

## ACCESS TO AN EFFECTIVE REMEDY IN EUROPEAN ASYLUM PROCEDURES

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### Introduction

Under international law it is well established that asylum seekers who claim that their expulsion to their country of origin will lead to a violation of the prohibition of *refoulement*, have a right to an effective remedy. However in practice, the access to this remedy may be problematic. Expulsion on a very short notice, short time-limits for lodging the appeal and national procedural rules may limit or even block the access to an effective remedy.

Since the development of the Common European Asylum System, asylum procedures in the Member States of the European Union are (partly) governed by Community law. Therefore the question is relevant whether Community law provides asylum seekers with a right to access to an effective remedy against the refusal of their asylum application or against a deportation order. Furthermore, it is interesting to examine, whether and if so on what conditions this access may be limited.

For answering these questions the Procedures Directive<sup>1</sup>, which lays down minimum guarantees for asylum procedures is most relevant. Article 39 of this Directive provides for a right to an effective remedy before a court or tribunal. The national courts of the Member States and the Court of Justice may be asked to review the legality of this provision and to apply and interpret it.

In performing this task these courts may use general principles of Community law, in particular the principles of effectiveness and effective judicial protection. The Court of Justice has already used these principles in questions regarding access to an effective remedy in cases concerning more traditional fields of Community law. The question is what these principles will signify in the context of the Common European Asylum System.

General principles of Community law are inspired by international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories.<sup>2</sup> It is therefore very likely that the content of the principles of effectiveness and effective judicial protection used in the context of the Common European asylum system will be inspired by international treaties, which are relevant in asylum cases, such as the European Convention of Human Rights (ECHR), the International

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<sup>1</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

<sup>2</sup> Article 6 (2) of the Treaty of the European Union.

Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT). For this reason it is necessary to examine the requirements with regard to access to an effective remedy, which follow from these treaties. Based upon the findings of this examination, the meaning and content of the Community law principles of effectiveness and effective judicial protection with regard to the right of access to an effective remedy in the context of the Common European Asylum System may be defined.

In this article I will start with a description of the relevant Community legislation with regard to the right of access to an effective remedy (I). Then I will briefly address the way in which the Court of Justice and the national courts apply general principles of Community law in general and the principles of effectiveness and effective judicial protection in particular (II). In the next paragraph the existing case-law by the Court of Justice with regard to the right of access to an effective remedy will be examined (III). After that I will explain how general principles of Community law will potentially be developed in the context of the Common European Asylum System (IV). Furthermore the case-law by the European Court of Human Rights (ECtHR), Committee against Torture (CAT) and Human Rights Committee (CCPR) with regard to the right of access to an effective remedy in asylum procedures will be addressed (V). Finally I will examine the guarantees offered by the right to a fair trial under Article 6 ECHR and 14 ICCPR (VI). To conclude I will try to identify the meaning and content of the Community law principles of effectiveness and effective judicial protection with regard to the right of access to an effective remedy in the context of the Common European Asylum System (VII).

## **I. Relevant Community Legislation**

The European Union has developed a Common European Asylum System, which is based on Article 63 of the EC-Treaty. This system comprises rules on several issues such as the criteria for granting a refugee status or subsidiary protection status, the determination of responsibility for an asylum claim, family reunification, temporary protection and asylum procedures. For the purpose of this article, the Procedures Directive and the Qualification Directive are most important.

### **I.1 The Procedures Directive**

The Procedures Directive provides for minimum norms with regard to national asylum procedures. It contains procedural guarantees for the asylum seeker, such as the right to be informed on the procedure, the right to a personal interview and the right to an interpreter and legal aid. It also lays down the asylum seeker's obligations. Furthermore, the Procedures Directive contains separate procedures for asylum claims processed at the border and subsequent asylum applications and states the grounds on which an asylum claim can be deemed inadmissible or manifestly unfounded.

The Procedures Directive also contains one provision regarding appeal procedures. Article 39 Procedures Directive lays down the right to an effective remedy. It states that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum. This includes decisions to consider an application inadmissible, decisions taken at the border or in the transit zones and decisions not to conduct an examination, in cases where the applicant for asylum is seeking to enter or has entered illegally into a Member State's territory from a European safe third country and in subsequent asylum procedures. Furthermore, the right to an effective remedy applies to persons whose refugee status has been withdrawn.

The Commission's original proposal for the Procedures Directive provided for minimum standards concerning time-limits in appeal, the scope of the judicial review and the possibilities of decision-making on appeal. The proposal even provided for a right to further appeal to an appellate court. However these provisions all disappeared during the negotiation process<sup>3</sup> and the issues covered by them are thus to be regulated by the Member States.<sup>4</sup>

It is important to note that, if a country has separate procedures for claims for a refugee status and for claims for a subsidiary protection status, the Directive is only applicable to procedures, in which a claim for refugee status is assessed. The asylum seeker cannot derive any rights from the Procedures Directive in the procedure, in which his right to a subsidiary protection status is determined. However, when an asylum seeker claims a right granted to him by Community law in a national asylum procedure, the general principles of Community law, among which the principle of effectiveness and effective judicial protection do apply (see further paragraph II). The most important rights granted by Community law, which asylum seekers may claim in an asylum procedure are laid down in the Qualification Directive.

## **I.2. The Qualification Directive**

The Qualification Directive<sup>5</sup> sets criteria for granting a refugee status or a subsidiary protection status. The Directive contains a few important rights

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<sup>3</sup> Byrne states that Article 39 is the result of an underlying legal approach to how the scope of asylum appeals may be curtailed. R. Byrne, 'Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures', *European Journal of Migration and Law*, 2005-7, p. 74.

<sup>4</sup> Commission of the European Communities, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM (2000) 578 final, 9 September 2000.

<sup>5</sup> 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.

for asylum seekers. If a person qualifies as a refugee in accordance with the Qualification Directive, the Member State should grant him refugee status.<sup>6</sup> If a person is eligible for subsidiary protection in accordance with the Qualification Directive, he should be granted a subsidiary protection status.<sup>7</sup> Finally the Qualification Directive also contains the right to be protected from *refoulement*.<sup>8</sup> Asylum seekers will normally claim these rights in an asylum procedure in one of the Member States.

## II. Applying General Principles of Community Law

General principles of Community law are used by the national courts and the Court of Justice for several purposes. First of all they use general principles of Community law to review the legality or the validity of Community legislation. General principles can be invoked to obtain the annulment of a Community Measure under Article 230 or under Article 234 EC-Treaty. An individual may attack the validity of a Community measure before a national court on grounds of infringement of the general principles. If the national court considers that a Community measure may be invalid on this ground, it should make a reference for a preliminary ruling to the Court of Justice.<sup>9</sup> In the context of a preliminary ruling, the Court of Justice can test a provision against the general principles of Community law, among which the principles of effectiveness and effective judicial protection. When the Court concludes that the provision violates (one of) these principles, it will deem it invalid.

Secondly, general principles are used to fill in gaps in Community legislation and to supplement the provisions of written Community law. The national courts and the Court of Justice in a preliminary ruling interpret a provision, using general principles of Community law. An important question is whether the Member States are bound by general principles of Community law, when the Community provision leaves them discretion. The Court of Justice ruled in *Parliament v. Council* that the fact that a Community provision leaves discretion to the Member State does not authorise the Member States to employ this provision in a manner contrary to general principles of Community Law.<sup>10</sup>

Article 39 of the Procedures Directive states that the Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against certain decisions. As this provision corresponds with provisions of international human rights law<sup>11</sup>, it is not very likely that this provision will be deemed contrary to the principles of Community law. However, the terms ‘effective remedy’ and ‘court or tribunal’ need to be

<sup>6</sup> Article 13 Council Directive 2004/83/EC.

<sup>7</sup> Article 18, *idem*.

<sup>8</sup> Article 21 *idem*.

<sup>9</sup> T. Tridimas, *General Principles of Community Law*, Oxford: Oxford University Press 2006, pp. 31, 35.

<sup>10</sup> Case C-540/03, *Parliament v. Council* [2006], para. 70.

<sup>11</sup> Compare with Article 13 ECHR and 2 (3) ICCPR.

interpreted by the national courts and the Court of Justice. The Court may also be asked whether certain national procedural provisions, which limit the right of access to a remedy, such as rules regarding time-limits or court fees are compatible with Community law. For this purpose it will potentially use the principles of effectiveness and effective judicial protection.

The principle of effectiveness and that of effective judicial protection could thus set requirements with regard to the right of access to an effective remedy against asylum decisions. Although the principle of effectiveness and the right to effective judicial protection have different starting points<sup>12</sup>, they often have the same effect: procedural hurdles should be removed or procedural guarantees should be put in place.<sup>13</sup> The Court draws similar procedural requirements from both principles. Normally, the Court uses the right to effective judicial protection, if there is a Community provision, which has to be interpreted.<sup>14</sup> If no procedural rules regarding the issue are available, the Court often uses the principle of effectiveness.<sup>15</sup> I will address the case-law concerning both principles with regard to access to an effective remedy in paragraph III.

## II.1 The Principle of Effectiveness

According to the Court's standing case-law, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights, which individuals derive directly from Community law.

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<sup>12</sup> The principle of effectiveness seeks to protect the interests of the Community. It is based on the direct effect of Community law and promotes the effective enforcement of Community law in national courts. The right to effective judicial protection is inspired by human rights law, laid down in Article 6 and 13 ECHR. This right seeks to protect the rights of individuals against the State. When a person considers himself wronged by the authorities of a State, he should be able to contest the decision or the acts concerned before an independent and impartial authority.

<sup>13</sup> In some cases however the principle of effectiveness and the right to effective judicial protection may conflict. I refer to Case C-232/05, *Commission v. French Republic* [2006], paras. 51, 55-56. This case shows that the principle of effectiveness may require immediate and effective execution of a decision, while the principle of effective judicial protection may require that suspensive effect is granted.

<sup>14</sup> See for example Case C-222/84, *Johnston* [1986]; Case C-226/99 *Siples* [2001]; Case C-424/99, *Commission v. Austria* [2001]; Case C-50/00, *Union de Pequeños* [2002]; Case C-459/99, *MRAX* [2002].

<sup>15</sup> See for example Case C-312/93, *Peterbroeck* [1995]; Case C-397/98, *Hoechst AG* [2001]; Case C-129/00, *Commission v. Italy* [2003]; Case C-147/01, *Weber's wine world* [2003]. The Court may apply the right of effective judicial protection in cases where no Community provisions regarding the procedure are available. Sometimes both the principle of effectiveness and the right to effective judicial protection are used to review an aspect of national procedural law. In *Unibet* for example, the Court considered: "the principle of effective judicial protection does not require it to be possible, as such, to bring a free-standing action which seeks primarily to dispute the compatibility of national provisions with Community law, provided that the principles of equivalence and effectiveness are observed in the domestic system of judicial remedies." Case C-432/05, *Unibet* [2007], para. 47.

The general rule is therefore that the Member States have procedural autonomy.

The Court ruled however in *Rewe*<sup>16</sup> that national procedural rules may not render practically impossible or excessively difficult the exercise of rights conferred by Community law. This principle is called the principle of effectiveness.

The principle of effectiveness applies to all rights granted by Community law. The national court must analyse each case, which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult, by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.<sup>17</sup>

It follows from the Court's case-law that the right to an effective remedy before a court or tribunal laid down in Article 39 Procedures Directive may not be rendered practically impossible or excessively difficult by national procedural rules. Furthermore the principle of effectiveness applies if an asylum seeker claims a right granted by Community law in an asylum procedure, which does not fall within the scope of the Procedures Directive. As was already stated in the previous paragraph, the Qualification Directive provides a few clear rights to asylum seekers. Furthermore the Dublin Regulation contains a right to have one's asylum application examined (Article 3 (1)). Therefore national asylum procedures, including rules with regard to the right to access to an effective remedy may not render the exercise of these rights practically impossible or excessively difficult.

## II.2 The Principle of Effective Judicial Protection

The Court of Justice considers the principle of effective judicial protection<sup>18</sup> a fundamental right. It is deemed essential in order to secure for the individual effective protection of the (fundamental) rights granted by EC-law.<sup>19</sup> The Court ruled that, in accordance with the principle of sincere cooperation,

“national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.”<sup>20</sup>

<sup>16</sup> Case C-33/76, *Rewe* [1976].

<sup>17</sup> See for example Case C-276/01, *Steffensen* [2003], para. 66.

<sup>18</sup> The Court uses different terminology for the same principle such as ‘the right to an effective judicial remedy’, Case 222/84, *Johnston* [1986], ‘the principle of effective judicial control’, Case C-185/97, *Cooté* [1998], ‘the requirement for judicial review’, Case C-459/99, *MRAX* [2002], or ‘the requirement of judicial control’, Case C-269/99, *Kühne* [2001].

<sup>19</sup> Case C-222/86, *Heylens* [1987]; see also Case C-340/89, *Vlassopoulou* [1991].

<sup>20</sup> Case C-50/00, *Union de Pequeños* [2002], para. 42.

The right to effective judicial protection applies to all rights guaranteed by Union law.<sup>21</sup> The Court of Justice often, but not always refers to Article 6 and 13 ECHR when it addresses effective judicial protection.<sup>22</sup>

The Court may use the right to effective judicial protection to interpret Article 39 of the Procedures Directive. Furthermore the right to effective judicial protection can be invoked as soon as the asylum seeker claims one of the above mentioned rights provided for by the Dublin Regulation and the Qualification Directive in asylum proceedings, which are not governed by the Procedures Directive.

### **III. Access to an Effective Remedy: Existing Case-law by the Court of Justice**

In this paragraph I will address the case-law by the Court of Justice with regard to the right of access to an effective remedy. First of all I will describe the Court's case-law with regard to the right to an effective remedy in general. Then I will go into the case-law regarding national procedural rules or practices which limit the access to an effective remedy. As the Procedures Directive requires an effective remedy before a court or tribunal, I will finally examine the Court's interpretation of the term 'court or tribunal'.

#### **III.1 The Right of Access to an Effective Remedy**

The Court of Justice addresses the right of access to an effective remedy both in cases, in which Community legislation governs the right of access to a court and in cases, in which no Community legislation on that issue is available. An example of a case in which Community legislation was available is *Johnston*<sup>23</sup>. In this case, which concerned the equal treatment of men and women, Article 6 of Directive 76/207 plays a prominent role.<sup>24</sup> This provision states:

“Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment [...] to pursue their claims”.

The Court of Justice considers that the requirement of judicial control stipulated by this provision reflects a general principle of law, which underlies the constitutional traditions common to the Member States. The Court of

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<sup>21</sup> See Article 47 of the Charter of Fundamental Rights.

<sup>22</sup> The Court referred to Article 6 and 13 ECHR for example in: Case C-222/84, *Johnston* [1986]; Case C-222/86, *Heylens* [1987]; Case C-226/99, *Siples* [2001]; Case C-269/99, *Kühne and others* [2001]; Case C-459/99, *MRAX* [2002]; Case C-263/02 P, *Jégo-Quéré* [2004]; Case C-327/02, *Panayotova* [2004]; Case C-506/04, *Graham Wilson* [2006]. The Court did not refer to Article 6 and 13 ECHR for example in: Case C-13/01, *Safalero* [2003]; Case C-125/05, *Vulcan Silkeborg* [2006]; Case C-131/03 P, *Tobacco Holdings* [2006].

<sup>23</sup> Case C-222/84, *Johnston* [1986]. See for application of this principle in immigration law cases C-327/02, *Panayotova* [2004] and C-136/03, *Dörr* [2005].

<sup>24</sup> Directive 76/207 on the equal treatment for men and women.

Justice refers to art 6 and 13 ECHR. It considers that Article 6 of the Directive, read in the light of the general principle of effective judicial protection, signifies that all persons have the right to obtain an effective remedy in a competent court against measures, which they consider to be contrary to the principle of equal treatment between men and women. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights, for which the Directive provides.

The Court has also derived a right to an effective remedy from provisions of Community legislation, which do not (directly) contain a right to appeal. An example is Article 6 (2) of Directive 89/105<sup>25</sup>, which only provides that an applicant should be informed of the remedies available to him and the time-limits allowed for such remedies.<sup>26</sup>

The Court's case law shows that it is not necessary that Community legislation provides for a right to a remedy, to claim a right to access to an effective remedy under Community law. The right of access to an effective remedy is also derived from the principle of effective protection of a fundamental right. A national decision, which restricts a fundamental right, must be capable of being subject to judicial proceedings, in which its legality under Community law can be reviewed.<sup>27</sup> In some cases the Court derives the right of access to a court or tribunal from the fact that national authorities have the competence to take certain decisions based on a provision of a Community measure. It is then for the Member States to ensure effective judicial scrutiny of the observance of the applicable provisions of Community law.<sup>28</sup>

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<sup>25</sup> Council Directive 89/105/EEC of 21 December 1988, relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in the scope of national health insurance systems. Article 6 (2) states: "In addition, the applicant shall be informed of the remedies available to him under the laws in force and of the time limits allowed for applying for such remedies".

<sup>26</sup> Case C-424/99, *Commission v. Austria* [1999].

<sup>27</sup> Case C-19/92, *Kraus* [1993] para. 40. This case concerned the freedom of movement and the freedom of establishment, laid down in Article 48 and 52 of the EC-Treaty. This right was restricted by the refusal by a national authority of an authorisation to use an academic title awarded abroad. See also Case 222/86, *Heylens* [1987]: "Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right." The Court then refers to *Johnston* and considers that this requirement reflects a general principle of Community Law.

<sup>28</sup> Case C-467/01, *Eribrand* [2003], para. 61. This case concerned a decision on the application for export refunds. Regulation 3665/87/EEC did not provide for a right of access to a court and no fundamental freedom was directly involved. The Court refers to *Johnston* and considers that the principle of effective judicial protection requires that exporters have a legal remedy against decisions taken by competent national authorities under the regulation.

### III.2 Limitations of the Right of Access to an Effective Remedy

The Court ruled in several cases on the question whether national procedural rules, which limit access to a remedy, violate Community law. In these cases the Court usually refers to the principle of equivalence and effectiveness. It considers that national procedural rules may not be less favourable than those governing similar domestic actions and they may not render practically impossible or excessively difficult the exercise of rights conferred by Community law.<sup>29</sup> Furthermore it refers to the principle of sincere cooperation, which requires that natural and legal persons are able to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.<sup>30</sup>

Several types of national procedural rules or practices may render the right of access to an effective remedy impossible or excessively difficult. Examples, which are particularly relevant for asylum procedures, are short time-limits to lodge an appeal and expulsion before a person has had the chance to lodge an appeal. However, there may also be other sorts of procedural hurdles, which limit the right of access to an effective remedy. Below, I will address some relevant case-law by the Court of Justice with regard to these three issues.

#### III.2.1 Time limits

The Court has ruled on the compatibility with Community law of national time-limits in cases, in which the applicants claimed a certain Community right, such as repayment of taxes levied contrary to Community law<sup>31</sup>, reparation of the loss or damage sustained as a result of the belated transposition of a Community directive<sup>32</sup>, or for membership of an occupational pension scheme<sup>33</sup>. According to national law, these claims had to be lodged within a certain period of time. If the action was lodged at a later time, the right to repayment, reparation or membership would lapse. The Court's standard consideration with regard to these time-limits, is that that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings. The Court deems it necessary to set time-limits for bringing proceedings in the interests of legal certainty, which protects both the applicant and the administration concerned. Such time-limits are not liable to render virtually impossible or excessively difficult the exercise of rights conferred by Community law. Only if time-limits make it impossible in practice to exercise rights, which the national courts have a duty to protect,

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<sup>29</sup> See for example Case C-13/01, *Safalero* [2003], para. 49, C-255/00, *Grundig Italiana* [2002], para. 33.

<sup>30</sup> Case C-50/00, *Union de Pequeños* [2002], para. 42.

<sup>31</sup> Case C-255/00, *Grundig Italiana* [2002].

<sup>32</sup> Case C-261/95, *Palmisani* [1997].

<sup>33</sup> This claim was based on sex discrimination contrary to Article 119 of the Treaty. Case C-78/98, *Preston and Fletcher* [2000].

they are considered to be contrary to Community law.<sup>34</sup> The Court concluded in a few cases that the time-limit was contrary to Community law.<sup>35</sup>

### III.2.2 Access to a Remedy before Expulsion

In *Pecastaing*<sup>36</sup> the Court was asked to interpret Article 8 and 9 of Directive 64/221.<sup>37</sup> Article 8 states that the person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration. According to the Court Article 8 of this directive does not require a remedy with suspensive effect.<sup>38</sup> Article 9 of the directive also allows for the expulsion of the person concerned before the decision on the appeal has been taken, on the condition that an opinion from a competent authority, mentioned in that article is obtained. In cases of urgency, the opinion of the competent authority mentioned in Article 9 may even be omitted.<sup>39</sup> The Court considers however that it follows from Article 9, that as soon as the opinion of the competent authority has been obtained, and notified to the person concerned, an expulsion order may be executed immediately, “subject always to the right of this person to stay on the territory for the time necessary to avail himself of the remedies accorded to him under Article 8 of the Directive”.<sup>40</sup> The person concerned must thus be given enough time and opportunity to lodge the appeal in the Member State, but he can be expelled during the procedure, if the conditions of Article 9 are met.

<sup>34</sup> Case C-45/76, *Comet* [1976], paras. 15-17.

<sup>35</sup> See for example Case C-78/98, *Preston and Fletcher* [2000], in which the Court considered that Community law, and more particularly the principle of its effectiveness, precludes a national procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme - a claim based on sex discrimination contrary to Article 119 of the Treaty - to be brought within six months of the end of each contract of employment to which the claim relates where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies. Whilst it is true that legal certainty also requires that it be possible to fix precisely the starting point of a limitation period, the fact nevertheless remains that, in the case of successive short-term contracts, setting the starting point of the limitation period at the end of each contract renders the exercise of the right conferred by Article 119 of the Treaty excessively difficult when it is possible to fix a precise starting point for the limitation period.

<sup>36</sup> Case 98/79, *Pecastaing* [1980].

<sup>37</sup> Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health.

<sup>38</sup> The Court considers that there may not be inferred from Article 8 an obligation for the Member States to permit an alien to remain in their territory for the duration of the proceedings, so long as he is able nevertheless to obtain a fair hearing and to present his defence in full. Case 98/79, *Pecastaing* [1980], para. 13.

<sup>39</sup> Case 98/79, *Pecastaing* [1980], para. 1.

<sup>40</sup> *Idem*, para. 18.

### III.2.3 Other Limitations

An example of another type of limitation to the right of access to a court can be found in the *MRAX* case. The applicant stated that the Belgian State's administrative practice denied third country nationals, who are married to Member State nationals and are not in possession of a visa, or whose visa has expired, the right to make an application for review when a decision was made refusing them a residence permit or ordering their expulsion. They were permitted only to bring an action for suspension and annulment of the decision before the Conseil d'État, which merely reviews the decision's legality and cannot review whether the decision was appropriate in the light of the facts and circumstances of the case. The applicant in this case referred to Article 9 of Directive 64/221<sup>41</sup>, which provides minimum procedural guarantees for persons refused a first residence permit, or whose expulsion is ordered before the issue of the permit.

The Court of Justice holds that any foreign national claiming to meet the conditions necessary to qualify for the protection afforded by Directive 64/221 benefits from the minimum procedural guarantees laid down in Article 9 of the Directive, even if he is not in possession of an identity document or valid visa. Those procedural guarantees would be rendered largely ineffective if entitlement were excluded in the absence of an identity document or visa.<sup>42</sup>

### III.3 Court or Tribunal

The Court has interpreted the concept of 'remedy before a court or tribunal' in several cases. In *Graham Wilson*<sup>43</sup> the referring national court asked the Court of Justice to interpret this concept for the purposes of Article 9 of Directive 98/5.<sup>44</sup> The case concerned the refusal to register Mr Wilson, a lawyer from the United Kingdom, in the Bar Register of the Luxembourg Bar Association. Mr Wilson could bring this decision before the Disciplinary and Administrative Committee, which consisted of five lawyers with Luxembourg nationality, who were registered in the Bar Register in Luxembourg. Furthermore, he could appeal the decision by the Disciplinary and Administrative Committee before the Disciplinary and Administrative Appeals Committee, which consisted of two judges and three lawyers registered in the Bar Register in Luxembourg. Finally he could appeal (only

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<sup>41</sup> Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health.

<sup>42</sup> Case C-459/99, *MRAX* [2002], paras. 102-103.

<sup>43</sup> Case C-506/04, *Graham Wilson* [2006].

<sup>44</sup> Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. Article 9 of this directive states that a remedy shall be available against a decision not to register a person as a lawyer, before a court or tribunal in accordance with the provisions of domestic law.

on points of law) to the Court of Cassation of the Grand Duchy of Luxembourg.

The question before the Court of Justice was whether appeal bodies, such as the Disciplinary and Administrative Committee and the Disciplinary and Administrative Appeals Committee, constitute ‘a remedy before a court or tribunal in accordance with domestic law’ within the meaning of Article 9 of Directive 98/5. The Court of Justice considers that the definition of the concept ‘court or tribunal’ has been laid down in the case-law of the Court relating to the definition of a national court or tribunal within the meaning of Article 234 EC (on the preliminary ruling procedure). This case-law sets out a certain number of criteria that must be satisfied by the body concerned, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and its independence and impartiality.

The Court considers, while referring to its standing case-law under Article 234 EC, that the concept of independence involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision. Moreover, the Court mentions two other aspects of the concept of independence. The first aspect “presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them”.<sup>45</sup> The second aspect is

“linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity [...] and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law”.<sup>46</sup>

The guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. The Court of Justice establishes in *Graham Wilson* that the Bar Council, whose members are lawyers registered the Bar Register, has its decisions refusing registration of a European lawyer reviewed at first instance by a body composed exclusively of lawyers registered on the same

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<sup>45</sup> The Court here refers to the judgment by the ECtHR in the Case Campbell and Fell of 28 June 1984, in which the ECtHR assesses the independency of an instance under Article 6 ECHR. See also Case C-516/99, *Schmid* [2002], para. 42, in which the Court considers that in the absence of an express legislative provision determining the length of the mandate of appeal chamber members and specifying the conditions of removal, members cannot be said to enjoy sufficient safeguards against undue intervention or pressure on the part of the executive.

<sup>46</sup> Case C-506/04, *Graham Wilson* [2006], para. 52.

list and on appeal by a body composed for the most part of such lawyers. It considers that a European lawyer whose registration in the Bar Register has been refused

“has legitimate grounds for concern that either all or the majority, as the case may be, of the members of those bodies have a common interest contrary to his own, that is, to confirm a decision to remove from the market a competitor who has obtained his professional qualification in another Member State, and for suspecting that the balance of interests concerned would be upset.”

Therefore, according to the Court these bodies cannot be considered impartial and thus do not constitute a court or tribunal as required by Directive 98/5/EC.

In the case *Commission v. Austria*, the Court decides that appeals to independent experts, which belong to an administrative authority cannot be equated with the remedies mentioned in Article 6 (2) of Directive 89/105.<sup>47</sup> The fact that the boards of experts could issue only recommendations and had no decision-making power, contributes to the court’s judgment that no effective remedy is provided.<sup>48</sup>

In the context of Article 234 EC (or the former 177 EC) the Court has in several cases come to the conclusion that a body asking the Court for a preliminary ruling could not be considered independent. In these cases, the Court gave several general rules, which have to be taken into account. The Court considered for example that it is impossible to regard a body as a third party in relation to that administrative authority, if there is an organisational link between the administrative authority, which took a decision and the authority, before which an appeal can be brought against this decision. According to the Court such a link is only acceptable if the national legal framework ensures a separation of functions between the body taking the decisions on the one hand, and, on the other, the authority which rules on complaints lodged against these decisions.<sup>49</sup> Furthermore, the body, before which the decision is challenged shall not be subject to possible directions from the decision-making authority.<sup>50</sup> Moreover, the Court considered that in the absence of an express legislative provision determining the length of the mandate of members of an appeal body and specifying the conditions of removal, members cannot be said to enjoy sufficient safeguards against undue intervention or pressure on the part of the executive.<sup>51</sup>

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<sup>47</sup> Article 6 (2) states that the applicant shall be informed of the remedies available to him under the laws in force and of the time limits allowed for applying for such remedies.

<sup>48</sup> Case C-424/99, *Commission v. Austria* [2001], para. 42.

<sup>49</sup> Case C-516/99 *Schmid* [2002], paras. 37-38; See also Case C-24/92, *Corbiau* [1993], para. 16.

<sup>50</sup> *Idem*, para. 42; See also C-53/03, *Syfait* [2005] para. 30.

<sup>51</sup> *Idem*, para 41; *Idem*, para. 31.

One question which is important in the context of the right to effective judicial protection is whether the lack of independence or impartiality of the appeal body can be repaired by the possibility to subject its decision to a further appeal before a court or tribunal. In *Graham Wilson* the applicant could appeal the decision by the Disciplinary and Administrative Appeals Committee on points of law before the Court of Cassation. The Court considers that “Article 9 of Directive 98/5, although it does not preclude appeal proceedings being brought before a body which is not a court or tribunal, does not provide that a legal remedy may be open to the person concerned only after all other remedies have been exhausted. In any event, where an appeal before a non-judicial body is provided for by national law, Article 9 requires actual access within a reasonable period [...] to a court or tribunal as defined by Community law, which is competent to give a ruling on both fact and law.” Apart from the question whether proceedings before two non-judicial bodies may be reconciled with the requirement of a reasonable period<sup>52</sup>, the Court notes that the jurisdiction of the Court of Cassation of Luxembourg is limited to questions of law, so that it does not have full jurisdiction. The Court concludes that Directive 98/5 precludes an appeal procedure, in which the decision must be challenged at first instance and on appeal before a body, which cannot be considered a court or tribunal, where the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts.<sup>53</sup>

#### **IV. Development of General Principles in the Context of the Common European Asylum System**

As we have seen, the Court of Justice has set requirements regarding the right of access to an effective remedy in several areas of Community law. The question is how the Court’s case-law with regard to this right will be applied and further developed in the context of the Common European Asylum System. How does the right of access to an effective judicial protection need to be interpreted in an asylum context? Does the effective remedy required by the principles of effectiveness and effective judicial protection need to offer more, less or different guarantees in asylum cases than in other fields of Community law? In order to be able to answer these questions, it is necessary to look at the way in which general principles of Community law are developed by the Court.

There are two main sources, which inspire the development of general principles of Community Law: the constitutional traditions of the Member

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<sup>52</sup> The principle that action is to be taken within a reasonable time is considered a general principle of Community law by the Court of Justice, see Case C-185/95 P, *Baustahlgewebe* [1998], para. 21, where the Court considered that the “general principle of Community law that everyone is entitled to fair legal process, which is inspired Article 6 ECHR and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law.”

<sup>53</sup> Case C-506/04, *Graham Wilson* [2006].

States and international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories.<sup>54</sup> Fundamental rights form an integral part of the general principles of Community law whose observance the Court of Justice ensures.<sup>55</sup> According to the Court's case-law, the ECHR has special significance as a source for the general principles of Community Law.<sup>56</sup> Therefore, in many cases, in which the Court of Justice applies general principles of Community law, it refers to the ECHR and/or the case-law by the ECtHR.<sup>57</sup>

Also other sources than the ECHR, such as the ICCPR<sup>58</sup> and potentially the Refugee Convention and the CAT can inspire the Court in the interpretation of the general principles. In order to be able to define the meaning and content of the Community law principles of effectiveness and effective judicial protection with regard to access to court in the context of the Common European Asylum System, it is therefore necessary to look at all these sources.

It is important to note that, although Article 6 ECHR (the right to a fair trial) is, according to the ECtHR, not applicable to asylum cases<sup>59</sup>, it can have significance in the context of the general principle of effective judicial protection. In the Updated Explanations relating to Article 47 of the Charter of Fundamental Rights<sup>60</sup>, which lays down a right to an effective remedy and to a fair trial it is stated that

“in Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law<sup>61</sup>. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union”.

Article 14 ICCPR, which provides for guarantees, which are comparable to those provided for by Article 6 ECHR, may also not apply to expulsion cases.<sup>62</sup> However, if Article 6 ECHR inspires the principle of effective

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<sup>54</sup> Article 6 (2) of the Treaty on the European Union.

<sup>55</sup> Case C-299/95, *Kremzow* [1997].

<sup>56</sup> Case C-222/84, *Johnston* [1986].

<sup>57</sup> The special significance of the ECHR as a source of general principles of Community Law is recognised in Article 6 (2) of the Treaty on the European Union.

<sup>58</sup> Case C-540/03, *Parliament v. Council* [2006], para. 37.

<sup>59</sup> ECtHR 10 October 2000, no. 39652/98 (*Maaouia v. France*).

<sup>60</sup> Updated Explanations relating to the text of the Charter of Fundamental Rights, CONV 828/1/03, 18 July 2003, p. 41.

<sup>61</sup> The text refers to the judgment by the Court of Justice in Case C-294/83, *Les Verts v. European Parliament* [1986].

<sup>62</sup> CCPR 15 June 2004, no. 1051/2002 (*Abani v. Canada*), para 10.9. Heckman argues that Article 14 ICCPR should be applicable to immigration proceedings. He concludes that ‘a review of the Human Rights Committee’s Article 14 jurisprudence, including its views in *Abani*, makes plain the pressing need for the Committee to clearly set out the standards and criteria governing the application of Article 14 (1) to public law proceedings in general and immigration proceedings in particular. Drawing on the *travaux préparatoires* to the Covenant,

judicial protection, this will probably also hold true for Article 14 ICCPR. I will therefore also address the guarantees offered by Article 6 ECHR and 14 ECHR.<sup>63</sup>

In the next paragraph, I will give an overview of the different views of the ECtHR, CAT and CCPR with regard to the right of access to a remedy in asylum procedures. I will address the guarantees required by the right to a fair trial laid down in Article 6 ECHR and 14 ICCPR in paragraph VI.

## V. The Right of Access to an Effective Remedy under International Law in Asylum Cases

Articles 3 ECHR<sup>64</sup>, 3 CAT<sup>65</sup> and 7 ICCPR<sup>66</sup> all contain an absolute prohibition of *refoulement*. This means that persons, who run a real risk to become a victim of torture or (in case of the ECHR and the ICCPR) inhuman or degrading treatment or punishment in their country of origin, cannot be returned to that country. Persons, who have an arguable claim<sup>67</sup> that the prohibition of *refoulement* will be violated when they are to be expelled or extradited, have a right to an effective remedy. This right to an effective remedy is laid down in Article 13 ECHR<sup>68</sup> and Article 2 (3)

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the Committee's jurisprudence, the interpretation of Article 6 (1) of the ECHR by the European Court [...] this Article has formulated some promising lines of inquiry that could assist the Committee to fulfill this task. A continued reluctance on the Committee's part to address these issues can only sow confusion and uncertainty among States Parties and individuals seeking to enforce their rights under the Covenant.' G. Heckman, International Law and Procedural Safeguards in Deportation Proceedings: *Ahani v. Canada*, *Revue québécoise de droit international*, 2004, p. 121.

<sup>63</sup> See also Costello, who states that once the right to asylum laid down in the Qualification Directive is at issue, the EC principles must be respected, including those which mirror Articles 6 and 13 ECHR. C. Costello, New issues in Refugee Research: The European Asylum Procedures directive in legal context, UNHCR November 2006, www.unhcr.org.

<sup>64</sup> ECtHR 25 October 1996, no. 70/1995/576/662 (*Chahal, v. The United Kingdom*).

<sup>65</sup> See for example CAT 20 May 2005, no. 233/2003 (*Agiza v. Sweden*), para. 13.8.

<sup>66</sup> CCPR 10 November 2006, no. 1416/2005 (*Alzery v. Sweden*), para. 4.27.

<sup>67</sup> Under the ECHR and ICCPR there should be an arguable claim that a Treaty provision is or will be violated. See for example ECtHR 25 March 1983, no. 5947/72 (*Silver and others v. The United Kingdom*), para. 113 and CCPR 19 September 2003, no. 972/2001 (*George Kazantzis v. Cyprus*), para. 6.6.

Under CAT a plausible allegation of a violation of Article 3 CAT is required, see CAT 20 May 2005, no. 233/2003 (*Agiza v. Sweden*), para. 13.7 .

<sup>68</sup> Everyone, whose rights and freedoms as set forth in the Convention are violated, shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ICCPR<sup>69</sup>. The Committee against Torture derived a right to an effective remedy from Article 3 CAT (the prohibition of *refoulement*).<sup>70</sup>

The question is which guarantees are required by the right to an effective remedy in order to ensure the availability and accessibility of a remedy. There are two aspects of the case-law by the ECtHR, CAT and CCPR, which are relevant in this regard and will therefore be addressed in this paragraph:

1. The case-law with regard to the right to an effective remedy
2. The case-law with regard to the exhaustion of domestic remedies<sup>71</sup>

In this paragraph, I will first go into the general requirements with regard to the availability and accessibility of a remedy set by the ECtHR, CAT and CCPR. Secondly, I will address the case-law with regard to national procedural rules or practices, which limit the accessibility of the available remedy. Finally, I will examine the case-law with regard to the requirements of independency and impartiality of the remedy available.

## V.1 The Right of Access to an Effective Remedy

### V.1.1 Article 13 ECHR

In asylum cases complaints regarding the availability or accessibility of a remedy are brought under Article 13 ECHR. The court also assesses the effectiveness of a remedy in the light of the obligation to exhaust domestic remedies laid down in Article 35 ECHR. According to the ECtHR:

“Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. Moreover, in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13.”<sup>72</sup>

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<sup>69</sup> Each State Party to Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. The right to an effective remedy shall be determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State. The competent authorities shall enforce such remedies when granted.

<sup>70</sup> CAT 20 May 2005, no. 233/2003 (*Agiza v. Sweden*).

<sup>71</sup> According to the ECtHR there is a “close affinity” between the right to an effective remedy and the obligation to exhaust domestic remedies. The concept of ‘effective remedy’ as required under Article 35 (1) ECHR corresponds to the alternative nature of the obligations under Article 13 of the Convention. Van Dijk and Van Hoof et al., *Theory and Practice of the European Convention on Human Rights*, Antwerpen-Oxford: Intersentia 2006, pp. 1009-1010.

<sup>72</sup> ECtHR 11 July 2000, no. 40035/98, (*Jabari v. Turkey*), para 48.

The remedy required by Article 13 must be effective in practice as well as in law. This means that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.<sup>73</sup> In *Onka* the Court states in the context of Article 35 ECHR that “the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy”.<sup>74</sup>

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information.<sup>75</sup>

In *Jabari*, the applicant’s asylum request was refused because it was not lodged within the time-limits required by law. The applicant was threatened to be expelled to Iran where she claimed to run a real risk to become the victim of a treatment in violation with Article 3 ECHR. The ECtHR considers that the refusal to consider her asylum request for non-respect of procedural requirements could not be taken on appeal. The applicant was able to challenge the legality of her deportation in judicial review proceedings. However, this remedy did not suspend the deportation and the court did not examine the merits of her claim to be at risk. It only considered that the applicant’s deportation was fully in line with domestic law requirements. The Court states that, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. The court did not provide any of these safeguards. Therefore the ECtHR concludes that Article 13 has been violated.<sup>76</sup>

### V.1.2 Article 3 CAT

The Convention against Torture does not have an ‘effective remedy provision’, which is comparable to Article 13 ECHR. However the CAT derives procedural guarantees from the absolute prohibition of *refoulement* laid down in Article 3. In *Agiza* the CAT considers:

“The Committee observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise

<sup>73</sup> ECtHR 12 April 2005, no. 36378/02 (*Shamayev and others v. Georgia and Russia*), para. 447.

<sup>74</sup> ECtHR 5 February 2002, no. 51564/99, (*Onka v. Belgium*), para. 46.

<sup>75</sup> ECtHR 20 June 2002, no. 50963/99 (*Al-Nashif v. Bulgaria*), para. 123.

<sup>76</sup> ECtHR, 11 July 2000, no. 40035/98, (*Jabari v. Turkey*); See also ECtHR 22 June 2006, no. 24245/03 (*D. v. Turkey*).

the protections afforded by the Convention would be rendered largely illusory.(.) In the Committee's view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in Article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof. (...)The nature of refoulement is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in Article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that Article 3 issues arise.”<sup>77</sup>

In *Agiza* the applicant had no possibility for review of any kind of the decision to expel, due to national security concerns in his case. The CAT considers that “while national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy Article 3's requirements of effective, independent and impartial review”. The CAT concludes that in “the absence of any avenue of judicial or independent administrative review of the Government's decision to expel” the State did not meet the procedural obligation to provide for effective, independent and impartial review required by Article 3 of the Convention.

### V.1.3 Article 2 (3) ICCPR

The CCPR ruled that Article 2, paragraph 3, of the Covenant requires State parties to ensure that individuals have accessible, effective and enforceable remedies to uphold the rights protected by the Covenant. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law.<sup>78</sup> The remedy should include compensation.<sup>79</sup>

In *Alzery*, the complainant had, just like in the fore mentioned *Agiza* case before the CAT no possibility for review of any kind of the expulsion decision. The CCPR considers that the absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of Article 7, read in conjunction with Article 2 of the Covenant.<sup>80</sup>

## V.2 Limitations of the Right to Access to an Effective Remedy

It is generally accepted that States may set formal requirements for access to a remedy. Also in asylum cases the applicants normally have to comply with

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<sup>77</sup> CAT 20 May 2005, no. 233/2003 (*Agiza v. Sweden*).

<sup>78</sup> CCPR 16 August 2007, no. 1328/2004 (*Kimouche v. Algeria*), para 7.10.

<sup>79</sup> CCPR 15 June 2004, no. 1051/2002 (*Ahani v. Canada*), para. 12.

<sup>80</sup> CCPR 10 November 2006, no. 1416/2005 (*Alzery v. Sweden*), para. 11.8.

national procedural rules. The ECtHR considered in *Babaddar*<sup>81</sup> in the context of Article 35 ECHR that even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner. There may however be special circumstances which absolve an applicant from the obligation to comply with such rules. Those special circumstances will depend on the facts of each case.

The CCPR considers in *Jagjit Singh Bhullar*, also an asylum case, that authors are bound by procedural rules such as filing deadlines applicable to the exhaustion of domestic remedies, provided that the restrictions are reasonable.<sup>82</sup>

### V.2.1 Time Limits for Lodging an Appeal

In *Babaddar* the applicant failed to submit grounds within the four month time-limit set by the court, because the supporting documents were not yet available. Therefore his appeal was declared inadmissible. The ECtHR considers that:

“it should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.”

In this case there were no special circumstances which absolved the applicant from complying with the procedural rules. Therefore the applicant did not exhaust domestic remedies.<sup>83</sup>

In *Jabari v. Turkey*<sup>84</sup> the applicant had not complied with a five-day time registration requirement, within which any asylum application had to be lodged. The ECtHR states that for that reason any scrutiny of the factual basis of the applicants fear about being removed to Iran was denied. The Court considers that “the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at

<sup>81</sup> ECtHR 19 February 1998, no. 25894/94 (*Babaddar v. The Netherlands*).

<sup>82</sup> CCPR 13 November 2006, no. 982/2001 (*Jagjit Singh Bhullar v. Canada*). The CCPR notes that both applications for judicial review were filed out of time by the author and were not subsequently pursued. According to the CCPR the author has failed to advance any reasons for these delays, nor any argument that the specified time limits in question were either unfair or unreasonable. He therefore failed to exhaust domestic remedies.

<sup>83</sup> ECtHR 19 February 1998, no. 25894/94 (*Babaddar v. The Netherlands*).

<sup>84</sup> ECtHR, 11 July 2000, no. 40035/98, (*Jabari v. Turkey*).

variance with the protection of the fundamental value embodied in Article 3 of the Convention”. One may derive from this judgment that the time-limit for exercising the remedy may not be unreasonably short.<sup>85</sup> The ECtHR has also recognised under Article 13 that a very short time-limit to introduce a remedy may render a remedy ineffective.<sup>86</sup>

### V.2.2 Access to a Remedy before Expulsion

The ECtHR ruled in several cases that Article 13 ECHR had been violated because the person claiming that his expulsion or extradition would violate Article 3 ECHR, did not have the opportunity to appeal the expulsion or extradition decision before this decision was enforced. In *Shamayev*<sup>87</sup> the ECtHR established that the applicants were not informed of the extradition proceedings and that they were not granted access to the case files submitted by the Russian authorities. The applicants were also not informed about the extradition decision. They only learned that some of them would probably be extradited when watching a television broadcast. The extraditing authorities did not inform the lawyers of the extradition of their clients either. The Court states that in order to challenge the extradition order, the applicants or their lawyers would have had to have sufficient information, served officially and in good time by the competent authorities.

The ECtHR furthermore considers that even if the applicants did have sufficient time to apply to a court after watching the television broadcast, they were effectively deprived of that possibility given their detention in conditions of isolation and the dismissal of their request to have their lawyers summoned. The Court states:

“where the authorities of a State hasten to hand over an individual to another State two days after the date on which the order was issued, they have a duty to act with all the more promptness and expedition to enable the person concerned to have his or her complaint under Articles 2 and 3 submitted to independent and rigorous scrutiny and to have enforcement of the impugned measure suspended. The Court finds it unacceptable for a person to learn that he is to be extradited only moments before being taken to the airport, when his reason for fleeing the receiving country has been his fear of treatment contrary to Article 2 or Article 3 of the Convention.”

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<sup>85</sup> See Committee of Ministers of the Council of Europe, Twenty Guidelines on Forced Return. September 2005, guideline no. 5 (2) and commentary.

<sup>86</sup> ECtHR 23 March 2006, no. 77924/01 (*Albanese v. Italy*), para 74. The Court observes that a remedy against the judgment which declared the applicant bankrupt needed to be introduced within fifteen days counting from the day the applicant had effectively taken notice of this judgment. The Court considers: “ce recours ne constitue donc pas un remède efficace pour se plaindre de la limitation des capacités personnelles du requérant perdurant jusqu’à l’obtention de la réhabilitation civile, compte tenu notamment du délai prévu pour son introduction”. See also ECtHR 22 April 2004, no. 7503/02 (*Neroni v. Italy*).

<sup>87</sup> ECtHR 12 April 2005, no. 36378/02 (*Shamayev and others v. Georgia and Russia*).

The Court concludes that Article 13 ECHR has been violated because neither the applicants nor their lawyers were informed of the extradition orders issued in respect of the applicants and the competent authorities unjustifiably hindered the exercise of the right of appeal that might have been available to them, at least theoretically.

The Court addressed a comparable situation in *Garabayev*<sup>88</sup>. The Court reiterates:

“that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.”

The Court concludes that Article 13 had been violated because the applicant was informed of the decision to extradite him on the day of the transfer. Furthermore he was not allowed to contact his lawyer or to lodge a complaint, in breach of the relevant provisions of the domestic legislation. The compatibility of the scheduled removal with Article 3 was not examined by the relevant authorities before it had occurred.<sup>89</sup>

The UN Committees also ruled in several cases that expulsion before a person could avail himself of an effective remedy violates the right to an effective remedy. The CCPR considers in *Alzery*<sup>90</sup> that by the nature of *refoulement*, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of Article 7, read in conjunction with Article 2 of the Covenant. The CCPR is even of the opinion that the State should give the applicant the opportunity to lodge a further appeal before being expelled, if this appeal is available. In a case, in which a person challenged his deportation to the United States, where he was under a death sentence the CCPR considered:

“by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution

<sup>88</sup> ECtHR 7 June 2007, no. 38411/02 (*Garabayev v. Russia*).

<sup>89</sup> See also ECtHR 10 August 2006, no. 24668/03 (*Olaechea Chuas v. Spain*) where the court took into account with regard to exhaustion of domestic remedies that the applicant “fut extradé le premier jour du délai dont il disposait pour faire appel”. Furthermore the available remedy did not have suspensive effect. Therefore this remedy could not be considered effective.

<sup>90</sup> CCPR 10 November 2006, no. 1416/2005 (*Alzery v. Sweden*).

would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights - the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a state where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of Article 6, together with Article 2, paragraph 3, of the Covenant."<sup>91</sup>

These considerations may also apply to cases, in which the prohibition of *refoulement* guaranteed by Article 7 ICCPR is invoked. The principle of non-*refoulement* is, like the right to life, considered one of the most fundamental rights.

The CAT considers in *Josu Arkauz Arana*<sup>92</sup>, in the context of the requirement of exhaustion of domestic remedies that an appeal against the deportation order would not have been effective or even possible, since it would not have had a suspensive effect and the deportation measure was enforced immediately following notification thereof, leaving the person concerned no time to seek a remedy. The Committee therefore declares the communication admissible. The applicant stated in this case that he was prevented from having access to the available remedies, because the deportation order was carried out immediately by the police, who allegedly forbade him to warn his wife and counsel. It would thus have been physically impossible for him to communicate with them to inform them that he had been notified of the deportation order and to ask them to file an immediate appeal against his deportation. Furthermore, the French authorities allegedly refused to give them any information on what had happened to him.<sup>93</sup>

### V.2.3 Other Limitations of Access to an Effective Remedy

#### *Information on the remedies available*

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<sup>91</sup> CCPR 20 October 2003, no. 829/1998 (*Judge v. Canada*).

<sup>92</sup> CAT 5 June 2000, no. 63/1997 (*Josu Arkauz Arana v. France*).

<sup>93</sup> See also CAT 3 May 2005, no. 194/2001 (*Iratxe Sorzabal Díaz v. France*), para. 6.1, where the CAT considers that it had been impossible for the complainant to seek an effective remedy against the expulsion order and the decision specifying Spain as the country of destination, as there had been no time to act between the serving of the orders and the enforcement of the expulsion. The CAT considers that the criterion in *Arkauz Arana* applies since an appeal against the ministerial deportation order, which was served on the very day of the applicant's expulsion, at the same time as the order indicating the country of destination, would not have been effective or even possible, since the deportation measure was enforced immediately following the notification thereof, leaving the person concerned no time to seek a remedy. The Committee also states in its Annual Report 2006 that "the requirement of exhaustion of domestic remedies can be dispensed with, if [...] there is a risk of immediate deportation of the complainant after the final rejection of his or her asylum application". Annual Report of the Committee against Torture 2006, A/61/44, para. 61.

A person needs to be informed in time in order to be able to avail himself of an effective remedy. In asylum cases this could imply that this information should be given in a language, which the asylum seeker understands. In *Onka* the Belgian government argued that the applicants had not in fact exhausted all remedies with regard to their complaint concerning their detention, based on Article 5 ECHR. The ECtHR rejects this preliminary objection, stating that the applicants were prevented from any meaningful appeal to the national court. It takes into account that the information on the available remedies handed to the applicants on their arrival at the police station was printed in tiny characters and in a language they did not understand. There was only one interpreter available to assist a large number of persons, who were to be expelled. In the closed centre where the applicants subsequently stayed, no interpreter was available.<sup>94</sup>

In *S.H. v. Norway* and *Z.T v. Norway*, the CAT declares the complaints inadmissible, but recommends the State party to undertake measures to ensure that asylum-seekers are duly informed about all domestic remedies available to them, in particular the possibility of judicial review before the courts and of being granted legal aid for such recourse.<sup>95</sup>

#### *Access to a lawyer*

As we have seen in the *Shamayev* and *Garabayev* judgments, the fact that a person does not get the opportunity to contact a lawyer before expulsion or the fact that the lawyer is not informed on the deportation decision is also considered a factor which affects the accessibility of the remedy. In *Onka* the ECtHR considers the fact that the applicant's lawyer was only informed of the detention and forthcoming deportation of his clients at a moment, on which any appeal would have been pointless, the decisive factor which made the domestic remedy inaccessible. Also the fact that the applicants could not call their lawyer, because not enough interpreters were available was taken into account.<sup>96</sup> In all these cases, the fact that the person concerned was detained prior to his expulsion, made it difficult, if not impossible to contact a lawyer without the cooperation of the State.

The Court has until this moment not accepted an obligation to provide for free legal aid under Article 13 in an asylum case. In *Goldstein* the Court considers that Article 13 does not guarantee a right to legal council paid by the State. In that case, the Court did not find an indication of any special reason calling for the granting of free legal aid in order for the applicant to take effective advantage of the available remedy.<sup>97</sup>

<sup>94</sup> ECtHR 5 February 2002, no. 51564/99 (*Onka v. Belgium*), para. 44.

<sup>95</sup> CAT 19 November 1999, no. 121/1998 (*S.H. v. Norway*), para. 7.4; CAT 19 November 1999, no. 127/1999 (*Z.T. v. Norway*), para. 7.4.

<sup>96</sup> ECtHR 5 February 2002, no. 51564/99 (*Onka v. Belgium*), paras. 44-45.

<sup>97</sup> ECtHR 12 September 2000, no. 46636/99 (*Goldstein v. Sweden*).

The CAT is of the opinion that in certain circumstances, a remedy can only be considered effective in the light of the requirement to exhaust domestic remedies, if the State provides for free legal aid. In *Z.T. v. Norway*, the complainant argued that he did not have access to the available domestic remedies, amongst others because of a lack of financial resources and access to legal aid. The CAT first deems the complaint inadmissible, noting that legal aid for court proceedings could be sought, but that there is no information indicating that this has been done in the case under consideration.<sup>98</sup> Several years later the applicant again lodges a complaint before the Committee. His request for legal aid had been denied. The CAT considers:

“Had legal aid been denied because the complainant's financial resources exceeded the maximum level of financial means triggering the entitlement to legal aid, and he was thus able to provide for his own legal representation, then the remedy of judicial review could not be said to be unavailable to him. Alternatively, in some circumstances, it might be considered reasonable, in the light of the complainant's language and/or legal skills, that s/he represented himself or herself before a court”.

The CAT notes that in the present case, it is unchallenged that the complainant's language and/or legal skills were plainly insufficient to expect him to represent himself, while, at the same time, his financial means were also insufficient for him to retain private legal counsel. If, in such circumstances, legal aid was denied to an individual, the Committee considered that it would run contrary to both the language of Article 22 (5) CAT, as well as the purpose of the principle of exhaustion of domestic remedies and the ability to lodge an individual complaint, to consider a potential remedy of judicial review as ‘available’, and thus declaring a complaint inadmissible, if this remedy was not pursued. It states that such an approach would deny an applicant protection before the domestic courts and at the international level. It takes into account that the claim involves a most fundamental right, the right to be free from torture. The consequence of the State party's denial of legal aid is therefore to open the possibility of examination of the complaint by the CAT, without the benefit of the domestic courts first addressing the claim.<sup>99</sup>

### V.3 Court or Tribunal

Article 13 ECHR requires a remedy before a national authority and therefore not necessarily before a court or tribunal. However, if the remedy is not provided by a judicial authority, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.<sup>100</sup> The ECtHR has concluded in several cases that a remedy could

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<sup>98</sup> CAT 19 November 1999, no. 127/1999 (*Z.T. v. Norway*), paras. 7.2-7.4; See also CAT 19 November 1999, no. 121/1998 (*S.H. v. Norway*).

<sup>99</sup> CAT 14 November 2005, no. 238/2003 (*Z.T. v. Norway*), paras. 8.2-8.3.

<sup>100</sup> ECtHR 26 March 1987, no. 9248/81 (*Leander v. Sweden*), para. 77.

not be regarded an effective remedy as required by Article 13 ECHR, because it could not be considered independent or impartial.<sup>101</sup>

Under Article 2 (3) ICCPR there should be an opportunity for an effective, independent review of the decision to expel.<sup>102</sup> Article 3 CAT requires effective, independent and impartial review of an expulsion decision. This review can be provided by a judicial or independent administrative authority.<sup>103</sup>

## VI. Access to Court under the Right to a Fair Trial

Article 6 ECHR and 14 ICCPR contain the right to a fair trial. As has been said before, these provisions may inspire the Community principles of effectiveness and effective judicial protection, although Article 6 ECHR and potentially Article 14 ICCPR do not apply to asylum proceedings. In this paragraph I will examine whether the right to a fair trial may add guarantees to those required by the right to an effective remedy in asylum proceedings. Like in the previous paragraph I will examine the case-law concerning the general requirements with regard to the availability and accessibility of a court, the acceptability of national procedural rules or practices which limit the accessibility of the available remedy and the requirements of independency and impartiality of the remedy available.

### VI.1 The Right of Access a Court

#### VI.1.1 Article 6 ECHR

Article 6 does not explicitly provide for a right of access to a court. However, the ECtHR decided in *Golder*<sup>104</sup> that

“it would be inconceivable that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit, without also protecting the right of access to a court which makes it in fact possible to benefit from such guarantees. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings”.<sup>105</sup>

Therefore Article 6 (1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. This "right to a court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his (civil) rights is unlawful and complains that he has

<sup>101</sup> See for example ECtHR 11 January 2007, no. 61259/00 (*Musa e.a. v. Bulgaria*); ECtHR 14 November 2006, no. 20868/02 (*Metin Turan v. Turkey*) and ECtHR 12 May 2000, no. 35394/97 (*Khan v. The United Kingdom*).

<sup>102</sup> CCPR 10 November 2006, no. 1416/2005 (*Alzery v. Sweden*), para. 11.8.

<sup>103</sup> CAT 20 May 2005, no. 233/2003 (*Agiza v. Sweden*).

<sup>104</sup> ECtHR 21 February 1975, no. 4451/70 (*Golder v. the United Kingdom*).

<sup>105</sup> ECtHR 22 March 2007, no. 59519/00 (*Staroszczyk v. Poland*), para. 123.

not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 (1).<sup>106</sup> The Court stresses that the Convention is “intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.”<sup>107</sup> A restrictive interpretation of the right of access to a court guaranteed by Article 6 (1) would not be consonant with the object and purpose of the provision.<sup>108</sup>

Article 6 also applies to appellate courts or *cours de cassation*, if the national system provides for them. Therefore access to these courts needs to be ensured.<sup>109</sup> The manner, in which Article 6 (1) applies to courts of appeal or *cours de cassation* depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them.<sup>110</sup>

### VI.1.2 Article 14 ICCPR

The CCPR considered under Article 14 (1) ICCPR that the notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees provided by this provision.<sup>111</sup>

### VI.2 Limitations of the Right to Court

According to the ECtHR “the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access ‘by its very nature calls for regulation by the State, regulation, which may vary in time and in place according to the needs and resources of the community and of individuals’”. The State enjoys a certain margin of appreciation in laying down such regulation. The Court stresses however that “the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”. Furthermore, a limitation will not be compatible with Article 6 (1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>112</sup>

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<sup>106</sup> ECtHR 28 May 1985, no. 8225/78 (*Ashingdane v. United Kingdom*), para.55.

<sup>107</sup> ECtHR 9 October 1979, no. 6289/73 (*Airey v. Ireland*).

<sup>108</sup> ECtHR 22 March 2007, no. 8932/05 (*Sialowska v. Poland*).

<sup>109</sup> See for example ECtHR 19 September 2000, no. 40031/98 (*Gnaboré v. France*), para 38; ECtHR 22 March 2007, no. 8932/05 (*Sialowska v. Poland*), para 103.

<sup>110</sup> The Court accepts that given the special nature of a court of cassation's role, the procedure followed in the court of cassation may be more formal. ECtHR 22 March 2007, 8932/05 (*Sialowska v. Poland*), para. 104.

<sup>111</sup> CCPR 10 November 1993, no. 468/1991 (*Oló Bahamonde v. Equatorial Guinea*), para. 9.4.

<sup>112</sup> ECtHR 28 May 1985, no. 8225/78 (*Ashingdane v. the United Kingdom*), para. 57.

### VI.2.1 Time limits for lodging an appeal

The ECtHR considers with regard to Article 6 that:

“the rules on time-limits for appeals are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should not prevent litigants from making use of an available remedy.”<sup>113</sup>

In a few cases the Court ruled that the time-limit imposed by national law, deprived the applicant of the right of access to a court. In *Pérez de Rada Cavanilles* for example the ECtHR considered a three day time-limit for lodging an appeal too short.<sup>114</sup>

### VI.2.2 Other Limitations to Access to Court

#### *Access to a lawyer*

Under Article 6 ECHR the Court sometimes accepts a positive obligation for the State to provide for free legal aid, in order to ensure the access to a court. It compels the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory or by reason of the complexity of the procedure or of the case.<sup>115</sup> If legal representation is obligatory, legal aid may not be refused by the competent authority on the sole basis of the latter’s assessment of the prospects of success of this review.<sup>116</sup> If legal aid is not obligatory, the procedure in which the prospects of the review are assessed must offer several guarantees.<sup>117</sup>

#### *Financial restrictions*

Sometimes persons who lodge an appeal must pay court fees or provide security for costs to be incurred by the other party to the proceedings, in order for the appeal to be admissible. The ECtHR accepts in the light of Article 6 ECHR that various limitations, including financial ones, may be placed on the individual’s access to a court or tribunal. These limitations may

<sup>113</sup> ECtHR 28 October 1998, no. 116/1997/900/1112, (*Pérez de Rada Cavanilles v. Spain*), para. 45.

<sup>114</sup> ECtHR 28 October 1998, no. 116/1997/900/1112 (*Pérez de Rada Cavanilles v. Spain*); See also ECtHR 10 July 2001, no. 40472/98 (*Tricard v. France*).

<sup>115</sup> ECtHR 9 October 1979, no. 6289/73 (*Airey v. Ireland*), para 26. The Court concluded in several cases that the State should have taken positive action to provide legal aid. See for example ECtHR 9 October 1979, no. 6289/73 (*Airey v. Ireland*); ECHR 21 February 2008, no. 20400/03 (*Tunç v. Turkey*).

<sup>116</sup> ECtHR 30 July 1998, no. 61/1997/845/1051 (*Aerts v. Belgium*), para. 60.

<sup>117</sup> Van Dijk and Van Hoof et al., *Theory and Practice of the European Convention on Human Rights*, Antwerpen-Oxford: Intersentia 2006, p. 562. They refer to ECtHR 19 September 2000, no. 40031/98 (*Gnaboré v. France*); ECtHR 26 May 2002, no. 46800/99 (*Del Sol v. France*) and ECtHR 26 February 2002, no. 49384/99 (*Essaadi v. France*).

however not restrict or reduce the access afforded to the applicant in such a way or to such an extent that the very essence of that right was impaired. Furthermore, they must have a legitimate aim and must be proportional. When assessing whether a person enjoyed his right to access to a court, the Court takes into account “the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant’s ability to pay them, and the phase of the proceedings at which that restriction has been imposed”.<sup>118</sup> The Court concluded in several cases that the court fees were so high that they barred effective access to the court.<sup>119</sup> In *Clionov* the Court considered that a blanket prohibition on granting court fee waivers raises of itself an issue under Article 6 (1) of the Convention.<sup>120</sup>

### *Excessive formalism*

National procedural rules, which limit access to an effective remedy, should not be excessively formalistic. In *Kadlec* the Court considers that it follows from the principle that a limitation to the right of access to court must have a legitimate aim and must be proportional that:

“si le droit d’exercer un recours est bien entendu soumis à des conditions légales, les tribunaux doivent, en appliquant des règles de procédure, éviter à la fois un excès de formalisme qui porterait atteinte à l’équité de la procédure, et une souplesse excessive qui aboutirait à supprimer les conditions de procédure établies par les lois”.<sup>121</sup>

In this case the applicant mentioned a wrong judgment as the judgment, against which he intended to lodge an appeal at the Constitutional Court on the front page of the appeal. In the introduction of his appeal he mentioned the right judgment and he also attached a copy of this judgment to his appeal. When he informed the Court of this error, the appeal was considered a new appeal and was declared inadmissible because the time-limit for lodging the appeal had expired. The Court ruled that Article 6 (1) had been violated because of excessive formalism.<sup>122</sup>

In *Liakopoulou*<sup>123</sup> the Court of Cassation of Greece declared an appeal inadmissible, because the applicant failed to state the facts, on which the decision of the Appellate Court was based. The ECtHR states that the procedural rule as such, which required the statement of these facts could be considered to be in the interest of legal certainty and the good administration of justice. However it establishes that the applicant had summarized the most important facts, the procedure followed and her objections against the

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<sup>118</sup> ECtHR 19 June 2001, no. 28249/95 (*Kreuz v. Poland*), para. 60.

<sup>119</sup> See ECtHR 19 June 2001, no. 28249/95 (*Kreuz v. Poland*), where the fees amounted to the average annual salary in Poland at that time and ECtHR 7 February 2008, no. 4113/03 (*Beian v. Romania*), where the fees amounted to twice the monthly income of the applicants.

<sup>120</sup> ECtHR 9 October 2007, no. 13229/04 (*Clionov v. Moldova*), para. 41.

<sup>121</sup> ECtHR 25 May 2004, no. 49478/99 (*Kadlec v. Czech Republic*), para. 26.

<sup>122</sup> ECtHR 25 May 2004, no. 49478/99 (*Kadlec v. Czech Republic*); See also ECtHR 28 June 2005, no. 74328/01 (*Zednik v. Czech Republic*).

<sup>123</sup> ECtHR 24 May 2006, no. 20627/04 (*Liakopoulou v. Greece*).

Appellate Court's judgment in her appeal. Furthermore she attached the Appellate Court's judgment to the appeal. Therefore the judges of the Court of Cassation knew the facts established by the Appellate Court. The ECtHR concludes that the Court of Cassation showed excessive formalism declaring the appeal inadmissible. The limitation of the right of access to court had not been proportional.

### VI.3 Court or Tribunal

Article 6 (1) ECHR requires access to a court or tribunal, which must have full jurisdiction. This means that it must be able to quash the challenged decision in all respects, on questions of fact and law.<sup>124</sup> Furthermore the court or tribunal needs to be independent and impartial. According to the ECtHR in order to establish whether a court or tribunal can be considered independent, regard must be had to "the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence."<sup>125</sup> The requirement of impartiality has two aspects:

"First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings".<sup>126</sup>

Van Dijk and others state that, in order to be impartial, 'it is required that the court is not biased with regard to the decision to be taken, does not allow itself to be influenced by information from outside the court room, by popular feeling, or by any pressure whatsoever'. Furthermore it needs to

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<sup>124</sup> See for example ECtHR 28 September 1995, no. 31/1994/478/560 (*Schmautzer v. Austria*), para 36; See also CCPR 26 August 2004, no. 1011/2001 (*Madafferi v. Australia*), where the CCPR considered in the light of the obligation to exhaust domestic remedies, that any decision handed down by the body concerned would only have recommendatory, rather than binding, effect, and thus could not be described as a remedy which would be effective.

<sup>125</sup> ECtHR 6 May 2003, no. 39343/98, 39651/98, 43147/98 and 46664/99 (*Kleyn and others v. the Netherlands*), para 190. According to Van Dijk and others, the notion of independency seems to fall within three categories. First of all the tribunal must function independently of the executive and base its decisions on its own free opinion about facts and legal grounds. Secondly there must be guarantees to enable the court to function independently. Thirdly even a semblance of dependence must be avoided. Van Dijk & Van Hoof et al. 2006, *supra* note 117, p. 614.

<sup>126</sup> ECtHR 6 May 2003, no. 39343/98, 39651/98, 43147/98 and 46664/99 (*Kleyn and others v. the Netherlands*), para. 191.

base its “opinion on objective arguments on the ground of what has been put forward at the trial.”<sup>127</sup>

Article 14 ICCPR provides for an absolute right to be tried by a competent, independent and impartial tribunal.<sup>128</sup> The guarantees offered by this Article are very much comparable to those offered by Article 6 ECHR.<sup>129</sup> I will therefore not address the CCPR’s case-law with regard to this issue.

#### **VI.4 Additional Value Right to a Fair Trial**

Article 6 ECHR and Article 14 ICCPR reinforce the case-law regarding accessibility of a remedy under Article 13 ECHR, 2 (3) ICCPR and 3 CAT. Furthermore they provide for some extra guarantees. First of all the ECtHR explicitly requires accessibility of all instances provided under national law, including appellate courts and courts of cassation. Furthermore the ECtHR ruled that financial restrictions should be legitimate and proportional and may not bar effective access to a court. The ECtHR also ruled under Article 6 ECHR that procedural rules, which limit access to a court may not be excessively formalistic. Finally both Article 6 and 14 guarantee access to a court or tribunal, while the right to an effective remedy does not. Under Article 6 ECHR and 14 ICCPR, extensive case-law exists regarding the required independency and impartiality of a court or tribunal.

#### **VII Access to an Effective Remedy in European Asylum Procedures**

Under Community law persons, who apply for asylum have a right to an effective remedy against the rejection of their asylum application or an expulsion decision in two situations. In the first situation the asylum procedure is governed by the Procedures Directive, which provides for a right to an effective remedy before a court or tribunal in Article 39. In the second situation the asylum seeker claims a right granted by Community law, such as the right to asylum laid down in the Qualification Directive. Then the Community principles of effective judicial protection and/or effectiveness require that an effective remedy is available if the applicant’s claim is refused.

The national courts and the Court of Justice will have to establish the content of the right to an effective remedy and the guarantees it has to offer in the asylum context. Furthermore they have to examine whether national

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<sup>127</sup> Supra note 70.

<sup>128</sup> CCPR 28 October 1992, no. 263/1987 (*Gonzales del Rio v. Peru*), para. 5.2.

<sup>129</sup> See for example CCPR 10 November 1993, no. 468/1991 (*Oló Bahamonde v. Equatorial Guinea*), where the CCPR rules that the situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal. See also CCPR 5 November 1992, no. 387/1989 (*Karttunen v. Finland*), where the CCPR considered that “Impartiality” of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”

procedural rules or practices, which limit access to this remedy are acceptable in the light of Community law. For this task they will potentially use the principles of effectiveness and effective judicial protection.

The Court of Justice has already set requirements with regard to the accessibility of a remedy in its existing case-law in other fields of Community law. The general rule is that natural persons need to be able to challenge a decision based on Community law before the national courts. National procedural rules or practices may not render this right impossible or excessively difficult. This applies for example to time-limits and expulsion shortly after the expulsion measure has been taken. The Court has furthermore developed rather detailed case-law with regard to the term 'court or tribunal'.

In the asylum context the principles of effective judicial protection and effectiveness have to be further developed. For this purpose the ECHR, CAT and ICCPR and the case-law by the ECtHR, CAT and CCPR are important sources of inspiration. Many of the guarantees required by the Court of Justice are supported or reinforced by the case-law by these international authorities. Furthermore, case-law, which specifically concerns asylum issues or procedural issues, which have until now not played a role before the Court of Justice, may inspire the Court of Justice to add extra guarantees in the context of asylum procedures.

In asylum cases, Community law will potentially offer more guarantees with regard to the right of access to an effective remedy than the international human rights instruments. First of all Article 39 Procedures Directive requires a remedy before a court or tribunal, while Article 13 ECHR and 2 (3) ICCPR only require a remedy before a competent authority. Moreover, although Article 6 ECHR and potentially Article 14 ICCPR are, according to the case-law by the ECtHR and CCPR, not applicable in asylum cases, they may inspire the Community principles of effective judicial protection and effectiveness, even in asylum cases. Furthermore, the principles of effective judicial protection and effectiveness apply to all asylum cases, including those, in which the asylum claim has been considered manifestly unfounded. The right to an effective remedy required by Article 13 ECHR, 2 (3) ICCPR and 3 CAT is only applicable in case of an arguable claim of a violation of the prohibition of *refoulement*.

How could the principles of effective judicial protection and effectiveness be defined with regard to the right of access to an effective remedy in asylum cases? First of all the available remedy should be accessible for the asylum seeker in practice. It follows from the ECtHR's case-law concerning Article 6 ECHR, that this principle does not only apply to courts of first instance, but also to appellate courts and courts of cassation. The special role of these courts has to be taken into account when examining the national procedural rules concerning their accessibility.

It is generally recognised that procedural rules are necessary in the interest of legal certainty and the good administration of justice. Those rules may however not impair the essence of the right of access to an effective remedy. Furthermore they must have a legitimate aim and they must be proportional. This also implies that they may not be applied in an excessively formalistic manner.

A few general rules might be derived from the case-law by the Court of Justice and that by the ECtHR, CAT and CCPR:

*Time-limits for bringing proceedings may not be too short.*

The Court of Justice has accepted that it is necessary to set time-limits for bringing proceedings in the interest of legal certainty. However they may not make it impossible in practice to exercise rights, which the courts have a duty to protect. The ECtHR has in a few cases deemed short time-limits (several days) for lodging an appeal a violation of the right to an effective remedy. The special circumstances of the case should always be taken into account. In asylum cases it should be born in mind that it may be very difficult, if not impossible to supply evidence within a short time. Therefore time-limits should not be so short or applied so inflexibly as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.

*An asylum seeker should get sufficient time and opportunity to appeal an expulsion measure before this measure is enforced.*

This rule may be derived from the Court's judgment in *Pecastaing*. In the asylum context it is reinforced by the case-law by the ECtHR, CAT and CCPR with regard to asylum and extradition. These authorities attach special importance to the fact that the remedy is intended to prevent irreparable harm, namely a violation of the prohibition of *refoulement*. The principle of non-*refoulement* can also be considered a general principle of Community law and should therefore be taken into account by the Court of Justice.<sup>130</sup>

*An asylum seeker should be informed in time about the expulsion decision and the available remedies in a language, which he understands*

According to the ECtHR's case-law, a lack of timely and understandable information on the expulsion measure and the available remedies may block the access to an effective remedy.

*The asylum seeker must be able to contact his lawyer before the expulsion measure will be enforced. Furthermore he should be provided with free legal aid, if this is necessary to guarantee his right to access to an effective remedy.*

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<sup>130</sup> The prohibition of non-*refoulement* is recognised by the ECtHR, CCPR and the CAT. It is furthermore laid down in Article 33 of the Refugee Convention and (with regard to torture) Article 3 CAT. Moreover the prohibition of *refoulement* is embedded in the constitutional traditions of the Member States. It is laid down in Article 19 of the Charter of Fundamental Rights. Moreover art. 20 (2), 25 (2) under c, 26 and 36 (4) of the Procedures Directive refer to the prohibition of *refoulement*.

In several cases the ECtHR considered that the fact that the asylum seeker was not allowed to contact his lawyer was an important factor which prevented access to an effective remedy. The ECtHR recognized under Article 6 ECHR, and the CAT acknowledged in the light of the requirement to exhaust domestic remedies, that a State may be obliged to provide free legal aid, in order to ensure access to court. If the asylum seeker does not know the legal system of the country of asylum and does not speak the language, legal aid may be indispensable to avail himself of the available remedy, particularly when the procedural rules are rather complex.<sup>131</sup>

*Court fees or other financial conditions for access to court should not be so high as to bar effective access to the court.*

The ECtHR considered under Article 6 ECHR that these fees should have a legitimate aim and should be proportional. Furthermore the financial situation of the applicant needs to be taken into account. Asylum seekers, who generally have no income, should not be prevented access to court because they are not able to pay the court fees required.

Article 39 Procedures Directive and the principle of effective judicial protection require access to an effective remedy before a court or tribunal. The Court of Justice and the ECtHR (under Article 6 ECHR) and ICCPR (under Article 14 ICCPR) have set similar requirements for an authority in order to be considered a court or tribunal. This authority needs to be independent and impartial and it must be able to take binding decisions.

An authority can be considered independent if it acts as a third party in relation to the authority which adopted the contested decision. The body must be protected against external intervention or pressure. For this reason the manner of appointment and the grounds for abstention, rejection and dismissal of its members and their term are relevant. Furthermore the members must be objective and must not have any interest in the outcome of the proceedings. They need to base their opinion on objective arguments on the ground of what has been put forward during the proceedings.

A whole set of procedural guarantees might thus be derived from the right to access to an effective remedy granted by the Procedures Directive and the general principles of Community law. These guarantees have to be claimed before the national courts of the Member States. Only then, the national courts and the Court of Justice will be able to recognize them in the context of the Common European Asylum System.

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<sup>131</sup> Note that Article 15 of the Procedures Directive provides for a right to legal aid. However this provision leaves the Member States wide discretion not to grant legal aid in particular circumstances.