

General principles of Community law in action:  
the role of general principles in the context of the  
Asylum Procedures Directive.

Emma Besselink

# Contents

<b>1</b>	<b>Introduction</b>	<b>3</b>
1.1	General principles of Community law and the Asylum Procedures Directive . . . . .	3
1.2	Research question . . . . .	4
<b>2</b>	<b>General Principles of Community law</b>	<b>6</b>
2.1	Introduction . . . . .	6
2.2	Fundamental rights as general principles of Community law . . . . .	7
2.2.1	The European Convention on Human Rights . . . . .	7
2.2.2	The Charter of Fundamental Rights of the European Union . . . . .	8
2.3	Other sources of inspiration . . . . .	10
2.4	The application of general principles of Community law in asylum procedures . . . . .	10
2.4.1	Case C-540/03 <i>Parliament v. Council</i> . . . . .	11
2.5	Conclusion . . . . .	12
<b>3</b>	<b>The Asylum Procedures Directive and the derogations of Article 24 PD</b>	<b>14</b>
3.1	Introduction . . . . .	14
3.2	Article 24 PD, derogations from the basic principles and guarantees . . . . .	16
3.2.1	Article 24(1) under (a): subsequent applications . . . . .	16
3.2.2	Article 24(1) under (b): border procedures . . . . .	20
3.2.3	Article 24(2): European safe third countries . . . . .	23
3.3	Conclusion . . . . .	25
<b>4</b>	<b>Procedural guarantees for asylum seekers under the European Convention on Human Rights</b>	<b>26</b>
4.1	Introduction . . . . .	26
4.2	Asylum seekers' rights under the ECHR . . . . .	27
4.2.1	Introduction . . . . .	27
4.2.2	Article 3 ECHR - the prohibition of torture . . . . .	28

4.2.3	Article 5 ECHR - the right to liberty and security . . .	33
4.3	Application of the ECHR guarantees to the derogations under the Procedures Directive . . . . .	36
4.3.1	Requirements for the examination of applications . . .	36
4.3.2	The right to a personal interview . . . . .	38
4.3.3	The right to legal assistance and representation . . . .	38
4.3.4	Procedural requirements on detention . . . . .	39
4.4	Conclusion . . . . .	40
<b>5</b>	<b>Procedural guarantees for asylum seekers under Community law</b>	<b>41</b>
5.1	Introduction . . . . .	41
5.2	Procedural rights for asylum seekers under Community law .	42
5.2.1	Introduction . . . . .	42
5.2.2	Article 6 ECHR as a general principle of Community law . . . . .	42
5.2.3	The rights of the defence . . . . .	45
5.2.4	The principle of good administration . . . . .	48
5.3	Applicability in the context of asylum proceedings . . . . .	52
5.3.1	Introduction . . . . .	52
5.3.2	Rights of the defence . . . . .	52
5.3.3	The principle of good administration . . . . .	54
5.4	Application of the Community law guarantees to the deroga- tions under the Procedures Directive . . . . .	55
5.4.1	Requirements for the examination of applications . . .	56
5.4.2	The right to a personal interview . . . . .	56
5.4.3	The right to legal assistance and representation . . . .	57
5.4.4	Procedural requirements on detention . . . . .	58
5.5	Conclusion . . . . .	58
<b>6</b>	<b>Application of the general principles to Article 24 PD</b>	<b>60</b>
6.1	Article 24(1): subsequent applications and border procedures	60
6.1.1	subsequent applications . . . . .	60
6.1.2	border procedures . . . . .	62
6.2	Article 24(2): European safe third countries . . . . .	63
<b>7</b>	<b>Conclusion</b>	<b>65</b>
<b>A</b>	<b>Bibliography</b>	<b>67</b>
<b>B</b>	<b>Table of Cases</b>	<b>70</b>

# Chapter 1

## Introduction

### 1.1 General principles of Community law and the Asylum Procedures Directive

In December 2005, the EC Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status ('Procedures Directive') was adopted.<sup>1</sup> It forms part of the establishment of a common European asylum system and intends to lay down common standards for fair and efficient asylum procedures in the Member States.<sup>2</sup>

The Procedures Directive lays down basic principles and guarantees that asylum procedures in the Member States must comply with. It has been subject to a lot of criticism from, amongst others, human rights organisations, regarding these standards. Several organisations have questioned whether the standards are in accordance with the standards that are required by international human rights law.<sup>3</sup>

However, there are also other problems that arise with regard to the Procedures Directive. The issue that will be dealt with in this thesis, relates to the possibilities that have been created in the Directive to derogate from the basic principles and guarantees laid down therein. Whereas, in Chapter II of the Directive, several procedural principles and guarantees for asylum procedures are laid down, in a number of cases, the Procedures Directive allows Member States to establish special procedures that derogate from the basic principles and guarantees. The Directive appears to grant the Member States a wide discretion to disregard these principles and guarantees in such

---

<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*, OJ L 326, 13.12.2005, p. 13–34.

<sup>2</sup>Preamble to Council Directive 2005/85 EC of 1 December 2005 *on minimum standards on procedures in Member States for granting and withdrawing refugee status*, point 2 and 3.

<sup>3</sup>See, for instance, ECRE Information Note 2006, ILPA Analysis 2004, Amnesty International 2004.

special procedures. This leads to the question whether Member States are really free to establish procedures without taking into account the basic principles and guarantees laid down in the Directive or whether there are rules of a higher order that could imply that the discretion that the Member States have is in fact not as wide as it seems.

The general principles of Community law are a factor that could be of importance in this context. The relevant general principles of Community law can be described as unwritten principles that have been developed by the European Court of Justice ('ECJ'), drawing on international human rights instruments and the constitutional traditions of the Member States. The general principles are binding upon the EU institutions whenever they act and on the Member States when they implement Community law or otherwise act within the scope of Community law. Accordingly, it is possible that the general principles of law also play a role where the Member States implement the Procedures Directive and where, in implementing the Directive, they choose to derogate from the basic principles and guarantees for asylum procedures laid down in the Directive. What role this is, is the question that will be discussed in this thesis.

## 1.2 Research question

As mentioned above, this thesis will discuss the role that the general principles of Community law play with regard to the implementation of the Procedures Directive. In order to do so, I have chosen to look at the provision that grants Member States the possibility to derogate from the basic principles and guarantees laid down in the second chapter of the Directive in a number of specific asylum procedures, Article 24 of the Procedures Directive ('PD').

The question that will be answered is what requirements the general principles of Community law create for the Member States when implementing Article 24 PD.

Chapter 2 will give an introduction to the general principles of Community law. It will discuss a number of sources of inspiration for the general principles of Community law, and it will establish whether asylum procedures fall within the scope of Community law and the general principles of Community law thus apply to the derogations in the Procedures Directive. Chapter 3 will go into the Asylum Procedures Directive and the derogations laid down in Article 24 PD. Chapter 4 will describe the requirements that the European Convention for the protection of Human Rights ('ECHR'), as a source of the general principles of Community law, creates for asylum procedures in the Member States. Chapter 5 will describe the requirements that the general principles of Community law, that originate from sources other than the ECHR, create for asylum procedures in the Member States.

Finally, in the concluding chapter the elements discussed in the earlier chapters will be combined in order to determine how Article 24 of the Procedures Directive must be implemented by the Member States.

## Chapter 2

# General Principles of Community law

### 2.1 Introduction

This chapter will give a basic introduction to general principles of Community law. It will discuss the issues that are of importance in light of the questions that this thesis seeks to answer. For this purpose, this chapter will start by examining a number of sources of inspiration for the general principles of Community law. Although there is some overlap between the two, a distinction will be made between general principles based on fundamental rights instruments and general principles that are derived from other sources. First of all, fundamental rights as general principles of Community law will be discussed. Special attention will be paid to the European Convention on Human Rights and the Charter of fundamental rights ('the Charter').<sup>1</sup> Next, general principles of Community law derived from other sources, will be dealt with.

In order to be able to assess what the effect of the general principles of Community law can be in the context of the Asylum Procedures Directive, a general analysis must be made in order to determine whether and how the general principles apply to EC asylum law. First of all, the question of whether asylum procedures fall within the scope of Community law will be discussed briefly. Then, we will look at Case C-540/03 *Parliament v. Council*.<sup>2</sup> This case dealt with the implementation of the Family Reunification Directive and will be able to serve as an example of how the Court deals with general principles in the context of derogations from EC legislation.

---

<sup>1</sup>Charter of fundamental rights of the European Union, *OJ C 303* of 14 December 2007, p. 1–17.

<sup>2</sup>Case 540/03 *European Parliament v. Council* [2006] ECR p. I-5769.

## 2.2 Fundamental rights as general principles of Community law

Initially, the Treaties contained no express provisions on the protection of fundamental rights. This changed with the Treaty of Amsterdam, that introduced Article 6(2) of the Treaty on European Union ('TEU') in 1997. Article 6(2) TEU reads as follows:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

The ECJ had by then already established in its case law that fundamental rights should be protected as general principles of Community law<sup>3</sup> and also after the recognition of fundamental rights in primary law, the protection of fundamental rights in the Community legal order has remained mostly the product of the case law of the ECJ.<sup>4</sup> It has become the settled case law of the ECJ that fundamental rights form an integral part of the general principles of law whose observance the Court ensures.<sup>5</sup> Hence, it is clear that fundamental rights form part of the general principles of Community law that bind the EU institutions and, as we will see below, the Member States. As far as the standard of protection is concerned, it is not the standard provided by national, but the standard provided by Community law that must be complied with.<sup>6</sup> Below, two of the most important fundamental rights instruments from which general principles are derived, will be analysed.

### 2.2.1 The European Convention on Human Rights

As we have seen Article 6(2) TEU refers to the ECHR as a source of general principles. Although it is not formally part of Community law, it is the most common source of reference for fundamental EC rights and both the European Court of Justice and the Court of First Instance ('CFI') often refer to the 'special significance' of the ECHR as a key source of inspiration for the general principles of Community law.<sup>7</sup> Consequently, as general principles

---

<sup>3</sup>Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>4</sup>Tridimas 2006, p. 298.

<sup>5</sup>Case C-5/88 *Wachauf* [1989] ECR 2609, para. 17; Case C-274/99 P *Connolly v. Commission* [2001] ECR I-1611, para. 17.

<sup>6</sup>Tridimas 2006, p. 321; see, however, L.F.M. Besselink, 'The Member States, the National Constitutions and the Scope of the Charter'. In: 8 Maastricht Journal of European and Comparative Law 1 (2001), pp. 68-80.

<sup>7</sup>Craig & de Búrca 2003, p. 329.



of Community law, the Community is required to respect the standards of the ECHR, even though it is not party to the Convention.<sup>8</sup>

In applying these rights, the ECJ will look at the case law of the European Court of Human Rights ('ECtHR') and it generally strives for an interpretation that is compatible with the interpretation given by the ECtHR.<sup>9</sup> The case law of the ECtHR can thus give a good indication of how the general principles of Community law, corresponding to rights laid down in the ECHR, must be applied by the Member States when implementing Community measures.

However, although the fundamental rights inspired by the ECHR are in most cases applied and interpreted in a similar way by the ECJ and the ECtHR, there are differences. In a number of areas the ECJ has interpreted fundamental rights in a way that differs from the ECtHR, and, consequently, a distinction can be made between fundamental rights as part of the ECHR and fundamental rights as general principles of Community law. For instance, the right against self-incrimination is applied differently by the ECJ than by the ECtHR.<sup>10</sup> Also, as will be discussed below, in Chapter 5, there is a difference in the scope of application between Article 6 ECHR as interpreted by the ECtHR and as applied as a general principle of Community law by the ECJ.

## 2.2.2 The Charter of Fundamental Rights of the European Union

The Charter of fundamental rights of the European Union was proclaimed on December 7th 2000 in Nice. The preamble of the Charter declares that the EU recognises the rights, freedoms and principles set out therein. It has been described as "a creative distillation of the rights contained in the various European and international agreements and national constitutions on which the ECJ had for some years already been drawing".<sup>11</sup>

The Charter is, as of yet, not legally binding. Initially, it was signed and proclaimed by the presidents of the European Parliament, the Council and the Commission at Nice. Subsequently, it was incorporated into Part II of the Constitutional Treaty. The Constitutional Treaty was, however, not ratified by the Member States. The Treaty of Lisbon, which was signed on 13 December 2007 by the Member States, but has yet to be ratified by all the Member States, contains a reference to the Charter. This means that, once the Treaty is ratified and enters into force, the Charter will have legally

---

<sup>8</sup>When the Treaty of Lisbon enters into force the EU will likely become a party to the ECHR.

<sup>9</sup>Craig 2006, p. 525; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P *Limburgse Vinylmaatschappij and Others v. Commission* [2002] ECR I-8375, paras. 273 and 274.

<sup>10</sup>Tridimas 2006, p. 344.

<sup>11</sup>Craig & de Búrca 2003, p. 359.

binding force. Until this is the case, the Charter is not legally binding. This does not, however, mean that it is of no significance.

First of all, the fact that it was incorporated in the Constitutional Treaty, which was signed by all Member States, and that also under the Treaty of Lisbon it will be given legally binding status, shows that it lays down the position agreed by all European Institutions and Member States.<sup>12</sup> As such, it functions as a source for the interpretation of rights.

The Charter has been referred to as an interpretative guide as to the scope and content of Community fundamental rights, in a large number of opinions of the Advocates General and by the Court of first instance.<sup>13</sup> For instance, AG Kokott has stated that though “the Charter still does not produce binding legal effects comparable to primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order.”<sup>14</sup> AG Trstenjak has stated that the Charter “must be regarded as the specific expression of common European values. Thus, it is natural to have reference to it in the interpretation of Community law.”<sup>15</sup>

The ECJ itself has also referred to the Charter a number of times.<sup>16</sup> Case C-540/03 *Parliament v. Council* was the first case in which the Court made mention of the legal status of the Charter. The Court states:

“The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court . . . and of the European Court of Human Rights’.”<sup>17</sup>

---

<sup>12</sup>Wakefield 2007, p. 57–58.

<sup>13</sup>Craig 2006, p. 539.

<sup>14</sup>Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, Opinion of AG Kokott, para. 108.

<sup>15</sup>Case C-62/06 *Fazenda Pública - Director Geral das Alfândegas v. ZF Zefeser - Importação e Exportação de Produtos Alimentares Lda* n.y.r., Opinion of AG Trstenjak, para. 43.

<sup>16</sup>For instance Case C-341/05 *Laval*, n.y.r.; Case C-432/05 *Unibet* [2007] ECR I-2271, para. 37; Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* n.y.r., para. 61–64.

<sup>17</sup>Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para. 38.

It can thus be concluded that although the Charter may not yet be legally enforceable, it does play an important role in the interpretation of Community law. It functions as a guide to the interpretation and application of general principles of Community law. The ECJ gives it particular importance where the directive that must be interpreted refers to it in its preamble. Since point 8 of the Preamble to the Procedures Directive refers to the Charter, it will certainly play a role where this Directive, and the derogations laid down in it, are to be interpreted.

### **2.3 Other sources of inspiration**

Fundamental rights play an important role in the area of asylum law. However, besides the fundamental rights described above, the European Court of Justice has developed a number of other general principles of Community law. These include, for instance, the principle of proportionality, the rights of the defence, the principle of legal certainty, the principle of non-discrimination and the principle of good administration. Some of these may also be classified as fundamental rights, but are not directly derived from international human rights instruments.

The origin of these rights is diverse. Article 6(2) TEU mentions that general principles that constitute fundamental rights are derived from the ECHR and the common constitutional traditions of the Member States. Other general principles, such as the principles of subsidiarity and proportionality and the principle of non-discrimination can be found in the EC Treaty itself. The Court has, however, also recognised general principles of Community law that cannot be derived from either the treaties or the common constitutional traditions of the Member States.<sup>18</sup>

This thesis will discuss principles whose status as a fundamental right or general principle is clear. Other principles, that are still being developed, and whose constitutional status is less clear will also be addressed. The case law must be examined in order to determine whether a certain right has been recognised as a general principle of Community law by the Court of Justice.

### **2.4 The application of general principles of Community law in asylum procedures**

The question that will be answered in this thesis relates to the role of the general principles of Community law in the implementation of the Asylum Procedures Directive. It is therefore of importance to establish whether the general principles can, in fact, be applied to the situation we will examine.

---

<sup>18</sup>Lenaerts & van Nuffel 2005, p. 713.

That is, the situation in which a Member State, in implementing the Procedures Directive, decides to make use of the possibilities for derogation laid down therein and sets up certain asylum procedures that derogate from the basic principles and guarantees laid down in the Directive.

In certain cases the ECJ, has applied the general principles of Community law to acts of the Member States. Generally, it can be said that the Member States are bound to comply with the general principles of Community law where they act within the scope of Community law.<sup>19</sup> This is, for instance, the case where Member States implement Community legislation, including directives.<sup>20</sup> In this case this is all the more so, since this area of law has been fully harmonised, meaning that there is no scope for autonomous national measures outside the Community rules. This means that Member States should take into account the general principles of Community law, when implementing the Procedures Directive.

The Court has, furthermore, determined that Member States must respect general principles of Community law when adopting national measures on the basis of an express derogation provided for in the EC Treaty.<sup>21</sup> The question arises whether the Member States also act within the scope of Community law where they make use of the possibility to derogate from the minimum standards laid down in the Procedures Directive.

It has been argued that this should indeed be the case.<sup>22</sup> In the case *Parliament v. Council*, that will be discussed next, this seems to have been confirmed by the Court.

#### **2.4.1 Case C-540/03 *Parliament v. Council***

In *Parliament v. Council* the European Parliament challenges a number of provisions of the Family Reunification Directive<sup>23</sup> on the grounds that they are incompatible with certain fundamental rights.

In the case, the European Parliament asked the Court to annul the final subparagraph of Article 4(1), Article 4(6) and Article 8 of the Family Reunification Directive. The Family Reunification Directive gives a right to family reunification to third country nationals residing lawfully in the territory of a Member State and lays down the conditions for the exercise of that right. The contested provisions allow for derogations from a number of these conditions by the Member States. The European Parliament, relying on the ECHR and Charter of Fundamental Rights, contended that these

---

<sup>19</sup>Case C-260/89 *ERT* [1991] ECR I-2925, para. 42.

<sup>20</sup>Case 222/84 *Johnston* [1986] ECR 1651; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411.

<sup>21</sup>Case C-260/89 *ERT*, *supra*.

<sup>22</sup>Peers & Rogers 2006, p. 117; Reneman 2007, p. 8–9.

<sup>23</sup>Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251, p. 12.

possibilities for derogation violate certain fundamental rights, in particular the right to family life and the principle of equal treatment.

In determining whether the provisions should be annulled, the Court applies the test of whether the provisions expressly or impliedly authorise the Member States to adopt or retain national legislation not respecting fundamental rights.<sup>24</sup> With regard to Article 4(1), for instance, that allows for the possibility of introducing a condition of integration to be met by children aged over the age of 12 arriving independently from the rest of their family before authorising entry and residence under the Directive, the Court determined that it did not run counter to the right to respect for family life. The Court decided that the provision did not expressly or impliedly authorise the Member States to adopt legislation not respecting general principles. The Court stated that:

“the fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights”.<sup>25</sup>

The Court makes it clear that while a Directive may leave the Member States a margin of appreciation, this does not mean that they can apply the Directive’s rules in a manner inconsistent with the requirements flowing from the protection of general principles recognised in the Community legal order.<sup>26</sup> By ruling on the way the Member States must make use of a margin of appreciation granted by a directive, the Court has implicitly determined that when Member States do so, they are acting within the scope of Community law. If this was not the case, the ECJ could not have made such a statement. It follows that also when Member States derogate from the Procedures Directive, they are acting within the scope of Community law and must comply with the general principles of Community law.

## 2.5 Conclusion

As we have seen, there are a number of sources of general principles of Community law. First of all, there are the fundamental rights. The most important source for these general principles is the European Convention on Human Rights. Although the Community is not a party to the ECHR, the rights contained therein are recognised as general principles of Community law by the ECJ and should thus be complied with by the Member States when they implement Community measures.

---

<sup>24</sup> *Parliament v. Council, supra*, para. 23.

<sup>25</sup> *Ibid.*, para. 70.

<sup>26</sup> *Ibid.*, para. 104–105.

Also, although it is not yet legally binding, the Charter of fundamental rights of the EU has become of increasing importance as a guide for interpreting and applying the general principles of Community law.

Other general principles of Community law are derived from the EC Treaty itself or from the common constitutional traditions of the Member States. However, the Court has also developed general principles that did not derive from either of these sources. The Court's case law must be examined in order to determine what rights form part of the general principles of Community law.

Finally, we have seen that general principles apply to acts of the Member States where they act within the scope of Community law. The *Parliament v. Council* case has shown that this is the case where Member States implement directives, even when they adopt national measures on the basis of an express derogation provided for in the directive. Even areas in which there is discretion for the Member States, still remain within the ambit of Community law and the general principles are applicable.

The case makes it clear that the margin of appreciation that, in some cases, may from the wording of the Directive, seem quite wide, will in fact be much narrower when interpreted in line with general principles of Community law.

## Chapter 3

# The Asylum Procedures Directive and the derogations of Article 24 PD

### 3.1 Introduction

The Asylum Procedures Directive was introduced in 2005 with the aim of setting common standards for fair and efficient asylum procedures in the Member States. Its main objective is to lay down a minimum framework in the Community on procedures for granting and withdrawing refugee status.<sup>1</sup> The Procedures Directive consists of six different chapters. The first chapter lays down the general provisions for the Directive, such as the definitions and scope of the Directive. The most important chapter of the Directive is Chapter II, in which the basic guarantees and principles that establish minimum standards for asylum procedures in the Member States are laid down. These basic guarantees are laid down in Article 6 to 22 and are, in short, the following:

- Access to the procedure (Article 6 PD). This provision gives a number of guarantees regarding the possibilities to have access to asylum procedures.
- The right to remain in the Member State pending the examination of the application (Article 7 PD).
- Requirements for the examination of the application (Article 8 PD). The requirements laid down in this provision include the prohibition of rejecting or excluding from examination applications for asylum on the sole ground that they have not been made as soon as possible and the requirement of ensuring that applications are examined and decisions

---

<sup>1</sup>Preamble of the Procedures Directive, under 5.

are taken individually, objectively and impartially and that precise and up-to-date information is obtained from various sources as to the general situation prevailing in the countries of origin of applicants for asylum.

- Requirements for a decision by the determining authority (Article 9 PD). Among the requirements laid down in this Article are the requirement that Member States shall ensure that decisions on applications for asylum are given in writing, and that in case of a rejection, reasons in fact and in law are stated.
- Guarantees and obligations for the applicants for asylum (Article 10, 11 PD). The guarantees for applicants for asylum laid down in this provision include the right to be informed in a language they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure as well as the result of the decision, the right to an interpreter and the right to an opportunity to communicate with the UNHCR.
- Guarantees regarding the right to a personal interview (Article 12–14 PD).
- The right to legal assistance and representation (Article 15–16 PD). These Articles ensure a (limited) right to legal assistance and representation in the event of a negative decision by a determining authority.
- Guarantees for unaccompanied minors (Article 17 PD).
- Requirements regarding detention (Article 18 PD). This Article provides that Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum and that where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.
- Procedure in case of (implicit) withdrawal or abandonment of the application (Article 19–20 PD).
- The role of UNHCR (Article 21 PD).
- Collecting of information on individual cases (Article 22 PD). This provision requires that Member States do not directly disclose information regarding individual applications for asylum and do not obtain any information from the alleged actors of persecution in a manner that would result in such actors being informed of the fact that an application has been made by the applicant.



Chapter III of the Directive concerns procedures at first instance. This chapter is the most controversial part of the Directive, it includes provisions regarding the controversial ‘safe third country’ concept and it contains a number of derogations from the basic guarantees and principles laid down in Chapter II of the Directive. The last three chapters concern procedures for the withdrawal of refugee status, appeals procedures and final provisions.

### **3.2 Article 24 PD, derogations from the basic principles and guarantees**

As mentioned above, Chapter III of the Procedures Directive provides for a number of derogations from the Chapter II guarantees. The provision that is the most explicit in granting derogations is Article 24 PD. This is therefore the Article that I have chosen to use as an example in determining how the derogations of the Directive should be dealt with by the Member States. First of all, an assessment must be made of the exact content of the derogations that are provided for in Article 24 PD. To what extent do the guarantees and principles of Chapter II not apply in the procedures described under Article 24 PD?

Article 24 provides for three specific instances in which Member States may derogate from the basic principles and guarantees set out in Chapter II of the Directive. Article 24 provides:

1. Member States may provide for the following specific procedures derogating from the basic principles and guarantees of Chapter II:
  - (a) a preliminary examination for the purposes of processing cases considered within the framework set out in Section IV;
  - (b) procedures for the purposes of processing cases considered within the framework set out in Section V.
2. Member States may also provide a derogation in respect of Section VI.

In the following sections the three specific procedures in which derogation from Chapter II is allowed, will be discussed. The provisions will be analysed and the level of protection that appears to be required under the Directive will be discussed. Finally, a number of important rights and guarantees that are not guaranteed under these procedures will be selected. These rights will be examined in light of the European Convention on Human Rights and the general principles of Community law in the following chapters in order to come to a conclusion on how the derogations must in the end be implemented by the Member States.

#### **3.2.1 Article 24(1) under (a): subsequent applications**

Article 24(1) under (a) PD gives Member States the choice to apply specific procedures derogating from the basic guarantees laid down in Chapter II of

the Directive in procedures for the purposes of processing cases considered within the framework set out in Section IV. Section IV of Chapter III of the Directive deals with subsequent applications and consists of three provisions. Article 32 provides:

1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.
2. Moreover, Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum:
  - (a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20;
  - (b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.
3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.
4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II.
5. Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons why a procedure has to be re-opened.
6. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 of this Article in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39.
7. The procedure referred to in this Article may also be applicable in the case of a dependant who lodges an application after he/she has, in accordance with Article 6(3), consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination referred to in paragraph 3 of this Article will consist of examining whether there are facts relating to the dependant's situation which justify a separate application.

Article 33 provides:

Member States may retain or adopt the procedure provided for in Article 32 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time.

Article 34 provides:

1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 32 enjoy the guarantees provided for in Article 10(1).
2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, inter alia:
  - (a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;
  - (b) require submission of the new information by the applicant concerned within a time-limit after he/she obtained such information;
  - (c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

The conditions shall not render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access.

3. Member States shall ensure that:
  - (a) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision;
  - (b) if one of the situations referred to in Article 32(2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

A subsequent application is an application by a person who has applied for asylum in a Member State before and who submits new facts and circumstances or a new application in the same Member State. Member States can choose to examine such an application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal.<sup>2</sup> Member States are, however, also allowed to apply a specific procedure, in the form of a preliminary examination, where a person makes a subsequent application for asylum (a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20 or (b) after a decision has been taken on the previous application.<sup>3</sup> The preliminary examination concerns the question whether new elements or findings relating to the examination of whether the applicant for asylum

---

<sup>2</sup>Article 32(1).

<sup>3</sup>Article 32(2).

qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.<sup>4</sup> The derogation under Article 24(1)(a), applies only to the preliminary examination. Once it has been established that new elements or findings have arisen or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83 EC, the guarantees of Chapter II apply.<sup>5</sup>

Procedures to which the Chapter II principles do not apply are thus procedures for the preliminary examination of subsequent applications. These preliminary examinations have the purpose of deciding whether subsequent applications should be subject to further examination. Where the outcome of the preliminary examination is positive, the derogation no longer applies and the further examination and decision on the subsequent application are once again subjected to the procedural guarantees of Chapter II.

The procedure for which the derogation applies may seem to be limited in scope, since it only applies to the ‘preliminary examination’ and not to the further examination and final decision on the subsequent application. However, this is deceptive. Since it is the preliminary examination itself that determines whether there will be a further examination, this preliminary examination is of great importance. It determines the possibility for the asylum seeker to have his/her claim assessed further in light of the new facts or circumstances that have arisen. A negative decision in a preliminary examination is, moreover, just as much a final decision as a negative decision on a subsequent application that has been further examined.

Besides the general possibility to derogate from the Chapter II guarantees, given under Article 24(1) under (a) PD, Article 34 PD explicitly permits Member States to lay down rules that oblige the applicant to indicate facts and substantiate evidence which justify a new procedure, to require submission of the new information within a time-limit after obtaining the information and to permit the preliminary examination to be conducted without a personal interview.<sup>6</sup> Only one of the provisions of Chapter II applies in preliminary examinations. Under Article 34(1) PD, Member States must ensure that applicants for asylum whose application is subject to a preliminary examination enjoy the guarantees provided for in Article 10(1) PD. This means that in a preliminary examination the asylum seeker has a

---

<sup>4</sup>Article 32(3).

<sup>5</sup>Article 32(4). According to Battjes paragraph 3 and 4 should be read in conjunction, so that paragraph 4 acts as an extra requirement for further examination of the subsequent application (see Battjes 2006, under 436, 438 and 441). From the wording of paragraph 4 it could also be concluded that the requirement that the new facts should “significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83 EC” only applies when new facts arise *following*, that is after, the preliminary examination. This would mean, however, that two types of preliminary examination would exist under section IV. It is unlikely that this is what the drafters of the Directive intended.

<sup>6</sup>Article 34(2) under (a), (b) and (c).

right to be informed in a language which they understand of the procedure to be followed and their rights and obligations, they have the right to the services of an interpreter, the right to communicate with the UNHCR, to be given notice in reasonable time of the decision, and to be informed of the result of the decision in a language they may reasonably be supposed to understand, including information on how to challenge a negative decision.

This means that, accordingly, a large number of important procedural guarantees do not apply in preliminary examination proceedings. The rights and principles that do not apply are the following:

- Access to the procedure (Article 6 PD).
- The right to remain in the Member State pending the examination of the application (Article 7 PD).
- Requirements for the examination of the application (Article 8 PD).
- Requirements for a decision by the determining authority (Article 9 PD).
- Guarantees regarding the right to a personal interview (Article 12–14 PD).
- The right to legal assistance and representation (Article 15–16 PD).
- Guarantees for unaccompanied minors (Article 17 PD).
- Requirements regarding detention (Article 18 PD).
- Procedure in case of (implicit) withdrawal or abandonment of the application (Article 19–20 PD).
- The role of UNHCR (Article 21 PD).
- Collection of information on individual cases (Article 22 PD).

### **3.2.2 Article 24(1) under (b): border procedures**

Article 24(1) under (b) PD states that Member States may provide for specific procedures for the purpose of processing cases considered within the framework set out in Section V, derogating from the basic principles and guarantees of Chapter II. Section V consists of Article 35, in which rules are given regarding border procedures. Article 35 PD provides:

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on applications made at such locations.

2. However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force on 1 December 2005, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide at the border or in transit zones as to whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter their territory.
3. The procedures referred to in paragraph 2 shall ensure in particular that the persons concerned:
  - (a) are allowed to remain at the border or transit zones of the Member State, without prejudice to Article 7;
  - (b) are immediately informed of their rights and obligations, as described in Article 10(1) (a);
  - (c) have access, if necessary, to the services of an interpreter, as described in Article 10(1)(b);
  - (d) are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 12, 13 and 14;
  - (e) can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 15(1); and
  - (f) have a representative appointed in the case of unaccompanied minors, as described in Article 17(1), unless Article 17(2) or (3) applies.

Moreover, in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why the application for asylum is considered as unfounded or as inadmissible.

4. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.
5. In the event of particular types of arrivals, or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, which makes it practically impossible to apply there the provisions of paragraph 1 or the specific procedure set out in paragraphs 2 and 3, those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

Although Article 24(1) under (b) PD seems to allow for derogations in border procedures in general, Article 35(1) PD makes it clear that when Member States provide for procedures in order to decide at the border or transit zones of the Member State on applications made at such locations (the so-called normal border procedures), these procedures must be in accordance with Chapter II. The second paragraph of Article 35, however, determines that when such procedures do not exist (and it is optional to instate regular border procedures), Member states are allowed to maintain

procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide at the border or in transit zones as to whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter the territory. This is the so-called ‘special border procedure’ and applies to asylum seekers that do not have a visa or permission to enter the country on other grounds.<sup>7</sup>

As was the case in the preliminary examination procedures, the special border procedure seems to be of limited importance since it is simply the procedure that decides whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter their territory. However, in a similar manner as in the case of preliminary examinations, even though permission to enter would not necessarily mean a positive decision on the application, a refusal to enter would amount to a negative decision on an application for asylum, so that procedural guarantees are equally important in special border procedures as they are in normal border procedures.<sup>8</sup>

Article 35(3) PD does provide for a number of guarantees, however there is still considerable room left for derogation from the basic principles and guarantees of Chapter II. The provisions that do not apply in the case of special border procedures are:

- Access to the procedure (Article 6 PD).
- Requirements for the examination of the application (Article 8 PD).
- Requirements for a decision by the determining authority (Article 9 PD).
- Guarantees for the applicants for asylum (Article 10(1), under (c), (d) and (e) PD). Article 10(2) PD furthermore provides that “with respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones referred to in paragraph 1(b), (c) and (d) of this Article”. This means that only the right to be informed of the result of the decision by the determining authority in a language that the applicant for asylum may reasonably be supposed to understand (Article 10(1) under (e) PD) is not guaranteed.
- Scope of legal assistance and representation (Article 16 PD).
- Requirements regarding detention (Article 18 PD).
- Procedure in case of (implicit) withdrawal or abandonment of the application (Article 19–20 PD).

---

<sup>7</sup>Preamble of the Procedures Directive, under 16 and Battjes 2006, under 382.

<sup>8</sup>Battjes 2006, under 382.

- The role of UNHCR (Article 21 PD).
- Collection of information on individual cases (Article 22 PD).

### 3.2.3 Article 24(2): European safe third countries

Article 24(2) PD states that Member States may also provide for procedures derogating from Chapter II, in respect of Section VI. Section VI consists of Article 36 and regards the ‘European safe third countries’ concept. This Article provides:

1. Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.
2. A third country can only be considered as a safe third country for the purposes of paragraph 1 where:
  - (a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;
  - (b) it has in place an asylum procedure prescribed by law;
  - (c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and
  - (d) it has been so designated by the Council in accordance with paragraph 3.
3. The Council shall, acting by qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt or amend a common list of third countries that shall be regarded as safe third countries for the purposes of paragraph 1.
4. The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-refoulement under the Geneva Convention, including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law.
5. When implementing a decision solely based on this Article, the Member States concerned shall:
  - (a) inform the applicant accordingly; and
  - (b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.
6. Where the safe third country does not re-admit the applicant for asylum, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.



7. Member States which have designated third countries as safe countries in accordance with national legislation in force on 1 December 2005 and on the basis of the criteria in paragraph 2(a), (b) and (c), may apply paragraph 1 to these third countries until the Council has adopted the common list pursuant to paragraph 3.

The procedure of Article 36 PD differs from the two previously discussed procedures in that it allows an examination of the application on substance to be avoided altogether. Member States may provide that no, or no full examination of the asylum application shall take place, once it has been established that the applicant for asylum comes from a ‘European safe third country’. This means that, in such cases, none of the procedural guarantees will apply. The main concern is that Article 36 does not expressly require any individual examination of the application and the actual consequences of return to a designated third country. Nor is there an opportunity for the applicant to rebut the presumption of safety in the particular circumstances of his/her case. The guarantees that do not apply are thus:

- Access to the procedure (Article 6 PD).
- The right to remain in the Member State pending the examination of the application (Article 7 PD).
- Requirements for the examination of the application (Article 8 PD).
- Requirements for a decision by the determining authority (Article 9 PD).
- Guarantees and obligations for the applicants for asylum (Article 10–11 PD).
- Guarantees regarding the right to a personal interview (Article 12–14 PD).
- The right to legal assistance and representation (Article 15–16 PD).
- Guarantees for unaccompanied minors (Article 17 PD).
- Requirements regarding detention (Article 18 PD).
- Procedure in case of (implicit) withdrawal or abandonment of the application (Article 19–20 PD).
- The role of UNHCR (Article 21 PD).
- Collection of information on individual cases (Article 22 PD).

### 3.3 Conclusion

As has been shown, in all three procedures discussed above, Member States are allowed, under the Procedures Directive, to derogate from important principles and guarantees of Chapter II. In order to examine how much freedom Member States will, in fact, have to apply these derogations when implementing the directive, we must next examine what procedural requirements are guaranteed under the general principles of Community law.

In the next two chapters, an analysis will be made of the procedural rights that follow from the general principles of Community law. In order to be able to apply these rights more specifically in the context of the derogations of Article 24 PD, a selection must be made of the most important procedural guarantees from which a derogation seems possible under the Procedures Directive. We will examine whether the following rights are guaranteed under the general principles of Community law.

- Requirements for the examination of applications (Article 8 PD), including the requirement of an individual examination of the application.
- The right to a personal interview (Article 12–14 PD).
- The right to legal assistance and representation (Article 15–16 PD).
- Procedural requirements on detention (Article 18 PD).

In the final chapter we will see what the analysis of the procedural rights guaranteed under the general principles of Community law means for the implementation of the derogations of Article 24 PD.

## Chapter 4

# Procedural guarantees for asylum seekers under the European Convention on Human Rights

### 4.1 Introduction

This chapter will deal with international asylum law and the guarantees it provides for asylum seekers in asylum procedures. As explained above, international human rights law affects Community actions by way of the general principles of Community law. In this chapter, the focus will be on the European Convention on Human Rights, rather than other instruments of international law such as the 1951 UN Convention relating to the Status of Refugees ('Refugee Convention') or the 1966 UN International Covenant on Civil and Political Rights ('ICCPR'). Besides the fact that the ECHR is more important as a source of the general principles of Community law, it has been argued that the protection guaranteed under the ECHR and its case law provides the most extensive protection for asylum seekers against *refoulement*.<sup>1</sup>

First, a general introduction will be given regarding the protection that asylum seekers enjoy under the ECHR. Next, the ECHR provision that is of the greatest importance in the context of asylum law, Article 3 ECHR, will be discussed and an analysis will be made of the case law regarding this provision and the requirements it creates for asylum procedures. Article 5 ECHR and its consequences for asylum procedures will then be discussed. Finally, the consequences of this case law for the rights and requirements that are not guaranteed under the derogations of Article 24 PD, identified

---

<sup>1</sup>Lambert 1999, p. 543–544.

in the previous chapter, will be discussed.

## 4.2 Asylum seekers' rights under the ECHR

### 4.2.1 Introduction

The ECHR does not contain an explicit right to asylum nor does it contain provisions explicitly dealing with asylum procedures. The standards for asylum procedures must therefore be inferred from other rights and guarantees laid down in the Convention.

First of all, the provision that would, at first glance, seem the most appropriate in this context is Article 6 ECHR, that deals with the right to a fair trial, and the procedural rights that follow from this Article. However, the scope of Article 6 ECHR is limited. Article 6, paragraph 1, determines that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. It is clear that asylum procedures do not fall into the second category – there is no ‘criminal charge’. The European Court of Human Rights (hereinafter: ECtHR) has determined that asylum procedures also fall outside of the scope of ‘determination of civil rights and obligations’. The Court has stated explicitly that Article 6 ECHR does not apply to decisions regarding the entry, stay and deportation of aliens<sup>2</sup> and this is still standing case law.<sup>3</sup> Consequently, Article 6 ECHR cannot set standards or provide for procedural guarantees in asylum procedures.

There are, however, other provisions in the ECHR, that are not limited in scope in the way that Article 6 is, and that may be of importance in providing procedural guarantees for asylum seekers. Article 5 ECHR, for instance, contains the right to liberty and security of person and implies certain procedural requirements on detention, that are also of importance within asylum procedures. Article 5 ECHR will be further examined in section 4.2.3. Article 13 ECHR provides for the right to an effective remedy before a national authority and is of importance with regard to appeal proceedings and the possible suspensory effect of such appeals. This right will not be discussed in great detail in this thesis, since it does not fall under the derogations of Article 24 PD, but is dealt with in a separate chapter of the Directive (Chapter V). Finally, Article 3 ECHR prohibits submitting a person to torture, inhuman treatment or punishment and degrading treatment or punishment, and it is the provision that has become most important in setting standards in the context of asylum.

---

<sup>2</sup>ECHR 5 October 2000, Reports of Judgments and Decisions 2000 - X (*Maaouia v. France*), para. 40.

<sup>3</sup>Van Dijk & van Hoof 2006, p. 530-531; see also ECHR 29 June 2004, application nos. 6276/03 and 6122/04, (*Taheri Kandomabadi v. The Netherlands*).

## 4.2.2 Article 3 ECHR - the prohibition of torture

Article 3 ECHR provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Besides the direct prohibition of torture and inhuman or degrading treatment or punishment, Contracting States may also be held responsible under Article 3 ECHR for extraditing a person where there are substantial grounds for believing that he would be in danger of being subjected to torture. This was decided by the ECtHR for the first time in the *Soering* case<sup>4</sup> and later also held to be applicable in the context of asylum, where the ECtHR held in the *Vilvarajah* case that:

“expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.”<sup>5</sup>

This has since become established case law of the ECtHR.<sup>6</sup>

Also, Article 3 ECHR is one of the fundamental rights that is mentioned in Article 15(2) ECHR as being non-derogable. This means that Article 3 contains an absolute right that cannot be limited by law. The ECtHR has determined that this is also true in expulsion and extradition cases. In the *Chahal* case, the Court stated that there is no room “for balancing the risk of ill treatment against the reasons for expulsion in determining whether a State’s responsibility under Article 3 is engaged”.<sup>7</sup>

The question of determining in what circumstances there is a ‘real risk of being subject to torture or inhuman or degrading treatment or punishment’ and to what extent the prohibition of Article 3 ECHR overlaps with the prohibition of *refoulement* that is laid down in Article 33(1) of the Refugee Convention (which contains a prohibition to expel asylum seekers with a well-founded fear of being persecuted in their country of origin), are questions that go beyond the scope of this thesis. The question that is of interest in relation to the Procedures Directive is whether Article 3 ECHR brings with it certain standards for asylum procedures to live up to.

---

<sup>4</sup>ECHR 7 July 1989, Series A no. 161 (*Soering v. the United Kingdom*).

<sup>5</sup>ECHR 30 October 1991, Series A no. 215 (*Vilvarajah and others v. The United Kingdom*), para. 103.

<sup>6</sup>Van Dijk & van Hoof 2006, p. 433–434; for instance ECHR 15 November 1996, Reports 1996-V (*Chahal v. the United Kingdom*), para. 73–74.

<sup>7</sup>*Chahal v. the United Kingdom*, *supra*, para. 78–80.

In general, the fact that asylum procedures should meet certain standards seems to be inherent in the prohibition of Article 3. In order to guarantee that Article 3 is not infringed, asylum procedures should be set up in such a way as to ensure that asylum seekers are not sent back to a country where they face a real risk of being subjected to torture or inhuman or degrading treatment or punishment. This follows from the effectiveness principle, which requires that the rights guaranteed under the Convention are practical and effective as opposed to theoretical or illusory.<sup>8</sup>

The main principle that must, thus, be kept in mind is that asylum procedures should ensure that there is no *refoulement* (in the sense of Article 3 ECHR). Asylum seekers cannot be sent back to a country where they face a real risk of being subjected to torture or degrading treatment or punishment; if an asylum procedure leads to *refoulement*, the procedure is in breach of Article 3 ECHR.

In a number of cases, that will be discussed below, the Court has affirmed that Article 3 ECHR creates certain standards for asylum procedures. Exactly what conditions asylum procedures should comply with has not been clearly formulated in the case law of the ECtHR. However, the case law that will be discussed next, does allow for certain conclusions to be drawn.

**Vilvarajah v. United Kingdom** The first case of importance is the abovementioned *Vilvarajah* case. The case was brought by a number of Sri Lankan citizens of Tamil ethnic origin. These applicants argued primarily that their expulsion by the United Kingdom to Sri Lanka violated Article 3 ECHR, since there were substantial grounds for fearing that they would be subjected to treatment in breach of Article 3 in their home country. Before going into an examination of the specific circumstances of the case the ECtHR sets out the general approach to be taken when assessing the risk of ill-treatment. The Court states that:

“the ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 ECHR. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case. The Courts examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe . . . . It follows from the above principles that the examination of this issue in the present case must focus on the foreseeable consequences of the removal of the applicants to

---

<sup>8</sup>For an example of application of the effectiveness principles in the context of asylum see ECHR 4 February 2005, application nos. 46827/99 and 46951/99 (*Mamatkulov and Askarov v. Turkey*).

Sri Lanka in the light of the general situation there in February 1988 as well as on their personal circumstances.”<sup>9</sup>

The Court then goes on to examine whether, in the case at hand, the removal of the applicants exposed them to a real risk of inhuman treatment and in the end finds that this is not the case. What is important in this case, however, is the standard the Court sets for determining whether there is a risk of ill-treatment, and thereby a violation of Article 3 ECHR. It is clear in stressing the importance of a rigorous examination of all the circumstances of the case. Even though these statements are made with regard to the examination by the ECtHR itself and not with regard to the examination by Contracting States in their asylum procedures, there is no reason why the standard of examination should be higher in the examination by the ECtHR than when the Contracting State examines the application. The Contracting State must, after all, also ensure that there is no violation of Article 3 and therefore make an adequate examination. The Court has, in fact, confirmed this in the later *Jabari* case,<sup>10</sup> which will be discussed below.

**Bahaddar v. Netherlands** An important case relating to procedural requirements in asylum cases is the *Bahaddar* case.<sup>11</sup> The case concerned Bahaddar, a Bangladeshi national, who had been denied refugee status in the Netherlands. The main question the case deals with is whether Bahaddar had exhausted all effective and available remedies in the Netherlands and whether the case is thus admissible before the ECtHR. In answering this question, however, the Court also makes a number of statements that are of importance in the context of asylum proceedings. First of all, it affirms 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.”<sup>12</sup>

The Court then goes on to state:

“Whether there are special circumstances which absolve an applicant from the obligation to comply with such rules will depend on the facts of each case. 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

---

<sup>9</sup> *Vilvarajah, supra*, para. 107–108.

<sup>10</sup> ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII (*Jabari v. Turkey*).

<sup>11</sup> ECHR 19 February 1998, Reports 1998-I (*Bahaddar v. the Netherlands*).

<sup>12</sup> *Ibid.*, para. 45.

supply evidence within a short time . . . . Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee states a realistic opportunity to prove his or her claim.”<sup>13</sup>

In the end, the Court decided that in the present case, there were no special circumstances to absolve Bahaddar from complying with the national procedural rules and his case was deemed inadmissible since the available domestic remedies had not been exhausted.

The main rule that can be taken from this case is that an applicant in an asylum procedure should be given a ‘realistic opportunity’ to prove his or her claim. This means that it is important to take into account the specific circumstances of the individual case and that national procedural rules must be applied with a certain measure of flexibility, in order to take into account such circumstances. Even though national formal requirements should in principle be complied with, they cannot take away an asylum seeker’s realistic opportunity to prove his or her claim and consequently, there can be situations in which an applicant for asylum can be absolved from the obligation to comply with formal requirements.

**Hatami v. Sweden** Another case that provides some clarification regarding requirements that Article 3 creates for the asylum procedures of Contracting States, is the case of *Hatami v. Sweden*.<sup>14</sup> In this report of the European Commission of Human Rights (hereinafter: the Commission), concerning the expulsion from Sweden and deportation to Iran of mr. Hatami, the Commission found a violation of Article 3 ECHR. The Swedish government had denied Hatami’s request for asylum based on a lack of credibility because of contradictions and inconsistencies in his story. However, after examining the facts of the case, the Commission, came to the conclusion that the applicant’s deportation to Iran would, if executed, amount to a violation of Article 3 ECHR. The Commission is not satisfied that the test that is required under Article 3 of the Convention was applied to the applicant’s case.<sup>15</sup> One of the reasons the Commission gives in order to come to this conclusion is that the report the Swedish government bases its conclusion of non-credibility on was based on an interview that:

“lasted less than ten minutes with interpretation provided over the telephone. The report, which has been submitted to the Commission, consists of one page and does not explain or set out in any detail the applicant’s situation. The contents of the

---

<sup>13</sup>*Ibid.*, para. 45.

<sup>14</sup>Report of the Commission 23 April 1998, (*Hatami v. Sweden*).

<sup>15</sup>*Ibid.*, para. 106.



report were not explained to the applicant who could not read the language used.”<sup>16</sup>

The Commission believes that no reliable information can be deduced from a police interrogation that was carried out under the described circumstances.<sup>17</sup>

With regard to the assessment of Hatami’s credibility, the Commission considers that “complete accuracy is seldom to be expected by victims of torture”.<sup>18</sup> A consideration that has recently been confirmed by the ECtHR in *Ayegh v. Sweden*,<sup>19</sup> in which it stated:

“due to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt in assessing the credibility of their statements and the supporting documents.”

The *Hatami* case relates to aspects of the asylum procedure regarding the gathering of information, in order to make an assessment of the applicant’s case. It highlights the importance of a thorough assessment, in light of the particular communicative challenges of the asylum process.<sup>20</sup> It shows that the Court and Commission take into account the special situation in which applicants for asylum find themselves. This should therefore also be done by national authorities in their assessment of an application for asylum.

**Jabari v. Turkey** In the *Jabari* case, the applicant, an Iranian national who had committed adultery in Iran, alleged, *inter alia*, that she would be subjected to a real risk of ill-treatment and death by stoning if expelled from Turkey. Jabari invoked Article 3 ECHR in respect of her complaint. In its decision, the Court more or less repeats the rule given in the *Vilvarajah* case that a rigorous scrutiny must be made of all the circumstances of the case. It, however, broadens the scope of the rule to the scrutiny of an individual’s claim in general, rather than simply the examination by the ECtHR. The Court thus apparently includes the examination of the claim under the national asylum procedure.<sup>21</sup> The Court states the following:

“having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual’s claim that his or her deportation to a third

---

<sup>16</sup> *Ibid.*, para. 96–97.

<sup>17</sup> *Ibid.*, para. 104.

<sup>18</sup> *Ibid.*, para. 106.

<sup>19</sup> ECHR 7 November 2006, application no. 4701/05, (*Ayegh v. Sweden*).

<sup>20</sup> Costello 2006, p. 25.

<sup>21</sup> Battjes 2006, p. 294–295.

country will expose that individual to treatment prohibited by Article 3. The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability.”<sup>22</sup>

This standard of examination of the possibility of breach of Article 3 ECHR consequently applies not only to the ECtHR but also to national authorities examining an application for asylum.

The Court also gave further clarity as to how national procedural rules should be applied in asylum cases. It decided that:

“It would appear that her failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran. In the Court's opinion, the automatic and mechanical application of such a short time limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in article 3 of the Convention.”<sup>23</sup>

It follows from this decision that an application for asylum cannot be denied for merely procedural reasons if this means that there is no opportunity for the facts of the application to be examined. Whereas the Court in *Bahaddar* already determined that time-limits should be applied in a way that allows applicants for asylum a realistic opportunity to prove their claim, the Court in this case gives an example of a case in which a formal requirement need not be complied with. In this case, the five-day time limit was considered to be in breach of Article 3 ECHR, since it denied Jabari any scrutiny of the factual basis of her fears. Besides a realistic opportunity to prove his or her claim, Article 3 ECHR requires that procedural rules should also ensure that the merits of the case are examined.<sup>24</sup>

In conclusion, the rule that can be inferred from the *Jabari* case is that asylum procedures, in order for them to be in compliance with Article 3 ECHR, should allow for a rigorous scrutiny and meaningful assessment of an individual's claim that expulsion would expose him to a risk of treatment in violation of Article 3. Also, procedural rules should not be applied automatically and mechanically, so that the applicant is denied the opportunity to have the substance of his or her case examined.

#### **4.2.3 Article 5 ECHR - the right to liberty and security**

Article 5 of the European Convention on Human Rights specifically addresses requirements on detention. It deals with the right to liberty and the

---

<sup>22</sup> *Jabari*, *supra*, para. 39–40.

<sup>23</sup> *Ibid.*, para. 40.

<sup>24</sup> See also the case annotation by Battjes in *Rechtspraak Vreemdelingenrecht*, 2000/2.

exhaustive circumstances in which it can be limited. Article 5 ECHR provides that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty except in the cases stated in the provision and in accordance with a procedure prescribed by law. Article 5(1)(f) allows the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

For the detention of asylum seekers to be allowed under Article 5 ECHR, a number of requirements should be met. First of all, the detention should be lawful, meaning that it should be in conformity with both domestic and international law and should not be imposed arbitrarily.<sup>25</sup> Furthermore, Article 5(4) states that:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

The ECtHR has given several judgments that further define the criteria described above. One of the most important cases is the *Amuur* case,<sup>26</sup> that concerned a group of Somalian asylum seekers who were refused entry to French territory by the French authorities and were held for twenty days in the international transit zone and a nearby hotel specifically adapted for holding asylum seekers. The Court found a breach of Article 5 ECHR, since the provision of national legislation on which the detention was based was considered not to constitute a ‘law’ of sufficient ‘quality’ such as to avoid arbitrariness.<sup>27</sup> According to the Court:

“Quality in this sense implies that where a national law authorises deprivation of liberty – especially in respect of a foreign asylum-seeker – it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States’ immigration policies.”<sup>28</sup>

It also held that “there must be adequate legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention” and that none of the laws in question “allowed the ordinary courts to review the conditions under which aliens were held

---

<sup>25</sup>Van Dijk & van Hoof 2006, p. 481.

<sup>26</sup>ECHR 25 June 1996, Reports 1996-III (*Amuur v. France*).

<sup>27</sup>*Ibid.*, para. 53.

<sup>28</sup>*Ibid.*, para. 50.

or, if necessary, to impose a limit on the administrative authorities as regards the length of time for which they were held. They did not provide for legal, humanitarian and social assistance, nor did they lay down procedures and time-limits for access to such assistance so that asylum-seekers like the applicants could take the necessary steps.”<sup>29</sup>

Besides the requirements that the national laws allowing detention must comply with, the ECtHR has determined that the fact that detention may not be arbitrary, also implies certain requirements. The Court has not given a general definition of what might constitute ‘arbitrariness’, but has developed certain principles on a case-by-case basis. For instance, it has established that detention is ‘arbitrary’ where there has been an element of bad faith or deception on the part of the authorities, where the detention does not genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1) and where there is no relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention<sup>30</sup>

The ECtHR has also determined that:

“any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f).”<sup>31</sup>

As a consequence, the period of detention must not exceed a reasonable time, for it to be in accordance with Article 5 ECHR. What a ‘reasonable time’ entails exactly, has not been explained by the ECtHR. The Court has determined that an administrative detention of seven days cannot be considered unreasonable.<sup>32</sup> A general rule to determine what is reasonable has, however, not been given.

It has been established by the Court that Article 5(1)(f) does not require that detention to prevent the unauthorised entry into the country be proportionate, that is, reasonably necessary.<sup>33</sup> This means that detention of asylum seekers is allowed, even where detention may not be ‘necessary’ in an individual case, for example to prevent fleeing. As we will see below, this could be different where Article 5 ECHR is applied as a general principle of Community law, in light of the general principle of proportionality.

---

<sup>29</sup> *Ibid.*, para. 50.

<sup>30</sup> ECHR 28 January 2008, application no. 13229/03 (*Saadi v. United Kingdom (II)*), para. 68–69. Referring *inter alia* to: ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I (*Conka v. Belgium*); ECHR 29 February 1988, Series A no. 129 (*Bouamar v. Belgium*); ECHR 30 July 1998, Reports 1998-V (*Aerts v. Belgium*).

<sup>31</sup> *Chahal*, *supra*, para. 113.

<sup>32</sup> *Saadi v. United Kingdom (II)*, *supra*, para. 79.

<sup>33</sup> ECHR 11 July 2006, application no. 13229/03 (*Saadi v. United Kingdom*); it has most recently been confirmed in the case *Saadi v. United Kingdom (II)*, *supra*, para. 70–73.

Concluding, the ECHR lays down a number of requirements for the detention of asylum seekers. Detention must be in conformity with domestic and international law and cannot be arbitrary. The first requirement implies that the national law that authorises detention must be sufficiently accessible and precise. The second requirement implies that “detention must be carried out in good faith, it must be closely connected to the purpose of preventing unauthorised entry of the person to the country, the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country (see *Amuur*, para. 43), and the length of the detention should not exceed that reasonably required for the purpose pursued”.<sup>34</sup> Also, persons in detention must be given the opportunity to have the lawfulness of their detention decided on by a court speedily. However, the margin of discretion for Contracting States to detain asylum seekers is wide, since no test of proportionality is required.<sup>35</sup>

### 4.3 Application of the ECHR guarantees to the derogations under the Procedures Directive

As has been shown in the previous section, even though the European Convention on Human Rights does not contain specific rules regarding procedures for granting asylum, Article 3 ECHR is of importance in this context. We have seen that Article 3 ECHR requires that claims that expulsion would lead to ill-treatment are subjected to a ‘rigorous scrutiny’ by the national authorities. This means that there should be a meaningful assessment of these claims, which should also take into account the specific communicative difficulties that are part of the asylum process. An applicant for asylum should be provided with a realistic opportunity to prove his or her claim. Furthermore, there should be room for assessing the specific circumstances of an individual case and procedural rules should be applied in a way that ensures that applicants in an asylum procedure are given a realistic opportunity to prove their claim.

The next question to be answered is what influence these general, perhaps somewhat vague, rules can have with regard to specific procedural guarantees.

#### 4.3.1 Requirements for the examination of applications

Article 8 of the Procedures Directive, from which Member States are allowed to derogate under Article 24 PD, provides for a number of requirements for

---

<sup>34</sup>*Saadi v. United Kingdom (II)*, *supra*, para. 74.

<sup>35</sup>Hailbronner 2007, p. 166.

the examination of applications for asylum. The requirements laid down in this provision include the prohibition of rejecting or excluding from examination applications for asylum on the sole ground that they have not been made as soon as possible and the requirement of ensuring that applications are examined and decisions are taken individually, objectively and impartially and that precise and up-to-date information is obtained from various sources as to the general situation prevailing in the countries of origin of applicants for asylum. These requirements seem to correspond to the requirements that have been described above.

The requirement that applications are examined and decisions are taken individually, objectively and impartially are all requirements that follow from Article 3 ECHR. The fact that applications for asylum cannot be rejected on the sole ground that they were not made as soon as possible follows from the *Bahaddar* case and the later *Jabari* case, in which it was decided that applicants should have a realistic opportunity to prove their case, and time-limits should therefore be applied with flexibility. The fact that decisions must take into account the individual situation of the applicant was stressed in the *Bahaddar* case, as was shown above. The requirement that claims that expulsion would lead to ill-treatment are subjected to a meaningful assessment by the national authorities, also implies that the examination and decision are impartial and objective. A rigorous scrutiny of claims also clearly implies that precise and up-to-date information is obtained from various sources. This has recently been confirmed in the *Salah Sheekh* case,<sup>36</sup> in which the Court stated that:

“... the Court considers that, given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations.”<sup>37</sup>

All the requirements laid down in Article 8 PD, thus, also follow from the requirement under Article 3 ECHR that claims should be subject to a rigorous scrutiny and meaningful assessment. Through the general principles of Community law, Article 8 PD should therefore be complied with in all asylum procedures, including those special procedures with regard to which the Procedures Directive provides for the possibility of derogation.

Regarding the requirement of an individual assessment of the claim on substance, reference can be made to the *Jabari* case. In this case, the five-day

---

<sup>36</sup>ECHR 23 May 2007, application no. 1948/04 (*Salah Sheekh v. The Netherlands*).

<sup>37</sup>*Ibid.*, para. 136.

time limit was considered to be in breach of Article 3 ECHR, since it denied her any scrutiny of the factual basis of her fears. This shows us that Article 3 requires that the merits of a case are examined and the right to rebut follows from the fact that applicants for asylum should be given a realistic opportunity to prove their claim. Where an examination of an application for asylum is denied altogether, because the applicant for asylum arrives from a 'European safe third country' Article 3 ECHR is not complied with.

#### **4.3.2 The right to a personal interview**

The right to a personal interview is one of the most important procedural safeguards that is not guaranteed under the derogations. The question of whether Article 3 ECHR requires that asylum seekers have a right to a personal interview has not been directly answered by the ECtHR in its case law. The general rules that were discussed in the previous section, can, however, provide an indication as to whether this is in fact the case.

As has been shown, the ECHR case law requires rigorous scrutiny of individual claims. It is likely that the right to a personal interview can be deduced from this general rule, since a personal interview is such an important factor in the examination of a claim. It is clear that the right to a personal interview is important for ensuring that an applicant for asylum can provide all relevant information and clarify any discrepancies, inconsistencies or omissions in his or her account and that these are important factors in guaranteeing a thorough investigation into and meaningful assessment of the claims.<sup>38</sup>

The abovementioned cases *Hatami* and *Ayegh v. Sweden* have shown that the particular communicative challenges of the asylum process are recognised by the ECtHR and should be taken into account. Given the special situation that applicants for asylum are in, it could be argued that a personal interview is the only way in which it can be ensured that they are able to communicate all relevant information. This case law supports the view that a personal interview cannot be dispensed with.<sup>39</sup>

This leads to the conclusion that there is strong evidence that under Article 3 ECHR a personal interview is required, before deciding on an application for asylum. As an important instrument in coming to a rigorous scrutiny of an individual asylum case, there should be the opportunity for a personal interview in all asylum procedures.

#### **4.3.3 The right to legal assistance and representation**

Just as the right to a personal interview, the right to legal assistance and representation is in the first place a right that relates to the right to a fair

---

<sup>38</sup>ECRE Information Note 2006, p. 13–14, ILPA Analysis 2004, p. 17.

<sup>39</sup>See also Costello 2006, p. 25.

trial as laid down in Article 6 ECHR. As we have seen, Article 6 ECHR does not apply in asylum cases and therefore we must, again, look at the general rules, given in the context of Article 3 ECHR. In this case, however, it is more difficult to make a connection between the general rules regarding the scrutiny of the individual application and the right to legal assistance and representation.

Although it is undoubtedly a right that plays an important role in safeguarding the rights of applicants in the asylum process,<sup>40</sup> it is doubtful that it is possible to deduce such a right from the non-*refoulement* principle as it is laid down in Article 3 ECHR and the procedural guarantees that follow from it.

It could be argued that consideration for the communicative challenges of the asylum procedure, as discussed above, means that applicants for asylum must have the opportunity to be represented by someone who understands the, possibly complex, asylum procedure and ensure that the applicant's case is put forward adequately. Also, it might be argued that free legal assistance and representation is necessary in order to allow the applicant for asylum a realistic opportunity to prove their case. However, a rigorous scrutiny and meaningful assessment of the individual situation of an applicant does not necessarily require a right to legal assistance and representation.

A right to legal assistance and representation must therefore be based on other legal grounds and as we shall see in the next chapter EC law provides more support for the idea that there is a right to legal assistance and representation in asylum procedures.

#### **4.3.4 Procedural requirements on detention**

The requirements of the ECHR for the detention of asylum seekers have been described above. In asylum procedures Member States must ensure that the detention of asylum seekers is lawful under both national and international law. The national laws under which the detention is allowed must be sufficiently accessible and precise, and there should be the opportunity of a speedy judicial review of the legality of the detention.

All of these requirements should, thus, be complied with by Member States, even in procedures in which the Procedures Directive provides for the possibility of derogations.

The ECtHR has determined that no assessment to determine whether detention was necessary in the particular case is required under Article 5 ECHR. As will be discussed below, the general principle of proportionality may, however, mean that this wide margin of assessment for Member States, may be more limited in the context of implementation of EC law.

---

<sup>40</sup>ECRE Information Note 2006, p. 15.



## 4.4 Conclusion

This Chapter has shown that the European Convention on Human Rights is of importance in asylum procedures. Article 3 ECHR on the prohibition of torture prohibits sending asylum seekers back to countries where they risk treatment in breach of Article 3 ECHR. As we have seen, Article 3 ECHR also places certain requirements on national asylum procedures. These procedures must be set up in such a way as to avoid asylum seekers being sent back to countries where they face a risk of treatment in breach of Article 3. Article 5 ECHR on the right to liberty and security also contains certain procedural requirements for the detention of asylum seekers.

In relation to the derogations, we have seen that the ECHR creates requirements for the examination of applications that correspond to those laid down in Chapter II of the Procedures Directive, in Article 8. Applications must be examined and decisions taken individually, objectively and impartially. Applicants for asylum must be given a realistic opportunity to prove their case, which also implies that procedural rules should not be applied too inflexibly. A rigorous scrutiny of the application must be made and the individual situation of the applicant must be taken into account.

The fact that Article 3 ECHR requires a meaningful assessment of the claim and a realistic opportunity for applicants to prove their claim implies that applicants for asylum have the right to a personal interview. This follows from the fact that a personal interview is essential for ensuring that all the relevant information is brought across. Also, the Court and Commission have recognised the importance of taking into account the communicative challenges of asylum proceedings.

The right to legal assistance and representation, cannot be deduced from Article 3 ECHR as easily. Although, it could for instance, be argued that free legal assistance and representation is necessary in order to allow the applicant for asylum a realistic opportunity to prove their case, the right to legal assistance and representation should not be based on Article 3 ECHR.

Finally, the ECHR lays down procedural requirements for detention. These include the requirement that the detention of asylum seekers is lawful under both national and international law. The national laws under which the detention is allowed must be sufficiently accessible and precise, and there should be the opportunity of a speedy judicial review of the legality of the detention.

Concluding, this chapter has given a first indication that the Member States are not completely free to derogate from the basic principles and guarantees laid down in Chapter 2 of the Procedures Directive. The ECHR, which must be complied with by the Member States as a general principle of Community law, creates a number of standards that asylum procedures should be in accordance with, even where there might be a possibility of derogation under the Directive.

## Chapter 5

# Procedural guarantees for asylum seekers under Community law

### 5.1 Introduction

In Chapter 2 of this thesis, a general, theoretical introduction was given regarding the general principles of Community law. This Chapter will allow us to look at general principles of Community law from a more practical point of view. It will illustrate the role that general principles of Community law play in a specific field of Community law, the procedural guarantees for asylum seekers.

As has been set out above, human rights and, in particular, the European Convention on Human Rights form part of the general principles of Community law. In this sense, the ECHR indirectly forms part of Community law, and the procedural rights examined in the previous chapter are consequently applied as general principles of Community law. This chapter will, however, focus on the procedural rights that have been developed as general principles by the European Court of Justice.

First, this chapter will give a general introduction regarding the procedural rights that have been developed as general principles of Community law. Next, the question of how Article 6 ECHR plays a role as a general principle of Community law will be discussed. An analysis will be made of the general principles developed by the ECJ that are of most importance in the context of asylum procedures. The applicability of these principles in the context of asylum procedures will then be discussed. Finally, the conclusions that can be drawn with respect to the rights and requirements that were identified in Chapter 3, will be discussed.

## 5.2 Procedural rights for asylum seekers under Community law

### 5.2.1 Introduction

Just as in the case of the ECHR, the general principles of Community law do not directly address the (procedural) rights of asylum seekers. A further difficulty is formed by the fact that the general principles relating to procedural rights are still in the process of being developed and much less established than the rights under the ECHR, which have been interpreted and explained extensively in the case law of the ECtHR. This means that there is still more controversy regarding the extent and content of the general principles of Community law. It is therefore important to examine what rights can be considered general principles of Community law and can thus be of importance in asylum proceedings.

We will discuss the right to be heard, the principle of equality of arms, the right to legal assistance and representation and the principle of good administration. First of all, however, we will return for a moment to the European Convention on Human Rights, in order to determine what importance Article 6 ECHR may have as a general principle of Community law.

### 5.2.2 Article 6 ECHR as a general principle of Community law

As was shown in the last chapter, the ECtHR has determined in its case law that Article 6 ECHR on the right to a fair administration of justice, is not applicable in the context of asylum procedures. Article 6(1) only applies when the ‘determination of civil rights and obligations’ or criminal charges are at issue. Administrative procedures, such as procedures for granting asylum, are not covered by Article 6. As a consequence, any procedural rights for asylum seekers had to be deduced from Article 3 ECHR on the prohibition of torture and inhuman or degrading punishment or treatment.

With regard to the procedural guarantees afforded to asylum seekers under the general principles of Community law, the role Article 6 ECHR plays must be reexamined. We have seen that the European Convention on Human Rights is the most important source of fundamental rights that are guaranteed in the Community legal order as general principles of Community law.<sup>1</sup> With regard to Article 6 ECHR, this raises the question as to how the standards it sets are to be applied as general principles of Community law. Does the limitation in scope of Article 6 also apply to the standards it sets as a general principle of Community law? In other words, is Article 6 ECHR incorporated as a general principle of Community law integrally, including

---

<sup>1</sup>Tridimas 2006, p. 341–342.

its limited scope, or is there a general principle of Community law that corresponds to Article 6 ECHR, but that is not limited in scope in a similar manner?

Most sources seem to suggest that the latter of these options is correct and that the standards of Article 6(1) ECHR apply as general principles of Community law, regardless of whether the procedure at hand is an administrative procedure.<sup>2</sup> This conclusion is based on case law of the ECJ. First of all, the ECJ has established in its case law that the general principles of Community law regarding a fair legal process are inspired by Article 6 ECHR.<sup>3</sup> However, the ECJ has not limited the scope of these principles inspired by Article 6 ECHR to ‘civil rights and obligations or criminal charges’.

Rather, the ECJ seems to have created its own rules for determining who can rely on the procedural rights guaranteed as general principles of Community law. Initially, the Court came up with the following rule:

“Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings.”<sup>4</sup>

Later case law extended the scope even further and determined that respect for the rights of the defence is a fundamental principle of Community law, “in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person.”<sup>5</sup> It could be argued that asylum proceedings are not initiated against an asylum seeker, but that an asylum seeker institutes these proceedings himself. But the decisive component of the term does not seem to be the “proceedings initiated against a person” but the element of adversely affecting that person. This follows from the fact that the ECJ has also recognised that the procedural rights apply in proceedings which are not initiated against a person but that may lead to a decision affecting his interests. For example, in the case where the decision directly affects a person’s legal position even if he is not the addressee of the decision.<sup>6</sup>

---

<sup>2</sup>See Battjes 2006, p. 319, 324–325; Costello 2006, p. 23–24; Peers & Rogers 2006, p. 121.

<sup>3</sup>Battjes 2006, p. 324; Case C-185/95 *Baustahlgewebe GmbH v. Commission* [1998] ECR I-8417, para. 20-21; Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-621, para. 18; Joined Cases C-174/98P and C-189/98P *Netherlands and Van der Wal v. Commission* [2000] ECRI-1, paragraph 17.

<sup>4</sup>Case 85/76 *Hoffmann-la Roche v. Commission* [1979] ECR 461, para. 9.

<sup>5</sup>See, inter alia, Case C-7/98 *Krombach* [2000] ECR I-1935, para. 42; Case C-135/92 *Fiskano v. Commission* [1994] ECR I-2885, para. 39; Case C-32/95 P *Commission v. Lisrestal and Others* [1996] ECR I-5373, para. 21.

<sup>6</sup>Case C-315/99 P *Isméri Europea v. Court of Auditors* [2001] ECR I-5281, para. 28; Case T-260/94 *Air Inter v. Commission* [1997] ECR II-997; Case T-450/93 *Lisrestal v. Commission* [1994] ECR II-1177; see also Tridimas 2006, p. 378–383, 394.

Another indication that points to the fact that the procedural guarantees are not subject to the same limitation in scope as Article 6 ECHR, can be found in the Charter of Fundamental Rights of the European Union. Article 47 of the Charter reads as follows:

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

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

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

The second paragraph of the provision corresponds to Article 6 ECHR, but does not include the limitation in scope. The Explanation that accompanies the Charter confirms that the absence of the limitation is intentional stating 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 as stated by the Court in Case 294/83, *‘Les Verts’ v. European Parliament* (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.”<sup>7</sup>

Also, referring to Article 47 of the Charter, Advocate General Alber has stated that the procedural guarantees are to be applied whenever “what is in issue is a right guaranteed by the law of the Union” regardless of whether it is an issue of civil law or public law.<sup>8</sup>

In conclusion, Article 6(1) ECHR, which ensures that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”, is not limited in scope where it is applied as a general principle of Community law. Its guarantees are, as a consequence, also applicable in asylum procedures.

<sup>7</sup>Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, Explanation on Article 47 — Right to an effective remedy and to a fair trial; see also Battjes 2006, p. 326.

<sup>8</sup>Case C-63/01 *Samuel Sidney Evans*, Opinion of Advocate General Alber, delivered on 24 October 2002, para. 85.

### 5.2.3 The rights of the defence

#### The right to be heard

Besides Article 6 ECHR, the ECJ has developed a number of procedural rights of its own, partly derived from Article 6 ECHR. The ECJ has made it clear that under the general principles of Community law, everyone is entitled to a fair legal process. The ECJ has developed this concept in its case law, usually referring to it as the ‘rights of the defence’.<sup>9</sup> While the rights of the defence include several procedural guarantees such as a right against self-incrimination<sup>10</sup> and the confidentiality of communications between lawyer and client,<sup>11</sup> the most important of the rights of the defence is the right to be heard.

The right to be heard was first recognised in a staff case, in which the Court stated:

“According to a generally accepted principle of administrative law in force in the Member States . . . the administration of these States must allow their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them. This rule, which meets the requirements of sound justice and good administration, must be followed by Community institutions.”<sup>12</sup>

The Court went on to confirm the right to be heard as a general principle of Community law in a great number of cases, mainly in the context of competition proceedings.<sup>13</sup>

The first case in which the ECJ expressly referred to the right to be heard as a general principle of Community law, was the *Hoffmann* case.<sup>14</sup> In the same case the Court also gave an indication as to the content of the right to be heard. According to the ECJ the right to be heard ensures that:

“the undertaking concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty.”

---

<sup>9</sup>Tridimas 2006, p. 373.

<sup>10</sup>Case 374/87 *Orkem v. Commission* [1989] ECR 3283.

<sup>11</sup>Case 155/79 *AM & S v. Commission* [1982] ECR 1575.

<sup>12</sup>Case 32/62 *Alvis v. Council* [1963] ECR 49, at p. 55.

<sup>13</sup>See for example *Hoffmann-la Roche v. Commission*, *supra*; *Fiskano v. Commission*, *supra*.

<sup>14</sup>The Court stated that: “Observance of the right to be heard is in all proceedings in which sanctions, in particular fines of penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings.” *Hoffmann-la Roche*, *supra*, para. 9.

This formula has since become standard case law.<sup>15</sup> Although the precise requirements depend on the type of procedure and particular circumstances of the case, the right to be heard demands that persons adversely affected by a decision must be able to ‘effectively’ or ‘properly’ put their own case and make known their views.<sup>16</sup>

### The principle of equality of arms

As stated above, the rights of the defence include other procedural rights besides the right to be heard. The right against self-incrimination and the legal privilege have already mentioned. One of the procedural principles that has been recognised as a right of the defence, and that may be of importance in the context of asylum procedures, is the principle of equality of arms.

In the *Solvay* case,<sup>17</sup> the Court of First Instance referred to ‘the general principle of equality of arms’ in order to reason that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding must be the same as that of the Commission.<sup>18</sup> This principle has since been relied on and confirmed a number of times.<sup>19</sup> The CFI has furthermore relied on the definition of the principle of equality of arms, that has been developed by the ECtHR. In the case *API v. Commission* the Court stated that the principle of equality of arms “requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”.<sup>20</sup> In a recent case,<sup>21</sup> the ECJ also referred to the principle of equality of arms as being included in the concept of a fair trial, which must be respected under Article 6 ECHR in combination with Article 6(2) EU.<sup>22</sup>

The existence of a general principle of equality of arms has thus been accepted in EC case law. Although it has been developed in relation to the

---

<sup>15</sup>Tridimas 2006, p. 386.

<sup>16</sup>Tridimas 2006, p. 385–386; referring to *Fiskano v. Commission*, *supra*, para 40; Case C-32/95 P *Commission v. Lisrestal* [1996] ECR I-5373, para. 21; Case C-269/90 *Technische Universität München* [1991] ECR I-5469; Case T-346/94 *France-Aviation v. Commission* [1995] ECR II-2841, para. 32.

<sup>17</sup>Case T-30/91 *Solvay v. Commission*, [1995] ECR II-1775.

<sup>18</sup>*Ibid.*, para. 83.

<sup>19</sup>Case T-37/91 *Imperial Chemical Industries v. Commission* [1995] ECR II-1901, para. 64; Case T-36/04 *Association de la presse internationale ASBL (API) v. Commission*, n.y.r., para. 79; see also Opinion of Advocate General Sharpston in Case C-450/06 *Varec v. État Belge*, n.y.r.

<sup>20</sup>*API v. Commission*, *supra*, para. 79; ECHR 27 October 1993, Series A no. 274 (*DomboBeheer BV v. Netherlands*), para. 33; ECHR 15 July 2003, application no. 33400/96 (*Ernst and Others v. Belgium*), para. 60; ECHR 18 April 2006, application no. 66018/01 (*Vezon v. France*), para. 31.

<sup>21</sup>Case C-305/05 *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*, n.y.r.

<sup>22</sup>*Ibid.*, para. 29-31 and 37.

right to access to documents,<sup>23</sup> it may also play a role in the context of other procedural guarantees, such as the right to legal aid.

### **The right to legal assistance and representation**

The ECJ has recognised the right to legal representation as a right of the defence.<sup>24</sup> Whether this right also includes a right to legal aid is, however, unresolved. A number of arguments can be made that support the conclusion that such a right is included as a general principle of Community law.

First of all, there is Article 6 ECHR. As was established above, although the EU is not a party to the European Convention on Human Rights,<sup>25</sup> the rights it guarantees are recognised as general principles of Community law. The rights of the defence and the right to a fair legal process, as developed by the ECJ, are, for instance, based on Article 6 ECHR. It has, furthermore, been stated that Community law offers protection ‘equivalent’ to that guaranteed by Article 6 ECHR,<sup>26</sup> that Article 6 ECHR has been incorporated into Community law,<sup>27</sup> and that “the guarantees afforded by the ECHR apply in a similar way to the Union.”<sup>28</sup> This could mean that where a right to legal aid exists in the context of Article 6 ECHR, such a right also exists as a general principle of Community law. In the *Airey* case, the right to legal aid in non-criminal cases was first recognised, in order to ensure that effective use can be made of the rights under the ECHR.<sup>29</sup> Under the case law of the ECtHR, legal aid must be provided where the applicant has insufficient means and the nature of the case means that legal assistance is required.<sup>30</sup> In order to determine whether this is the case, account must be taken of the complexity of the case and the need to ensure equality of arms.<sup>31</sup>

Secondly, Article 47 of the Charter of Fundamental Rights of the European Union, contains a right to legal aid. It states that:

“Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

---

<sup>23</sup>Groussot, p. 221.

<sup>24</sup>Jans *et al.* 2002, p. 241; Tridimas 2006, p. 373; Case 115/80 *Demont v. Commission* [1981] ECR 3147; Joined Cases 46/87 and 227/88 *Hoechst v. Commission* [1989] ECR 2859, para. 16; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para. 46.

<sup>25</sup>Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres*, *supra*, para. 37.

<sup>26</sup>Case T-112/98 *Mannesmannröhren-Werke v. Commission* [2001] ECR II-729, para. 77.

<sup>27</sup>*Samuel Sidney Evans*, Opinion of Advocate General Alber, *supra*, para. 84.

<sup>28</sup>Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, Explanation on Article 47 — Right to an effective remedy and to a fair trial.

<sup>29</sup>ECHR 9 October 1979, Series A no. 32 (*Airey v. Ireland*).

<sup>30</sup>ILPA Annex 2004, p. 13.

<sup>31</sup>*Airey*, *supra*, para. 26; Costello 2006, p. 31–32.



Since the Charter can be seen as an important guideline in indicating what the general principles of Community law are, this is another argument for the presumption that there is a right to legal aid in asylum proceedings.<sup>32</sup>

#### 5.2.4 The principle of good administration

Since in asylum procedures an administrative decision to grant asylum is made by the national authorities, the principle of good administration is of special relevance to asylum procedures. The principle has been laid down in Article 41 of the Charter of Fundamental Rights of the European Union.

- “1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
  - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
  - (c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.”

The principle of good administration has, however, not been generally recognised as a general principle of Community law. Whereas certain specific procedural rights relating to the principle of good administration, such as the rights laid down in the second paragraph of Article 41 of the Charter, are considered to be general principles of Community law,<sup>33</sup> it is disputed whether the principle of good administration as an independent ground for review is such a general principle of Community law.<sup>34</sup> It would therefore be better to regard the principle of good administration as a collection of

---

<sup>32</sup>See also Battjes 2006, p. 327.

<sup>33</sup>Groussot 2006, p. 251; Tridimas 2006, p. 411.

<sup>34</sup>Groussot 2006, p. 252; Tridimas 2006, p. 410–415; Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, Explanation on Article 41 — Right to good administration.

rights, some of which may be seen as general principles of Community law, others whose status may be less clear.

Article 41 of the Charter lays down the most important rights that are included in the principle of good administration.<sup>35</sup> In the first paragraph, it lays down the right to have one's affairs handled impartially, fairly and within a reasonable time. This right, that corresponds to the duty of care or the duty of diligence,<sup>36</sup> will be discussed first. The right to be heard, laid down in paragraph 2 (a) of Article 41, has been discussed above, as one of the rights of the defence. The rights laid down in paragraph 2 (b) and (c), the right of access to one's file and the right to a reasoned decision, will be discussed below.

### The duty of care or diligence

Of particular importance in the context of asylum decisions, is the duty of care or the duty of diligence. It has been argued that this duty, which can be defined as a duty on the EC institutions to examine carefully and impartially a request in administrative proceedings, has become a general principle of Community law.<sup>37</sup> Although the ECJ has never expressly stated that the duty of care is a general principle of Community law, a string of case-law, also regarding the duty to act in a reasonable time, can be relied on in order to come to this conclusion.<sup>38</sup> An important case that is relied on is the *Nölle* case.<sup>39</sup> In his Opinion in this case, Advocate General van Gerven stated that:

“In a matter such as this, in which the Community institutions have a wide discretion, it is all the more important that the decision adopted shall be subject to a careful review by the Court with regard to observation of essential formalities and the principles of good administration, which include the duty of care. From the same point of view the Court reviews the question whether, in accordance with the duty of care, an authority on which a

---

<sup>35</sup>Although it has been suggested that the list of rights set out in Article 41 is not exhaustive; Wakefield 2007, p. 69–70.

<sup>36</sup>Groussot 2006, p. 256–257.

<sup>37</sup>Groussot 2006, p. 261; Craig 2006, p. 373–374, Nehl 1999, p. 103 Usher, *General Principles of EC law*, Longman 1998, p. 108, referred to in Groussot 2006; H.G. Schermers and D.F. Waelbroeck, *Judicial protection in the European Union*, Kluwer 2001, p. 126; K.P.E. Lasok and T. Millet, *Judicial control in the EU: procedures and principles*, p. 369.

<sup>38</sup>See, for instance, Case T-167/94 *Nölle (II)* [1995] EC II-2589, para. 73; Case C-367/95 *P Commission v. Sytraval and Brink's France* [1998] ECR I-1719, para. 62; Case T-44/90 *La Cinq v. Commission* [1992] ECR II-1, para. 86 and Case T-62/98 *Volkswagen AG v. Commission* [2000] ECR II-2707, para. 269; with regard to the duty to act in a reasonable time see, for instance, Case C-282/95 *Guérin Automobiles v. Commission* [1997] ECR I-1503, para. 37.

<sup>39</sup>Case C-16/90 *Detlef Nölle v. Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163.

wide discretion is conferred has determined with the necessary care the features of fact and of law on which the exercise of its discretion depends . . . .”<sup>40</sup>

AG van Gerven further stated that the Court has confirmed the existence of the duty of care in other fields of Community law in which the institutions have powers of administration or management.<sup>41</sup> Examples that he gives are the management of the EAGGF,<sup>42</sup> the export licence system,<sup>43</sup> the determination of levies,<sup>44</sup> the ECSC Treaty,<sup>45</sup> and the law relating to officials.<sup>46</sup>

The ECJ has, seemingly, also accepted the existence of a duty of care. In the case *Technische Universität München*, the Court states that:

“ . . . where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.”<sup>47</sup>

The Court explicitly places the duty of care at the same level as the right to be heard and the right to a reasoned decision, both of which have been recognised as general principles of Community law, and thereby suggests that it, too, may be considered a ground for review.<sup>48</sup>

The Court of First instance has, furthermore, derived a number of obligations from the duty to act with due diligence.<sup>49</sup> These include the duty to adopt decisions “on the basis of all information which might have a bearing on the result”,<sup>50</sup> the duty to take decisions based on accurate data and fol-

---

<sup>40</sup>Opinion of Advocate General van Gerven in *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, *supra*, para. 28.

<sup>41</sup>*Ibid.*, footnote 42.

<sup>42</sup>Case C-10/88 *Italy v. Commission* [1990] ECR I-1229, paragraph 13.

<sup>43</sup>Case 122/78 *Buitoni* [1979] ECR 677; Case 181/84 *Man Sugar* [1985] ECR 2889.

<sup>44</sup>Case 64/82 *Tradaex Graanhandel v. Commission* [1984] ECR 1359.

<sup>45</sup>Case 111/63 *Lemmerz-Werke v. High Authority* [1965] ECR 677; Case 46/85 *Manchester Steel v. Commission* [1986] ECR 2351, paras. 11 and 15.

<sup>46</sup>Case 417/85 *Maurissen v. Court of Auditors* [1987] ECR 551, paras. 12 and 13; Case 125/80 *Arning v. Commission* [1981] ECR 2539; Case 105/75 *Giuffrida v. Council* [1976] ECR 1395, paras. 11 and 17.

<sup>47</sup>*Technische Universität München*, *supra*, para. 14.

<sup>48</sup>Nehl 1999, p. 132–133.

<sup>49</sup>Tridimas 2006, p. 412.

<sup>50</sup>Case T-73/95 *Oliveira v. Commission*, [1997] ECR II-381, para. 32.

lowing a thorough investigation of the file and the duty to act fairly *vis-à-vis* the citizen.<sup>51</sup>

The EU Charter of Fundamental Rights forms further evidence to support Groussot’s conclusion that the principle of care constitutes a general principle of Community law, where it incorporates this principle in the first paragraph of Article 41. As has been explained above, the Charter of Fundamental Rights forms an important guideline for establishing what rights form part of the general principles of Community law.<sup>52</sup>

### **The right of access to one’s file**

The right of access to one’s file, laid down in paragraph 2(b) of Article 41 has been recognised as a general principle of Community law. Just as the right to be heard, it was recognised by the ECJ as a corollary of the rights of the defence.<sup>53</sup>

The right of access to the file means that “the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation which may be relevant for its defence.”<sup>54</sup> Although the right of access to files was developed mainly in relation to competition cases, it is does not exclusively apply in competition proceedings and has been applied by the Court in other areas of Community law.<sup>55</sup>

### **The right to a reasoned decision**

The right to a reasoned decision has been laid down in paragraph 2(c) of Article 41 of the Charter and has also been recognised as a general principle of Community law. It is also laid down in Article 253 of the EC Treaty which requires EC institutions to give reasons for their decisions.

The extent of the requirement depends on the nature of the measure, individual decisions requiring more detailed reasoning than, for instance, generally applicable legislation.<sup>56</sup> In an individual decision, the Court has for instance stated that the considerations of fact and law must be ‘clearly and coherently’ indicated.<sup>57</sup>

---

<sup>51</sup>Tridimas 2006, p. 412, referring to Case T-139/01 *Comafrika v. Commission* [2005] ECR II-409; Case T-193/04 *Tillack v. Commission* [2006] ECR II-3995.

<sup>52</sup>See Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, Explanation on Article 41 — Right to good administration; Groussot 2006, p. 261.

<sup>53</sup>Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and others v. Commission* [2004] ECR I-123, para. 68.

<sup>54</sup>*Ibid.*, para. 68.

<sup>55</sup>Craig 2006, p. 367.

<sup>56</sup>Case 5/67 *Beus* [1968] ECR 83, para. 95; Case 250/84 *Eridania* [1986] ECR 117, para. 146.

<sup>57</sup>Case 41/69 *ACF Chemiefarma v. Commission* [1970] ECR 661, para. 690.

## 5.3 Applicability in the context of asylum proceedings

### 5.3.1 Introduction

The EC legislation on asylum is relatively new. The Procedures Directive was adopted on 1 December 2005 and the other main instruments regarding asylum were adopted in 2003 (Regulation 343/2003 ('Dublin Regulation') and Directive 2003/9/EC ('Reception Conditions Directive')) and 2004 (Directive 2004/83/EC ('Qualification Directive')). It is therefore not surprising that no extensive case law on asylum and asylum procedures has been developed by the ECJ. Consequently, the general principles pertaining to fair procedures do not directly refer to asylum procedures, but were developed in the context of direct EC administration, often in specialist fields such as competition law and anti-dumping law.<sup>58</sup> This does not mean that the general principles do not apply in the context of asylum procedures. It is, however, of importance that a careful analysis is made in order to determine whether specific principles can apply to asylum procedures. In Chapter 2 it was established that, in general, EC law should be considered to be applicable in asylum proceedings. In this section, the applicability of specific general principles in asylum procedures will be looked at in more detail. First the rights of the defence will be discussed and then the principle of good administration will be looked at.

### 5.3.2 Rights of the defence

Although the right to be heard was mainly developed in the context of competition law, the ECJ and CFI have also recognised the existence of a right to be heard in a number of other fields of Community law. Besides competition proceedings and staff cases,<sup>59</sup> which have already been mentioned, other fields in which the right to be heard has been recognised are, anti-dumping proceedings,<sup>60</sup> custom matters,<sup>61</sup> fund program cases (social fund, European Agricultural Guidance and Guarantee Fund, energy),<sup>62</sup> fishing licences,<sup>63</sup> state aids<sup>64</sup> and community trademarks.<sup>65</sup> The ECJ's trend

---

<sup>58</sup>Costello 2006, p. 23.

<sup>59</sup>*Alvis v. Council, supra*; Case T-76/92 *Jean-Panayotis Tsirimokos v. Parliament* [1993] ECR II-1281.

<sup>60</sup>Case C-49/88 *Al-Jubail Fertilizer v. Council* [1991] ECR I-3187.

<sup>61</sup>*Technische Universität München, supra*.

<sup>62</sup>*Lisrestal v. Commission, supra*; *Commission v. Listrestal, supra*; Case T-340/00 *Comunità montana della Valnerina v. Commission* [2003] ECR II-811; Case C-48/96, *Windpark Groothusen v. Commission* 1998 ECR 2873.

<sup>63</sup>*Fiskano v. Commission, supra*.

<sup>64</sup>Case C-294/90 *British Aerospace v. Commission* [1992] ECR I-493.

<sup>65</sup>Case T-174/01 *Jean M. Goulbourn v. OHIM* [2003] ECR II-789.

towards a broad application of the right to a hearing, that started with the *Al-Jubail* case,<sup>66</sup> has been continued in a number of recent cases.

In the case of *Organisation des Modjahedines du peuple d'Iran v. Council*,<sup>67</sup> for instance, the Court of First Instance decided that the rights of the defence, including the right to a hearing, are also applicable with regard to decisions taken in the context of the common foreign and security policy. According to the CFI “the safeguarding of the right to a fair hearing is, as a matter of principle, fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001”.<sup>68</sup>

This case law shows us that the right to be heard is a general principle of Community law that is widely applicable, and not just limited to competition cases.<sup>69</sup> The conclusion can thus be drawn that it is likely that the ECJ will also accept the applicability of this general principle in the context of EC asylum law.

A second question that must be answered is whether the rights of the defence can also be invoked against national authorities. The case law cited above, shows us that it can be invoked against EC institutions. However, in order to determine the relevance of this general principle of Community law with regard to the derogations in the Procedures Directive, it must also be established whether the rights of the defence should, under the general principles of Community law, also be respected in national procedures.

In answering this question, the case that is of most importance is the *Dokter* case.<sup>70</sup> In this case, the ECJ made it clear that the rights of the defence should also be respected by *national* authorities, when implementing EC law.<sup>71</sup> Although doctrine already held this to be the case,<sup>72</sup> it was the first time it was explicitly confirmed by the ECJ. The case concerned the measures taken by national authorities on the basis of EC Directives for the control of foot-and-mouth disease. Without elaborating on the reasons for finding that national authorities were bound to respect the rights of the defence, the Court simply decided that:

“Given the important consequences for breeders flowing from decision taken on the basis of Article 5 of Directive 85/511, Article 2 of Decision 2001/246 and Article 10(1) of Directive 90/425, [the rights of the defence require], in connection with the control of foot-and-mouth disease, that the addressees of such decisions be, in principle, placed in a position in which they may effectively

---

<sup>66</sup>Groussot 2006, p. 219, Tridimas 2006, p. 404.

<sup>67</sup>Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council*, n.y.r.

<sup>68</sup>*Ibid.*, para. 108, see also the Opinion of AG Maduro in Case C-402/05 P *Kadi v. Council*, n.y.r.

<sup>69</sup>Groussot 2006, p. 220.

<sup>70</sup>Case C-28/05 *G.J. Dokter* [2006] ECR I-5431.

<sup>71</sup>R.J.G.M. Widdershoven, annotation of Case C-28/05 in AB 2006/390.

<sup>72</sup>Tridimas 2006, p. 415–416; Jans *et al.* 2002, p. 241–242; Costello 2006, p. 26.

make known their views on the evidence on which the contested measure is based.”

No reason distinguishing asylum procedures can be found why this case law would not apply in asylum cases. What’s more, in *Dokter* the Court refers to the important consequences of the decision, so it is likely that in asylum procedures where, arguably, much more is at stake the Court will also find that the rights of the defence apply. In accordance with this case law, national authorities will, as a consequence, arguably, also be bound by respect for the rights of the defence when implementing EC asylum legislation such as the Procedures Directive.

Finally, it is important to now refer back to the ECHR and the prohibition of *refoulement*, that is implicitly contained in Article 3 ECHR. As an absolute right that is of fundamental importance, it will play a role where procedural rights of asylum seekers are at issue, also as a matter of Community law. The fact that the principle is referred to in the preamble to the Procedures Directive, confirms the fact that it is of importance in EC asylum law.

As has been set out above, Article 3 ECHR requires that procedural rights must ensure that asylum seekers are not sent back to a country where they risk ill-treatment. Even though the rights of the defence are not directly linked to Article 3 ECHR, their importance in ensuring that that Article 3 ECHR is practical and effective and asylum seekers are not sent back to countries where there is a risk of ill-treatment in violation of Article 3 is clear.

### 5.3.3 The principle of good administration

The principle of good administration and the procedural rights it entails, have been recognised in all manner of cases.<sup>73</sup> In particular, the Court has stressed the importance of respect for the procedural rights guaranteed by the Community legal order in procedures in which the administration has a wide margin of appreciation in taking its decision.<sup>74</sup> The Court thus apparently takes into account what kind of procedure is at issue and has recognised that certain procedures especially require adherence to the procedural rights guaranteed under Community law. Since decisions in asylum procedures can have such a great impact, it is to be expected that the principle of good administration and the related procedural rights, such as the right of access to one’s file and the duty of care, will also be recognised in the field of asylum law.

The principle of good administration has been developed by the ECJ in relation to the Community institutions. The Court has, so far, only ap-

---

<sup>73</sup>See the cases cited above in section 5.2.6.

<sup>74</sup>See *Technische Universität München*, *supra*.

plied the principle of good administration to decisions taken by one of the Community institutions, in most cases the Commission. Also, the Charter of Fundamental Rights speaks of the right to have ones affairs handled impartially, fairly and within a reasonable time by *the institutions, bodies, offices and agencies of the Union*. The question arises whether the principle must also be complied with by national authorities.

Although the case may be stronger in the context of the rights of the defence which are clearly based on Article 6 ECHR, a fundamental right, the same argument that was made in the context of the rights of the defence can be made here. The rights that are part of the principle of good administration have been recognised as being general principles of Community law. As we have seen in Chapter 2, where national authorities implement Community law, they are bound by the general principles of Community law.<sup>75</sup>

Even though the Court has not explicitly recognised a principle of good administration in national administrative proceedings, the *Dokter* case has shown that the procedural principles that apply to the Community administration also apply to the national administration, especially in cases in which the decision can have important consequences for the individual concerned. There does not seem to be any reason that would justify the application of different standards in the context of the principle of good administration.<sup>76</sup>

Again, the special role that Article 3 ECHR plays in asylum procedures must be pointed out. In asylum procedures, adhering to the principle of good administration can be seen as part of the rigorous scrutiny, required under Article 3 ECHR in order to ensure that there is no *refoulement*. The importance of this principle could mean that the ECJ will more quickly accept that the rights developed under the principle of good administration must also be complied with in national procedures.

## 5.4 Application of the Community law guarantees to the derogations under the Procedures Directive

Having examined the procedural rights that have been developed by the ECJ as general principles of Community law, it is now time to apply these principles to the derogations under the Procedures Directive. The specific procedural guarantees that were selected in Chapter 3, will be discussed one by one in order to determine the role of the general principles of Community law discussed above.

---

<sup>75</sup>Tridimas 2006, p. 415; Jans *et al.* 2002, p. 159.

<sup>76</sup>See Tridimas 2006, p. 416.



### 5.4.1 Requirements for the examination of applications

With regard to the requirements for the examination of applications, the principle of good administration and, in particular, the principle of care, is of importance. As discussed above, it is likely that the duty of care constitutes a general principle of Community law. The Court has recognised the importance of the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case.<sup>77</sup> And, as mentioned above, in the case-law of the CFI a number of obligations have been derived from the principle of good administration, in the context of the duty of the Community administration to act with due diligence.<sup>78</sup> These include the duty to adopt decisions “on the basis of all information which might have a bearing on the result”,<sup>79</sup> the duty to take decisions based on accurate data and following a thorough investigation of the file and the duty to act fairly *vis-à-vis* the citizen.<sup>80</sup>

Since asylum procedures require the examination of applications by the national authorities and an administrative decision, it is clear that the principle of good administration plays an important role. As has been shown, requirements that apply to the Community administration, must also be met by the national administration when implementing Community measures. This means that in the examination of applications for asylum, the national authorities must examine carefully and impartially all the relevant aspects of the individual case. They will have to take into consideration all information which might have a bearing on the result and a thorough investigation must take place.

With regard to the necessity of an individual examination of the application, the requirements set out above clearly imply that an individual assessment on the merits of the case must be made.

### 5.4.2 The right to a personal interview

As has been discussed above, the general principles of Community law include a right to be heard. A right to be heard does not however, necessarily imply a right to a personal interview. A right to make one’s views known in writing, could also be in compliance with a right to be heard. A number of arguments can, however, be made that would suggest that in asylum procedures, the right to be heard includes a right to a personal interview.

As has been shown, the precise requirements of the right to be heard depend on the type of procedure and particular circumstances of the case.

---

<sup>77</sup> *Technische Universität München*, *supra*, para. 14.

<sup>78</sup> Tridimas 2006, p. 412.

<sup>79</sup> *Oliveira v. Commission*, *supra*, para. 32.

<sup>80</sup> Tridimas 2006, p. 412, referring to Case T-139/01 *Comafrika v. Commission* [2005] ECR II-409; Case T-193/04 *Tillack v. Commission* [2006] ECR II-3995.

In the context of asylum procedures it can be reasoned that that type of procedure certainly requires a personal interview.

The right to be heard demands that persons adversely affected by a decision must be able to ‘effectively’ or ‘properly’ put forward their own case and make known their views. In the context of the Commission’s administrative investigations into infringements of Articles 81 EC and 82 EC, this means that the undertakings against which the investigation is directed have the right to an oral hearing; “The undertakings concerned are entitled to make known orally at a hearing their views on the objections raised against them.”<sup>81</sup>

With regard to asylum procedures, it can be argued that a personal interview is necessary, in order to allow the applicant for asylum to effectively put forward his case. Since personal testimony is often decisive for determinations,<sup>82</sup> and important for ensuring that an applicant can provide all relevant information and clarify any discrepancies, inconsistencies or omissions in his or her account,<sup>83</sup> the omission of a personal interview would undermine the opportunity of applicants for asylum to put forward their case effectively and properly. Consequently, in asylum procedures the right to be heard entails a right to a personal interview.

### 5.4.3 The right to legal assistance and representation

As has been discussed above, the right to legal assistance and representation has been recognised by the ECJ as one of the rights of the defence. A number of arguments were made, in order to come to the conclusion that this right to legal assistance and representation also implies a right to *free* legal assistance and representation. Also, we have established that the rights of the defence also apply in asylum procedures. Consequently, it is likely that a right to legal aid, can be deduced from the rights of the defence.

In the context of asylum procedures, the principle of ‘equality of arms’ is also of importance. As has been discussed above, this principle has been recognised as a general principle of Community law. It can be argued that in the context of asylum proceedings, this principle requires that applicants for asylum should have a right to legal aid.

In asylum procedures there is an inherent inequality between the asylum seekers and the national authorities.<sup>84</sup> In light of the fact that asylum proceedings are often complex and keeping in mind that asylum seekers will generally have little knowledge of national procedures and will perhaps not have the confidence to assert their rights during interviews, access to legal

---

<sup>81</sup>Opinion of Advocate General Geelhoed in Case C-411/04P *Salzgitter Mannesmann GmbH v. Commission* [2007] I-959, para. 51.

<sup>82</sup>UNHCR Provisional Observations 2004, p. 2.

<sup>83</sup>ECRE Information Note 2006, p. 13–14, ILPA Analysis 2004, p. 17.

<sup>84</sup>Da Lomba 2004, p. 203.

aid will be necessary, in order to ensure that an applicant for asylum has a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* the national authorities.

#### 5.4.4 Procedural requirements on detention

The general principles of Community law do not contain procedural guarantees with regard to the requirements on detention. The subject matter of detention is of limited importance within Community law. Although there have been some cases that dealt with detention,<sup>85</sup> these cases did not deal with the requirements on detention and no general principles have been developed regarding the matter.

Although the general principles of Community law do not address detention explicitly, the general principle of proportionality may be of importance where Article 5 ECHR is applied as a general principle of Community law. As was discussed above, in interpreting Article 5 ECHR, the ECtHR has determined that the detention of asylum seekers, that is allowed under Article 5(1)(f) ECHR, need not be subject to a test of proportionality, in the sense that an assessment is made of whether detention is necessary in the individual case in order to achieve the stated aim.

It has been argued that the general principle of proportionality should also be applied to the detention of asylum seekers. This would then imply that certain criteria must be met, such as the fact that a useful purpose can still be achieved by a detention and whether in the light of individual circumstances of a case a detention excessively interferes with an individual's basic human rights.<sup>86</sup>

## 5.5 Conclusion

The question to be answered in this Chapter was what procedural guarantees are provided for asylum seekers under the general principles of Community law.

First of all, we have seen that Article 6 ECHR, although it does not apply to asylum seekers under the regime of the ECtHR, does play a role as a general principle of Community law. And thus, the procedural requirements it provides should also be complied with in asylum procedures.

As regards the rights of the defence, the right to be heard requires that persons adversely affected by a decision must be able to 'effectively' and 'properly' make known their views and the principle of equality requires that each party is given a reasonable opportunity to present his case under

---

<sup>85</sup>Case C-215/03 *Salah Oulane v. Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I-1215; Case C-288/05 *Criminal proceedings against Jürgen Kretzinger* [2007] n.y.r.

<sup>86</sup>Hailbronner 2007, p. 169.

conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. The general principles of Community law also contain a right to legal assistance and representation.

Furthermore, the principle of good administration contains a number of procedural rights, that may be of importance in asylum procedures. First of all, the duty of care or diligence means that requests in administrative proceedings should be examined carefully and impartially, and the decision must be taken on the basis of all relevant information and after a thorough investigation of the case. And the general principles of Community law also contain a right of access to one's file and the right to a reasoned decision.

It has been established that these general principles of Community law must be applied in the context of asylum procedures and they are binding, not only on the Community institutions, but also national authorities taking decisions in asylum proceedings in the context of Community law.

Finally, the importance of these findings for the implementation of the Asylum Procedures Directive was examined. We have seen that the general principles of Community law lay down standards for the examination of applications that follow from the duty of care. Also, the rights of the defence require that there is a personal interview in asylum proceedings and that applicants for asylum have access to free legal assistance and representation. Finally, with regard to the procedural requirements on detention, we have seen that, although there are no general principles of Community law that directly deal with detention, the general principle of proportionality requires that detention of asylum seekers is proportionate. This may not be the case when detention is not necessary in order to achieve a useful purpose or when in light of individual circumstances of a case, detention excessively interferes with an individual's basic human rights.

## Chapter 6

# Application of the general principles to Article 24 PD

In this final chapter we will return to Article 24 of the Procedures Directive, in order to answer the question what requirements the general principles of Community law create for the Member States when implementing this provision. As the ECJ has shown in the case *Parliament v. Council*, the discretion granted to the Member States in this provision to derogate from the basic principles and guarantees laid down in the Directive may not be as wide as it would seem at first glance.

We have seen that both the general principles derived from the ECHR and those developed by the ECJ lay down procedural standards that apply to asylum procedures. Also, the case *Parliament v. Council* has made it clear that national procedures that are based on an express derogation provided for in the Directive, must also comply with these standards. Below, we will see what this means for the implementation of the special procedures with regard to which the Directive allows for derogations from the basic principles and guarantees.

### **6.1 Article 24(1): subsequent applications and border procedures**

#### **6.1.1 subsequent applications**

Under Article 24(1) under (a) PD, the principles laid down in Chapter II of the Procedures Directive, do not apply to procedures for the preliminary examination of subsequent applications. Although Article 34 PD does provide for a number of procedural guarantees, a lot of important rights are not guaranteed. In Chapter 3 a few of these rights were chosen to look at in light of the general principles of Community law. The rights that were selected are the requirements for the examination of the application, the right

to a personal interview, the right to legal assistance and representation and requirements regarding detention.

With regard to the requirements for the examination of applications, we have seen that Article 3 ECHR requires a rigorous scrutiny and meaningful assessment of claims that expulsion would lead to ill-treatment. This entails an individual examination of the application. Also the duty of care, which has been established to be a general principle of Community law, is of importance in this context. This duty implicates that national authorities must examine carefully and impartially all the relevant aspects of the individual case. All the information which might have a bearing on the result must be taken into account.

Since these requirements for the examination of application follow from the general principles of Community law, they must all be complied with by the Member States. In a subsequent application, where new facts or circumstances have arisen, the national authorities will thus have to ensure that these new aspects are examined just as rigorously, carefully and impartially as the original application.

Article 24(1) in combination with Article 32–34 PD seems to allow Member States not to provide for a right to a personal interview in procedures for the preliminary examination of subsequent applications. Here too the general principles of Community law suggest otherwise.

It can be inferred from Article 3 ECHR that applicants for asylum have a right to a personal interview. This follows from the fact that Article 3 ECHR requires a meaningful assessment of the claim and the only way to ensure this is by granting a personal interview. Furthermore, the right to be heard is a general principle of Community law developed by the ECJ as one of the rights of the defence. It is likely that, in asylum procedures, this right includes the right to an oral hearing.

This means that also the right to a personal interview cannot be dispensed with as easily as may seem from Article 24(1) PD. In the case of a subsequent application, it is possible that a personal interview has already been held in the initial procedure. However, where there are new facts or circumstances that mean that a subsequent application is made, there must, again, be a possibility for applicants for asylum to put forward their case with regard to the new facts or circumstances.

Under the ECHR, the right to legal assistance and representation could also be inferred from Article 3 ECHR. It can be argued that the specific communicative challenges of the asylum procedure require an applicant for asylum to have access to legal assistance and representation in order to have a realistic opportunity to prove their case. Although it is perhaps difficult to infer this right directly from Article 3 ECHR, we have seen that Article 6 ECHR is also applicable to asylum proceedings as a general principle of Community law. From Article 6 ECHR combined with the principle of equality of arms and Article 47 of the Charter of Fundamental Rights, a

general principle guaranteeing a right to free legal assistance and representation can be inferred. Again, this general principle must be complied with by the Member States even where they make use of the express derogation of Article 24 PD. So that asylum seekers are adequately assisted in all stages of their procedure.

Finally, there are the requirements for detention. Article 5 ECHR lays down a number of requirements for the detention of asylum seekers. Detention must be in conformity with domestic and international law and may not be arbitrary. Detention must be carried out in good faith and be closely connected to the purpose of preventing unauthorised entry of the person to the country, the length of the detention should not exceed that which is reasonably required for the purpose pursued and persons in detention must be given the opportunity to have the lawfulness of their detention decided on by a court speedily. To these requirements we can, possibly, add the requirement of proportionality. The principle of proportionality is a general principle of Community law and in the context of detention could mean that detention must be necessary to achieve a useful purpose and must not excessively interfere with an individual's basic human rights in light of the individual circumstances of a case.

### **6.1.2 border procedures**

As was shown in Chapter 3, the Procedures Directive allows for derogations from the basic principles and guarantees in so-called special border procedures. Under this procedure the right to a personal interview is guaranteed. Although the right to legal assistance and representation is also guaranteed, Article 16 PD (on the scope of legal assistance and representation), which ensures that a legal advisor or counsellor has access to the file, is not. Furthermore, the requirements for the examination of the application and the requirements on detention, can be derogated from.

The requirements for the examination of the application have been discussed in relation to subsequent procedures. In the context of border procedures it also of importance that the applicant's claim is examined rigorously, impartially and carefully. The fact that special border procedures only concern the question of whether the asylum seeker is allowed to enter the country in order to apply for asylum, does not mean that their claim should be examined in any less detail. As was explained in Chapter 3, a negative decision has consequences that are just as far-reaching as if a decision was made on the application for asylum itself.

The fact that requirements on detention are also of importance in border procedures, was illustrated in the abovementioned *Amuur* case. The case concerned the detention of Somalian asylum seekers that had been refused entry to French territory and the ECtHR determined that in the case of such asylum seekers it is of fundamental importance to avoid all risk of

arbitrariness.<sup>1</sup>

With regard to the scope of legal assistance and representation, we have seen above that the general principles of Community law contain a right of access to one's file. This will mean that although Article 16 PD may be derogated from under Article 24 PD, as a general principle, right of access to one's file must be guaranteed by the Member States. In border procedures (as well as, of course, in subsequent procedures) this means that legal advisors should have access to the file.

## 6.2 Article 24(2): European safe third countries

Finally, the provisions on European safe third countries allow the Member States to provide that no, or no full examination of the application will take place, once it has been established that the applicant for asylum comes from a 'European safe third country'. In such cases, none of the procedural guarantees laid down in Chapter II of the Procedures Directive will apply.

As we have seen above, this is not in compliance with the general principles of Community law. The requirements for the examination of applications clearly call for a meaningful assessment of the individual claim. Both under Article 3 ECHR and under the duty of care, it is not possible to dispense with an examination of an application on substance.

Whereas the derogations laid down in Article 24(1) can be interpreted in a way so as to ensure that the general principles of Community law are still complied with, this is less clear for Article 24(2). Article 24(2) refers to Article 36 of the Procedures Directive which states that:

"Member States may provide that no, or no full examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2."

In *Parliament v. Council*, in which the Court set out how derogations must be implemented in line with the general principles of Community law, we saw that a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.

Where Article 36 PD allows Member States to provide that no examination of the asylum application on substance will take place when the applicant for asylum has entered its territory from a safe third country, the

---

<sup>1</sup> *Amuur*, *supra*, para. 50.



provision seems to expressly authorise Member States to adopt legislation not respecting the general principles of Community law. If the Court is asked to rule on the legality of this provision, it is thus likely that it will apply the same rule as it did in *Parliament v. Council* and unlike in *Parliament v. Council*, find that this provision is in breach of the general principles of Community law.

## Chapter 7

# Conclusion

In conclusion, we have seen that the general principles of Community law play an important role with regard to the Asylum Procedures Directive. The European Court of Justice has established that the general principles must be adhered to by the Member States where they make use of the possibility to derogate from rights laid down in a directive. This will mean that when a national court is confronted with a question regarding asylum procedures that have been set up in derogation of the Procedures Directive, it will have to assess this procedure in light of the general principles of Community law. Where it finds that national procedures are not in compliance with the general principles, this might even mean that decisions on applications for asylum may have to be annulled.

In this thesis, an overview has been given of procedural guarantees that can be derived from the general principles of Community law. As has been shown, the ECHR creates a number of procedural rights for asylum seekers and procedural rights can also be derived from other general principles of Community law, such as the rights of the defence and the duty of care. In combination, these two sources provide broad protection for asylum seekers. The protection seems to be more extensive than when they are applied separately. The rights developed by the ECJ are often wider in scope and extent of protection, than the ECHR. While, for instance, the ECHR does not allow for the application of Article 6 ECHR in asylum procedures, the ECJ has extended the scope of this right so that, as a general principle of Community law, it also includes asylum procedures. Also, where Article 5 ECHR does not provide for a test of proportionality of the detention of asylum seekers, the general principle of proportionality steps in to fill that gap. On the other hand, under Article 3 ECHR extensive case law has been developed regarding asylum procedures, that can serve as a standard in the Community law context. It illustrates how the principle of non-*refoulement* as laid down in Article 3 ECHR can create requirements for asylum procedures and the importance of providing procedural protection to asylum

seekers.

These standards, rights and principles will have to be taken seriously by the Community courts as well as the national courts and as such the general principles of Community law will come to play a prominent role as an integral part of EC asylum law.

# Appendix A

## Bibliography

### **Amnesty International 2006**

Amnesty International, 'The European Union — now more free, secure and just? Amnesty International's human rights assessment of the Tampere agenda', June 2004.

### **Battjes 2006**

H. Battjes, *European asylum law and international law*, Leiden: Martinus Nijhoff Publishers 2006.

### **Costello 2006**

C. Costello, 'The European asylum procedures directive in legal context', *New Issues in Refugee Research Paper*, no. 134, November 2006.

### **Craig 2006**

P. Craig, *EU administrative law*, New York: Oxford University Press 2006.

### **Craig & de Búrca 2003**

P. Craig, G. de Búrca, *EU law — Text, cases and materials*, New York: Oxford University Press 2003.

### **Da Lomba 2004**

S. Da Lomba, *The right to seek refugee status in the European Union*, Antwerp: Intersentia 2004.

### **Van Dijk & van Hoof 2006**

P. van Dijk, G.J.H. van Hoof *et al.*, *Theory and practice of the European Convention on Human Rights*, Antwerpen-Oxford: Intersentia 2006.

### **ECRE Information Note 2006**

European Council on Refugees and Exiles, 'ECRE information note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status', October 2006.

**Groussot 2006**

X. Groussot, *General principles of Community law*, Groningen: Europa Law Publishing 2006.

**Hailbronner 2007**

K. Hailbronner, 'Detention of asylum seekers', *European Journal of Migration and Law*, Vol. 9, 2007, pp. 159–172.

**ILPA Analysis 2004**

Immigration Law Practitioners' Association, 'Analysis and critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', July 2004.

**ILPA Annex 2004**

Immigration Law Practitioners' Association, 'Binding Standards: annex to Analysis and critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', July 2004.

**Jans et al. 2002**

J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Inleiding tot het Europees bestuursrecht*, Nijmegen: Ars Aequi Libri 2002.

**Lambert 1999**

H. Lambert, 'Protection against *refoulement* from Europe: human rights law comes to the rescue', *International and Comparative Law Quarterly*, Vol. 48, no. 3 (July 1999), pp. 515–544.

**Lenaerts & van Nuffel 2005**

K. Lenaerts and P. van Nuffel, *Constitutional law of the European Union*, London: Sweet & Maxwell 2005.

**Nehl 1999**

H. Nehl, *Principles of administrative procedure in EC law*, Oxford: Hart publishing 1999.

**Peers & Rogers 2006**

S. Peers and N. Rogers (eds.), *EU immigration and asylum law: text and commentary*, Leiden: Nijhoff 2006.

**Reneman 2007**

M. Reneman, 'Procedurerichtlijn biedt kansen: over effectieve rechtsbescherming in asielprocedures', *Nieuwsbrief Asiel- en Vreemdelingenrecht*, no. 5, 2007.

**Tridimas 2006**

T. Tridimas, *The general principles of EU law*, Oxford: Oxford University Press 2006.

**Wakefield 2007**

J. Wakefield, *The right to good administration*, Alphen aan de Rijn: Kluwer Law International 2007.

**UNHCR Provisional Observations 2004**

Summary of UNHCRs Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, Council Document 14203/04, Asile 64, November 2004.

# Appendix B

## Table of Cases

### European Court of Justice

Case 32/62, *Alvis v. Council*, [1963] ECR 49

Case 111/63, *Lemmerz-Werke v. High Authority*, [1965] ECR 677

Case 5/67 *Beus* [1968] ECR 83

Case 41/69 *ACF Chemiefarma v. Commission* [1970] ECR 661

Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125

Case 105/75, *Giuffrida v. Council*, [1976] ECR 1395

Case 85/76, *Hoffmann-la Roche v. Commission*, [1979] ECR 461

Case 122/78, *Buitoni*, [1979] ECR 677

Case 155/79, *AM & S v. Commission*, [1982] ECR 1575

Case 115/80, *Demont v. Commission*, [1981] ECR 3147

Case 125/80, *Arning v. Commission*, [1981] ECR 2539

Case 64/82, *Tradax Graanhandel v. Commission*, [1984] ECR 1359

Case 294/83, *Les Verts v. European Parliament*, [1986] ECR 1339

Case 181/84, *The Queen, ex parte E. D. & F. Man (Sugar) Ltd v. Intervention Board for Agricultural Produce (IBAP)*, [1985] ECR 2889

Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR I-621

Case 250/84 *Eridania* [1986] ECR 117

Case 46/85, *Manchester Steel v. Commission*, [1986] ECR 2351

Case 417/85, *Maurissen v. Court of Auditors*, [1987] ECR 551

Case 374/87, *Orkem v. Commission*, [1989] ECR 3283

Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR 2859

Case C-5/88 *Wachauf* [1989] ECR 2609

Case C-10/88 *Italy v. Commission* [1990] ECR I-1229

Case C-49/88, *Al-Jubail Fertilizer v. Council*, [1991] ECR I-3187

Case C-260/89 *ERT* [1991] ECR I-2925

Case C-16/90, *Detlef Nölle v. Hauptzollamt Bremen-Freihafen*, [1991] ECR I-5163

Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, [1991] ECR I-5469

Case C-294/90, *British Aerospace v. Commission*, [1992] ECR I-493

Case C-135/92, *Fiskano v. Commission*, [1994] ECR I-2885

Case C-32/95 P, *Commission v. Lisrestal and Others*, [1996] ECR I-5373

Case C-185/95, *Baustahlgewebe GmbH v. Commission*, [1998] ECR I-8417

Case C-282/95, *Guérin Automobiles v. Commission*, [1997] ECR I-1503

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

Case C-48/96, *Windpark Groothusen v. Commission*, 1998 ECR 2873

Case C-7/98, *Dieter Krombach v André Bamberski*, [2000] ECR I-1935

Joined Cases C-174/98P and C-189/98P, *Netherlands and Van der Wal v. Commission*, [2000] ECRI-1

Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P *Limburgse Vinylmaatschappij and Others v. Commission* [2002] ECR I-8375

Case C-274/99 P *Connolly v. Commission* [2001] ECR I-1611

Case C-315/99 P, *Ismeri Europea v. Court of Auditors*, [2001] ECR I-5281

Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411

Case C-94/00, *Roquette Frères*, [2002] ECR I-9011



Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and others v. Commission* [2004] ECR I-123

Case C-63/01, *Samuel Sidney Evans*, [2003] ECR I-14447

Case C-215/03, *Salah Oulane v. Minister voor Vreemdelingenzaken en Integratie*, [2005] ECR I-1215

Case C-540/03 *Parliament v. Council* [2006] ECR I-5769

Case C-411/04P, *Salzgitter Mannesmann GmbH v. Commission*, [2007] I-959

Case C-28/05, *G.J. Dokter v. Minister van Landbouw, Natuur en Voedselkwaliteit*, [2006] ECR I-5431.

Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*, n.y.r.

Case C-432/05 *Unibet* [2007] ECR I-2271

Case C-341/05 *Laval*, n.y.r.

Case C-288/05, *Criminal proceedings against Jürgen Kretzinger*, [2007] n.y.r.

Case C-402/05 P, *Kadi v. Council*, n.y.r. (Opinion 16 January 2008)

Case C-450/06, *Varec v. État Belge*, n.y.r. (Opinion 25 October 2007)

Case C-62/06 *Fazenda Pública - Director Geral das Alfândegas v. ZF Zefeser - Importação e Exportação de Produtos Alimentares Lda* n.y.r.

Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, n.y.r.

### **European Court of First Instance**

Case T-44/90, *La Cinq v. Commission*, [1992] ECR II-1

Case T-76/92, *Jean-Panayotis Tsirimokos v. Parliament*, [1993] ECR II-1281

Case T-450/93, *Lisrestal v. Commission*, [1994] ECR II-1177

Case T-30/91, *Solvay v. Commission*, [1995] ECR II-1775

Case T-37/91, *Imperial Chemical Industries v. Commission*, [1995] ECR II-1901

Case T-346/94, *France-Aviation v. Commission*, [1995] ECR II-2841

Case T-260/94, *Air Inter v. Commission*, [1997] ECR II-997

Case T-167/94, *Nölle (II)*, [1995] EC II-2589

Case T-62/98, *Volkswagen AG v. Commission*, [2000] ECR II-2707

Case T-112/98, *Mannesmannröhren-Werke v. Commission*, [2001] ECR II-729

Case T-174/01, *Jean M. Goulbourn v. OHIM*, [2003] ECR II-789

Case T-340/00, *Comunità montana della Valnerina v. Commission*, [2003] ECR II-811

Case T-139/01, *Comafrica v. Commission*, [2005] ECR II-409

Case T-193/04, *Tillack v. Commission*, [2006] ECR II-3995

Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, n.y.r.

Case T-36/04, *Association de la presse internationale ASBL (API) v. Commission*, n.y.r.

### **European Court of Human Rights**

ECHR 9 October 1979, Series A no. 32 (*Airey v. Ireland*)

ECHR 29 February 1988, Series A no. 129 (*Bouamar v. Belgium*)

ECHR 7 July 1989, Series A no. 161 (*Soering v. the United Kingdom*)

ECHR 30 October 1991, Series A no. 215 (*Vilvarajah and others v. The United Kingdom*)

ECHR 27 October 1993, Series A no. 274 (*DomboBeheer BV v. Netherlands*)

ECHR 25 June 1996, Reports 1996-III (*Amuur v. France*)

ECHR 15 November 1996, Reports 1996-V (*Chahal v. the United Kingdom*)

ECHR 19 February 1998, Reports 1998-I (*Bahaddar v. the Netherlands*)

ECHR 30 July 1998, Reports 1998-V (*Aerts v. Belgium*)

ECHR 11 July 2000, Reports of Judgments and Decisions 2000-VIII (*Jabari v. Turkey*)

ECHR 5 October 2000, Reports of Judgments and Decisions 2000 - X (*Maaouia v. France*)

ECHR 5 February 2002, Reports of Judgments and Decisions 2002-I (*Conka v. Belgium*)

ECHR 15 July 2003, application no. 33400/96 (*Ernst and Others v. Belgium*)

ECHR 29 June 2004, application no. 6276/03 and 6122/04 (*Taheri Kandomabadi v. The Netherlands*)

ECHR 4 February 2005, application no. 46827/99 and 46951/99 (*Mamatkulov and Askarov v. Turkey*)

ECHR 18 April 2006, application no. 66018/01 (*Vezon v. France*)

ECHR 11 July 2006, application no. 13229/03 (*Saadi v. United Kingdom*)

ECHR 7 November 2006, application no. 4701/05 (*Ayegh v. Sweden*)

ECHR 23 May 2007, application no. 1948/04 (*Salah Sheekh v. The Netherlands*)

ECHR 28 January 2008, application no. 13229/03 (*Saadi v. United Kingdom (II)*)

#### **European Commission on Human Rights**

EComHR 23 April 1998, application no. 32448/96 (*Hatami v. Sweden*)