorded such protection. As regards individual assessment, the Original Proposal provided that a country could be regarded as safe for an individual application only if ‘there are no grounds for considering that the country is not a safe third country in [the applicant’s] particular circumstances.’<sup>70</sup> No agreement could be agreed on this text, and the Directive requires Member States to set out ‘rules on methodology’ to determine whether the rule is applicable to ‘a particular country or to a particular applicant.’<sup>71</sup> These rules must be:

[I]n accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.<sup>72</sup>

The latter clause was inserted in the April 2004 draft of the Directive, in order to avoid the violation of international law inherent in the previous draft, which denied access to the asylum procedure altogether.<sup>73</sup> However, that clause does not seem to go far enough, as it only requires a minimum assessment of Article 3 ECHR concerns, rather than wider human rights and effective protection issues.

As regards FCA, the Procedures Directive refers to applications being deemed inadmissible where the applicant has already been recognised as a refugee in another country or where she otherwise enjoys ‘sufficient protection in that country, including benefiting from the principle of non-refoulement.’<sup>74</sup> The Original Proposal also included the FCA concept, but defined FCA as such where an applicant ‘has been admitted to that country as a refugee or for other reasons justifying the granting of protection, and can still avail of that protection.’<sup>75</sup> The Revised Proposal contained a reference to protection in the FCA ‘that is in accordance with the relevant standards laid down in international law.’ Although none of these definitions is particularly elaborate, the final version, referring to ‘sufficient protection’ may well represent an attempt to dilute those international standards to which the Revised Proposal referred.

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<sup>69</sup> Article 27(1)(a) – (d) Procedures Directive.

<sup>70</sup> Original Article 22; Amended Article 28.

<sup>71</sup> Article 27(2)(b) Procedures Directive.

<sup>72</sup> *Ibid.*, Article 27(2)(c).

<sup>73</sup> G Gilbert, ‘Is Europe Living Up to Its Obligations to Refugees?’ (2004) *European Journal of International Law* 963, 981.

<sup>74</sup> Article 26 Procedures Directive. Recital 22 states that Member States ‘should examine all applications in substance’ except where the Directive provides otherwise. This is said to be so ‘in particular where it can reasonably be assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an asylum application where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country.’

<sup>75</sup> Original Proposal, Article 20.

It is regrettable that the evolving international legal term ‘effective protection’ was not used.<sup>76</sup>

The Procedures Directive’s provisions on so-called ‘supersafe third countries’ in the European region allow Member States to deny access to the procedure to all asylum seekers who arrive ‘illegally’ from designated countries.<sup>77</sup> The underlying assumption is that these European countries ‘observe particularly high human rights and refugee protection standards.’<sup>78</sup> The countries potentially at issue, neighbouring the enlarged European Union, include Albania, Belarus, Bulgaria, Croatia, Macedonia, Romania, the Russian Federation, Serbia and Montenegro, Norway, Turkey, Ukraine and Switzerland. Many of these countries, although they may have adopted asylum laws, implement them only in a very limited fashion and in effect cannot provide access to a proper procedure. As such, transferring applicants to these countries may amount to a denial of international protection. Indeed, there is much evidence to rebut any generalised assumption of safety in relation to these countries.<sup>79</sup>

### *Safe country of origin (SCO)*

The Directive creates a procedure to establish a common list of countries which all Member States must treat as SCO.<sup>80</sup> The Commission originally proposed an optional list, subject to strict safeguards.<sup>81</sup> However, in October 2003 the Council agreed that Member States would be required to apply this principle, at least for a common list of states deemed ‘safe’. It provides that the minimum common list ‘shall be regarded by Member States as safe countries of origin.’<sup>82</sup> Some Member States do not currently operate safe country of origin systems.<sup>83</sup> Accordingly, aside from the fundamental rights issues, this raises competence concerns, as the EU is only entitled to establish ‘minimum standards’ in this area.

Originally it was foreseen that the common list would be adopted with the Directive, as an Annex thereto.<sup>84</sup> However, it proved impossible to reach the requisite unanimous agreement on the list, so the Directive now foresees later adoption of a

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<sup>76</sup> See further Legomsky, above n 61.

<sup>77</sup> Article 36 Procedures Directive. The practice may be applied either where the Council has agreed a common list of such supersafe countries (Article 36(3)) or in the absence of such a list, Member States may maintain their own in force (Article 36(7).)

<sup>78</sup> Recital 24 Procedures Directive.

<sup>79</sup> For instance, ECRE provides recent examples in relation to Turkey, the Russian Federation and Bulgaria, indicating a failure to provide refugee protection. ECRE, *Recommendations to the Justice and Home Affairs Council on the Safe Third Country Concept at its Meeting 22-23 January 2004* (Brussels, ECRE, 15 January 2004).

<sup>80</sup> Article 29(1) Procedures Directive.

<sup>81</sup> Original Proposal.

<sup>82</sup> Article 29(1) Procedures Directive. In addition, Recital 19 states that once a country is included on the list, ‘Member States *should* be obliged to consider applications of persons with the nationality of that country, or of stateless persons formerly habitually resident in that country, on the rebuttable presumption of the safety of that country.’

<sup>83</sup> See further, ELENA, *The Application of The Safe Country of Origin Concept in Europe: An Overview* (Brussels, ECRE, 2005).

<sup>84</sup> European Commission Newsroom, Asylum Procedures – agreement on the principle of having a joint list of safe countries of origin, 3 October 2003, available at [http://europa.eu.int/comm/justice\\_home/news/intro/wai/news\\_1003\\_en.htm](http://europa.eu.int/comm/justice_home/news/intro/wai/news_1003_en.htm).

common list.<sup>85</sup> (As previously mentioned, the procedure for agreeing the common list has been challenged by the European Parliament before the ECJ).<sup>86</sup> At least two attempts to agree such a list have failed.<sup>87</sup> The more recent, in June 2006, floundered not only due to the absence of agreement in the Council, but also due to differences among the College of Commissioners.<sup>88</sup> One problem in agreeing the list is that an entire country must be deemed safe for its entire population. It is not possible to make group or geographically-specific designations, in contrast to the practice of some Member States. As a result, Member States prefer to maintain their own more detailed context-sensitive lists, which are explicitly permitted under the Procedures Directive.<sup>89</sup>

The Procedures Directive fails to set out clear requirements concerning the examination of whether the particular country is safe for the individual applicant.<sup>90</sup> The Recitals display considerable ambivalence on this point,<sup>91</sup> with the text referring to the applicant submitting ‘serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances.’<sup>92</sup> Most worrying, according to the text of the Procedures Directive, interviews may be dispensed with in SCO cases.<sup>93</sup> I will return below to the issue of interviews, and argue that they cannot be dispensed with in the discretionary manner the Procedures Directive suggests.

### **The qualification directive and evidential assessment**

The Qualification Directive contains important common definitions of persecution, and serious harms for the purposes of subsidiary protection. In addition, the clarification regarding non-state actors of persecution should also lend itself to some convergence in outcomes in asylum applications across the EU. However, the Directive does not exhaustively harmonise the field, and some key issues remain to be addressed solely by international law. In this context, it is noteworthy that Article 4 thereof sets out important rules on evidential assessment, which are of relevance to the present procedural discussion. Noll argues that these will ‘exceed present practice

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<sup>85</sup> Council of the European Union doc 14383/04 ASILE 65, 2004.

<sup>86</sup> Above n 42.

<sup>87</sup> See <http://www.statewatch.org/news/2004/sep/safe-countries.pdf>, 3.

<sup>88</sup> Although the issue appears set to reappear on the agenda. See further, ‘Frattoni set to come up with longer list of ‘safe’ countries’ EU Observer, 2 June 2006, available at <http://euobserver.com/9/21764>.

<sup>89</sup> Article 30(1) Procedures Directive provides: ‘Without prejudice to Article 29, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum. *This may include the designation of part of a country as safe where the conditions set out in Annex II are fulfilled in relation to that part.*’ (emphasis added). Article 30(3) refers to retaining in force national legislation permitting SCO designation for ‘a country or part of a country for a specified group of persons in that country.’

<sup>90</sup> *Ibid.*, Article 31(1).

<sup>91</sup> Recital 21 of the Directive acknowledges that SCO designation ‘cannot establish an absolute guarantee of safety for nationals of that country.’ However, Recital 19 refers to the ‘rebuttable presumption of the safety’ of the SCO and Recital 17 states that Member States should be able to presume safety for a particular applicant ‘unless he/she presents serious counter-indications.’

<sup>92</sup> *Ibid.*, Article 31(1).

<sup>93</sup> *Ibid.*, Article 12(2)(c) and 24(3)(c)(i).

in the Member States'<sup>94</sup> and represent a 'unique contribution to the debate on assessing evidence.'<sup>95</sup>

Article 4(1) contains an optional provision permitting Member States to consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection.<sup>96</sup> However, this does not affect the basic duty whereby '[i]n cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.'<sup>97</sup>

This key co-operative requirement applies in addition to the Procedures Directive's requirements that decisions be taken in an individual, objective, impartial<sup>98</sup> and expert<sup>99</sup> manner. Thus, the applicant must be afforded the opportunity to participate in the process.<sup>100</sup> Accordingly, it is doubtful whether it would be permissible to 'accelerate' or 'prioritise' cases, including STC and SCO cases, where the cooperative duty has not been complied with. This is the case notwithstanding the apparent *carte blanche* provided by the Procedures Directive for acceleration.<sup>101</sup> This argument turns on the acceptance of the Qualification Directive as applicable to all procedures, which appears to be in keeping with its scope of application, and mandatory nature. In contrast, the Procedures Directive is largely facilitatory, so Article 4 Qualification Directive would appear to be applicable even cases to which Member States are entitled to apply special procedures under the Procedures Directive.

The assessment is confined to 'relevant' matters, which are exhaustively set out in Article 4(2). It refers to the the 'reasons for applying for international protection' rather than 'reasons for being granted international protection.' Thus, the applicant cannot be obliged to make out her claim, but rather only to explain her reasons for applying.<sup>102</sup> The other specified information comprises the relevant applicant's statements, all documentation at the applicants' disposal regarding their age, background, identity, nationality, country and place of previous residence, previous asylum application, travel routes, identity, and travel documents. Thus, it includes the information which may lead to decisions on SCO and the various forms of STC, so the co-operative obligations applies in these cases also.

Article 4(3) then lists (non-exhaustively) the issues to be taken into account, which include (a) country of origin information, as is confirmed by the Procedures Directive.<sup>103</sup> It also refers to (b) the applicant's statements; and (c) the individual

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94 G Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive' (2006) *European Public Law* 295. See further R Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) *European Journal of Migration and Law* 79.

95 *Ibid.* at 297.

96 Article 4(1) first sentence Qualification Directive.

97 *Ibid.*, second sentence.

98 Article 8(2)(a) Procedures Directive.

99 *Ibid.*, Article 8(2)(c): Decision-makers must 'have the knowledge with respect to relevant standards applicable in the field or asylum and refugee law.'

100 Noll, above n 94, at 299-301.

101 Article 23(3) Procedures Directive.

102 Noll, above n 94, at 305.

103 Article 8(2)(b) Procedures Directive: Member States must ensure that 'precise and up-to-date information is obtained from various sources, such as the [UNHCR], as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through



position and personal circumstances of the applicant. The Qualification Directive adds (d) information on the motive behind *sur place* activities and (e) whether the applicant could have availed of citizenship elsewhere. This final issue is irrelevant, and should not form part of the assessment.<sup>104</sup>

Article 4(4) establishes that evidence of earlier persecution, serious harm, or direct threat of such persecution or harm is a ‘serious indication’ that the requisite fear or risk exists for the purposes of warranting protection.

Article 4(5) then relieves the evidential burden on the applicant (if this has been imposed under Article 4(1)), in light of the fact that aspects of the claim will in likelihood not be amenable to documentary or other evidential confirmation. Provided that five cumulative conditions are met, the asylum seeker’s account alone must be accepted. These five conditions relate to the applicant’s explanation for failure to substantiate all the relevant elements, and her general credibility.<sup>105</sup> The underlying assumption is that applicants may warrant recognition, despite the failure to support all aspects of the claim by such ‘documentary or other evidence.’ This general acknowledgement is welcome, although the individual criteria must be applied with caution, in light of international legal standards.<sup>106</sup>

Article 4 will clearly produce different effects in different systems. It has potential to purge asylum processes of rules which require decision-makers to reach negative credibility and substantive findings on the basis of irrelevant information. A full examination of this phenomenon is beyond the scope of this chapter, but one example illustrates some of the potential impact.

Several Member States treat the failure to produce identity and other documentation as evidence of a weak substantive claim. For example, in the Netherlands, asylum applications may be regarded as manifestly unfounded if an applicant has not submitted relevant documents, unless she can establish that she is not to blame for this. However, asylum seekers are generally held to blame,<sup>107</sup> such that as Spijkerboer

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which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions.’

<sup>104</sup> See UNHCR comment: ‘There is no obligation on the part of an applicant under international law to avail him- or herself of the protection of another country where s/he could ‘assert’ nationality. The issue was explicitly discussed by the drafters of the [Refugee] Convention. It is regulated in Article 1A(2) (last sentence), which deals with applicants of dual nationality, and in Article 1E of the 1951 Convention. There is no margin beyond the limits of these provisions.’ UNHCR, *Annotated Comments*, above n 5, 15.

<sup>105</sup> The conditions are: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements, at the applicant’s disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given; (c) the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established. Article 4(5) Qualification Directive. Only items (a) to (c) reflect paragraphs 203-204 of the UNHCR Handbook, above n 8.

<sup>106</sup> For example, UNHCR maintains that Article 4(5)(d) concerning prompt application should have no impact on the assessment. UNHCR, *Annotated Comments*, above n 5, 16. See further Noll, above n 94, at 311-312.

<sup>107</sup> J Van Rooik, ‘Asylum Procedure *versus* Human Rights: Obstacles to later statements or evidence in light of the European Convention on Human Rights’ with an Afterword by T Spijkeboer (Amsterdam, Vrije Universiteit, April 2004) 58. Available at [www.rechten.vu.nl/dbfilestream.asp?id=1357](http://www.rechten.vu.nl/dbfilestream.asp?id=1357).

puts it ‘lack of documentation has become an independent ground for rejecting asylum application.’<sup>108</sup> Legislators see this as a means to discourage future applicants from destroying their documents, and in turn deter smugglers from advising asylum seekers to do so.<sup>109</sup> In a somewhat similar vein in the UK, a statutory provision requires decision-makers to draw negative credibility inferences from a range of unco-operative behaviour on the part of asylum seekers, including the failure to provide documentation.<sup>110</sup> However, the section’s impact has been blunted by the appellate decision-making body, the Immigration Appeals Tribunal, which insists that the distortion of evidential assessment resulting from the section must be kept to a minimum.<sup>111</sup> In contrast, in the Netherlands, courts and adjudicators have largely facilitated the distortion.

Under the Procedures Directive, Member States may oblige asylum applicants to hand over their passports and other documentation.<sup>112</sup> Applications may be regarded as manifestly unfounded where identity documents are withheld<sup>113</sup> or for failure to co-operate.<sup>114</sup> In these cases, the general procedural guarantees still apply,<sup>115</sup> but the procedure may be accelerated if failure to co-operate is ‘without good reason’.<sup>116</sup> However, the Qualification Directive would seem to limit the inferences which may be drawn and consequences which may be imposed on asylum seekers for failure to co-operate. While Article 4 Qualification Directive permits Member States to place a burden of production of documentation on the applicant, which encompasses identity and travel documents, the Article 4(5) rule makes it clear the failure to produce should not lead to negative inferences or decisions, provided that the five cumulative conditions are met. Moreover, the general co-operative obligation in Article 4(1) still applies, so automatic findings of unfoundedness will often be precluded, and the applicant must be given an opportunity to explain the failure to produce.

### **Minimum standards legislation and three sources of fundamental rights and fair procedures**

The Procedures Directive and Qualification Directive purport to set down minimum standards only. This is inherent in the scope of the EC’s competence under Title IV EC Treaty. In principle, this means that Member States are free to adopt higher standards of protection.<sup>117</sup> Many areas of EC competence are so constrained. Normally, legislation in these areas contains a standstill clause, explicitly precluding Member States from lowering their domestic standards in implementing the

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<sup>108</sup> *Ibid.* 60

<sup>109</sup> *Ibid.*

<sup>110</sup> Asylum and Immigration (Treatment of Claimants etc) Act 2004, section 8.

<sup>111</sup> Thomas, above n 94, 95, citing *SM v Secretary of State for the Home Department* (Section 8: Judge’s Process) Iran [2005] UKIAT00116, para 8.

<sup>112</sup> Article 11(2)(b) Procedures Directive refers to ‘documents in their possession relevant to the examination of the application, such as their passports.’

<sup>113</sup> Article 23(4)(d) and (f) Procedures Directive.

<sup>114</sup> Article 23(4)(k) Procedures Directive.

<sup>115</sup> Article 23(4) Procedures Directive.

<sup>116</sup> Article 23(4)(k) Procedures Directive.

<sup>117</sup> See eg C-84/94 *UK v Council* [1996] ECR I-5755, para 17 and C-2/97 *Borsana* [1998] ECR I-8597, para 35 concerning another minimum standards competence, namely that for health and safety of workers.

Directive.<sup>118</sup> This is notably absent in the Procedures Directive and Qualification Directive. Several exceptional provisions in the Procedures Directive do make reference to derogation only where ‘existing legislation’ so provides.<sup>119</sup> The scope of ‘existing legislation’ means at the time of the formal adoption of the Directives. Many Member States amended their asylum laws in the course of the negotiation of the Procedures Directive,<sup>120</sup> arguably in order to exploit these exceptional provisions.

However, although the Title IV EC Treaty competence is confined to setting minimum standards, the text of the Directives betrays one of their more controversial and ambiguous features. Article 5 Procedures Directive provides that:

Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, *insofar as those standards are compatible with this Directive*.<sup>121</sup>

This appears to qualify the minimum standards guarantee, in that it suggests a limit to Member States freedom to establish higher standards. Similarly, Article 3 Qualification Directive provides that:

Member States may introduce or maintain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, *insofar as those standards are compatible with this Directive*.<sup>122</sup>

This appears to be a contradiction in terms, and was much debated during the drafting. Clarification was sought from the Council Legal Service on Article 3 of the Qualification Directive.<sup>123</sup> It advised that in order not to ‘annihilate’ the objective of harmonisation, the capacity to introduce more favourable standards should have

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<sup>118</sup> See, for example, Council Directive 2000/78/EC establishing a general framework for Equal Treatment in employment and occupation [2000] OJ L303/16 and Council Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22. Both enshrine minimum standards, but contain the following standstill clause: ‘The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.’ (Articles 8(2) and 6(2) respectively).

<sup>119</sup> Eg Article 35(2) Procedures Directive on border procedures.

<sup>120</sup> D Ackers, ‘The Negotiations on the Asylum Procedures Directive’ (2005) *European Journal of Migration and Law* 1, 2.

<sup>121</sup> (Emphasis added). Recital 7 Procedures Directive provides: ‘It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention.’

<sup>122</sup> (Emphasis added). Recital 8 Qualification Directive provides: ‘It is the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1A of the Geneva Convention, or a person who otherwise needs international protection.’

<sup>123</sup> Doc 14348/02 JUR 449 ASILE 67, 15 November 2002.

Available at <http://www.statewatch.org/news/2002/dec/14348.02.doc>.

limits.<sup>124</sup> In particular, it suggested that the provisions determining the personal scope of the Qualification Directive should not be deviated from.<sup>125</sup> Accordingly, the definitions laid down in Article 2 of the Directive and related provisions had to be applied *stricto sensu*.<sup>126</sup>

This interpretation appears excessively strict.<sup>127</sup> Although it describes the use of ‘may’ or ‘shall’ as only a ‘rough indicator’ of when the provisions of the Directive must be complied with *stricto sensu*,<sup>128</sup> even using these terms as such risks rendering the notion ‘minimum standards’ otiose. This is because the non-mandatory provisions of the Directive explicitly allow Member States a choice, irrespective of the competence constraint in Title IV EC Treaty. The better understanding of the concept of minimum standards is more nuanced and context-sensitive, and would allow higher standards in all areas, provided that this does not undermine the purpose of the measure, which cannot be conceived baldly in terms of harmonisation (for then all deviation would undermine the purpose). Instead, the purpose of the Qualification Directive has to be conceived of, in accordance with its Preamble as to ‘ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection.’<sup>129</sup> While certain common approaches are necessary, protecting better or more does not in itself undermine that basic objective. The Procedures Directive has its ‘main objective’ the introduction of a ‘minimum framework ... on procedures.’<sup>130</sup> As such, higher standards would seem to be permissible in all areas, as it is difficult to see how a ‘minimum framework’ could be undermined by higher standards.

Member States are not only entitled, but indeed may be required to adopt higher standards than those set out in the Directive in certain instances. This is because three sources of fundamental rights law are binding. These are first, national administrative law; secondly, the ECHR and other applicable norms of international human rights law; and thirdly, the general principles of EC law. The bulk of the chapter focuses on the implications of this third source. At this point it is important to explain the scope of the three sources in turn.

### *National administrative laws*

First, the ECJ has consistently acknowledged that when implementing EC law, national authorities are still required to ‘act in accordance with the procedural and substantive rules of their own national law’.<sup>131</sup> Thus national implementing actions are ‘governed by the public law of the Member State in question.’<sup>132</sup> This is sometimes referred to as national procedural autonomy, but this is a misnomer, as it underestimates the impact of the EC context. The application of domestic standards is subject to two important EC caveats: that the national rules do not render the

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<sup>124</sup> *Ibid*, para 5.

<sup>125</sup> *Ibid*, para 6.

<sup>126</sup> *Ibid*, para 7.

<sup>127</sup> Cf MT Gil-Bazo, chapter 7 in this volume.

<sup>128</sup> Above n 123, para 8.

<sup>129</sup> Recital 6 Qualification Directive.

<sup>130</sup> Recital 5, Procedures Directive. Again limiting secondary movements is merely something the Directive should help limit (Recital 6).

<sup>131</sup> Case C-285/93 *Dominikanerinnen-Kloster Altenhohenau v Hauptzollamt Rosenheim* [1995] ECR I-4069, para 26; Case C-292/97 *Kjell Karlsson and others* [2000] ECR I-2737.

<sup>132</sup> Case 230/78 *Eridania v Minister for Agriculture and Forestry* [1979] ECR 2749, para 33.

enforcement of EC law more difficult than that of analogous national law (the principle of equivalence),<sup>133</sup> or excessively difficult (the principle of effectiveness).<sup>134</sup> Moreover, as outlined below, the general principles must be complied with, although these are not exhaustive. Accordingly, national administrative law will continue to be of relevance, particularly in light of the Procedures Directive's broad facilitative provisions, but subject to the general principles. In practice, whether the general principles are invoked tends to depend on whether they provide some clear added value, in which case litigants are keen to establish an EC dimension to their claim.<sup>135</sup>

### *ECHR law and other international human rights instruments*

Secondly, as Contracting Parties, Member States remain subject to their international legal obligations, under the Refugee Convention, ECHR and United Nations Convention Against Torture (UNCAT). Although the ECtHR accommodates the autonomy of the EU legal order, when Member States act on the basis of EU/EC law their obligations under the Convention remain in all instances where they exercise discretion. In the context of giving effect to minimum standards directives, discretion is invariably afforded to the Member States, so ECHR obligations remain pertinent.<sup>136</sup> This is so even in relation to Dublin Regulation transfers, as even here, the sending Member State is afforded discretion to process the asylum claim itself.<sup>137</sup>

As regards fair procedures, the ECtHR does not apply the Article 6 ECHR guarantee in the asylum context, as asylum is deemed not to concern the determination of civil rights and obligations or criminal liability.<sup>138</sup> It has been convincingly argued that Article 6 should apply where someone is excluded from refugee status, as this is akin to a criminal finding in some respects.<sup>139</sup> Moreover, in a recent ruling, the ECtHR held that Article 6 did apply to an immigration-related matter, namely the issuance of employment permits, as these determined the validity of any subsequent employment contract, and hence concerned civil rights. In this instance, Article 6 required an oral hearing.<sup>140</sup> Accordingly, in light of the evolving Strasbourg jurisprudence, Article 6 is

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<sup>133</sup> See eg Case 8/77 *Sagulo* [1977] ECR 1495.

<sup>134</sup> See eg Case 14/83 *Von Colson v Kamann* [1984] ECR 1891.

<sup>135</sup> See, eg, UK case law concerning the general principle of non-discrimination, which reveals the tendency to expand the scope of EC law in order to avail of this principle, not recognised in the same manner in domestic administrative law. *R v Ministry of Agriculture, Fisheries and Food, ex p. First City Trading Ltd.* [1997] 1 CMLR 250 (QBD.) See further, S Boyron, 'General Principles of Law and National Courts: Applying a *Jus Commune*' (1998) *European Law Review* 171-178 and Tridimas, above n 4, at 42-44.

<sup>136</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi (Bosphorus Airways) v Ireland* [GC], Application No 45036/98, judgment of 30 June 2005, paras 155-156, Reports of Judgments and Decisions 2005-V (2006) 42 EHRR 1. See C Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) *Human Rights Law Review* 87.

<sup>137</sup> Dublin Regulation, above n 19. See further, Costello, *ibid*, at 109.

<sup>138</sup> *Maaouia v France*, Application No 39652/98, 5 October 2000 (2001) 33 EHRR 1037, and the Commission decisions cited in para 35 of the judgment. Para 40 states: 'Decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights and obligations or of a criminal charge against him, within the meaning of Article 6(1) ECHR.' See further (concerning extradition) *Mamatkulov v Turkey*, Application No 46827/99, 8 March 2005.

<sup>139</sup> G Gilbert, 'Exclusion and Evidentiary Assessment' in G Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston, Martinus Nijhoff Publishers, 2005) 161.

<sup>140</sup> *Coorplan-Jenni GmdH and Hascic v Austria*, Application No 10523/02 [2006] ECHR 749.

of some relevance in the asylum context. However, as I outline in the next section, EC law guarantees fair procedures more broadly in any event, so this issue is of less pertinence in the EC context.

Despite its position on Article 6, as previously mentioned the ECtHR has developed a context-sensitive jurisprudence concerning appropriate procedures and remedies in the asylum context, based primarily on Articles 3 and 13 ECHR. Article 13 requires an effective remedy whenever an infringement of another Convention right is at issue. The jurisprudence is informed by the desire to ensure that Article 3 is practical and effective. This is relevant, as it binds the Member States directly, *and* decisively informs the general principles of EC law. Pertinent aspects of the Strasbourg caselaw are referred to in the final section below.

### *General principles of EC law – scope, sources and salience*

EC general principles are now applicable in the asylum context, as a result of the communitarisation of law in this area. As agents of the EC in their implementation and application of EC Directives, Member States are bound to respect the general principles of EC law, which encompass administrative principles of fair procedures and fundamental rights law more generally.<sup>141</sup> This includes when they use the ‘upwardly-flexible’ area accorded by the Directive to establish higher standards.<sup>142</sup> The general principles thus come to influence national systems, over time even beyond the decentralised administration of EC law.<sup>143</sup>

The ECJ regards the general principles as embodied in EC law itself, regardless of the type of EC rights at stake.<sup>144</sup> This is evident in cases concerning so-called third country national family members of EU citizens<sup>145</sup> and third country nationals whose countries of origin have association agreements with the EC, such as *Panayotova*,<sup>146</sup> *Cetinkaya*<sup>147</sup> and *Dörr*.<sup>148</sup> Thus, it is already apparent that the general principles have procedural implications for the entry and residence rights of third country nationals, where they derive these rights from EC law. In *Panayotova*, the general principles necessitated a procedural system which was ‘easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time.’<sup>149</sup> The right to effective judicial protection is also

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<sup>141</sup> Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411.

<sup>142</sup> See further, F De Cecco, ‘Room to Move? Minimum Harmonisation and Fundamental Rights’ (2006) *Common Market Law Review* 9.

<sup>143</sup> See further, J Schwarze (ed), *Administrative Law under European Influence: On the convergence of the administrative laws of the EU Member States* (London/Baden-Baden, Sweet & Maxwell/Nomos Verlagsgesellschaft, 1995).

<sup>144</sup> See further, E Brouwer, ‘Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All?’ (2005) *European Journal of Migration and Law* 219 and Chapter 2 [in this volume](#) ‘Effective Remedies in Immigration and Asylum Law Procedures: The Relevance of General Principles of EU Law’.

<sup>145</sup> Case C-459/99 *MRAX* [2002] ECR I-6591; Case C-503/03 *Commission v Spain*, 31 January 2006.

<sup>146</sup> Case C-327/02 *Panayotova v Minister voor Vreemdelingenzaken en Integratie* [2004] ECR I-11055, para 27.

<sup>147</sup> Case 467/02 *Cetinkaya v Land Baden-Wurtemberg* [2004] ECR I-10895.

<sup>148</sup> Case C-136/03 *Dörr v Sicherheitsdirektion für das Bundesland Karnten* [2005] 3 CMLR 11.

<sup>149</sup> Above n 146, judgment, para 26: ‘It should also be pointed out that the procedural rules governing issue of such a temporary residence permit must themselves be such as to ensure that exercise of the

applicable, requiring that refusals ‘must be capable of being challenged in judicial or quasi-judicial proceedings.’<sup>150</sup>

The application of these EC procedural general principles turns neither on membership of the polity, nor presence in the territory, but rather reflects the vindication of the rule of law at the supranational level. Accordingly, once EC law sets out those entitled to asylum, it becomes difficult for the ECJ to find a doctrinal basis for indulgence in asylum exceptionalism. Admittedly, the ECJ *has* accepted that border issues may be subjected to unusual regulatory procedures, on the basis of the sector’s peculiar characteristics.<sup>151</sup> However, the constitutionalisation of the general principles tends to expand their scope of application, and once EC individual rights are at issue, the general principles follow.

Legal doctrine thus requires the robust application of the EC general principles to the asylum context. While doctrinally sound, this assertion will no doubt meet with some resistance. Governments (and perhaps also the Council and Commission) may raise legal arguments before the ECJ against the robust application of the general principles to the asylum context. The influence of national governments as strategic litigants before the ECJ is now well-established.<sup>152</sup> Moreover, the general principles have not developed in a purely autopoietic manner, but rather have been subject to institutional and political sway over the years. The right to a hearing, for example, was incorporated from the common law when the European Commission (and in turn the ECJ) came under pressure from powerful commercial interests, reluctant to adhere to the outcomes of competition law proceedings in the absence of such a right.<sup>153</sup> What this institutional account implies for the asylum context remains to be seen. In the absence of a powerful commercial lobby, or institutional ally, asylum seekers’ rights remain precarious, dependent on careful test case strategies, legal ingenuity and national judicial receptivity to EC argumentation.

The general principles derives their inspiration from international human rights instruments, in particular the ECHR, and the common constitutional traditions of the Member States.<sup>154</sup> On fundamental rights issues, the jurisprudence of the ECtHR is now the preeminent source, and applied by the ECJ conscientiously, as has been

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right of establishment conferred by the Association Agreements is not made impossible or excessively difficult.’

<sup>150</sup> *Ibid.*, judgment, para 27, citing by analogy, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para 90.

<sup>151</sup> See Case C-257/01 *Commission v Council* [2005] ECR I-345 concerning Council Regulation No 789/2001 which reserves to the Council implementing powers for examining visa applications, and Council Regulation No 790/2001, which reserves to the Council implementing powers for carrying out border checks and surveillance. See further, C Costello, ‘Administrative Governance and the Europeanisation of Asylum and Immigration Policy’ in H Hofmann and A Türk (eds), *EU Administrative Governance* (London, Elgar Publishing, 2006) 287, at 309-310.

<sup>152</sup> See further, MP Granger, ‘When governments go to Luxembourg...: the influence of governments on the European Court of Justice’ (2004) *European Law Review* 1 and ‘The future of Europe: judicial interference and preferences’ (2005) *Comparative European Politics* 155.

<sup>153</sup> See further F Bignami, ‘Creating European Rights: National Values and Supranational Interests’ (2005) *Columbia Journal of European Law* 241, 259-293.

<sup>154</sup> See, for example, Case C-299/95 *Kremzow v Austria* [1977] ECR I-2629.

recognised by the ECtHR.<sup>155</sup> The ECHR provides minimum standards, and in key areas, EC standards are higher.

This is partly explained by the fact that the general principles develop in dialogue with national judges, and so are also infused with elements from different national systems. Over time, they percolate back into the national systems, as they bind national authorities when they act within the scope of EC law. This is particularly so with regard to those general principles of administrative law. As Harlow puts it:

[T]he constitutionalization of the basic administrative procedures as ‘general principles of EC law’ allowed them to be diffused through national administrations, at least in situations involving EC law, providing the opportunity, not always taken, for ‘levelling up’ of national law.<sup>156</sup>

The EU Charter of fundamental rights, drafted in 2000 and now Part II of the draft Constitutional Treaty for the EU, is, despite its non-binding status, of legal relevance. An Advocate-General of the ECJ has characterised it as ‘the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed in the Community legal order.’<sup>157</sup> For the first time in June 2006,<sup>158</sup> the ECJ cited the Charter, as the legislation in question made preambular references to the Charter and due to that instrument’s synthetic nature.<sup>159</sup> The Preambles of both the Procedures and Qualification Directives refer to the Charter, so on the same basis, it is legally relevant here.<sup>160</sup>

It has been suggested that the Charter may result in a less creative fundamental rights jurisprudence from the ECJ. In Weiler’s view, in the absence of a bill of rights, EU judges:

[U]se the legal system of each Member State as a living laboratory of human rights protection which then, case by case, can be adapted and adopted for the needs of the Union by the European Court in dialogue with its national counterparts. A charter may not thwart this process, but it runs the risk of inducing a more inward looking jurisprudence and chilling the constitutional dialogue.<sup>161</sup>

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<sup>155</sup> See further, Costello, above n 136.

<sup>156</sup> C Harlow ‘Global Administrative Law: The Quest for Principles and Values’ (2006) *European Journal of International Law* 187, 205.

<sup>157</sup> *Booker Aquaculture*, above n 141, Opinion, para 126.

<sup>158</sup> Case C-540/03 *European Parliament v Council*, 27 June 2006

<sup>159</sup> *Ibid.*, para 38. The Court referred to the Charter’s principal aim as to reaffirm ‘rights as they result, in particular, from the common constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and the European Court of Human Rights.’

<sup>160</sup> Recital 8 Procedures Directive, Recital 10 Qualification Directive.

<sup>161</sup> JHH Weiler, ‘Does the European Union Truly Need a Charter of Rights?’ Editorial (2000) *European Law Journal* 95.



Certainly, the text of the Charter is detailed, and must be read in light of a range of sources. However, the institutional rationale which leads the ECJ to have recourse to national legal inspiration remains potent, and the general principles remain in parallel to the Charter.

The Charter is referred to in this chapter in order to elucidate the content of the general principles. Like them, it applies to the Member States when they implement EC law,<sup>162</sup> and takes the ECHR as a minimum guide only.<sup>163</sup>

The general principles pertaining to fair procedures have developed principally in the context of direct EC administration, very often in specialist fields such as competition law. Their application to domestic asylum procedures will require an adaptation to the very particular fairness concerns which arise in this context.

It is important to note that the general principles are broader in their scope of application than the procedural guarantees under the ECHR. As mentioned above, Article 6 ECHR is only applicable where a national authority is making a determination about a civil right or criminal liability, and Article 13 (effective remedies) applies when an infringement of another Convention right is at issue. In contrast, the EC general principles are treated as deriving from EC law's inherent features, namely its effectiveness and uniformity, and applicable whenever EC rights are at issue. Moreover, 'right' is broadly understood in EC law, and legislative guarantees which create clear obligations are generally conceived of as creating rights for individuals. In the asylum context, the Qualification Directive arguably creates a right to asylum,<sup>164</sup> and so once this right is at issue, the EC general principles must be respected, including those which mirror Articles 6 and 13 ECHR.

This is reflected in the Charter's provisions on effective remedies and fair procedures. Article 47(1) provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

Article 47(2) refers to the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.' Article 47 is a complex provision, encompassing aspects of Article 6 and 13 ECHR, and EC law on the right to an effective remedy before a court. Unsurprisingly, its explanatory note is lengthy.<sup>165</sup> While it describes Article 47(1) as 'based on' (rather than 'corresponding

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<sup>162</sup> Article 51(1) provides: 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

<sup>163</sup> Article 52(3) provides: 'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down in the said Convention. This provision shall not prevent Union law providing more extensive protection.'

<sup>164</sup> See MT Gil-Bazo, chapter 7 [in this volume](#).

<sup>165</sup> Updated Explanations issued by the Praesidium of the Constitutional Convention, doc CONV/828/1/03, Rev 1, 18 July 2003, 41. (This is the second set of Explanations to the Charter. See

to') Article 13 ECHR, it quite properly notes that the EC protection is 'more extensive', citing ECJ case law.<sup>166</sup> It notes in particular that the right to an effective remedy before a court applies to 'all rights guaranteed by Union law.'<sup>167</sup> With regard to Article 47(2) of the Charter, it notes again that although this corresponds to Article 6(1) ECHR, EC law is of broader application.

The Procedures and Qualification Directives must be interpreted and implemented in compliance with the general principles. In other fields, the ECJ has used the general principles to constrain the discretion afforded by Directives.<sup>168</sup> Below, salient general principles and their impact on asylum procedures are outlined.

### **The general principles in action**

Under the terms of the Procedures Directive, the interview may be dispensed with on a number of grounds, for example, where the applicant only raises submissions not relevant or only minimally relevant to a refugee claim;<sup>169</sup> or makes 'inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/ her having been the object of persecution.'<sup>170</sup> Both features are entirely common in genuine asylum applications, and if the apparent discretion afforded by the Directive were exploited by decision-makers, would lead to *refoulement*. The asylum seeker often receives no independent advice, legal or otherwise, when filling out the initial application, which generally takes the form of a long and complicated questionnaire. The interview is necessary in order to allow the applicant to clarify any discrepancies, inconsistencies or omissions in his/her initial account. Instead, the Directive envisages that such applications are to be regarded as 'clearly unconvincing' and thus no interview provided. This could be the death-knell of reliable asylum determinations.

The Procedures Directive does contain communicative guarantees, but these are less robust than one would have hoped. On the crucial issue of translation, it merely provides 'Member States may provide for rules concerning the translation of documents relevant for the examination of applications.'<sup>171</sup> Other communicative guarantees are cast in less than forceful terms. The right to be informed is merely in a language the asylum seekers 'may reasonably be supposed to understand.'<sup>172</sup> Similarly, the right to an interpreter is restricted to whenever this is 'necessary', an

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further, Explanations relating to the text of the Charter of fundamental rights, provided by the Praesidium of the Charter Convention, doc CHARTE 4473/00, 11 October 2000.)

<sup>166</sup> *Ibid*, citing Case 222/84 *Johnston* [1984] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097; Case C-9/91 *Borelli* [1992] ECR I-6313.

<sup>167</sup> *Ibid*.

<sup>168</sup> See, eg, in the context of Citizenship of the Union, Case C-209/03 *R (on the application of Bidar) v London Borough of Ealing, Secretary of State for Education and Skills*, as noted by C Barnard, Casenote (2005) 42 CMLR 1465, in particular 1481-1483 concerning its effects on the Citizenship Directive 2004/38 [2004] OJ L158/77 and, in the context of the interpretation of the Biotechnology Directive, Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079; and the Data Protection Directive, Case C-465/00, C-138/01, C-139/01 *Rechnungshof* [2003] ECR I-4989; Case C-101/01 *Lindqvist* [2003] ECR I-12971.

<sup>169</sup> Article 23(4)(a).

<sup>170</sup> Article 23(4)(g).

<sup>171</sup> Article 8(2).

<sup>172</sup> Article 10(1)(a).

undefined term, save for the proviso that an interpreter is deemed necessary where there will be an interview, and ‘appropriate communication cannot be ensured without such services.’<sup>173</sup> The interview need not necessarily take place in the applicant’s preferred language, where there is ‘another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate in.’<sup>174</sup>

In contrast to this vision of procedural laxity in the Procedures Directive, Article 4 of the Qualification Directive sets out a generally applicable co-operative obligation, with clear communicative implications.<sup>175</sup> In light of the mandatory nature of that obligation, it must be respected over and above any facultative provisions in the Procedures Directive.

Moreover, binding fundamental rights authorities highlight the importance of a thorough assessment, in light of the particular communicative challenges of the asylum process. For instance, in *Hatami v Sweden*,<sup>176</sup> the European Commission on Human Rights found a violation of Article 3 ECHR, where the Swedish authorities denied an asylum application on the basis of negative credibility inferences reached on the basis of contradictions and inconsistencies in the applicant’s account. The Commission stressed that ‘no reliable information’ could be deduced from the original peremptory interview,<sup>177</sup> but that subsequent evidence did substantiate the applicant’s claim. Of particular note is the fact that the Commission stated explicitly that ‘complete accuracy [was] seldom to be expected by victims of torture.’<sup>178</sup> A similar formulation is used by the UNCAT Committee, which consistently states that ‘complete accuracy is seldom to be expected in victims of torture, especially when the victim suffers from post-traumatic stress syndrome; ... the principle of strict accuracy does not necessarily apply even when the inconsistencies are of a material nature.’<sup>179</sup>

Thus, these authorities cast doubt on whether it is legally permissible to dispense with interviews in the manner suggested by the Directive.

The general principles of EC law also contain a right to a hearing, which in some instances includes the right to an oral hearing. This right was incorporated into the general principles from UK law, although it now goes beyond the common law requirements in some respects.<sup>180</sup> Even if it is not explicitly provided for in the applicable EC law, the ECJ may infer such a right on the basis of ‘the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known.’<sup>181</sup> First recognised in the context of disciplinary proceedings against EC staff members,<sup>182</sup> it

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<sup>173</sup> Article 10(1)(b).

<sup>174</sup> Article 12(3)(b).

<sup>175</sup> See above, section titled ‘The Qualification Directive and Evidential Assessment’.

<sup>176</sup> *Hatami v Sweden*, Application No 32448/96, 23 April 1988.

<sup>177</sup> *Ibid.*, para 104.

<sup>178</sup> *Ibid.*, para 106.

<sup>179</sup> *Haydin v Switzerland*, Application 101/1997, 16 December 1998; *Tala v Sweden*, Application 43/1996, 15 November 1996; *Alan v Switzerland*, Application 21/1995, 21 January 1995.

<sup>180</sup> Bignami, above n 153, at 259-293, in particular 291-293, outlining the manner in which the procedural guarantees in EC law were stronger than under UK law, at least as applied in the competition law context.

<sup>181</sup> Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, para 15. The British Advocate-General in the case, AG Warner, made the common law origins of the right clear.

<sup>182</sup> See, for example, the first such case, Case 32/62 *Alvis v Council* [1963] ECR 49.

is now acknowledged as of wide application, in all procedures liable to culminate in a measure adversely affecting any person. Caselaw has not recognised an analogous right to a hearing when national authorities take such decisions, but the general principles should apply in the same way when domestic authorities give effect to EC law.<sup>183</sup>

This view is supported by Article 41 of the EU Charter of fundamental rights.<sup>184</sup> It provides a ‘right to good administration’ which includes the ‘right of every individual to be heard, before any individual measure which would affect him or her adversely is taken.’<sup>185</sup> The article is addressed explicitly to the ‘institutions and bodies of the Union’ but this does not prevent its being invoked where Member States implement EC law. The Court of First Instance (CFI) has cited Article 41 twice,<sup>186</sup> in judgments which suggest the development of a fundamental right to good administration. This development is significant, in that it means that although context-sensitive in its application, the right to a hearing must be regarded as definitively constitutionalised.<sup>187</sup> As such, its application in a robust manner to domestic authorities is apt.

As set out below, the right to a reasoned decision also creates communicative obligations, in particular when placed in the context of the Qualification Directive’s co-operative obligation for the assessment of evidence.

### *The right to a reasoned decision*

Article 253 EC Treaty requires EC institutions to give reasons for their decisions.<sup>188</sup> It is also reflected in Article 41 of the EU Charter, although this is narrower in formulation. The rationale for the requirement is to enhance the individual’s ability to vindicate her rights, by facilitating judicial review (and hence is an aspect of the right to effective judicial protection discussed further below) and to enhance transparency generally. Accordingly, the decision-maker must state its reasoning clearly, such that the individual concerned may know the reasons and so that courts can exercise their

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<sup>183</sup> Tridimas, above n 4, at 415-417. He argues (at p 416): ‘So far ... the Court has not recognized a general right to a hearing in national administrative proceedings where Community rights are at stake. ... [S]uch a right should be recognized although its precise requirements will depend on the circumstances of the case. In principle, the rights of an individual should not differ depending on whether he or she is dealing with Community or national authorities.’ The ECJ did apply Article 6 ECHR fair trial standards to national action in Case C-276/01 *Steffensen* [2003] ECR I-3735.

<sup>184</sup> For a full examination, see K Kanska, ‘Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights’ (2004) *European Law Journal* 296.

<sup>185</sup> Article 41(2).

<sup>186</sup> Case T-211/02 *Tideland Signal v Commission* [2002] ECR II-3781; Case T-54/99 *Max Mobil v Commission* [2002] ECR II-313.

<sup>187</sup> See further Nehl, above n 4, at 96-99. For criticism of this development, see C Harlow, above n 146, at 206-207. She argues: ‘Article 41 ... seemingly extends classical due process rights dramatically, upholding ‘the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.’ And the article goes further still, guaranteeing the European citizen the ‘right to have his or her affairs handled impartially, fairly and within a reasonable time.’ This is a questionable development; it seems to elevate to the level of fundamental freedoms a bureaucratic failure to answer a letter.’

<sup>188</sup> See generally P Kapteyn and P VerLoren van Themaat, *Introduction to the Law of the European Communities* (3rd ed, The Hague, Kluwer, 1998), 335-340; K Lenaerts and D Arts, *Procedural Law of the European Union* (London, Sweet & Maxwell, 1999) 193-196.

judicial review function. Although related to the right to be heard, the two requirements are distinct.<sup>189</sup> The detail required varies according to the context, with individual decisions requiring greater elaboration than generally applicable measures.<sup>190</sup> In the context of individual decisions, the decision-maker must give an account of its factual and legal assessment.<sup>191</sup> The requirement is context-sensitive, and the ECJ takes into account the legal rules, the degree of engagement the individual had in the process and the time pressures.<sup>192</sup> Nonetheless the right to reasons, in particular reasoned individual decisions, is broader and stronger than in most Member States,<sup>193</sup> and so is represents a clear addition to administrative fairness in this field. For instance, English law does not recognise a discrete right to reasons,<sup>194</sup> although, reasons are increasingly required as a general matter of fairness.<sup>195</sup>

The Procedures Directive requires that decisions are in writing, and that negative decisions generally contain ‘the reasons in fact and in law ... and information on how to challenge a negative decision.’<sup>196</sup> However, ‘Member States need not provide information on how to challenge a negative decision in writing where the applicant has been informed at an earlier stage either in writing or by electronic means accessible to the applicant of how to challenge such a decision.’<sup>197</sup> This restriction seems at best petty, and at worst as an attempt to prevent the utilisation of appeals procedures. However, read in light of the general principle, the Procedures Directive’s requirement may help move beyond the institutional practice of giving terse boilerplate rejections. As Shapiro notes, it is a requirement apt to take on substantive connotations as courts tend to ‘start with the procedural requirement that an agency do something, give reasons [and] ... end up with a substantive requirement, that the agency decision is reasonable.’<sup>198</sup>

The requirement to give reasons also has implications prior to the final decision of the asylum adjudicator. It requires the decision-maker to give reasons along the way, explaining its assessments of evidence. For example, in the competition law context, the CFI has combined the requirement to give reasons with the general duty of good administration, to create an obligation on the Commission to engage in dialogue with the undertaking under examination, and reasons each part of its assessment of

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<sup>189</sup> Tridimas, above n 4, at 408-409 and case cited therein.

<sup>190</sup> See eg Case 5/67 *Beus* [1968] ECR 83; Cases 142 and 156/84 *British American Tobacco Company v Commission* [1987] ECR 4487, 4585; Case 250/84 *Eridania* [1986] ECR 117 at 146.

<sup>191</sup> Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, 690. A statement of reasons (in the context of the Commission’s competition law enforcement) must indicate ‘clearly and coherently the considerations of fact and law on the basis of which the fine has been imposed on the parties concerned, in such a way as to acquaint both the latter and the Court with the essential factors of the Commission’s reasoning.’

<sup>192</sup> Eg Case C-350/88 *Delacre v Commission* [1990] ECR I-395, 422.

<sup>193</sup> Craig and De Burca, above n 4, 117. For a comparison between the EC and UK requirement, see P Craig ‘The Common Law, Reasons and Administrative Justice’ (1994) *Cambridge Law Journal* 282.

<sup>194</sup> See further, FG Jacobs, ‘Public Law – The Impact of Europe’ (1999) *Public Law* 232, 235-236.

<sup>195</sup> *Privy Council Appeal No. 16 of 1998 Stefan v General Medical Council* [1999] 1 W.L.R. 1293, 1301. The Privy Council stated that ‘...in all cases heard by the Health Committee there will be a common law obligation to give at least some brief statement of the reasons which form the basis for their decision.’ Para 31.

<sup>196</sup> Article 9(1) and 9(2) first indent, Procedures Directive.

<sup>197</sup> Article 9(2) third indent, Procedures Directive.

<sup>198</sup> M Shapiro, *The Institutionalization of European Administrative Space* (UC Berkeley, Center for Culture, Organization and Politics, Working Paper 2000-09, 2000) available at <http://ist-socrates.berkeley.edu/~iir/culture/abstracts/Shapiro.html>, 26.

evidence as the process unfurls.<sup>199</sup> The ECJ stepped back from such a formal dialogue requirement,<sup>200</sup> but emphasised the need to address all the main contents of complaints in its final decision. Thus, an implicit dialogue requirement still lurks in its judgment.<sup>201</sup> Moreover, the co-operative requirement under Article 4 of the Qualification Directive would seem to suggest that a dialogue requirement is particularly apt in the asylum context, where the relevant evidence is only obtainable through sensitive and open communication with the asylum applicant herself. Some diligence on the part of asylum advocates is called for in harnessing these diverse legal sources, but the doctrinal arguments are sound.

### *The right to effective judicial protection*

The Procedures Directive amplifies the current trend towards restricting appeals, and allowing deportation while appeals are pending. It provides not a right to appeal as such, but rather a 'right to an effective remedy, before a court or tribunal.'<sup>202</sup> Member States are required 'where appropriate' to adopt rules 'in accordance with their international obligations' dealing with whether the remedy has suspensive effect.<sup>203</sup> The text suggests that the right to remain is precarious. However, ECtHR case law on effective remedies clarifies that appeals must have suspensory effect. In *Jabari v Turkey*,<sup>204</sup> an Article 13 violation was found where the applicant was refused asylum on procedural grounds. The only domestic remedy available was judicial review. However, this entitled the applicant neither to suspend the application of the deportation order nor to have her substantive claim of a risk of Article 3 violation examined. The ECtHR reiterated the robust nature of the Article 13 guarantee in this context, requiring 'independent and rigorous scrutiny' of the substantive claim *and* 'the possibility of suspending the implementation of the measure impugned.'<sup>205</sup> Going further in *Hilal v UK* the Court reiterated the rigorous Article 13 standards, requiring 'the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and grant some relief', a remedy that was effective 'in practice as well as in law.'<sup>206</sup>

*Conka v Belgium*<sup>207</sup> clarifies that suspensive effect is required not only in Article 3 cases, but also where other Convention guarantees are potentially infringed. The case concerned a violation of the prohibition of collective expulsion under Article 4, Protocol 4 ECHR. The ECtHR again stressed the potentially irreversible effects of removal decisions.<sup>208</sup> In light of the limited availability of the remedy of suspending deportation, the ECtHR found a violation of Article 13.<sup>209</sup> Article 13 required guarantees, not mere 'statements of intent' or 'practical arrangements' with regard to stays of deportation. Accordingly, a system which did not provide secure legal

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<sup>199</sup> Case T-95/94 *Sytraval and Brink's France v Commission* [1995] ECR II-2651.

<sup>200</sup> Case C-367/95P *Commission v Sytraval and Brink's France* [1998] ECR I-1719.

<sup>201</sup> Shapiro, above n 198, at 43-44 and Nehl, above n 4, at 163-165.

<sup>202</sup> Article 39.

<sup>203</sup> Article 39(3).

<sup>204</sup> Above n 27.

<sup>205</sup> *Ibid.*, para 50.

<sup>206</sup> *Ibid.*, para 75.

<sup>207</sup> Above n 28.

<sup>208</sup> *Ibid.*, para 79.

<sup>209</sup> *Ibid.*, para 82.

assurances that deportation would not take place, could not be regarded as embodying the rule of law.<sup>210</sup> *Conka* represents an enhancement of the right to a suspensive appeal. While the ECtHR in *Jabari* spoke of the ‘possibility’ of such a remedy, in *Conka* it refers to the state’s duty to provide the ‘necessity’ of such a guarantee, for a ‘minimum reasonable period.’<sup>211</sup> Byrne’s interpretation is noteworthy:

While the Member States and UNHCR have integrated the principle of suspensive effect into a regime of relative rights to an effective remedy based upon classification criteria, the European Court of Human Rights appears to be incorporating the principle of full suspensive effect as an absolute safeguard based upon the potential effects of wrongful deportation under Article 3.<sup>212</sup>

Under the EC general principles, the right to effective judicial protection is well-established. Moreover, it applies in all instances where EC rights are at stake, and so is of broader scope than Article 13 ECHR. As the ECJ stated in the seminal *Johnston* case, ‘Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law.’<sup>213</sup> Thus, it applies not only in the context of internal market guarantees,<sup>214</sup> but also when third country nationals have rights under EC law.<sup>215</sup> Even if national law purports to oust or restrict judicial review, these national provisions are simply ineffective in the EC law context. The right to effective judicial protection has taken shape in order to vindicate *individual* rights accorded by EC law. This is reflected in *Johnston*, where the ECJ held that the right to effective judicial protection precluded the acceptance an official certificate as conclusive evidence, in that case to justify derogation from the principle of equal treatment for men and women. Instead, judicial review had to be available to scrutinise official claims in each individual case. Similarly, it is arguable that generalised official determinations of ‘safety’ under STC and SCO must be open to judicial scrutiny in individual cases, in order to fulfil the right to effective judicial protection.<sup>216</sup>

Effective judicial protection does not require an appeal, as the ECJ recognises that ‘it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.’<sup>217</sup> However, this is subject to the principles of equivalence and effectiveness,<sup>218</sup> and it must be possible ‘to apply the relevant principles and rules of Community law’<sup>219</sup>

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<sup>210</sup> *Ibid.*, para 83.

<sup>211</sup> *Ibid.*, para 84.

<sup>212</sup> R Byrne, ‘Remedies of Limited Effect’ (2005) *European Journal of Migration and Law* 71, 80.

<sup>213</sup> Case C-222/84 *Johnston* [1986] ECR 1651, para 18.

<sup>214</sup> Case C-222/86 *UNECTF v Heylens* [1987] ECR 4097. ‘[T]he existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of the right to free access to employment is essential in order to secure for the individual effective judicial protection for his right.’

<sup>215</sup> See discussion above around n 144-149.

<sup>216</sup> Thanks to Catherine Donnelly for this suggestion.

<sup>217</sup> Case C-120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* [1999] ECR I-223.

<sup>218</sup> Para 32, citing Case C-312/93 *Peterbroeck v Belgian State* [1995] ECR I-4599, para 12, and para 18 of the judgment in Case C-326/96 *Levez* [1998] ECR I-7835.

<sup>219</sup> Para 36.

when reviewing national decisions implementing EC law. This is a loaded caveat, for it includes the general principles.

EC law does not impose any one particular standard of review, and the Community Courts themselves apply different standards in different contexts. For example, where the body under review has a wide discretion, for instance if it is making social policy choices, then a deferent standard will be employed.<sup>220</sup> In other contexts, where individual decisions are at stake, more rigorous review is required. For example, in merger cases, the ECJ has emphasised the need for intensive review,<sup>221</sup> insisting that courts must be in a position to establish whether the evidence relied on by the decision-maker (in that case the Commission) was ‘factually accurate, reliable and consistent’, and also whether that evidence contained ‘all the information’ needed to assess a ‘complex situation’ and whether it was ‘capable of substantiating’ the Commission’s conclusions.<sup>222</sup> Its reasoning has a striking, if unexpected, parallel with the asylum context. It stressed that as the merger assessment was concerned with future effects of the proposed merger, it must be carried out ‘with great care’, since it concerned not an examination of past or current events, but rather a prediction of the future. As such, ‘it [was] necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.’<sup>223</sup> Accordingly, a particularly rigorous approach to fact-finding was apt, and a concomitant strict judicial review of the fact-finding process. The asylum process, with ‘essays in prediction’<sup>224</sup> at its core, is similarly fraught, and this reasoning suggests that a strict standard of review should be demanded as a matter of EC law.

In the Netherlands, it has already been suggested that the deferent standard of review is incompatible with Article 13 ECHR.<sup>225</sup> It also seems incompatible with the EC requirement of effective judicial protection. With EC law, national judges themselves are obliged of their own motion to apply the appropriate standard of review, and give full effect to EC law, notwithstanding any contrary national rules. UK judges thus apply proportionality as the applicable standard of review in cases with an EC dimension.<sup>226</sup> The UK’s judiciary’s current standard of review in the asylum context, namely most anxious scrutiny test,<sup>227</sup> appears to meet the requisite EC standard. However, EC law is nonetheless of added value.

Together with the EC principle of effective judicial protection, it empowers national judges to ignore ouster clauses, or other domestic statutory attempts to restrict judicial review law. In addition, EC proportionality is particularly demanding when it comes to assessing the legitimacy of derogations from EC rights. This may well provide a legal tool to read exceptions in the Procedures Directive and Qualification Directive

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<sup>220</sup> See, eg, Case C-25/02 *Rinke v Arztekammer Hamburg* [2003] ECR I-8349, paras 39-42.

<sup>221</sup> Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987.

<sup>222</sup> *Ibid.*, para 39.

<sup>223</sup> *Ibid.*, paras 42-43.

<sup>224</sup> The phrase is Goodwin-Gill’s. He states: ‘The debate regarding the standard of proof reveals some of the inherent weaknesses of a system of protection founded upon essays in prediction.’ GS Goodwin-Gill *The Refugee in International Law* (2nd ed, Oxford, OUP, 1996) 39.

<sup>225</sup> Essakkili, above n 33.

<sup>226</sup> See, eg, *Countryside Alliance* [2006] EWCA Civ 817 and [2005] EWHC 1677 (Admin).

<sup>227</sup> As Lord Bridge observed in the House of Lords, ‘[t]he most fundamental of all human rights is the individual’s right to life and when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny.’ *Bugdaycay v Secretary of State for the Home Department* (1987) ImmAR 250, 263.



narrowly. For instance, there is established jurisprudence limiting national security grounds for derogation from fundamental EC freedoms, which require a high standard of proof.<sup>228</sup> When applying the Qualification Directive, the provisions on exclusion from refugee status and subsidiary protection should also be conceived of as derogations from rights afforded by EC law, and hence only applicable in a proportional manner.

### *An EC right to legal aid?*

The Directive does not provide for legal aid at the initial stage,<sup>229</sup> merely an entitlement to consult a lawyer at the applicant's own cost.<sup>230</sup> Member States are only required to provide 'free legal assistance and/or representation' for appeals before courts.<sup>231</sup> Member States are permitted place restrictions on this entitlement.<sup>232</sup> This approach is counterproductive, cost saving in a basically inefficient manner. Many errors made at first instance arise as where claimants misunderstand procedures and processes. Correcting such errors requires recourse to costly appeals and judicial reviews. As such, legal advice at the initial stage is an important aspect of the front-loading of procedural resources, which enhances efficiency *and* helps ensure fair and reliable determinations.<sup>233</sup> Investing at the initial stage is thus more efficient even from a governmental perspective, and the most apt means to meet the dual Tampere commitment to fairness and efficiency.

It is arguable that legal aid should be regarded as a fundamental right under EC law. This has not yet been recognised by the ECJ, but the doctrinal argument is sound. As previously explained, the Strasbourg Article 6 case law is applicable to asylum determinations, where these involve the enforcement of EC rights. Although the ECtHR does not generally apply Article 6 in the asylum context, EC law incorporates Article 6 standards whenever EC rights are being invoked. This is evident in the formulation of Article 47 of the EU Charter, subparagraph 3 of which states that:

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

To recap the Article 6 ECHR requirements, it requires civil legal aid to be provided where the applicant has insufficient means, and the nature of the case means that legal assistance is required to make access to justice meaningful. In assessing whether this is so, the ECtHR takes into account the complexity of case, the need to ensure

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<sup>228</sup> See, eg, Joined Cases 115/81 and 116/81 *Adoui and Cornuaille v Belgium* [1982] ECR I-1665; Case C-358/96 *Criminal Proceedings Against Calfa* 1999] ECR I-11.

<sup>229</sup> Article 16.

<sup>230</sup> Article 15(1).

<sup>231</sup> Article 15(2).

<sup>232</sup> Article 15(3): Member States may provide free legal assistance and/or representation (a) only for procedures before a Court or tribunal under Chapter V and 'not for any onward appeals of reviews provided for under national law.' This would exclude legal aid for judicial review of administrative decisions; (b) only to those who lack sufficient resources; (c) only to legal advisers specifically dedicated to assisting asylum applicants; (d) only if the appeal or review is likely to succeed. This latter ground is subject to the caveat that legal assistance/representation is not 'arbitrarily restricted'.

<sup>233</sup> See further ECRE, *The Way Forward: Europe's Role in the Global Refugee Protection System: Towards Fair and Efficient Asylum Systems in Europe* (Brussels, ECRE, 2005) 38.

equality of arms, and the applicant's emotional involvement.<sup>234</sup> Thus, whether legal aid is required is dependent on the individual circumstances, rather than the sector concerned.<sup>235</sup> Application of these criteria to the asylum determination process leads to the conclusion that in many, if not most instances, legal aid would be a requirement.<sup>236</sup>

### **Future directions – convergence or fragmentation?**

The Procedures Directive suggests a differentiated, fragmented approach to asylum procedures, across countries, levels and types of application. The general principles, in contrast, have a unifying logic. Taking them seriously should ideally prompt streamlining and convergence of procedures, as they must be respected in all instances where EC rights are at stake. At a minimum, they should lead to the application of a single procedure to refugee status and subsidiary protection cases. On the political front, in light of the legislative failures, a single procedure has become an important aspect of the Commission's hortatory policy,<sup>237</sup> and it plans to propose legislation for just such a 'one-stop shop' type of procedure. Of note is the fact that the Commission appears to understate (perhaps tactically) the fact that the general principles require a degree of convergence between refugee status and subsidiary protection applications. For instance, it outlines as a policy option (rather than legal requirement) the application to negative decisions on subsidiary protection the right to an effective remedy, as enshrined in Chapter V of the Procedures Directive.<sup>238</sup> However, as I have argued, the EC right to effective judicial protection applies in any event to subsidiary protection determinations, even in the absence of an express EC legislative guarantee to this effect. Admittedly, the Communication does later stress the fact that the right is 'prescribed not only by the Court of Justice but also by the European Court of Human Rights',<sup>239</sup> perhaps a hint at the judicial outcome I suggest is doctrinally warranted.

Other institutional developments may also lead to convergence in procedural practices, in particular moves to enhance practical co-operation between asylum decision-makers. That practical co-operation is for the moment focused on country of

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<sup>234</sup> *Airey v Ireland*, Application No 6289/73 (1980) 2 EHRR 305; *Ait-Mouhoub v France*, Application No 00022924/93 (28 October 1998); *Patel v United Kingdom*, Application No 38199/97 (19 February 2002); *Faulkner v United Kingdom*, Application No 00030308/96 (1 December 1998); *Del Sol v France*, Application No 00046800/99 (26 February 2002); *Aerts v Belgium*, Application No 00025357/94 (30 July 1998), para 60.

<sup>235</sup> For instance, concerning defamation, the ECtHR held that Article 6 required legal aid in a case where the imbalance between the parties was significant and the legal issues highly complex (*Steel v United Kingdom*, Application No 68416/01) although in other defamation cases there was no such entitlement (*McVicar v United Kingdom*, Application No 46311/99 (2002) 35 EHRR 22; *A v United Kingdom*, Application No 35373/97 (2003) 36 EHRR 51).

<sup>236</sup> If asylum applicants are in detention, *Duyonov v United Kingdom*, Application No 36670/97 (7 November 2000) suggests that legal aid is also required under Article 5(4) of the Convention.

<sup>237</sup> Commission Communication, Towards a common asylum procedure and a uniform status valid throughout the Union for persons granted asylum, COM (2000) 755 final, 22 November 2000; Communication from the Commission to the Council and the European Parliament, A more efficient common European asylum system: the single procedure as the next step, COM (2004) 503 final, 15 July 2004.

<sup>238</sup> Communication, A more efficient common European asylum system: the single procedure as the next step (*ibid.*), para 17.

<sup>239</sup> *Ibid.*, para 20.

origin information and burden sharing, described as how to respond to particular pressures.<sup>240</sup> In the Hague Programme, the European Council also requested the Commission to ‘present a study on the appropriateness as well as the legal and political implications of joint processing of asylum applications within the Union’,<sup>241</sup> and requested that ‘separate study’ to be conducted ‘in close consultation with UNHCR’ to examine ‘the merits, appropriateness, and feasibility of the joint processing of asylum applications outside the EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards.’<sup>242</sup> The issues of external and joint processing seemed to have slipped from the agenda more recently, with the focus in the Commission’s Communication on Regional Protection Programmes being on containing refugees, rather than external processing *per se*.<sup>243</sup>

From the outset, harmonisation of procedures was linked to the need to ensure that asylum applications would be handled similarly across the EU in order to ensure similar outcomes.<sup>244</sup> The current move toward practical co-operation shares this objective.<sup>245</sup> At present, stark divergences are evident. For example, UNHCR has stated that all those Chechens whose place of permanent residence was the Chechen Republic prior to their seeking asylum abroad should be considered in need of international protection, unless there are serious grounds to exclude them from refugee status under the Refugee Convention.<sup>246</sup> However, as ECRE notes:

Throughout Europe the treatment of Chechens seeking protection varies considerably, with refugee recognition rates<sup>247</sup> in 2003<sup>248</sup> ranging from 0% (Slovakia) to 76.9% (Austria),<sup>249</sup> showing that for many Chechens, the outcome of the ‘asylum lottery’ will very much depend on the country in which they seek asylum.<sup>250</sup>

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<sup>240</sup> Hague Programme, Strengthening Freedom Security and Justice in the European Union, Annex I to the European Council Conclusions 4-5 November 2004, 9. See further, Commission Communication on Strengthening Practical Cooperation, New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System, COM(2006) 67 final, 17 February 2006

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> Commission Communication on regional protection programmes, COM(2005) 388 final 1 September 2005.

<sup>244</sup> See eg, Commission working document, Towards Common Standards on Asylum Procedures, SEC (1999) 271 final, 3 March 1999, 6.

<sup>245</sup> Commission Communication, New Structures, New Approaches, above n 240, para 4

<sup>246</sup> UNHCR, *Position regarding Asylum Seekers and Refugees from the Chechen Republic Russian Federation*, October 2004.

<sup>247</sup> Refugee recognition rate = Number of recognised refugees divided by the total number of recognised refugees, number of persons granted other forms of protection, and persons rejected protection x 100%.

<sup>248</sup> Refugee recognition rates for 2004 were not available at time of writing.

<sup>249</sup> For more information on refugee recognition rates for Chechens in different European countries see Norwegian Refugee Council, *Whose responsibility? Protection of Chechen internally displaced persons and refugees*, May 2005.

<sup>250</sup> ECRE, *Guidelines on the Treatment of Chechen Internally Displaced Persons (IDPs), Asylum Seekers and Refugees in Europe*, doc PP2/05/2005/Ext/CR (Brussels, June 2005) (footnotes in the original text).

Convergence is thus a pressing protection issue. It remains to be seen whether these institutional moves to develop common approaches will lead to convergence around good practice, or simply amplify the tendencies of the pre-Amsterdam era of informal sharing of deflective and restrictive strategies. The benign vision of co-operative practices in the Commissions Communications<sup>251</sup> belies not only the lessons of the intensive transgovernmentalism<sup>252</sup> of that era, but also the ongoing co-operation which takes place as part of the Dublin system. As Van Selm notes:

In order to implement the Dublin Regulation effectively, several Member States have exchanged, on a bi-lateral basis, liaison officers, who deal with the inter-state communication on the individual cases. Usually these exchanges are with neighbouring states, through which a 'Dublin case' may have passed in transit.<sup>253</sup>

Here, where states have a clear incentive, co-operation is pursued. Whether the Commission's new co-operative mechanisms will achieve their aims, in the absence of strong incentives or legal obligations, remains to be seen.

The Procedures Directive is unlikely in itself to promote convergent approaches, although together with the Qualification Directive and the general principles, some legal inducements towards convergence may be proffered.

## **Conclusions**

Of all the post-Amsterdam measures in the asylum field, the Procedures Directive has been the most controversial. This is at least partly explained by the context wherein national governments jealously guard their leeway to manipulate asylum procedures, in order to pursue various goals. Although the procedural changes of the past decades have proved legally controversial at the domestic and European level, many have become entrenched in the practices of the Member States.

The highly qualified and differentiated procedural guarantees in the Procedures Directive are the result, and demonstrate a reluctance to commit to unequivocal procedural standards, or maintain access to asylum within the EU. Thus, the critiques of the Procedures Directive are well-founded. In particular, the variety of procedures permitted reflects an assumption that it is possible to determine the cogency of claims on the basis of generalisations or cursory examination. This runs counter to any informed context-sensitive understanding of the asylum process. In the worst cases under the Procedures Directive, such as the supersafe third country provisions, the generalised assessment entirely substitutes for any individual process. In the Directive, we see the result of a legislative process which should have established clear minimal guarantees, but instead cast a negotiated settlement in law, apparently reinvesting national administrations with discretion that they had lost in some measure due to domestic and ECtHR rulings.

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<sup>251</sup> Above n 237 and n 240.

<sup>252</sup> The phrase is from H Wallace and W Wallace (eds), *Policymaking in the European Union* (4th ed, Oxford, OUP, 2000) 28. See further, Costello, above n 151.

<sup>253</sup> J Van Selm, 'European Refugee Policy: is there such a thing?' *New Issues in Refugee Research* (UNHCR Working Paper No 115, May 2005).

However, the highly qualified and differentiated procedural guarantees in the Procedures Directive must be interpreted and applied in a manner compatible with the general principles of EC law and applicable international norms. Indeed, the Directive's validity depends on compliance with the general principles. When it comes to actually implementing and applying the Directive, the main task is to reassert those domestic and ECtHR principles of fundamental rights and fair procedures, but the medium through which this is best accomplished is the general principles of EC law. Thus, national judges are empowered to reassert national administrations' legal accountability.

The general principles of EC law, and the provisions of the Qualification Directive on evidential assessment, require careful individual assessment of asylum claims. In four key areas, I suggest that the apparent discretion afforded by the Procedures Directive is limited. The right to a hearing and the co-operative obligations in the Qualification Directive preclude Member States from deciding asylum claims without interviewing the asylum applicant, in spite of the wording of the Procedures Directive on this matter. The requirement of a reasoned decision applied in the asylum context will require more than the all-too-common boilerplate refusal. Moreover, the requirement has implications for the decision-making process as well as the form of the final decision, and is ripe for evolution into a dialogic obligation. The right to judicial protection has long been recognised in EC law, precluding ouster of judicial review. It is also likely to require a robust standard of review in the asylum context, to ensure that rights granted under EC law are practical and effective. It may also include a right to legal aid, going beyond the text of the Procedures Directive.

However, there is much to regret in the turn to judicial salvation. Litigation is inevitably costly and time-consuming. A fitful, piecemeal process, it involves impugning practices in individual cases, and ultimately depends on appropriate institutional reforms. It also raises concerns about strain on judicial resources and independence. The ECJ currently lacks full jurisdiction over immigration and asylum matters, and as a proposal has been issued to grant it full preliminary ruling jurisdiction over these matters.<sup>254</sup> As such, it is unclear whether its institutional position is as secure as in other fields. Although the ECJ will have a crucial role to play, it is initially and ultimately national judges who must vivify the general principles in this new context.

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<sup>254</sup> Above n 43.