

The principle of effective judicial protection as a catalyst for institutional change?

An inquiry into judicial
empowerment in asylum matters

Maxime Tecqmenne
EU Legal Studies (Uliège)
Università di Bologna
ACCESS - Gatekeepers to international refugee
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Overview



- ▶ Directives on asylum procedures reflect national traditions on administrative decision-making.
- ▶ The principle of effective judicial protection has served to (re)instate judicial oversight over administrative discretion.
- ▶ Bottom line: The mandate of national judges is reevaluated to reflect their role as gatekeepers for the protection of asylum seekers' fundamental rights.

Tra il dire ...



- ▶ Tampere European Council conclusions (1999): the Common European Asylum System should include « common standards for a fair and efficient asylum procedure » (para. 14).
- ▶ Art. 63(1)(d) EC Treaty: Legislative mandate to set up « minimum standards on procedures ».
- ▶ But... unanimity requirement, and limited involvement of European Parliament (Art. 67 EC Treaty).

... e il fare



- ▶ Directive 2005/85 perpetuates national traditions on decision-making in asylum matters.
- ▶ Administrative discretion ... with little to no judicial oversight!
- ▶ Article 39 : mere reference to right to an effective judicial review.
- ▶ General reluctance to involve judges in immigration matters also plays out in Visa Code, Dublin Regulation, Schengen Border Code, etc.

Bridging the gap between Directive 2005/85 and international human rights law



- ▶ (In)compatibility with case law of European Court of Human Rights: absence of provisions on scope of review, suspensive effect of appeal, and time limits.
- ▶ Article 52(3): ECHR as a floor of protection to define material content of PEJP.
- ▶ Suspensive effect of appeals (C-562/13, Abdida; C-239/14, Tall).
- ▶ Standard of review involving full scrutiny of both elements of facts and law; reasonable time limits (C-69/10, Samba Diouf).

Directive 2013/32, a step forward for the judicial protection of asylum seekers?



- ▶ Impetus towards creation of « common procedures » on asylum (Art. 78(2)(d) TFEU).
- ▶ Commission commits to progress « towards a common asylum procedure » (COM(2009) 554 final).
- ▶ Ordinary legislative procedure (Art. 78(2)): Greater involvement of Parliament and qualified majority voting within the Council.
- ▶ Is Directive 2013/32 conducive to a more robust conception of judicial protection, or does it constitute a mere codification of relevant case law?

Directive 2013/32, a step forward for the judicial protection of asylum seekers?



- ▶ Directive 2013/32 continues to allow space for administrative discretion.
- ▶ It does no more than codify relevant case law.
- ▶ Art. 46(3): Judicial review includes full and *ex nunc* assessment of both appraisal of facts and law.
- ▶ Art. 46(4): Reasonable time limits.
- ▶ Art. 46(5): Right to remain pending judicial appeal.

Article 47 of the Charter, a catalyst for the development of positive judicial obligations in asylum matters



- ▶ ECJ operating as a positive norm-setter in procedural matters.
- ▶ National judges are asked to do more than simply set aside conflicting national procedural provisions; they must apply directly effective standard of judicial protection deriving from Article 47 of the Charter (See, e.g., FMS, Torubarov, etc.)
- ▶ Onus shifts onto the material content deriving from Article 47 of the Charter.

Isolating the essence of effective judicial protection



- ▶ Creation of new remedies dictated by the « essence » of judicial protection (Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS* and C-556/17, *Torubarov*).
- ▶ The concept of « essence » of judicial protection is coextensive with the normative demands of rule of law.
- ▶ The essence of Article 47 of the Charter includes: right to bring judicial proceedings before an independent court or tribunal; scope of review involving appraisal of all relevant elements, including both elements of facts and law (C-403/16, *El Hassani*, para. 39); binding effect of judicial decisions (*Torubarov*, See also C-752/18, *Deutsche Umwelthilfe*).

The polymorphism of effective judicial protection



- ▶ Specific procedures and remedies tailored to the fundamental rights nexus of asylum matters.
- ▶ Fundamental rights nexus of asylum matters filtered primarily through the terms of Directive 2013/32.
- ▶ Increased investigative powers to enable national judges to discharge the mandate attributed to them by Directive 2013/32.
- ▶ Suspensive effect of appeal dictated by the principle of non-refoulement
Ex officio assessment of detention dictated by right to liberty (C-720/21).

Concluding remarks: The case for increased institutional demands



- ▶ Functionally, the frontier between administrative authorities and national judges is increasingly difficult to locate.
- ▶ Does it call for greater institutional demands on national judges?
- ▶ Tension between the requirement of independence and the continued prevalence of quasi-judicial bodies maintaining (strong) ties with the administration (C-175/11, H.I.D. and B.A.).
- ▶ Specialised courts in the making? National determining authorities are subject to obligations of specialisation (Art. 4(3)-(4) Dir. 2013/32)...