Common Market Law Review **49**: 327–348, 2012.

Case C-69/10, *Brahim Samba Diouf* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of the Court of Justice (Second Chamber) of 28 July 2011, nyr.

1. Introduction

The constitutionally mandated establishment of a common asylum system at the EU level resulted in the intense harmonization of national rules determining the scope of the right to asylum.[1] As a consequence, EU law now largely outlines the conditions for the reception of asylum applicants across the European Union,[2] whereas Member States remain responsible for the processing and final determination of applicants' asylum status.[3] In 2005, the freshly harmonized national rules have been complemented by EU provisions aimed at ensuring a fair application procedure.[4]

The *Samba Diouf* judgment presented a first opportunity for the European Court of Justice to interpret these procedural provisions as implemented in the national legal orders and to clarify their scope in the light of the right to an effective judicial remedy as reflected in the now binding Charter of

1. Art. 67 TFEU states that the Union shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. The direct legal basis for the common European asylum system can be found in Art. 78 TFEU (ex 63 EC), see Peers, *EU Justice and Home Affairs Law*, 3rd ed. (OUP, 2011), pp. 295–314; see also Boeles, Den Heijer, Lodder and Wouters, *European Migration Law* (Intersentia, 2009), pp. 347–350.

2. In accordance with Art. 78 TFEU, the European Parliament and the Council shall adopt a uniform status of asylum for nationals of third countries, valid throughout the Union. This resulted in Directive 2003/9/EC of 27 Jan. 2003 laying down minimum standards for the reception of asylum seekers, O.J. 2003, L 31/18 and Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, O.J. 2004, L 304/12.

3. In 2010, the EU nevertheless created a European Asylum Support Office (EASO). The EASO's role mainly consists in facilitating national application of EU asylum rules, see Regulation 439/2010 of 19 May 2010 establishing a European Asylum Support Office, O.J. 2010, L 132/11.

4. See Directive 2005/85/EC of 1 Dec. 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. 2005, L 326/13.

Fundamental Rights.[5] More generally, the Court's reliance on the Charter also highlighted the role of the right to effective judicial protection in shaping and adapting national procedural provisions. From that perspective, it could be argued that a nascent fundamental rights approach to national procedural provisions – different from the national procedural autonomy approach traditionally relied on – is reflected in the judgment.

2. Factual and procedural background

Brahim Samba Diouf is a Mauritanian national who had been employed as a servant-slave in Mauritania since childhood. Searching for a better life and following a hazardous escape – which included stealing money from his former employer-master and a boat ride across the Mediterranean Sea –, he eventually settled in Luxembourg, where he filed an application for asylum in August 2009.[6] His application was supported by a forged passport.[7] In the application, Mr Samba Diouf claimed that he had left Mauritania to flee from slavery and to fulfill his wish of settling in Europe and start a family. He feared that his former employer would hunt him down and kill him for stealing his money should he remain in Mauritania.[8]

By decision of 18 November 2009, the competent Luxembourg Minister rejected Mr Samba Diouf's application, maintaining that in order to obtain international refugee protection under the 1951 Geneva Convention,[9] the grounds relied on should not be economic in nature. One's wish to live in better conditions did not therefore provide a valid reason for the granting of refugee status. In addition, a 2008 Mauritanian law punished slavery and therefore rendered seeking refuge to escape it no longer a valid political reason.[10]

The Luxembourg Minister relied on a 2006 national procedural law on the right of asylum and complementary forms of protection (the 2006 Law) to

5. Charter of Fundamental Rights of the European Union, 30 March 2010, O.J. 2010, C 83/389, hereafter referred to as the Charter. On the binding character of the Charter, see Art. 6(1) TEU.

6. See for an overview of facts, judgment of 3 Feb. 2010, *Tribunal Administratif du Grand-Duché de Luxembourg (3ème Chambre),* <www.ja.etat.lu/26396.doc> (last visited Nov. 21, 2011), 2–3.

7. Judgment, para 19.

8. Judgment, para 15.

9. The substance of international refugee protection is predominantly based on the Geneva Convention of 28 July 1951 relating to the status of refugees and its protocol, see <www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (last visited Nov. 21, 2011).

10. Judgment, para 20.

determine the course and scope of processing Mr Samba Diouf's request.[11] The 2006 Law comprises a transposition of Directive 2005/85/EC outlining EU minimum procedural standards in asylum proceedings. On the basis of Article 23(4) of the Directive, Article 20 of the 2006 Law allows the Minister to apply an accelerated procedure in situations where the application for asylum appears unfounded at first sight. These situations include the clear lack of qualification for the status conferred by international protection and the presentation of false information or documents to the competent authorities.[12] The Minister shall in that case adopt his decision no later than two months from the day on which it became apparent that the applicant falls within one of the categories justifying an accelerated treatment of the asylum request.[13] Based on the facts in Mr Samba Diouf's application, the Minister decided to initiate an accelerated procedure.

Following rejection of his application, Mr Samba Diouf lodged an appeal with the competent national court, the *Tribunal Administratif*.[14] In his appeal, he directly contested the Minister's decision to apply the accelerated procedure to his case, as well as the ultimate rejection of his application and the order to leave the territory.

According to Luxembourg law, however, judicial appeals in accelerated procedures can only be initiated against decisions that definitively reject the application and order the applicant to leave the territory. The 2006 Law does not explicitly include the decision to *initiate* the accelerated procedure among the categories of judicially reviewable decisions in that regard.[15] In accordance with Luxembourg Law, the *Tribunal* will only hear actions for reversal or annulment on the condition that they have been lodged within 15 days following notification of the rejection and the order to leave, and to the extent that they form the subject of a single application.[16] *Tribunal* judgments reviewing accelerated procedure decisions are not open to any appeal.[17] These procedural requirements contrast with the ordinary asylum review procedure.

11. Loi du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection, *Mémorial* A 2006, 1402.

12. Art. 20 (1) of the 2006 Law; see also judgment, para 33.

13. Art. 20 (2) of the 2006 Law, see judgment, para 12. For a position on accelerated procedures and judicial protection, see the United Nations High Commissioner for Refugees' Statement of 21 May 2010 on the right to an effective remedy in relation to accelerated asylum procedures, <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4bf67fa12>(last visited Nov. 27, 2011).

14. For an overview of the judge's role in Luxembourg asylum law, see Sünnen, "Le contentieux de l'asile et le rôle du juge au Luxembourg" in Gerkrath (Ed.), *Droit d'asile au Grand-Duché de Luxembourg et en Europe* (Brussels, 2009), pp. 134–154.

15. Art. 20 (5) of the 2006 Law at the time of the dispute, see judgment, para 12.

16. Art. 20 (4) of the 2006 Law.

17. Art. 20 (4) of the 2006 Law, final sentence.

In that procedure, actions for reversal or annulment could be lodged within one month following notification and the ensuing *Tribunal* judgment could be appealed before the higher *Cour administrative*.[18]

Given the explicit exclusion of the decision to *initiate* the accelerated procedure from its scope of review, the *Tribunal* considered itself unable to assess the substantive reasons underlying the Minister's decision to opt for accelerated treatment.[19] Those reasons, it was maintained, nevertheless determine the final outcome of the application for asylum. Since Article 39 of Directive 2005/85/EC generally requires that "Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum", the *Tribunal* wondered to what extent the decision to initiate an accelerated procedure would fall within the scope of that provision. It therefore asked the Court of Justice whether or not Article 39 of the Directive should be interpreted to incorporate judicial review against a decision to use accelerated proceedings. In case of a negative answer to that question, the *Tribunal* inquired whether the general principle of an effective remedy under Union law might nevertheless require that decision to be judicially reviewable.[20] The *Tribunal* indirectly also questioned the imposition of abbreviated time limits and the lack of appeal against its judgments in accelerated procedures.

3. The Opinion of the Advocate General

Advocate General Cruz Villalón concluded that Article 39 of Directive 2005/85/EC does not preclude national rules under which an applicant for asylum does not have an independent judicial remedy against decisions to open an accelerated procedure, as long as the grounds for refusal which have already been assessed in the procedural decision can be effectively challenged before the court as part of the action that may, in any case be brought against the final decision concluding the procedure dealing with the application for asylum.[21]

The Advocate General built this conclusion on four interrelated claims. First, he refined the *Tribunal*'s questions by distinguishing a validity and

18. Art. 19 of the 2006 Law.

19. Judgment of 3 Feb. 2010, *Tribunal Administratif du Grand-Duché de Luxembourg (3ème Chambre),* <www.ja.etat.lu/26396.doc> (last visited Nov. 21, 2011), 7. At 5, the Tribunal hints at a 2007 judgment of the *Cour Administrative* seemingly expressing a contrary position. According to the Luxembourg Government, the latter had been the consistent case law position, see judgment, para 53.

20. Judgment, para 18.

21. Opinion of A.G. Cruz Villalón, para 67.

interpretation prong in the reference for a preliminary ruling. Second, the Advocate General evaluated the validity of Article 39 of Directive 2005/85/EC in the light of the Charter's right to an effective judicial remedy. Third, he interpreted the scope of Article 39's right to an effective remedy in the context of asylum applications. Fourth, the Opinion elaborated on the leeway granted to national legal systems to abbreviate time limits and to eliminate appellate jurisdiction in accelerated procedures.

3.1. *Two types of questions*

Despite the *Tribunal*'s insistence on the interpretative dimension of the reference, the Opinion distinguishes the questions related to the validity and interpretation of EU law in the reference.[22] The Advocate General argued that the questions referred first inquire to what extent Article 39 of Directive 2005/85/EC complies with the right to an effective remedy in Article 47 of the Charter. Since "it seems clear that the content and scope of the right to an effective judicial remedy recognized by European Union law does not vary depending on the Community rule or principle enshrining that right in each case",[23] it also provides the constitutional basis for Article 39. To the extent that the legal expression of that fundamental right in Directive 2005/85/EC conflicts with the requirements of Article 47 of the Charter, Article 39 of the Directive would be vitiated by invalidity for the infringement of a fundamental right. Only "once any doubt as to the compatibility of Article 39… has been dispelled, it will…make sense to answer" the interpretative questions raised referred to the Court.[24]

3.2. *The validity of Article 39 of Directive 2005/85/EC*

The Advocate General commenced by articulating the importance of the principle of effective judicial protection as a general principle of European Union law stemming from the constitutional traditions common to the Member States.[25] The expression of that principle in Article 47 of the Charter includes the right to a judicial remedy as such (para 1), to procedural guarantees (para 2) and to legal aid (para 3). The fundamental right to an effective remedy therefore guarantees both the access to a court and the fair conduct of proceedings. Its scope of protection must be constructed in the light of "the *acquis* of over half a century of European Union law, which, as a

22. Ibid., para 30.
23. Ibid., para 32.
24. Ibid., para 34.
25. Ibid., para 35.

system of law, has given rise to the development of its own set of defining principles".[26]

According to the Advocate General, the EU's interpretation of the right to an effective remedy aims to guarantee everyone the right to request protection from a court against any acts harmful to the rights and freedoms recognized by the European Union. Recourse to the courts should be "effective, capable of securing reparation, where appropriate, for the loss complained of and its pursuit must not be subject to conditions that make it impossible or extremely difficult to exercise".[27] Article 39 of Directive 2005/85/EC is naturally consistent with that fundamental right, since it guarantees applicants for asylum the right to an effective remedy against decisions taken on their application for asylum, without providing direct limitations on that right. It should therefore be considered valid in the light of Article 47 of the Charter.

3.3. *The interpretation of Article 39 of Directive 2005/85/EC*

Article 39(1) of Directive 2005/85/EC "provides that Member States ensure that applicants for asylum have an effective remedy against a decision taken on their application".[28] A "decision taken on their application" could refer to any decision adopted in relation to an application for asylum, including a decision to open an accelerated procedure. The Advocate General nevertheless rejects that interpretation on two grounds. First, such an interpretation would not be consistent with the interest and expediency of procedures relating to asylum applications. The specific nature of particular judicial proceedings warrants or justifies a limitation on categories of decisions amenable to judicial review. Second, Article 39 of Directive 2005/85/EC provides non-exhaustive examples of particular types of decisions against which an appeal should be possible. These examples include a decision not to re-open a file after discontinuation, a decision not to further examine an application, a decision refusing entry in case of a subsequent application following withdrawal of an earlier application, etc. In the Advocate General's reading, the examples only reflect final decisions related to applications for asylum. A decision merely applying particular procedural modalities to a particular case file could in that interpretation not be considered as final, since a decision eventually rejecting or granting the application still has to be adopted by the competent administrative authority. Article 39 is therefore only "directed towards those decisions which make it

26. Ibid., para 39.
27. Ibid., para 43.
28. Ibid., para 52.

definitively impossible for an asylum application to succeed".[29] The Article does not in principle require that the national law should provide for a specific, independent or direct remedy against a decision to continue the asylum application under an accelerated procedure.[30]

As a result, a procedural remedy should not necessarily and immediately be available against the actual decision to initiate the accelerated procedure. To the extent however that a decision to rule on the accelerated procedure may itself already contain elements of a substantive decision, these elements should be amenable to a remedy before the refusal to grant asylum becomes final and enforceable.[31] This implies that judicial review of the final decision should also incorporate substantive elements already ruled on in the decision to accelerate the procedure. To the extent that this incorporation proves impossible as a matter of national law, EU law would be violated.[32]

3.4. *Member States' additional obligations*

Article 39(2) of Directive 2005/85/EC requires Member States to provide for time limits and other rules necessary for the applicant to exercise his right to an effective remedy. In so doing, the Member State retains significant autonomy. The Advocate General nevertheless inquired whether the abbreviated time limit and the lack of appeal against *Tribunal* judgments in review procedures concerning accelerated decisions would violate the EU right to an effective judicial remedy.

An abbreviated time limit of 15 days is, according to the Advocate General, in general sufficient and common in accelerated procedures, given the rights and interests involved.[33] However, should that time limit prove inadequate in any particular situation, it remains for the national court to determine whether or not to uphold the action and to order the administrative authority to continue its investigation under the ordinary procedure.[34]

29. Ibid., para 57.
30. Ibid., para 59.
31. Ibid., para 58.
32. Ibid., para 61.
33. Ibid., para 63. For an overview of time limit variations across Member States, see "Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status", COM (2010) 465 final, <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0465:FIN:EN:PDF> (last visited Nov. 27, 2011), 14.
34. Opinion, para 64.

The Advocate General also maintained that the EU right to an effective remedy only requires one level of jurisdiction, in which all substantive issues could be considered by a judge. It does not impose two levels of jurisdiction.[35]

4. Judgment of the Court

The Court argued that Directive 2005/85/EC only incorporates minimum standards, leaving a margin of assessment with the Member States to implement these standards in the light of particular features of national law.[36] Despite that margin, it held that national rules, under which no separate action may be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, cannot be construed to exclude the reasons which led that authority to examine the merits of the application under such a procedure from judicial review in the action which may be brought against the final decision rejecting the application.[37] The Court derived its conclusion from a two-stage interpretation of Article 39 of Directive 2005/85/EC. First, the Court established the meaning of the "decision" concept in that Article. Second, it inquired whether that interpretation was compatible with the right to an effective judicial remedy. Unlike the Advocate General, it did not first consider the validity of that Article.

According to the Court, Article 39 of Directive 2005/85/EC only requires an effective remedy to be provided against final decisions on the application for asylum. The wording of Article 39(1)(a), in particular the non-exhaustive list of decisions contained therein, makes clear that the concept of "decision" only "covers a series of decisions which, because they entail rejection of an application for asylum or are taken at the border, amount to a final decision rejecting the application on the substance".[38] The interpretation of "decision" in Article 39 as incorporating any kind of decision would not be consistent with the expediency of procedures relating to applications for asylum.[39] EU law only requires that final decisions are subject to judicial review.

The Court subsequently referred to the fundamental principle of effective judicial protection and its explicit recognition in Article 47 of the Charter. According to the Court, the principle constitutes an interpretive guideline to

35. Ibid., para 65.
36. Judgment, para 29.
37. Ibid., para 70.
38. Ibid., para 41.
39. Ibid., para 44.

assess the system put in place by the transposed national rules.[40] Referring to its precedent in *Safalero*,[41] it stated that

> "the principle of effective judicial protection of the right which the EU legal order confers on individuals is to be construed as not precluding national legislation under which an individual cannot bring court proceedings to challenge a decision taken by the public authorities, where there is available to that individual a legal remedy which ensures respect for the rights conferred on him by EU law and which enables him to obtain a judicial decision finding the provision in question to be incompatible with EU law.
>
> The decision relating to the procedure to be applied for the examination of the application for asylum, viewed separately and independently from the final decision which grants or rejects the application, is a measure preparatory to the final decision on the application".[42]

The availability of a remedy against the final decision therefore suffices.

The grounds that led the national authority to initiate an accelerated procedure decision should nevertheless remain amenable to judicial review. "Since the grounds relied on by the competent authority to use an accelerated procedure are the same as, or broadly tally with, those which led to a substantive decision refusing refugee status",[43] they should be incorporated in a thorough review by the national court of final decisions rejecting the application.[44] The effectiveness of a remedy against final decisions alone would not be guaranteed if the reasons relied on by the national authority to examine the merits of the application under an accelerated procedure are not taken into account.[45] In order for the right to an effective remedy to be exercised effectively with a view to ensuring that the Geneva Convention and fundamental rights are fully complied with, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons. It is also within the framework of that remedy that the national court hearing the case must establish whether the decision to examine

40. Ibid., paras. 47 –49.

41. Case C-13/01, *Safalero*, [2003] ECR I-8679, para 56. See for an assessment of that case in the realm of effective judicial protection, Taborowski, "Case C-432/05 Unibet – Some Practical Remarks on Effective Judicial Protection", 14 CJEL (2007–2008), 639.

42. Judgment, paras. 54–55.

43. Ibid., para 47.

44. Ibid., para 58.

45. This would render impossible a full legality review of both facts and law, see judgment, para 57.

an application for asylum under an accelerated procedure was taken in compliance with the procedures and basic guarantees laid down in Directive 2005/85/EC. National courts are therefore required to interpret their national procedural laws so as to include these reasons within the scope of judicial review.[46]

By way of *obiter dicta*, the Court also considered the Member States' freedom to determine time limits and to organize second level jurisdiction in accelerated procedures. It confirmed the Advocate General's Opinion that these competences fall within a Member State's procedural autonomy. The Court considered a 15 day time period to be sufficient and left it to the national court to determine the circumstances in which actions could still be upheld if the time limit proved insufficient in particular instances.[47] Regarding the lack of two levels of jurisdiction, the Court stated that in the current state of the law, "the principle of effective judicial protection affords an individual a right of access to a single court or tribunal, but not to a number of levels of jurisdiction".[48]

5. Comment

The *Samba Diouf* judgment is the first case dealing with Directive 2005/85/EC under the preliminary ruling procedure.[49] It also provides the first reference made by a national court related to asylum procedures following the elimination of limitations on national courts' ability to refer preliminary rulings to the Court prior to the entry into force of the Lisbon Treaty.[50] The outcome of the preliminary ruling also appears straightforward. Article 39 of Directive 2005/85/EC should be interpreted constitutionally and does not therefore require judicial review to be necessary against a preparatory decision relating to the initiation of accelerated procedure. The reasons for initiating that procedure should nevertheless remain within the purview of judicial review against the final decision rejecting an asylum application.

The judgment's relevance nevertheless also transcends the scope of EU asylum law and goes to the heart of debates on balancing effective judicial

46. Judgment, paras. 60–61.

47. Ibid., para 68.

48. Ibid., para 69.

49. Two earlier judgments considered the Council's competence and Ireland's failure to transpose the Directive, see Case C-133/06, *European Parliament* v. *Council of the European Union*, [2008] ECR I-3189, and Case C-431/10, *Commission* v. *Ireland*, judgment of 7 Apr. 2011, nyr.

50. Peers, "Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon", 48 CML Rev. (2011), 666 and 681–685.

protection and national procedural obligations following the entry into force of the Charter.

Three interrelated consequences of the judgment will be discussed in this part. *First*, *Samba Diouf* could be read as extending a strand of case law that imposes procedural obligations on Member States into the field of asylum law (5.1.). *Second*, the judgment clarifies the Court's newfound constitutional mandate supporting the development of procedural obligations (5.2.). *Third*, the judgment emphasizes the adapted scope of Member States' procedural obligations and the movement away from a classic national procedural autonomy approach (5.3.).

5.1. *Rights, remedies and procedural rules: A shifting balance of competences in the context of asylum procedures?*

The annotated judgment obliges national courts to incorporate the reasons for initiating accelerated proceedings into the judicial assessment of the outcome of these proceedings.[51] In addition, the Court also suggested that abbreviated time limits applicable to appeals against accelerated procedure decisions should be modified, disregarded or prolonged in individual cases when concrete circumstances indicate that the abbreviated time period proved too short to initiate appellate proceedings.[52] The Court thus directly interferes with Member States' discretion to adapt their national systems in conformity with newly identified EU adequate judicial protection requirements. In so doing, *Samba Diouf* challenges the classic division of procedural competences between the EU and its Member States.

The classic division of procedural competences relies on a distinction between rights, remedies and procedural rules. EU rights have long been recognized as entitlements or claims based on EU primary law or secondary legislation.[53] The realization of rights required the establishment of classes of actions or remedies through which these actions could be rendered justiciable.[54] Whereas the competence to establish remedies remained at the national level, the European Court of Justice has over time adopted a more active stance and supplemented national remedies with a set of EU-wide

51. Judgment, para 58.

52. Ibid., para 68.

53. On the notion of Union (formerly Community) Rights, see Downes and Hilson, "Making sense of rights: Community rights in E.C. law", 24 EL Rev. (1999), 121–138. See also Ruffert, "Rights and remedies in European Community Law: A Comparative View", 34 CML Rev. (1997), 306–337; Eilmansberger, "The relationship between rights and remedies in EC law: in search for the missing link", 41 CML Rev. (2004), 1199–1246.

54. Van Gerven, "Of Rights, Remedies and Procedures", 37 CML Rev. (2000), 502.

remedies.[55] These EU remedies were to guarantee the adequate protection and enforcement of EU rights. As these remedies allowed rights to be brought before the national judges, national procedural rules would govern the conduct of proceedings. Procedural rules have always been held to remain firmly within the Member States' sovereign competences[56] and could, as a matter of EU law, only be disapplied whenever they rendered the effective application of adequate remedies and recognized rights impossible or excessively difficult.[57] From a procedural rules point of view, effective judicial protection worked like a shield, not like a sword. It only forbade the application of an existing domestic provision, but did not dictate a new rule.[58] Unlike remedies, the Court did not assess the adequateness of national procedural rules in light of the general system of EU rights enforcement.[59] In cases where the non-application of national procedural rules resulted in procedural gaps, the Court was not to replace defunct national rules with its own procedural standards.

Recent case law evolution has questioned that classic presentation. In *Unibet*, the Court firmly stated that it was no longer willing to create new remedies to accommodate EU rights, nor did it require the creation of particular self-standing remedies at the national level.[60] That approach has been confirmed in *Impact*.[61] Although these judgments reflect a new area of judicial restraint in the field of remedies,[62] they remain silent on the Court's approach regarding procedural rules. *Impact* did however introduce the novel concept of "procedural disadvantages",[63] serving as a tool to evaluate the national institutional and procedural regime in the light of EU law. The vague and open-ended notion of "procedural disadvantages" could also allow the

55. For a recent overview, see Dougan, "The vicissitudes of life at the coalface: Remedies and procedures for enforcing Union law before the national courts" in Craig and De Búrca (Eds.), *The evolution of EU law*, 2nd ed. (OUP, 2011), pp. 407–438.

56. Craufurd Smith, "Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection" in Craig and De Búrca (Eds.), *The evolution of EU law* (Oxford, 1999), p. 298.

57. See in general, Delicostopoulos, "Towards European procedural primacy in national legal systems", 9 ELJ (2003), 606–613.

58. Caranta, "Judicial protection against Member States: A new *jus commune* takes shape", 32 CML Rev. (1995), 706.

59. Van Gerven, op. cit. *supra* note 54, 504. See also Prechal, "Judge-made harmonisation of national procedural rules: A bridging perspective" in Wouters, Stuyck and Kruger (Eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Antwerp, 2000), pp. 43–44.

60. Case C-432/05, *Unibet,* [2007] ECR I-2271, paras. 40–42.

61. Case C-268/06, *Impact*, [2008] ECR I-2483, para 54.

62. Arnull, "The principle of effective judicial protection: An unruly horse?", 36 EL Rev. (2011), 54.

63. *Impact*, cited *supra* note 61, para 55.

Court directly to question the constitutional adequacy of national procedural provisions without having to focus on the availability or necessity of specific EU-triggered remedies. As such, the combined reference to both "procedural disadvantages" and the national legal orders' obligation to establish remedies in *Impact* could be interpreted as a self-invitation by the Court to re-orient its more active review approach from remedies to procedural rules.

In *VEBIC*, the Court seemed to confirm that approach when it held that effective judicial protection implies that a national competition authority should have a right to act as a defendant or intervening party in appellate judicial proceedings against its decisions, even if that authority itself comprises an administrative court in accordance with national law.[64] The judgment directly imposed institutional and procedural changes on the national legal system to remedy the procedural disadvantages in Belgian competition law procedure.[65] The *DEB* judgment also requires potential national adaptations regarding grants of legal aid to corporate legal persons that could not be brought about by mere non-application of national procedural rules.[66] Although the judgment does not prescribe procedural changes as directly as in *VEBIC*, the Court clearly indicates a preference for more direct procedural intervention.[67]

VEBIC and *DEB* could therefore be read as positing a more stringent adequacy review of national procedural provisions. National procedural provisions no longer have to be merely effective; they should be adequate according to EU judicial protection standards. The Court considers itself competent to translate these adequate judicial protection standards into direct procedural obligations imposed on Member States' legal orders.

Samba Diouf subscribes to that positive procedural obligations approach. The judgment rightly presupposes the presence of rights and accompanying remedies and considers the dispute to focus on the scope of procedural rules at the national level. The national procedural rule at stake resulted in the inability of national judges to consider the reasons for initiating an accelerated procedure. Non-application of that provision would not however directly result in judges taking the reasons for initiating the accelerated procedure into account in review procedures against final decisions rejecting an application. On the contrary, the non-application of that rule would result in a legal gap, as the reasons for initiating accelerated proceedings would no longer be included

64. Case C-439/08, *VEBIC*, judgment of 7 Dec. 2010, nyr.; see Frese, case note on *VEBIC,* 48 CML Rev. (2011), 893–906.

65. Petit, "The judgment of the European Court of Justice in VEBIC: Filling a Gap in Regulation 1/2003″, (2011) *Journal of European Competition Law & Practice*, 340–344.

66. Case C-279/09, *Deutsche Energiehandels- und Beratungsgesellschaft mbH (DEB),* judgment of 22 Dec. 2010, nyr.

67. *DEB*, cited previous note, para 60.

in the legal framework governing asylum procedures. In order to attain an adequate procedural solution, the Court had to provide direct guidance on how to organize national procedural law. The Court therefore required national law to ensure that the reviewing court can directly consider the reasons for initiating accelerated proceedings as part of its scope of review against the final decision.

The Court's reliance on positive procedural obligations in this case should not, however, be overgeneralized. The extent of positive obligations imposed in *Samba Diouf* might rather result from the specificity of the asylum procedural context than from a direct judicial desire to extend the scope of direct procedural obligations. According to the Court, Directive 2005/85/EC granted the Member States a discretionary margin of assessment with regard to the implementation of the Directive's minimum standards in the light of the particular features of national law.[68] The Court's judgment mainly confirmed national discretionary competence in this field and provided guidance on how to interpret procedural obligations encapsulated in the Directive. It could therefore be argued that the Court has only been willing to derive a positive procedural obligation directly from (a constitutional interpretation of) Directive 2005/85/EC. In that regard, the annotated judgment resembles *VEBIC*, in which the Court identified a positive obligation in the provisions of an EU regulation.[69]

The factual outcome of *Samba Diouf* confirms the limited scope of positive procedural obligations in that regard. Luxembourg adapted its law on 19 May 2011, i.e. before the annotated judgment was delivered but following the Advocate General's Opinion. In the adapted Law, judicial review against a final decision rejecting an accelerated application may include an action for the annulment of the decision initiating the accelerated procedure.[70] The annulment action can only be lodged following a final rejection decision, but the *Tribunal* will now explicitly and directly have to take the reasons underlying the initiation decision into account in future cases when the action is explicitly lodged against decisions to initiate the accelerated procedure. Although a consistent judicial interpretation of the 2006 law with that obligation would not have seemed impossible,[71] the legislative adaptation

68. Judgment, para 29–30.

69. The outcome in *VEBIC* was to be read in Art. 35 of Regulation 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. 2003, L 1/1, stating that Member States may designate Courts as national competition authorities, see *VEBIC*, cited *supra* note 64, para 64.

70. Judgment, para 13. See also: Loi du 19 mai 2011 modifiant la loi modifiée du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection, *Mémorial* A 2011, 1618.

71. The Luxembourg Government maintained that position, see judgment, para 53.

ensures that the constitutional interpretation of Article 39 of Directive 2005/85/EC is now reflected in Luxembourg law. The legislative adaptation would not however seem to bring solace for Mr Samba Diouf. The new law allows for actions to be brought against a decision initiating an accelerated procedure. Although Mr Samba Diouf initiated a similar action, he did not lodge it within the time limits under the new legislative regime. The 19 May 2011 Law would therefore not seem to apply to the action lodged before its entry into force. The national judge would therefore still have to interpret the existing Luxembourg law in conformity with the Court's obligation to take the reasons for initiating an accelerated procedure into account.[72]

Samba Diouf nevertheless also demonstrates that the Court might be willing to entertain a positive procedural obligations approach in the absence of secondary legislation. The Court's reasoning on time limits is exemplary in that respect. The determination of time limits did not form part of the harmonization package of Directive 2005/85/EC.[73] Although Member States remain free to determine time limits, established case law maintains that time limits cannot render the right to initiate an action excessively difficult or virtually impossible.[74] A short or abbreviated time period for particular types of actions could in that regard unreasonably frustrate the right to a remedy as interpreted in EU law. In those cases, the non-application of the specific, abbreviated time period and a subsequent automatic application of the general time period would seem to provide a sufficient solution.[75] The Court did not however propose this simple solution, but at least hinted at direct interference with how national courts could in that case deal with time limits. The *Samba Diouf* judgment suggests that the national judge should assess whether the application should be upheld despite being lodged late and whether it should subsequently be conducted under the ordinary – i.e. non-accelerated – review procedure.[76] In so doing, the Court departs from rulings in earlier cases,[77] in which it decided on the prolongation or the extension of the starting point of

72. Judgment, para 60.

73. Art. 39(2) of Directive 2005/85/EC leaves the determination of time limits to the Member States.

74. See among others Case C-211/06, *Kempter*, [2008] ECR I-411, para 58; Case C-63/08, *Pontin,* [2009] ECR, I-10467, para 48; Case C-246/09, *Bülicke*, judgment of 8 July 2010, nyr, para 36.

75. On the basis of the general maxim *lex specialis derogat legi generali*, the non-application of the specific rule results in the application of the more general one. This principle has been recognized in EU law with regard to a hierarchy between different Treaties, see Joined Cases C-201 & 216/09, *Arcelor Mittal*, judgment of 29 March 2011, nyr, para 59.

76. Judgment, para 68.

77. See among others Case C-208/90, *Emmott* [1991] ECR I-4269, para 23; Case C-327/00, *Santex*, [2003] ECR I-1877, paras. 57–61; Case C-542/08, *Barth,* [2010] ECR I-3189, paras. 33–36; Case C-452/09*, Iaia,* judgment of 19 May 2011, nyr, para 21.

time limits without directly ruling on substantive consequences of the actions underlying time limits. The Court directly provides national judges with a concrete suggestion on how to proceed in those cases. Although that solution is not immediately imposed on national courts, the Court clearly considers that approach to be in conformity with the EU right to an effective remedy. In so doing, the Court provides a direct constitutionally acceptable solution for national judges to consider without any reference to a provision in EU secondary legislation.

The Court's potentially intrusive approach regarding time limits should not however be overstated. First, the Court confirms its long-standing case law that national time limits should be reasonable and thereby leaves it to the Member States to determine what time limits should overall be considered reasonable. A short time limit might in that regard be reasonable given the expediency of the asylum procedures at hand.[78] From that perspective, Member States retain a significant amount of discretion to impose a fairly short time limit. Second, the Court does not directly impose an obligation on the national legal orders. It rather "suggests" an alternative solution to the national court. The nature of that suggestion does however remain unclear from the judgment, as does the way in which a suggestion could be read to impose an obligation. Third, the reasoning on time limits only remains *dictum* in the judgment. The Court did not therefore herald a new approach in its actual decision in this case. More judicial clarification on the scope of positive procedural obligations devoid of particular secondary legislation is therefore necessary with a view truly to accept the imposition of procedural obligations as a new trend in the case law. At the very least, *Samba Diouf* indicates the Court's willingness to travel along this path.

5.2. *National procedural obligations and the post-Lisbon constitutional mandate*

The *Samba Diouf* judgment not merely reflects a preference for positive EU standards, it also provides a firm constitutional basis for developing them. The constitutional translation of the principle of effective judicial protection in the Charter of Fundamental Rights is guiding in that regard.

References to the principle of effective judicial protection in the Court's case law are hardly novel. In *Johnston*, the Court already famously declared that "Member States must ensure that [Union] rights conferred may be effectively relied upon before the national courts by the persons concerned".[79]

78. Judgment, para 67.

79. Case 222/84, *Johnston*, [1986] ECR 1651, para 17. On the principle, Haapaniemi, "Procedural autonomy: A misnomer?" in Ervo et al. (Eds.), *The Europeanization of Procedural*

To that extent, the principle of judicial control by national courts reflects "a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms of 4 November 1950".[80] The principle of effective judicial protection requires both access to a national court and procedural tools to develop a claim based on EU law. The EU Treaty framework recognizes this conceptual intertwinement in Article 19 TEU, stating that "Member States shall provide remedies sufficient to ensure *effective legal protection* in the fields covered by Union law". Article 47 of the Charter explicitly mentions both elements as a part of a fundamental *right* or entitlement to judicial review. The right to effective legal protection therefore bundles access rights and rights related to the proper conduct of judicial proceedings.

The Charter's phraseology of rights is crucial in light of the Court's position in *Samba Diouf*. It is well known that the Charter has the same legal value as the Treaties by virtue of Article 6 TEU.[81] The Court acknowledges its binding force,[82] after having been inspired by it before.[83] In turning the principle of effective judicial protection into a bundle of access and conduct rights, "effective judicial protection" becomes a tool for direct intervention in Member States legal orders. The content and scope of these rights have both been clarified in the Court's judgment.

The content of the access to court and fair procedure rights is supposedly determined by the interpretations given to Articles 6 and 13 ECHR.[84] Article 52(3) of the Charter clearly states that the meaning and scope of rights which correspond to ECHR rights remains the same under the Charter. The Article also allows the Union to develop a more stringent standard of protection than the ECHR. In addition Article 52 (4) holds that fundamental rights should be interpreted in the light of the common constitutional traditions of Member

Law and New Challenges to a Fair Trial, (Groningen, 2009), p. 102. See also Groussot, *General principles of Community Law* (Europa Law Publishing, 2006), pp. 235–242; Lenaerts, "The rule of law and the coherence of the judicial system of the European Union", 44 CML Rev. (2007), 1625–1659.

80. *Johnston*, cited *supra* note 79, para 18.

81. See Dougan, "The Treaty of Lisbon 2007: Winning Minds, not Hearts", 45 CML Rev. (2008), 662.

82. The first case in which the Court expressly acknowledged this binding character as determining the scope of EU fundamental rights was Case C-555/07, *Seda Kücükdeveci* , [2010] ECR I-365, para 22. In Case C-403/09 PPU, *Detiček*, [2009] ECR I-12193, para 55, the Court implicitly considered the binding nature of the Charter as a result of the entry into force of the Lisbon Treaty.

83. See Case C-540/03, *European Parliament v. Council* [2006] ECR I-5769, para 38; *Unibet*, cited *supra* note 60, para 37; Case C-341/05, *Laval un Partneri Ltd*., [2007] ECR 1-11767, paras. 90–91.

84. Opinion, para 35.

States. This choice of words in the Charter confirms its inherent reliance on the provisions of the ECHR and does not appear to grant much room to an independently developed particular body of EU fundamental rights. The Court's position in earlier case law confirms this point. In *DEB*, the Court stated that the principle of effective judicial protection stems from the constitutional traditions common to the Member States, enshrined in Articles 6 and 13 ECHR.[85] The content of procedural guarantees should thus be determined in that respect. Advocate General Cruz Villalón seems to have confirmed that approach in *Samba Diouf*.[86]

At the same time however, the Advocate General argued that the right to an effective judicial remedy in Article 47 of the Charter acquired a separate identity and *substance*, not being the mere sum of the provisions of Articles 6 and 13 ECHR.[87] As such, both content and scope of Article 47 retain at least some independence from the ECHR system. The Court confirmed the latter approach and simply referred to effective judicial protection as a general principle of EU law to which expression is now given in Article 47 of the Charter.[88] No references whatsoever to the ECHR can be found in the judgment.

The Court's exclusive reliance on Article 47 of the Charter, combined with the option to develop more stringent standards of protection under EU law in Article 52(3) of the Charter could be interpreted as an indication that the Court is willing to move beyond the contents of Articles 6 and 13 ECHR in the establishment of particular EU-oriented procedural rights. The extent to which the EU and ECHR systems can live apart together, as both the Court and the Advocate General seem to presume, is not directly addressed in the judgment.[89] At the very least, the Court considers reliance on the Charter fundamental for the development of EU-tailored procedural standards.

5.3. *From procedural autonomy to a fundamental rights approach*

The *Samba Diouf* judgment at the very least confirms the Court's willingness to impose positive procedural obligations on national legal orders and the

85. *DEB,* cited *supra* note 66, para 29.

86. Opinion, para 38.

87. Ibid., para 39. In para 40, he argued that the scope of application of the Charter differed from the more restrictive scope of Art. 13 ECHR.

88. Judgment, para 49.

89. On the interaction between the ECHR and EU fundamental rights regimes, see Lock, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order", 48 CML Rev. (2011), 1034. See already Corthaut and Vanneste, "Waves between Strasbourg and Luxembourg: the Right of Access to a Court to Contest the Validity of Legislative and Administrative Measures", 25 YEL (2006), 475–514.

constitutional basis for doing so. This preference for more direct, positive harmonization efforts with respect to procedural provisions is reminiscent of the Court's activism in developing remedies[90] and the underlying critiques of a Court focused on uniformity rather than regulatory differentiation as the EU's integration objective.[91] The Court's approach does not however imply the end of national procedural autonomy. Rather, it modifies and restructures the role of Member States' obligations and the principle of national procedural autonomy within a "Europeanized" procedural law framework based on fundamental procedural rights reflected in the Charter. It replaces the traditional procedural autonomy analysis by a fundamental rights oriented approach regarding national procedural provisions.

The principle of national procedural autonomy[92] states that the institutional organization of courts and detailed procedural rules applicable are a matter for the domestic legal order, subject to conditions of equivalence and effectiveness.[93] This principle and its limiting conditions only apply in the absence of secondary Union legislation on the matter. In *Samba Diouf*, the Court did not as such mention the principle, since secondary Union legislation did exist and did itself provide for minimum harmonization standards. Article 39 of Directive 2005/85/EC did not however directly harmonize national rules. It rather imposed the provision of an effective remedy as a matter of EU law, an obligation now also following from the Charter itself. It could therefore be argued that the scope of procedural autonomy remains equal in instances not subject to harmonization and in situations where harmonizing instruments mainly refer to the obligation to provide an effective judicial remedy without framing how that remedy should be rendered operational. In this reading of procedural autonomy, conditions of equivalence and effectiveness still provide limits to a Member State's freedom, but only to the extent that it operates within the boundaries drawn by the right to an effective judicial remedy.[94] These boundaries include the positive obligations reflected in the

90. Van Gerven, "Toward a coherent constitutional system within the European Union", 2 EPL (1996), 96–98.

91. Dougan, *National Remedies before the European Court of Justice* (Hart, 2004), pp. 200–226.

92. The Court formally introduced the principle in Case C-201/02, *Wells* [2004] ECR I-723, para 65 and has referred to it since, see recently Case C-262/09, *Meilicke*, judgment of 30 June 2011, nyr, para 55.

93. For a recent overview, see Bobek, "Why there is no principle of 'procedural autonomy' of the Member States" in De Witte and Micklitz (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Antwerp, 2011), forthcoming. See also Kakouris, "Do the Member States possess judicial procedural autonomy?", 34 CML Rev. (1997), 1389–1412.

94. In the judgment, paras. 49–50, the Court made clear that it relied directly on the Charter to determine the scope of Member States' procedural competences. The absence of any procedural harmonization directive would not modify the Court's position in that respect.

Charter itself. Positive obligations thus provide additional constitutional restraints on a Member State's autonomy to determine procedural provisions. A Member State's procedural system can only remain autonomous and differentiated within the heteronomous institutional boundaries crafted by the Court in its interpretation of the Charter.

In *Samba Diouf*, the Court's fundamental rights approach resulted in a modified interpretation of the scope of judicial review and a "suggestion" towards the application of time limits in particular cases. Although these results do not epitomize the Court as a full-fledged procedural norm-creator, they at least showcase that the Court considers itself competent to address institutional recommendations to both national courts[95] and legislatures[96] with a view to adapting procedural provisions within the boundaries indicated by a judicial interpretation of the Charter. National courts appear to recognize the Court's role as an institutional norm-giver and the ensuing limits on a Member State's autonomy to develop procedural rules or specialized judicial institutions. An example of that new national court consciousness can be found in another – currently pending – reference for a preliminary ruling regarding Article 39 of Directive 2005/85/EC. In that reference, the national court questions whether appeal procedures before a specialized Tribunal that could ultimately be overridden by an Irish government Minister comply with the fundamental right to an effective remedy.[97] Just like in *Samba Diouf*, the Court's reply to that reference will directly address institutional choices made by the Member States and delineate or restrict the autonomous procedural choices of a Member State even further.

In a fundamental procedural rights approach, a Member State will only be able to invoke the principle of procedural autonomy to the extent that no EU obligation could be detected and, if that is the case, to the extent that conditions of equivalence or effectiveness do not warrant the rule's non-application. Given the general scope of application of the Charter, new procedural obligations are likely to abound across different sectors of EU regulation. Room for regulatory differentiation will thus become ever more confined to particular choices provided by the Court of Justice itself, in ways comparable to the EU-wide remedies developed by the Court.[98]

95. Albeit limited by the duty to interpret national law in conformity with EU law, including positive procedural obligations and without overstepping the boundaries of the judicial mandate granted under national law, judgment, para 60.

96. The Luxembourg Law of 19 May 2011, cited *supra* note 70, is a direct result of the Court's actions.

97. Case C-175/11, *HID and BA*, Reference for a preliminary ruling from High Court of Ireland made on 13 April 2011, O.J. 2011, C 204/14.

98. On the role of national autonomy in the light of judicially created EU-wide remedies, see Craufurd Smith, op. cit. *supra* note 56, pp. 305–307.

6. Conclusion

The *Samba Diouf* judgment showcases that the interaction between EU fundamental rights and judicial protection requirements pervades any field of EU law, including EU and national asylum procedures. At the same time, the judgment confirms the increasing importance of the Charter of Fundamental Rights as a justificatory instrument for the development of EU-wide adequate judicial protection standards. The Charter allows the Court to impose additional procedural obligations on national legal orders that either fill in gaps in the minimum approach adopted in sector-specific procedural directives or directly restructure national procedural provisions in the absence of EU legislation on the matter. In so doing, the Court complements both EU and national legislative organs and guides national judges towards the implementation of an EU-tailored procedural rule of law. National judges and legislators retain some autonomy, but the Court is more than ever willing to delineate the boundaries of that autonomy. As a result, national autonomy to design procedural rules grows increasingly heteronomous.

Pieter Van Cleynenbreugel*

* Fellow Research Foundation Flanders, Centre for a Common Law of Europe, University of Leuven, Faculty of Law. LL.M. (Harvard University), LL.B., LL.M. (University of Leuven) pieter.vancleynenbreugel@law.kuleuven.be.