Master Thesis

The interim right to remain pursuant to Article 46(6) and (8) EU Procedures Directive in light of the right to an effective remedy and the principle of non-refoulement

— Assessing the German implementation

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<th>Full Form</th>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<tr>
<td>AsylG</td>
<td>Asylgesetz (Asylum Act)</td>
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<tr>
<td>AufenthG</td>
<td>Aufenthaltsgesetz (Residence Act)</td>
</tr>
<tr>
<td>BAMF</td>
<td>Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees)</td>
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<tr>
<td>BVerfG</td>
<td>Bundesverfassungsgericht (Federal Constitutional Court)</td>
</tr>
<tr>
<td>BVerfGG</td>
<td>Bundesverfassungsgerichtsgesetz (Law of the Constitutional Court)</td>
</tr>
<tr>
<td>BVerwG</td>
<td>Bundesverwaltungsgericht (Federal Administrative Court)</td>
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<tr>
<td>CAT</td>
<td>Convention against Torture</td>
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<tr>
<td>CEAS</td>
<td>Common European Asylum System</td>
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<tr>
<td>CFR; the Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<tr>
<td>ComAT</td>
<td>Committee against Torture</td>
</tr>
<tr>
<td>Council</td>
<td>Council of the European Union</td>
</tr>
<tr>
<td>EASO</td>
<td>European Asylum Support Office</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EC Treaty</td>
<td>Treaty Establishing the European Community</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>EXCOM</td>
<td>Executive Committee</td>
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<tr>
<td>GG</td>
<td>Grundgesetz (Basic Law)</td>
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<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>OFPRA</td>
<td>L’Office français de protection des réfugiés et apatride.</td>
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<tr>
<td>PD</td>
<td>Recast of the Procedures Directive (2013/32/EU)</td>
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<tr>
<td>QD</td>
<td>Recast of the Qualification Directive (2011/95/EU)</td>
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<tr>
<td>RC</td>
<td>Refugee Convention</td>
</tr>
<tr>
<td>RCD</td>
<td>Reception Conditions Directive (2013/33/EU)</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<tr>
<td>Vienna Treaty Convention</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>VwGO</td>
<td>Verwaltungsgerichtsordnung (Act on Administrative Judicial Procedure)</td>
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A. Introduction

Does the appeal against an asylum rejection have to guarantee the right to remain during the asylum appeal proceedings? In pondering the consequences of an appeal which does not guarantee such a right to remain, the question has to be answered affirmatively. The serious harm which may occur in case of a well-founded claim of asylum is irreversible. It cannot be made good again by a judgment confirming the well-founded claim. Asylum appeal proceedings would be ineffective if an asylum seeker could be deported before the conclusion of the appeal proceedings. What is more, the right to non-refoulement would be ineffective. That is the reason why an appeal against an asylum rejection must ensure the right to remain in the territory of the receiving Member State during asylum appeal proceedings. This right is laid down in Article 46(5) Procedures Directive (PD).1 However, not all asylum seekers enjoy such a right to remain. Article 46(6) PD exempts certain asylum seeker groups from this “full right to remain”.2 Asylum seekers affected by Article 46(6) PD are subjected to a restricted right to remain. They are only authorised to remain during the period within which a court decides whether or not they have to be granted a full right to remain. Hence, a full right to remain is not guaranteed by law, but is decided upon on a case-by-case basis. Nevertheless, a right to remain during these interim proceedings is guaranteed by law. This – restricted – right to remain is laid down in Article 46(8) PD. Consequently, the initial question transforms. Is it sufficient if a right to remain is only guaranteed during the interim proceedings, even though a decision on the asylum appeal has yet to be taken? If so, which procedural requirements do these interim proceedings have to fulfil in order to preserve the effectiveness of the asylum appeal?

Article 46(6) PD does not oblige Member States to implement this restricted right to remain. However, if they do so Member States have to comply with the Charter of Fundamental Rights of the European Union (the Charter; CFR).3 Germany made use of this option, and implemented the restricted right to remain. Notably, Section 36 Asylum Act (AsylG)4 taken in conjunction with Section 80(5) Act on Administrative Judicial Procedure (VwGO)5 constitute the implementation of Article 46(6) and (8) PD.6 This implementation has to comply with Union law, including the Charter. When assessing its Union law compliance, the standard set by the right to an effective remedy enshrined in Article 47 CFR as well as the principle of non-refoulement guaranteed by Article 19(2) CFR is of utmost relevance.

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2 The expression “full right to remain” is derived from CJEU Case C-269/18 PPU C. J and S [2018] para 53 (literal translation of German version).
In 2018, the success rate of asylum appeals (on the merits) in German administrative courts was 31.7%. In 2017, it was even 40.8%. This is a sign that the Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge; BAMF) often wrongly rejects asylum applications. In order to give administrative courts the possibility to effectively correct wrong administrative decisions before a deportation takes place, it is important that sufficient procedural safeguards are already in place during the interim proceedings. The objective of this thesis is to analyse which procedural safeguards have to be provided for during these interim proceedings.

I. Research question and sub-questions

This thesis attempts to define the minimum standard which a Member State has to meet when implementing Article 46(6) and (8) PD. This standard shall be defined by consulting an interpretation in light of the Charter. In a second step, it will be examined whether the German implementation of Article 46(6) and (8) PD meets this standard. The research question and sub-questions are as follows:

How does Article 46(6) and (8) PD have to be interpreted and implemented in light of the principle of non-refoulement (Article 19(2) CFR) and the right to an effective remedy (Article 47 CFR), and does the German implementation meet this standard?

1. What are the origins, purpose, content and context of Article 46(6) and (8) PD?
2. Which procedural guarantees do Articles 47 and 19(2) CFR require in respect of asylum appeal proceedings?
3. Which circumstances allow for a limitation of certain procedural guarantees, and to what extent are limitations of such procedural guarantees possible?
4. Which procedural guarantees do Articles 47 and 19(2) CFR require in respect of interim proceedings which implement Article 46(6) and (8) PD?
5. To what extent does the German implementation of Article 46(6) and (8) PD meet the standard of Article 46(6) and (8) PD as interpreted in light of Articles 47 and 19(2) CFR?

II. Limitation

This thesis will not interpret or test the border procedure regulated in Article 46(7) PD. Nevertheless, Article 46(7) PD will be consulted in so far as it is relevant for a contextual interpretation of Article 46(6) and (8) PD. Interim Dublin proceedings are regulated in Article 27(3)(b) and (c) Dublin III Regulation. An in-depth analysis of this provision may possibly yield results which can be deployed for a contextual interpretation of Article 46(6) and (8) PD. However, such an analysis is beyond the scope of this thesis. Dublin proceedings will only be taken into account so far as they play a role in case law of the European Court of Hu-

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8 Regulation 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31.
man Rights (ECtHR). By contrast, the Return Directive (RD)\(^9\) is directly relevant for an interpretation of Article 46(6) and (8) PD. This is due to the fact that a denial of a right to remain is linked to the enforcement of a return decision.\(^10\)

The focus of the analysis lies on the German implementation. Nevertheless, the interpretation of Article 46(6) and (8) PD in light of Union law in general allows for the application of the findings to other Member States as well. One preliminary remark regarding a German particularity should be made nonetheless. When assessing a German implementation of a Union law act which leaves discretion, one divergence of opinion should be noted. According to the Federal Constitutional Court (Bundesverfassungsgericht; BVerfG), such an implementation has to be exclusively assessed against the German Constitution (Grundgesetz; GG).\(^11\) By contrast, the Court of Justice of the European Union (CJEU) argues for a parallel application of national constitutions and the Charter in cases where the respective Union law act leaves discretion. The CJEU argues that constitutional standards can be applied as long as they do not compromise the level of protection provided by the Charter and the effet utile of Union law.\(^12\) Without going into further detail, I follow the CJEU and assess the German implementation against the Charter. In this vein, the relevance of the findings of this thesis for other Member States can be ensured.

### III. Methodology

The research question will be approached by applying the method the CJEU uses to interpret a provision of EU law. The CJEU takes into account wording, context, objectives and origins of a provision.\(^14\) Furthermore, it interprets a provision “in a manner consistent with […] the Charter”.\(^15\)

**Chapter B**: The aim of chapter B is to get a better understanding of Article 46(6) and (8) PD on the basis of a wording, purpose and context related interpretation. The Preamble of the PD does not reveal the particular purpose of the restricted right to remain during interim proceedings. Therefore, its purpose will be deduced from an analysis of its legal history. This analysis consults documents of the European Commission, the Council of the European Union (Council), the European Parliament, and the European Council. Additionally, scholarly writing concerning EU asylum law and the PD is used (I). The finding of this analysis will be compared

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\(^10\) cf. Philipp Wittmann, „Die Ablehnung des Asylantrags als „offensichtlich unbegründet“ nach EuGH Rs. C-181/16 (`Gnandi`) und C-269/18 PPU (`C, J und S`)“ (2019) 2 Zeitschrift für Ausländerrecht und Ausländerpolitik 45, 49 argues that Article 46(6) PD can logically only relate to the enforceability of a return decision.

\(^11\) Basic Law (Grundgesetz; GG) announced on 23.05.1949 Federal Law Gazette (Bundesgesetzblatt) page 1, most recently changed through Article 1 of the law 28.03.2019 Federal Law Gazette I page 404.


\(^14\) CJEU Case C-621/18 Wightman and others [2018] para 47 and further case law cited.

\(^15\) CJEU Case C-585/16 Alheto [2018] para 114.
with the general objectives of the PD which can be derived from the Preamble itself (II.). Thereafter, the content of Article 46(6) and (8) PD will be explored on the basis of its wording (III.). The ensuing context related analysis focuses on other rights to remain which are regulated in the PD. For this, the PD itself and scholarly writing on the PD is used (IV.). Finally, the relation and demarcation between the PD and the RD will be examined. CJEU case law serves this analysis in the first place. Additionally, opinions of the respective Advocate Generals (AG) help to understand background considerations of the CJEU. Moreover, Wittmann’s elaborate and convincing analysis of recent CJEU case law developments in this regard is intensively engaged with (V.).

Chapter C aims to interpret Article 46(6) and (8) PD in light of the Charter. As the CJEU has not yet adjudicated on the research question, EU law in the stricter sense as interpreted by the CJEU so far will not yield a complete result. Therefore, relevant sources of interpretation are additionally required.

Chapter I extracts effective remedy requirements from case law on the European Convention on Human Rights (ECHR). As Reneman has exactly written on the research topic, namely the EU right to remain during asylum appeal proceedings, her analysis is dealt with in the first place. I relied on case law she referred to, and engaged with her analysis. Furthermore, I relied on De Weck who particularly deals with Article 3 ECHR case law, and parts of her analysis include the right to an effective remedy under the ECHR. For the selection of case law, I additionally relied on EASO which includes more recent developments of ECHR case law until November 2017.

Chapter II deduces effective remedy requirements from the Refugee Convention (RC). Relevant documents of the United Nations High Commissioner for Refugees (UNHCR) and the Executive Committee (EXCOM) have been analysed. In order to understand which weight has to be attached to those documents within the EU legal order, I particularly relied on Battjes. His book lays a particular focus on how international law, including the Refugee Convention, works within the framework of EU law. Furthermore, Reneman has analysed to what extent those documents influence CJEU case law, and is therefore also relied upon. In order to understand how the Refugee Convention itself has to be interpreted, I relied on Battjes and Wouters. Wouters’ book provides for an extensive analysis of international asylum law, including the Refugee Convention. For the selection of relevant documents regarding the right to an effective remedy under the Refugee Convention, I consulted Reneman.

16 Wittmann (n 10) 47-48.
21 Hemme Battjes, European Asylum Law and International Law (Martinus Nijhoff Publishers 2006) 22 and 94.
22 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 65-66 and 70.
23 Battjes, European Asylum Law and International Law (n 22) 9-11, 14-20.
man, Battjes, Wouters, and Moreno-Lax. Even though Moreno-Lax works towards the extraterritorial dimension of EU asylum law, parts of her book determine the content of Article 47 CFR in light of international law with regard to the territorial dimension, before moving further to the extraterritorial implications. Her findings are therefore also relevant for the right to remain in the territory of a Member State during the asylum appeal proceedings. For the analysis of the mentioned documents, I partly relied on the writings of these scholars or analysed the documents myself. In order to find relevant CJEU case law, I consulted the database Curia using the search words “Article 1F”, “Geneva Convention”, and “national security”.

**Chapter III** concerns the Convention against Torture (CAT). Relevant views and General Comments of the Committee against Torture (ComAT) have been analysed. In order to understand the significance of the CAT in EU law, I relied again on Battjes and Reneman. Wouters served an understanding of how the CAT itself has to be interpreted. For the selection of relevant views and comments of the Committee, I relied on several authors, including Reneman and Moreno-Lax for the reasons stated above. Furthermore, I used Wouters and De Weck who both provide for an extensive analysis of the principle of non-refoulement in international law, including the CAT. Additionally, Nowak and McArthur published a commentary on the CAT which has been helpful to find views of the CAT which are relevant in asylum appeal cases. On the basis of this selection, views and comments of the CAT have been analysed by partly relying on scholarly interpretation.

**Chapter IV** extracts effective remedy requirements from the International Covenant on Civil and Political Rights (ICCPR). Relevant views and General Comments of the Human Rights Committee (HRC) have been analysed. In order to understand which weight has to be attached to those documents within the EU legal order, I relied again on Battjes and Reneman. In order to set out the rules for the interpretation of the ICCPR itself, I relied again on Wouters. For the selection of views and comments of the HRC, I consulted Reneman and Moreno-Lax for the reasons stated above. Additionally, Joseph and Castan’s commentary on

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26 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 118-125, 136.
27 Battjes, European Asylum Law and International Law (n 22) 292-293, 466-468, 319, 323-324.
30 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1984] 1465 UNTS 85.
31 Battjes, European Asylum Law and International Law (n 22) 85.
32 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 56.
33 Wouters (n 25) 429-434.
34 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 120-124, 135-137, 271-272.
35 Moreno-Lax (n 29) 405-409.
36 Wouters (n 25) 513-518.
37 De Weck (n 19) 288-291.
40 Battjes, European Asylum Law and International Law (n 22) 20-22, 94-95.
41 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 66-70.
42 Wouters (n 25) 364-369.
43 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 124, 135-137.
44 Moreno-Lax (n 29) 403-409.
the ICCPR has been deployed. The analysis of this selection is based on scholarly writing or own considerations.

Chapter V concerns the Charter in the stricter sense as interpreted by the CJEU so far. For the selection and analysis of case law, I particularly relied on Reneman as she devoted a whole book on the EU right to an effective remedy. Furthermore, I consulted Moreno-Lax for the reasons stated above. For the sake of up-to-date nature, relevant cases contained in NEAIS, and ELENA Weekly Legal Updates have been included. Moreover, Sinaniotis has been consulted to grasp the idea of interim relief during judicial proceedings in EU law in general. In addition, I consulted the database Curia using the search word “Gnandi”. Opinions of the AGs serve a better understanding of the judgments. For a further analysis of the recent CJEU judgments, I drew to a certain extent inspiration from the reading of the administrative court Minden. In the analysis of these recent judgments I kept distance from Hruschka’s reading which has been rejected by national courts, a scholar, and I myself am not completely convinced. For this reason, I attempted to find my own interpretation. Hruschka’s interpretation, which is – not completely, but in crucial respects – different from my interpretation, is referred to nonetheless. This shall give an idea of a partly diverging opinion.

Chapter VI draws on the findings of the analyses of the ECHR, the Refugee Convention, the CAT, the ICCPR, and the Charter in stricter sense. On this basis, the standard which the Charter sets in respect of the implementation of Article 46(6) and (8) PD will be set out.

Chapter C illustrates how Article 46(6) and (8) PD is implemented in German law, and assesses this implementation against the Union law standard developed in chapter B. Relevant German law, commentaries on German law, German case law as well as scholarly writing are used for the analysis. Wittkopp and Wittmann provide for an extensive analysis of recent CJEU case law and its implications for the German implementation. For the selection of cases, I consulted the database of the BVerfG using the following combination of search words: “offensichtlich unbegründet” and ”Asyl”, or “offensichtlich unbegründet” and ”ernstliche Zweifel”. In order to find relevant judgments of first and second instance administrative courts, I used the database beck-online entering the following search words: “Gnandi”; “C, J und S”; “ernstliche Zweifel” and ”36 AsylG”; “ernstliche Zweifel” and ”offensichtlich unbegründet”. For the selection of case law of the Federal Administrative Court (Bundesverwal-

46 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 127-130
47 Moreno-Lax (n 29) 437-443.
54 Wittmann (n 10) 46 and 51.
56 Wittmann (n 10).
tungsgericht; BVerwG) I relied on Berlit, who himself is judge at the BVerwG, and president of the appellate court division responsible for asylum law.

B. Origins, objectives, content and context

As the particular purpose of Article 46(6) and (8) PD cannot directly be inferred from the Preamble of the PD, its purpose will be deduced from an analysis of its legal history (I.). These findings will be contemplated against the background of the general objectives of the PD which follow from its Preamble (II.). The content of Article 46(6) and (8) PD will subsequently be examined on the basis of a wording related interpretation (III.). The context in which Article 46(6) and (8) PD is embedded will be explored by having regard to other rights to remain (IV.). Finally, the contextual relation to the RD will be analysed (V.).

I. Origins

The origins of Article 46(6) and (8) PD are illustrated by cutting its legal history into three main parts. Part 1 deals with the intergovernmental resolutions, part 2 considers its development within the PD (2005), and part 3 takes a closer look at its introduction into the PD. On this basis, the purpose of the interim proceedings and the right to remain pursuant to Article 46(6) and (8) PD will be found (part 4).

1. London Resolutions & Resolution on minimum guarantees for asylum procedures

The rule laid down in Article 46(6) PD, according to which Member States are free to restrict the right to remain pending asylum appeal procedures for specific asylum seeker groups, can be traced back to the 1990s. Whereas Denmark was the first country which introduced the safe third country concept in 1986 and Switzerland pioneered the safe country of origin concept in 1990, Member States not only soon copied these concepts, but also adopted common soft law standards. In 1992, the Council adopted three London Resolutions which provide for a normative framework regarding the concepts of safe third countries, safe countries of origin, and manifestly unfounded asylum applications. According to the latter Resolution, asylum applications can be considered manifestly unfounded in case of two general scenarios. First, an asylum claim has “clearly no substance”. Second, “a claim is based on deliberate deception or is an abuse of asylum procedures”. These two scenarios were not considered exhaustive. States could also subject other cases (such as those involving public order risks or those falling within the scope of Article 1F RC) to the same legal consequences which apply to manifestly unfounded applications.

61 European Union Conclusions on Countries in Which There is Generally No Serious Risk of Persecution (“London Resolution”) [1992].
63 London Resolution on Manifestly Unfounded Applications for Asylum (n 62) paras 1(a) and 6-8.
64 London Resolution on Manifestly Unfounded Applications for Asylum (n 62) paras 1(a) and 9-10.
65 London Resolution on Manifestly Unfounded Applications for Asylum (n 62) para 11.
The Resolution allowed states to channel such manifestly unfounded asylum applications through accelerated or admissibility procedures. This implied that states did not have to provide for a “full examination at every level of the procedure”\(^6^6\) and that “[a]ppeal or review procedures may be more simplified”.\(^6^7\)

After the entry into force of the Maastricht Treaty\(^6^8\) in November 1993, when asylum matters were still subjected to intergovernmental cooperation (third pillar),\(^6^9\) the Council adopted a Resolution\(^7^0\) on minimum guarantees for asylum procedures.\(^7^1\) This Resolution stipulated that, as “general principle”, an asylum seeker is allowed to remain in the territory of the receiving Member State pending the outcome of the appeal.\(^7^2\) Nevertheless, Member States could make an exception to this principle with regard to asylum applications being rejected as manifestly unfounded in accordance with the London Resolutions. However, further guarantees had to be put in place in order to “ensure the correctness of the decision” in such cases. For instance, another authority had to review the asylum rejection.\(^7^3\)


_Treaty of Amsterdam and legal basis_ Article 63(1)(d) EC Treaty

With the entry into force of the Treaty of Amsterdam\(^7^4\) in May 1999, Community competences in asylum matters were moved to the first pillar.\(^7^5\) The European Community had been endowed with the power to enact measures on asylum.\(^7^6\) Article 63(1) EC Treaty\(^7^7\) set a period of five years after the entry into force of the Treaty of Amsterdam within which the Community could adopt, inter alia, minimum standards on procedures for granting or withdrawing refugee status.\(^7^8\) Article 63(1)(d) EC Treaty provides the legal basis for the PD (2005). During the transitional period of five years (i.e. until 1 May 2004), the heads of the Member States – acting via the Council – still had a strong position in the legislative process. The Council had to enact a legislative proposal of the Commission or a Member State unanimously.\(^7^9\) The European Parliament only had to be consulted.\(^8^0\)

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\(^{6^6}\) London Resolution on Manifestly Unfounded Applications for Asylum (n 62) para 2.

\(^{6^7}\) London Resolution on Manifestly Unfounded Applications for Asylum (n 62) para 3.


\(^{7^2}\) Council Resolution on minimum guarantees for asylum procedures (n 52) para 17.

\(^{7^3}\) Council Resolution on minimum guarantees for asylum procedures (n 52) para 21.


\(^{7^5}\) Peers, _EU Justice and Home Affairs Law_ (n 71) 9.

\(^{7^6}\) Hannah Tewocht, _Drittstaatsangehörige im europäischen Migrationsrecht_ (Nomos 2016) 278.


\(^{7^8}\) Peers, _EU Justice and Home Affairs Law_ (n 71) 235.

\(^{7^9}\) Article 67(1) EC Treaty.

\(^{8^0}\) Peers, _EU Immigration and Asylum Law_ (n 69) 8.
First proposal
In October 2000, the Commission issued its first proposal for the PD (2005).\textsuperscript{81} Swift and correct procedures seem to be the main aims which run through the proposed Preamble.\textsuperscript{82} Recital 5, for example, states:

“Asylum procedures should not be so long and drawn out that persons in need of protection have to go through a long period of uncertainty before their cases are decided, and persons who have no need of protection but wish to remain on the territory of the Member States see an application for asylum as a means of prolonging their stay by several years. At the same time, asylum procedures should contain the necessary safeguards to ensure that those in need of protection are correctly identified” (emphasis). Specific procedures foreseen for inadmissible (not worth tackling substantial questions) and manifestly unfounded asylum applications serve to identify refugees in need quickly. Hence, such procedures are linked to the swiftness objective.\textsuperscript{83} However, this one-sided objective shall be balanced with “minimum procedural guarantees and requirements regarding the decision-making process”. Nevertheless, “decision making can and should be prioritised in both instances and further appeal may be restricted”.\textsuperscript{84}

The swiftness objective is clearly accommodated by the proposed provisions distinguishing between regular and accelerated procedures.\textsuperscript{85} The proposal for the PD (2005) does not allow for restrictions of the right to remain pending the outcome of an appeal in regular asylum procedures.\textsuperscript{86} However, the proposal permits such restriction in specific cases, including manifestly unfounded applications. The correctness objective, in turn, can be recognised in the requirement, according to which applicants “shall have the right to apply to the competent authority for leave to remain […] during the appeals procedure”. During this time of interim review “[n]o expulsion may take place”.\textsuperscript{87}

Consultation European Parliament
As required by Article 67 EC Treaty, the Council consulted the European Parliament which submitted its proposed amendments on the Commission proposal.\textsuperscript{88} The provision, which allowed Member States to derogate from the guarantee of automatic suspensive effect in certain cases, was probably the provision which the Parliament was most worried about. The Parliament opposed this provision by arguing for its deletion, and justified its opposition as follows:

“The draft article is not consistent with international standards in so far as it allows for derogations from the rule of the suspensive effect of the appeals on safe third country bases, in case of manifestly unfounded claims and on grounds of national security or public order. An asylum seeker should in principle have the right to remain on the territory of the asylum country and should not be removed, excluded or deported until a final decision has been made on the case or on the responsibility for assessing the case”.\textsuperscript{89}

\textsuperscript{82} COM (2000) 578 final (n 81) 31 Recitals 7-9.
\textsuperscript{83} COM (2000) 578 final (n 81) 31 Recital 9.
\textsuperscript{84} COM (2000) 578 final (n 81) 31 Recital 11.
\textsuperscript{85} COM (2000) 578 final (n 81) 42-45 Sections 1 and 2.
\textsuperscript{86} COM (2000) 578 final (n 81) 32, 45 Recital 15 and Article 33(1).
\textsuperscript{87} COM (2000) 578 final (n 81) 45 Article 33(2) and (3).
\textsuperscript{89} European Parliament, A5-0029/2001 (31.08.2001) (n 88) 42-43(emphasis added).
Council

The negotiations in the Council proved to be difficult.\(^90\) Apparently, the requirement to achieve unanimity within the Council constituted the major obstacle to reach an agreement.\(^91\) Eventually, the Council asked the Commission to present a new proposal.\(^92\) Notwithstanding these difficulties, the Council documents give some insight into Member State’s considerations. Grounds for accelerated procedures, for example, were supposed to be supplemented by grounds relating to the “applicant’s refusal to cooperate and any abuse of the procedure through the submission of applications for asylum as a delaying tactic”.\(^93\) As far as suspensive effect of appeals was concerned, it was clear that derogations should be possible in case of, inter alia, accelerated procedures. It was also clear that the possibility to request suspensive effect should be guaranteed in such cases. However, Member States apparently disagreed with regard to the question which effects (suspensive or not) such a request should bring about.\(^94\) This question “remains open”.\(^95\)

Second Proposal

The second proposal\(^96\) submitted by the Commission tackled the controversies in the Council surrounding the right to remain in a remarkable manner. According to the second proposal, Member States could derogate from the guarantee to endow an appeal with automatic suspensive effect even within the regular procedure. In such cases, a court should rule on the right to remain pending the outcome of the appeal. No expulsion should take place during the time of these interim proceedings. However, Member States could make an exception to this right to remain during the interim proceedings in cases involving national security risks.\(^97\) The provision concerning accelerated procedures was regulated in a similar way. One difference was, however, that the range of cases in which the right to remain during the interim proceedings did not necessarily have to be guaranteed was wider. It included, for example, certain inadmissible and subsequent asylum applications.\(^98\)

In November 2004, nearly two years after the Commission issued its second proposal, the Council found an agreement.\(^99\) Eventually, the Council decided that the question whether or not the appeal and/or the request for interim relief should be endowed with suspensive effect should be left to the discretionary power of Member States. They were supposed to establish rules – “in accordance with their international obligations” – which deal with this question.\(^100\) The same wording has been introduced into Article 39(3) PD (2005).

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\(^90\) Peers, *EU Immigration and Asylum Law* (n 69) 211.


\(^94\) Council, Council doc 14767/01 (n 93) 6-7.


\(^97\) COM (2002) 326 final (n 96) 43 Article 39.

\(^98\) COM (2002) 326 final (n 96) 44 Article 40.


\(^100\) Council, Council doc 14203/04 (n 99) 66-67.
The Parliament was outraged as it was not consulted prior to the Council agreement, as required by the EC Treaty. The Parliament, for its part, completely dismissed the conclusions of the Council regarding the right to remain pending appeal proceedings. It deemed the fact that the right to remain was left to the discretion of Member States to be contrary to the principle of non-refoulement.

“Many refugees in Europe are recognised only during the appeal process. Given the potentially serious consequences of an erroneous determination at first instance, the suspensive effect of asylum appeals is a critical safeguard. […] As held by the European Court of Human Rights, [the right to an effective remedy] implies the right to remain in the territory of a Member State until a final decision on the application has been taken”.


By the time the Commission issued its proposal for the PD (2013) in 2009, the decision-making process in asylum matters had undergone two major changes. First, the unanimity requirement in the Council had been replaced by quality majority voting. Second, the Parliament had achieved equal power as the Council, as its consultation role had been converted into the role of a co-legislator. These changes had a certain impact on the legislative process of the PD, as will be seen. Article 78(d) TFEU constitutes the legal basis for the PD.

The Hague Programme instructed the Commission to evaluate the first-phase asylum legislation and present the second-phase legislation. In its 2009 impact assessment, the Commission took up several points regarding the right to an effective remedy. It tested the PD (2005) against case law of the ECtHR and CJEU which require a full and ex nunc examination, automatic suspensive effect of an appeal and appropriate time limits. The Commission found that the PD (2005) did not do justice to neither of these aspects by leaving discretion to Member States. Their discretion regarding time limits for lodging appeals, for example, resulted in a range of 3 to 75 days across the Member States. As regards the right to remain pending appeal proceedings, Vedsted-Hansen argued that the term “in accordance with international obligations” did not establish a sufficient guarantee to ensure the right to automatic suspensive effect as required by international law. Following a 2010 research of UNHCR, this proved to be right. In two Member States automatic suspensive effect was not endowed to

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104 Peers, EU Justice and Home Affairs Law (n 71) 10-11, 17-18 and 237; Tewocht (n 76) 280-284 The changes were brought about by the entry into force of the Treaty of Nice in 2003, and the entry into force of the Treaty of Lisbon in 2009. Article 67(5) EC Treaty required the Council to adopt legislation “defining the common rules and basic principles” in order to trigger the mentioned changes. Following the CJEU Case C-133/06 Parliament v. Council [2008] para 66, it has been argued that the PD (2005) involved “common rules and basic principles” within the meaning of Article 67(5) EC Treaty to set off the changes. Furthermore, the Treaty of Lisbon generally established the co-decision procedure in asylum matters. From this moment, the competences on asylum matters can be found in Article 78 TFEU which refers to the “ordinary legislative procedure” in Article 294 TFEU. Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.
108 COM (2009) 554 (n 107) 121-123.
109 Vedsted-Hansen (n 91) 261.
any appeal, and in a “significant number of Member States” appeals against certain decisions did not have suspensive effect.¹¹⁰

The Commission’s efforts to solve the above mentioned discrepancy between the PD (2005) and case law of the CJEU and ECtHR respectively can clearly be recognised in its proposal of the PD (2013).¹¹¹ According to the proposed provision regulating the right to remain during appeal proceedings, an appeal against an asylum rejection decision shall, as a rule, have suspensive effect. However, in specific procedures, including accelerated procedures, Member States do not have to endow the appeal with suspensive effect. Nevertheless, a court must have the power to review a request for interim relief, and this request must have suspensive effect. This implies that an asylum seeker must always be authorised to remain in the territory during the interim proceedings.¹¹²

Bearing in mind that still a considerable group of asylum seekers is affected by the restricted right to remain, it is striking that the European Parliament did not contest the proposed provision in any way whatsoever.¹¹³ Whereas the Parliament elaborated extensively on the adherence to international obligations within the negotiations on the PD (2005), no mention of that kind was made during the negotiations on the PD. This changed position on the same matter may be explained by the new role which the Parliament has acquired as a co-legislator. In order to find a workable compromise with opinions of Member States in the Council, the Parliament may be more inclined to promote a restrictive asylum policy. Given that the alternative would be that legislations are dropped, the Parliament is under pressure to bring its point of view in line with the Council.¹¹⁴

The negotiations within the Council, for their part, were dominated by Member States’ concerns about potential abuses of the asylum system, and high costs especially regarding receptions conditions during long appeal procedures.¹¹⁵ The joint contribution of the German, French and United Kingdom delegations provides us with some insight as to how Member States dealt with these concerns. By introducing “exceptions from the principle that appeals should have suspensive effect”, Member States wanted to “reconcile the demands of ECHR case law with the need to have rapid and effective procedures in the case of abuse of the right of asylum”.¹¹⁶ Apparently, the German government has played a central role for the maintenance of a restricted right to remain. “It is […] of crucial importance for Germany to have an

¹¹² COM (2009) 554 final (n 111) 67 Article 41(5).
¹¹⁶ Council, “Subject: Joint contribution of the German, French and United Kingdom delegations regarding the proposals for a directive laying down standards for the reception of asylum seekers and for asylum procedures” (27.06.2011) Council doc 12168/11, 4.
exception from the suspensive effect of an appeal where a claim for asylum is rejected as manifestly ill founded”.\textsuperscript{117}

Owing to the predominant consensus between the Council and the Parliament, the provision on appeal and suspensive effect which the Commission proposed early in 2009 has been maintained in the final PD. The relevant provisions are Article 46(5), (6) and (8) PD. The Directive entered into force on 20 July 2015.\textsuperscript{118}

4. Finding: purpose of Article 46(6) and (8) PD

The analysis of the negotiations on the right to remain during appeal proceedings reveals that Article 46(5), (6) and (8) PD is the outcome of the tension between, on the one hand, the swiftness objective, and on the other hand, the correctness objective. Given the fact that wrong administrative decisions are only corrected during appeal proceedings, suspensive effect of the asylum appeal is an important guarantee. Otherwise the principle of non-refoulement can be infringed. However, the right to remain during long appeal proceedings is associated with high costs of reception conditions. Asylum applicants, who abusively lodge an asylum application only as a means of prolongation of their stay, shall not enjoy this right. Therefore, persons who are not in need of international protection shall be identified quickly. This swiftness objective is accommodated by the use of accelerated and admissibility procedures. Furthermore, the lack of suspensive effect of an appeal serves the quick termination of an unmerited stay. Nevertheless, certain safeguards have to counterbalance the risk of wrong administrative decisions. That is why a court shall rule (within interim proceedings) whether an applicant shall be granted a right to remain pending the outcome of appeal proceedings. Conclusively, it can be ascertained that the purpose of interim proceedings is to counterbalance the risk of wrong administrative decisions which are not subject to an appeal with suspensive effect, and may therefore result in refoulement. The right to remain during interim proceedings constitutes one safeguard to preserve the effectiveness of interim proceedings.

II. General objectives of the PD

The balance which Article 46(6) and (8) PD tries to strike between swiftness and correctness\textsuperscript{119} can similarly be found in the Preamble of the PD. On the one hand, asylum procedures shall meet the requirements of fairness and comprehensiveness in order to correctly recognise applicants in need of international protection. On the other hand, asylum procedures have to be efficient.\textsuperscript{120} It is considered to be in the interests of both Member States and applicants to make a decision “as soon as possible”. This latter aspect, in turn, shall be “without prejudice to an adequate and complete examination being carried out”.\textsuperscript{121}

The Preamble acknowledges Member States’ interest to apply accelerated procedures “[i]n well-defined circumstances where an application is likely to be unfounded or where there are serious national security or public order concerns”. In such cases, time limits may be “shorter,
but reasonable […] without prejudice to an adequate and complete examination being carried out and to the applicant’s effective access to basic principles and guarantees”.122

III. Content

Article 46(5), (6) and (8) PD regulate the right to remain pending the outcome of appeal proceedings brought against asylum rejections. The precise content of the provision, which can be derived from its wording alone, will be illustrated in this chapter.

Article 46(5) PD contains the rule, according to which an appeal against an asylum rejection shall have suspensive effect. More precisely, it guarantees the right to remain until the expiry of the time limit within which the right to appeal can be exercised. Furthermore, when such a right has been exercised, it ensures the right to remain pending the outcome of the appeal procedure. Article 46(6) PD constitutes the exception to this rule. In case one of the exceptions listed in this provision (see below) applies, it regulates that:

“a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant’s request or acting ex officio, if such a decision results in ending the applicant’s right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law”.

Article 46(6) PD restricts the right to remain during asylum appeal proceedings to the extent that it is dependent upon a court decision. In contrast to Article 46(5) PD, an appeal does not automatically ensure the right to remain pending the whole appeal proceedings. Instead it is dependent upon a decision taken on a case-by-case basis. Member States have discretion in respect of several aspects when implementing Article 46(6) PD. First, Article 46(6) PD does not oblige Member States to derogate from the full right to remain laid down in Article 46(5) PD, but they can choose to do so.123 Second, a court or tribunal shall act either upon the applicant’s request or on its own motion. Third, considering its wording alone (disregarding an interpretation in light of the Charter)124 Member States have discretion with regard to the body of appeal (court or tribunal with the power to rule on the full right to remain).

Member States do not have discretion with regard to two aspects. First, if a Member State opts for a derogation from Article 46(5) PD in the cases listed in Article 46(6) PD, the body of appeal has to rule upon the question whether or not the right to remain during the appeal proceedings shall be granted in the individual case. Second, Article 46(6) PD has to be read and applied together with Article 46(8) PD. This latter provision guarantees (by law) the right to remain during these interim proceedings. This right to remain is obligatory (“shall”).

“Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraphs 6 and 7”.

Remarkably, Article 46(6) PD does neither refer to the requirement of a full and ex nunc examination of both facts and points of law (Article 46(3) PD) nor to the obligation to set reasonable time limits and other necessary rules to exercise the right to an effective remedy (Article 46(4) PD). It is questionable if, and if so, how these provisions should be applied to the interim proceedings regulated in Article 46(6) PD. This question will be part of the analysis in the ensuing chapter C.

122 Recital 20 PD.
123 This is clear from the wording in Article 46(6) PD: “if such a decision results in ending the applicant’s right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law” (emphasis added).
124 For interpretation in light of the Charter see chapters C.V.4.c and C.VI.
When does Article 46(6) PD apply?

Whilst Article 46(1) PD lists all the decisions which can be appealed against (e.g. rejected as unfounded, decision not to further conduct an examination, etc.), Article 46(6) PD lists five decisions which can be made subject to the restricted right to remain. Article 46(6)(a)-(d) PD contains the following decisions:

- manifestly unfounded according to Article 32(2) PD;
- unfounded after an accelerated examination according to Article 31(8) PD, except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h) PD;
- inadmissible pursuant to Article 33(2)(a), (b) or (d) PD (i.e. another Member State has granted international protection; first country of asylum concept applies; subsequent application which does not involve new elements);
- rejection of reopening of the applicant’s case after it has been discontinued according to Article 28 PD (i.e. in the event of implicit withdrawal or abandonment);
- decision not to examine or not to examine fully the application pursuant to Article 39 PD (i.e. European safe third country concept applies).

Comparing the personal scope of Article 46(1) PD with the cases listed in Article 46(6) PD, it can be deduced that – at least – the following cases must not be subjected to the restricted right to remain:

- unfounded according to Article 32(1) PD;\textsuperscript{125}
- safe third country (not European) according to Article 33(2)(c) PD;\textsuperscript{126}
- no facts justifying a dependants separate application according to Article 33(2)(e) PD;\textsuperscript{127}
- refused to reopen the examination of an application after its discontinuation pursuant to Article 27 PD (explicit withdrawal);\textsuperscript{128}
- application was subjected to an accelerated procedure because of failure to apply as soon as possible according to Article 31(8)(h) PD.\textsuperscript{129}

IV. Context – different rights to remain in the PD

Besides Article 46(5), (6) and (8) PD, the PD contains three other provisions – Articles 9, 41 and 24 PD – regulating different rights to remain. The term “remain in the Member State” is defined by Article 2(p) PD as meaning “to remain in the territory, including at the border or in transit zones, of the Member State in which the application for international protection has been made or is being examined”.

1. Right to remain during administrative asylum procedures

Article 9(1) PD ensures an asylum seeker’s presence during the administrative asylum procedure. It states that “applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III of the APD”.\textsuperscript{130}

Article 9(2) PD names two exceptions to this right to remain. One exception affects persons who will be surrendered or extradited to another Member State (in accordance with the European arrest warrant), a third country, or international criminal courts or tribunals. The second exception refers to the two types of subsequent asylum applications listed in Article 41 PD:

\textsuperscript{125} cf. Article 46(1)(a)(i) PD.
\textsuperscript{126} cf. Article 46(1)(a)(ii) PD and Article 46(b) PD.
\textsuperscript{127} cf. Article 46(1)(a)(ii) PD and Article 46(b) PD.
\textsuperscript{128} cf. Article 46(1)(b) PD and Article 46(c) PD.
\textsuperscript{129} Article 46(6)(a) PD.
\textsuperscript{130} see also Recital 25 PD.
“(a) [a person] has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or

(b) [a person] makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded” (emphasis added).

According to Article 41 PD, “Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect re-foulement”. This highlights the exceptional character of Article 41 APD. The exemption from the right to remain has to be interpreted restrictively and applied with prudence compared to the rule guaranteeing the right to remain during administrative procedures.\textsuperscript{131}

2. Exception to the right to remain during interim proceedings

As emphasised in chapter B.III., Member States are obliged (“shall”) to ensure the right to remain during the interim proceedings pursuant to Article 46(6) PD. This follows from Article 46(8) PD. However, Member States “may” derogate from this right to remain in case of the two types of subsequent applications listed in Article 41 PD.\textsuperscript{132} This exception is regulated in Article 41(2)(c) PD.

3. Right to remain during appeal proceedings in border procedures

The restricted right to remain during appeal proceedings regulated by Article 46(6) PD can, in principle, also be applied to border procedures. However, it “shall only apply” to border procedures if certain additional procedural safeguards are provided for. This is demanded by Article 46(7) PD. It requires the following additional procedural safeguards:

“(a) the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting him or her the right to remain on the territory pending the outcome of the remedy; and

(b) in the framework of the examination of the request referred to in paragraph 6, the court or tribunal examines the negative decision of the determining authority in terms of fact and law”.

If these safeguards are not provided for, the rule laid down in Article 46(5) PD shall apply.

4. Applicants in need of special procedural guarantees

Article 24(3) PD obliges Member States to provide “adequate support” for applicants in need of special procedural guarantees. If such support cannot be granted in accelerated or border procedures, Member States shall cease to apply those procedures. If, in such cases, Member States apply Article 46(6) PD, they shall provide for the additional procedural guarantees listed in Article 46(7) PD.\textsuperscript{133}

As far as unaccompanied minors are concerned, Article 25(6)(d) PD is even more demanding: “in applying Article 46(6) to unaccompanied minors, Member States shall provide at least the guarantees provided for in Article 46(7) in all cases”. Nevertheless, the two types of subsequent applications listed in Article 41 PD are exempted from this guarantee.

\textsuperscript{131} EASO (n 20) 83.
\textsuperscript{132} see chapter B.IV.1.
\textsuperscript{133} see also Recital 30 PD.
5. Finding: context related interpretation

It can be ascertained that asylum seekers who lodge certain subsequent asylum applications (including those who lodge, generally speaking, their “third asylum application”) may be exempted from both the right to remain during administrative procedures (Article 9(1) PD) and the right to remain during interim proceedings (Article 46(8) PD). In this vein, the PD counteracts the use of asylum applications as a delaying tactic. However, not all third asylum applications will involve such a tactic. In order to enable Member States to dynamically deal with such applications, it is important that Article 41 PD leaves discretion.

Article 46(7) PD shows that persons whose freedom of movement is restricted (such as applicants subjected to the border procedure) experience disadvantages in accessing their right to an effective remedy. That is why additional procedural safeguards shall be made available in such cases if the appeal does not itself have suspensive effect (i.e. in case Article 46(6) PD applies). These additional procedural guarantees encompass access to interpretation, legal assistance, at least one week to request interim relief, and full judicial review. Thus, both the restriction of freedom of movement and short time limits are aspects which require the mentioned additional procedural guarantees in cases where Article 46(6) PD applies.

V. Relation and demarcation between PD and RD

The RD applies to third-country nationals staying illegally in the territory of a Member State. It sets out the procedural steps which Member States have to take for returning an illegally staying third-country national. In this regard, it provides for a fixed order of the various steps. The adoption of a return decision pursuant to Article 6(1) RD constitutes the first step. The order of steps which follow a return decision is arranged according to a clear graduation beginning with the measure which allows the most liberty. This is the voluntary departure period. Only if a person does not comply with his obligation to voluntarily return, Member States can carry out removal measures. Detention pursuant to Article 15 RD has to be the measure of last resort, as it restricts a person’s liberty the most.

The relation between asylum seekers encompassed by the material scope of the PD and the RD has been addressed by the CJEU in Arslan, Tall, Gnandi, C, J, and S, and X and

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134 Article 41(1)(b) PD affects asylum seekers who lodge “another subsequent application”.
135 According to Article 43(2) PD, applicants subjected to the border procedure can be denied entry to the Member State concerned up to four weeks.
136 EASO (n 20) 161.
137 Article 2(1) RD; Article 3(2) RD defines “illegal stay”.
139 For the sake of readability, the masculine form is used in this thesis. However, both men and women are encompassed.
140 El Didri (n 138) paras 36-41.
141 Article 3(1) PD.
142 CJEU Case C-534/11 Arslan [2013].
143 CJEU Case C-239/14 Tall [2015].
144 CJEU Case C-181/16 Gnandi [2018].
145 C, J and S (n 2).
146 CJEU Case C-175/17 X [2018].
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X and Y.147 Given that illegal stay triggers the applicability of the RD, the question arises when an asylum seeker’s stay is considered illegal within the meaning of the RD. In Arslan, the CJEU associated legal stay with the existence of a right to remain. However, in Gnandi the question of (il)legal stay has clearly been separated from the existence of a right to remain. These two judgements will be dealt with in order to grasp the distinction between right to remain and (il)legal stay. The other judgments will be part of the analysis in chapter C.V.4.

1. **Arslan**

Does the RD apply to applicants for international protection?148 This question was at issue in the case Arslan. The CJEU first had regard to Recital 9 RD149 which is central for the delineation of illegal stay (applicability of the RD) and asylum procedures. Recital 9 RD states:

> “a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force”.

Thereafter, the Court referred to the provisions of the PD (2005) regulating the rights to remain during administrative procedures,150 and appeal proceedings.151 Following these references, the Court concluded that an asylum seeker cannot be regarded as illegally staying as long as he has a right to remain, because illegal stay relates to removal.152 The “[RD] does not apply to a third-country national who has applied for international protection […] during the period from the making of the application to the adoption of the decision at first instance on that application or, as the case may be, until the outcome of any action brought against that decision is known”.153 Thus, Arslan links the existence of a right to remain to legal (!) stay. The RD does therefore not apply as long as an asylum seeker has a right to remain. Remarkably, the relevant operative provision of the judgment encompasses both the right to remain during administrative procedures and appeal proceedings.

2. **Gnandi**

In Gnandi, the Court was confronted with the question whether a return decision can be adopted immediately after an asylum rejection, and therefore before the appeal proceedings brought against that rejection have been concluded.154 As the adoption of a return decision within the meaning of Articles 6(1) and 3(4) RD presupposes illegal stay, the first issue to be solved was the question whether an asylum seeker’s stay becomes illegal after the rejection of his asylum application.155

2.1. Right to remain and (il)legal stay – Opinion AG Mengozzi

In order to answer this question, AG Mengozzi relied on the drafting documents of the RD, Recital 9 RD, and in particular on the judgment Arslan described above. First, it follows from the legislative documents that a stay should be regarded as illegal following a “final decision”

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147 CJEU Case C-180/17 X and Y [2018].
148 Arslan (n 142) para 40.
149 Arslan (n 142) para 44.
150 Arslan (n 142) paras 45-46 reference to Article 7 PD (2005), counterpart provision to Article 9 PD.
151 Arslan (n 142) para 47 reference to Article 39(3) PD (2005), counterpart to Article 46(5), (6) and (8) PD.
152 Arslan (n 142) para 48.
153 Arslan (n 142) paras 49 and 64.
154 Gnandi (n 144) para 35.
155 Gnandi (n 144) para 38.
on the asylum application. Second, according to the last part of Recital 9 RD (quoted above), a negative decision on the asylum application must have “entered into force” in order to consider an asylum seeker’s stay illegal. Third, AG Mengozzi made a clear deduction from Arslan: as long as an asylum seeker has a right to remain, his stay cannot be regarded as illegal. The absence of illegal stay – following an authorisation to remain – entails the inapplicability of the RD. As a consequence, a return decision cannot be adopted as long as a person has a right to remain.

As regards the question when an asylum applicant has a right to remain, AG Mengozzi deemed the considerations of Arslan on the right to remain during administrative procedures to be “directly applicable” to Mr. Gnandi’s situation. Belgian law guaranteed Mr. Gnandi a right to remain during the appeal proceedings brought against his asylum rejection. According to the AG, there is no relevant difference between the right to remain during administrative procedures and the right to remain during appeal proceedings which Article 39(3) PD (2005) allows Member States to provide for. Both rights are temporary rights to remain for the conduct of procedures. Furthermore, both rights are “essentially intended to protect the applicant from the consequences of a possible refoulement which may take place before his application has been examined or before he has been able to exercise his right to an effective legal remedy”. Due to these parallels of the two rights to remain, AG Mengozzi could directly apply the findings of Arslan to Mr. Gnandi’s situation. As long as no “final decision” has been taken, a person keeps his status as an asylum seeker, and does not fall under the material scope of the RD. The term “final decision” is defined in Article 2(d) PD (2005) as “a decision […] which is no longer subject to a remedy […], irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome”. Hence, in case an asylum seeker lodges an appeal he has a right to remain pending the outcome of the appeal proceedings. Yet, the CJEU did not follow the AG, as will be seen.

2.2. Right to remain and (il)legal stay – CJEU judgment

The CJEU implicitly overturned Arslan in Gnandi in a contradictory manner. According to the Court, the sole purpose of Arslan was to ensure that a return procedure would not be carried out as long as a person has a right to remain during asylum appeal proceedings. Therefore, this right to remain led to the inapplicability of the RD. Nevertheless, such a right to

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157 Additional Opinion of AG Mengozzi Gnandi (n 156) para 24 (emphasis added by AG Mengozzi).
158 Additional Opinion of AG Mengozzi Gnandi (n 156) paras 31-34.
159 Additional Opinion of AG Mengozzi Gnandi (n 156) para 38.
160 Article 7 PD (2005), counterpart provision to Article 9 PD.
161 Additional Opinion of AG Mengozzi Gnandi (n 156) para 35; see also Gnandi (n 144) para 42.
162 Additional Opinion of AG Mengozzi Gnandi (n 156) para 36.
163 Additional Opinion of AG Mengozzi Gnandi (n 156) para 39 at fn 36 citing Article 2(c) PD: “applicant” means a third-country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken” (emphasis added by AG Mengozzi).
164 Additional Opinion of AG Mengozzi Gnandi (n 156) para 39.
165 Additional Opinion of AG Mengozzi Gnandi (n 156) para 39 at fn 36 citing Article 2(d) PD (2005).
166 Gnandi (n 144) para 45.
167 Gnandi (n 144) para 43.
remain does not preclude that a stay can be considered as illegal within the meaning of the RD.\(^\text{168}\) The contradiction becomes obvious from the latter aspect which is not a consideration stemming from Arslan, but was introduced only in Gnandi. How can an applicant, who has a right to remain and therefore is not affected by the applicability of the RD, suddenly be considered as illegally staying, bearing in mind that illegal stay triggers the applicability of the RD? This contradiction between the two judgments reveals that the Court tacitly overturned Arslan.\(^\text{169}\) Whereas a right to remain is not compatible with illegal stay according to Arslan, the Court argues for their compatibility in Gnandi.

The Court takes the provision regulating the right to remain during administrative procedures\(^\text{170}\) as the starting point of its reasoning. According to this provision, the right to remain ends with the adoption of a first instance (administrative) decision.\(^\text{171}\) Reading this provision together with Recital 9 RD quoted above, the Court ascertains that an applicant cannot be regarded as illegally staying until the authority adopts an asylum rejection. Once an asylum rejection at administrative instance is adopted, a stay becomes illegal.\(^\text{172}\)

The Court points out that no recital or provision comparable to Recital 9 RD exists in respect of the right to remain during the appeal proceedings.\(^\text{173}\) In this context, it should be noted that the Court overlooked the last part of Recital 9 RD stating “[…] until a negative decision on the application […] has entered into force”.\(^\text{174}\) The Court moved on by stating that nothing in the RD or PD (2005) prevents from regarding a stay awaiting the outcome of an appeal against an asylum rejection as being illegal.\(^\text{175}\) Moreover, the illegality of a stay, which triggers the applicability of the RD, does not depend on the absence of a right to remain.\(^\text{176}\) The Court bases this consideration on Recital 12 RD:

“The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. […]”.

Following this Recital, the RD applies to persons who are staying illegally but who are allowed to remain because they cannot yet be removed. The Court promotes its view, inter alia, with Article 7 RD which obliges Member States to provide for an appropriate period of voluntary departure. During this period, the Court argues, the stay is illegal but the person is still allowed to remain in the territory.\(^\text{177}\) Thus, right to remain and illegal stay may coexist.

### 2.3. Simultaneous adoption of asylum rejection and return decision

Having in mind the Court’s finding that an asylum-seeker’s stay becomes illegal within the meaning of the RD as soon as the authority rejects his application for international protection, we can return to the preliminary question: can a return decision be adopted immediately after

\(^{168}\) Gnandi (n 144) para 44.

\(^{169}\) cf. Additional Opinion of AG Mengozzi Gnandi (n 156) para 34: “[…] it is only by overturning the judgment [Arslan] that the Court could affirm that Directive 2008/115 applies to an applicant for international protection authorised to remain in the Member State concerned pending the outcome of his application procedure”.

\(^{170}\) Article 7(1) PD (2005), counterpart provision to Article 9(1) PD.

\(^{171}\) Gnandi (n 144) para 40.

\(^{172}\) Gnandi (n 144) paras 40-41.

\(^{173}\) Gnandi (n 144) para 46.

\(^{174}\) Recital 9 RD (emphasis added); Wittmann (n 10) 48 The Court overlooked this part of Recital 9 RD even though AG Mengozzi pointed this wording related consideration out (Additional Opinion of AG Mengozzi Gnandi (n 156) para 24).

\(^{175}\) Gnandi (n 144) para 46.

\(^{176}\) Gnandi (n 144) para 47.

\(^{177}\) Gnandi (n 144) para 47.
an asylum rejection, and therefore before the appeal proceedings brought against that rejection have been concluded?

The Court’s reasoning leads to the conclusion that a return decision can be adopted as soon as an asylum application has been rejected (due to the transition from legal stay to illegal stay at this moment in time). In this vein, the way was paved to conclude that a return decision can be adopted “immediately after the rejection of [an application for international protection] by the determining authority or together in the same administrative act, and thus before the conclusion of any appeal proceedings brought against that rejection […]”. Article 6(6) RD constitutes the basis for this option to adopt an asylum rejection simultaneously with a return decision in a single administrative act. Article 6(6) RD states:

“This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law” (emphasis added).

3. Assessment of Gnandi (first part) & summary of findings

The adoption of a decision on the ending of a legal stay together with a return decision pursuant to Article 6(6) PD allows Member States to quickly conduct a return procedure. Notably, appeals against the two measures can either be combined or conducted in parallel. This possibility constitutes an important element to ensure swiftness. If the preservation of this possibility was the kind of result the CJEU aimed to reach in Gnandi, this would explain why it omitted to stress certain parts of Recital 9 RD. The wording of Recital 9 RD formed the Court’s key argument after all. AG Mengozzi made a direct reference to the part of Recital 9 RD which states that an asylum seeker “should not be regarded as staying illegally […] until a negative decision on the application […] has entered into force”. However, the Court simply focussed on the moment in time of the adoption of an administrative asylum rejection. If the Court had followed AG Mengozzi’s considerations, the outcome of Gnandi would have been completely different. The adoption of a return decision would only have been possible after a court had confirmed the administrative asylum rejection. An asylum seeker’s stay would have become illegal only in this moment of a negative judicial decision. Hence, only in this moment in time the precondition for “a decision on the ending of a legal stay” within the meaning of Article 6(6) RD would have been fulfilled. Contrary to what the Court argued in Gnandi, the possibility of joint handling in Article 6(6) RD would precisely not have become redundant. Article 6(6) RD provides for “a single […] judicial decision” as an alternative to “a single administrative […] decision”. That implies that a court confirming an asylum rejection could issue a return decision together with the decision on the

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178 cf. Gnandi (n 144) paras 40-41 and 46-47.
179 Gnandi (n 144) para 67 see also para 59.
180 Gnandi (n 144) paras 48-49; Additional Opinion of AG Mengozzi Gnandi (n 156) paras 46-47.
181 see above chapter B.V.2.2.
182 Gnandi (n 144) para 46.
183 Additional Opinion of AG Mengozzi Gnandi (n 156) para 24 (emphasis added by AG Mengozzi).
184 Gnandi (n 144) paras 40 and 46.
185 Additional Opinion of AG Mengozzi Gnandi (n 156) paras 51-52; Gnandi (n 144) para 50.
186 Additional Opinion of AG Mengozzi Gnandi (n 156) para 39.
187 cf. Additional Opinion of AG Mengozzi Gnandi (n 156) paras 41-50; cf. Wittmann (n 10) 48.
188 Gnandi (n 144) para 50.
asylum appeal.\textsuperscript{189} If national law does not allow that,\textsuperscript{190} the authority could adopt a return decision immediately after a negative judgment on the asylum appeal (or after its entry into force).

Admittedly, the appeal against a return decision could not have been conducted in parallel to the appeal against an asylum rejection in such cases. In order to still do justice to the swiftness objective, AG Mengozzi argued that the former could be “speedily dismissed in its turn”.\textsuperscript{191} By contrast, the Court takes into account that this practice “could significantly delay the initiation of the return procedure and make that procedure more complex”.\textsuperscript{192} This would be inconsistent with the objective to establish an “effective removal and repatriation policy”.\textsuperscript{193} Hence, the result which the Court’s reasoning yields is in the end more easily practicable for Member States. However, AG Mengozzi’s result is based on a more proper legal reasoning. The Court’s disregard of parts of the wording of Article 9 RD as well as the hidden contradictions to \textit{Arslan} cannot be welcomed.

\textit{In sum}, the possibility to adopt an asylum rejection simultaneously with a return decision did justice to Member States’ interest to swiftly carry out return procedures. This possibility is based on the premise that an asylum seeker’s stay becomes illegal as soon as the authority rejects his asylum application. An asylum seeker’s right to remain (e.g. during appeal proceedings) does not have any bearing on the question of (il)legality of stay. In chapter C.V.4.1.c., it will be seen that the Court took also account of asylum seekers’ interests regarding their right to remain during appeal proceedings. Considering this balancing of interests, \textit{Gnandi} can be considered a “solomonic incorrect judgment”, as Wittmann put it.\textsuperscript{194}

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\begin{itemize}
\item \textsuperscript{189} Additional Opinion of AG Mengozzi \textit{Gnandi} (n 156) para 51.
\item \textsuperscript{190} In this regard, the separation of powers plays a crucial role. Hardly any deductions can be drawn from Union law. The CJEU has only ruled on the question whether or not a national court can substitute a rejecting asylum decision with its own annulment decision. In case a court annuls an asylum rejection, Member Stats have the possibility to regulate that the file is referred back to the determining authority for adopting a new decision (\textit{Alheto} (n 15) paras 144-149). A court can substitute an administrative asylum rejection with its own annulment decision only under particular circumstances (CJEU Case C-556/17 \textit{Torubarov} [2019] para 79). However, matters will be somewhat different when a court \textit{confirms} an asylum rejection, and adopts a return decision on its own motion. In any case, Article 6(6) RD seems to allow for the adoption of a return decision by a court.
\item \textsuperscript{191} Additional Opinion of AG Mengozzi \textit{Gnandi} (n 156) para 51.
\item \textsuperscript{192} \textit{Gnandi} (n 144) para 50.
\item \textsuperscript{193} \textit{Gnandi} (n 144) paras 48-50.
\item \textsuperscript{194} Wittmann (n 10) 47-48 (“salomonische Fehlentscheidung”).
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C. Interpretation in light of Articles 19(2) CFR and 47 CFR

Member States are bound by the Charter whenever they act within the scope of Union law. This follows from Article 51(1) CFR,\(^{195}\) and holds also for Union law acts which leave discretion as to their national implementation.\(^{196}\) The Qualification Directive (QD)\(^{197}\) stipulates criteria for qualifying for international protection, and the PD contains rules on asylum procedures. Decisions on applications for international protection fall thus within the scope of Union law.\(^{198}\) Conclusively, when Member States adopt such decisions, they have to comply with the Charter. Article 47 CFR guarantees the right to an effective remedy against such decisions. For the purpose of this thesis, it is sufficient to note that Member States act within the scope of Union law when they implement Article 46(6) and (8) PD. Therefore, they have to comply with the Charter.\(^{199}\) The right to an effective remedy enshrined in Article 47 CFR is particularly relevant, as Article 46(6) and (8) PD regulate appeal proceedings brought against certain asylum rejections. The principle of non-refoulement enshrined in Article 19(2) CFR is important, because Article 46(6) and (8) PD regulate asylum seekers’ interim right to remain in the territory of the receiving Member State.

Having established that Article 46(6) and (8) PD have to be interpreted in light of the Charter, the question arises what standard the Charter requires in respect of this provision. International law informs the rights enshrined in the Charter to a certain extent. Therefore, the ECHR (I.), the Refugee Convention (II.), the CAT (III.), and the ICCPR (IV.) will be analysed. Each chapter will explain to what extent the respective international agreement is relevant. Thereafter, particular focus will be laid on Articles 19(2) and 47 CFR as interpreted by the CJEU so far (V.). Finally, the findings will be applied to Article 46(6) and (8) PD (VI.). The aim is to set out the standard which Member States have to adhere to when implementing Article 46(6) and (8) PD.

I. Interpretation in light of the ECHR

The aim of this chapter is to find out which procedural safeguards the ECHR requires with regard to appeal proceedings in asylum cases, and what these requirements mean for the implementation of Article 46(6) and (8) PD. Particular attention will be paid to the right to remain and safeguards which have to be put in place during interim proceedings. Can certain safeguards be restricted for certain asylum seekers groups? If so, which safeguards can be restricted? Does the nature of interim proceedings allow for restrictions? These questions will be tackled in the following sections. Before diving into the essence of these questions (2.), preliminary remarks on the relation between the Charter and the ECHR will be made (1.).

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\(^{195}\) Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17, Article 51; Åkerberg Frons\(\)son (n 13) paras 20-21.


\(^{198}\) e.g. Articles 32, 33, 39, 40, 43(1), 27, 28, 45 PD.

\(^{199}\) cf. X and Y (n 147) paras 27-28 and 44.
1. Relation between the Charter and the ECHR

This chapter will first map out the relevance of the ECHR for the definition of Charter rights (1.1.). Subsequently, ECHR rights which correspond to Articles 19(2) and 47 CFR will be illustrated (1.2.).

1.1. Interpretation of the Charter in light of the ECHR

In order to determine the standard of the Charter, the ECHR and ECHR case law serve as an important source of interpretation. Article 6(3) TEU states that the fundamental rights enshrined in the ECHR constitute “general principles of the Union's law”. Furthermore, Article 52(3) CFR states:

“In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law for providing more extensive protection”.

This provision aims to ensure “consistency between the Charter and the ECHR”. However, it should be noted that Union law may provide more extensive protection. Despite the “special significance” of the ECHR in informing the meaning and scope of Charter rights, the following limitation regarding its impact on the Charter should be noted. The ECHR “does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law”. Consequently, the CJEU is formally not bound by ECHR case law. In cases where ECHR rights provide more protection than the Charter, the CJEU’s interpretation of Article 53 CFR becomes relevant. Article 53 CFR states:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions” (emphasis added).

This provision allows Member States, in principle, to apply ECHR standards in case they are higher than the standard of the Charter. However, the CJEU argued in its opinion on the agreement on the EU accession to the ECHR for a limitation of this principle. Notably, Member States can only apply a higher ECHR standard in so far as “the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised”. This echoes the CJEU’s interpretation of Article 53 CFR in Melloni, a case in which the constitutional traditions of Member States (not the ECHR) were at stake. Follow-

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200 Explanations relating to the Charter (n 195) Article 52 (emphasis added).
201 Explanations relating to the Charter (n 195) Article 52.
202 Article 52(3) CFR; Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 62-63 and case law discussed.
203 Parliament v Council [2006] (n 196) para 35 with further references.
204 CJEU Case C-601/15 PPU J.N. [2016] para 45 with further references.
206 CJEU Opinion Accession (n 205) paras 187-189 (emphasis added).
207 CJEU Opinion Accession (n 205) para 188, see reference to Melloni (n 13) para 60.
208 Melloni (n13) paras 55-63 The case concerned a provision of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1. This provision was not in compliance with the right to a fair trial (surrender of a person convicted in absentia) of the Spanish Constitution, but it was in compliance with the Charter. The CJEU clearly denied the interpretation of Article 53 CFR, according to which it “gives general authorisation to a Member State to apply
ing the CJEU’s opinion on the accession agreement, the same interpretation of Article 53 CFR arguably holds for the application of the ECHR within the Union law order. Hence, Article 53 CFR allows for the application of a higher ECHR standard, but only in so far as it does not encroach upon the effet utile of the EU. However, the CJEU usually tries to coordinate its case law with ECHR case law. This is important as Member States are bound by the judgments of the ECtHR (in contrast to the views of the supervisory bodies of the Refugee Convention, the CAT and the ICCPR). The ECHR maintains its “special significance [for] the general principles of EU law” after all. This holds despite the sole possible limitation with respect to the effet utile in case of collisions between the Charter and higher ECHR standards.

1.2. Interpretation of Articles 19(2) and 47 CFR in light of the ECHR

The Explanations relating to the Charter set out the sources of the respective Charter rights. The relevant corresponding ECHR rights to Articles 19(2) and 47 CFR can be found out on this basis.

Article 19(2) CFR incorporates Article 3 ECHR case law concerning non-refoulement, such as Soering. Article 19(1) CFR, which prohibits collective expulsions, corresponds to Article 4 of the Protocol No. 4 to the ECHR. As will be seen below, the nature of that right is comparable to Article 3 ECHR. Therefore, case law on Article 4 of the Protocol No. 4 will also be consulted in the analysis.

Article 47(1) CFR is based on Article 13 ECHR. Article 47(2) CFR corresponds to the right to a fair trial guaranteed by Article 6(1) ECHR. However, as this thesis deals with asylum cases one cannot readily consult Article 6 ECHR case law. Article 6(1) ECHR does only apply to civil rights and criminal charges. Maouia spells out that “decisions regarding the entry, stay and deportation of aliens” do not pertain to such matters. Hence, Article 6(1) ECHR does not apply to migration proceedings as long as they do not concern criminal

the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter”. The Court held: “It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised” (emphasis added). Thus, if a higher level of protection provided for by national constitutions endangers the effet utile of EU law, national constitutions have to step back.

59 E.g. J.N. (n 204) paras 44-46 and 77-81 Even though the CJEU announced to interpret the preliminary question solely in light of the Charter, it ultimately verified whether this interpretation was in line with ECHR case law; see also Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 61.
210 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 59-60 and 69-70.
211 CJEU Opinion Accession (n 205) para 37.
212 Explanations relating to the Charter (n 195).
213 Soering v The United Kingdom App no 14038/88 (ECtHR, 7 July 1989).
214 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11 [1963] ETS 46.
215 Explanations relating to the Charter (n 195) Article 19.
216 Souza Ribeiro v France App no 22689/07 (ECtHR, 13 December 2012) para 82; Khlaifia v Italy App no 16483/12 (ECtHR, 15 December 2016) paras 274-281 However, the nature of collective expulsion claims is only comparable in so far as applicants allege facing violations of Articles 2 or 3 ECHR. This is due to the “potentially irreversible nature” of the alleged harm. The fact that the expulsion is collective in nature alone does not suffice for the comparability.
217 Explanations relating to the Charter (n 195) Article 47.
218 Maouia v France App no 39652/98 (ECtHR, 5 October 2000) para 40.
charges or civil rights.\textsuperscript{219} In particular, expulsion proceedings of migrants are excluded from the scope of Article 6(1) ECHR.\textsuperscript{220} Nevertheless, the scope of Article 47 CFR is wider than Article 6(1) ECHR,\textsuperscript{221} and the CJEU may use standards of Article 6 ECHR case law to inform Article 47 CFR.\textsuperscript{222} Furthermore, the ECtHR occasionally deemed procedural guarantees stemming from Article 6 ECHR to be relevant for Article 13 ECHR as well.\textsuperscript{223} It may therefore be enlightening to thoroughly analyse Article 6 ECHR case law as well. However, such an analysis would reach beyond the scope of this thesis; this thesis will confine itself to Article 13 ECHR case law.

Thus, case law on Article 13 in conjunction with Article 3 ECHR or Article 4 Protocol No. 4 will be analysed in order to determine the meaning of Articles 19(1) and 47 CFR.

2. The right to an effective remedy in asylum cases

How does Article 46(6) and (8) PD have to be interpreted in light of the procedural safeguards which the ECHR requires with regard to appeal proceedings in asylum cases? This is the guiding question of this chapter. It will first explain general principles surrounding Article 13 ECHR (2.1.) and then examine ECHR case law with regard to the right remain during asylum appeal proceedings (2.2.-2.4.). Finally, it will summarise the extracted safeguards which have to be taken into account when interpreting Article 46(6) and (8) PD in light of the ECHR (2.5.).

2.1. General principles surrounding Article 13 ECHR

As preliminary points, the principle of subsidiarity (2.1.1.), the fact that Article 13 ECHR is an accessory right (2.1.2.), and the requirement of an “arguable claim” (2.1.3.) will be explained.

2.1.1. Principle of subsidiarity

Article 13 ECHR ensures “the availability at national level of a remedy to enforce the substance of the [ECHR] rights”.\textsuperscript{224} As is clear from Article 1 ECHR, national authorities are responsible to secure the rights enshrined in the ECHR to everyone within their jurisdiction. The complaint with the ECtHR guaranteed by Article 34 ECHR has therefore a subsidiary

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\textsuperscript{219} Marcelle Reneman, “European Court of Human Rights 5 October 2000, Application 39652/98. Maaouia” in Stefan Kok and others (eds), Rechtspraak Vreemdelingenrecht. Landmark Cases on Asylum and Immigration Law. Jurisprudentie 1950-2015 (Ars Aequi Libri 2015) 669 Notwithstanding this finding, see also 670: “[i]n some cases the result of an administrative law conflict can be decisive for a civil right. […] Therefore, it may be argued that some migration proceedings concern conflicts about civil rights in terms of Article 6 ECHR. The result of a migration procedure can be decisive for the exercise of the right to family life, the right to property (for example real-estate in the receiving country) or freedom of contract (for example employment or rental agreements)”.

\textsuperscript{220} Maaouia (n 218) 37.

\textsuperscript{221} Marcelle Reneman, “Expulsion of EU Citizens on the Basis of Secret Information: Article 47 of the EU Charter on Fundamental Rights Requires Disclosure of the Essence of the Case” (2014) 7 Review of European Administrative Law 69, 76-77; see also CJEU Case C-348/16 Sacko [2017] para 40 Sacko is an asylum case, and the CJEU explicitly referred to Article 6 ECHR and cited Article 6 ECHR case-law.

\textsuperscript{222} e.g. G.R. v. The Netherlands App no 22251/07 (ECtHR, 10 January 2012) paras 48-50; Kudla v Poland App no 30210/96 (ECtHR, 26 October 2000) paras 148-149; A.C. and others v Spain App no 6528/11 (ECtHR, 22 April 2014) paras 103-104.

\textsuperscript{223} M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011) para 288; Souza Ribeiro (n 216) para 78.
role.225 If states are confronted with the allegation of having violated a Convention right, they should have the “opportunity to put matters right through their own legal system” before the ECtHR examines such an allegation.226 This principle of subsidiarity is expressed by the admissibility requirement to exhaust domestic remedies laid down in Article 35(1) ECHR, and the right to an effective remedy before a national authority enshrined in Article 13 ECHR.227 Article 35 ECHR requires only the exhaustion of – accessible and effective – remedies. Given that the availability of an effective remedy is expressed by Article 13 ECHR, the rule to exhaust effective domestic remedies “has close affinity” with Article 13 ECHR.228

2.1.2. Accessory right

Article 13 ECHR guarantees every person who has been violated in his rights and freedoms enshrined in the ECHR an effective remedy before a national authority. This guarantee provides the person concerned with a means “to enforce the substance of the Convention rights and freedoms”.229 This purpose reveals the accessory character of Article 13 ECHR. That means that it always has to be invoked in conjunction with a substantial Convention right.230 The scope of obligations which Article 13 ECHR imposes upon states depends on the “nature of the applicant’s complaint”.231 Thus, the respective accessory substantial right is determinative for the procedural safeguards Article 13 ECHR demands.232

2.1.3. “Arguable claim”

The wording of Article 13 ECHR suggests that its application is only triggered when another substantial right enshrined in the ECHR has been “violated”. If this was taken literally, Article 13 ECHR would only serve as an additional provision without providing for a guarantee on its own.233 That is why a violation of another Convention right is not required.234 The ECtHR has, for example, found a violation of Article 3 in conjunction with Article 13 ECHR, but no violation of Article 3 ECHR in one and the same case.235 According to well-established case law, Article 13 ECHR requires an “arguable claim” in order to be triggered.236 De Weck describes this notion as a “potential violation of another (substantial) right guaranteed by the ECHR”.237 The question whether a claim is arguable or not depends on the particular circum-

225 M.S.S. v Belgian and Greece (n 224) para 287.
226 Selmouni v France App no 25803/94 (ECtHR, 28 July 1999) para 74.
227 M.S.S. v Belgian and Greece (n 224) para 287; Souza Ribeiro v France (n 216) para 77.
228 Selmouni v France (n 226) paras 74–75; D. v Ireland App no 26499/02 (ECtHR, 27 June 2006) para 83.
229 M.S.S. v Belgian and Greece (n 224) para 288; Mohammed v Austria App no 2283/12 (ECtHR, 6 June 2013) para 69.
231 cf. Souza Ribeiro v France (n 216) paras 82–83.
233 Diallo v The Czech Republic App no 20493/07 (ECtHR, 23 June 2011) para 64.
234 Çelik and Imret v Turkey App no 44093/98 (ECtHR, 26 October 2004) paras 49, 57, 60; Khlaifia v Italy (n 216) paras 269–270; De Weck (n 19) 277 and case law cited.
235 Souza Ribeiro v France (n 216) para 78 (“arguable complaint”); Singh and others v Belgium App no 33210/11 (ECtHR, 2 October 2012) para 78; Mohammed v Austria (n 229) paras 69 (“arguable complaint”) and 80 (“arguable claim”).
236 De Weck (n 19) 277 (emphasis added by De Weck).
stances of the individual case. At any rate, a claim is arguable if “it is not prima facie unfounded”.

2.2. The right to an effective remedy in asylum cases

This chapter addresses the procedural safeguards which Article 13 ECHR requires in case of an arguable claim under Article 3 ECHR. It will first assess whether the appeal or (only) the request for interim relief must have suspensive effect (2.2.1.-2.2.2.). Thereafter, the chapter will examine which other procedural guarantees a remedy has to meet. A particular focus will be laid on the form of suspensive effect (2.2.3.), the scope of judicial scrutiny (2.2.4.), and availability of the remedy (2.2.5.). These findings will be summarised (2.2.6.), before the ensuing chapters explore if and when limitations of procedural safeguards are allowed (2.3.), and to what extent limitations are allowed in such cases (2.4.).

2.2.1. Suspensive effect of appeal

Does Article 13 ECHR oblige states to allow asylum seekers to remain in their territory during the appeal proceedings brought against an asylum rejection or expulsion order? In Jabari, the ECtHR addressed this question for the first time. In this case, an asylum seeker could not avail herself of a remedy against the refusal to examine her asylum request, but she could challenge the deportation order. However, this latter appeal did not suspend the implementation of the deportation order. Given these circumstances, the Court found a violation of Article 3 in conjunction with Article 13 ECHR. In coming to this finding, it made the following reasoning which proved to become well-established in its case law to date:

“given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires [...] the possibility of suspending the implementation of the [expulsion] measure impugned”.

During the years that followed Jabari, the Court had the opportunity to develop this notion of an effective remedy even further. In Gebremedhin, the Court spelled out that a remedy against a removal order must have “automatic suspensive effect”. Remarkably, the Court considers the possible occurrence of irreversible harm only to be an issue involved in Article 3, Article 2 ECHR, and Article 4 of Protocol No. 4 cases. Remedies in Article 8 ECHR cases do, in principle, not have to be endowed with automatic suspensive effect. As mentioned under 2.1.2., the scope of Article 13 ECHR varies according to the nature of the right at stake.

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239 V.M. and others v Belgium App no 60125/11 (ECtHR, 7 July 2015) para 188; cf. A.E.A. v Greece App no 39034/12 (ECtHR, 15.03.2018) para 74 (conversely: claim shall be prima facie well-founded).
240 Jabari v Turkey App no 40035/98 (ECtHR, 11 July 2000).
241 HUDOC was adjusted to search for judgments from 01.02.1949 to 11.07.2000 (date on which Jabari was issued). The following combination of terms was used “suspend”/“suspension”, “Article 13”, “expulsion/deportation”. Besides Jabari, the only relevant Article 3 ECHR case of the output was: G.H.H. and others v Turkey App no 43258/98 (ECtHR, 11 July 2000) paras 37-39. In this case, the Court simply ascertained that no deportation would take place pending the appeal. Therefore there was no violation of Article 13 ECHR.
242 Jabari v Turkey (n 240) para 49.
243 Jabari v Turkey (n 240) para 50; see also Khlaifia v Italy (n 216) para 275; A.M. v The Netherlands App no 29094/09 (ECtHR, 5 July 2016) para 62 and further case law cited.
244 Gebremedhin v France App no 25389/05 (ECtHR, 26 April 2007) para 66 (emphasis added); see also Diallo v The Czech Republic (n 234) para 74; Abdolkhani and Karimnia v Turkey App no 30471/08 (22 September 2009) para 108; M.A. v Cyprus App no 41872/10 (ECtHR, 23 July 2013) para 133.
245 Souza Ribeiro v France (n 216) paras 82-83.
2.2.2. System where stays of execution are decided on a case-by-case basis

The Court made clear that remedies must have automatic suspensive effect with regard to the implementation of an expulsion measure as soon as an arguable claim under Article 3 ECHR is established. However, its case law still leaves several questions unanswered. Uncertainty exists in particular with regard to the different systems of interim protection. Does the appeal against an asylum rejection or expulsion decision itself have to automatically suspend the expulsion, or is it sufficient if only the request for interim relief suspends the expulsion? The Court has yet to explicitly address this question, but has expressed concern about “system[s] where stays of execution must be applied for and are granted on a case-by-case basis”. What precisely the Court means by this will be analysed through several cases. The case of Štěpán Štěpán Štěpán Štěpán a Slovakian family of Roma origin who applied for asylum in Belgium. After the initial and the subsequent asylum application had been rejected, the applicants had two remedial means at their disposal: application for judicial review combined with a request for stay of execution under the ordinary procedure or under the extremely urgent procedure. The family used the former combination of remedy. The government considered this choice to be ill-suited, as requests for stay of execution under the ordinary procedure do not have suspensive effect. According to the government, only appeals under the extremely urgent procedure have suspensive effect. In this respect, the Court simply pointed out that the availability of both kinds of remedy “was, to say the least, liable to confuse the applicants”. The Court went on to examine the request for stay of execution under the extremely urgent procedure, which allegedly (according to the Belgian government) fulfilled the requirements of suspensive effect.

“Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13”.

“Secondly, even if the risk of error is in practice negligible – a point which the Court is unable to verify, in the absence of any reliable evidence – it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention […]”.

246 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 140.
247 M.A. v Cyprus (n 244) para 137; A.C. and others v Spain (n 223) para 94; V.M. and others v Belgium (n 239) para 214; A.M. v The Netherlands (n 243) para 63.
249 Štěpán Štěpán Štěpán Štěpán v Belgium (n 248) para 69.
250 Štěpán Štěpán Štěpán Štěpán v Belgium (n 248) paras 69, 78.
251 Štěpán Štěpán Štěpán Štěpán v Belgium (n 248) para 80.
252 Štěpán Štěpán Štěpán Štěpán v Belgium (n 248) paras 70-74.
253 Štěpán Štěpán Štěpán Štěpán v Belgium (n 248) para 80.
254 Štěpán Štěpán Štěpán Štěpán v Belgium (n 248) paras 70-74.
255 Štěpán Štěpán Štěpán Štěpán v Belgium (n 248) para 82 (emphasis added).
256 Štěpán Štěpán Štěpán Štěpán v Belgium (n 248) para 83 (emphasis added).
The ensuing considerations which led the Court to find a violation of Article 13 ECHR (in conjunction with Article 4 of the Protocol No. 4) were exclusively related to the second remark quoted above. Notably, the application for stay of execution under the extremely urgent procedure did not constitute a “guarantee” (see below 2.2.3.) for a suspension of the family’s deportation during the time the Conseil d’Etat reviewed their application.257

By contrast, the Court did not elaborate on its first remark, which emphasised the “risk of error” in “a system where stays of execution must be applied for and are discretionary”, in its ensuing considerations of the case.258 With that remark the Court could logically only refer to the fact that the application for judicial review did not itself suspend the execution of the deportation order. Instead the stay of execution had to be applied for by means of the extremely urgent procedure. 259 Furthermore, the stay of execution was dependent upon a court’s decision (i.e. discretion).260 This system, as such, was under critique by the Court in its first remark.261

If this factor (a system, as such, in which suspensive effect has to be applied for) was really worrying for the Court, the question arises as to why it did not stress that factor in its ensuing reasoning. The Court gives us an explanatory hint from which two points can be deduced. First, the issue whether or not the “risk of error is in practice negligible” cannot be verified by the Court “in the absence of any reliable evidence”.262 Presumably the Court was not in possession of such reliable evidence proving the risk of error in the Belgian system. At least, the statements of the Belgian state and the applicants were inconsistent with regard to the success rate in the extremely urgent procedure.263 In the absence of any reliable evidence, the Court presumably deemed itself not able to answer the question whether the risk of error practically plays a role in the Belgian system (or whether that risk is in practice negligible). Second, “even if the risk of error is in practice negligible”, there was a violation of Article 13 ECHR because another requirement of Article 13 ECHR was not fulfilled (lack of “guarantee”).264 Hence, the inability to assess the risk of error did not matter for the assessment of the Belgian proceedings, as the lack of another requirement of Article 13 ECHR led to a violation anyway. Thus, the Court did not have to inquire into the risk of error of that system.

Against the background of these considerations, the following conclusion can be drawn. If there is reliable evidence proving a risk of error which is in practice not negligible, a system where stays of execution must be applied for and are decided on a case-by-case basis will amount to a violation of Article 13 ECHR. For instance, a low success rate regarding requests for interim relief in connection with a high recognition rate in appeal proceedings in one and the same cases can constitute such evidence.

257 Čonka v Belgium (n 248) paras 83 and 85.
258 Čonka v Belgium (n 248) paras 82-85.
259 cf. Čonka v Belgium (n 248) paras 70 and 80.
260 cf. Čonka v Belgium (n 248) para 66.
261 Čonka v Belgium (n 248) para 82.
262 Čonka v Belgium (n 248) para 83.
263 Čonka v Belgium (n 248) paras 66 and 72 According to the applicants, the success rate in the extremely urgent procedure was only 1.36 %. However, the Belgian government contended that stays of execution had been ordered in 25.22 % of the cases.
264 Čonka v Belgium (n 248) para 83.
No matter of concern anymore?

After Čonka, Belgian law regarding the extremely urgent procedure changed. The responsible appeal body was no longer the Conseil d’Etat but the Aliens Appeal Board. An appeal against an expulsion order did still not suspend the implementation of that order. However, the request for a stay of execution under the extremely urgent procedure now automatically suspended the implementation of the expulsion measure “by law” until the Aliens Appeal Board decided on the request. This new law was in place at the time the Court issued its judgment in M.S.S.

In M.S.S., the Court agreed with the government that the new system described above is a “sign of process in keeping with the judgment in Čonka”. However, the Court did not mention the fact that Belgium still had in place a system where stays of execution must be applied for. Admittedly, this system was improved to the extent that the interim request (request for stay of execution under the extremely urgent procedure) now suspended the enforcement of an expulsion order in the form of a guarantee. Nevertheless, the appeal to set aside the expulsion order did not automatically suspend the enforcement of that order; the stay of execution had to be applied for. Why did the Court not – in line with its first remark in Čonka – raise concerns about the risk of error involved in such a system?

This silence on a potentially relevant risk of error involved in the Belgian system at the time of M.S.S. can be interpreted in three ways: a) the Court tacitly accepts systems where only requests for interim relief have suspensive effect; b) the question whether or not such a system is allowed under the ECHR remains unanswered; c) such a system may – if the risk of error can be proved – lead to a violation of Article 3 in conjunction with Article 13 ECHR.

Silence on problematic system – interpretation a)

The fact that the Court, in M.S.S., examined the request for stay of execution under the extremely urgent procedure (i.e. request for interim relief) speaks in favour of interpretation a). Similarly, in Gebremedhin the Court went on to examine the interim measure, after it had briefly ascertained that the appeal did not have suspensive effect. The Court exclusively deemed the request for interim relief to lack automatic suspensive effect and found a violation of Article 13 ECHR. The fact that the appeal did not have automatic suspensive effect did not bother the Court in the course of its further reasoning. Likewise, in Salah Sheekh only the provisional measure was assessed in light of Article 13 ECHR. The Dutch system did not provide for an appeal with automatic suspensive effect against the expulsion order at stake. The applicant could only request the provisional measures judge to suspend the deportation, pending the outcome of this appeal. The judge rejected this request. The Court emphasised that a remedy does not have to be “bound to succeed” in order to be considered in compliance with Article 13 ECHR. Furthermore, as the provisional measures judge examined whether the

265 M.S.S. v Belgium and Greece (n 224) para 386.
266 M.S.S. v Belgium and Greece (n 224) para 387.
267 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 140 citing M.S.S. v Belgium and Greece (n 224) paras 386-396 for the procedure paras 138-140.
268 Gebremedhin v France (n 244) paras 65-67.
269 Gebremedhin v France (n 244) para 64.
270 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 140 citing Gebremedhin v France (n 244), see particularly paras 64-67.
271 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 140 citing Salah Sheekh v The Netherlands App no 1948/04 (ECtHR, 11 January 2007) para 154, see also paras 36-37.
planned removal would be in compliance with Article 3 ECHR, the Court found that the remedy was in accordance with Article 13 ECHR. Following these cases, the Court seems to tacitly accept systems where only the request for interim relief fulfils the requirement of automatic suspensive effect. It would not be necessary to scrutinise requests for interim relief if Article 13 ECHR required the appeal itself to have suspensive effect.

Interpretation a) is, however, inconsistent with the Court's first remark in Čonka. If the Court completely accepted systems, where interim measures have to be applied for and are dependent upon an assessment on a case-by-case basis, the Court's elaboration in Čonka on its concern about the risk of error involved in such a system would have been redundant.

**Silence on problematic system – interpretation b)**

Interpretation b) is based on the assumption that the Court did not have to assess the issue of risk of error in the Belgian system in M.S.S. After the Court had welcomed the improvements in the Belgian system (guarantee instead of practical arrangement), it could directly move on to another issue, namely the lack of close and rigorous scrutiny. In this vein, the Court made a move comparable to the one in Čonka, where the Court found a violation simply because another requirement of Article 13 ECHR (“guarantee”) was not fulfilled. Applying the same considerations made above regarding the Čonka judgment to M.S.S., it may be that the Court lacked reliable evidence proving a risk of error in such a system. Together with the existence of another worrying factor (close and rigorous scrutiny), which alone deprived the remedy of its effectiveness, the question of practical (ir)relevance of a risk of error involved in such a system could sidestep. Due to the lack of close and rigorous scrutiny, the Court did not have to tackle the question whether such systems, where stays of execution must be applied for, are allowed or not. The answer to that question was therefore left open.

However, Salah Sheekh counters this interpretation. In this case, the Court did not have any other issue to tackle. As the Dutch provisional measures judge examined whether the expulsion was in compliance with Article 3 ECHR, there was no lack of close and rigorous scrutiny. Nor was there any other issue which the Court had to focus on. According to interpretation b), the Court would, at this point, have to inquire into the risk of error in the Dutch system. However, the Court did not do so. Instead it confirmed the compliance of the request for a provisional measure with Article 13 ECHR. This fact speaks in favour of interpretation a), namely that Article 13 ECHR accepts systems where interim measures have to be requested.

**Silence on problematic system – interpretation c)**

In terms of overall consistency, interpretation c) is most convincing. If the Court was not concerned about such systems anymore, this would constitute a tacit turning point from its crucial (first) remark in Čonka. The fact that the Court does not intend to overturn this statement follows from several more recent judgments which repeat this remark.

However, we know from interpretation a) that such a system alone does not always lead to a violation of Article 13 ECHR, as exemplified by M.S.S., Gebremedhin and Salah Sheekh.

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272 Salah Sheekh v The Netherlands (n 271) para 154.
273 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 140.
274 Čonka v Belgium (n 248) para 82.
275 M.S.S. v Belgium and Greece (n 224) para 387.
276 Čonka v Belgium (n 248) paras 83 and 85.
277 Salah Sheekh v The Netherlands (n 271) para 154.
278 M.A. v Cyprus (n 244) para 137; A.C. and others v Spain (n 223) para 94; V.M. and others v Belgium (n 239) para 214; A.M. v The Netherlands (n 243) para 63.
Remarkably, Article 13 ECHR was not violated at all in Salah Sheekh. Following these cases, appeals against expulsion orders themselves do not have to be endowed with automatic suspensive effect as long as the request for interim relief fulfills all the requirements of Article 13 ECHR. Furthermore, interpretation b) reveals that the risk of error involved in such a system does not necessarily have to be inquired by the Court.

Notwithstanding these findings, the more recent judgments repeating the concern raised by Čonka show that the Court still considers such a system to have negative impacts on Article 13 ECHR. In V.M., for example, the Court explicitly referred to the risk of wrong refusals:

“the risk cannot be ruled out that in a system where a stay of execution must be applied for and is examined on a case-by-case basis it may be refused wrongly, in particular were it subsequently to transpire that the court ruling on the merits does nonetheless have to quash an expulsion order for failure to comply with the Convention, for instance if it considers after a more thorough examination that the applicant would actually risk being subjected to ill-treatment in the receiving country.”

In order to grasp the repeated concern about such systems, interpretation c) goes back to Čonka. Only Čonka gives some insight into the concrete-practical relevance regarding the assessment of such a system under Article 13 ECHR. As explored above, if there is reliable evidence proving a certain risk of error which is in practice not negligible, such a system will amount to a violation of Article 3 in conjunction with Article 13 ECHR. As the Court does not itself engage in such an assessment, it has to be proved by the persons concerned. If such proof can be submitted, the risk of error factor will become relevant for the assessment of the compliance of such a system with Article 13 ECHR.

**Finding: suspensive effect of an appeal or request for interim relief**

As soon as an arguable claim under Article 3 ECHR can be established, a remedy must be made available which automatically suspends the implementation of an expulsion measure. The appeal against an expulsion order should, as a rule, constitute that remedy with automatic suspensive effect. A request for interim relief should, in principle, constitute that remedy with automatic suspensive effect. This is due to the risk of wrong refusals involved in systems where interim measures have to be applied for and are granted on a case-by-case basis. However, Article 13 ECHR is not necessarily violated if states derogate from that principle. In such cases, the request for interim relief has to fulfil all the effective remedy requirements, particularly the requirement of automatic suspensive effect. Hence, if a request for interim relief fulfills all the requirements following from Article 13 ECHR (see below 2.2.1.-2.2.5.), there will be no violation. Notwithstanding this finding, systems where only requests for interim relief have automatic suspensive effect risk violating Article 13 ECHR under specific circumstances. Notably, if the parties concerned can prove that the respective system entails a risk of wrong refusals of interim requests which is in practice not negligible, the system as such will amount to a violation of Article 3 in conjunction with Article 13 ECHR.

The further requirements, which a remedy with automatic suspensive effect – be it appeal against expulsion order or request for interim relief – has to meet, are examined in the following chapters (2.2.3.-2.2.5.). It should be noted that the following analysis uses exclusively case law where interim proceedings were scrutinised by the Court. This is important for the purpose of this thesis which attempts to define procedural safeguards which have to be met

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279 V.M. and others v Belgium (n 239) para 214 (emphasis added); see also A.C. and others v Spain (n 223) para 94.
280 see interpretation b).
particularly during interim proceedings. Nevertheless, it will be seen that the Court does not subject interim proceedings to more restricted safeguards than appeal proceedings. Therefore, it is contended that effective remedy requirements following from Article 13 ECHR case law, in which asylum appeal proceedings are scrutinised, apply equally to interim proceedings.

2.2.3. Suspensive effect as a “guarantee”

The Court repeatedly held that “the requirements of Article 13 […] take the form of a guarantee and not of a mere statement of intent or a practical arrangement”. This requirement of Article 13 ECHR was not met by the Belgian authorities at the time of Čonka. For the execution of an expulsion order, the Belgian authorities were not legally bound to await the decision of the Conseil d’État on the application for stay of execution under the extremely urgent procedure. It was only on the basis of internal directions and discretionary instructions of the judge that the authorities refrained from doing so in practice. As the applicants had “no guarantee” that this practice would always be complied with, the remedy was “too uncertain” to meet the requirements of Article 13 ECHR. A request for stay of execution did therefore not guarantee the suspension of the enforcement of an expulsion order. Due to the lack of this guarantee, Belgium violated Article 13 ECHR in conjunction with Article 4 of Protocol No. 4 in the case of Čonka.

The requirement “guarantee” was also at stake in Gebremedhin. This case concerned the border procedure in France at the relevant time. As mentioned under 2.2.2., the Court did not test the appeal against the refusal of the leave to enter, which did not have suspensive effect. Instead it assessed the provisional measure under the urgent procedure. The government brought forward that this provisional measure had suspensive effect “in practice” because the authorities “restrained from removing” during the urgent procedure. However, the Court noted that the provisional measure did “not have automatic suspensive effect, with the result that the individual concerned could, quite legally, be removed before the [urgent-applications] judge has given a decision”. Repeating the principle that Convention rights take the form of a “guarantee”, the Court came to the same conclusion as in Čonka. Suspensive effect was not guaranteed under the French urgent-applications procedure. Article 3 in conjunction with Article 13 ECHR had been violated.

2.2.4. “Close and rigorous scrutiny”

In M.S.S. the Court found that the extremely urgent procedure in Belgium violated Article 3 in conjunction with Article 13 ECHR despite acknowledging the “sign of progress” since Čonka. The request for stay of execution under the extremely urgent procedure suspended eventu-

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281 see chapter 2.2.4. dealing with M.S.S. v Belgium and Greece (n 224) para 388.
282 Čonka v Belgium (n 248) para 83; see also R.U. v Greece App no 2237/08 (ECtHR, 7 June 2011) para 77.
283 Čonka v Belgium (n 248) paras 71, 81, 83.
284 Čonka v Belgium (n 248) para 83.
285 Čonka v Belgium (n 248) paras 83-85.
286 Gebremedhin v France (n 244) para 66.
287 Gebremedhin v France (n 244) para 64.
288 Gebremedhin v France (n 244) paras 65-67.
289 Gebremedhin v France (n 244) para 66.
290 Gebremedhin v France (n 244) para 65.
291 Gebremedhin v France (n 244) paras 66-67.
ally automatically the execution of the expulsion order.292 However, Belgium violated Article 13 ECHR nonetheless. This violation was related to the judicial review of the request for interim relief. First of all, the Court set out its well-established principle regarding the scope of scrutiny:

“[…] any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny and that, subject to a certain margin of appreciation left to the States, conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation”.295

Importantly, the Court spelled out that the stay of execution of an expulsion measure “cannot be considered as a subsidiary measure”. Therefore, the “requirements concerning the scope of scrutiny” cannot be disregarded. Otherwise a person could be expelled without having her claim under Article 3 ECHR examined “as rigorously as possible”.294 Accordingly, the requirements flowing from Article 13 ECHR cannot be restricted in respect of requests for interim relief.

The Court took approaches of certain divisions of the Aliens Appeal Board into account. These judgments revealed that the examination of the complaint under Article 3 ECHR was “not thorough”.295 In this respect, the Court pointed out to two aspects. First, the persons concerned had to submit “concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3 ECHR”.296 This requirement “increase[d] the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation”. Second, “even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeals Board did not always take that material into account”.297 The Court deduced that “[t]he persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the Convention”.298 Consequently, “the procedure for applying for a stay of execution under the extremely urgent procedure [did] not meet the requirements of Article 13

292 M.S.S. v Belgium and Greece (n 224) paras 386-387.
293 M.S.S. v Belgium and Greece (n 224) para 387 (emphasis added); see also Diallo v The Czech Republic (n 234) para 74; see for “independent and rigorous scrutiny”: Jabari v Turkey (n 240) para 50; Abdolkhani and Karimmia v Turkey (n 244) para 108; M.A. v Cyprus (n 244) para 133.
294 M.S.S. v Belgium and Greece (n 224) para 388.
295 M.S.S. v Belgium and Greece (n 224) para 389.
296 M.S.S. v Belgium and Greece (n 224) para 389, the Court refers to para 148: Certain “divisions have opted for an […] approach, which consists in taking into account the failure to demonstrate a link between the general situation in Greece and the applicant’s individual situation. For example, in judgment […] , rejecting a request for a stay of execution of a transfer to Greece, the Aliens Appeals Board reasoned as follows: […] ”The general information provided by the applicant in his file mainly concerns the situation of aliens seeking international protection in Greece […] . The materials establish no concrete link showing that the deficiencies reported would result in Greece violating its non-refoulement obligation vis-à-vis aliens who, like the applicant, were transferred to Greece ... Having regard to the above, the applicant has not demonstrated that the enforcement of the impugned decision would expose him to a risk of virtually irreparable harm”’ (emphasis added); cf. Allianazarova v Russia App no 46721/15 (ECHR, 17 February 2017) paras 102-103: proof of an alleged future risk cannot be required.
297 M.S.S. v Belgium and Greece (n 224) para 389, the Court referred to para 144 : “In assessing the reasoning for the order to leave the country, the Aliens Appeals Board takes into consideration first and foremost the facts revealed to the Aliens Office during the ‘Dublin’ interview and recorded in the administrative file. Should evidence be adduced subsequently […] , it is not systematically taken into account by the Aliens Appeals Board, on the grounds that it was not adduced in good time or that, because it was not mentioned in the asylum applicant’s statements to the Aliens Office, it is not credible” (emphasis added).
298 M.S.S. v Belgium and Greece (n 224) para 389.
of the Convention”. The Belgian extremely urgent procedure “precisely [led] to that result” that persons could be expelled without having their claims examined “as rigorously as possible”. The case Diallo should be noted as it concerned an asylum applicant whose application was rejected as manifestly unfounded. The national court did not carefully review the appeal against the asylum rejection, but only confirmed the manifest unfoundedness verdict of the authorities (due to a safe third country concept). Furthermore, the appeal against the expulsion order did not have suspensive effect. As a result, the applicants’ remedies had not been reviewed on the merits before their expulsion. The Court found a violation of Article 3 in conjunction with Article 13 ECHR.

In A.C., the Court took account of the rapid judicial decision on the request for stay of execution. The rapidity had repercussions on the scope of scrutiny. The request for stay of execution had been the applicants’ only possibility to suspend their expulsion, as the appeal did not have suspensive effect. However, the national court rejected that request one day after it had been lodged. Furthermore, the applicants did not have sufficient time to submit details on points which were relevant for the interim proceedings due to the accelerated character of the procedure. The Court found that speediness must not be privileged at the expense of effectiveness of procedural guarantees. Without the Court’s intervention the applicants could have been expelled without having the merits of their claims examined as “rigorously and rapidly as possible”. In this context, the Court quoted the part of M.S.S. where the Court held that claims should be examined “as rigorously as possible” before an expulsion. Given the Court’s critique on the speedy judicial decision in A.C., the requirement “as […] rapidly as possible” can only be related to the merits of the claim. Notably, the Court took also into account that the appeal (lodged in 2011) was still pending at the moment the Court took its decision (2014). If a remedy does not have suspensive effect and a request for stay of execution is rejected, the national court should act with a “particular prompt diligence and decide on the merits rapidly”. In the particular case, this requirement was linked to legal uncertainty and material insecurity.

2.2.5. Availability of a remedy

Article 13 ECHR requires a remedy to be “available in practice as well as in law”. This requirement was at stake in the cases discussed below which will be illustrated in turn. In order to fully understand the Court’s reasoning, it is partly necessary to describe also the facts of the cases in detail.

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299 M.S.S. v Belgium and Greece (n 224) para 390.
300 M.S.S. v Belgium and Greece (n 224) paras 388-389.
301 Diallo v The Czech Republic (n 234) paras 79-85; see also Baysakov and others v Ukraine App no 54131/08 (ECtHR, 18 February 2010) paras 72 and 75; Muminov v Russia App no 42502/06 (ECtHR, 11 December 2008) para 102 A court must be able to “effectively review the legality of executive discretion on substantive and procedural grounds”.
302 A.C. and others v Spain (n 223) paras 79 and 99-102 (translated).
303 A.C. and others v Spain (n 223) para 102 referring to M.S.S. v Belgium and Greece (n 224) para 388.
304 A.C. and others v Spain (n 223) para 102.
305 A.C. and others v Spain (n 223) para 103 (translated).
306 Mohammed v Austria (n 229) para 71; Souza Ribeiro v France (n 216) para 80; M.S.S. v Belgium and Greece (n 224) para 290.
**V.M. and S.J. – Complexity and material situation**

In *V.M.*, the Belgian extremely urgent procedure was at issue again. The case concerned a family with minor children of Roma origin from Serbia, who applied for asylum already in France before coming to Belgium. The applicants received an expulsion order which they could appeal against. This appeal did not suspend the enforcement of the expulsion. Additionally, the family had two kinds of remedies at their disposal. They could make a request for a stay of execution under the ordinary procedure or under the extremely urgent procedure. Only the latter automatically suspended the enforcement of the expulsion order. However, in order to be granted a stay of execution under the extremely urgent procedure, the enforcement of the expulsion measure must be “imminent”. Following the case law of the Aliens Appeal Board, an expulsion is imminent when a person is “subject to a coercive measure aimed at securing his or her departure from the country”. In practice, this mainly affects persons who are in detention. As the family was not detained with a view of expulsion, they did not make use of the request for stay of execution under the extremely urgent procedure, but under the ordinary procedure. As a result of the lack of suspensive effect of this request, they did not receive material assistance any more. This eventually forced them to leave Belgium to the country where they had fled.

However, the Belgian system provided for the possibility to rely on automatic suspensive effect in such a situation. Such a suspension could have been obtained by using a “different combination of remedies”. First an appeal combined with a request for stay of execution under the ordinary procedure should have been lodged. And then, once the family would have been subjected to a coercive expulsion measure (e.g. detention), a request for stay of execution under the extremely urgent procedure could have been made (which has suspensive effect). Hence, the request for stay of execution under the ordinary procedure simply has a precautionary role; it preserves the right to make a request under the extremely urgent procedure once the expulsion becomes imminent.

The Court criticised this system in a number of respects. It held, inter alia, that “while [the arrangement of appeals] may be effective in theory, [it] is in practice difficult to implement and very complex”. In the case *S.J.*, the Court made even clear that this arrangement of appeals is “too complex”. Turning back to *V.M.*, it should be noted that the Court took additionally account of the material situation of the family. Due to the denial of material assistance (which was, in turn, attributable to the lack of suspensive effect), the family was “forced” to leave Belgium “without their merits of fears being examined”.

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307 *V.M. and others v Belgium* (n 239) paras 6-8.
308 *V.M. and others v Belgium* (n 239) para 206.
309 *V.M. and others v Belgium* (n 239) paras 59, 208-209.
310 *V.M. and others v Belgium* (n 239) paras 62, 211.
311 *V.M. and others v Belgium* (n 239) paras 63, 211.
312 *V.M. and others v Belgium* (n 239) para 66.
313 *V.M. and others v Belgium* (n 239) para 204.
314 *V.M. and others v Belgium* (n 239) para 212, cf. paras 59, 204.
315 *V.M. and others v Belgium* (n 239) para 204.
316 *V.M. and others v Belgium* (n 239) paras 210-212.
317 *V.M. and others v Belgium* (n 239) para 216.
318 *S.J. v Belgium* App no 70055/10 (ECtHR, 27 February 2014) paras 102-108.
319 *V.M. and others v Belgium* (n 239) para 216.
further particularities of the case (length of proceedings, vulnerability), the Court found a violation of Article 3 in conjunction with Article 13 ECHR.\textsuperscript{320}

When drawing conclusions from \textit{V.M.} and \textit{S.J.}, it should be noted that the judgments did not become final.\textsuperscript{321} In \textit{V.M.}, the Belgian government requested the referral of the case to the Grand Chamber which was granted.\textsuperscript{322} As the family lost contact with their representative, the Grand Chamber struck the case out of the list.\textsuperscript{323} Even though the two judgments did not become final, the reasoning may still be deployed by the Court in similar future cases.

Two conclusions can be drawn from \textit{V.M.} and \textit{S.J.} First, the complexity of a remedy with automatic suspensive effect may hinder its accessibility in practice. Second, lack of material assistance during the duration of proceedings renders a remedy with automatic suspensive effect inaccessible in practice.

\textbf{I.M. – Speediness, freedom of movement, access to language and legal assistance}

\textit{I.M.} concerns the prioritised procedure in France. The first critical observations of the Court pertain to question whether France was allowed to subject Mr. I.M. to the prioritised procedure.\textsuperscript{324} This question will be analysed below under 2.4. The focus of this chapter will be on the issue of how the prioritised procedure was designed. In this respect, many details were relevant, as the procedure as a whole led to a violation of Article 3 in conjunction with Article 13 ECHR. Therefore, the facts of the case will first be set out in detail, and then the Court’s reasoning will be described. Finally, conclusions will be drawn having regard to deducible effective remedy requirements.

Mr. I.M. was taken into custody for 24 hours upon his arrival with forged documents in France. He alleged to have asked for asylum already at that stage, and that this was not taken into account.\textsuperscript{325} On account of an infringement of the French Aliens Act, Mr. I.M. was condemned to one month of detention. In the detention centre, he formulated his asylum claim and put it into a box foreseen for this purpose. Due to the situation in detention, he was unable to go to the préfecture for lodging an asylum application in person as prescribed by French law.\textsuperscript{326} The préfecture issued an expulsion decision which Mr. I.M. appealed against. The time limit for lodging an appeal was 48 hours. Mr. I.M. was therefore only able to formulate the appeal without a lawyer in Arabic. Before the hearing with the court he only had a few minutes to speak with a lawyer assigned to him.\textsuperscript{327} The court rejected the appeal arguing that the hearing did not reveal additional facts on top of his asylum application. Furthermore, Mr. I.M. did not provide any evidence which would have corroborated his allegation of a real risk of ill-treatment.\textsuperscript{328} A few days later Mr. I.M. was taken into removal detention. The first day of detention he was informed about the possibility to lodge an asylum application. On 19 January 2009 he lodged an asylum application together with the help of the French NGO Cime. On 22 January 2009 his asylum application had been registered and assigned to the

\begin{itemize}
\item \textsuperscript{320} \textit{V.M. and others v Belgium} (n 239) paras 217-220.
\item \textsuperscript{321} \textit{S.J. v Belgium} App no 70055/10 (striking out) (ECtHR, 19 March 2015); \textit{V.M. and others v Belgium} App no 60125/11 (striking out) (ECtHR, 17 November 2016) para 39.
\item \textsuperscript{322} \textit{V.M. and others v Belgium} (striking out) (n 321) para 5.
\item \textsuperscript{323} \textit{V.M. and others v Belgium} (striking out) (n 321) paras 32-41.
\item \textsuperscript{324} \textit{I.M. v France} App no 9152/09 (ECtHR, 2 February 2012) paras 141-142.
\item \textsuperscript{325} \textit{I.M. v France} (n 324) para 20.
\item \textsuperscript{326} \textit{I.M. v France} (n 324) paras 23-24.
\item \textsuperscript{327} \textit{I.M. v France} (n 324) para 25.
\item \textsuperscript{328} \textit{I.M. v France} (n 324) para 26.
\end{itemize}
prioritised procedure. The interview with OFPRA\textsuperscript{329} took place on 30 January 2009 in the morning. Mr. I.M. claimed that during this short period of time he could not effectively prepare the interview and submit the necessary evidence. In particular, a medical certificate and a certificate of residence in Darfour would have been required. The interview only took half an hour and OFPRA issued the asylum rejection on the same day in the afternoon.\textsuperscript{330} The reasoning included, inter alia, that Mr. I.M. could not convincingly explain that he was born and raised in Darfour.\textsuperscript{331} He appealed this decision with the national court. Nevertheless, he was brought to the Sudanese embassy in order to be provided with a laissez-passer on 11 February 2009.\textsuperscript{332} Five days later, he made successfully use of Rule 39 of the Rules of the Court. After providing the national court with a medical expert report and a certificate of residence, he was eventually granted refugee status and the asylum rejection was annulled.\textsuperscript{333}

The Court considered the consequences of the assignment to the prioritised procedure. Firstly, the time limit for lodging an asylum application was reduced from 21 days (under the regular procedure) to 5 days. This was a particularly short time limit for an applicant who was detained and had to prepare an asylum application in French language.\textsuperscript{334} Secondly, the difficulties in view of the short time limit were strongly aggravated by the language factor. No interpreter was available at that stage.\textsuperscript{335} Thirdly, the situation in detention did not allow the applicant to contact intermediaries outside the detention center in order to gather all the necessary documents. This shortcoming is particularly worrying in case of an asylum applicant who lodged his application for the first time. With the benefit of hindsight, the Court knew that the medical expert report and the certificate of residence in Darfour were the decisive factors for the French court to ultimately recognise refugee status. However, Mr. I.M. was not able to submit precisely these decisive documents during the asylum interview with OFPRA.\textsuperscript{336}

As regards the appeal proceedings brought against the expulsion decision (note: not the appeal against the asylum rejection), the Court ascertained that this appeal theoretically allowed for an effective remedy (it had suspensive effect).\textsuperscript{337} However, the applicant faced several obstacles in the course of these proceedings. Firstly, the Court stressed the extreme short time limit of 48 hours for lodging an appeal.\textsuperscript{338} Secondly, this short time limit forced the applicant, who was in detention and did not have access to legal or linguistic assistance, to submit an appeal in Arabic. This plea entailed few details and no evidence. The lack of evidence was ultimately decisive for the administrative court to reject the appeal. The lawyer, who Mr. I.M. met shortly before the oral hearing, was not in a position to add the necessary information either.\textsuperscript{339} Against this background, the Court had serious doubts as to whether the applicant was in a position to effectively invoke his claim under Article 3 ECHR before the administrative court.\textsuperscript{340}

\footnotesize{\textsuperscript{329} l’Office français de protection des réfugiés et apatride.} \\
\footnotesize{\textsuperscript{330} I.M. v France (n 324) paras 27, 30.} \\
\footnotesize{\textsuperscript{331} I.M. v France (n 324) para 30.} \\
\footnotesize{\textsuperscript{332} I.M. v France (n 324) para 32.} \\
\footnotesize{\textsuperscript{333} I.M. v France (n 324) paras 36-38.} \\
\footnotesize{\textsuperscript{334} I.M. v France (n 324) para 144.} \\
\footnotesize{\textsuperscript{335} I.M. v France (n 324) para 145.} \\
\footnotesize{\textsuperscript{336} I.M. v France (n 324) para 146.} \\
\footnotesize{\textsuperscript{337} I.M. v France (n 324) para 149.} \\
\footnotesize{\textsuperscript{338} I.M. v France (n 324) para 150.} \\
\footnotesize{\textsuperscript{339} I.M. v France (n 324) paras 151-152.} \\
\footnotesize{\textsuperscript{340} I.M. v France (n 324) para 153.}}
If a remedy with automatic suspensive effect was theoretically available, its accessibility in practice was limited due to several factors which were linked to the prioritised procedure. The Court noted again the brevity of the time limits to access available remedial measures, and the material and procedural difficulties hindering the submission of evidence while the applicant found himself in detention and reclusion. Furthermore, these procedural shortcomings could not be compensated by an appeal to the higher court due to the lack of suspensive effect of such an appeal. Without the Court’s intervention the applicant could have been expelled without his asylum claim being examined “as rigorously as possible”. Conclusively, the Court unanimously found a violation of Article 3 in conjunction with Article 13 ECHR.

One general conclusion can be drawn from I.M.. Even though an appeal procedure may in itself be considered effective (e.g. appeal has suspensive effect), the aggregate of restrictive procedural factors may lead to the finding that the procedure as a whole is at variance with Article 13 ECHR. Such restrictive procedural features encompass short time limits for lodging an asylum application and/or an appeal, deprivation of liberty resulting in poor access to legal assistance and interpreters, no suspensive effect of an appeal at a higher instance court.

2.2.6. Findings: effective remedy requirements

The respective remedy which is endowed with automatic suspensive effect – be it appeal against an expulsion decision or a request for interim relief – has to meet the following procedural guarantees. First, suspensive effect has to be guaranteed by law (Čonka, Gebremedhin). Second, a court has to apply close and rigorous scrutiny when reviewing the remedy. In particular, the merits have to be reviewed as rigorously as possible (M.S.S., Diallo, A.C.). For that purpose, the burden of proof shall not be too high (M.S.S.), and time limits too short (A.C.) as to hinder applicants to submit details on relevant points. Furthermore, materials which are submitted after an administrative interview shall be taken into account by the court (M.S.S.). Additionally, time limits should not be too short as to hinder a court to decide on the merits (A.C.). However, if (!) a request for interim relief has been rejected, the court shall rapidly decide on the appeal. The purpose of this requirement is to ensure that merits are decided upon as rapidly as possible, and in any case, prior to an expulsion (A.C.). The mentioned safeguards following from the requirement of a close and rigorous scrutiny apply to requests for interim relief in the same way as to any other remedy. Otherwise states could remove persons without having reviewed their complaints under Article 3 ECHR as rigorously as possible (M.S.S.). It follows that the requirement of close and rigorous scrutiny cannot be restricted with regard to interim proceedings. Third, the remedy shall be accessible in practice as well as in law. This accessibility can be affected by several characteristics: remedies which involve complex steps for obtaining suspensive effect (V.M., S.J.), lack of material assistance (V.M.), restricted freedom of movement resulting in poor access to legal or language assistance, short time limit for lodging an appeal, absence of a remedy with suspensive effect at a higher judicial instance. The aggregate of such procedural shortcomings (at least) amounts to a violation of Article 13 ECHR (I.M.).

341 I.M. v France (n 324) para 154.
342 I.M. v France (n 324) para 155.
343 I.M. v France (n 324) paras 158-159 (translated).
344 chapter C.I.2.2.3.
345 chapter C.I.2.2.4.
346 chapter C.I.2.2.5.
2.3. “Arguable claim” as the door-opener for effective remedy guarantees

Having analysed the effective remedy guarantees flowing from Article 13 ECHR in case of an arguable claim under Article 3 ECHR, the question arises: when is there an arguable claim? Can, for example, a third asylum application still be considered an arguable claim? As already touched upon above, the Court deals with this question on a case-by-case basis. Therefore, it is difficult to deduce clear guidance from its case law on that question. The cases Mohammed [347] and Sultani [349] give at least some guidance as regards subsequent asylum applications.

Mohammed makes clear that a subsequent asylum application constitutes an arguable claim when new circumstances since the rejection of the first asylum application have come to light. The fact that Mr. Mohammed’s first asylum application had already been examined on the merits and rejected did not suffice to deprive him of an arguable claim. New reports informing about the situation in Hungary as well as the changed practice of the Austrian Asylum Court gave rise to an arguable claim involved in his subsequent asylum application. [350] The Court held: “where an applicant makes an arguable claim under Article 3 of the Convention, he or she should have access to a remedy with automatic suspensive effect, meaning a stay on a potential deportation”. [351] However, under Austrian law, the subsequent asylum application did not protect Mr. Mohammed from enforcement of the transfer order to Hungary. [352] The Court took into account the long time (almost a year) that elapsed between the transfer order and its enforcement, and the new information that has come to light in the meantime. Furthermore, the Court considered the state’s interest to deal with “repetitive and clearly abusive or manifestly ill-founded” asylum applications. [353] However, in view of the new information and the year that passed between the transfer decision and the scheduled transfer, “that second application cannot prima facie be considered abusively repetitive or entirely manifestly ill-founded. On the contrary, […] the applicant had – at that time – an arguable claim […]”. [354]

Likewise, Sultani concerned a subsequent asylum application. In this case, the Court stated: “as soon as an individual complains that his expulsion exposes him to a treatment contrary to Article 3 of the Convention, remedies without suspensive effect cannot be considered effective within the meaning of Article 35(1) of the Convention”. [355] As elaborated above, [356] the rule of exhaustion of – effective – remedies in Article 35 ECHR has close affinity with Article 13 ECHR. Following the above quoted statement of the Court, an arguable claim does not seem to be required to trigger the requirement of suspensive effect. The existence of an asylum application involving a claim under Article 3 ECHR – be it first, subsequent or third asylum application – would be sufficient. [357] However, it remains to be seen whether conclusions from Article 35(1) ECHR case law can readily be drawn with regard to Article 13 ECHR. It

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347 chapter C.I.2.1.3.
348 Mohammed v Austria (n 229).
349 Sultani v France App no 45223/05 (ECtHR, 20 September 2007). Only extracts of the judgment are available on HUDOC. The full judgment can be found in Thomas Spijkerboer, Annotation Jurisprudentie Vreemdelingenrecht 2007/462, issue 14.
350 Mohammed v Austria (n 229) paras 76-81.
351 Mohammed v Austria (n 229) para 80.
352 Mohammed v Austria (n 229) para 76.
353 Mohammed v Austria (n 229) para 80.
354 Mohammed v Austria (n 229) para 80 (emphasis added by the ECtHR).
355 Sultani v France (n 349) para 50 (translated).
356 chapter C.I.2.1.1.
357 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 133-134.
would not be the first time that the Court (in spite of the close affinity) applied lower standards with regard to Article 13 ECHR than in respect of Article 35(1) ECHR.\(^{358}\)

*In sum*, it can be ascertained that a subsequent asylum applicant who puts forward new elements, which have come to light since the rejection of his first asylum application, can rely on an arguable claim under Article 3 ECHR. However, prima facie abusively repetitive or entirely manifestly unfounded applications may be said to not involve an arguable claim (*Mohammed*). Nevertheless, it remains difficult to determine when exactly a claim is prima facie abusive. *Sultani* suggests even that any asylum claim complaining about treatment contrary to Article 3 ECHR triggers the respective Article 13 ECHR guarantees (at least a remedy with suspensive effect). It remains to be seen whether such an interpretation which is inferred from Article 35 ECHR case law, indeed, equally applies to Article 13 ECHR.

### 2.4. Limitation and balancing

Notwithstanding the issue of *when* the guarantees following from Article 13 ECHR are triggered, Article 13 ECHR may be limited even where an arguable claim can be established. For example, states can set “reasonable time limits”.\(^{359}\) Arguably, the interpretation of “reasonable” may vary according to the interests at stake. If abusive asylum applications are involved the balance will tilt more in favour of the state. Shorter time limits for lodging an appeal will then be justified. The interest of states to deal with certain asylum seeker groups in a certain way has, indeed, been acknowledged by the Court:

> “The Court acknowledges the need of EU Member States to ease the strain of the number of asylum applications received by them and in particular to find a way to deal with repetitive and clearly abusive or manifestly ill-founded applications for asylum”.\(^{360}\)

In this regard, the Court accepted accelerated asylum procedures as a means for states to deal with such applications more easily.\(^{361}\) The Court also stated that, it “does not question the interest and the legitimacy of the existence of a prioritised procedure […] for applications where all signs indicate that they are unfounded or abusive”.\(^{362}\) Furthermore, the Court acknowledges “the necessity of states confronted with a high number of asylum seekers to put in place measures which cope with such litigation as well as with the risk of satiation of the [judicial] system”.\(^{363}\) However, a balance has to be struck between such interests of states and the personal interest to have one’s asylum application effectively processed.

> “If the Court acknowledges the importance of the rapidity of the procedure, it considers that this must not be privileged at the expense of the effectiveness of procedural guarantees which are essential in view of protecting the applicant against arbitrary refoulement”.\(^{364}\)

\(^{358}\) *A.M. v The Netherlands* (n 243) paras 58 and 67-70.

\(^{359}\) Hemme Battjes, „In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed” (2009) 22 Leiden Journal of International Law, 583, 605 The fact that an arguable claim under Article 3 ECHR triggers Article 13 ECHR guarantees (e.g. rigorous scrutiny) “does not preclude domestic authorities from stating ‘reasonable time limits’; exercise of the right to appeal ‘must not be unjustifiably hindered by the acts or omissions of the authorities’. Certain limitations are hence allowed for (‘reasonable’ or ‘justifiable’).”.

\(^{360}\) *Mohammed v Austria* (n 229) para 80.

\(^{361}\) *I.M. v France* (n 324) para 142; *Mohammed v Austria* (n 229) para 79; *A.C. and other v Spain* (n 223) para 99.

\(^{362}\) *M.E. v France* App no 50094/10 (ECtHR, 6 June 2013) para 66; see also *K.K. v France* App no 18913/11 (ECtHR, 10 October 2013) para 67; *M.V. and M.T. v France* App no 17897/09 (ECtHR, 4 September 2014) para 60 (translated).

\(^{363}\) *I.M. v France* (n 324) para 142; *A.C. and others v Spain* (n 223) para 104 (translated).

\(^{364}\) *I.M. v France* (n 324) para 147 (translated).
As regards the risk of satiation of the judicial system, the Court held:

“However, like Article 6 of the Convention, Article 13 imposes on Contracting States the duty to organise their judicial systems in such a way that they can respond to the demands of such circumstances [high number of asylum seekers].”

Following such reasoning, the question arises: to what extent are procedural limitations allowed? The Court’s case law on French accelerated procedures gives some insight. As will be seen, the issues involved in the accelerated administrative procedure have repercussions on the accessibility of the appeal. Finally, the case Auad explains if limitations of the scope of judicial scrutiny are allowed.

Sultani shows that a first asylum application, which has already been examined on the merits, justifies the subjection of a subsequent asylum application to an accelerated procedure. As far as subsequent asylum applications are concerned, it is sufficient to verify the existence of new elements within the framework of accelerated procedures. On the contrary, the Court distinguished I.M. clearly from Sultani. Whereas Mr. Sultani lodged a subsequent asylum application, Mr. I.M. lodged his first asylum application. The accelerated asylum procedure was hence the sole examination of the substance of Mr. I.M.’s asylum claim. This factor alone did not lead to a violation of Article 13 ECHR, but it was one factor which played a role in coming to the finding of a violation. In particular, the consequences of the subjection to the accelerated procedure were not tenable in case of a first-time asylum applicant. By contrast, in M.E., also a case concerning a first asylum application, the Court accepted the application of the accelerated procedure. The ground for the subjection to the accelerated procedure was that Mr. M.E. lodged his asylum application only three years after his arrival in France. Under these circumstances, the Court found that Mr. M.E. had sufficient time to gather all the evidence to support his asylum claim (difference to Mr. I.M.). Therefore, it could not be contended that asylum procedure and remedy (both suspensive) were not accessible. In contrast to I.M., the Court did not find a violation in M.E. A comparable case is M.V. and M.T. where the Court emphasised that the applicants – in contrast to Mr. I.M. – where in liberty to gather all the evidence. The consequences of the accelerated procedure could therefore not be said to violate Article 13 ECHR, even not in case of first-time asylum applicants.

Another issue the Court considered in I.M. had to do with the reason why Mr. I.M. was subjected to the accelerated procedure. In view of the authorities, Mr. I.M. applied for asylum only after an expulsion decision had already been issued (even though he applied for asylum at an earlier stage which was not considered by the authorities). Therefore, his application was considered to be “deliberately fraud”. The Court pointed out to the automatic character of the classification under the accelerated procedure. The assignment of the claim to the accelerated procedure was solely linked to a procedural ground, but “neither to circumstances of the case nor to the exact content of the claim and its substance”.

\[365\] A.C. and others v Spain (n 223) para 104 (translated).
\[366\] Sultani v France (n 349) paras 64-65.
\[367\] I.M. v France (n 324) paras 142-143; see also A.C. and others v Spain (n 223) para 99.
\[368\] chapter C.I.2.5.b.
\[369\] I.M. v France (n 324) paras 136-160 in particular paras 142-144.
\[370\] M.E. v France (n 362) paras 68-69; see also K.K. v France (n 362) paras 69-70.
\[371\] M.V. and M.T. v France (n 362) paras 63-66 The third fruitless attempt to receive fingerprints from the applicants was considered as a ground which justifies the prioritised procedure.
\[372\] I.M. v France (n 362) para 141 (translated).
Auad concerns the question whether the scope of judicial scrutiny can be restricted. The case makes clear that the requirement of a “close, independent and rigorous scrutiny” cannot be dispensed with. Most importantly, it cannot be dispensed with even when states’ interest to protect national security is at stake. Under Bulgarian law, appeals brought against expulsion orders issued on national security grounds were denied automatic suspensive effect. Furthermore, courts did not have the power to suspend that order. The Court ascertained that the applicant could be expelled before his claim under Article 3 ECHR has been subject to a rigorous review. Consequently, it found a violation of Article 3 combined with Article 13 ECHR.

"That [close, independent and rigorous] scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State".

Thus, national security considerations cannot limit the required scope of judicial scrutiny.

**Summary of findings – Extent of possible limitations**

Even if an arguable claim under Article 3 ECHR can be established, the requirements following from Article 13 ECHR can be limited in case of competing state interests. The interest to find a way to deal with clearly abusive or manifestly unfounded asylum applications has been acknowledged by the Court. This brings the question about to what extent effective remedy requirements can be limited if such interests are at stake. The Court has accepted accelerated or prioritised procedures as legitimate means to deal with such applications. However, rapidity must not be privileged at the expense of effective procedural requirements. Hence, states interests have to be balanced against personal interests. Several aspects need to be taken into account in the balancing exercise. First, more prudence is required with regard to first asylum applications. They cannot be subjected to accelerated procedures as easily as subsequent asylum applications. First-time asylum applications do not entail procedural features which are able to counterbalance (e.g. merits have already been examined before) the procedural restrictions inherent in accelerated procedures (I.M., Sudani). However, if freedom of movement is not restricted or a person had sufficient time to prepare his asylum application, accelerated procedures may also be justified in case of first-time asylum applications. In such cases, the procedural restrictions involved in accelerated procedures can be balanced out. At any rate, the legitimacy of the application of an accelerated procedure has to be assessed in respect of an applicant’s possibility to gather necessary information in support of his asylum claim (M.E., M.V. and N.T.). Third, grounds for accelerated procedures have to be linked to the circumstances of the case or the content and substance of the claim. Procedural grounds which lead to an automatic subjection to accelerated procedures are not allowed (I.M.). Fourth, the limitation of guarantees linked to the requirement of close and rigorous scrutiny is under no circumstances allowed. Such a limitation is not even justified by national security risks (Auad).

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373 Auad v Bulgaria App no 46390/10 (ECtHR, 11 October 2011) paras 120-123.
374 Auad v Bulgaria (n 373) para 120.
2.5. Application to Article 46(6) and (8) PD

Article 46(6) and (8) PD incorporate a system where stays of execution of the enforcement of a return decision (right to remain) are decided on a case-by-case basis. Member States can even opt for a system where stays of execution have to be applied for (request for interim relief). This system entails the risk that requests for interim relief are wrongly rejected. Errors can happen, in particular, if a subsequent more thorough judicial examination reveals a real risk of ill-treatment, and the court ruling on the appeal has to quash a return decision nonetheless. However, such a system (as such) will only violate Article 13 ECHR if a risk of error, which is in practice not negligible, can be proven in a Member State.\textsuperscript{375}

As Article 13 ECHR, in principle, allows for systems where only the request for interim relief has automatic suspensive effect,\textsuperscript{376} the interim proceedings regulated in Article 46(6) and (8) PD have to fulfil all the effective remedy requirements discussed. Article 46(8) PD guarantees the suspension of the enforcement of a return decision (right to remain) by law.\textsuperscript{377} However, when implementing Article 46(6) and (8) PD, Member States have to make sure that they comply with all the other requirements as well. First, national courts have to review the claim under Article 3 ECHR with close and rigorous scrutiny.\textsuperscript{378} This requirement cannot be restricted. This holds even for cases where the national security ground Article 31(8) PD is the reason for a restricted right to remain.\textsuperscript{379} Furthermore, the nature of interim proceedings does not justify any limitation in this regard.\textsuperscript{380} As to the question which concrete procedural guarantees follow from the close and rigorous scrutiny requirement, I refer to the analysis in C.I.2.2.4 and the findings in C.I.2.2.6. Within the framework of Union law, this means that the full and \textit{ex nunc} examination laid down in Article 46(3) PD should be applied to the interim proceedings regulated in Article 46(6) PD as well.

At first glance, the grounds for accelerated procedures laid down in Article 31(8) PD seem to be principally justified.\textsuperscript{381} However, depending on the respective situation, accelerated procedures can violate Article 13 ECHR in individual cases. In particular, accelerated procedures shall not hinder access to a remedy with automatic suspensive effect. Thus, even though a shorter time limit for requesting interim relief is, in principle, justifiable in case of abusive or manifestly unfounded applications,\textsuperscript{382} access to that request must not be hindered. Aspects which need to be taken into account when assessing the accessibility of a request for interim relief include time limits, freedom of movement, access to legal and language assistance, material assistance and complexity. In general, an applicant must be able to gather all necessary information and documents in support of his asylum claim. Arguably, the duty imposed upon Member States to provide for reasonable time limits and other necessary rules to access a remedy, which is laid down in Article 46(4) PD, has to be applied to Article 46(6) and (8) PD as well. When implementing these provisions, Member States have to comply with Article 13 ECHR by taking into account the analysis and findings of chapters C.I.2.2.5-C.I.2.4.

\textsuperscript{375} chapter C.I.2.2.2.
\textsuperscript{376} chapters C.I.2.2.1. and C.I.2.2.2.
\textsuperscript{377} chapter C.I.2.2.3.
\textsuperscript{378} chapter C.I.2.2.4.
\textsuperscript{379} chapter C.I.2.4.
\textsuperscript{380} chapters C.I.2.2.4. and C.I.2.2.6.
\textsuperscript{381} chapter C.I.2.4.
\textsuperscript{382} chapter C.I.2.4.
II. Interpretation in light of the Refugee Convention

This chapter focusses on the procedural guarantees which follow from the Refugee Convention. Particular emphasis will first be laid on the right to an effective remedy, especially the right to remain during asylum appeal proceedings. In a second step, possible procedural restrictions which the Refugee Convention allows for will be examined. The findings will finally be applied to Article 46(6) and (8) PD.

Before turning to the essence, certain preliminary considerations have to be thought through. Chapter 1 will ask why the Refugee Convention is deployed to interpret the PD, and what standing it has in EU law. Subsequently, chapter 2 will illustrate the kind of sources which must be used to interpret the Refugee Convention itself. Having established the range of interpretative sources, chapter 3 will ask the more basic question whether an asylum procedure and a remedy are required under the Refugee Convention. While chapter 4 will shed light on the procedural requirements following from an effective remedy under the Refugee Convention, chapter 5 will point out to procedural restrictions which the Refugee Convention allows for. It will be asked under which circumstances, and to what extent restrictions are allowed. Chapter 6 will illustrate UNHCR’s point of view particularly on Article 46(6) and (8) PD. Finally, chapter 7 will apply the findings to Article 46(6) and (8) PD.

1. Standing of the Refugee Convention in EU asylum law

Article 78(1) TFEU, the legal basis for the Common European Asylum System (CEAS) legislation, states that the measures adopted on this basis shall be “in accordance with” the Refugee Convention. Recital 3 of the PD acknowledges that the PD forms part of the CEAS which is “based on the full and inclusive application of the [Refugee Convention]”. It can therefore be concluded that the PD has to be interpreted in light of the Refugee Convention. However, the significance the CJEU attributes to the Refugee Convention itself is different from the weight it attaches to the non-binding views of UNHCR or the conclusions of EXCOM. The latter documents are only occasionally used as a source of interpretation. Arguably, their relevance depends on the “quality of their reasoning”.

2. Interpretation of the Refugee Convention

The Refugee Convention is a source of international law and therefore has to be interpreted according to Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (Vienna Treaty Convention). These interpretation rules are considered to form part of customary law. The fact that the Refugee Convention was concluded before the Vienna Treaty Convention does, therefore, not exclude the interpretation of the Refugee Convention according to these rules.

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383 cf. CJEU Case C-720/17 Bilali [2019] paras 54-57 In this case, the CJEU interpreted a provision of the QD in light of the Refugee Convention. The CJEU referred to Article 78(1) TFEU and the Preamble of the QD. The same reasoning can be transferred to the PD.
384 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 65-66.
385 Battjes, European Asylum Law and International Law (n 22) 22 and 94; Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 68.
386 Battjes, European Asylum Law and International Law (n 22) 9.
388 Battjes, European Asylum Law and International Law (n 22) 15 for a detailed description of the rules of interpretation see 14-19.
States, supervisory bodies and scholars have to apply Articles 31, 32 and 33 of the Vienna Treaty Convention when they interpret the Refugee Convention. The International Court of Justice (ICJ) has the competence to issue judgments constituting legally binding sources of interpretation of the Refugee Convention. However, neither a state nor UNHCR has confronted the ICJ with a dispute relating to the Refugee Convention to date.

Albeit not binding, two sources of interpretation are important. First, owing to its duty to supervise the application of the Refugee Convention, the opinions of UNHCR are one source of interpretation. Second, the Conclusions of EXCOM are relevant in that they reflect the consensus among the states which are parties to the Refugee Convention. Besides, the Handbook takes a special authoritative position. On the one hand, it illustrates states practice and, on the other hand, the view of UNHCR. It does, however, not make clear which parts pertain to states practice and which parts include the view of UNHCR. It is not binding either but it is an important source for interpretation of the Refugee Convention.

3. Access to asylum procedures and right to appeal

The Refugee Convention does not contain any procedural rules for the assessment of refugee status. However, in order to determine who states owe their obligation under Article 33 RC to, the principle of effectiveness requires some kind of procedural determination process. Even though compliance with non-refoulement, as such, does not require a procedure to determine a person’s status pursuant to the refugee criteria of Article 1 RC, it has been argued that such a procedure is nonetheless required by the Refugee Convention. The requirement to interpret the Refugee Convention in “good faith”, the object and purpose of the Convention as well as the effectiveness of Convention rights, which are only granted to recognised refugees, oblige states to conduct a status determination procedure.

The Refugee Convention does not contain a provision requiring the possibility to appeal against an asylum rejection either. The non-discrimination clause in Article 16 RC, which requires that refugees have access to courts, has triggered discussions as to whether this provision guarantees appeals against asylum rejections. However, this interpretation of Article 16 RC does not find broad support, and UNHCR does not even consider such an interpreta-

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389 Battjes, European Asylum Law and International Law (n 22) 19.
390 Article 38 RC; Wouters (n 25) 37.
392 Article 35 RC.
393 Battjes, European Asylum Law and International Law (n 22) 20; Wouters (n 25) 45-46.
395 Battjes, European Asylum Law and International Law (n 22) 20.
396 Wouters (n 25) 43.
397 Battjes, European Asylum Law and International Law (n 22) 292; Moreno-Lax (n 29) 396-397.
398 Battjes, European Asylum Law and International Law (n 22) 467; Wouters (n 25) 164; Moreno-Lax (n 29) 397.
399 Battjes, European Asylum Law and International Law (n 22) 467; see also Wouters (n 25) 164; Moreno-Lax (n 29) 397 citing inter alia UNHCR EXCOM Conclusion No. 82 (XLVIII) “Safeguarding Asylum” (1997) para (d)(ii).
400 Wouters (n 25) 173-174.
401 Battjes, European Asylum Law and International Law (n 22) 319; by contrast Moreno-Lax (n 29) 402.
tion.\textsuperscript{402} Equally disregarding Article 16 RC, EXCOM has nonetheless concluded: “[i]f the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision”.\textsuperscript{403}

4. Requirements of an effective remedy

UNHCR emphasised that the reviewing authority has to be “separate from and independent of” the authority which took the rejecting decision.\textsuperscript{404} UNHCR made also clear that that body has to review “both facts and law based on up-to-date information”.\textsuperscript{405} Furthermore, EXCOM and UNHCR require that an applicant is allowed to remain in the territory during both the asylum procedure and appeal proceedings.\textsuperscript{406} This right to remain during appeal proceedings follows from diverse reasons. First, the declaratory nature of refugee status implies that an asylum seeker must be protected from refoulement until a final decision has been reached stating that he does not fulfil the requirements for refugee status.\textsuperscript{407} Second, due to the irreparable harm that might occur if an asylum applicant is expelled on the basis of a wrong asylum rejection, the effective application of Article 33 RC requires the right to remain during appeal proceedings. Third, as an asylum seeker’s account is usually the most important evidence, his presence during the appeal procedure is required in order to enable the body of appeal to properly assess the claim.\textsuperscript{408} In line with these considerations, UNHCR commented on the proposal of the PD (2005):

“Many refugees in Europe are recognized only during the appeal process. Given the potentially serious consequences of an erroneous determination at first instance, the suspensive effect of asylum appeals is a critical safeguard. This requirement is essential to ensure respect for the principle of non-refoulement. If an applicant is not permitted to await the outcome of an appeal against a negative decision at first instance in the territory of the Member State, the remedy against a decision is ineffective”.\textsuperscript{409}

\textsuperscript{403} UNHCR EXCOM Conclusion No. 8 (XXVIII) “Determination of Refugee Status Determination of Refugee Status” (1977) para (e)(vi).
\textsuperscript{406} UNHCR EXCOM Conclusion No. 8 (n 403) para (e)(vii); UNHCR Handbook (2019) (n 394) part II 43; UNHCR, “UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures” (n 404) 7 para 21.
\textsuperscript{407} Wouters (n 25) 175-176.
\textsuperscript{408} Battjes, European Asylum Law and International Law (n 22) 323-324; see also Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 135-136 and 138.
5. Extent of allowed procedural limitations

EXCOM acknowledged that measures are required which tackle the “problem of manifestly unfounded or abusive applications for refugee status”.410 It ascertained that “such applications are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees”.411

According to EXCOM, only asylum applications can be labelled “clearly abusive” or “manifestly unfounded” if they are “clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the [Refugee Convention]”.412 In addition to these two situations, UNHCR mentions that repeated asylum applications, which do not involve meaningful changes since the assessment of a first asylum application, can be subjected to accelerated procedures.413

In order to deal with such applications, national asylum procedures should include provisions which allow proceeding with them in an “expeditious manner”.414 UNHCR considers the idea of subjecting such applications to accelerated procedures as a useful measure for the management of a high caseload. It notes that accelerated procedures in that sense are procedures proceeding with the substance of a claim in an expedited manner; this distinguishes them from admissibility procedures.415

Considering the “grave consequences of an erroneous determination” certain procedural guarantees have to be met nonetheless.416 UNHCR points to certain procedural requirements specific to accelerated procedures. These include the possibility to have an asylum rejection reviewed by a body of appeal prior to a removal. Yet, such an appeal procedure can be “more simplified” than in cases which have not been rejected as clearly abusive or manifestly unfounded.417 This simplification implies that appeals against asylum rejections do not necessarily have to have suspensive effect.418 In this respect, UNHCR adds to its comment quoted above (in which it emphasised that suspensive effect of asylum appeals constitutes a “critical safeguard”) the following statement:

“Exceptions to this fundamental principle [asylum appeals should have suspensive effect] should only be permitted in precisely defined cases, where there is clearly abusive behaviour on the part of an applicant, or where the unfoundedness of a claim is manifest. Here, the automatic application of suspensive effect […]

410 UNHCR EXCOM Conclusion No. 28 (XXXIII) “Follow-up on Earlier Conclusions of the Sub-Committee of the Whole on International Protection on the Determination of Refugee Status, Inter Alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedures” (1982) para (d).
411 UNHCR EXCOM Conclusion No. 30 (XXXIV) “The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum” (1983) para (c).
414 UNHCR EXCOM Conclusion No. 30 (n 411) para (d).
416 UNHCR EXCOM Conclusion No. 30 (n 411) para (e).
417 UNHCR, “Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)” (n 415) 7-8 para 32; UNHCR EXCOM Conclusion No. 30 (n 411) para (e)(iii).
418 cf. UNHCR, “UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures” (n 404) 7 para 21 stating that suspensive effect must be provided for “except for very limited cases”.
could be lifted. Additional exceptions could apply with respect to preliminary examinations in the case of subsequent applications.”

Nevertheless, UNHCR emphasises that “even in these cases, there should be some form of review by a court or other independent body”. The lawfulness of the denial of suspensive effect should be the subject matter of this review. During this review “the applicant should always be permitted to stay”. The review can be “be simplified and fast”, yet it must take into account “both facts and law”.

6. UNHCR’s assessment of Article 46(6) and (8) PD

*Grounds in Article 46(6)(a)-(d) PD*

UNHCR calls for the deletion of, inter alia, Article 31(8)(j) PD which states:

> “the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.”

This ground concerns persons who allegedly constitute a public order risk to the receiving Member State. According to Articles 32 and 33(2) RC, applicants can be expelled and exempted from *non-refoulement* in such cases. The latter provision is transposed in Article 21(2) QD, the consequence of which is *refoulement*, and in Article 14(4) QD, the consequence of which is the denial of refugee status. By contrast, the exclusion grounds encompassed by Article 1F RC cannot be found in Article 31(8)(j) PD. Notably, exclusion from refugee status pursuant to Article 1F RC (transposed in Article 12(2) QD) “is not conditional on the person concerned representing a present danger to the host Member State”. Nevertheless, UNHCR argues against accelerated procedures in case of both public order grounds and exclusion grounds under Article 1F RC. In view of the grave consequences following the applicability of those grounds, asylum applications have to be extensively examined in that regard. In case a state alleges that grounds encompassed by Article 1F RC exist, “an assessment on a case-by-case basis of the specific facts” is, indeed, required. Likewise, an “ind-

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421 UNHCR, “UNHCR comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final” (n 412) 26. Additionally, UNHCR rejects the part of Article 31(8)(e) PD which includes “improbable representations” as a ground for accelerated procedures. This is not a ground which is encompassed by its clear delimitation of grounds through the two categories abuse and manifest unfoundedness.


425 B, D (n 423) para 105.


427 B, D (n 423) para 99; see also Cathryn Costello and Emily Hancox, “The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refu-
individual assessment of the specific facts […] has to be carried out” with regard to the denial of a residence permit under Article 24(1) QD on grounds of “compelling reasons of national security or public order”. This follows from a judgment of the CJEU where it also illustrated the close relation between the provision at stake, Article 24(1) QD, and Articles 14 and 21 QD (all provisions concern national security or public order risks). Thus, the reasoning of UNHCR can be followed: accelerated procedures should neither be applied to Article 1F RC cases nor to cases involving alleged national security or public order risks. Article 31(8)(j) PD has to be struck out.

Derogation from the right to remain guaranteed by Article 46(8) PD

UNHCR does not object to the derogation from the right to remain pending interim proceedings (Article 46(8) PD) affecting the two types of subsequent applications listed in Article 41 PD. As described in more detail under B.IV.2, this derogation applies, inter alia, to applicants who, generally speaking, lodge their “third asylum application”. In such cases, neither the appeal nor the request for interim relief does necessarily have to have suspensive effect. UNHCR does not criticise this provision. It simply repeats what is stated in the provision itself, namely that non-refoulement has to be respected.

Interim Review in Article 46(6) PD

Apart from arguing for the deletion of, inter alia, the above mentioned ground regarding “public security” issues, “UNHCR does not oppose the modifications to Article 46 (6) broadening the scope of exceptions to the general principle of automatic suspensive effect”. Yet, UNHCR adds that certain procedural safeguards have to be respected. In particular, it refers to the requirement to have an ex nunc examination of both facts and law (cf. Article 46(3) APD), and to the requirement of reasonable time limits to make use of the right to an effective remedy (cf. Article 46(4) APD).

7. Application to Article 46(6) and (8) PD

Following the above interpretation, an appeal must, in principle, have suspensive effect. The reasoning for this finding is comprehensive. It includes the declaratory nature of refugee status, the principle of effectiveness of non-refoulement (irreparable harm), and the capacity to properly conduct the assessment of refugee status when the applicant is present.

UNHCR considers accelerated procedures, including the lifting of suspensive effect of the appeal, appropriate measures to deal with a high case load and clearly abusive and manifestly unfounded asylum applications. Such procedural restrictions are only allowed in clearly delimited cases. Only two categories are conceivable: clearly abusive or manifestly unfounded

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gee” in Vincent Chetail and others (eds), Reforming the Common European Asylum System. The New European Refugee Law (Brill Nijhoff 2016) 416.
428 CJEU Case C-373/13 H.T. [2015] para 89, see also paras 84 and 86.
429 H.T. (n 428) paras 50, 69-75 All three provisions concern national security or public order risks. Nevertheless, Article 24 QD differs from Article 14(4) and Article 21(2) in that “[t]he consequences, for the refugee, of revoking his residence permit […] are […] less onerous, in so far as that measure cannot lead to the revocation of his refugee status [Article 14(4) QD] and, even less, to his refoulement [Article 21(2) QD]”.
431 UNHCR, “UNHCR comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final” (n 412) 34 UNHCR does not mention the provisions Article 46(3) and (4) PD explicitly. However, it echoes the content of these provisions.
asylum applications. Additionally, subsequent asylum applications can – under specific circumstances (see below) – be subjected to procedural restrictions. These scenarios for possible restrictions are exhaustive. Public order or national security risks do not constitute grounds for the application of accelerated procedures or the restricted right to remain. UNHCR convincingly reasoned that allegations concerning national security or public order risks (as well as exclusion grounds under Article 1F RC) have to be assessed extensively. Therefore, an accelerated procedure is not the appropriate measure to deal with such cases. Article 31(8)(j) PD shall be deleted.

In order to counterbalance the procedural restrictions involved in accelerated procedures and the lifting of suspensive effect, UNHCR insists on certain procedural safeguards. UNHCR took account of the risk of wrong administrative decisions in case of denial of suspensive effect. Arguably, the additional safeguards which Member States shall respect when implementing Article 46(6) and (8) PD aim to avoid this risk and the grave consequences of wrong refusals. This argument is in line with the interpretation of the Refugee Convention in good faith, bearing in mind the declaratory nature as well as the effectiveness and preservation of non-refoulement. The procedural safeguards which UNHCR insists on should therefore be implemented when applying Article 46(6) and (8) PD. These safeguards include:

- *ex nunc* examination of both facts and law within the interim proceedings pursuant to Article 46(6) PD (i.e. respect of Article 46(3) PD), even though it can be more simplified and faster than in regular procedures;
- reasonable time limits within the interim proceedings pursuant to Article 46(6) and (8) PD (i.e. respect of Article 46(4) APD), even though time limits can be more expeditious than in regular asylum procedures.

Subsequent asylum applications may only be subjected to accelerated procedures, if:

- the original claim has been examined on the merits, and
- new elements do not appear to reinforce the earlier claim.

These requirements regarding subsequent applications come very close to the idea of an *ex nunc* assessment. As this procedural safeguard of an *ex nunc* assessment can be traced back to an appropriate interpretation of the Refugee Convention (Article 33 RC interpreted in good faith: *refoulement* can occur if a court does not consider a change of circumstances, and wrongly rejects an appeal), it is convincing in terms of quality of reasoning. However, no such conclusions can be drawn with regard to UNHCR’s statement on the two types of subsequent asylum applications listed in Article 41 PD. UNHCR does not provide a reasoning for its view that the right to remain can be waived already during the interim proceedings in such cases of, for example, “third asylum applications”.
III. Interpretation in light of the CAT

This chapter focusses on the requirements the CAT sets in respect of appeal proceedings in asylum cases. Special emphasis will be laid on the right to remain during the time of the appeal proceedings. The structure of this chapter is similar to the previous chapter on the Refugee Convention. It starts with preliminary considerations on the CAT and its standing in EU law, before it turns to the mentioned essence of the chapter.

1. Standing of the CAT in EU asylum law

The CAT is a relevant source of interpretation, in particular in terms of its content as Article 3 CAT contains an explicit non-refoulement provision. It informs EU asylum law owing to three kinds of legal basis – Article 78(1) TFEU, general principles of law, and Article 53 CFR – which will be illustrated in the order mentioned.

Article 78(1) TFEU, which constitutes the legal basis of the CEAS, states:

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”. 432

Arguably, the CAT forms part of one of the “other relevant treaties” considering especially its explicit non-refoulement provision. 433 Additionally, the CAT serves as a source of inspiration to define the “general principles of law”, as the following quote of the CJEU shows. In this context, it should be noted that all Member States are parties to the CAT.

“Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect”. 435

Finally, Article 53 CFR (which has already been discussed with regard to the ECHR) 436 constitutes another basis for the CAT as a source of interpretation of the Charter. Beyond that, Article 53 CFR addresses the question whether the level of protection of the Charter may be lower than the protection the CAT affords. Article 53 CFR states:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions” (emphasis added).

At first glance, this provision suggests that the level of protection the Charter affords can never be interpreted lower than the standards of international agreements to which all Member States are party (such as the CAT). However, case law of the CJEU proved that a lower standard of the Charter may, under specific circumstances, take precedence over a higher in-

432 Article 78(1) TFEU (emphasis added).
433 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 56.
434 List of signatory states of the CAT:
436 chapter C.I.1.1.
ternational law standard or Member States’ constitutions (which are equally mentioned in Article 53 CFR). However, it cannot be excluded that certain views of the Committee against Torture will serve as a source of interpretation. This will particularly be the case if the quality of reasoning is convincing and other bodies ruling on a similar right (e.g. ECtHR on Article 3 ECHR) take a comparable view.

2. Interpretation of the CAT

The CAT is an international human rights treaty, and therefore has to be interpreted according to the rules set out in the Vienna Treaty Convention. The Committee against Torture is the body which is entrusted with the task to interpret the CAT through several monitoring mechanisms. According to Article 19 CAT, states have to submit reports on measures they have taken to give effect to their obligations under the Convention. They have to do so every four years at the request of the Committee. The Committee responds to these reports with Concluding Observations or Comments. These Comments may also be published in the Committee’s Annual Reports. The Committee issued also two General Comments on the implementation of Article 3 CAT. Whereas the reports under Article 19 CAT are obligatory, states have the option to decide whether they recognise the individual complaint mechanism in Article 22 CAT. If states declare their recognition of that mechanism, individuals who claim to be victim of a violation of provisions in the CAT can lodge a communication with the Committee. The Committee shall consider the communication and forward its decisions, called “views”, to the state and the individual concerned.

The Committee’s Concluding Observations, Comments, Annual Reports and two General Comments as well as its views are important sources to interpret the CAT, yet not legally binding. They are considered to constitute an “authoritative interpretation”.

3. Access to asylum procedures and right to appeal

The prohibition of non-refoulement enshrined in Article 3 CAT protects a person only from the risk of torture, but not from the risk of other inhuman or degrading treatment. The duty to assess claims under Article 3(1) CAT can be derived from Article 3(2) CAT, which states:

“For the purpose of determining whether there are such grounds [substantial grounds for believing that a person would be in danger of being subjected to torture], the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

437 CJEU Case C-249/96 Grant [1998] paras 44-47 The case is described below in chapter C.IV.1.
438 Melloni (n 13) paras 55-63 The case is described above in chapter C.II.1. at fn 208.
439 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 56; Battjes, European Asylum Law and International Law (n 22) 85; cf. Grant (n 437) paras 46-47 The CJEU took into account that the view of the HRC did not include “specific reasons” for the finding. Furthermore, it did not “reflect the interpretation so far generally accepted […] in various international instruments”.
440 Wouters (n 25) 433-434.
441 Articles 17-24 CAT; Wouters (n 25) 429.
442 Articles 19(4) and 24 CAT; Wouters (n 25) 430.
443 ComAT General Comment No. 1 A/53/44 (21 November 1997) annex IX; ComAT General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22 on the implementation of article 3 of the Convention in the context of article 22 (2017).
444 Wouters (n 25) 429.
445 Articles 22(1)-(7) CAT.
446 Wouters (n 25) 431-432.
447 Articles (n 25) 438; ComAT B.S. v Canada Com no 166/2000 (14 November 2001) para 7.4; Nowak and McArthur (n 38) 165 para 116 and views cited.
Furthermore, in its General Comment No. 1 the Committee made clear that states are obliged to assess the risk of torture under Article 3 CAT.\textsuperscript{448} This follows further from the General Comment No. 4 which replaced the former.\textsuperscript{449} Procedural safeguards which have to be met during this procedure can be derived from the many individual cases in which the Committee issued its views.\textsuperscript{450}

In contrast to the ECHR, the CAT does not contain a provision guaranteeing a domestic remedy in order to invoke a violation of the right to non-refoulement (i.e. no counterpart to Article 13 ECHR). Nevertheless, the Committee interprets Article 3 CAT as to “encompass a remedy for its breach”.\textsuperscript{451} The reasoning behind this finding is that “the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory”.\textsuperscript{452} A person must have “an opportunity for effective, independent and impartial review of the decision […] when there is a plausible allegation that Article 3 issues arise”.\textsuperscript{453} The prerequisite of the right to an effective remedy under Article 3 CAT, a “plausible allegation”, can be considered the counterpart to an “arguable claim” in respect of Article 13 ECHR.\textsuperscript{454}

The rule to exhaust domestic remedies in Article 22(5)(b) CAT reflects – comparable to Article 35 ECHR – the subsidiary nature of the individual complaint mechanism with the Committee. The CAT requires only effective remedies to be exhausted.\textsuperscript{455} Effective remedy requirements have, therefore, not only been assessed under Article 3 CAT but also under Article 22(5) CAT.\textsuperscript{456} Therefore, the following analysis will analyse both decisions on the merits under Article 3 CAT and admissibility decisions under Article 22(5) CAT.

4. Requirements of an effective remedy

The Committee has developed certain requirements which a remedy against an expulsion decision has to fulfil in order to be considered effective. First of all, the body of appeal needs to be an independent and impartial authority.\textsuperscript{457} Besides, there must be sufficient time between the adoption of the deportation order and the enforcement thereof. In Arana, the deportation order was enforced on the day of its notification. For that reason, the available non-suspensive remedy was not considered effective. Therefore, it did not have to be exhausted to pass the admissibility threshold.\textsuperscript{458}

\textsuperscript{448} ComAT General Comment No. 1 (n 443) para 6.
\textsuperscript{449} ComAT General Comment No. 4 (n 443) paras 13 and 27.
\textsuperscript{450} De Weck (n 19) 232 analysis of views on 243-450; Wouters (n 25) analysis of views on 513-515; e.g. ComAT Iya v Switzerland Com no 299/2006 (26 November 2007) paras 6.5-7 The fact that the Swiss authorities rejected the asylum application on procedural grounds without having examined the merits contributed to the finding of a violation of Article 3 CAT.
\textsuperscript{451} ComAT Agiza v Sweden Com no 233/2003 (20 May 2003) para 13.6; Wouters (n 25) 516 with further references.
\textsuperscript{452} ComAT Agiza v Sweden (n 451) para 13.6.
\textsuperscript{453} ComAT Agiza v Sweden (n 451) para 13.7 (emphasis added).
\textsuperscript{454} De Weck (n 19) 296.
\textsuperscript{455} De Weck (n 19) 114-115.
\textsuperscript{456} Reneman, “An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?” (n 18) 426 and views cited.
\textsuperscript{457} ComAT Agiza v Sweden (n 451) para 13.7; ComAT Kalonzo v Canada Com no 343/2008 (18 May 2012) para 8.3.
\textsuperscript{458} ComAT Arana v France Com no 63/1997 (9 November 1999) paras 2.6 and 6.1.
As indicated in this latter case, the lack of suspensive effect constitutes a characteristic of an appeal which vitiates its effectiveness.\footnote{ComAT Ahmad Dar v Norway Com no 249/2004 (11 May 2007) paras 6.4-6.5; see also ComAT General Comment No. 4 (n 443) para 13.} In Brada, the appeal with the higher court of appeal did not have suspensive effect and the applicant was removed while the appeal was still pending. In the Committee’s view, such an appeal becomes “pointless” when “the action which interim measures are intended to prevent has taken place”. The reason for this is that “irreparable harm cannot be averted if the domestic remedy subsequently yields a decision favourable to the complainant”.\footnote{ComAT Brada v France Com no 195/2002 (17 May 2005) paras 2.6-2.7, 7.7. The case concerned an asylum seeker whose asylum application was rejected, and an order to leave to Algeria was issued. He appealed against this order to leave. As this appeal did not have suspensive effect, he appealed to the interim relief judge. Where as the request for interim relief was successful, the appeal itself was turned down by the Administrative Court. The applicant subsequently complained against this judgment with the Administrative Court of Appeal. This appeal did not have suspensive effect, and a few months later the applicant was deported.} Following such reasoning, an appeal against a deportation order must have suspensive effect because of its purpose. Otherwise the availability of such an appeal would become “pointless”.\footnote{ComAT Brada v France (n 460) para 7.8.} Furthermore, even an appeal before a higher court of appeal must have suspensive effect.\footnote{ComAT Brada v France (n 460) para 7.8; see also ComAT Tebourski v France Com no 300/2006 (11 May 2007) para 7.3.}

Prior to the ECHR ruling on Gebremedhin, the Committee expressed its concerns about the waiting zone procedure in France. It indicated France “that a refusal decision (refusal of admission) that entails a removal order should be open to a suspensive appeal that takes effect the moment the appeal is filed”.\footnote{ComAT Concluding Observations France CAT/C/FRA/CO/3 (3 April 2006) para 7 (emphasis added).} This suggests that the Committee expects some kind of automatic suspensive effect which it made explicit in its Annual Report 2006. In this report, the Committee defined the requirement of remedy with suspensive effect as “remedies that do […] automatically stay the execution of an expulsion order”.\footnote{ComAT Annual Report A/61/44 (1 November 2006) 83 para 61 (emphasis added).}

In its Concluding Observations, the Committee recommended Belgium to “[g]ive suspensive effect not only to emergency remedies applied for but also to appeals filed by any foreigner against whom an expulsion order is issued […]”.\footnote{ComAT Concluding Observations Belgium CAT/C/CR/30/6 (23 June 2003) para 7(d).} Hence the application for stay of execution of the order to leave under the extremely urgent procedure does not seem to be a sufficient form of suspensive effect. Arguably, the appeal against the order to leave itself should have suspensive effect.

As regards the required intensity of judicial review, the Committee’s views are not unambiguous. Its views on the Canadian system reveal the inconsistency.\footnote{Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 271-272; De Weck (n 19) 290-291.}\footnote{see also ComAT S.A.C. v Monaco Com no 346/2008 (13 November 2012) para 7.2.} Singh stands in contrast to other judgments where the Committee accepted the Canadian system of review. It considered the remedies available “[w]ere not mere formalities, and the Federal Court may, in appropri-
ate cases, look at the substance of a case”. By contrast, in *Singh* the Committee concluded that the remedies did not constitute effective remedies for the purpose of Article 22(5) CAT. The reason for this conclusion was that judicial review did not encompass the “merits” of the claim under Article 3 CAT, but solely the “reasonableness” of the expulsion decision.

In some cases, the Committee deemed domestic appeals not effective when legal aid was not granted. As a “precondition of effectiveness” the appeal must be available and accessible to the person concerned. In *Z.T.*, three circumstances which occurred at the same time led to the view that the denial of legal aid rendered the appeal unavailable. For one thing, the applicant’s legal skills as well as language skills were insufficient to expect him to represent himself. For another thing, his financial means were not enough to retain a private council. Another case concerned court fees. In *C.M.*, a person was required to pay the full amount of court fees at once in order to pass the admissibility threshold. The Committee took into account that the person was not allowed to work and did not receive social assistance. Considering this difficult financial situation, judicial review could not reasonably be denied on the basis of financial grounds.

In *S.H.*, the Committee took note of the “limited hours of free legal assistance available for asylum-seekers for administrative proceedings”, and advised Norway “to undertake measures to ensure that asylum-seekers are duly informed about all domestic remedies available to them, in particular the possibility of judicial review before the courts and of being granted legal aid for such recourse”.

5. Extent of allowed procedural limitations

In *Agiza*, a case in which national security was at stake, the Committee recalled the absolute character of Article 3 CAT and that “such considerations emphasise the importance of appropriate review mechanisms [even in the context of national security concerns]”. It further contended:

“While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3’s requirements of effective, independent and impartial review”.

Such adjustments may, under certain circumstances, include the use of anonymous sources. Other reasons for the modification of asylum procedures do not seem to have impressed the Committee. It expressed, for example, its concerns about the safe country of origin concept which does not guarantee “absolute protection against the risk of being returned”. France was therefore called to assess an asylum application to which such a concept applies “with due consideration for the applicant’s personal situation and in full conformity with articles 3 and 22 of the Convention”. Furthermore, the Committee was concerned about the “summary

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468 ComAT *Aung v Canada* Com no 273/2005 (15 May 2006) paras 6.3-6.4; see also De Weck (n 19) 330 and views cited, including the more recent case ComAT *Z.H. v Canada* Com no 604/2014 (20 November 2015) paras 2.5 and 7.3; Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (n 18) 271 and views cited.


471 ComAT *Z.T. (No. 2) v Norway* (n 452) paras 8.1-8.2.


474 ComAT *Agiza v Sweden* (n 451) para 13.8.

475 Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (n 18) 343 and views cited.

476 ComAT Concluding Observations France (n 464) para 9; see also ComAT Concluding Observations The Netherlands CAT/C/NET/CO/4 (3 August 2007) para 11(a).
nature” of the priority procedure in the waiting zone of the airports in France. The accelerated procedure in the Netherlands was also a matter of concern for the Committee with regard to several aspects. Besides the short time limits during the asylum procedure, the Committee was concerned about the “marginal scrutiny” at the appeal stage as well as the restricted possibility to submit new information. In respect of the latter aspect, the Committee recommended to “revise the accelerated procedure” so that “appeal procedures entail an adequate review of rejected applications and permit asylum seekers to present facts and documentation which could not be made available, with reasonable diligence, at the time of the first submission”.

6. Application to Article 46(6) and (8) PD

The analysis of the views, General Comments and Concluding Observations of the Committee revealed several procedural aspects which need to be taken into account for a proper assessment of a claim under Article 3 CAT. The application of the findings to Article 46(6) and (8) PD yields the following interpretation.

The Committee convincingly argued that an appeal against an expulsion decision must have automatic suspensive effect. Because of the intrinsic link between the appeal against an expulsion decision and the purpose to prevent the expulsion, an expulsion decision cannot be enforced before the appeal is concluded. Otherwise the appeal would become pointless and irreparable harm may occur (Brada). The request for interim relief regulated in Article 46(6) and (8) PD suspends the enforcement of a return decision for the time a court decides on the right to remain. This should, in principle, be sufficient to comply with Article 3 CAT. The views of the Committee do not reveal that an appeal against an asylum rejection has to be endowed with suspensive effect. However, the Committee goes further than the PD in that it requires suspensive effect at a higher court of appeal (Brada, S.A.C.).

Article 46(6) PD does not make an explicit reference to the requirement of a full and ex nunc examination laid down in Article 46(3) PD. If Singh is the new line of case law of the Committee, the court reviewing a request for interim relief would have to review the merits of an asylum application and not just the reasonableness of the administrative decision. Furthermore, a marginal review at the appeal stage or the rejection of information which could not be made available at the time of first submission is not allowed (Observations Netherlands). Moreover, national security concerns do not justify a restricted scope of judicial review (Agiza).

Finally, Member States should make sure that judicial review is available and accessible when implementing Article 46(6) and (8) PD. Asylum seekers will usually not have the legal skills and language knowledge to represent themselves. When they additionally do not have sufficient income to retain a private council, they shall be granted legal aid (Z.T.). A prohibition of work or a limited amount of social assistance will usually demand Member States to provide for legal aid (C.M.). Furthermore, asylum seekers should be duly informed about their possibilities to lodge an appeal and receive legal aid (S.H.).

477 ComAT Concluding Observations France (n 464) para 6.
478 ComAT Concluding Observations The Netherlands (n 476) para 7.
479 cf. Wittmann (n 10) 49 ascertains that Article 46(6) PD can logically only be directed against the enforceability of a return decision.
IV. Interpretation in light of the ICCPR

This chapter analyses which procedural guarantees the ICCPR requires in respect of appeals in asylum cases. The question of suspensive effect of such an appeal will be of particular interest. The structure of this chapter is the same as the structure of the previous chapters on the Refugee Convention and the CAT. Before inquiring into the mentioned essence of the chapter, preliminary considerations on the ICCPR and its standing in EU law will be made.

1. Standing of the ICCPR in EU asylum law

The ICCPR can be considered as “other relevant treaty” within the meaning of Article 78(1) TFEU in the same way as the CAT. The principle of non-refoulement is considered to be inherent in Articles 6 and 7 ICCPR. Additionally, the CJEU pointed out that the “[ICCPR] is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law”. It follows, however, from Grant that the CJEU is not always willing to use views of the HRC to interpret EU law. This case concerned EU anti-discrimination law. The person concerned contended that the prohibition of discrimination on the basis of “sex” codified in Article 119 of the former EC Treaty encompassed prohibition of discrimination on the basis of “sexual orientation”. The person based this argument on a view of the HRC which extended the scope of “sex” in Article 26 ICCPR (in conjunction with Article 2(1) ICCPR) to “sexual orientation”. The CJEU did not follow the HRC for several reasons. First, international agreements cannot widen the competences of the EU. Second, views of the HRC are not binding and the HRC came to the submitted view “without giving specific reasons”. Third, this view of the HRC does not “reflect the interpretation so far generally accepted of the concept of discrimination based on sex which appears in various international instruments concerning the protection of fundamental rights”.

It can be deduced that a view of the HRC alone does not necessarily convince the CJEU to use it as a source of interpretation. Yet, if the quality of reasoning is convincing, or a view is in line with case law of bodies supervising other human rights treaties, a view of the HRC may benefit from the CJEU’s attention. In several cases, views of the HRC have influenced opinions of the AGs.

2. Interpretation of the ICCPR

The ICCPR is an international human rights treaty and has to be interpreted according to the rules of treaty interpretation laid down in the Vienna Treaty Convention. Furthermore, as it is a human rights treaty, human rights should be interpreted widely and restrictions should be interpreted narrowly. Besides, as an evolving instrument it should be interpreted in light of the present day conditions.

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480 see chapter C.III.1.
481 see chapter C.IV.3.
482 Parliament v Council [2006] (n 196) para 37 with further references.
483 Grant (n 437) paras 43-50.
484 Battjes, European Asylum Law and International Law (n 22) 20-22, 94-95.
485 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 68; see also CJEU Case C-357/09 PPU Kadzoev [2009] Opinion of AG Mazak, para 85 fn 33.
486 Wouters (n 25) 361.
487 Wouters (n 25) 367.
488 Wouters (n 25) 368.
The HRC has the important role of monitoring the implementation of the ICCPR in the states which are parties to the Convention. The Committee was created by the states themselves pursuant to Article 28 ICCPR. Several monitoring mechanisms are entrusted to the HRC. First, states are obliged to submit reports on measures they have adopted which give effect to the rights of the ICCPR. The HRC replies to these reports with Concluding Observations. Furthermore, the HRC can issue General Comments expressing its interpretation of the ICCPR. Second, if a state has ratified the First Optional Protocol, it recognises the individual complaint mechanism. According to this mechanism, the HRC receives and considers communications from individuals who claim to be victim of a violation of a right enshrined in the ICCPR. Third, the ICCPR provides for an inter-state complaint mechanism. As states did not make use of that so far, it will not be relevant for the following analysis.

3. Access to asylum procedures and right to appeal

The ICCPR does not contain a principle of non-refoulement in explicit terms. However, the HRC has developed the prohibition of non-refoulement in respect of the risks proscribed by Articles 6 and 7 ICCPR. Article 6 prohibits arbitrary deprivation of life; Article 7 ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

The ICCPR does not contain a regulatory framework regarding the conduct of asylum procedures. However, the HRC made clear that “in order to afford effective protection under articles 6 and 7 of the Covenant, applications for refugee status should always be assessed on an individual basis”. Documents of the HRC pronounce minimum requirements which have to be fulfilled during asylum procedures.

In contrast to the CAT, the ICCPR contains a provision which codifies the right to an effective remedy. Article 2(3) ICCPR obliges states to put in place “accessible, effective and enforceable remedies to vindicate” substantive rights enshrined in the ICCPR. Similar to Article 13 ECHR, the right to an effective remedy guaranteed by Article 2(3) ICCPR “can only be invoked by individuals in conjunction with substantive rights of the Covenant”. Hence, Article 2(3) ICCPR has accessory character. The HRC does not agree with a literal understanding of Article 2(3) ICCPR according to which a “violation” of a substantive right would be prerequisite. Such an understanding of Article 2(3) ICCPR would render the provision “void if [the right to such a remedy] were not available where a violation had not yet been

489 Wouters (n 25) 364.
490 Article 40(1) ICCPR.
491 Article 40(4) ICCPR.
493 Wouters (n 25) 364.
494 Article 1 of the First Optional Protocol.
495 Article 41 ICCPR.
496 Wouters (n 25) 365.
497 HRC General Comment No. 31 CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para 12; see also HRC General Comment No. 20 “Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)” (10 March 1992) para 9; HRC X. v Sweden Com no 1833/2008 (17 January 2012) para 9.4; Joseph and Castan (n 45) 262-265 paras 9.98-9.107 and views cited.
499 Wouters (n 25) 411-412; Moreno-Lax (n 29) 405 and views cited.
501 HRC Kazantzis v Cyprus (n 500) para 6.6.
established”. The threshold required to invoke Article 2(3) ICCPR is an “arguable risk” under a substantive provision, such as Articles 6 or 7 ICCPR. This lower threshold has occasionally led the HRC to find a violation of Article 2(3) ICCPR in conjunction with a substantive right, but at the same time no violation of the substantive right itself. The question what exactly amounts to an “arguable risk” is not very clear. In Katantzi, at least, the HRC gave a general remark. The claim under a substantive right must be “sufficiently well-founded to be arguable”. In the case Katantzi, the person concerned “has failed to substantiate […] his claims”, and therefore the appeal was inadmissible. Thus, some sort of substantiation is arguably required to trigger the protection of Article 2(3) ICCPR.

In order to give priority to domestic review of alleged violations of ICCPR rights, a rule of exhaustion of remedies is included in the individual complaint mechanism. This rule, which becomes relevant at the admissibility stage, is laid down in Article 5(2)(b) of the First Optional Protocol. “[D]omestic remedies” within the meaning of that provision do not only mean “available, but also effective” remedies. Accordingly, the effectiveness of domestic remedies has also been examined under Article 5(2)(b) of the First Optional Protocol at the admissibility stage. Therefore, views on both Article 2(3) in conjunction with 7 ICCPR (merits) and on Article 5(2)(b) of the First Optional Protocol (admissibility) will be analysed below.

4. The right to an effective remedy in asylum cases

First of all, an asylum seeker has to be able to appeal against “any first-instance deportation order before the deportation is carried out”. If only an asylum application has been rejected without being accompanied or followed by a deportation order, states do not have to provide for appeals against the asylum rejection. The reason for this is that “[i]t is not an inevitable consequence of a failed application for asylum that a deportation will take place”. An expulsion decision must be subject to an “independent and impartial” review. In general, the HRC seems to accept both administrative and judicial authorities, despite affording judicial review a certain primacy. This tendency is especially relevant in refoulement cases, as we will see. The HRC stated that “if the alleged offence is particularly serious, as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary measures cannot be considered adequate and effective”. The HRC came to this view after considering that “the effectiveness of a remedy […] depend[s] on the nature of

502 HRC Katantzis v Cyprus (n 500) para 6.6.
505 Wouters (n 25) 414.
509 ibid; see also HRC Weiss v Austria Com no 1086/2002 (15 May 2003) para 8.2.
511 HRC Khadjie v The Netherlands Com no 1438/2005 (15 November 2006) para 6.3.
512 HRC General Comment No. 31 (n 497) para 15; HRC Alzery v Sweden (n 503) para 11.8.
513 HRC General Comment No. 31 (n 497) para 12.
514 HRC R.T. v France Com no 262/1987 (30 March 1989) para 7.4; Wouters (n 25) 413.
515 HRC Vicente and others v Colombia (n 508) para 5.2.
the alleged violation”.\(^{516}\) As the nature of Article 6 ICCPR (right to life) is comparable to the nature of Article 7 ICCPR (both concern the “risk on an irreparable harm”),\(^{517}\) the same reasoning must apply to all _refoulement_ cases under the ICCPR. Consequently, judicial instead of administrative review must be guaranteed when an expulsion decision raises an arguable risk under Articles 6 or 7 ICCPR.

Most important for the purpose of this thesis is to note that an appeal against an expulsion decision must have suspensive effect.\(^{518}\) The case _Alzery_ concerned a terrorist suspect who was expelled to Egypt without being given the opportunity to appeal against the expulsion decision.\(^{519}\) The HRC found a violation of Article 7 in conjunction with Article 2 ICCPR by holding:

> “By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning”.\(^{520}\)

In _Weiss_, a case in which the applicant had already been extradited when the non-suspensive remedy was still pending before the court,\(^{521}\) the HRC elaborated:

> “In such cases, a remedy which is said to subsist after the event which the interim measures sought to prevent occurred is by definition ineffective, as the irreparable harm cannot be reversed by a subsequent finding in the author’s favour by the domestic remedies considering the case”.\(^{522}\)

### 5. Extent of allowed procedural limitations

Procedural restrictions within the scope of asylum appeal procedures do not seem to be justified. As regards the concept of safe countries of origin, for example, the HRC was not only concerned about the risk of denial of an individual assessment, but also about the denial of suspensive effect. Such asylum applications should not have such restrictive procedural effects.\(^{523}\) Likewise, the HRC emphasised that appeals should have suspensive effect in cases of other manifestly unfounded asylum applications which are subjected to accelerated procedures.\(^{524}\) Moreover, the HRC was concerned about the short time limits which apply to the accelerated asylum procedure in Latvia. In particular, the short time limit for lodging an appeal was worrying. As this risked that the availability of an effective remedy would be denied, the HRC recommended Latvia to extend the time limits, “in particular for the submission of an appeal”.\(^{525}\) Nevertheless, the HRC accepts some procedural restrictions as long as they are “reasonable”. In _Bhullar_, the applicant lodged an appeal only two years after the expiry of the time limit. As he did not bring any arguments forward saying that the time limit was “either unfair or unreasonable”, his complaint was declared inadmissible.\(^{526}\)

\(^{516}\) HRC _Vicente and others v Colombia_ (n 508) para 5.2.

\(^{517}\) cf. HRC General Comment No. 31 (n 497) para 12; cf. Joseph and Castan (n 45) 121 para 6.04.

\(^{518}\) HRC Concluding Observations France CCPR/C/FRA/CO/4 (31 July 2008) para 20; HRC Concluding Observations Germany CCPR/C/DEU/CO/6 (12 November 2012) para 11; for further references Reneman, _EU Asylum Procedures and the Right to an Effective Remedy_ (n 18) 135.

\(^{519}\) HRC _Alzery v Sweden_ (n 503) paras 3.3, 3.9, 11.8; Joseph and Castan (n 45) 264-265 para 9.104.

\(^{520}\) HRC _Alzery v Sweden_ (n 503) para 11.8.

\(^{521}\) HRC _Weiss v Austria_ (n 509) para 2.13.

\(^{522}\) HRC _Weiss v Austria_ (n 509) para 8.2.

\(^{523}\) HRC Concluding Observations Estonia (n 498) para 13.

\(^{524}\) HRC Concluding Observations Finland CCPR/CO/82/FIN (2 December 2004) para 12.


\(^{526}\) HRC _Bhullar v Canada_ Com no 982/2001 (13 November 2006) paras 2.7 and 7.3.
6. Application to Article 46(6) and (8) PD

In general, the HRC does not seem to endorse what is laid down in Article 46(6) and (8) PD. It explicitly objected to the practice of denying suspensive effect to manifestly unfounded asylum applications. This and similar statements can be found in Concluding Observations. However, these statements are unfortunately not accompanied by any reasoning. Accordingly, it cannot be attached much significance to those statements.

On the contrary, the views discussed above are more elaborately reasoned. The HRC explicitly distinguishes between appeals against asylum rejections and appeals against deportation orders. In this respect, it ascertains that a deportation is not necessarily the consequence of an asylum rejection. For this reason, states do not have to provide for appeals against asylum rejections, – provided that an asylum rejection is not accompanied or followed by a deportation order. At any rate, an asylum applicant must be provided with an appeal against a deportation order (Khadje). Arguably only this appeal must fulfill all the requirements of an effective remedy. The requirements which could be extracted from the analysis above are:

- appeal before a judicial authority (instead of an administrative authority);
- suspensive effect of the appeal (Alzery, Weiss);
- national security risks do not justify a derogation from suspensive effect (Alzery);
- fair and reasonable time limit for lodging the appeal (cf. Bullhar).

Following this analysis, the possibility to request interim relief foreseen in Article 46(6) and (8) PD is, in principle, in line with the ICCPR. This is due to the fact that the request suspends the enforcement of a return decision (at least during the interim proceedings). When implementing Article 46(6) and (8) PD, Member States will have to make sure that the request for interim relief is reviewed by a judicial authority. They also have to provide for fair and reasonable time limits to enable the persons concerned to lodge a request for interim relief. Hence, applicants should be able to rely on Article 46(4) PD within the framework of interim proceedings pursuant to Article 46(6) and (8) PD.

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527 cf. Wittmann (n 10) 49 ascertains that Article 46(6) PD can logically only be directed against the enforceability of a return decision.
V. Interpretation in light of EU law (in the stricter sense)

Does suspensive effect have to be conferred upon an appeal against an asylum rejection and/or a return decision? And what kind of other procedural safeguards do Articles 47 and 19(1) CFR require in respect of appeals in asylum cases? In order to answer these questions, this chapter will focus on EU law in the stricter sense as interpreted by the CJEU so far.

After general remarks on the EU right to an effective remedy and the principle of effectiveness (1.-2.), considerations of the CJEU on the question of interim relief in general will be illustrated by the landmark case Factortame. The case illustrates the idea behind interim measures, and that the principle of effectiveness can serve as a legal basis for interim protection. However, as Article 46(5) PD and Article 46(6),(8) PD already constitute legal basis for interim protection in asylum cases, the findings of Factortame will not be further deployed for the analysis. Nevertheless, the reasoning which underlies the judgment generally applies to asylum cases as well (3.). Subsequently, the chapter will explore the essence of the questions raised above. The main focus lies on the requirements of an effective remedy which follow from EU law in the stricter sense as interpreted by the CJEU (4.). The findings will not be summarised separately in this chapter. Instead the next chapter (VI.) contemplates the findings of this chapter together with findings of the analysis of the ECHR, the Refugee Convention, the CAT, and the ICCPR.

1. EU right to an effective remedy - general aspects

The right to an effective remedy has been developed by CJEU case law in order to guarantee effective protection of rights which EU law confers upon an individual. If the benefit of those rights has been denied to him by the authorities, the right to an effective remedy is an essential safeguard to protect those rights. In its well-established case law, the CJEU identified the right to an effective remedy as a general principle of EU law. This general principle is now codified in Article 47 CFR.

In contrast to Article 13 ECHR, Article 47 CFR does not presuppose an “arguable claim” in order to take effect. Once a subject matter falls within the scope of Union law, an individual can rely on the right to an effective remedy guaranteed by Article 47 CFR. Hence, the question whether a manifestly unfounded asylum application involves an arguable claim is not relevant in order to trigger the right to an effective remedy.

Article 52(3) CFR makes clear that the level of protection the Charter affords may be higher than the level of protection of the ECHR. One example where the level of protection of Article 47 CFR is higher than the standard of 13 ECHR can be found in the Charter Explanations. In contrast to Article 13 ECHR, Article 47 CFR guarantees the right to an effective remedy...

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529 ibid; CJEU Case C-97/91 Borelli [1992] para 14; Case C-50/00 P Pequeños Agricultores [2002] para 39; Case C-432/05 Unibet [2007] para 37.
530 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 86; Moreno-Lax (n 29) 438-439.
531 Article 51(1) CFR; see also chapter C.
532 Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 86.
before a court.\(^5\)\(^3\) This has been confirmed by the CJEU with regard to both appeals against return decisions and appeals against asylum rejections, as we will see below.\(^5\)\(^4\)

2. Principles of effectiveness and equivalence

Union law leaves Member States much discretion in laying down procedural rules regarding the enforcement of Union law rights. This is also known as the principle of procedural autonomy.\(^5\)\(^3\) The CJEU pays deference to this principle, and repeatedly held:

“in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law”.\(^5\)\(^6\)

This procedural autonomy is subject to two limitations,\(^5\)\(^7\) as can be seen in the continuation of the Court’s statement:

“[…] those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness)”.\(^5\)\(^8\)

The principle of equivalence contains a non-discrimination rule. As far as comparable situations are concerned, procedural rules governing rights guaranteed by EU law must not be less favourable than procedural rules governing rights guaranteed under domestic law.\(^5\)\(^9\) When assessing a national procedural rule in light of the principle of effectiveness, the CJEU takes, “where appropriate”, the following aspects into account:

“the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances and that, in the light of that analysis, the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure”.\(^5\)\(^0\)

National procedural rules in the context of asylum procedures have been assessed in light of these principles by the CJEU.\(^5\)\(^4\) Persons applying for international protection should be “actually in a position to avail themselves of the rights conferred on them by [the QD]”. This includes the right to apply for international protection, and should the conditions be fulfilled, the right to be granted international protection. The CJEU considers the granting of these rights to be the asylum seekers’ “most basic rights” which need to be safeguarded by procedural rules.\(^5\)\(^2\)

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\(^5\)\(^3\)Explanations relating to the Charter (n 195) Article 47: For criteria which a body has to fulfil in order to be considered as a court under Union law see: CJEU Case C-175/11 H.I.D. [2013] para 83; Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 90; Moreno-Lax (n 29) 439 and further case law cited.

\(^5\)\(^4\)Chapters C.V.4.1.c. and C.V.4.1.d.

\(^5\)\(^5\)Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 73-76; X and Y (n 147) para 34.

\(^5\)\(^6\)CJEU Case C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV [2011] para 43; see also Case C-33/76 Rewe [1976] para 5; Case C-560/14 M [2017] para 30 (asylum case).

\(^5\)\(^7\)Moreno-Lax (n 29) 434-435; Sinaniotis (n 50) 53.

\(^5\)\(^8\)Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV (n 536) para 43; see also Case C-429/15 Danqua [2016] para 29 (asylum case).

\(^5\)\(^9\)Moreno-Lax (n 29) 430-431.

\(^5\)\(^0\)Reneman, EU Asylum Procedures and the Right to an Effective Remedy (n 18) 88 citing inter alia CJEU Case C-276/01 Steffensen [2003] para 66; see also Danqua (n 538) para 42 (asylum case).

\(^5\)\(^1\)CJEU Case C-604/12 H.N. [2014] paras 56-57; X and Y (n 147) para 43; Danqua (n 538) paras 38-49.

\(^5\)\(^2\)Danqua (n 538) paras 39-40, 45.
3. Factortame – principle of effectiveness and interim relief

Factortame has been celebrated as “revolutionary” in that it guarantees interim protection on the basis of the principle of effectiveness. It should however be noted at the outset that it does not have direct relevance for the interpretation of Article 46(6) and (8) PD. The findings of Factortame would only be relevant if the PD did not regulate the question of interim relief during asylum appeal proceedings, and if national law prevented a national court from granting interim relief. In such a case, that national procedural rule would have to be set aside on the basis of the principle of effectiveness. The reasoning in Factortame is remarkable nonetheless. Notably, the same reasoning could be applied to asylum cases if interim relief was not already guaranteed by Article 46(5), (6) and (8) PD.

The case Factortame concerned British law which required fishing vessels to fulfil several conditions in order to be registered under the British flag. The conditions appeared to be neutral but, in fact, they discriminated against fishermen from other Member States. A group of Spanish fishermen challenged the compliance of this act with Community law, which prescribes equal access to fishing zones in all Member States. Furthermore, they applied for interim relief during the appeal procedure. They alleged that they would suffer irreparable loss of financial means if interim relief was not granted. The House of Lords considered this claim to be well-founded. However, it faced the problem that courts had “no power to grant interim relief” in such a case under national law. It referred the preliminary question to the CJEU asking whether the power to grant interim relief exists under Union law. If this was the case, the House of Lords asked for the criteria for granting interim relief.

The CJEU reformulated the preliminary questions to one question: does “a national court which […] considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, [have to] disapply that rule”? The CJEU has been criticised for this move because it changed the issue at stake. Whereas English courts did not have jurisdiction to grant interim relief, the CJEU assumed the existence of national law denying that jurisdiction. In this way, the CJEU cut down the matter to a question of supremacy (i.e. set aside a conflicting national rule). This enabled the CJEU to ignore the second preliminary question asking for the criteria to decide on a request for interim relief. Nevertheless, Factortame deserves attention as it acknowledges the right to interim relief under Union law.

The Court’s reasoning to answer its preliminary question is very concise. The principle of supremacy in Simmenthal serves as a starting point. According to the relevant parts of this judgment, national courts have to set aside any national law “which might impair the effectiveness of Community law”. National rules must not “prevent, even temporarily, Community

543 Sinaniotis (n 50) 61 and 65.
545 Factortame (n 544) para 10.
547 Factortame (n 544) paras 13-15.
548 Factortame (n 544) para 17.
549 Papadias (n 544) 171; see also Sinaniotis (n 50) 60-64.
550 Sinaniotis (n 50) 62.
rules from having full force and effect".\textsuperscript{551} Subsequently, it moved on to the issue of interim relief and stated:

“\textit{It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule}".\textsuperscript{552}

This crucial paragraph can be traced back to AG Tesauro’s elaborate considerations on the right to interim relief. He stressed the problem involved in the lack of contemporaneity between the moment in which a right exists and the moment in which a right is acknowledged and becomes effective. Judicial review, especially in a structured and complex system, postpones that latter moment. That is, the right which already existed at the beginning of the application for judicial review becomes retroactively operational (“effect is carried back to the point in time when the right was invoked by initiating the procedure for judicial review”). However, this retroactive effect cannot always be achieved by a remedy. “Sometimes the right’s existence is established too late for the right claimed to be fully and usefully exercised […]. The result is that in such a case the utility as well as the effectiveness of judicial protection may be lost”.\textsuperscript{553} Hence, if a remedy is not capable of rendering a right retroactively effective, interim relief is required. Otherwise a judgment would be deprived of its objective and would become pointless.

“Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection”.\textsuperscript{554}

\textit{Application to asylum cases}

The reasoning which underlies the \textit{Factortame} finding applies to asylum cases as well. The right to protection from \textit{refoulement} cannot retroactively be made effective by a judgment, if a person is \textit{refouled} prior to that judgment. Interim relief is therefore required. Only this safeguard makes it possible to counteract the irremediable deprivation of the right to \textit{non-refoulement} which would otherwise occur during the elapse of time between its existence and its recognition. The effectiveness of the right to \textit{non-refoulement} and the effectiveness of judicial protection of that right serve as legal basis for the duty to grant interim relief in asylum cases. Hence, interim protection would have to be granted even in the absence of Article 46(5), (6) and (8) PD.

\section*{4. The EU right to an effective remedy in asylum cases}

This chapter will discuss the requirements a remedy has to fulfil in asylum cases under EU law. It will start by exploring the crucial question of interim protection during asylum appeal proceedings (4.1.). Thereafter, the chapter will deal with the requirements regarding scope of judicial review, the right to be heard (4.2.), and time limits (4.3.). Following these extracted safeguards, it will be examined if, and to what extent, they can be limited under certain circumstances (4.4.). Finally, it will be ascertained in how far asylum applications subjected to accelerated procedures can be treated less favourable than other asylum applications (4.5.).

\textsuperscript{551} \textit{Factortame} (n 544) para 20.\textsuperscript{552} \textit{Factortame} (n 544) para 21 (emphasis added) see also para 23.\textsuperscript{553} Opinion of AG Tesauro \textit{Factortame} (n 546) paras 16-18 (emphasis added).\textsuperscript{554} Opinion of AG Tesauro \textit{Factortame} (n 546) para 19.
All these findings will be applied to Article 46(6) and (8) PD in the next chapter (VI.) by including the findings following from the analysis of international law.

4.1. Interim protection in asylum cases

Does the appeal against an asylum rejection have to be endowed with suspensive effect? Is it alternatively sufficient if only the appeal against a return decision suspends the enforcement thereof? And if so, what if a return decision is adopted before the closing of asylum appeal proceedings? Can a return decision be enforced despite a pending asylum appeal? What role do the rights to remain guaranteed by Article 46(5) PD and Article 46(6) and (8) PD play in this respect? Does an appeal at second judicial instance have to be endowed with suspensive effect, if suspensive effect has already been guaranteed at first instance? These questions were at issue in the cases Abdida, Gnandi, C, J and S, X, X and Y which will be discussed and analysed in the order mentioned.

a. Abdida

Mr. Abdida applied for leave to reside in Belgium on medical grounds. The Belgian authorities rejected his application arguing that medical care for persons suffering from AIDS is available in his country of origin. Subsequently, Mr. Abdida received an order to leave Belgium which he could appeal against. However, the appeal did not suspend the enforcement of this removal order.\(^{555}\)

Does a remedy with suspensive effect against an order to leave have to be made available for a person who faces a real risk of inhuman or degrading treatment due to the lack of appropriate medical treatment\(^{556}\). This was one of the preliminary questions the CJEU was confronted with. As the question concerned the interpretation of the QD, the PD and the RD, the Court first had to deal with the applicability of these Directives respectively. It ascertained that a person, who suffers from illness requiring medical treatment which is not available in his country of origin, cannot rely on subsidiary protection within the meaning of the QD and PD.\(^{557}\) According to AG Bot, such an application for international protection does not fulfil the requirement, according to which a state must, directly or indirectly, be responsible for the risk.\(^{558}\) Furthermore, the ECHR case D., following which the removal itself constitutes a breach of Article 3 ECHR attributed to the receiving state,\(^{559}\) is excluded from the subsidiary protection regime under the QD and PD. AG Bot based this finding on the preparatory works. In this context, he emphasised the “own specific protection mechanism [of the subsidiary protection regime] which is distinct from the obligations incumbent on the contracting States under Article 3 of the ECHR”.\(^{560}\) The CJEU seems to follow the opinion of AG Bot. It concluded that such an application does not constitute an application for subsidiary protection.\(^ {561}\)

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\(^{556}\) Abdida (n 555) para 31.

\(^{557}\) Abdida (n 555) paras 31-35.

\(^{558}\) Opinion of AG Bot Abdida (n 555) paras 63-81.

\(^{559}\) D. v The United Kingdom App no 30240/96 (ECtHR, 2 May 1997) paras 46-54.

\(^{560}\) Opinion of AG Bot Abdida (n 555) paras 82-83.

\(^{561}\) Abdida (n 555) paras 31-35. Furthermore, the CJEU could at the time of the judgment Abdida already rely on Case C-542/13 M’ Bodj [2014] para 36: “the risk of deterioration in the health of a third country national suffering from a serious illness as a result of the absence of appropriate treatment in his country of origin is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection”. It was also AG Bot who gave his opinion in that case.
Consequently, neither the QD and nor the PD had to be interpreted in *Abdida* in order to answer the preliminary question. Only the RD was at issue.

The order to leave, which Mr. Abdida received, constituted a return decision within the meaning of the RD, and Article 13 RD affords the right to appeal against such return decisions. In view of this provision, it is apparent that the body of appeal must have the power to temporarily suspend the enforcement of a return decision. However, it does not follow from its wording that the remedy shall “necessarily have suspensive effect”. Nevertheless, when interpreting Article 13 RD in light of Articles 19(2) and 47 CFR, the Court came to the conclusion that such a remedy must, *ipso jure*, have suspensive effect in respect of a return decision. The Court came to this conclusion by having regard to ECHR case law. In the first place, it drew on Article 3 ECHR case law, namely *N.* In this context, it held:

“In the very exceptional cases in which the removal of a third country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-refoulement, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115, taken in conjunction with Article 19(2) of the Charter, proceed with such removal”.

Hence, the enforcement of a return decision in such a situation constitutes a violation of the principle of non-refoulement. In the second place, the Court found support in Article 3 combined with Article 13 ECHR case law, namely *Gebremedhin* and *Hirsi Jamaa.* In view of the “seriousness and irreparable nature of the harm that may be caused by the removal”, the appeal against a return decision, in order to be effective, must have suspensive effect. More precisely, “a remedy enabling suspension of enforcement of the measure authorising removal should, *ipso jure*, be available to the persons concerned”. In sum, an appeal against a return decision has to suspend its enforcement in such cases.

b. **Tall**

In *Tall*, the CJEU was invited to rule on the impact of *Abdida* on appeals regulated in the PD (2005). The case concerned a Senegalese national whose subsequent asylum application has not been further examined by the Belgian authorities. Under Belgian law, appeals against rejections of subsequent asylum applications did not have suspensive effect.

Is a national rule which “does not confer suspensory effect upon the appeal brought against a decision […] not to further examine a subsequent application for asylum” in compliance with Article 47 CFR? When interpreting this question in light of Articles 47 and 19(2) CFR, the

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562 Belgium did not make use of the possibility in Article 3(2) PD (2005) to apply the PD (2005) to applications for any kind of international protection (see *Abdida* (n 555) para 34).
563 *Abdida* (n 555) paras 38-63.
564 Article 3(4) RD, Article 6 RD.
565 *Abdida* (n 555) para 44; see also Opinion of AG Bot *Abdida* (n 555) para 103.
566 *Abdida* (n 555) para 53.
567 *Abdida* (n 555) para 47.
568 *Abdida* (n 555) para 48.
569 *Abdida* (n 555) para 49.
570 *Abdida* (n 555) para 52 referring to *Gebremedhin v France* (n 244) para 67; *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012) para 200.
571 *Abdida* (n 555) para 50.
572 *Abdida* (n 555) para 52.
573 *Abdida* (n 555) para 53.
574 *Tall* (n 143) para 28.
575 *Tall* (n 143) paras 51-60.
Court made the following considerations. The findings of Abdida served as a starting point. Leaving aside the particularity of Abdida regarding the state of health, the Court stated:

“when a State decides to return a foreign national to a country where there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR requires that a remedy enabling suspension of enforcement of the measure authorising removal should, ipso jure, be available to that foreign national.” 576

However, the CJEU made a crucial distinction between Abdida and Tall. Whereas in Abdida a return decision was at stake, Tall concerned the appeal against an asylum rejection (in particular, the decision not to further examine a subsequent asylum application). The CJEU clearly drew a line between these two kinds of decisions:

“The lack of suspensory effect of an appeal brought against […] a decision [not to further examine a subsequent asylum application] is, in principle, compatible with Articles 19(2) and 47 of the Charter. Although such a decision does not allow a third-country national to receive international protection, the enforcement of that decision cannot, as such, lead to that national’s removal”. 577

By contrast, […] an appeal must necessarily have suspensory effect when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19(2) and 47 of the Charter are met in respect of that third-country national (see, to that effect, judgment in Abdida […]).” 578

Having regard to the case before it, the Court noted that Tall concerns – “only” – a decision not to further examine a subsequent asylum application. In this regard, “[t]he lack of suspensory effect of an appeal brought against such a decision is, in principle, compatible with Articles 19(2) and 47 of the Charter.” 579 The reason for this finding is that “the enforcement of [that decision] is not likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 3 ECHR.” 580

Analysis of Tall
Following Tall, considerations regarding non-refoulement are not readily relevant when it comes to appeals brought against asylum rejections. Even though an objection to an asylum rejection may give rise to risks forbidden by the principle of non-refoulement, they will not trigger its protection at this procedural stage. By contrast, the core of asylum law will only become relevant when a return decision has been issued. Thus, the RD which is not part of the CEAS legislation 581 serves as a catch-all measure. Nevertheless, it would have been desirable if the Court payed deference to the role of non-refoulement specifically in EU asylum procedures, 582 and required Member States to confer suspensive effect upon appeals against rejecting asylum decisions. However, in Gnandi the CJEU went a step further, as we will see below.

576 Tall (n 143) para 54.
577 Tall (n 143) para 56.
578 Tall (n 143) paras 57-58.
579 Tall (n 143) para 55.
580 Tall (n 143) paras 59 and 60.
581 cf. Article 78(2) TFEU; Article 63(3)(b) EC Treaty (counterpart to Article 79 (2)(c) TFEU).
582 Recitals 3, 48 and Article 21(1) QD; Recital 3, Articles 9(3), 41(1), 28(2), 35(b), 38(c), 39(4) PD.
c. Gnandi

Gnandi shows that appeals against asylum rejections cannot as easily be separated from considerations on non-refoulement as suggested by Tall. In chapter B.V.2.-3., certain findings of the judgment Gnandi have already been illustrated. They address the issue of when a return decision can be adopted in asylum cases, and will briefly be summarised. This chapter will then centre on the second part of the judgment Gnandi. This second part deals with the repercussions of appeals against asylum rejections on return procedures.

The first part of the judgment Gnandi yields the following crucial results. An asylum seeker’s stay becomes illegal as soon as an asylum rejection is adopted. Before this moment in time, a person’s stay cannot be regarded as illegal because Recital 9 RD forbids that. However, this prohibition to regard such a stay as illegal does not hold for stays during asylum appeal proceedings. According to the Court, no provision whatsoever prevents Member States from regarding that stay as being illegal for the purpose of the RD. This finding implies that a return decision can be adopted as soon as an asylum application has been rejected at first (administrative) instance. Therefore, Member States can adopt a return decision immediately after or simultaneously with an asylum rejection. A potentially existing right to remain pending the appeal procedure does not stand in the way of such interpretation. Right to remain and illegal stay may coexist.\(^583\)

Gnandi – “Second Act”

All of the findings summarised above are based on wording, context, and objective related considerations. If the Court had stopped at this point, the outcome would have been that return decisions could be readily enforced after the expiry of the voluntary departure period,\(^584\) notwithstanding the existence of a right to remain during appeal proceedings. This would have contradicted the outcome of Tall and Abdida, according to which return decisions must not be enforced when a person objects that removal would lead to refoulement. So, what kind of effects does the appeal against an asylum rejection bring about then, if it does not have any bearing on the illegality of a person’s stay? As we will see below, the Court’s recourse to fundamental rights finally tilted the balance to some extent in favour of asylum seekers’ interests.

Interpretation in light of Articles 47, 18, 19(2) CFR – Tall and Abdida

First of all, the Court reiterated that remedies against return decisions (Article 13 RD) and remedies against rejections of applications for international protection (Article 39 PD (2005)) have to be interpreted in light of Article 47 CFR and the principle of non-refoulement as laid down in Articles 18 and 19(2) CFR.\(^585\) It referred to the cases Tall and Abdida, and ascertained that a remedy with “automatic suspensory effect” must be made available in respect of a return decision.\(^586\) If these judgments still left some discretion regarding the body of appeal within the meaning of Article 13 RD and Article 39 PD (2005), Gnandi clarifies this issue. By referring to Samba Diouf, the Court spelled out that a remedy must be made available “before a judicial body” in respect of both appeals against return decisions and asylum rejections.\(^587\) Furthermore, the Court adhered to the principle it set out in Tall which draws a clear line between appeals against asylum rejections and appeals against return decisions. Accordingly,

\(^{583}\) chapter B.V.2.-3.

\(^{584}\) Articles 7 and 8 RD.

\(^{585}\) Gnandi (n 144) paras 51-53.

\(^{586}\) Gnandi (n 144) paras 54-56.

\(^{587}\) Gnandi (n 144) paras 57-58.
appeals against asylum rejections do not have to be endowed with suspensive effect in order to comply with Articles 19(2) and 47 CFR. By contrast, in case of a real risk of ill-treatment awaiting the applicant in his country of origin, a remedy must be made available which automatically suspends “the measure authorising his removal”.\footnote{Gnandi (n 144) para 54.}

Following these considerations, the Court first came to the conclusion we already know: a return decision may be adopted immediately after or simultaneously with an asylum rejection (unless a right to stay or residence permit pursuant to Article 6(4) RD has been granted). The existence of a right to remain during asylum appeal proceedings does not have a bearing on the illegality of a stay, which is the consequence of a rejecting asylum decision.\footnote{Gnandi (n 144) para 59.} Thereafter, the Court finally turned to the safeguards which have to be respected nonetheless in such cases. This move centres on Article 6(6) RD, the provision which allows for such a simultaneous adoption.\footnote{Article 6(6) RD is fully quoted in chapter B.V.2.3.} Notably, Article 6(6) RD requires respect of “procedural safeguards available under Chapter III [of the RD] and under other relevant provisions of Community and national law”.\footnote{Gnandi (n 144) para 60.} Hence, the safeguards which the Court derived from this provision apply only (!) to cases where a return decision is adopted simultaneously with or immediately after an asylum rejection.\footnote{Gnandi (n 144) paras 60 and 67.}

\textit{Safeguards in cases of Article 6(6) RD ("simultaneous" or "immediately after")}

AG Mengozzi put forward that such “other relevant provisions” within the meaning of Article 6(6) RD include the "principles of EU law [he] referred to".\footnote{CJEU Case C-181/16 Gnandi [2018] Opinion of AG Mengozzi delivered on 15 June 2017, para 87.} It can reasonably be assumed that he means the “effectiveness of a legal remedy against […] a decision [rejecting an application for international protection]”\footnote{Opinion of AG Mengozzi delivered on 15 June 2017 Gnandi (n 593) paras 67-68, 70.} and the “principle of non-refoulement” which he, indeed, referred to earlier in his opinion. In previous case law, these two principles led the Court to conclude that a remedy must be made available which suspends the enforcement of a removal measure. As pointed out above, the pertinent cases are \textit{Abdida} and \textit{Tall}.\footnote{Opinion of AG Mengozzi delivered on 15 June 2017 Gnandi (n 593) para 70 (emphasis added).} In this context, AG Mengozzi made a crucial remark which seems to have guided the Court in its continuing reasoning in \textit{Gnandi}. AG Mengozzi argued:

> “Although the case-law referred to above \textit{[Abdida and Tall]} concerns only appeals against measures the enforcement of which risks exposing the person concerned to ill-treatment contrary to Article 3 ECHR and Article 19(2) of the Charter, a decision rejecting an application for international protection which does not per se entail removal measures does not, in principle, constitute such a measure. That is why the Court has taken the view that the lack of suspensory effect of an appeal brought against such a decision is, in principle, compatible with Article 19(2) and Article 47 of the Charter. Although such a decision does not allow a third-country national to receive international protection, the enforcement of that decision cannot, as such, lead to that national’s removal.

However, the effectiveness of a legal remedy against such a decision and observance of the principle of non-refoulement would also be infringed if, during the period for lodging that action — and, once this
had been lodged, until its outcome — the asylum seeker were exposed to the enforcement of removal measures”. 597

“[As the enforcement of a removal order] during the period of bringing an appeal against the decision rejecting his application for international protection [would deprive that appeal of its effectiveness and infringe the principle of non-refoulement], […] that national has the right to remain on the territory of the Member State in which he has lodged in that appeal during the aforementioned period”. 598

The Court took up these considerations when drawing attention to the “full effectiveness of an appeal against a decision rejecting an application for international protection”. 599 In order to safeguard the effectiveness of appeals against asylum rejections, the “principle of equality of arms” has to be respected. On the basis of these principles, the Court spelled out that “all the effects of the return decision must be suspended during the period prescribed for bringing that appeal, and if such an appeal is brought, until the resolution of the appeal”. 600 In this context, it is necessary to be precise. With “that appeal” the Court means the appeal against an asylum rejection; it does not mean the appeal against a return decision. 601 Nevertheless, the appeal against an asylum rejection has repercussions on the return decision and ensuing return procedure. To be even more precise here, the appeal does not affect the return decision itself (i.e. a return decision may still be adopted), 602 but the appeal suspends “all the effects of the return decision”. 603

The Court named explicitly four effects of a return decision which have to be suspended during the time limit prescribed for lodging an appeal against an asylum rejection, and if such an appeal has been lodged, pending the outcome of the appeal. 604

Firstly, “all the legal effects” of the return decision must be suspended during that time. The Court refers explicitly to the voluntary departure period (Article 7 RD) which must not start to run, and detention for the purpose of removal (Article 15 RD) which is prohibited during that time. 605 At this point, it can be deduced that the enforcement of a removal measure must not be carried out either. Article 8(1) RD is relevant in that regard:

“Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7” (emphasis added).

Given that the voluntary departure period is hindered from running in case an appeal is brought against an asylum rejection, 606 the precondition for the enforcement of a return decision (Article 8(1) RD) cannot be fulfilled. As a consequence, the removal cannot be carried out. Hence, the Court’s explicit mention regarding the hindrance of the voluntary departure period is in line with AG Mengozzi’s statement, following which asylum seekers shall not be “exposed to the enforcement of removal measures” if an appeal against an asylum rejection

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597 Opinion of AG Mengozzi delivered on 15 June 2017 Gnandi (n 593) paras 67-68 (emphasis added by AG Mengozzi).
598 Opinion of AG Mengozzi delivered on 15 June 2017 Gnandi (n 593) para 70 (emphasis added by AG Mengozzi).
599 Gnandi (n 144) para 61.
600 Gnandi (n 144) para 61.
601 Gnandi (n 144) para 61.
602 Gnandi (n 144) paras 59, 67.
603 Gnandi (n 144) para 61.
604 Gnandi (n 144) paras 61-65.
605 Gnandi (n 144) para 62.
606 Gnandi (n 144) para 61.
has been lodged. On the contrary, they should have the “right to remain” during that time.\textsuperscript{607} The Court seems to agree with AG Mengozzi’s opinion in this respect. The following two statements of the Court are unambiguous:

- “[...] given that, […] an applicant for international protection must be allowed to remain pending the outcome of an appeal against [a rejection of an application for international protection, […]].”\textsuperscript{608}
- The “safeguards discussed in paragraphs 61 and 62 above [require] that the return procedure is suspended pending the outcome such an appeal [brought against rejection of an application for international protection] […]”\textsuperscript{609}

Secondly, asylum seekers keep their entitlement to benefit from rights under the Reception Conditions Directive (RCD).\textsuperscript{610} Article 3(1) thereof makes the application of the RCD exclusively dependent upon a right to remain; the illegality of a stay does not have an impact on the eligibility for benefits.\textsuperscript{611} Thirdly, asylum seekers shall have the possibility to invoke any change in circumstances subsequent to the adoption of a return decision. This can influence the assessment of a person’s situation, particularly in light of Article 5 RD. This provision requires Member States to take into account the best interests of the child, family life, state of health and respect of non-refoulement when implementing the RD.\textsuperscript{612} Fourthly, Member States have to inform an applicant in a fair and transparent manner about their adherence to all of the above mentioned requirements.\textsuperscript{613} Conclusively, the Court could answer the preliminary question: a return decision can be adopted simultaneously with or immediately after the adoption of an asylum rejection, and thus before the conclusion of appeal proceedings brought against an asylum rejection, – provided that all of the requirements described above are met during the asylum appeal proceedings. These requirements include, inter alia, that “all the legal effects of the return decision are suspended pending the outcome of the appeal”.\textsuperscript{614}

\textbf{Analysis of Gnandi}

It follows from Gnandi that a return decision can be adopted simultaneously with or immediately after an asylum rejection, irrespective of the existence of a right to remain during the appeal proceedings brought against an asylum rejection. That is, appeals against asylum rejections do not prevent Member States from initiating return procedures. This does not remain without any repercussions on the clear distinction between appeals against asylum rejections and appeals against return decisions. Tall drew a clear line between appeals against return decisions which must have suspensive effect, and appeals against asylum rejections which do not necessarily have to be endowed with suspensive effect. The reason for this distinction is that the enforcement of a return decision may result in the exposure of a person to a serious risk of treatment proscribed by Article 19(2) CFR. By contrast, the enforcement of an asylum rejection does not readily involve such a risk. Gnandi blurs this clear distinction. The fact that the adoption of an asylum rejection allows for the immediate adoption of a return decision (Article 6(6) RD) comes down to the same risk at stake in both decisions (provided that a

\textsuperscript{607} Opinion of AG Mengozzi delivered on 15 June 2017 Gnandi (n 593) paras 68 and 70 (emphasis added by AG Mengozzi).
\textsuperscript{608} Gnandi (n 144) para 64 (emphasis added).
\textsuperscript{609} Gnandi (n 144) para 66 (emphasis added).
\textsuperscript{611} Gnandi (n 144) para 63.
\textsuperscript{612} Gnandi (n 144) para 64.
\textsuperscript{613} Gnandi (n 144) para 66.
\textsuperscript{614} Gnandi (n 144) para 67.
Member State makes use of such option).\textsuperscript{615} Notably, the voluntary departure period, which would start to run after the adoption of a return decision, would after its expiry allow for the enforcement of a removal measure. Thus, the risk of *refoulement*, which is directly linked to return decisions, would arise simultaneously with or shortly after the asylum rejection.

Given that the risk at stake following such asylum rejections\textsuperscript{616} is the same as the risk involved in return decisions, an appeal against the former must ultimately have the same effects as an appeal against the latter. Essentially, the appeal must have the effect of suspending the removal measure. Nevertheless, the Court does not go so far as to endow the appeal against asylum rejections directly with suspensive effect. It makes a detour. This detour implies that all the effects of a return decision have to be suspended. Effects of a return decision encompass, inter alia, the voluntary departure period which starts to run, and after the expiry thereof, the enforcement of the removal measure. If an appeal is brought against an asylum rejection, these effects shall be suspended. This suspension includes in particular the hindrance of the voluntary departure period. Furthermore, when the voluntary departure period is hindered, the enforcement of the removal measure is suspended automatically. In fact, the appeal against an asylum rejection has automatic suspensive effect through that detour; it suspends the enforcement of the removal measure.

This outcome is crucial as it ensures the right to remain during asylum appeal proceedings. Otherwise the finding that a right to remain does not exclude the initiation of a return procedure (right to remain and illegal stay may coexist), would have resulted in an unworkable situation. The return decision would become enforceable at some moment in time (in principle after the expiry of the voluntary departure period), despite the existence of a right to remain pending the outcome of the asylum appeal. This existence of a right to remain together with an enforceable return decision would constitute an incompatible situation. That is why the Court had to make the detour via the *effects* of the return decision. In order to effectively ensure the right to remain during asylum appeal proceedings, which is prescribed by (Belgian) law,\textsuperscript{617} the appeal against an asylum rejection “freezes” the return procedure. A different outcome would have led to the incompatible coexistence of a right to remain guaranteed by law and an enforceable return decision. In order to avoid this incompatibility, it is important that *Gnandi* effectively ensures the right to remain by suspending the return procedure as long as (Belgian) law grants a right to remain. This is what the following statement of the Court suggests:

\textsuperscript{615} Only if a Member State makes use of the option to adopt a return decision before the conclusion of asylum appeal proceedings (“immediately after” or “simultaneously with”, in particular Article 6(6) PD), the safeguards developed in *Gnandi* will apply. This is logic, because otherwise only in such cases the risk of *refoulement* would exist during the time of the asylum appeal proceedings. This is due to the fact that the return decision can possibly become enforceable already during asylum appeal proceedings. In other cases, in which the return decision is issued after the conclusion of asylum appeal proceedings, the risk of *refoulement* does not exist during the asylum appeal proceedings (due to the lack of a return decision). In such cases, the clear distinction between appeals against return decisions and appeals against asylum rejections set out in *Tall* will arguably apply. The risk of *refoulement* is precisely not at stake in the latter asylum appeal proceedings.

\textsuperscript{616} Asylum rejections which are followed by the immediate adoption of a return decision, or accompanied by the simultaneous adoption of a return decision.

\textsuperscript{617} *Gnandi* (n 144) para 42.
“it is necessary that all the legal effects of that decision be suspended and, in particular, that the period granted for voluntary departure in accordance with Article 7 of Directive 2008/115 should not start to run as long as the person concerned is allowed to remain”.

Beyond that, it is not only (!) important to effectively ensure the right to remain during the appeal proceedings (by freezing the return procedure) because the law grants such a right to remain. It is first and foremost important to ensure the right to remain during the asylum appeal proceedings, because otherwise the principle of non-refoulement would be infringed and the appeal would be deprived of its effectiveness. This is what AG Mengozzi explicitly stated, and what the Court took into account (at least with regard to the “full effectiveness of an appeal”). Remarkably, the Court took for granted the right to remain pending the outcome of appeal proceedings:

“[…] given that, […] an applicant for international protection must be allowed to remain pending the outcome of an appeal against [a rejection of an application for international protection], […]”.

The two statements of the Court quoted above leave us, however, with one ambiguity behind. Should the right to remain in general be granted during the whole asylum appeal proceedings (as suggested by the latter statement), or during the time the “person concerned” has a right to remain granted by (e.g. national) law (as suggested by the former quotation)? In Gnandi, this ambiguity did not raise a problem, as the right to remain which Belgian law afforded to Mr. Gnandi corresponded with the right to remain which must be granted in general to “an applicant of international protection” (cf. latter statement). Essentially, both rights to remain covered the period prescribed for bringing an appeal against the asylum rejection, and if an appeal is brought, until the resolution of the appeal. However, the ambiguity becomes apparent when the period of the right to remain afforded by law, and the period of the right to remain pending the whole asylum proceedings do not correspond. This is exemplified by Union law itself. In particular, the right to remain for asylum seekers falling under Article 46(6) PD is shorter than the period the Court emphasised in Gnandi, namely the whole asylum appeal proceedings. Article 46(8) PD grants them only a right to remain during the interim proceedings. The right to remain during the whole asylum appeal proceedings is dependent upon a court’s decision which decides on a case-by-case basis pursuant to Article 46(6) PD.

The Court did not have to clarify this ambiguity in Gnandi, as Belgian law afforded a right to remain during the whole asylum appeal proceedings anyway. However, if the Court will be confronted with the above question one day, it would be desirable if it clarified the issue not only from the standpoint of the irreconcilable coexistence of right to remain afforded by law (Article 46(8) PD) and enforceable return decision. This alone would only involve a contextual reasoning. It should go beyond that, as it did in Gnandi, and deal with the requirements flowing from the full effectiveness of the appeal against an asylum rejection. Such an approach is required in order to interpret the restricted right to remain in light of the fundamental rights (right to an effective remedy). Additionally, following AG Mengozzi, the Court

618 Gnandi (n 144) para 62 (emphasis added).
619 Opinion of AG Mengozzi delivered on 15 June 2017 Gnandi (n 593) para 70, see quotation above.
620 Gnandi (n 144) para 61 see discussion above.
621 Gnandi (n 144) para 64.
622 Gnandi (n 144) para 64.
623 Gnandi (n 144) paras 42 and 61-62, 64.
624 Wittmann (n 10) 49.
625 Gnandi (n 144) para 61.
626 In C, J and S (n 2) para 51, the Court referred to “the right to an effective judicial remedy”. 76
should take the principle of non-refoulement into account. As a result, if the Court does not call the validity of Article 46(6) and (8) PD into question, it will have to deal with the safeguards which have to be respected already during the interim proceedings in order to ensure the full effectiveness of the asylum appeal. Arguably, the absence of a full right to remain during the whole asylum appeal proceedings affects the effectiveness of the asylum appeal. In particular, the principle of equality of arms (Gnandi) could be affected if the applicant is not present during the asylum appeal proceedings. Furthermore, if for example the request for interim relief is wrongly refused, the asylum appeal will be deprived of its effectiveness. In such a situation, a positive judgment on the asylum appeal cannot make the right to international protection (including protection from refoulement) retroactively effective (cf. Factortame). Thus, in order to ensure the full effectiveness of an asylum appeal in cases where a full right to remain is absent (i.e. Article 46(6) and (8) PD), certain procedural safeguards have to be in place already during the interim proceedings. These considerations will be further elaborated in the analysis of C, J and S.

d. C, J and S

In C, J and S, the Court strongly drew on its reasoning in Gnandi. However, two differences must be recognised. First, while Gnandi concerned the interpretation of the PD (2005) and RD, C, J and S concerned the PD and RD. Second, Gnandi was about a case where national law allowed for a right to remain during appeal proceedings against an asylum rejection (comparable to what is now Article 46(5) PD). C, J and S on the other hand concerned asylum applicants subjected to the restricted right to remain pursuant to Article 46(6) and (8) PD. The judgment C, J and S concerned several cases in which asylum applications had been rejected as manifestly unfounded pursuant to Article 32(2) PD. The pertinent Dutch law made use of the option to subject such asylum applications to the restricted right to remain codified in Article 46(6) and (8) PD. Hence, the appeal of C, J and S against their asylum rejections did not have suspensive effect. However, as required by Article 46(8) PD, the request for interim relief had suspensive effect. According to Dutch law, the applicants were considered to be illegally staying in the territory of the Netherlands from the moment of their rejection as manifestly unfounded. On account of their illegal stay, the RD was applicable and they were detained on the basis of Article 15 RD. They were taken into detention before a court had decided on their request for interim relief (J was detained on the day of the asylum rejection, S was detained one day after the asylum rejection, C two days later). The preliminary question was as follows: can a person whose asylum application has been rejected as manifestly unfounded, and whose appeal against that rejection does not have suspensive effect, be taken into detention for the purpose of removal, despite the existence of an authorisation to remain until the resolution of the interim proceedings pursuant to Article 46(8) PD?

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627 Opinion of AG Mengozzi delivered on 15 June 2017 Gnandi (n 593) paras 68 and 70.
628 C, J and S (n 2) para 29.
629 C, J and S (n 2) para 30.
630 C, J and S (n 2) para 29.
631 C, J and S (n 2) para 28
632 C, J and S (n 2) para 24.
633 C, J and S (n 2) para 26.
634 C, J and S (n 2) para 22.
635 C, J and S (n 2) paras 42-43.
Given that a person can only be detained pursuant to Article 15 RD in case of illegal stay within the meaning of the RD, the Court directly applied its finding of Gnandi to C, J and S. A person is staying illegally as soon as his application for international protection is rejected (unless a right to stay pursuant to Article 6(4) RD has been granted). The existence of a right to remain pending the outcome of the appeal against an asylum rejection does not have any bearing on that principle. Therefore, a return decision can be issued together with an asylum rejection in a single administrative act pursuant to Article 6(6) RD. Nevertheless, several safeguards have to be respected in such cases. Most importantly, “all of the effects of the return decision must be suspended during the period prescribed for bringing [the appeal against an asylum rejection] and, if such an appeal is brought, until resolution of the appeal”. This finding was not only based on the “full effectiveness of an appeal against a decision rejecting an application for international protection”, but also on “the right to an effective judicial remedy”. The prohibition of removal detention (Article 15 RD) was of particular relevance for C, J and S. The CJEU stated that a person cannot be detained “as long as he is authorised to remain on the territory”. In this respect, the Court took into account the difference between the right to remain pursuant to Article 46(5) PD and the right to remain according to Article 46(6) and (8) PD. With regard to the latter right to remain, the Court noted:

“It is true that it follows from Article 46(5) and (6) of Directive 2013/32 that, in that case, the person concerned does not enjoy, by operation of law, a right to remain on the territory of the Member State in question pending the resolution of his appeal”.

The literal translation of the German version of the judgment is even more straightforward, by acknowledging that a person affected by Article 46(5) and (6) PD does not enjoy a “full right to remain”. However, the Court took notice of the right to remain during the interim proceedings following from Article 46(8) PD. Consequently, the Court concluded:

“a third-country national whose application for international protection has been rejected as manifestly unfounded cannot be detained pursuant to Article 15 of Directive 2008/115 during the period prescribed for bringing an appeal against that rejection. If such an appeal is brought, the person concerned also cannot be detained on the basis of that article while he is authorised to remain in the territory of the Member State in question, in accordance with Article 46(8) of Directive 2013/32”.

Analysis of C, J and S

Removal detention is the measure of last resort which Member States can use to enforce a return decision. C, J and S were kept in removal detention even though they had a right to remain following their request for interim relief pursuant to Article 46(8) PD. Hence, the issue at stake was the coexistence of the enforcement of a return decision (by means of removal detention) and the right to remain pursuant to Article 46(8) PD. As argued in the analysis of Gnandi, the Court wants to circumvent this incompatible coexistence by suspending the effects of a return decision (including removal detention) during the period an asylum seeker has a right to remain. In C, J and S, the right to remain guaranteed by Article 46(8) PD was at

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636 C, J and S (n 2) paras 47-50.
637 C, J and S (n 2) para 50 referring to Gnandi (n 144) para 61.
638 C, J and S (n 2) para 51.
639 C, J and S (n 2) paras 50-51 referring to Gnandi (n 144) paras 61-62.
640 C, J and S (n 2) para 53 (emphasis added).
641 C, J and S (n 2) para 53 (literal translation of German version).
642 C, J and S (n 2) paras 54-55 (emphasis added).
643 El Didri (n 138) paras 36-41 see also chapter B.V.
stake. Hence, the Court did not have to go so far as to argue for the suspension of the removal detention during the whole asylum appeal proceedings. It only argued for its suspension during the interim proceedings pursuant to Article 46(6) and (8) PD. In this respect, it argued from the standpoint of the “full effectiveness of an appeal”, and “the right to an effective judicial remedy”. Arguably, “appeal” in this regard pertains to the request for interim relief pursuant to Article 46(6) and (8) PD, and not to the appeal against the asylum rejection itself. That would explain why the outcome was that an asylum seeker cannot be held in removal detention as long as a court decides on his request for interim relief. Consequently, as soon as a court rejects a request for interim relief, an applicant can, in principle, be taken into removal detention even though the asylum appeal procedure has yet to conclude. This is due to the lack of a right to remain during these latter proceedings.

It can be deduced that the Court again combined contextual considerations with fundamental rights considerations, as it did Gnandi. However, it reduced the fundamental rights considerations to the matter at stake, namely the full effectiveness of the request for interim relief and effective judicial protection during the interim proceedings (despite paying lip service to the “full effectiveness of an appeal against a decision rejecting an application for international protection”). If it were confronted with the question whether a person can be detained after the interim proceedings despite pending asylum appeal proceedings, the Court would arguably have to argue from the standpoint of the full effectiveness of the asylum appeal. The interpretation of the asylum appeal in light of the right to effective judicial protection would possibly bring about certain safeguards which would have to be respected during the time of detention (e.g. access to legal assistance from a specialised migration lawyer).

Arguably, the same would hold if the question was whether a person affected by Article 46(6) and (8) PD should actually have a right to remain reaching beyond Article 46(8) PD. The Court could not confine itself to considerations about the full effectiveness of the request for interim relief. Instead it would have to argue from the perspective of the full effectiveness of the appeal against the asylum rejection. In view of the absence of a right to remain during the asylum appeal proceedings, the full effectiveness of the asylum appeal would demand certain procedural requirements which balance the absence of a full right to remain out. As argued in the analysis of Gnandi, if the full effectiveness of the asylum appeal does not already call the validity of Article 46(6) and (8) PD into question (as indirectly suggested by Hruschka),

644 C, J and S (n 2) paras 50-51.
645 Verwaltungsgericht Minden 10 K 2632/17.A (16.04.2019) paras 47, 49, 53 In case of manifestly unfounded asylum applications, “appeal” – in the sense of “full effectiveness of an appeal” and “all legal effects of the return decision are suspended during the outcome of the appeal” (Gnandi (n 144) paras 61 and 68) – means the request for interim relief under German law (“Antrag auf Anordnung der aufschiebenden Wirkung”), which implements Article 46(6) and (8) PD.
647 Hruschka (n 52) Comparable to what is contended in this thesis, Hruschka argues that there is a difference between the right to remain pursuant to Article 46(8) PD and the right to remain during the whole asylum appeal proceedings (in case of Article 6(6) RD). Following C, J and S, Hruschka states, the rejection as manifestly unfounded can only have the effect that a person does not enjoy the full right to remain pursuant to Article 46(8) PD. Nevertheless, the absence of this full right to remain does not make deportation possible. On the contrary, Hruschka states, the enforcement of a return decision is not allowed before the resolution of the (whole) asylum appeal proceedings. He bases this finding on C, J and S (n 2) paras 50 and 52. In these paragraphs, the CJEU first repeated the Gnandi-principle, according to which all legal effects of the return decision must be suspended during the whole asylum appeal proceedings. Thereafter, the Court made clear that this principle applies to asylum seekers whose applications have been rejected as manifestly unfounded. On this basis, Hruschka concludes
would demand to put in place certain procedural safeguards already during the interim proceedings. For instance, a thorough and full judicial review already during the interim proceedings would ensure the correctness of a decision on the request for interim relief. It remains to be seen which concrete procedural requirements the Court would expect. In any case, it will have to argue from the standpoint of the full effectiveness of the asylum appeal when establishing requirements which have to be fulfilled during the interim proceedings regulated by Article 46(6) and (8) PD.

e. X & X and Y

The two cases X\(^648\) and X and Y\(^649\) concern Dutch law which does not provide for automatic suspensive effect at second judicial level in asylum cases. While the preliminary question in X concerned Article 39 (2005) and Article 13 RD, the preliminary question in X and Y concerned Article 46 PD and Article 13 RD. The Court’s reasoning is almost identical in both cases, apart from the different particularities concerning PD (2005) and the PD. These different particularities were however not decisive for the outcome which is identical in both cases. It suffices therefore to discuss the cases together.

According to the pertinent Dutch law, the appeal against an asylum rejection has automatic suspensive effect at first instance before the district court (rechtbank). If the district court confirms the asylum rejection and the return decision, Dutch law provides for an appeal against that judgment at second instance before the Council of State (Raad van State). However, this appeal at second judicial instance does not have automatic suspensive effect. There is the possibility to apply for interim relief with the judge hearing such applications (voorzieningenrechter). However, this application for interim relief does not have automatic suspensive effect either.\(^650\) The CJEU dealt with the question whether second instance appeals against judgments of the first judicial instance have to be endowed with automatic suspensive effect. The Court was asked to interpret Article 46 PD (in X: Article 39 PD (2005)) and Article 13 RD in light of Articles 18, 19(2) and 47 CFR.\(^651\)

The Court analysed first the wording, objective and context of the provisions in the PD and RD. From this analysis it did not follow that Member States are required to introduce a second judicial level. Nevertheless, Member States are not precluded from introducing a second instance judicial review. However, if they do so, EU law does not oblige them to confer au-

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\(^648\) X (n 146).

\(^649\) X and Y (n 147); see also CJEU Case C-422/18 PPU FR v Italy (27 September 2018).

\(^650\) X (n 146) paras 14-17; X and Y (n 147) paras 14-15.

\(^651\) X (n 146) para 25; X and Y (n 147) para 20.
automatic suspensive effect on the appeal at second judicial level.\textsuperscript{652} Thereafter, the Court went on to analyse the matter in light of the Charter. It referred to its “settled case-law” \textit{Tall, Abdi da} and \textit{Gnandi}, according to which Article 47 CFR and the principle of \textit{non-refoulement} require to provide an applicant (who claims a real risk of ill-treatment if returned) with “a remedy enabling automatic suspension of enforcement of the measure authorising his removal”.\textsuperscript{653} Having regard to the appeal against an asylum rejection, the Court held that, “all the effects of the return decision” have to be suspended “during the period prescribed for bringing the appeal and, if such an appeal is brought, until resolution of the appeal”. In this way, Member States can “ensure the full effectiveness of an appeal against a decision rejecting the application for international protection”.\textsuperscript{654} Furthermore, the Court made clear that a remedy in respect of a return decision (Article 13 RD) must have “automatic suspensory effect, before at least one judicial body”.\textsuperscript{655} Drawing on \textit{Gnandi} and \textit{Samba Diouf}, it held that a remedy in respect of both a return decision (Article 13 RD) and an asylum rejection (Article 46 PD) must be made available before a “judicial body”. However, Article 47 CFR and the principle of \textit{non-refoulement} do not require “two levels of jurisdiction”.\textsuperscript{656}

In order to reinforce this finding, the Court relied on ECHR case law. In \textit{A.M.}, the ECtHR held that states are not obliged to introduce a second level of jurisdiction even if a real risk of ill-treatment is invoked. Given that Article 13 ECHR assesses a national judicial system as a whole, the ECtHR considered the possibility to appeal at a first judicial instance, including automatic suspensive effect at first judicial instance, to be sufficient.\textsuperscript{657} Against this background, the CJEU concluded that neither Article 13 RD nor Article 46 PD – interpreted in light of Article 47 CFR and the principle of \textit{non-refoulement} – require a remedy with automatic suspensive effect at second judicial instance.\textsuperscript{658}

The CJEU was not done with its assessment at this point. It considered the introduction of a second judicial instance in respect of asylum rejections and return decisions as well as the provision for suspensive effect in such cases as a domestic procedural rule which implements Article 39 PD (2005) (arguably also Article 46 PD) and Article 13 RD. Due to this procedural autonomy, the principles of equivalence and effectiveness have to be respected.\textsuperscript{659} As regards the principle of equivalence, the Court left the question of a comparable procedural rule to the national court. However, it gave guidance on that matter.\textsuperscript{660} As to the principle of effectiveness, the Court noted that it is not necessary, in this particular case, to go beyond the requirements following from right to an effective remedy and the principle of \textit{non-refoulement}. Fundamental rights do neither require a second judicial level nor suspensive effect at second instance. Following this, the Court noted that “the mere fact that an additional level of jurisdiction, provided for by national law, does not have automatic suspensory effect, does not justify a finding that the principle of effectiveness has been disregarded”.\textsuperscript{661}

\textsuperscript{652} X (n 146) paras 26-30; \textit{X and Y} (n 147) paras 21-26.
\textsuperscript{653} X (n 146) para 32; \textit{X and Y} (n 147) para 28.
\textsuperscript{654} X (n 146) para 33; \textit{X and Y} (n 147) para 29.
\textsuperscript{655} X (n 146) para 33; \textit{X and Y} (n 147) para 29.
\textsuperscript{656} X (n 146) para 34; \textit{X and Y} (n 147) para 30.
\textsuperscript{657} X (n 146) paras 35-36; \textit{X and Y} (n 147) paras 31-32; CJEU Cases C-175/17 \textit{X} and C-180/17 \textit{X and Y} [2018] Opinion of AG Bot, paras 46 and 48; \textit{A.M. v The Netherlands} (n 243) paras 67-70.
\textsuperscript{658} X (n 146) para 37; \textit{X and Y} (n 147) para 33.
\textsuperscript{659} X (n 146) para 37; \textit{X and Y} (n 147) para 33.
\textsuperscript{660} X (n 146) paras 41-46; \textit{X and Y} (n 147) paras 37-42.
\textsuperscript{661} X (n 146) para 47; \textit{X and Y} (n 147) para 43.
Analysis

It is regrettable that the Court confined its assessment of the principle of effectiveness to the guarantees following from the fundamental rights. In this respect, it disregarded its settled case law, according to which a national procedural rule has to be analysed “by reference to the role of the rules concerned in the procedure viewed as a whole, to the conduct of that procedure and to the special features of those rules, before the various national instances”.

4.2. Scope of judicial review and right to be heard

Samba Diouf makes clear that “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”. One particularity applies to asylum applications channelled through accelerated procedures. Given that the decision to subject an application to an accelerated procedure is considered “a measure preparatory to the final decision”, an appeal does not have to be at disposal at this stage of the procedure. However, the “reasons justifying the use of an accelerated procedure” can be challenged within the framework of the appeal proceedings brought against the final asylum rejection. Within this framework, a court has to thoroughly review the “legality of the final decision”.

Article 46(3) PD requires a court to conduct a full and ex nunc assessment of facts and points of law. Alheto filled that provision with detailed meaning based on an interpretation of its ordinary meaning, purpose and context, and in light of Article 47 CFR. The objective to deal with asylum applications “as soon as possible […] without prejudice to an adequate and complete examination being carried out”, played a particular role in the Court’s assessment. An ex nunc assessment obliges a court to consider “new evidence which has come to light after the adoption of the decision under appeal”. The purpose is “to deal with the application for international protection exhaustively without there being any need to refer the case back to the determining authority”. Therefore, a court has the “power to take into consideration new evidence on which that authority has not taken a decision”. A full assessment requires a court to take into account “evidence which the determining authority took into account or could have taken into account and that which has arisen following the adoption of the decision by that authority”. Additionally, the interpretation in light of Article 47 CFR brought the following finding to light. A full and ex nunc examination implies that a court shall interview the applicant, subject to limitations (for limitations, see 4.4.). In any case, if new evidence is revealed after the adoption of an asylum rejection, which might affect the applicant adversely, an applicant must always be given the “opportunity to express his views”. The close link between the right to be heard and the court’s obligation to conduct a full and ex nunc examination has already been emphasised in Sacko. In this case, the right to be heard including its limitations has been analysed by the Court (see 4.4.).

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662 X (n 146) para 40; X and Y (n 147) para 36.
663 CJEU Case C-69/10 Samba Diouf [2011] para 61; see also Sacko (n 222) para 36.
664 Samba Diouf (n 663) paras 55-58.
665 Alheto (n 15) paras 108-118.
666 Recital 18 PD.
667 Alheto (n 15) para 109.
668 Alheto (n 15) paras 111-112.
669 Alheto (n 15) para 113.
670 Alheto (n 15) para 114.
671 Sacko (n 222) paras 42-44.
Whereas *Alheto* deals with the issue of new evidence which came to light after the adoption of an asylum rejection, *Ahmedbekova* centres on grounds or evidence relating to events which took place before the adoption of an asylum rejection or even before the asylum application. More precisely, two scenarios are at stake in *Ahmedbekova*. For one thing, it concerns the situation where an applicant relies on grounds relevant for international protection for the first time within the appeal proceedings, even though the alleged events took place before the adoption of the asylum rejection, or even before the asylum application. For another thing, it concerns the situation where an applicant submits further evidence in support of the ground already put forward within the administrative procedure for the first time during the appeal proceedings, even though the evidence is related to events which took place before the adoption of the asylum rejection, or even before the asylum application. Owing to the “specific resources and specialised staff” of the determining authorities, the administrative procedure constitutes a “vital stage” of the asylum procedure. Hence, an applicant cannot simply rely on his right to obtain a full and *ex nunc* examination by a court without fulfilling his obligation to cooperate with the authorities. Therefore, a lack of cooperation on the part of the applicant cannot be without procedural consequences. For these reasons, the Court gave national courts instructions as to how to deal with such cases. Such grounds or evidence must be regarded as “further representations” within the meaning of Article 40(1) PD. This implies that a court, in principle, has to assess those grounds and evidence within the appeal proceedings after having given the determining authority the opportunity to assess the grounds. However, a national court is not obliged to do that, if “those grounds or evidence”:

- “were relied on in a late stage of the appeal proceedings”, or
- “are not presented in a sufficiently specific manner to be duly considered”.

In respect of evidence alone, the court can discount evidence if:

- “it finds that that evidence is not significant or insufficiently distinct from evidence which the determining authority was already able to take into account”.

These aspects are listed alternatively (“or”). Hence, as soon as one of these aspects applies, the court can discount the grounds or evidence without asking the authority for an assessment.

Remarkably, the Court did not directly refer to the Charter in its reasoning in *Ahmedbekova*. It only referred to *Alheto* which, in turn, interpreted Article 46(3) PD in light of the Charter. If the Court had deployed an interpretation in light of the Charter, it would have presumably come across the ECHR case *M.S.S.* In this judgment, the Belgian judicial review system has been criticised for not having systematically considered submissions, which were not already put forward during the administrative procedure, and therefore submitted for the first time during the interim proceedings. Thus, *Ahmedbekova* offers a lower level of protection compared to *M.S.S*. The latter seems to require a systematic consideration of delayed submissions.

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672 CJEU Case C-652/16 *Ahmedbekova* [2018] para103.
673 *Ahmedbekova* (n 672) paras 94-100.
674 *Ahmedbekova* (n 672) paras 101-102 combined with 97-100.
675 *Ahmedbekova* (n 672) paras 96-97.
676 *Ahmedbekova* (n 672) paras 98-103.
677 *Ahmedbekova* (n 672) paras 92-96.
678 *M.S.S. v Belgium and Greece* (n 224) para 389, see analysis in chapter C.I.2.2.4. quote in fn 279.
4.3. Time limits

In Danqua, the time limit of 15 days for lodging an application for subsidiary protection (after refugee status had been rejected) has been assessed in light of the principle of effectiveness. In this context, the Court took account of the requirement to assess a national procedural rule “by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies”. Having regard to the asylum matter at stake, the Court assessed whether the national procedural rule was “justified for the purposes of ensuring the proper conduct of the procedure for examining an application for subsidiary protection”. As regards more specifically the assessment of national procedural time limits, the Court pronounced the following general principle:

“[…] Member States [have] to establish […] time limits in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration.”

Applying this principle to Danqua, the Court considered the particular importance of the asylum procedure; it enables asylum seekers to “safeguard their most basic rights by the grant of such protection”. Furthermore, it took account of the “difficult human and material situation in which they may find themselves”. Additionally, it pointed out to the number of persons who may be affected. In this respect, the time limit of 15 days is “particularly short and does not ensure, in practice, that all those applicants are afforded a genuine opportunity to submit an application for subsidiary protection”. Thus, the principle of effectiveness precludes such a national procedural rule.

A time limit of 15 days was also at issue in Samba Diouf. However, this time limit concerned the period for lodging an appeal against an asylum rejection (under the accelerated procedure). The Court ascertained that a time limit “must be sufficient in practical terms to enable the applicant to prepare and bring an effective action”. Against this background, it considered a period of 15 days, in general, to “appear reasonable and proportionate to the rights and interests involved”. However, a 15-day time limit may “prove, in a given situation, to be insufficient in view of the circumstances”. This is for the national court to determine. If it deems the time limit to be insufficient, it shall examine the case under the ordinary procedure.

4.4. Limitation of the right to an effective remedy

The rights enshrined in the Charter, including Article 47 CFR, are not unfettered rights. They can be restricted, provided that the conditions laid down in Article 52(1) CFR are met:

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others” (emphasis added).

679 Danqua (n 538) paras 38-49.
680 Danqua (n 538) para 42.
681 Danqua (n 538) para 43.
682 Danqua (n 538) para 44 (emphasis added).
683 Danqua (n 538) paras 45-49.
684 Samba Diouf (n 663) para 66.
685 Samba Diouf (n 663) paras 66-67.
686 Samba Diouf (n 663) para 68.
As regards more particularly the right to effective judicial protection, including the rights of the defence, the Court gave the following guiding principle:

“an infringement of the rights of the defence and the right to effective judicial protection must be examined in relation to the specific circumstances of each case, including the nature of the act at issue, the context in which it was adopted and the legal rules governing the matter in question”.  

In *Sacko*, an asylum case, the Court held that the right to be heard before a court can be restricted to some extent.\(^\text{688}\) The question whether or not it is necessary to hear the applicant has to be interpreted in respect of the court’s obligation to conduct a full and *ex nunc* examination. The Court attached much weight to the personal interview which is carried out already at the administrative level. The report of that interview links the administrative procedure with the judicial proceedings because its content is an important factor when the court conducts the full and *ex nunc* examination. Furthermore, the report of the interview is accessible for the court in the case file. Against this background, the CJEU concluded that a national court has to assess whether it is in a position to carry out a full and *ex nunc* examination on the basis of the case file. The hearing can only be dispensed with if the court deems itself to be in such a position.\(^\text{689}\) In any case, national law must not prevent a court from ordering a hearing where it deems a hearing necessary.\(^\text{690}\) Furthermore, following *Alheto*, an applicant shall always be given the “opportunity to express his views” (in the sense of an “interview” with the court), if new evidence (which might affect the applicant adversely) came to light after the adoption of an asylum rejection.\(^\text{691}\)

In *Sacko*, the Court made also one crucial remark regarding the role of the right to be heard in accelerated procedures. In cases where the court considers itself to lack the capacity to conduct a full and *ex nunc* examination, the hearing is an “essential procedural requirement which cannot be dispensed with on grounds of speed”. This implies that the authorisation to accelerate certain asylum procedures does not at the same time allow for the disregard of such an essential procedural requirement.\(^\text{692}\)

*Sacko* shows that a court must always be able to conduct a full and *ex nunc* examination in asylum cases. The right to be heard can only be restricted to the extent that a full and *ex nunc* examination is preserved. This scope of judicial review will arguably also have to be maintained if national security issues are involved in an asylum procedure. In *ZZ*, a case concerning the EU Citizenship Directive,\(^\text{693}\) national security considerations were considered a legitimate aim for the restriction of Article 47 CFR including the right to be heard.\(^\text{694}\) The applicant was only allowed to obtain the essence of the grounds, but not the evidence underlying those grounds.\(^\text{695}\) Nevertheless, the court had to be in a position to review both all the grounds

\(^{687}\) *Sacko* (n 222) para 41 (emphasis added).

\(^{688}\) *Sacko* (n 222) paras 38-40.

\(^{689}\) *Sacko* (n 222) paras 42-44.

\(^{690}\) *Sacko* (n 222) para 48.

\(^{691}\) *Alheto* (n 15) para 114.

\(^{692}\) *Sacko* (n 222) para 45.


\(^{694}\) CJEU Case C-300/11 Z [2013] paras 51, 54.

\(^{695}\) Z [n 694] para 65.
Hence, no overriding interests can restrict the right to obtain a full judicial review. The same principle will arguably also apply to asylum cases. Freedom of movement of EU citizens did not play a role in the Court’s reasoning in ZZ when setting out these principles.  

4.5. Differentiation between ordinary and accelerated procedures

The two cases Samba Diouf and H.I.D. illustrate how the Court assesses national procedural rules (based on the PD) which subject certain asylum seeker groups to accelerated procedures. None of the cases yielded a finding of discrimination as minimum procedural requirements were still fulfilled.

In Samba Diouf, two procedural restrictions which affected accelerated procedures were scrutinised by the Court. First, asylum applicants subjected to an accelerated procedure had only 15 days for lodging an appeal, instead of one month as regulated within the scope of the ordinary procedure. Second, only one level of jurisdiction was provided for in accelerated procedures, instead of two levels as in the ordinary procedure. The Court deployed the following argument justifying the less favorable treatment of asylum seekers subjected to accelerated procedures:

“[I]t must be stated at the outset that the differences that exist, in the national rules, between the accelerated procedure and the ordinary procedure, […] are connected with the nature of the procedure put in place. The provisions […] are intended to ensure that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently.”

Such unequal treatment is hence justified by the (legitimate) aim to efficiently process applicants with good grounds. For that reason, other applications have to be assessed more quickly. From the Court’s ensuing reasoning it can be derived that the two measures deployed to achieve that aim are also proportionate. First, the time limit of 15 days for lodging an appeal is, in principle, “reasonable and proportionate” (see 4.3.). Second, EU law does not require a two levels jurisdiction. One judicial body is sufficient.

In H.I.D., the Court made clear that applicants coming from designated safe countries of origin can be channeled through accelerated procedures. Unequal treatment on the basis of nationality is allowed in asylum cases, as the country of origin plays a decisive role in the assessment of an asylum claim. However, in order to avoid discrimination, applicants subjected to accelerated procedures must not be deprived of the procedural requirements laid down in the PD (2005) which apply to all asylum applicants. In particular, they must be granted a sufficient period of time to gather all the materials in support of their asylum application. Furthermore, the authority shall conduct a fair and comprehensive examination.

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696 ZZ (n 694) para 58.
698 Samba Diouf (n 663) para 62.
699 Samba Diouf (n 663) para 64.
700 Samba Diouf (n 663) para 65.
701 Samba Diouf (n 663) paras 66-69.
702 H.I.D. (n 533) paras 71-73.
703 H.I.D. (n 533) paras 74-75.
VI. Finding: Article 46(6) and (8) PD in light of the Charter

On the basis of the analysis in the preceding chapters, the interim proceedings regulated in Article 46(6) PD together with the (restricted) right to remain guaranteed by Article 46(8) PD can be interpreted in light of Articles 19(2) and 47 CFR. This interpretation allows to fill the provision with further detailed content by setting minimum requirements which Member States have to fulfil when implementing Article 46(6) and (8) PD. In the first place, the analysis of EU law in the stricter sense as interpreted by the CJEU (C.V.) will be deployed. Where this analysis leaves gaps, the analysis of the ECHR (C.I.), the Refugee Convention (C.II.), the CAT (C.III.), and the ICCPR (C.IV.) will be consulted. Due to its special significance as a source of inspiration for the interpretation of the Charter,\(^\text{704}\) and its binding force on the Member States,\(^\text{705}\) the findings following from the analysis of the ECHR will be attributed particular weight.

**Court**

Article 46(6) PD leaves discretion as to the body of appeal. However, it can be derived from CJEU case law that only a court within the meaning of EU law can rule on the question whether or not an applicant is allowed to remain during asylum appeal proceedings. The CJEU spelled out that both appeals against asylum rejections and appeals against return decisions must be made available before a judicial body (Gnandi, X and Y).\(^\text{706}\) Given the fact that the question whether or not a right to remain shall be granted is inextricably linked to the question whether or not a return decision can be enforced,\(^\text{707}\) interim proceedings should be treated like appeal proceedings brought against return decisions. Accordingly, the body of appeal within the scope of Article 46(6) PD must be a court within the meaning of EU law.

**Suspension of enforcement of return decision & guarantee**

As the request for interim relief pursuant to Article 46(6) and (8) PD can logically only be directed against the enforcement of a return decision,\(^\text{708}\) it must *ipso jure* suspend the enforcement that return decision (Abdida, Tall, Gnandi). By contrast, the appeal against the asylum rejection itself pursuant to Article 46(1) PD does not necessarily have to have suspensive effect in respect of the denial of international protection (Tall).\(^\text{709}\) Article 46(8) PD fulfills that requirement in that it guarantees the right to remain during the interim proceedings (i.e. suspension of the enforcement of a return decision). As this right to remain is provided for by law, it constitutes a *guarantee* within the meaning of ECHR case law (Gebremedhin, Čonka).\(^\text{710}\)

**Combination of asylum rejection and return decision**

The clear distinction between appeals against return decisions and appeals against asylum rejections (Tall) gets blurred, if (!) the adoption of an asylum rejection is combined with the adoption of a return decision (or if the return decision is issued by other means before the conclusion of the asylum appeal proceedings). This will particularly be the case if a Member

\(^{704}\) *Parliament v Council* [2006] (n 196) para 35.

\(^{705}\) chapter C.I.1.1.

\(^{706}\) chapters C.V.4.1.c. and C.V.4.1.e.

\(^{707}\) cf. Wittmann (n 10) 49 ascertains that Article 46(6) PD can logically only be directed against the enforceability of a return decision.

\(^{708}\) Wittmann (n 10) 49.

\(^{709}\) chapters C.V.4.1.a.-C.V.4.1.e.

\(^{710}\) chapter C.I.2.2.3.
State implements Article 6(6) RD. In such cases, the appeal against an asylum rejection must have suspensive effect in respect of the return procedure. In particular, all legal effects of the return decision have to be suspended during the time limit for lodging an appeal, and if an appeal has been lodged, pending the outcome of the appeal proceedings (Gnandi). This “freezing” of the return procedure ensures the right to remain during the mentioned period, namely during the whole asylum appeal proceedings. However, this right to remain is precisely not guaranteed by Article 46(6) and (8) PD. In such cases, the appeal against the asylum rejection does not suspend the enforcement of a return decision for the time of the whole asylum appeal proceedings. Nevertheless, appeals (or requests for interim relief) against the asylum rejections listed in Article 46(6) PD suspend all the legal effects of the return decision during the interim proceedings (C, J and S). These suspending effects avoid a situation of incompatible coexistence of a right to remain during the interim proceedings (Article 46(8) PD) and an enforceable return decision. Hence, the suspending effects ensure the full effectiveness of the interim proceedings. In particular, the right to remain pursuant to Article 46(8) PD is – effectively – ensured. In this regard, the analysis of C, J and S contends that the CJEU argued from the standpoint of the full effectiveness of the request for interim relief (despite paying lip service to the full effectiveness of the appeal against an asylum rejection). This is what the case before it demanded. However, when it comes to the question whether all the effects of a return decision have to be suspended during the time of the whole asylum appeal proceedings, even though a person only has a shorter right to remain pursuant Article 46(8) PD, the matter at stake will reach beyond the effective preservation of an already existing right to remain afforded by secondary EU law. Hence, the Court will have to achieve more than contextual coherence. It will have to genuinely deal with the full effectiveness of an appeal brought against an asylum rejection. If the absence of the suspension of the enforcement of a return decision during the complete asylum appeal proceedings (i.e. absence of full right to remain) does not call the validity of Article 46(6) and (8) PD into question, the Court’s assessment will have to centre on the requirements which shall be fulfilled nonetheless in order to ensure the full effectiveness of asylum appeal proceedings. In view of the absence of a right to remain during the asylum appeal proceedings in case the request for interim relief is rejected, particular procedural safeguards arguably have to be respected during the interim proceedings. Otherwise the appeal brought against an asylum rejection could be easily deprived of its effectiveness (e.g. if the request for interim relief is wrongly rejected).

When it comes to the question which procedural safeguards should be respected during the interim proceedings in cases where the appeal does not ensure the full right to remain during the whole asylum proceedings, one cannot (only) fall back on Gnandi and C, J and S. In Gnandi, the Court genuinely argued from the standpoint of the full effectiveness of the appeal against an asylum rejection. In light of this, it concluded that, inter alia, benefits under the RCD have to be granted and that new circumstances need to be taken into account. From C, J and S, it can be deduced that these safeguards need to be in place during the interim proceedings in cases of Article 46(6) and (8) PD. However, following the analysis of C, J and S, these safeguards ensure only the full effectiveness of interim proceedings. Hence, the findings of C, J and S cannot readily be applied to cases where the full effectiveness of the asylum appeal is at stake. As already mentioned, this was not at issue in C, J and S. Furthermore, even though

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711 chapter C.V.4.1.c.
712 chapters C.V.4.1.d. and C.V.4.1.e.
Gnandi – genuinely – argued from the perspective of the full effectiveness of the asylum appeal, the findings are not directly transference to a situation where the full right to remain during the asylum appeal proceedings is absent. The procedural safeguards put forward in Gnandi presuppose the existence of a right to remain during the whole asylum appeal proceedings. As argued in the analysis of Gnandi, the Court took this full right to remain even for granted when pronouncing the mentioned procedural safeguards. By contrast, if the full effectiveness of the asylum appeal is at stake in a situation where a person precisely does not have a right to remain during the asylum appeal proceedings, the procedural requirements which follow from the full effectiveness of the asylum appeal will differ in certain respects. The absence of a full right to remain during the whole asylum appeal proceedings affects the effectiveness of the asylum appeal. In particular, the principle of equality of arms (see Gnandi) could be affected if the applicant is not allowed to remain during the asylum appeal proceedings. Hence, certain procedural requirements have to be provided for which balance the absence of a full right to remain out. For instance, a thorough and full judicial review already during the interim proceedings will ensure the correctness of a decision on the request for interim relief. In order to identify concrete requirements which shall be fulfilled during interim proceedings, one can particularly draw on ECHR case law. The ECtHR assessed requests for interim relief in cases where the appeal itself did not have automatic suspensive effect.

**Full and ex nunc examination of facts and points of law** (Article 46(3) PD)

M.S.S. makes clear that the scope of judicial review cannot be reduced within interim proceedings. Otherwise a person could be expelled without having his claims under Article 3 ECHR examined as rigorously as possible. EU law should draw on this principle. Consequently, the right to obtain a full and ex nunc examination laid down in Article 46(3) PD should fully apply to the interim proceedings regulated in Article 46(6) PD. In this context, I refer to the requirements following from the judgments Alheto and Ahmedbekova. Furthermore, as the requirement of a judicial full and ex nunc examination is closely linked to the right to be heard, the findings of Sacko are also relevant for interim proceedings. ECHR case law adds that the burden of proof should not be too high as to hinder an examination on the merits (M.S.S.). Furthermore, courts should always take into account delayed submissions, even if they were not submitted during the administrative procedure (M.S.S., note however inconsistency with Ahmedbekova). In any case, a remedy must be reviewed on the merits before an expulsion takes place (Diallo). For this purpose, time limits in accelerated procedures should not be too short as to hinder applicants to submit relevant information (A.C.). In order to enable a court to review a request for interim relief on the merits, it should have sufficient time for taking a decision (A.C.).

The analysis of the Refugee Convention corroborates the finding that a full and ex nunc examination must be carried out during the interim proceedings.

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713 chapters C.V.4.1.d. and C.V.4.1.e.
714 chapter C.I.2.2.2.
715 chapter C.I.2.2.4.
716 chapter C.V.4.2.
717 chapters C.V.4.2. and C.V.4.4.
718 chapter C.I.2.2.4.
719 chapter C.V.4.2.
720 chapter C.I.2.2.4.
Finally, it should be noted that national security considerations do not allow for a restriction of the scope of judicial review. This follows from EU law itself (Z.Z.),\textsuperscript{722} the ECHR (Auad),\textsuperscript{723} the CAT (Agiza),\textsuperscript{724} and the ICCPR (Alzery).\textsuperscript{725}

**Reasonable time limits** (Article 46(4) PD)

It follows from ECHR case law that time limits with regard to various procedural steps have to be reasonable within interim proceedings as well. Time limits may be shorter in case of accelerated procedures, but they must enable applicants to lodge their request for interim relief in a sufficiently substantiated manner (I.M., M.E., K.K.). Applicants shall have sufficient time to submit details on points which are relevant for the interim proceedings (A.C.), and to gather the relevant information or evidence (I.M.).\textsuperscript{726}

Article 46(4) PD requires “reasonable time limits” in order to enable an applicant to effectively exercise his right to appeal. Against the background of ECHR case law, the provision should apply to Article 46(6) PD cases as well. This provision has to be interpreted in light of the ECHR case law referred to above, and the CJEU case law on the matter. *Samba Diouf* makes clear that a time limit for lodging an appeal shall enable a person to prepare and bring effective action. Depending on the circumstances of an individual case, a time limit of 15 days may prove insufficient for one person, even though it is accepted in general. Following *Danqua*, the difficult human and material situation in which asylum seekers may find themselves as well as the numbers of asylum seekers affected must be taken into account. A time limit of 15 days for lodging an asylum application is not sufficient to ensure that *all* applicants affected can genuinely prepare their application.\textsuperscript{727}

**“other necessary rules”** (Article 46(4) PD)

Article 46(4) PD states that Member States have to put in place “other necessary rules” in order to ensure that the applicant is able to exercise his right to appeal. Drawing on ECHR case law concerning interim proceedings, this provision should apply to the interim proceedings regulated in Article 46(6) PD. When implementing the provision, Member States will have to take into account the following findings derived from ECHR case law.

First, access to the request for interim relief should not be too complex (V.M., S.J.). Second, social assistance has to be granted during the time of interim proceedings (V.M., S.J.). Third, short time limits for lodging the request, deprivation of liberty resulting in poor access to legal and linguistic assistance are aspects which hinder the accessibility to an effective request for interim relief (I.M., cf. M.E.).\textsuperscript{728}

Article 46(7) PD recognises the accessibility problems which deprivation of liberty brings about (in case of border procedures). The restriction of freedom of movement pursuant to Article 7 of the RCD may, depending on the size and location of the area assigned to a person, equally hinder access to legal and language assistance. Hence, the additional procedural guarantees laid down in Article 46(7) PD should also apply to such cases.

\textsuperscript{722} chapter C.V.4.4.
\textsuperscript{723} chapter C.I.2.4.
\textsuperscript{724} chapter C.III.5.
\textsuperscript{725} chapter C.IV.4.
\textsuperscript{726} chapters C.I.2.2.4. and C.I.2.2.5.
\textsuperscript{727} chapter C.V.4.2.
\textsuperscript{728} chapter C.I.2.2.5.
The CAT adds that legal aid shall be granted in case of lack of language and legal skills combined with the absence of financial means (no permission to work or absence of social assistance). Furthermore, asylum seekers should be duly informed about available remedies and access to legal aid.\textsuperscript{729}

**Judicial review upon request or ex officio**

Article 46(6) PD allows for both options of judicial review upon request or ex officio. This is, in principle, in line with the ECHR. However, the ECtHR expressed concern about systems where interim relief has to be applied for and is decided on a case-by-case basis.\textsuperscript{730} Both options involve a decision on a case-by-case basis. However, application for interim relief can be avoided by opting for an ex officio review. Arguably, this option would be more preferable in light of the ECHR.

**When can Article 46(6) PD be applied?**

In general, the ECHR does not object to the application of accelerated procedures in case of manifestly unfounded, abusive, or subsequent asylum applications (not involving new circumstances). However, accessibility to a remedy with suspensive effect has to be guaranteed nonetheless.\textsuperscript{731} Similarly, the CJEU has approved the subjection of applicants coming from safe countries of origin to accelerated procedures, provided that sufficient procedural guarantees are in place.\textsuperscript{732}

The analysis of the Refugee Convention revealed that the national security ground laid down in Article 31(8)(j) PD has to be struck out. Allegations regarding national security or public order risks have to be assessed extensively. Therefore, Member States shall not subject such cases to accelerated procedures. Interim proceedings which are usually also characterised by speediness should therefore not apply to such cases either. However, UNHCR does not justify its statement that the two types of subsequent asylum applications listed in Article 41 PD can be exempted from the right to remain pursuant to Article 46(8) PD. Due to the lack of a (convincing) reasoning, UNHCR cannot be followed in this respect.\textsuperscript{733}

\textsuperscript{729} chapter C.III.4.
\textsuperscript{730} chapter C.I.2.2.2.
\textsuperscript{731} chapter C.I.2.4.
\textsuperscript{732} chapter C.V.4.5.
\textsuperscript{733} chapters C.II.6. and C.II.7.
D. German implementation of Article 46(6) and (8) PD

The aim of this chapter is to assess whether the German domestic implementation of Article 46(6) and (8) PD meets the EU standard set out in chapter C. For this purpose, it is necessary to first illustrate how Article 46(6) and (8) PD are implemented in German law.

The outline of this chapter is as follows. Chapter I illustrates how asylum rejections and deportation orders interrelate in general under German law. In order to grasp procedural rules which are comparable to the implementation of Article 46(6) and (8) PD, chapter II will briefly set out how Article 46(5) PD is implemented in German law. The implementation of Article 46(6) and (8) PD will be illustrated and analysed in chapter III. Finally, chapter IV assesses the German implementation in light of Union law.

I. Relation between asylum rejections and deportation orders

The relation between asylum rejections and deportation orders is mainly characterised by their simultaneous adoption in one administrative act (1.), and the fact that the effects which a deportation order entails are dependent on the respective underlying asylum rejection (2.).

1. Simultaneous adoption of asylum rejection and deportation order

If an application for asylum is rejected, and the applicant is not in possession of a residence permit, the BAMF issues a deportation order (“Abschiebungsandrohung”). This deportation order constitutes a return decision within the meaning of the RD. German law made use of Article 6(6) RD which allows for the simultaneous adoption of asylum rejection and return decision. An asylum rejection is hence adopted in conjunction with a deportation order.

The fact that an asylum rejection and a deportation order are issued in one administrative verdict does not mean that such a verdict constitutes one decision. By contrast, both decisions – the asylum rejection and the deportation order – can be challenged separately. Subject matter of the appeal against an asylum rejection is the obligation to issue an administrative decision granting asylum. This appeal has to be combined with an appeal against the deportation order. Subject matter of this latter appeal is the annulment of the deportation order.

2. Different forms of asylum rejections and varying effects of deportation order

The effects of a deportation order differ depending on the respective asylum rejection adopted. It should be distinguished between, on the one hand, ordinarily unfounded asylum ap-
applications, and on the other hand, certain inadmissible, manifestly unfounded and subsequent asylum applications. In general, it can be ascertained that the effects of a deportation order adopted together with the former are less restrictive than the effects of a deportation order issued together with the latter. Only the latter are relevant to grasp the German implementation of Article 46(6) and (8) PD. The effects of a deportation order in case of ordinarily rejected asylum applications will therefore only cursorily be illustrated (II.), before turning to certain inadmissible, manifestly unfounded and subsequent asylum applications (IV.).

II. Implementation of Article 46(5) PD

The purpose of this chapter is to give an idea of domestic procedural rules which are comparable to the implementation of Article 46(6) and (8) PD, yet less restrictive. Effects of deportation orders adopted together with ordinary asylum rejections offer a valuable insight into the German implementation of Article 46(5) PD (at least at first judicial instance).

1. Personal scope of ordinarily unfounded asylum applications

The BAMF rejects an asylum application as ordinarily unfounded if none of the criteria for inadmissibility or manifest unfoundedness applies, and if a person does not fulfil the requirements for asylum status, refugee status, subsidiary protection status, or national prohibitions of deportation.

2. Effects of deportation order and appeal

In case of ordinary asylum rejections, a deportation order is adopted notifying a voluntary departure period of 30 days. An appeal can be brought against the decision rejecting the application for asylum, and the deportation order within a time limit of two weeks after receipt of the verdict. The appeal has to be substantiated within one month of the receipt. Under German law, suspensive effect of appeals against decisions under the Asylum Act (AsylG) is conceptualised as being the exception; non-suspensive appeals are the rule in asylum cases. Appeals against deportation orders in case of ordinary asylum rejections are part of these exceptions. If an asylum application is ordinarily rejected, the appeal against the deportation order has suspensive effect. The effect of such an appeal is in particular the hindrance of the enforceability of the obligation to leave (“Ausreisepflicht”). The voluntary departure period is tied to the enforceability of the obligation to leave. Hence, suspension of the enforceability of the obligation to leave entails the hindrance of the voluntary departure

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744 Section 29 (1) AsylG regulates inadmissibility decisions.
745 see chapter D.III.1.1.
747 Section 59(1) AufenthG in conjunction with Section 38(1) AsylG.
748 Section 74(1) AsylG.
749 Section 74(2) AsylG.
750 Martin Seeger, “§ 75 AsylG. Aufschiebende Wirkung der Klage” in Andreas Heusch and Winfried Kluth (eds), BeckOK Ausländerrecht (22nd edn, Beck 2019) § 75 AsylG paras 1-3.
751 Section 75(1) AsylG in conjunction with Section 38(1) AsylG.
752 Heusch, Das neue Asylrecht (n 737) 457; cf. Hörich (n 736) 122.
753 cf. Section 59 (1) sentence 6 AufenthG states that the voluntary departure period will start to run anew when the obligation to leave becomes enforceable again.
In case the appeal is also rejected as ordinarily unfounded, the voluntary departure period of 30 days will only start to run after the expiry of the one-month time limit for lodging an application for admission to the second instance court. Thus, during the time of the first instance appeal proceedings (until expiry of the voluntary departure period) a deportation cannot be carried out. The suspensive effect of an appeal against a deportation order in case of ordinary asylum rejections guarantees therefore the right to remain during the first instance asylum appeal proceedings.

Not all first instance judgments can be appealed against at second judicial level. And even if they are contestable, the applicant has to apply for leave for further appeal before the higher administrative court. The application has to be made and substantiated within one month of the receipt of the decision of the administrative court, and has automatic suspensive effect for another three months. However, the higher administrative court can order further suspensive effect upon request.

### III. German implementation of Article 46(6) and (8) PD

In case of manifestly unfounded, certain inadmissible and inadmissible subsequent asylum applications, the effects of a deportation order are more restrictive. These restrictions affect, inter alia, the right to remain during asylum appeal proceedings. Section 36 AsylG is the central provision in this respect. Section 36 AsylG taken in conjunction with Section 80(5) Act on Administrative Judicial Procedure (VwGO) implement Article 46(6) and (8) PD.

Before discussing the procedural effects of a deportation order in such cases, including Section 36 AsylG, the personal scope of the asylum applications affected will be illustrated (chapter 1). The procedural restrictions surrounding Section 36 AsylG will extensively be discussed in chapter 2. Crucial parts of this provision can be traced back to the constitutional change from 1993. In its landmark judgment dating back to 1996, the BVerfG clarified certain aspects of the constitutional basis which underlies Section 36 AsylG. As these clarifications are relevant to date, they will be highlighted in chapter 3. Thereafter, chapter 4 will centre on the concept of obviousness developed by the BVerfG in a different line of case law. The two lines of case law will be compared and analysed in chapter 5. Conclusions will be drawn in chapter 6.

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755 Section 38 (1) sentence 2 AsylG, Section 78(2)-(4) AsylG; However, if the appeal is rejected as manifestly unfounded or inadmissible, the judgment cannot be contested. That means that the voluntary departure period will start to run after the receipt of this judgment (Section 38 (1) sentence 2 AsylG, Section 78 (1) AsylG).
756 Section 58 (1) sentence 1 AufenthG requires inter alia the enforceability of the obligation to leave and the expiry of the voluntary departure period, if granted.
758 Section 78 AsylG.
759 Section 78(4) AsylG.
760 Section 80b VwGO; Bundesverwaltungsgericht 1 C 6.16 (09.08.2016) para 15.
763 Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996).
1. Personal scope

Section 36 AsylG affects asylum applications which are rejected as manifestly unfounded (1.1.), inadmissible pursuant to Article 29(1) no. 2 and 4 (referred to as “certain inadmissible applications”) (1.2.), and inadmissible subsequent asylum applications (1.3.). The following sections will show to what extent this personal scope is in line with the grounds listed in Article 46(6) PD.\(^\text{764}\)

1.1. Manifestly unfounded applications

According to Article 32(2) PD, unfounded asylum applications may be considered manifestly unfounded if one of the circumstances listed in Article 31(8) PD applies. Unlike its predecessor provision in the PD (2005), the listed grounds in Article 31(8) PD are exhaustive.\(^\text{765}\) Sections 30 and 29a AsylG list circumstances which lead to asylum applications being considered as manifestly unfounded under German law. The grounds listed therein have to correspond to Article 31(8) PD in order to comply with Union law.\(^\text{766}\) This is, however, not always the case, as will be seen.

Section 30 AsylG is structured in two parts. The first part, Section 30(1) and (2), encompasses situations of factual manifest unfoundedness. The second part, Section 30(3), lists grounds for legal fictions of manifest unfoundedness. This implies that ordinarily unfounded asylum applications are deemed to be manifestly unfounded (fiction) if one of the listed grounds applies.\(^\text{767}\)

a. Factual manifest unfoundedness

Section 30(1) and (2) AsylG state:

“(1) An asylum application shall be considered manifestly unfounded if the prerequisites for granting asylum status and the prerequisites for granting international protection are obviously not met.

(2) In particular, an asylum application shall be manifestly unfounded if it is obvious from the circumstances of the individual case that the foreigner is remaining in the federal territory only for economic reasons or in order to evade a general emergency situation” (emphasis added).

The grey legal concept of “obviousness” has been interpreted by the BVerfG. The understanding of “obviousness” of the BVerfG will be illustrated in chapter 4, which examines its impact on interim judicial proceedings.

Section 30(2) AsylG names two examples for grounds which are not relevant for asylum or international protection: economic reasons and evasion of a general emergency situation (e.g. natural disaster or epidemic). If an asylum seeker’s account exclusively contains such reasons, the asylum application is manifestly unfounded. However, it should be taken into account that such reasons can become relevant if they target a group of persons in a discriminatory way.\(^\text{768}\)

\(^\text{764}\) chapter B.III.

\(^\text{765}\) Peers, EU Immigration and Asylum Law (n 69) 258: Article 31(8) APD states “if” instead of “in particular”. Furthermore, the deletion of several grounds as well as “the objective of establishing common standards and high quality first instance decisions speaks in favour of an exhaustive examination”.


\(^\text{767}\) Heusch in BeckOK Ausländerrecht (n 766) § 30 AsylG paras 13 and 16.

\(^\text{768}\) Heusch in BeckOK Ausländerrecht (n 766) § 30 AsylG paras 27-29.
b. Manifest unfoundedness as legal fiction

Section 30(3) AsylG lists seven additional grounds for manifest unfoundedness. These grounds work as legal fictions. That is, the existence of one of the grounds does not render the asylum application factually manifestly unfounded (in contrast to Section 30(1) and (2) AsylG). However, an – unfounded – asylum application is deemed to be manifestly unfounded due to the existence of one of the grounds. Hence, the rejection as manifestly unfounded presupposes an asylum application being unfounded in the first place. Only if additionally one of the seven grounds applies, an asylum application can be rejected as manifestly unfounded. The existence of one of the seven grounds entails the degradation of an ordinarily unfounded rejection to a manifestly unfounded rejection. This precondition of (ordinarily) unfoundedness is also required by Article 32(2) PD.770

As already mentioned above, not all grounds comply with Article 31(8) PD. However, it would be beyond the scope of the thesis to discuss them in detail. I will therefore only refer to the pertinent discussions. Some grounds do not contain the same strict wording as their corresponding grounds in Article 31(8) PD. This holds for the implementation of Article 31(8)(c), and (e) PD. One ground and part of another ground are not even based on Article 31(8) PD. Moreover, Article 46(6)(a) PD explicitly excludes Article 31(8)(h) PD from the scope of Article 46(6) PD.775 This exemption has not been implemented in German law with regard to Section 30(3) no. 5 AsylG, which contains the infringement of the obligation to cooperate by not having immediately applied for asylum. Adaptions of national legislation are necessary in respect of these Union law inconsistencies.

c. Further grounds for manifest unfoundedness

Sections 29a and 30(4) AsylG contain two further grounds for manifest unfoundedness. Section 29a AsylG regulates that asylum applications lodged by persons coming from designated safe countries of origin shall be rejected as manifestly unfounded if they do not rebut the presumption of safety. This is in accordance with Article 31(8)(b) PD. However, the ground laid down in Section 30(4) AsylG is problematic. It states that an unfounded asylum application shall be rejected as manifestly unfounded, if the requirements of Article 33(2) RC or Article 1F RC are met.776 The former relates to national security risks, and is therefore encompassed by Article 31(8)(j) PD. By contrast, as elaborated under C.II.6., the exclusion clause Article 1F RC does not relate to a security risk which an applicant constitutes for the receiving state.

769 Heusch in BeckOK Ausländerrecht (n 766)§30 AsylG para 30; see also Verwaltungsgericht Würzburg W 8 S 18.32428 (04.12.2018) para 16.
770 Schröder in Hoffmann Ausländerrecht (n 766) § 30 AsylG para 42.. Schröder in Hoffmann Ausländerrecht (n 766) § 30 AsylG para 27 commenting on Section 30(3) no. 3 AsylG. Schröder in Hoffmann Ausländerrecht (n 766) § 30 AsylG para 17 commenting on Section 30(3) no. 1 AsylG. Schröder in Hoffmann Ausländerrecht (n 766) § 30 AsylG para 38 commenting on Section 30(3) no. 7 AsylG. Schröder in Hoffmann Ausländerrecht (n 766) § 30 AsylG para 31 commenting on Section 30(3) no. 5 AsylG. chapter B.III.; Peers, EU Immigration and Asylum Law (n 69) 260.
776 Actually, Section 30(4) AsylG states: “Furthermore, an unfounded asylum application shall be rejected as manifestly unfounded, if the requirements of Section 60 (8), first sentence, of the Residence Act or Section 3 (2) [Asylum Act] are met [...]”. Section 60 (8) first sentence AufenthG implements Article 33(2) RC (Winfried Möller, „§ 60 AufenthG. Verbot der Abschiebung“ in Rainer M. Hoffmann (ed), Ausländerrecht (2nd edn, Nomos 2016) § 60 AufenthG para 42), and Section 3(2) AsylG implements Article 1 F RC (Verwaltungsgericht Berlin 36 L 358.18 A (24.09.2018) paras 13-14).
It is therefore not encompassed by Article 31(8)(j) PD.\textsuperscript{777} In addition to that, it has been argued in chapter C.II.6. that both grounds relating to national security risks and grounds relating to Article 1F RC demand a comprehensive assessment on a case-by-case basis. Accelerated procedures must not be applied in such cases. Given that the German interim proceedings are characterised by acceleration (“Eilverfahren”), the same holds for the application of interim proceedings. They must not be applied to such cases. Thus, Section 30(4) AsylIG has to be struck out.

1.2. Inadmissible applications pursuant to Section 29(1) no. 2 and 4 AsylIG

Two kinds of inadmissibility decisions are affected by Section 36 AsylIG, namely the decisions pursuant to Section 29(1) no. 2 and 4 AsylIG. They have to be in compliance with the grounds listed in Article 46(6) PD.

Section 29(1) no. 2 AsylIG affects applicants who have already been granted international protection by another Member State. This is in line with Article 33(2)(a) PD\textsuperscript{778} which is among the grounds listed in Article 46(6)(b) PD. Section 29(1) no. 4 AsylIG affects applicants who have already been safe from persecution in another third country (than a safe third country), and this country is willing to readmit the applicant. The concept of safety from persecution in another third country\textsuperscript{779} falls within the scope of Article 35 PD. This provision contains the concept of first country of asylum.\textsuperscript{780} Article 33(2)(b) PD allows Member States to reject an asylum application as inadmissible in case the first country of asylum concept applies. This inadmissibility decision, in turn, can be found in Article 46(6)(b) PD. Hence, Section 29(1) no. 4 AsylIG, as such, is in accordance with the PD. However, it is beyond the scope of this thesis to ascertain whether the national concept of safety from persecution in another third country meets all the conditions of the first country of asylum concept in Article 35 PD.

1.3. Subsequent asylum applications

A subsequent asylum procedure shall only be conducted if matters of fact or law have changed, or new evidence has come to light after the rejection of a first asylum application has become incontestable (Section 71 AsylIG). If these requirements are not fulfilled, the BAMF decides not to further conduct a subsequent asylum procedure, and rejects the application as inadmissible pursuant to Section 29(1) no. 5 AsylIG.\textsuperscript{781} This is in accordance with Articles 40 PD and 33(2)(d) PD which allow for the adoption of an inadmissibility decision in such cases.\textsuperscript{782} The latter provision, in turn, is among the grounds listed in Article 46(6)(b) PD. Thus, the subjection of such subsequent applications to the restricted right to remain pending the appeal proceedings regulated in Section 36 AsylIG\textsuperscript{783} is in accordance with the PD.

\textsuperscript{777} chapter C.II.6.; diverging opinion: Schröder in Hoffmann Ausländerrecht (n 766) § 30 AsylIG para 41 argues that Article 1F RC grounds fall under Article 31(8)(j) PD (without giving further reasons for this view).

\textsuperscript{778} Carsten Günther, “§ 29 AsylG. Unzulässige Anträge” in Andreas Heusch and Winfried Kluth (eds), BeckOK Ausländerrecht (22nd edn, Beck 2019) § 29 AsylIG para 76.

\textsuperscript{779} The concept of safety from persecution in another third country than a safe third country is laid down in Section 27 AsylIG, which Section 29(1) no. 4 AsylIG refers to.

\textsuperscript{780} Roman Fränkel, “§ 27 AsylG. Anderweitige Sicherheit vor Verfolgung” in Rainer M Hoffmann (ed), Ausländerrecht (2nd edn, Nomos 2016) § 27 AsylIG, para 1.


\textsuperscript{783} Section 71(4) AsylIG refers to Section 36 AsylIG.
2. Effects of the deportation order

The following sections illustrate the effects of a deportation order which is adopted together with one of the asylum rejections described above (manifestly unfounded, certain inadmissible, inadmissible subsequent applications). The implementation of Article 46(6) and (8) PD, Section 36 AsyIG combined with Section 80(5) VwGO, will be of particular relevance. Some particularities apply to deportation orders adopted together with inadmissible subsequent asylum applications. They will therefore be highlighted separately in an insertion under 2.2. Apart from these particularities, the following analysis equally applies to inadmissible subsequent applications.

2.1. Enforceability of a deportation order and appeal

In case of the above mentioned asylum rejections, a deportation order is issued notifying a voluntary departure period of one week. The time limit for lodging an appeal against the verdict is also one week. An appeal has to be lodged against the asylum rejection (oblige the authority to grant a certain protection status), and against the deportation order (annulment). However, the appeal against the deportation order does not have suspensive effect. The consequence of this lack of suspensive effect is that the deportation order becomes enforceable with the receipt of the verdict. The enforceability at this moment in time has been called into question by Gnandi and C, J and S, as will be seen under 2.2. The obligation to leave occurs and becomes enforceable in the same moment in time. Due to the link between the obligation to leave and the voluntary departure period, the receipt of the verdict triggers also the voluntary departure period (before Gnandi and C, J and S, see 2.2). This starting point of the voluntary departure period entails that the deportation can, in principle, be carried out one week after of the receipt of the verdict in spite of pending appeal proceedings.

785 Section 59(1) AufenthG in conjunction with Section 36(1) AsyIG.
786 Section 36(3) sentences 1 and 10 AsyIG in conjunction with Section 74(1) AsyIG.
788 Section 75 AsyIG.
790 Section 67(1) no 4 AsyIG, Section 58(2) sentence 2 AufenthG; Wittkopp (n 55) 328.
791 Section 36(1) AsyIG in conjunction with Section 75 AsyIG; Müller, Hoffmann Ausländerrecht (n 787) § 36 AsyIG para 9; Wittmann (n 10) 51-52 saying that this is not in compliance with conditions Gnandi sets; Wittkopp (n 55) 328 expressing doubts regarding the compliance with the conditions set in the Gnandi judgment.
792 Stephan Hocks, "§ 58 AufenthG. Abschiebung" in Rainer M. Hoffmann (ed), Ausländerrecht (2nd edn, Nomos 2016) para 14. According to Section 58(2) sentence 2 AufenthG, the obligation to leave is enforceable as soon as the decision denying asylum is enforceable. In case of manifestly unfounded and inadmissible asylum applications, the decision rejecting asylum becomes enforceable with the receipt of the verdict. Thus, the obligation to leave becomes also enforceable with the receipt of the asylum rejection. The enforceability of the obligation to leave is, together with the expiry of the voluntary departure period, one of the preconditions for a deportation pursuant to Section 58(1) AufenthG. Therefore, a deportation can, in principle, be carried out after the expiry of one week following the receipt of the rejection.
2.2. Request for interim relief and right to remain

In order to avoid deportation in such cases, German law provides the person concerned with the possibility to request interim relief. The legal basis for this is Section 36(3) AsylG in conjunction with Section 80(5) VwGO. With this remedial measure, the person requests a court to endow the appeal against the deportation order with suspensive effect. The time limit for lodging such a request runs simultaneously with the time limit for lodging an appeal; it is one week. While this request does not have an impact on the enforceability of the deportation order, it suspends the deportation (execution) for the time a court reviews the request for interim relief. Section 36 AsylG states:

“[…] No deportation shall be permitted prior to a court decision if the request has been filed in time. […] This shall not affect the enforceability of the deportation order”.

The fact that the request for interim relief only suspends the deportation, but not the enforceability of the deportation order (i.e. return decision) is not consistent with Gnandi and C, J and S (“all the legal effects” of the return decision must be suspended). This has induced national courts to argue that Section 36 AsylG has to be interpreted in conformity with Union law to the extent that a request suspends the enforceability of a deportation order. Furthermore, Section 36 AsylG does not contain sufficient guarantees with regard to another aspect. The provision does not ensure the suspension of a deportation (actually: enforceability of the deportation order) during the time limit for lodging an appeal, as required by Gnandi and C, J and S. Arguing from the standpoint of full effectiveness of the request for interim relief, the administrative court Minden interpreted Section 36 AsylG as to suspend the effects of a deportation order a fortiori until the expiry of the time limit for lodging such a request.

As a consequence, asylum seekers have a right to remain from the receipt of the asylum rejection until the expiry of the time limit for requesting interim relief, and if such a request has been lodged, until a decision on that request. Beyond that, this right to remain is directly followed by a factual right to remain until the expiry of the voluntary departure period. This follows from Article 7 RD in conjunction with Article 8(2) RD, the latter of which states:

“If a Member State has granted a period for voluntary departure in accordance with Article 7 [between 7 and thirty days], the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period” (emphasis added).

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793 Müller, Hoffmann Ausländerrecht (n 787) § 36 AsylG para 11.
794 Section 36(3) AsylG in conjunction with Section 74(1) AsylG.
795 Section 36(3) AsylG.
796 Section 36(3) sentence 11 AsylG.
797 Section 36(3) sentence 8 AsylG.
798 Gnandi (n 144) para 62; C, J and S (n 2) para 51.
800 cf. Gnandi (n 144) para 61; cf. C, J and S (n 2) para 50.
802 Verwaltungsgericht Minden 10 K 2632/17.A (16.04.2019) para 75 interpreting Article 46(8) PD and Section 36(3) sentence 8 AsylG.
803 Verwaltungsgericht Minden 10 K 2632/17.A (16.04.2019) para 77 referring only to Article 7 RD, but not to Article 8 RD.
804 Article 7(4) RD states: “If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.” As Germany did not refrain from granting a period of voluntary departure in
As stated under 2.1., the voluntary departure period starts to run with the receipt of an asylum rejection. This domestic rule is not in compliance with *Gnandi and C, J and S.* Nevertheless, the rule can be interpreted consistently with Union law. According to this interpretation, the period of voluntary departure must not start to run before the expiry of the time limit for requesting interim relief. If such a request has been made, the period can only start to run after the outcome of these interim proceedings. A deportation can only take place after the expiry of the voluntary departure period.

**Insertion: Inadmissible subsequent asylum applications – particularities**

Subsequent asylum applications which do not involve new elements or circumstantial changes are rejected as inadmissible pursuant to Section 29(1) no. 5 AsylG. In such cases, the BAMF has discretion to decide between two options regarding the deportation order. For one thing, Section 71(4) AsylG refers to Section 36 AsylG. This implies the adoption of a (new) deportation order notifying a voluntary departure period of one week. If this option is chosen, all of the other procedural steps described in this chapter apply to inadmissible subsequent asylum applications as well. For another thing, the BAMF can make use of the option offered by Section 71(5) AsylG. This provision states that the adoption of a new deportation order and setting of a new voluntary departure period is not required. This option involves an unsettled point regarding the question which kind of request for interim relief is permitted in such cases. Nevertheless, it is clear that some kind of request for interim relief is needed to ensure that the deportation is not carried out, since the appeal itself does not have suspensive effect.

**Implications of Gnandi, C, J and S, and J.N.**

At first glance, the option in Section 71(5) AsylG runs counter the finding of *Gnandi and C, J and S* regarding the hindrance of the voluntary departure period. However, in light of J.N., it is questionable whether this finding can directly be transferred to inadmissible subsequent applications. *J.N.* concerned an asylum seeker, who lodged a subsequent asylum application, and enjoyed the right to remain during the asylum procedure pursuant to Article 9 PD. The CJEU held that a return procedure which has already been initiated before the introduction of the subsequent asylum application “must be resumed […] as soon as the application for international protection […] has been rejected at first instance”. More precisely, the return procedure must be continued “at the stage at which it was interrupted […] [by] the application for international protection”. Arguing from the standpoint of effective removal policy, one main objective of the RD, it would be contrary to this objective if the return pro-

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805 Wittmann (n 10) 52; see also Verwaltungsgericht Arnsberg 3 L 1935/18 (17.12.2018) paras 11-14.
808 Dickten, *BeckOK Ausländerrecht* (n 781) § 71 AsylG paras 31-38 for further details.
809 Wittkopp (n 55) 328 fn 11; Wittmann (n 10) 53.
810 *J.N.* (n 204) paras 21-36.
811 *J.N.* (n 204) paras 75 and 80.
812 *J.N.* (n 204) paras 75 and 80.
procedure “could not be resumed at the stage at which it was interrupted but had to start afresh”.

Following J.N., the voluntary departure period does precisely not have to start to run (only) after the expiry of the time limit for lodging an appeal, as suggested by Gnandi and C, J and S. Hence, it remains to be seen how Gnandi and C, J and S can be reconciled with J.N. in respect of inadmissible subsequent asylum applications. If J.N. asserts itself, the option in Section 71(5) AsylG not to issue a new deportation order and not to set a new voluntary departure period would arguably be in conformity with Union law.

2.3. Time limits: substantiation of request & court decision

When adopting one of the asylum rejections at issue, the BAMF has to send a copy of the file to the applicant and the court. This serves the practicability of the interim proceedings which are characterised by acceleration. The court should (“soll”) decide on the request for interim relief within one week. In order to be able to fulfil this obligation, the court should have access to the file as soon as it is confronted with a request for interim relief. The receipt of the asylum rejection together with the file is also important for the applicant. He has practically only one week to substantiate his request for interim relief. Notwithstanding its obligation to send the asylum rejection together with the case file, the BAMF often does not. It mostly sends the file to the court only upon the court’s request. However, this would constitute a reason for the court to prolong the time limit for passing a decision.

2.4. Oral hearing and reasoning

The court should (“soll”) take a decision on the request for interim relief on the basis of a written procedure; an oral hearing in which the (main) appeal is assessed at the same time is not permitted. Even though an oral hearing is not excluded by law, it will only take place in exceptional cases. The court does not have to state the reasons for the rejection of a request for interim relief. Instead it can refer to the reasoning of the BAMF in the administrative verdict in so far as it agrees with that reasoning.

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813 J.N. (n 204) para 76.
814 Gnandi (n 144) para 62; cf. C, J and S (n 2) 50-51 referring to Gnandi (n 144) para 62.
815 cf. Wittkopp (n 55) 328 fn 11; Wittmann (n 10) 53.
816 Section 36(2) AsylG.
817 Section 36(3) sentence 5 AsylG.
819 Pietzsch, BeckOK Ausländerrecht (n 818) § 36 AsylG para 7.1.
820 Jan Bergmann, “§ 36 Verfahren bei Unzulässigkeit nach § 29 Absatz 1 Nummer 2 und 4 und bei offensichtlicher Unbegründetheit” in Jan Bergmann and Klaus Dienelt (eds), Ausländerrecht Kommentar (12th edn, C.H.Beck 2018) § 36 AsylG para 8; Pietzsch, BeckOK Ausländerrecht (n 818) § 36 AsylG para 17.1. The law does not set a specific time limit for the submission of the reasoning to the request for interim relief. However, the fact that the court has to decide after one week of the expiry of the one-week time limit for lodging such a request, necessarily implies that the substantiation of the appeal has to be submitted within one week as well.
821 Section 36(3) sentences 6 and 7 AsylG; Pietzsch, BeckOK Ausländerrecht (n 818) § 36 AsylG, paras 8 and 22.1.
822 Section 36(3) sentence 4 AsylG.
824 Section 77(2) AsylG.
2.5. New elements and delayed submissions

In case a court takes the decision without an oral hearing (which is usually the case in interim proceedings), it decides on the basis of the circumstances at the time of the decision. New elements which arise after the adoption of the deportation order can therefore be invoked. Additionally, if the request for interim relief has been rejected, an applicant can lodge an application for annulment or amendment of the decision. One of the following conditions has to be met for a successful application. First, circumstances have changed since the decision on the request for interim relief has been taken. Second, an applicant can rely on circumstances which already existed at the time of the interim proceedings, but only if he shows that the initial retention was not his fault. This is considered to be in compliance with the requirement following 

2.6. Consequences of a rejecting judicial decision

In case a court rejects a request for interim relief, the voluntary departure period of one week starts to run with the receipt of the negative judicial decision (since Gnandi). The rejecting decision cannot be contested before a second instance administrative court. Therefore the court is not required to disclose the reasoning immediately to the applicant. It is provisionally sufficient to inform the applicant only about the operative provisions of the decision. This implies that the applicant can be deported without having received the reasoning. In any case, the court is obliged to disclose the reasoning at a later moment. This is particularly necessary as the constitutional complaint before the BVerfG is still (the only) available remedy in such cases.

3. Constitutional change and its impact on interim proceedings

In addition to the procedural aspects described above, the constitutional amendments dating back to 1993 are relevant for the interim proceedings to date. The right to asylum enshrined in Article 16a GG has been subject to a major change in that year. In the preceding year 1992, the number of asylum seekers arriving in Germany rose rapidly, whilst at the same time the recognition rate was considerably low (4,3%). This has been interpreted as a sign that many asylum seekers had no reason to apply for asylum. As a consequence, the German legislator decided to restrict the right to asylum with regard to several amendments. These amendments include, inter alia, the procedural restrictions affecting interim proceedings according to Arti-
This constitutional provision is relevant to grasp the German implementation of Article 46(6) and (8) PD as Section 36(4) AsylG is based on Article 16a(4) GG. The content of both Article 16(4) GG and Section 36(4) AsylG will be analysed in chapters 3.1.–3.4. Since the “serious doubts” standard plays a significant role in these provisions, it will have to be demarcated from the “no doubts” standard involved in the concept of “obviousness” in case of manifestly unfounded asylum applications (4.). Having established the BVerfG’s understanding of the two different standards, it will be analysed how first instance administrative courts apply these standards (5.). Finally, the findings will be summarised (6.).

3.1. Content of Article 16a(4) GG and Section 36(4) AsylG

The asylum seekers’ right to remain until a legally valid decision on their asylum application is rooted in the right to asylum itself. This right to remain is restricted to a certain extent by Article 16a(4) GG.

The provision regulates judicial interim proceedings directed against the enforcement of measures terminating a stay. As a preliminary point, it should be noted that measures terminating a stay encompass deportation orders. Article 16(4) GG states:

“In the cases specified by paragraph (3) of this Article [asylum seekers from safe countries of origin who are not able to rebut the presumption of safety] and in other cases that are manifestly unfounded or considered to be manifestly unfounded, the enforcement of measures to terminate an applicant’s stay may be suspended by a court only if serious doubts exist as to the lawfulness of these measures; the scope of review may be limited, and delayed submissions may be disregarded. Details shall be determined by a law” (emphasis added).

Accordingly, interim proceedings dealing with the right to remain may be subject to three procedural restrictions. In this regard, Article 16(4) GG modifies the right to an effective remedy enshrined in Article 19(4) GG in three respects. First, the suspension of the enforcement of measures terminating stay requires serious doubts ("ernstliche Zweifel") regarding the lawfulness of such measures. Second, the legislator may limit the scope of review during the interim proceedings. Third, delayed submissions may be precluded within the scope of these interim proceedings. Details regarding particularly two of the three procedural modifications are determined by Section 36(4) AsylG. The content of Article 36(4) AsylG can be split in three parts: limitation of the judicial scope of review (sentence 2), preclusion of delayed submissions (sentence 3), and the serious doubts standard (sentence 1). They will be examined in the order mentioned.

3.2. Limitation of judicial scope of review

The legislator made use of the possibility offered by Article 16a(4) GG to limit the judicial scope of review in interim proceedings. Section 36(4) sentence 2 AsylG states:

“Facts and evidence not stated by the persons involved shall not be considered unless they are obvious or known to the court”.  

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834 Joachim Henkel, "Das neue Asylrecht" (1993) 42 Neue Juristische Wochenschrift 2705, 2705.
835 Bundesverfassungsgericht, 2 BvR 1516/93 (14.05.1996), para 88.
837 Heusch, Das neue Asylrecht (n. 737) para 362.
838 Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 98.
The provision limits the inquisitorial system in that the court may only take into account submissions of the parties concerned, and information that is obvious or known to the court. Information regarding the situation in the country of origin is considered to be known to the court, if the respective reports can be found in the database of the court or in other court decisions. As the database contains multiple reports, it is assumed that only current basic and background knowledge can be considered known the court. Furthermore, information which is easy to access, such as reliable press releases, is understood to be obvious. Own investigations of the court which reach beyond the mentioned information is not permitted; sentence 2 leaves no discretion in this respect.

3.3. Preclusion of delayed submissions

Article 16(4) GG authorises the legislator to adopt a provision, according to which delayed submissions can be precluded during the interim proceedings. The outcome can be found in Section 36(4) sentence 3 AsylG which states:

“The introduction of facts and evidence which were not considered in the administrative procedure pursuant to Section 25 (3) and facts and circumstances within the meaning of Section 25 (2) which the foreigner did not produce in the administrative procedure may be left unconsidered by the court if the court decision would otherwise be delayed”.

This provision leaves the court discretion as to the preclusion of two kinds of submissions. First, Section 25(3) AsylG allows the BAMF to preclude circumstances which were known to the applicant at the time of the administrative interview, but which were invoked by the applicant at a later stage. Section 36(4) sentence 3 AsylG, in turn, allows the court to preclude such facts and circumstances within the scope of interim proceedings. Second, circumstances within the meaning of Section 25(2) AsylG mean circumstances other than those pertaining to asylum status or international protection. Hence, national prohibitions of deportation (“nationale Abschiebungsverbote”) are meant. They are relevant as soon as an applicant puts forward health issues or other existential problems which trigger protection under the ECHR. If such circumstances were not put forward during the administrative procedure, they can be precluded by the court within the interim proceedings. However, such preclusions presuppose that the applicant was informed about the consequences of such an infringement of the obligation to cooperate. Moreover, preclusion is only allowed if the consideration of such circumstances would lead to a delay of the interim proceedings.

840 Müller, Hoffmann Ausländerrecht (n 787) § 36 AsylG para 29; Pietzsch, BeckOK Ausländerrecht (n 818) § 36 AsylG para 30.
841 Müller, Hoffmann Ausländerrecht (n 787) § 36 AsylG para 30 and case law cited; Pietzsch, BeckOK Ausländerrecht (n 818) § 36 AsylG para 32 and case law cited.
842 Müller, Hoffmann Ausländerrecht (n 787) § 36 AsylG para 31; Bergmann, Ausländerrecht Kommentar (n 820) § 36 AsylG para 24.
844 Fränkel, Hoffmann Ausländerrecht (n 843) § 25 AsylG para 13.
845 Pietzsch, BeckOK Ausländerrecht (n 818) § 36 AsylG paras 34-35; Müller, Hoffmann Ausländerrecht (n 787) § 36 AsylG para 33.
3.4. Serious doubts standard

According to Article 16a(4) GG, a court may only suspend a deportation if there are serious doubts regarding the lawfulness of the measure terminating the applicant’s stay. Section 36(4) AsylG takes this rule over without determining further details regarding the concept of serious doubts, as can be seen:

“An order to suspend deportation may be issued only if there are serious doubts as to the lawfulness of the administrative act” (emphasis added).

In order to grasp the standard of serious doubts, the judgment of the BVerfG dating back to 1996 on the introduction of Article 16a(4) GG is more illuminating. The Court pronounced that “the weight of factors which give rise to doubts is decisive”.846 Furthermore, it gave the definition: “serious doubts within the meaning of Article 16(4) GG exist when considerable grounds argue that the measure will probably not endure a legal assessment”.847 It announced that the serious doubts standard constituted a deviation from its former line of case law. According this former line of case law, a court had to be “convinced of the correctness of the manifest unfoundedness verdict of the BAMF” in order to terminate the right to remain.848 This is different now. Article 16(4) GG modifies the right to an effective remedy enshrined in Article 19(4) GG due to, as the Court states, the huge influx of asylum seekers.849 With the new standard of serious doubts, the right to remain will already end when there are “no serious doubts” as to the lawfulness of the decision.850

Article 16a(4) GG, including the serious doubts standard, is justified by a balancing exercise between the interest of the state to deal with high numbers of asylum seekers, and the asylum seekers’ interest to be effectively protected from persecution.851 In case of clearly hopeless asylum applications, the interim right to remain has to step back. That is why Article 16(4) GG limits the right to remain for asylum seekers whose applications have been rejected as manifestly unfounded.852 Only this group of asylum seekers can be expected to await the outcome of an appeal in their countries of origin.853 The idea behind manifest unfoundedness is that past experience shows that the immediate enforcement of a measure terminating stay is not at the expense a well-founded claim for asylum. Alternatively, the public interest in the immediate enforcement prevails due to other reasons (e.g. national security).854 Hence, the balancing exercise occurs under circumstances which represent the existence of a high certainty that an asylum rejection does not infringe a well-founded claim for asylum. From the

847 Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 99: ”’Ernstliche Zweifel’ im Sinne des Art. 16a Abs. 4 Satz 1 GG liegen dann vor, wenn erhebliche Gründe dafür sprechen, daß die Maßnahme einer rechtlichen Prüfung wahrscheinlich nicht standhält” (translated).
848 Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) paras 88 and 98 (translated), citing: Bundesverfassungsgericht 2 BvR 1413/83 (02.05.1984).
849 Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 98.
853 Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 94.
BVerfG’s reasoning it can be deduced that this high certainty is the reason why only the high standard of serious doubts can tilt the balance in favour of the applicant.  

In sum, the BVerfG ruled that Article 16(4) GG is in compliance with the so-called eternity clause, and therefore constitutional.

a. Serious doubts standard – a higher standard of proof than real risk?

Möller makes clear that the serious doubts standard does not imply a limitation of the investigation of the facts of the case, since it constitutes a standard of proof. The application of the serious doubts standard presupposes the full knowledge of the facts of the case. The question arises thus when the serious doubts standard is established in order that the court is in a position to suspend the enforcement of the deportation order. Doubts (alone) regarding the lawfulness of a measure terminating stay are not sufficient for the suspension of such a measure; they have to be serious. This follows clearly from the wording of Article 16a(4) GG. Furthermore, the BVerfG points to the deviation from its former line of case law, which required conviction. Having regard to this former line of case law, Randelzhofer explains that conviction of the lawfulness of the decision required “no doubts” regarding the correctness of the manifestly unfounded asylum rejection. It was not sufficient if the lawfulness of the measure was “equally likely as unlikely” in order to be convinced of its correctness. He argues that the BVerfG raises this standard on the basis of the balancing exercise described above. Hence, the serious doubts standard is more difficult to meet. Following this, Pietzsch deduces that serious doubts cannot be established if the unlawfulness of the measure is (only) equally likely as unlikely. This mathematical “balance of probabilities” test to grasp the standard of serious doubts would be rejected by the Federal Administrative Court (Bundesverwaltungsgericht; BVerwG), if the eligibility for a protection status was at stake during the interim proceedings. “A well-founded fear of an event […] can exist even if from a `quantitative’ or mathematical viewpoint there is less than a 50% probability that the event will occur”. The BVerwG made this clear with regard to the standard of “substantial probability” (“beachtliche Wahrscheinlichkeit”). This standard is considered to correspond to the real risk standard of Article 3 ECHR, and the well-founded fear standard of Article 1A RC. So, if Pietzsch is right, the serious doubts standard would be higher than the substantial probability standard, to the extent that the unlawfulness of the deportation order shall reach a more than 50% probability.

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857 Neither the right to asylum nor the right to an effective remedy enshrined in the GG stood in the way of Article 16a (4) GG, as the latter itself is a constitutional norm. Nevertheless, the BVerfG was confronted with the question whether Article 16a(4) GG was in compliance with the so-called eternity clause laid down in Article 79(3) GG. This eternity clause forbids constitutional amendments affecting the principles enshrined in Article 1 GG (human dignity) and Article 20 GG (principle of the rule of law and principle of social justice and welfare). See to that extent Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) paras 98, 102 and 141; Bundesverfassungsgericht 2 BvR 1938/93, 2 BvR 2315/93 (14.05.1996) paras 199-204.  
859 Albrecht Randelzhofer, “Artikel 16a Abs. 4 GG. Ernstliche Zweifel als Beurteilungsmaßstab” in Roman Herzig and others (eds), Grundgesetz: Kommentar Maunz/Dürig (78th supp, Beck 2016) paras 155-156 (translated).  
860 Pietzsch, BeckOK Ausländerrecht (n 818) § 36 AsylG para 37.  
861 cf. Berlit (n 57) 113-114.  
862 Bundesverwaltungsgericht 10 C 33.07 (07.02.2008) para 37 (unofficial translation).  
863 Bundesverwaltungsgericht 10 C 33.07 (07.02.2008) para 37 (unofficial translation).  
864 Berlit (n 57) 117.
Even if a pure balance of probabilities test is not appropriate\textsuperscript{865} to test the serious doubts standard, the question still arises whether the serious doubts standard is higher than the substantial probability standard (i.e. real risk). Remarkably, the BVerfG’s general approach to test the serious doubts standard resembles the test which the BVerwG deploys to test the substantial probability standard. According to the latter, “a `qualifying’ approach must be adopted, in the sense of a weighting and weighing of all ascertained circumstances and their significance”.\textsuperscript{866} In its 1996 decision on the serious doubts standard, the BVerfG held that the “weight of factors is decisive”, and that “considerable grounds [have to] argue that the [deportation order] will probably not endure a legal assessment”.\textsuperscript{867} These similar general approaches to test the two standards as well as the fact that the serious doubts standard involves a probability test suggest that the serious doubts standard, indeed, constitutes a standard of proof (cf. Möller). Essentially, it does not necessarily constitute a standard of proof in the sense of a pure balance of probabilities test. Nevertheless, this finding brings us back to the question: is the serious doubts standard higher than the substantial probability standard (i.e. real risk)?

A clear guidance regarding the real risk standard cannot be derived from ECHR case law, as the ECtHR decides on a case-by-case basis on this matter.\textsuperscript{868} However, at least Saadi makes clear that occurrence of ill-treatment does not have to be “more likely than not” in order meet the real risk standard.\textsuperscript{869} If Pietzsch is right, and the unlawfulness of the deportation order has to be more than equally likely as unlikely (after a weighting of factors) to meet the serious doubts standard, it would be higher than the real risk standard. No complete conclusions can be drawn in this respect, as a comprehensive analysis of case law would be required to answer this question. Nevertheless, it can be ascertained that the wording of the serious doubts standard suggests a higher standard of proof in comparison to the substantial probability standard (i.e. real risk).

Admittedly, the subject matter of the serious doubts standard is not the probability of a future occurrence of serious harm, but the lawfulness of a deportation order. Hence, this different subject matter might be a good reason for the application of a higher standard. However, given that the deportation order at issue is based on an asylum rejection, the question of future existence of serious harm is inextricably linked to its lawfulness. Nevertheless, an understanding of the precise subject matter of the request for interim relief provides a more differentiating insight.

b. Subject matter of the request for interim relief

The BVerfG spelled out that the immediate enforcement of a measure terminating stay constitutes the subject matter of the request for interim relief.\textsuperscript{870} Given that the immediate enforcement of such a measure follows from the manifest unfoundedness verdict, the starting point of the interim proceedings must be the question whether the BAMF correctly rejected the asylum applications as manifestly unfounded.\textsuperscript{871} Hence, the serious doubts standard applies par-

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{865} cf. Hathaway and Foster, \textit{The Law of Refugee Status} (n 422) 115 with regard to the well-founded fear standard under the Refugee Convention.
\item\textsuperscript{866} Bundesverwaltungsgericht 10 C 33.07 (07.02.2008) para 37 (unofficial translation, emphasis added).
\item\textsuperscript{867} Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 99 (translated, emphasis added).
\item\textsuperscript{868} De Weck (n 19) 234.
\item\textsuperscript{869} De Weck (n 19) 234 citing \textit{Saadi v Italy} App no 37201/06 (ECtHR, 28 February 2008) para 140.
\item\textsuperscript{870} Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 93.
\item\textsuperscript{871} Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 93.
\end{itemize}
\end{footnotesize}
particularly to the *manifest unfoundedness* verdict. The administrative court cannot grant interim relief “as long as [it] does not have serious doubts regarding the lawfulness of the manifest unfoundedness verdict”. Having regard to subsequent asylum applications, the serious doubts standard addresses the requirements for carrying out another asylum procedure (e.g. new circumstances). Even though the asylum rejection itself is not subject matter of the interim proceedings, the interim proceedings shall nonetheless center on the prospects of success of the asylum claim.

c. Serious doubts, substantial probability and subject matter(s)

Coming back to the serious doubts standard, it can be ascertained that the subject matter is not the deportation order as such, but the manifest unfoundedness verdict on which it is based. Arguable, a court has to apply two different standards. For one thing, it has to entertain serious doubts regarding the lawfulness of the manifest unfoundedness verdict in order to grant suspensive effect. For another thing, it has to apply the substantial probability standard to the asylum claim itself. The fact that the deportation order is based on a *manifestly unfounded* asylum rejection may be a reason to deploy a higher standard of proof, yet only with regard to the matter of manifest unfoundedness. However, in practice, the two different subject matters cannot always be easily separated from each other. Which standard does a court apply if, for example, an asylum seeker has to rebut the presumption of safety regarding his country of origin? The question of refutation inevitably plays a role in both the manifestly unfoundedness verdict and the prospect of success of an asylum claim.

The judicial assessment of a request for interim relief becomes even more complex when another standard is added. This additional standard concerns the establishment of the facts of the case with regard to manifestly unfounded asylum applications. This standard will be analysed in the following section.

4. The concept of obviousness in case of manifestly unfounded asylum rejections

The concept of obviousness is only relevant for manifestly unfounded asylum rejections pursuant to Sections 30 and 29a AsylG, as briefly mentioned under 1.1.a. This concept entails procedural safeguards which administrative courts have to comply with when confirming the administrative manifest unfoundedness verdict. The safeguards apply not only to main appeal proceedings, but also to interim proceedings, as will be seen below.

In its well-established case law on the concept, the BVerfG starts by referring to the fact that only one judicial instance is guaranteed to asylum applicants whose asylum applications have been rejected as manifestly unfounded. This involves the danger that wrong judicial decisions cannot be corrected by a further judicial instance. In order to counteract the risk of wrong incontestable decisions, the BVerfG requires procedural guarantees which shall ensure the correctness of manifest unfoundedness decisions. Even though more than one instance cannot be demanded, the lack of a further judicial review has repercussions on procedural safeguards

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872 Möller, *Hoffmann Ausländerrecht* (n 858) § 16a GG para 50; Heusch, *Das neue Asylrecht* (n 737) para 362.
873 Bundesverfassungsgericht 2 BvR 1794/08 (03.09.2008) para 3 (translated).
874 Bundesverfassungsgericht 2 BvR 2131/95 (16.03.1999) para 22; see also Bundesverfassungsgericht 2 BvR 1262/07 (12.02.2008) paras 15-16.
875 Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 93.
876 Bundesverfassungsgericht 2 BvR 1516/93 (14.05.1996) para 95.
877 Randelzhofer (n 859) para 157 (translated).
878 Bundesverfassungsgericht 1 BvR 1470/82 (12.07.1983) para 60.
regarding the establishment of the truth.\textsuperscript{879} Accordingly, the Court relied on the following definition of manifest unfoundedness in asylum cases:

\begin{quote}
"The appeal is manifestly unfounded if, following a comprehensive assessment of the facts of the case pursuant to the inquisitorial system, the correctness of the factual findings of the court can reasonably not be doubted. Furthermore, the generally acknowledged interpretation of the law, following the present state of jurisprudence and science, need to clearly argue for a rejection of the appeal regarding such facts of the case".\textsuperscript{880}
\end{quote}

This definition was put forward in 1983,\textsuperscript{881} and has been repeated ever since.\textsuperscript{882} It is applicable in spite of the constitutional amendments from 1993.\textsuperscript{883} The question which particular procedural safeguards are required is addressed in the following paragraphs.

The BVerfG held that certain conditions regarding the reasoning of the judgment and the investigation of the facts are demanded in order to counteract the risk of wrong incontestable decisions.\textsuperscript{884} Administrative courts have to explain why they reject an appeal as manifestly unfounded and not only as ordinarily unfounded. In this regard, a court shall set out the standards which justify a rejection as manifestly unfounded, and engage on the basis of these criteria with the individual facts of the case. The pure repetition of the law is not enough.\textsuperscript{885} Furthermore, a court can neither rely on the use of synonyms (such as “evident” or “clear”) nor on a reference to the “full conviction of the court”.\textsuperscript{886}

The BVerfG developed the described requirements in its case law on (main) appeal proceedings, in which administrative courts rejected the appeal as manifestly unfounded. In a recent case, the BVerfG made clear that the requirements equally apply to the assessment of the manifest unfoundedness within interim proceedings.\textsuperscript{887} As seen above, the subject matter of the interim proceedings is the manifest unfoundedness verdict adopted by the BAMF. In this respect, “the court cannot only be satisfied with the prediction of the expected lawfulness of the manifestly unfoundedness. Instead the question of manifest unfoundedness, if confirmed, has to be answered exhaustively with binding nature for the interim proceedings”. Therefore the administrative court has to go “beyond a summary examination”. It has to assess whether the BAMF has exhaustively examined all submitted and accessible evidence, and whether the decision reveals why the application is rejected as manifestly unfounded and not only as ordi-

\textsuperscript{880} Bundesverfassungsgericht 1 BvR 1470/82 (12.07.1983) para 62 (translated, emphasis added).
\textsuperscript{881} Bundesverfassungsgericht 1 BvR 1470/82 (12.07.1983) para 62.
\textsuperscript{883} Bundesverfassungsgericht 2 BvR 1452/98 (23.09.1998) para 2.
nearly unfounded. Finally, the court has to ascertain whether the manifestly unfoundedness can still be upheld.888

In the case before it, the BVerfG found that the administrative court was wrong in merely referring to the reasoning of the BAMF, as the reasoning of the BAMF consisted only of the repetition of the law. Section 30(3) no 1 Asylum Act, the ground for manifest unfoundedness in case of contradictions regarding key aspects of the asylum account, was at stake. Even though the applicant immediately explained these contradictions, the BAMF did not take that into consideration and stuck to its finding of contradictory statements. The BVerfG criticised that the administrative court did not engage with the explanations invoked by the applicant (which he also gave within the scope of the interim proceedings).889

In sum, the absence of a second judicial instance requires a comprehensive assessment of the facts (already during the interim proceedings). The purpose of this is to ensure that there are no doubts (cf. definition quoted above) regarding the correctness of the factual findings underlying the manifest unfoundedness verdict. The judicial reasoning is an essential safeguard to ensure the correctness. A court has to engage with the individual circumstances of the case on the basis of the criteria of manifest unfoundedness. Only such a reasoning allows to understand why an application is not ordinarily unfounded, but manifestly unfounded. Furthermore, a court has to investigate the facts exhaustively; it has to go beyond a summary examination. In case it merely refers to the reasoning of the BAMF, the court has to make sure that the BAMF fulfilled the mentioned requirements regarding the reasoning and the investigation of the facts.

5. Serious doubts standard and obviousness in first instance judicial decisions

The aim of this section is to see how first instance administrative courts apply the serious doubts standard and the procedural requirements following from the concept of obviousness. All of the analysed decisions repeat the task to assess whether serious doubts exist regarding the lawfulness of the deportation order.890 In order to deny interim relief, it is sufficient if there are no serious doubts regarding the lawfulness of the manifest unfoundedness verdict.891 However, only some courts go on to genuinely engage with the requirements following from the concept of obviousness.892 According to this concept, a court should have no doubts regarding the correctness of the facts which underlie the manifest unfoundedness.893 For instance, doubts regarding authenticity of a document shall not lead to manifest unfoundedness. Instead a forgery has to be proved.894 In some cases, administrative courts which refer to the

893 chapter D.III.5.
concept of obviousness deal with the circumstances of the individual cases and explain why they uphold the manifest unfoundedness verdict. However, in other cases, administrative courts only repeat the definition of the serious doubts standard and/or the concept of obviousness, without dealing with the individual circumstances in their reasoning. Instead they refer to the reasoning of the administrative decision rejecting the application as manifestly unfounded. This is in itself not unconstitutional. If the administrative decision rejecting an application as manifestly unfounded clearly reveals the reasons for such rejection, and if the court follows the reasoning of the BAMF, it can simply refer to that administrative reasoning. However, this practice endangers the substantive correctness of judicial decisions which uphold a manifest unfoundedness verdict. As set out above, the BVerfG’s established case law requires administrative courts to reason such decisions in order ensure the correctness of these – incontestable – decisions. The possibility to refer only to the reasoning of the BAMF holds the potential of undermining this requirement.

6. Summary of findings and assessment

There are two different standards following from the two different lines of case law of the BVerfG. On the one hand, a court should have no doubts regarding the correctness of the underlying facts arguing for manifest unfoundedness in order to be able to uphold the manifest unfoundedness verdict. On the other hand, it is sufficient if the court has no serious doubts regarding the lawfulness of the manifest unfoundedness verdict in order to uphold the verdict and deny suspensive effect. While the no doubts standard concerns the investigation of the facts, the no serious doubts standard concerns the standard of proof which has to be applied on the basis of these facts. Hence, the court has to be certain (no doubts) about the underlying facts, but the standard of proof to convince the court of the unlawfulness of the manifest unfoundedness is high (doubts alone are not sufficient).

However, these two different standards do not explain the different approaches of the administrative courts. They can be explained by other inherent ambiguities. On the one hand, courts are obliged to engage with the individual circumstances of the case and reason why they confirm the manifest unfoundedness verdict. On the other hand, courts have the possibility to simply refer to the reasoning of the BAMF. This allows them to solely repeat the definition of the serious doubts standard and/or obviousness and deny suspensive effect. Another ambiguity concerns the investigation of the facts of the case. On the one hand, courts are required to exhaustively assess all facts of the case with binding nature for the interim pro-

896 Verwaltungsgericht München M 25 S 13.30166 (12.03.2013); Verwaltungsgericht Augsburg Au 6 S 13.30321 (09.10.2013); Verwaltungsgericht Ansbach AN 14 K 06.31035 (19.06.2007); Verwaltungsgericht Gelsenkirchen 7a K 2375/16.A (18.05.2016).
898 chapter D.III.4.
899 chapter D.III.3.4.
900 chapters D.III.4.-5.
901 chapters D.III.3.4.-5.
902 chapter D.III.5.
903 chapter D.III.4.
904 chapter D.III.2.4.
ceedings. On the other hand, the nature of the interim proceedings generally requires only a summary assessment of facts and law. It is difficult to see how this latter characteristic can be reconciled with the requirement to go “beyond a summary assessment”. In an own attempt to grasp the concept, it could be deduced that the serious doubts standard constitutes a standard of proof. Its wording and the deviation of the BVerfG’s former line of case law suggest that the serious doubts standard is higher than the substantial probability standard. Whereas this latter standard applies to the question whether or not serious harm will probably occur upon return, the former applies to the question whether or not a manifest unfoundedness verdict is probably unlawful. Hence, the subject matters of the two standards of proof are different. For this reason, the (higher) serious doubts standard may be justified with regard to the lawfulness of the deportation order (which is based on the manifest unfoundedness verdict). However, in practice it is difficult to separate between the asylum claim itself and the manifest unfoundedness part of the asylum claim. This brings uncertainty about as to how the two different standards should be applied with regard to the two interrelated subject matters. In addition to that, the serious doubts standard is still very unclear.

Due to these uncertainties and the lack of clear guidance, courts have a wide discretion when applying the standard which may result in the serious doubts standard being applied in a subjective manner. This was precisely not the objective of the BVerfG which stated that “an internal state of doubts which is not measurable” is not decisive. Furthermore, the risk of subjective applications of the serious doubts standard could be exacerbated by the fact that only one judge decides on the request for interim relief. This is not compensated by harmonising higher instance decisions. In fact, requests for interim relief risk being at the mercy of subjective decisions of judges who can simply follow the BAMF. This, in turn, risks wrong incontestable decisions on requests for interim relief.

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905 chapter D.III.4.
909 chapter D.III.3.4.
910 cf. Randelzhofer (n 859) paras 154-155.
912 Section 76 AsylG; Ulrich Maidowski and Jens Hanschmidt, "Flüchtlingsrecht vor Gericht. Professionelle Rechtsberatung und Rechtsführung" (2017) 7-8 Beilage zum Asylmagazin 27, 29.
IV. German implementation in light of Union law

Having examined how Article 46(6) and (8) PD has to be interpreted in light of the Charter, this chapter will finally assess whether the German implementation thereof complies with this Union law standard. As a preliminary point, it should be noted that German law made use of the option in Article 6(6) RD. An asylum rejection is adopted together with a deportation order (i.e. return decision) in one administrative act. Therefore, all the procedural safeguards following from Gnandi and C, J and S are relevant for the assessment.

Guarantee

If an applicant lodges a request for interim relief, his right to remain during the interim proceedings is guaranteed by law (Section 36 AsylG). This is in line with Union law (Tall). However, Section 36 AsylG does not guarantee the suspension of the deportation during the period for lodging the request. Even though an interpretation in light of Union law ensures the suspension also during this period, it is not explicitly laid down in law. Therefore, it is not guaranteed as required by the ECHR. Textual adaptations of Section 36 AsylG are necessary in this respect.

Suspension of all the legal effects of a return decision

Section 36 AsylG suspends only the deportation (execution). In view of Gnandi and C, J and S, the enforceability of the deportation order has to be suspended. This is due to the fact that all legal effects of a return decision have to be suspended. Section 36 AsylG has to be adapted in this regard. Furthermore, the voluntary departure period must not start to run before the expiry of the time limit for requesting interim relief, and if a request has been lodged, after the conclusion of the interim proceedings. The German rule, according to which the voluntary departure period starts to run with the receipt of the asylum rejection, is not consistent with Union law.

Scope of review

From the analysis of Article 46(6) and (8) PD in light of Union law follows that the judicial scope of review cannot be restricted. This holds even if national security is at stake. Furthermore, the ECtHR makes clear that interim measures cannot be treated as subsidiary measures when it comes to the judicial scope of scrutiny. Section 36(4) sentence 2 AsylG, which limits the judicial scope of review to the submissions of the parties and to what is obvious and known to the court, is at variance with the full judicial review required by Union law.

New evidence

According to German law, courts have to take into account new elements which came to light after the adoption of the asylum rejection and return decision during the interim proceedings.

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913 chapter D.I.1.
914 chapters C.V.4.c.-d.
915 chapters D.III.2.1.-2.
916 chapter C.VI.
917 chapter C.I.2.2.
918 chapter C.I.2.2.3.
919 chapters C.I.2.1.-3.
920 chapter C.VI.d.
921 chapter C.I.2.2.4.
922 chapter D.III.3.2.
Additionally, if the request for interim relief has been rejected, such elements are also taken into account after the conclusion of the interim proceedings.\footnote{chapter D.III.2.5.} This is in line with Union law which obliges courts to take into account new circumstances that came to light after the adoption of the asylum rejection (\textit{Alheto})\footnote{chapter C.V.4.2.} and return decision (\textit{Gnandi}).\footnote{chapter C.I.2.2.4.}

### Delayed submissions

Section 36 AsylG allows for the preclusion of delayed submissions which were known during the administrative interview, but invoked at a later stage of the administrative procedure. The court does not have to take into account such submissions during the interim proceedings, if certain requirements are met. Notably, Section 36 AsylG allows for such preclusion only if otherwise the interim proceedings were delayed.\footnote{chapter D.III.3.3.} This is not in accordance with \textit{Ahmedbekova}, which allows courts to preclude delayed submissions if they are submitted at a late stage of the appeal proceedings.\footnote{chapter C.V.4.2.} Hence, applicants cannot be reproached for having submitted elements at a late stage of the administrative procedure. Additionally, \textit{M.S.S.} obliges courts to systematically take into account submissions which have not already been invoked at administrative level.\footnote{chapter C.V.4.2.} Bearing in mind that Germany is bound by the ECHR, it should strike the preclusion clauses out. After all, they do not comply with the conditions for preclusion set out by the CJEU in \textit{Ahmedbekova}.

German law allows for the review of delayed submissions which are relied upon for the first time after the rejection of a request for interim relief (if the initial retention can be excused).\footnote{chapter D.III.2.4.} This rule can be welcomed. Remarkably, this rule does not only guarantee the full effectiveness of interim proceedings (which are already concluded at this point), but in particular the full effectiveness of the asylum appeal. In this respect, German law pays deference to the full effectiveness of the appeal against an asylum rejection.\footnote{chapter C.I.2.2.4.}

### Hearing before a court

Section 36 AsylG does not forbid a court to order a hearing. Nevertheless, it reduces a court’s discretion in that it does not state “can” instead of “should”.\footnote{chapter D.III.2.5.} This does not comply with Union law. Following \textit{Sacko}, it is up to the full discretion of the court to decide whether it is in a position to carry out a full and \textit{ex nunc} assessment without ordering a hearing.\footnote{chapter D.III.2.4.}

### Standard of proof

Following \textit{M.S.S.}, the scope of judicial scrutiny shall not be limited in interim proceedings. Requests for interim relief do not constitute subsidiary measures in this regard.\footnote{chapter C.V.4.4.} Arguably, the same holds for the standard of proof. That is, the real risk standard shall not be increased in interim proceedings.

When assessing a request for interim relief, a court has to entertain \textit{serious doubts} regarding the lawfulness of the deportation order to be able to endow the appeal with suspensive effect.
If this standard is higher than the substantial probability (i.e. real risk) standard, it has to be abandoned. The subject matter of the serious doubts standard, the manifest unfoundedness verdict, is closely intertwined with the asylum rejection. Therefore, its application involves the risk that asylum claims are affected by a higher standard of proof than a real risk standard.\textsuperscript{934}

**Accessibility**

The time limit for lodging – and substantiating – a request for interim relief is one week.\textsuperscript{935} This short time limit can, in individual cases, lead to inaccessibility of a request for interim relief. For instance, asylum seekers coming from designated safe countries of origin are obliged to live in one accommodation during the time of both the asylum procedure and interim proceedings.\textsuperscript{936} During this time they are not allowed to work,\textsuperscript{937} and receive asylum seeker benefits in kind (benefits in kind have priority in these cases).\textsuperscript{938} They are only allowed to move freely within the area assigned to them.\textsuperscript{939} If they want to see a lawyer, they first have to ask the BAMF for permission to leave the area.\textsuperscript{940} The short time limit for lodging a request for interim relief combined with the lack of financial assistance in cash, and the restricted freedom of movement renders the request for interim relief inaccessible in practice (cf. I.M., V.M.).\textsuperscript{941} What is more, lawyers only have one week from the receipt of the verdict for the substantiation of the request.\textsuperscript{942} Migration lawyers who are already overburdened will be reluctant to accept mandates of asylum seekers affected by Section 36 AsylG.

**Risk of error**

Two aspects increase the risk of error in the German system where interim relief has to be requested and is decided on a case-by-case basis (Čonka).\textsuperscript{943} First, the possibility of a court to refer to the reasoning of the BAMF\textsuperscript{944} holds the potential that courts do not engage with the individual circumstances of the case, but instead fall back on the repetition of the law or general definitions.\textsuperscript{945} Arguably, courts may be particularly inclined to make use of this possibility when they are under time pressure. In case of interim proceedings, which are also called "accelerated proceedings" ("Eilverfahren"), courts have principally only one week to decide on the request for interim relief.\textsuperscript{946} This may affect the requirement of a close and rigorous scrutiny (A.C.).\textsuperscript{947} Second, the summary assessment of facts and law, which is a general characteristic of interim proceedings, undermines the requirement following from the BVerfG’s

\textsuperscript{934} cf. chapter D.III.3.4.
\textsuperscript{935} chapters D.III.2.1. and D.III.2.3.
\textsuperscript{936} Section 47(1a) AsylG.
\textsuperscript{937} Section 61(1) (see also no. 3) and (2) AsylG.
\textsuperscript{938} Section 3(2) Asylum Seeker Benefits Act (Asylbewerberleistungsgesetz) new announcement 05.08.1997 Federal Law Gazette (Bundesgesetzblatt) I page 2022, most recently changed through Article 5 of the law 15.08.2019 Federal Law Gazette I page 1294.
\textsuperscript{939} Section 56 AsylG.
\textsuperscript{940} Section 57 AsylG.
\textsuperscript{941} chapter C.I.2.2.5.
\textsuperscript{942} chapter C.I.2.2.5.
\textsuperscript{943} chapter D.III.2.3.
\textsuperscript{944} chapter C.I.2.2.2.
\textsuperscript{945} chapter D.III.2.4.
\textsuperscript{946} chapters D.III.4.6.
\textsuperscript{947} chapter D.III.2.3.
case law to exhaustively examine all the facts with binding nature for the interim proceedings. This affects equally the requirement of a close and rigorous scrutiny.

Proceedings as a whole
In addition to all of the above discussed procedural restrictions, two further features may lead to the request for interim relief being considered ineffective. First, the rejection of a request for interim relief cannot be contested at a second judicial instance. This implies that wrong decisions on requests for interim relief cannot be corrected at a second level. Second, in principle, only one judge decides on the request for interim relief. Due to the uncertainties evolving around the grey legal concept of serious doubts, this may lead to subjective decisions and multiple different legal interpretations which are not harmonised by a higher judicial level.

948 chapter D.III.6.
949 chapter D.III.2.6.
950 chapter D.III.6.
E. Conclusion

By deploying an origins, objectives, wording, and context related interpretation in combination with an interpretation in light of the Charter, this thesis approached the following research question.

*How does Article 46(6) and (8) PD have to be interpreted and implemented in light of the principle of non-refoulement (Article 19(2) CFR) and the right to an effective remedy (Article 47 CFR), and does the German implementation meet this standard?*

Before addressing the German implementation, I will first summarise the results regarding the first part of the research question.

The restricted right to remain regulated in Article 46(6) and (8) PD is the outcome of the tension between, on the one hand, the interest of Member States to quickly terminate an unmerited stay, and on the other hand, their duty to comply with international obligations, in particular ECHR case law. Furthermore, the general objectives of the PD find expression in the provision. The preamble of the PD is infiltrated by the tension between swift conduct of asylum procedures and correct determination of international protection status. Given the fact that wrong administrative decisions are only corrected during appeal proceedings, suspensive effect of an asylum appeal is an important guarantee. However, the prolongation of the right to remain during appeal proceedings involves high costs for Member States regarding the reception conditions. Therefore, the guarantee of suspensive effect shall be restricted in case of asylum applications which are considered abusive or involve national security risks. Against this background, the following purpose of the provision could be identified. The purpose of interim proceedings is to counterbalance the risk of wrong administrative decisions which are not subject to an appeal with suspensive effect, and may therefore result in refoulement. They should be conducted more swiftly than appeal proceedings in order to do justice to Member States’ interest to quickly terminate stays of certain asylum seeker groups.

The interpretation of Article 46(6) and (8) PD in context of other rights to remain regulated in the PD revealed that restriction of freedom of movement, short time limits, and vulnerability (in particular unaccompanied minors) are aspects which hinder the accessibility of interim relief. In case Article 46(6) PD applies to situations characterised by these aspects, the additional procedural guarantees laid down in Article 46(7) PD have to be provided for. These additional procedural guarantees encompass access to interpretation and legal assistance, at least one week to request interim relief, and full judicial review (fact and law).

When interpreting Article 46(6) and (8) PD in light of the Charter, ECHR case law is an important source of interpretation. In case of an arguable claim under Article 3 ECHR, asylum seekers have to be provided with an appeal that has automatic suspensive effect in respect of the implementation of the expulsion decision. In principle, it is sufficient if only the request for interim relief has automatic suspensive effect. However, the ECtHR has repeatedly expressed concern about systems where stays of execution must be applied for and are decided on a case-by-case basis. Such systems involve a risk of error, in particular, if a subsequent more thorough judicial examination reveals a real risk of ill-treatment. Article 46(6) and (8) PD incorporate such a system. Despite acknowledging the risk of error in such a system, the ECtHR has not called the validity of such a system into question to date. Arguably, the ECtHR will only call the validity of such a system into question if a certain risk of error (which is in practice not negligible) can be proven. In any case, such systems have to ensure that the
request for interim relief fulfills all requirements flowing from Article 13 ECHR. The ECtHR made clear that interim measures cannot be considered as subsidiary measures. In this regard, it already had occasion to pronounce that the scope of scrutiny cannot be restricted within interim proceedings. An arguable claim under Article 3 ECHR must always be reviewed as rigorously as possible on the merits before an expulsion takes place. This requirement entails (at least) that the burden of proof should not be too high, courts shall take into account delayed submissions, time limits must not hinder the submission of relevant points, nor shall time limits hinder courts from reviewing the request for interim relief on the merits. Besides, automatic suspensive effect does not only have to be guaranteed by law. A remedy with suspensive effect must also be accessible in practice. Aspects which have to be taken into account when assessing the accessibility include freedom of movement, time limits for lodging a request, material assistance, language and legal assistance, complexity of the remedy. Provision for an appeal with suspensive effect at second instance may play a role in the assessment of the overall effectiveness. In general, the ECtHR does not oppose the application of accelerated procedures to repetitive or manifestly unfounded asylum applications. However, these procedures shall not hinder the accessibility of a remedy with automatic suspensive effect. Furthermore, the ECtHR made clear that the requirement of independent, close and rigorous review must always be complied with, no matter what a person did to warrant expulsion. This holds even for cases involving national security risks to receiving states.

The analysis of the Refugee Convention, the CAT and the ICCPR yielded the following supporting or additional results. The analysis of the Refugee Convention supports the finding regarding the scope of judicial review. UNHCR explicitly requires a full and ex nunc examination of both facts and law within the interim proceedings. From the analysis of the CAT follows that eligibility for legal aid may also constitute an aspect which has to be taken into account when assessing the accessibility of an appeal. Lack of permission to work or lack of social assistance combined with poor language and legal skills will render a remedy inaccessible, if legal aid is not granted. Furthermore, the CAT supports the view that the scope of judicial review cannot be restricted in cases involving national security risks. Due to the nature of the right at stake, the ICCPR requires a remedy before a judicial body of appeal. Furthermore, the HRC made clear that national security risks do not justify derogation from suspensive effect.

The analysis of EU law in the stricter sense as interpreted by the CJEU so far yielded the following results. Tall makes clear that appeals against asylum rejections do not have to be endowed with suspensive effect. However, following Gnandi, appeals against asylum rejections shall have suspensory effects in respect of return procedures, if (!) asylum rejection and return decision are adopted simultaneously (or if the return decision is issued by other means before the conclusion of the asylum appeal proceedings). The suspension of all legal effects of the return decision entails the suspension of the enforcement of a return decision. In this vein, the right to remain during the asylum appeal proceedings is effectively guaranteed. Thus, an appeal against an asylum rejection has automatic suspensive effect by making a detour via the effects of a return decision. In C, J and S, the suspension of all legal effects of the return decision during the interim proceedings pursuant to Article 46(6) and (8) PD was at issue. Arguing from the standpoint of the full effectiveness of the request for interim relief (despite paying lip service to the full effectiveness of the appeal against an asylum rejection), the CJEU ruled that an applicant cannot be detained with view of his removal (one of the legal effects of
a return decision) during the interim proceedings. This thesis argues that the CJEU would have to genuinely deal with the full effectiveness of the appeal against an asylum rejection, if it were confronted with a matter involving the following question: which procedural safeguards have to be provided for during the interim proceedings, if an asylum seeker is not authorised to remain during the asylum appeal proceedings? This finding is based on the fact that the absence of a right to remain during the asylum appeal proceedings (in case the request for interim relief is rejected) may affect the effectiveness of the asylum appeal. In view of this absence of a full right to remain, certain procedural safeguards arguably have to be respected already during the interim proceedings. Otherwise the appeal brought against an asylum rejection could be easily deprived of its effectiveness, in particular if the request for interim relief is wrongly rejected. In order to identify the relevant procedural requirements, one cannot (only) fall back on the safeguards which the CJEU put forward in Gnandi (benefits under the RCD, consideration of new circumstances etc.). These safeguards ensure the full effectiveness of an appeal in case an applicant has a right to remain during the asylum appeal proceedings. Arguably, more safeguards are required if applicants do not have such a right to remain. Essentially, certain procedural requirements have to be provided for which balance the absence of a full right to remain out.

This thesis has identified such procedural safeguards by having recourse especially to ECHR case law, as the ECtHR has assessed requests for interim relief in cases where the appeal itself did not have automatic suspensive effect. Bearing in mind that the scope of judicial review cannot be restricted during the interim proceedings, it is argued that the requirement of a judicial full and ex nunc examination laid down in Article 46(3) PD has to be fully applied to interim proceedings. Hence, the full range of CJEU case law interpreting this provision has to be applied to interim proceedings as well. Furthermore, Article 46(4) PD requires Member States to provide for reasonable time limits and other necessary rules for applicants to exercise their right to an effective remedy. Time limits for lodging appeals shall enable every person to prepare and bring effective action in practice. Even though a time limit of 15 days has been considered reasonable in general, it may prove insufficient in individual cases. Lack of financial means, deprivation of liberty, and short time limits are factors which hinder access to language and legal assistance. This renders a remedy inaccessible in practice. Hence, the assignment of a particular area to an asylum seeker (Article 7 RCD), the restriction of access to the labour market (Article 15 RCD), or the granting of asylum seeker benefits in vouchers or kind (Article 17 RCD) obliges Member States to make sure that access to legal and language assistance is guaranteed.

The German implementation of Article 46(6) and (8) PD does not meet the required Union law standard in a number of respects. First, the limitation of the judicial scope of review is at variance with the requirement to carry out a full and ex nunc examination of both facts and points of law. The judicial scope of review cannot be restricted in respect of interim proceedings. Second, the possibility to preclude submissions which have been invoked at a late stage of the administrative procedure does not comply with the requirement of a full and ex nunc examination either. CJEU case law on delayed submissions does not encompass such a situation as a ground for preclusion. Additionally, the preclusion clauses in general are not in conformity with ECHR case law which requires courts to systematically take into account delayed submissions. Third, the limitation of judicial discretion regarding the order of an oral hearing is not in compliance with Union law. According to CJEU case law, it is up to the full
discretion of the court to decide whether it is in a position to carry out a full and *ex nunc* ex-
amination without ordering a hearing. Fourth, the fact that a court has to entertain serious
doubts with regard to the lawfulness of a deportation order bears the risk that a higher stan-
ard than the substantial probability standard (i.e. real risk) is applied to an asylum claim. The
reason for this risk is that the manifest unfoundedness verdict (subject matter of the serious
doubts standard) is closely intertwined with the asylum rejection itself. Fifth, the time limit of
one week for lodging and substantiating a request for interim relief can, in individual cases,
render the request inaccessible. It will particularly be inaccessible for asylum seekers who are
not allowed to move freely outside the area assigned to them. Moreover, employment bans,
the receipt of asylum seeker benefits in kind as well as the assignment to rural areas hinder
access to legal assistance in practice.

Beyond these clear Union law inconsistencies, further features of the German implementation
entail the risk of wrong refusals of requests for interim relief. First, interim proceedings are
characterised by a summary assessment of facts and law. This characteristic undermines the
requirement to exhaustively examine all circumstances with binding nature for the interim
proceedings. This is required by the BVerfG’s case law on the concept of obviousness which
applies to manifestly unfounded asylum applications. In this context, the BVerfG precisely
requires national courts to go beyond a summary assessment. The inherent contradictions in
interim proceedings become apparent particularly from this latter requirement pronounced by
the BVerfG and the summary characteristic. Second, courts have the possibility to refer to the
reasoning of the BAMF. This rule risks undermining another requirement of the BVerfG’s
case law. Notably, courts shall engage with the individual circumstances of the case and rea-
son why they confirm the manifest unfoundedness verdict. However, the possibility to refer to
the reasoning of the BAMF holds the potential that courts instead fall back on the pure repeti-
tion of the law or general definitions. By introducing the two mentioned requirements, the
BVerfG intended to counteract the risk of wrong – incontestable – decisions. This attempt to
ensure correctness of decisions denying interim relief is impaired by the summary characteris-
tic of interim proceedings and the possibility to refer to the administrative reasoning.
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