European Chapter of IARLJ – Lisbon Conference

The right to an effective remedy [1]

The scope of Article 39 of the Procedures Directive (2005/85/EC) and the effect of the proposals for amendment of the Directive (2009 COM 554/4)

Introduction

In this paper, after first comparing the current Article 39 of the Procedures Directive ('PD') and its proposed replacement by Article 41 of the amended Directive proposed by the European Commission, we shall consider two principal issues:

1. what is the meaning of the phrase '*the right to an effective remedy before a court or tribunal*' which is common to both Article 39 of the current Directive and to the proposed replacement Article 41;

2. what is the scope of the enquiry required to give that effective remedy.

But it is first necessary that we explore the differences in wording between the current and the proposed Articles.

The proposed amendments to both the Qualification Directive (2004/83/EC) ('QD') and to the PD are put forward under the provisions of Article 63 of the Consolidated Version of the Treaty Establishing the European Community (TEC) incorporated under the Amsterdam Treaty of 2 October 1997 which came into force on 1 May 1999.

They accordingly have no reference to the amendments introduced by the Treaty on the Functioning of the European Union (TFEU), the Lisbon Treaty, and, in particular, the proposed change in the basis of the Common European Asylum System from one based on '*minimum standards*' both of qualification and procedures under Article 63(1)(c) and (d) TEC to one based on the concept of a '*uniform status*' throughout the European Union of asylum and subsidiary protection (Article 78(2)(a) and (b) TFEU) and '*common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status*' (Article 78(2)(c) TFEU).

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As we shall see, however, the TFEU is not wholly irrelevant to the issues with which we are concerned since it incorporates the Charter of Fundamental Rights of the European Union as part of European Law. Article 47 of that Charter is of particular relevance to an understanding of the terms used in Article 39 and its proposed replacement.

A comparison of the provisions of Article 39 PD and proposed Article 41 PD

There is annexed to this paper a copy of the two articles printed side by side for ease of reference.

Article 39.1 PD

The opening words of paragraph 1 are similar in that each imposes a mandatory requirement on Member States:

> '*to ensure that applicants … have the right to an effective remedy before a court or tribunal against the following: …'*

and each paragraph then goes on to list the categories of decisions in respect of which such an effective remedy must be provided. We will not analyse those sub-provisions further because it suffices to say that all categories of protection decisions by the Member State under the PD are encompassed within the specified categories. [2]

The proposed paragraph 1 does, however, differ from that under the current PD in one important respect. The 2005 PD imposed requirements only in respect of asylum claims under the QD and not of claims for subsidiary protection (article 3.1 PD). So far as claims for subsidiary protection were concerned, the application of the PD procedures was required only in cases where the Member State concerned employed or introduced a procedure in which both asylum and subsidiary protection applications were considered together. To that extent there was a lack of symmetry between the QD and PD although in practice many Member States chose also to apply the provisions

[2] UNHCR published in March 2010 its research paper 'Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice'. This was based on research into the operation of the PD in the following Member States: Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Italy, Netherlands, Slovenia, Spain and the United Kingdom. The report establishes that there remains considerable divergence of approach between the Member States in asylum procedures and, in relation to Article 39, makes this generalized observation:

'The notion of effectiveness implies that a person should be able to access the remedy in not only legal terms, but also in practice. The research indicated that, in practice, various and numerous impediments face prospective appellants in some Member States, relating among other things to inadequate information provided to applicants on how to appeal, and to which appeal body; extremely short time-limits within which to appeal; lack of linguistic assistance for applicants with regard to information on how to appeal and with the submission of the appeal; a shortage of legal advisers and a lack of competent legal advisers; a requirement to lodge the appeal in person, which is impossible for some applicants to fulfil in practice; difficulties in accessing the case file in a timely manner; and limited physical access to the court or tribunal due to distance and lack of financial resources to travel.

In some Member States, a number of these impediments may combine to render the right of appeal ineffective in practice. Moreover, the obstacles listed above tend to be exacerbated when the applicant is in detention, and shortened time limits generally apply.'

of the PD to claims for subsidiary protection, the new category of international protection recognized under the QD.

The proposed Article 41.1 of the amended PD removes that distinction and applies the provisions of the PD to all claims for international protection arising under the QD.

Nothing in Article 39 expanded on the matters which were to be taken into account in the provision of the prescribed *'effective remedy',* although, having regard to the requirements imposed on the State determining authority as to the consideration of the claim and the nature and content of its written decision, it would have been strange if Article 39 was not to be regarded as imposing at least similar requirements on the court or tribunal providing an effective remedy against the initial executive decision.

The proposed Article 41 is not, however, so reticent and Articles 41.2 and 3 propose important clarification on two issues.

First, Article 41.2 provides that the right to an effective remedy against the rejection of an asylum claim shall be preserved even when the applicant has been recognized as entitled to subsidiary protection status.

Secondly, Article 41.3 imposes a mandatory requirement that, *'at least in appeal procedures before a court or tribunal of first instance'*, there must be provision for:

(a) 'a full examination of both facts and points of law' including

(b) 'an ex nunc examination of the international protection needs' as specified in the QD.

These requirements mirror to some extent the obligations of the first instance determining authority that applicants are to be examined and decisions reached individually, objectively and impartially (Article 8.2(a) PD), after taking into account country of origin information (Article 8.2(b)) supported by a written decision in which the reasons for the decision both in fact and law are set out (Article 9(2) PD).

It was clearly not considered necessary by the Commission to spell out such mandatory requirements of a review at the time of adoption of the PD.

At paragraph 3.1.5 of the Explanatory Memorandum which precedes the proposal for amendments to the existing PD, the Commission explains the current proposals in the following terms:

> *'The proposal facilitates access to effective remedy for asylum applications in line with Community and international obligations of Member States. In this respect, the proposal is largely informed by ongoing developments in respective case law of the ECJ* [European Court of Justice] *and the ECtHR* [European Court of Human Rights].*'*

Significantly, the Commission is making it clear that the expansion of the existing Article 39 PD requirements in the proposed amendments is seen as being no more than declaratory of the effect of Community law and international obligations as they already exist.

Article 39.2 PD

This concerns the need for member States to provide necessary rules for the conduct of the review or appeal, including the imposition of time limits.

The proposed amendment (Article 41.4) adds two important restrictions to the apparent generality of the existing wording.

Firstly, the time limits imposed must be *'reasonable'* and the effect of that requirement is emphasised in the second paragraph of the proposed amendment which states:

> *'The time limits shall not render impossible or excessively difficult the access of applicants to an effective remedy pursuant to paragraph 1. Member States may also provide for an ex officio review of decisions taken pursuant to Article 37.'*

As we shall see later it is probably right to regard the first sentence as being merely declaratory of the generally applicable principles of EU and international law.

The second sentence refers to proposed Article 37 (formerly Article 35 PD) which is concerned with border procedures. A refused applicant has a right to seek review of border decisions under Art. 39.1(a)(ii) which is preserved by proposed Article 41.1(a)(iii), but this provision gives a permissive power to the Member State to provide for automatic review of border decisions of its own volition (presumably by the 'determining authority' which would then generate a further appealable decision).

Article 39.3(a) and (b) PD

These provisions are concerned with whether the review or appeal application has a suspensive effect in terms of removal of the applicant and are drawn in generally permissive terms and without regard to the extensive ECtHR jurisprudence on this important issue. The proposed amendments in Article 41.5 – 8 are intended to remedy this deficiency.

Subject to a saving in cases falling to be dealt with under the Dublin Regulation (which are governed by the review provisions of that Regulation), Article 41.5 states the general position unequivocally. It provides:

> *'Without prejudice to paragraph 6, the remedy provided for in paragraph 1 of this Article shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome.'*

The mere lodging of the application for a review or appeal will accordingly generally have the effect of suspending any removal directions until the application is finally disposed of.

Article 41.6 is concerned only with decisions taken either under the accelerated procedure under proposed Article 27.6, or to consider an application inadmissible under proposed Article 29.2(d). Article 27.6 relates only to cases of accelerated examination procedure in the course of reaching the first instance decision and Article 29.2(d) applies to applications declared inadmissible in the case of lodgement of an identical application after a final decision. They are therefore concerned with applications which, in broad terms, may be considered generally abusive of process. But, even in these cases, where suspensive effect *'is not foreseen under national legislation'*, the Member State cannot deprive the relevant court or tribunal, to whom application has been made pursuant to Article 41.1, of:

'the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or acting on its own motion.'

Article 39.4 PD

This contains a general permissive power for member States to provide time-limits within which the court or tribunal is to determine the review or appeal. The proposed Article 41.9 changes that to a mandatory requirement.

Article 39.5 PD

This paragraph provides the court or tribunal with the opportunity to dismiss an application in circumstances where both (a) the applicant had already been granted a status giving the same rights and guarantees as refugee status under the QD and (b) the court or tribunal came to the view that there was insufficient interest on the applicant's part in maintaining the proceedings.

It will be noted that this is a method of curtailing proceedings open only to the court or tribunal and not to the executive of the Member State so that a judicial decision to dismiss on these grounds is still required.

The proposed Article 41.10 is in identical terms.

Article 39.6 PD

This, again, is left unaltered in the proposed replacement provision – Article 41.11.

It simply gives the Member State the power in legislation to prescribe the conditions under which implicit withdrawal or abandonment of pursuit of the remedy under paragraph 1 has taken place, and to prescribe appropriate rules on the procedure to be followed in such circumstances.

The meaning of the phrase '*the right to an effective remedy before a court or tribunal*'

We can turn now to the first of the two questions posed at the beginning of this Paper.

The issue can be expressed as whether that phrase is to be interpreted solely by reference to the provisions of the PD, whether in its current or proposed amended form, or whether it is to be interpreted under Community Law generally, and/or international conventions, and/or the national law of Member States.

It is convenient to deal with these three propositions in reverse order.

Effect of the national law of Member States

Since the PD is an EC Directive, its provisions require to be transposed into the national law of Member States. In the application of Article 39 PD rights it will, therefore, always first be necessary to start from the relevant transposing provisions of the national law. But, insofar as

they have not been so transposed, they will have vertical direct effect provided that they are sufficiently clear and precisely stated, are unconditional and non-dependent, and confer a specific right on which an applicant can base his claim.[3]

Moreover, both the QD and the PD are concerned with '*minimum standards'* and there is a general saving for Member States to apply more favourable standards.[4]

Finally, the national law of Member States may independently have constitutional traditions which relate to the right to access to justice and to the provision of an effective remedy before a court or tribunal. These may be of relevance[5], particularly in the case of those Member States who have applied for a derogation from the TFEU.[6]

The relevance of international conventions and treaties

The right to an effective remedy is a concept which is already well-known to international law. It appears, for example, in Article 2 of the United Nations International Covenant on Civil and Political Rights (ICCPR) and in Articles 6 and 13 of the ECHR.

The international conventions do not, however, have a direct effect on the interpretation of Article 39 or its proposed replacement. Insofar as they have informed the concept of an effective remedy, however, they have an indirect effect as part of the inspiration and source material for the European Charter. This applies with particular force to Articles 6 and 13 of the ECHR which were relevant to the terms of Article 47 of the European Charter. Further, although it does not directly apply ECtHR jurisprudence, the ECJ will have general regard to that jurisprudence and frequently applies principles derived from it.[7]

The relevance of Community Law generally and the European Charter specifically.

In proceedings concerning enforceable Community rights, the general principles of Community law will be applied by the ECJ. Those principles are, in general terms, set out in the European Charter of Fundamental Rights, 2000.

Article 47 of the Charter, which is titled *'Right to an effective remedy and to a fair trial'*, provides as follows:

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[3] *Van Gend en Loos v Netherlands* [1963] ECR 1.

[4] Article 5 PD provides: *'Member States may introduce or maintain more favourable standards on procedures for granting and with drawing refugee status, insofar as those standards are compatible with this Directive.'*

[5] See commentary on Recital 27 PD below.

[6] This issue is the subject of separate consideration below.

[7] The ECtHR does not have jurisdiction to admit claims arising from asylum decisions of Contracting States pursuant to Articles 6 and 13 ECHR (see *Maaouia v France* 33 EHRR 1037 GC) because they fall within the concept of public law decisions: but, such a distinction does not exist under Community Law where rights granted are ultimately within the jurisdiction of the ECJ.

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.

Articles 18 and 19 are concerned respectively with the right to asylum and to protection in the event of removal in the following terms:

'18. The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').'

And

'19. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

Under the TEC, the Charter did not form part of EU law although it did have the status of a Charter '*solemnly proclaimed*' by the European Parliament, the Council and the Commission. Moreover, the Charter was drawn up on the basis that it was declaratory of existing principles to which Member States acceded.

It has been accorded some recognition at first instance in the ECJ as a source for general principles of Community Law and many EU laws make direct reference to it in their recitals, as appears below.

Until the enactment of the TFEU, therefore, the European Charter had already some limited effect, but that position changed on the coming into force of the TFEU on 1 December 2009. Article 6 of the Treaty makes a number of provisions which have important implications for the protection of third country nationals claiming protection under the QD.

The relevant provisions of Article 6 TFEU are:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and

with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The importance of this is that the effective remedy required under the PD, whether in its existing or proposed form, is concerned with a decision which affects a Community right to international protection conferred upon nationals of third countries or stateless persons who meet the requirements of the QD.

The methodology of application of Article 39 PD rights

The consideration of the meaning and effect of the provisions for an effective remedy under Article 39 begins with the consideration of that Article as transposed into the national law of the relevant Member State.

Since Article 39 does not provide any definition of the phrase *'an effective remedy'* it is appropriate to consider the Directive as a whole to elucidate its meaning. There is some guidance to be obtained from Recitals 8 and 27.

Recital 8 of the PD provides:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Fundamental Charter of the European Union.'

Recital 27 currently provides:

'*It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty.*[8] *The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.'*

I would suggest, therefore, that Article 47 was relevant to the interpretation of the right conferred by Article 39 prior to the enactment of the TFEU. I would suggest further that since 1 December 2009, when the TFEU came into force, Article 47 is a primary relevant source for the interpretation of the meaning of the effective remedy prescribed by Article 39 PD.

[8] Article 234 TEC is concerned with conferring jurisdiction on the ECJ.

So far as Recital 27 is concerned, it not only reflects that issues as to effective remedy are justiciable before the ECJ but also incorporates the Member States' national law norms as the appropriate law against which to consider the provision of an effective remedy. As we shall see below, both the United Kingdom and the Czech Republic have effective national law concepts concerned with the right of access to the courts of which the right to an effective remedy is one aspect. Quite apart from the traditional provision of access under their own national systems, many Member States have incorporated the provisions of the ECHR into their national legal system so that Articles 6 and 13 ECHR may be relevant in this way.[9]

The effect of the changes pursuant to the proposed Article 41

As in the case of Article 39, the proposed amended PD contains no definition of the meaning of *'effective remedy'*, but it does proposed changes to recitals 8 and 27 by their replacement with new recitals 13 and 34.

The proposed recital 13 contains an addition which emphasises the relevant provisions of the Charter. It reads as follows:

> *'This Directive respects the fundamental rights and observes the principles recognised in particular by the Fundamental Charter of the European Union. In particular this Directive seeks to promote the application of Articles 1, 18, 19, 21, 24 and 47 of the Charter[10] and has to be implemented accordingly.'*

The proposed equivalent recital 34 omits the latter part of recital 27 and reads simply:

> *'It reflects a basic principle of Community law that the decisions taken on an application for international protection and on the withdrawal of refugee or subsidiary protection status are subject to an effective remedy before a court or tribunal.'*

It will be recalled that the proposed Article 41.3 qualified the duties of the court or tribunal as to reinvestigation *ex nunc* as applying *'at least in an appeal before a court or tribunal of first instance'*. But, that is simply to recognize that in many national judicial systems, an appeal from the court of first instance may be limited to a point of law only so that the facts found at first instance may be revisited only if there has been an error of law by the lower court which renders unsafe the findings of fact which it made. It is clear, however, that national norms remain of relevance despite the proposed change to Recital 27.

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[9] In the United Kingdom, for example, Article 6 ECHR was incorporated into UK Law by the Human Rights Act 1998, but not Article 13 (effective remedy), the Government arguing that its inclusion was unnecessary as the Act provided sufficient procedures and remedies to ensure that the other rights in the ECHR could be enforced.

[10] Article 1 of the Charter relates to the right to human dignity; Article 21 to non-discrimination; and Article 24 to the rights of the child. The other Articles referred to are dealt with in the text.

The constitutionalisation of human rights norms in Member States[11]

We have already considered the potential effect of Article 6 TFEU by which all Member States are bound subject to three limited exceptions. The Charter interpreted by the ECJ is not to apply fully to the United Kingdom, Poland, and the Czech Republic although it would still bind the EU institutions and apply to the field of EU law.[12]

The effect of the derogations remains a matter of some uncertainty[13] but, even if they amount to an exclusion of direct effect of the Charter in the countries in question, it is doubtful that they will in practice lead to any appreciable difference of approach to issues concerning the provision of an effective remedy because that right is already recognized and applied as part of their national law.

Indeed, the right to an effective remedy forms part of the body of principles which guarantee the right of access to the courts for those within their jurisdiction where, following a fair hearing before an impartial tribunal, the applicant is entitled to an effective remedy for his complaint. These are traditional rights inherent in all legal systems which respect the rule of law.

Article 47 arguably goes further in that it applies to all rights under Community law and includes a right to legal aid but the accuracy of the general proposition was well illustrated recently in the judgment of Silber J in *R (ex parte Medical Justice) v SSHD* [2010] EWHC (Admin) 1925.

This was a representative action in which a general challenge was made to the lawfulness of the UK Home Office's policy of exceptions to its general rule that those unlawfully present in the United

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[11] I am indebted to Judge Bostjan Zalar of Slovenia for recalling to my attention that this is a subject on which he delivered a paper to the IARLJ Conference in Strasbourg in October 2007 (subsequently published in the European Journal of Migration and Law, Vol 10). It is a subject of enormous topical importance and I would refer those interested also to 'A Europe of Rights – The Impact of the ECHR on National Legal Systems' edited by Keller and Sweet, 2008 OUP.

[12] The derogation in the case of the United Kingdom and Poland provides: (1)The Charter does not extend the ability of the ECJ, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. (2) In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. So far as the Czech Republic is concerned the position is complex. The current derogation is regarded as political but the Czech Republic seeks a similar derogation to that enjoyed by the United Kingdom and Poland which is to be attached to the next Accession Treaty as a protocol..

[13] It is not the purpose of this paper to explore this issue further. It is rather my thesis that, irrespective of the effect of the derogations by these Member States, the nature of the right to access to a court recognized by their national law is likely in practice to enable applicants to seek an effective remedy. Professor Sturma of the Czech Republic takes the view that the Czech Protocol, even when adopted, is an interpretative tool only. In the United Kingdom, Cranston J in *Saeedi v SSHD* [2010] EWHC 705 (Admin) held that under the Protocol the Charter is not directly enforceable in the UK and that applicable EU Directives and Regulations *"must be interpreted and applied in the context of the Common European Asylum System and of fundamental rights as recognised in European Law"* (para 151).

Kingdom might be removed on 72 hours' notice. The challenge was based on the claim that third country nationals treated under the exceptions, and thus subject to appreciably shorter time limits, had insufficient opportunity to exercise their basic right of access to justice. Silber J, after considering whether it was appropriate to treat this as a generic challenge to the State's policy or only on a case by case basis, upheld the former approach because of the difficulties inherent in *ex post facto* challenges. He recorded that under the English common law it is settled that the following principles applied to a citizen's right to access to justice:

1. '*it is a principle of law that every citizen has a right of unimpeded access to a court*'[14];
2. *'rules which did not comply with that principle would be ultra vires*[15]*';*
3. *'Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule, it is simply an application of the right of access to justice*[16]*.'*

He went on to approve the formulation of the claim by the applicant based on the proposition that the constitutional right of access to justice comprises *"important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court, the right of access to a legal adviser under the seal of legal professional privilege*".[17]

Thus, in the English jurisdiction, the courts will seek to ensure the right of access to the courts derived from their inherent jurisdiction to do so based on constitutional principles enshrined in the Common Law.

It is also clear that a similar result is likely to obtain in the Czech Republic by reference to the provisions enshrined in Article 10 of their written Constitution concerning the primacy of international law obligations where they would lead to an outcome different from that which would apply under Czech national law.[18] Although the first two cases are not directly concerned with asylum decisions within the meaning of Article 39 PD, there are three recent decisions which illustrate the way in which Article 10 of the Czech Constitution has a direct bearing on the concept of the right of access to a court and provision of an effective remedy without any reliance on the European Charter or Article 39 PD.

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[14] per Steyn LJ giving the judgment of the Court of Appeal in *R v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198 at 210.

[15] (ibid) citing Lord Wilberforce in *Raymond v Honey* [1983] 1 AC.1, 13.

[16] per Lord Steyn with whom Lords Hoffman, Millett and Scott of Foscote agreed in *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1AC 604 at 621.

[17] per Lord Bingham (*R (Daly) v Secretary of State for Home Department* [2001] 2 AC 532 at 538) and, in that case, Lord Cooke said of those rights that they were "*inherent and fundamental to democratic society*".

[18] I am indebted for the information relating to the Czech Republic to Hana Lupacova of the Czech Courts Documentation and Research Service.

In the first case,[19] an Afghanistan asylum seeker who had produced prima facie evidence of an arrest warrant against him for spreading non-Muslim opinions which might lead to the death penalty, had his application discontinued without further consideration under the national law provision which so provided where an applicant sought to leave the country irregularly during the course of the asylum procedure. The Court observed that application of the national law *simpliciter,* without reference to the international treaties which were part of the legal order, would deprive the applicant of the over-riding benefit of such treaty obligations which prevailed over conflicting national law under Article 10 of the Constitution. The court observed that *'in such case it is inevitable that the authority dealing with the matter covered by the international treaty applies preferentially the respective convention and diverges from the order provided by the national legal norm'*. Further, this principle applied at least from the time that the authority became aware of the prima facie evidence and that *'no authority may therefore lawfully ignore the international obligation or defer it until later or leave it to another authority'*. The discontinuance of the asylum procedure under national law was therefore unlawful as being in breach of the appropriate non-refoulement provisions under international treaty obligations.

The second case[20] concerned an asylum seeker who had been removed to Germany under the Dublin Regulation at a time when there were already court proceedings against a negative asylum decision made by the Czech Republic. Section 33(e) of the Czech Act on Asylum provides that courts shall discontinue such proceedings if the plaintiff is "*of unknown stay*". The Regional Court was informed of the position following the plaintiff's removal and, after appointing an NGO as guardian *ad litem,* discontinued the proceedings accordingly. The Guardian appealed and the Supreme Administrative Court quashed the lower court's decision on the grounds that, irrespective of the provisions of s. 33(e) of the Act of Asylum, Article 19(2) of the Dublin Regulation contained provisions for review of administrative decisions taken under it. The obligatory discontinuance under s. 33(e) effectively excluded the plaintiff, who might still be in Germany, from his right of review under the Regulation and national law must be adjusted to the specifities of the Dublin procedure. It was open to the regional Court to have used the provisions on exchange of information under Chapter VI of the Dublin Regulation to establish the Plaintiff's whereabouts, a task in which the defendant should assist, as it was necessary to know the plaintiff's address for service of court papers to enable him to take a meaningful part in the review process. Although there might be practical difficulties, '*this does not deprive the court of its duty to contact the plaintiff at least once'*.

The third Czech case is a recent decision of the Constitutional Court[21] which was concerned with a challenge to the validity of the imposition of a 7 day time limit for appeals against a decision that the protection application was manifestly unfounded. This was in contrast to the 15 day limit for lodgement of appeals which applied in other protection cases. The Court held that whilst the imposition of a time limit could not as such be considered in breach of the constitutional right to a fair trial, in the case of asylum-seekers, having the disadvantage of not knowing the Czech language and being dependent on outside assistance, the shortened time-limit placed too heavy a burden on them, having particular regard to the need for quality of argument in such cases to be high and that the pleas of appeal had to be settled within the applicable time limit for lodging the action. Applying

[19] Judgment of the Supreme Administrative Court of 14 June 2007, ref. no. 9 Azs 23/2007 – 64.

[20] Supreme Administrative Court – Judgment of 21 May 2009 under ref no. 6 Afs 75/2009-51

[21] Constitutional Court judgment of 1 December 2009 under ref no. PI.US 17/09.

the principle of proportionality, the effect of the shorter time limit was to render the court protection illusory and the 15 day time limit should in future apply to appeals from 'manifestly unfounded' decisions also.[22]

Summary

The decisions of the Czech and English courts, taken without reference to the provisions of Article 47 of the European Charter, reinforce the argument put forward by the Commission that Article 47 is based upon *'traditional rights, inherent to all legal systems which respect the law, guaranteed constitutionally and by international texts on the protection of human rights'*.[23]

The PD is concerned with the procedures by which asylum claims fall to be considered under the QD. Article 13 QD imposes a duty on Member States to grant refugee status to a third country national or stateless person who qualifies as a refugee in accordance with Chapters II and III of the QD. Article 18 makes similar provision in relation to such persons eligible for subsidiary protection in accordance with Chapters II and V of the QD.

Since the coming into force of Article 6 TFEU those are justiciable Community rights to which the provisions of Article 47 of the Charter apply.

Those rights are to be assessed first under the relevant provisions of the national legislation of Member States transposing the QD and PD into their domestic law.

Article 39 PD also confers an enforceable right but, as we have seen, the nature of the right to an effective remedy is encompassed also in Article 47 of the Charter, if not already effectively in the national law of Member States as a matter of constitutional principle. [24]

It is therefore suggested that Article 39 cannot be construed as being restrictive of the wider rights of access to justice available under Community or national law, whichever is appropriate in the

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[22] It appears that this is not an isolated case and that the Czech Constitutional Court has struck down time limits in similar situations on three principal grounds: lack of proportionality; arbitrary nature of the relevant legislation; and lack of equality of arms between the parties. It is clear that there is a well-developed jurisprudence in the Czech Republic concerned with consideration of fundamental rights issues in relation to the constitutional propriety of legislative provisions.

[23] See the commentary on Article 47 issue by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs which contains a useful summary of all aspects of Article 47 including extensive case law and national law references – http://www.eurpa.eu/comparl/libe/elsj/charter/art47/default_en.htm.

[24] This is not a novel proposition. Prior to the coming into force of the TFEU, it had been argued that the review provisions under Community law were wider in scope than those under the PD, applying the principle of *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] EUECJR -222/84 that *'Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law'*– see Research Paper No 134 of November 2006 for UNHCR (The European Asylum Procedures Directive in legal context) by Cathryn Costello and H J Battjes' 'European Asylum Law and International Law' at Chapter 6.3, paragraph 420. The difference is that since the coming into force of the TFEU, there are explicit provisions as to the enforcement of Community law rights by reference to Article 47 of the Charter.

Member State. To that extent, whilst the proposed Article 41 may serve to clarify what is normally meant by the requirement for provision of an effective remedy before a court or tribunal, it is not of itself determinative of the limits of the right of access to justice, including the right to an effective remedy, which rests on the general applicable law in the Member State applying not only the transposing laws concerned with Article 39 but also, subject to the three possible limited exceptions noted above, Article 6 TFEU and Article 47 of the European Charter of Fundamental Rights.

Where there is a conflict between national law and the relevant Community law provisions, then, save to the extent that any protocol for specific Member States may modify the position, the Community law will prevail.

What is the scope of the enquiry required to give that effective remedy?

Apart from the existence of the concept as fundamental to the right to justice inherent in all systems governed by law, the EU has drawn from the provisions of Articles 6 and 13 of the ECHR its inspiration for its own provisions in the TEC and, now, the TFEU as well as in the European Charter.[25]

In broad terms, the nature of an effective remedy will vary depending on the nature of the applicant's complaint. But, it has long been recognized that cases concerned with the right to international protection differ from most cases which come before the national courts because they are not concerned with the application of the relevant law to a past set of facts. The court's duty is, rather, forward-looking in that the court is required to consider whether the protection rights are established on the basis of a real risk[26] of future harm in the applicant's country of origin of a kind which leads to the right to international protection and, in particular, to the right not to be returned (*'refouled'*) to the country of origin.

The commentary referred to in footnote 23 above contains extensive references to the jurisprudence both of the ECtHR and of the ECJ on issues relevant to the provisions of Article 47 of the European Charter and thus provides a useful guide to relevant case law.

In general terms, the ECJ will take into account and frequently apply the jurisprudence of the ECtHR in proceedings before it which involve issues of international protection rights.

A summary of the most important case-law is set out in Chapter 3 of the IARLJ Manual and the scope of the duty of enquiry of the Court in Article 3 ECHR cases has been the subject of consideration on many occasions.

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[25] In the decision of the ECJ in *P & O European Ferries*, Joined Cases T-116/01 and T/118/01, the Court said: 'It is settled case-law that the requirement of judicial review reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to an effective remedy has, moreover, been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union'.

[26] I make reference to the concept of 'real risk' deliberately. Whether the issue is refugee or subsidiary protection status under the QD, I would suggest for the reasons elaborated in the IARLJ Manual that this is the appropriate test of risk and that there is no difference between that applicable to either status. I have appended the relevant extract from the Manual to this paper.

It is relevant to the issue of the scope of the enquiry necessary to provide an effective remedy against decisions to which Article 39 PD applies because the feared harm in Article 3 cases is similar in nature to that which applies in both asylum claims and claims to subsidiary protection under the rights to recognition of international protection status provided for by the QD.

The ECtHR approach clearly indicates the nature and the extent of the enquiry normally to be made by a court or tribunal in any appeal or review from a first instance decision made concerning protection status under the PD in order to provide the effective remedy which is required by Article 39.

It was one of the issues considered by the ECtHR in the case of *Salar Sheekh v The Netherlands* 1948/04 [2007] ECHR in its judgment given on 11 January 2007. It provides a very clear exposition of the duties of the reviewing court or tribunal and it is appropriate to quote paragraphs 136 and 137 of the judgment in full.

> '136. The establishment of any responsibility of the expelling State under Article 3 inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, § 67). In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*, in particular where the applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government. In respect of materials obtained *proprio motu*, 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. In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting State concerned without comparing these with materials from other, reliable and objective sources. This further implies that, in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion (see *Vilvarajah and Others*, cited above, p. 36, § 107). In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, pp. 1856 and 1859, §§ 86 and 97, *Reports* 1996-V; *H.L.R. v. France*, 9 April 1997, *Reports* 1997-III, p. 758, § 37; and *Mamatkulov and Askarov*, cited above, § 69).

137. Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (see, amongst other authorities, *Hilal*, cited above, § 60). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (see *H.L.R. v. France*, cited above, p. 758, § 40).'

Conclusion

In summary, therefore, I would suggest that the meaning of the phrase '*the right to an effective remedy before a court or tribunal*' is to be found not simply from a consideration of Article 39 PD or the proposed Article 41 if and when it is enacted, but rather from the corpus of Community Law with particular reference to Article 6 TFEU and Article 47 of the European Charter, supplemented, so far as it may provide more favourable provisions to the applicant, by the national laws of the relevant Member State. So far as the United Kingdom, Poland and the Czech Republic are concerned, however, the effect of the derogations must be taken into account, and these may mean that the effective remedy prescribed by Article 39 PD will be determined by reference to their own legal traditions governing the fundamental right of access to justice.

The scope of the enquiry necessary to provide the right to an effective remedy in international protection cases is clearly set out in the jurisprudence of the ECtHR, of which one of the more recent and fuller expositions appears in the extracts from the judgment in *Salar Sheekh v The Netherlands* op. cit. In general terms the scope of the enquiry will be governed by relevant ECtHR jurisprudence to which all Member States are required to give effect in Article 39 PD appeals by virtue of being signatories to the ECHR.

Appendix 1

The standard of proof in international protection status cases[27]

Article 2 of the [Qualification] Directive, which defines the meaning of refugee, gives no guidance as to how the well founded fear of persecution is to be proved. It is, however, generally accepted in international jurisprudence that in order to be well founded the refugee's subjective fear of persecution must be objectively sustainable.[28] The provisions of Chapter II of the Qualification Directive reflect such an approach in the mandatory terms of Article 4.3(a) requiring Member States to investigate the objective situation in the country of origin. In the definition of *'person eligible for subsidiary protection'* at Article 2(e), however, the definition requires that *'substantial grounds for believing that the person concerned … would face a real risk of suffering serious harm'* as defined in Article 15 are to be demonstrated.

The question has been raised whether the 'real risk' test differs from the Geneva Convention test of 'well founded fear'.[29] Whilst it appears that there may be some differences of academic opinion on the issue, the practical case for construing the standard of proof – or where that is a concept which has no strict application in a Member State's procedural law, the nature of the issue to be proved by the claimant - as being the same in the case of either status has much to commend it. The recognition of each status requires a finding as to whether a claimant is entitled to international protection.[30]

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[27] This passage is an extract from the opening of Chapter 3 of the IARLJ Handbook op.cit.

[28] See also generally paras 37 to 50 of the UNHCR Handbook *op cit*.

[29] H Battjes *op cit* states at Chapter 5.3.1: *'As to subsidiary protection, article 2(e) QD requires that the 'risk' be 'real'. This criterion occurs in the case law of the [ECtHR]… It can be argued that the real risk criterion sets a stricter standard than well-founded fear. The [QD] does not elaborate on this standard. But it appears that the distinction in risk assessment between qualification for refugee and for subsidiary protection status is intentional, as the real risk criterion also replaces the well-founded fear test that applied to subsidiary protection in the Commissions Proposal for the [QD].'* Gregor Noll in 'Evidentiary assessment and the EU qualification directive' *op cit.*, however, argues the opposite case, namely that well-founded fear under the Geneva Convention imposes a higher standard of proof than the Article 2(e) QD standard of *'substantial grounds for believing …[that] a real risk'* exists (see footnote 5 of his paper).

[30] In its Explanatory Statement *op cit.* the Commission would appear to suggest that the distinctions mentioned in the preceding footnote were not intended to be drawn from the wording of the definition section of the PD as originally proposed. Despite the changes in wording to which H Battjes draws attention, it should be remembered that Recital (6) as enacted clearly identifies one of the main objects of the Directive as being *'to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection'*: but, the original proposal referred simply to the ensuring of a minimum level of protection. It is equally arguable that the final form referring to 'real risk' rather than 'well-founded fear' was selected simply because the concept of serious harm was more clearly grounded in claims in respect of which the ECtHR had jurisdiction, so that there was already a body of European jurisprudence relevant to that concept: the change to Recital (6) sufficed to clarify that the criteria for recognition for international protection were common to both forms of protection status.

For the purposes of the Qualification Directive such a need arises only where there may be persecution for a Geneva Convention reason, or serious harm which may, but for the absence of the nexus of the appropriate Geneva Convention reason, befall the claimant. The only arguable exceptions in the serious harm concept to this direct correlation with the concept of persecution are execution which is lawful under the national law of the country of origin or, depending upon which view as to its meaning prevails, serious harm as defined in Article 15(c) of the Directive. But even in those two cases, the test to be applied remains that of real risk.

It is suggested that it would not only be impracticable, but wrong in principle, to impose a difference in the standard of proof for persecution and serious harm.[31] There is also international jurisprudence on the standard of proof of well founded fear of persecution which supports the argument that the standard applicable is one of real risk.[32]

The absurdity of applying differential standards in the recognition of claims to international protection status will, of course, be particularly apparent in those Member States who elect to apply the Procedures Directive both to asylum and subsidiary protection status claims. It is suggested that the ECtHR concept of real risk applies equally to the proving of asylum as well as subsidiary protection claims.

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[31] The Immigration Appeal Tribunal of the United Kingdom was required to consider precisely this issue when the Human Rights Act 1998 (largely incorporating the ECHR into national law) came into force in October 2000. In *Kacaj* [2000] UKIAT 23044 it was held that there was no difference in the tests for asylum and Article 3 infringements, which was the existence of a 'real risk'. The President, Collins J, said at para 12: *'Various expressions have been used to identify the correct standard of proof required for asylum claims. These stem from language used by Lord Diplock in R v Governor of Pentonville Prison ex p. Fernandez [1971] 2 All ER 691 at p. 697, cited by Lord Keith in Sivakumaran at [1988] 1 All ER 198. Lord Diplock said that the expressions 'a reasonable chance', 'substantial grounds for thinking' and 'a serious possibility' all conveyed the same meaning. There must be a real or substantial risk of persecution. The test formulated by the European Court requires the decision maker and appellate body to ask themselves whether there are substantial grounds for believing that the applicant faces a real risk of relevant ill-treatment. That is no different from the test applied to asylum claims. The decision maker and the appellate body will consider the material before them and will decide whether the existence of a real risk is made out. The words 'substantial grounds for believing' do not and are not intended to qualify the ultimate question which is whether a real risk of relevant ill-treatment has been established. They merely indicate the standard which must be applied to answer that question and demonstrate that it is not that of proof beyond a reasonable doubt. … In our view, now that the European Court has fixed on a particular expression and it is one which is entirely appropriate for both asylum and human rights claims, it should be adopted in preference to any other…'*

[32] See, e.g., *Chan v Minister for Immigration and Ethnic Affairs* [1989] 169 CLR 379 in which the High Court of Australia approved the formulation of the standard as 'a real chance of persecution' – such an expression was to be used 'because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring' per Mason CJ *ibid*. Similar formulations have been applied in New Zealand (Refugee Appeal No 523/92 *Re RS*, 17 March 1995).