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Summary

The foundation of international Refugee Law was laid down in the early 1950s by the creation of UNHCR 1950 and the 1951 Convention relating to the status of refugees (1951 GC). Refugees and asylum seekers are not only protected through the relatively limited refugee law but also through general human rights instruments. The most significant Convention in Europe is the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR). The Member States are committed to the ECHR and the 1951 GC, which are binding instruments under international law.

By transferring power from the Member States to the European Community, the power of the ECHR has decreased to the extent that it is the Member States who are bound by the Convention, not the European Community as such. There is no obligation for the European Court of Justice (ECJ) under the ECHR to apply the same principles on the interpretation of the ECHR that the European Court of Human Rights (ECtHR) is using. Since under Article 307 EC Treaty, rights and obligations arising from the ECHR shall not be effected by the provisions of the Treaty establishing the European Community, human rights obligations of EU Member States will have priority in case of a conflict.

The idea of a common asylum system is relatively new within the European Community and the question is how common can the standards get with only minimum rules as guarantees. The Amsterdam Treaty moved the issue of asylum from the third pillar to the first pillar where EU institutions play a more prominent role. The fundamental change brought about by the Amsterdam Treaty is that influential legislative tools of Article 251 EC Treaty, such as regulations, directives and decisions, are available to use for harmonising EC asylum policy. Protocols to the Treaty give the UK, Ireland and Denmark possibility to “opt out” of participating in these measures. The ability of the UK, Ireland and Denmark to “opt out” means that adopted measures or interpretative decisions in the area of asylum, immigration and visas does not apply to them. There are already discussions that parallel Conventions may be entered into force, with countries that have “opted out”, for example to extend the scope of the system of responsibility for asylum applicants to other countries. If an intergovernmental instrument would be created, the consequence would be that the interpretation of this instrument is left to national courts. Such differentiation in legislation and case law will lead to differences in judicial protection for individuals within EU.

A fundamental element of EC law is the principle of supremacy. The Treaty signed in Rome on 25 March 1957 establishing the European Economic Community (EEC) did not explicitly establish the supremacy of Community law over the laws of the Member States. It was the ECJ that through its case law established the principle of supremacy. Another cornerstone of Community law that has been laid down by the ECJ is the principle of direct

effect, which means that the Community constitutes a legal order that confers rights on individuals. An individual can rely on a directives direct effect against a state if the relevant provisions of the directive are unconditional, sufficiently precise and have not been adequately implemented into national law. The individual has, consequently, been made a direct participant in the European integration process, mostly, because of the principles of supremacy and direct effect.

Article 63 (1c) EC Treaty obliges the Council to adopt minimum standards with respect to the qualification of third country nationals as refugees. The draft Directive on Qualification consists only of minimum standard, which means that the Member States can have more liberal rules on the definition of refugees. This is contrary to the idea of a harmonised refugee definition under the 1951 GC in Community law. It is difficult to see how agreements can be reached on the other directives without deciding whom they apply to. The main aim of the proposal is to ensure that laws and policies of the Member States are harmonised to provide a minimum level of protection to persons determined to be Convention refugees or beneficiaries of subsidiary protection. The goal of the harmonisation is to prevent refugee flows to certain Member States based solely on differing levels of protection in their legal framework

The draft Directive on asylum procedure lies in the heart of the asylum system. The final Articles of the Directive are still under negotiation. The text represents improvements of procedure standards in some areas, but still allows for practices which put refugees in danger, hence, detention and safe country of origin lists that can harm the individual, the safe third country practice and accelerated procedures with insufficient legal and procedural safeguards to prevent refoulement are all allowed. Here the EU diverts from international principles such as the principle of non-refoulement, *inter alia*, when it comes to the extensive possibilities to derogate from the principle of suspensive effect of appeals, allowed under Articles 39(2) and (3) of the draft Directive, and in certain cases of border procedure where no minimum principles or guarantees appear to apply and access to the asylum procedure can be denied altogether.

The provisions in these Directives are only minimum rules, but even minimum rules need to be interpreted in a uniform way. The Treaty of Amsterdam has accredited the ECJ to interpret and rule on the validity of Community instruments adopted in the field of asylum. The question of a uniform interpretation of the refugee definition will be one of the most important elements of the European harmonisation process where the ECJ will have an important role through its binding interpretations of Community rules.

Under the EC Treaty the Court of Justice key functions are:

1. To rule at the request of the Commission,¹ or of another Member State,² on the alleged failure to fulfil an obligation under the Treaty;
2. to review the legality of Community acts;³
3. to establish a failure to act by one of the institutions,⁴
4. And to give preliminary rulings concerning the interpretation of the Treaty and the validity and interpretation of acts of the institutions of the Community.⁵

Article 230 provides a direct way for individuals to have standing. Another alternative for the individual is that to, at the national level, directly assert that the Member State has violated a Community law provision and that this provision would have given them rights that they could enforce at the national level. The national court may ask the ECJ whether the particular EC provision really gives the individual such rights. This is one way for an individual to invoke Community law in a national court and to claim that the Member State has violated EC law.

In many ways the most important aspect of the work of the Court is its jurisdiction to give “preliminary rulings” under Article 234 EC Treaty. The direct applicability of EC law in combination with the preliminary ruling has developed into the most effective instrument for individuals to ensure that the Member States follow and apply EC law. The question that can be raised is whether the existing procedure established by the Amsterdam Treaty is adequate to provide for an efficient judicial review of an individual’s rights in asylum matters.

For Community law to be fully effective, it is not enough that certain rights can be relied on. It is as important that the individual relying on a Community right gets access to an effective remedy before a judge and that the court really tries his case. An individual must be able to rely on the right of access to judicial review, which is a fundamental right within the Community legal order. From the case law of the ECJ it is clear that when an individual has a right under Community law and that right might have been infringed, he or she has the right to have the case tried before a national court. It must be possible for an individual to get judicial control on any decision by a national authority, which deals with application of Community law at the national level. Indeed, this requirement of judicial control reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR.

The role of evidence is a crucial part of a fair trial. The role of evidence in a procedure before the Court of Justice is to present the existence of facts from

¹ Article 226 EC Treaty.

² Article 227 EC Treaty.

³ Article 230 EC Treaty.

⁴ Article 232 EC Treaty.

⁵ Article 234 EC Treaty.

material which can be either primary or secondary. A primary fact constitutes a direct understanding of facts, and secondary means that the perception of facts is gained indirectly through a conclusion drawn from some other fact or general experience or practice. The general rule in Community law that determines the party on whom the burden of proof lies is that each party proves the fact upon which his claim is based. It is unclear what standard of proof is required by the ECJ. Clearly, the Court must be convinced of the existence of the facts in the case, but what is necessary to convince the Court? The ECJ does not seem to have decided on a specific formula for the standard of proof.

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFI	Court of First Instance
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
GC	Convention on the Status of Refugees
ICCPR	International Covenant on Civil and Political Rights
SEA	Single European Act
SIS	Schengen Information System
TEC	Treaty establishing the European Community as amended by the Treaty of Amsterdam
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Presentation of the Subject

Almost fifteen years after the beginning of intergovernmental co-operation in asylum and immigration matters, the establishment of a Common European Asylum System has become a priority in the European Union. This priority has its legal base in the Treaty of Amsterdam. The Treaty of Amsterdam has accredited the European Court of Justice to interpret and rule on the validity of Community instruments adopted in the field of visas, asylum, immigration and other policies related to free movement of persons. Since the Amsterdam Treaty, several instruments have been adopted or are under negotiation. Two of these instruments are the Qualification Directive and the Procedure Directive. But what is the Competence of the Court of Justice in assessing Member States compliance with the Directives that will be adopted in the field of asylum. What possibilities does an asylum seeker have to have his/her rights tried in the ECJ? I will try to analyse this subject through my thesis and use the Qualification Directive and the Procedure Directive as examples.

1.2 Limitations

According to the Amsterdam Treaty the Community institutions should adopt all the relevant instruments until 2004 to harmonise the areas of immigration, visas and asylum within the EU. The Court of Justice is the first supranational judicial organ to be granted explicit competence to rule on the interpretation of the 1951 Convention on the Status of Refugees. The main purpose of this essay is to see if the remedies available are sufficient enough, compared to other areas of EC law and how the Court can handle its new competence in view of the highly sensitive character of asylum policies. My focus will be on the Procedure Directive and the Qualification Directive.

1.3 Methods and Material

The method used is a theoretical discussion concerning the European Court of Justice competence to assess the Member States compliance with the Directives that are or will be adopted in the field of asylum. I will use the draft Directives on Qualification and Procedure to exemplify future possible cases. This theoretical approach has also been exemplified with the help of case law mainly from the European Court of Justice.

1.4 Outline

This thesis is divided into six chapters. The first chapter provides an introduction into the subject matter. In chapter two, the normative framework of the international refugee regime is presented, including the relevant case law on human rights from the European Court of Justice and the European Court of Human Rights. With the aim of clarifying the aquis which the European Court of Justice will need to rely upon in future judgements. This chapter also makes an evaluation of European co-operation in asylum and immigration matters from the mid-1980s onwards. Including implications with regard to the Member States who has “opted out” of title IV EC Treaty and a short introduction of the draft Directives on Procedures and Qualification.

Chapter three provides us with a short overview of the organisation and composition of the European Court of Justice. This is followed by a thorough analysis of different remedies before the Court, especially regarding title IV measures. Through this analysis we can see what competencies the European Court of Justice have in general and their specific competence with regard to directives emanating from title IV EC Treaty.

The fourth chapter will consist of a review of EC fundamental principles of “right to access to court” and “Right to fair trial”. These principles have been developed through case law, hence, will see a discussion of their meaning today with the help of existing case law. Rules on evidence are a crucial part of the right to a fair trial. With that in mind I have tried, in the fifth chapter, to explain the role of evidence and the burden of proof in the European Court of Justice.

The last chapter recapitulates the main findings of the thesis.

2 Background

2.1 International Refugee Protection

The foundation of international refugee law was laid down in the early 1950s by the creation of UNHCR 1950 and the 1951 GC⁶. Refugees and asylum seekers are not only protected through the relatively limited refugee law but also through general human rights instruments. The most significant convention in Europe is the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR).⁷ One of the most relevant articles of this Convention is Article 3, the return to a state where the person concerned is subjected to torture or to inhuman or degrading treatment or punishment is a breach of the Article. This was laid down for the first time in the *Soering* case where *Soering* was under suspicion of having killed two persons in the United States.⁸ He was caught in England and United States wanted him extradited but the European Court of Human Rights (ECtHR) stated that the plaintiff risked the death penalty if convicted for murder and extradited from the U.K. to the United States. The Court found that the time aspect and the general conditions in the death row where the plaintiff would spend several years awaiting execution of the death penalty would be a violation of Article 3 ECHR. Through this judgement we can see that Article 3 has an extraterritorial effect and that states party to the Convention has an obligation to guarantee that the return to a state does not subject the person concerned to torture or to inhuman or degrading treatment or punishment.

Other instruments, which to some extent touch upon the principle of non-refoulement, are universal, such as the ICCPR.⁹ Article 7 of this Convention states a prohibition against torture or cruel or inhuman or degrading treatment or punishment. Article 7 is absolute, but no isolated asylum cases have been reported. Instead, the CAT is a stronger instrument since it contains an explicit prohibition of refoulement.¹⁰

In international law there is no right to asylum as the right to sovereignty is more important for the states. UDHR, Article 14, sets out the right to seek and enjoy asylum, not a right to obtain it.¹¹ The main principle is that a State has sovereign power to decide the extent and time of immigration to its territory; this is part of the principle of sovereignty. The law and policies

⁶ Convention relating to the Status of Refugees, Geneva 28 July 1951. UNTS No. 2545, Vol. 189, entered into force 22 April 1954.

⁷ Rome, 4.XL. 1950, ETS No.5.

⁸ECtHR, *Soering vs. the United Kingdom* (1989).

⁹ New York, 19 December 1966, entered into force 23 March 1976 (Trb. 1969 Nr. 99).

¹⁰ New York, 10 December 1984 (1465 UNTS 85).

¹¹ Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly resolution 217A (III) of 10 December 1948.

within the EU have emphasised the control of borders. But control of borders and other similar policies of the EU are not to effect the Member States obligations under international law. The Member States are committed to the ECHR and the 1951 GC, which are binding instruments under international law. The Member States are also bound by obligations and principles from other sources of law. A common European asylum and immigration policy is not exempted from international obligations. Treaty obligations for the EU Member States under international law and different rules of customary law establish a minimum standard for the treatment of refugees that they must receive from the Member States. These obligations have to be taken into consideration even if they are not obligations of the European Community.¹²

Article 63(1) of the Treaty Establishing the European Community (EC Treaty) makes a reference to the 1951 GC by stating that measures in the asylum area should be taken in accordance with the 1951 GC. Article 63 (1) is a self imposed limitation of how far the Community acts can go with regard to its refugee policy.

By transferring power from the Member States to the European Community, the power of the ECHR has decreased to the extent that it is the Member States who are bound by the Convention and not the European Community as such. There is no obligation for the European Court of Justice (ECJ) under the ECHR to apply the same principles on the interpretation of the ECHR that the ECtHR is using. In the case of *Cantoni v. France*, the ECtHR stated that it will exercise its jurisdiction over measures of contracting states even if these measures are completely decided by Community law.¹³ In other words, Member States are still subject to judicial review by the ECtHR even if they have implemented Community directives on asylum matters in national law. If the two courts would interpret Member States human rights obligation differently, the ECJ will have to take into account that the Member States are bound by the ECtHR's judgements. Since under Article 307 EC Treaty rights and obligations arising from the ECHR shall not be effected by the provisions of the Treaty establishing the European Community, human rights obligations of EU Member States will have priority in case of a conflict.

If a Community regulation would infringe on the human rights of asylum seekers, it would not be subject to additional review by the ECtHR. The only possibility for individuals to have Community regulation reviewed is in national courts or the ECJ. The Treaty provides for direct access for individuals to the ECJ only under some restrictive circumstances of direct and individual concern for the applicant.¹⁴

In conclusion, the most crucial question of the relationship between the ECJ and ECHR is still unresolved. The interaction between these two Courts need

¹² Hailbronner; "Immigration and Asylum law and Policy of the European Union", 2000, p 3.

¹³ ECtHR, *Cantoni vs. France* (1996).

¹⁴ See chapter 3.1.3 on Article 230 (4) EC Treaty.

to be made clearer, the best solution would be if it were prescribed by law. In its opinion 2/94, the ECJ considered that a Treaty amendment was the only way to enable the Community to accede to the ECHR.¹⁵ However, Member States were not able to find an agreement on the accession of the Communities to the ECHR during the negotiations of the Amsterdam Treaty. It remains to be seen whether the ECJ will submit itself to the decisions of the ECHR, or whether the ECHR will its power as a supreme adjudicating organ in the human rights field.

2.2 The Need for Harmonisation

Asylum and immigration issues have always been considered to be a matter for the individual Member States of the European Union. As the political and economic co-operation has developed between the Member States of the EU, the necessity of a common approach to issues such as asylum policy has become apparent. Different Member States have different sets of rules and that is why it has been difficult to find a common ground and a common standard that every Member State can accept. The idea of a common asylum system is relatively new within the European Community. In this area the Community has adopted the method of minimum harmonisation and the question is how common can the standards get with only minimum rules as guarantees. In this section we will see a short evaluation of European co-operation in asylum and immigration matters from the mid-1980s onwards, this to give a background on the Member States affords in this area.

2.2.1 The Schengen Agreement

In 1985 the first symbol of the immigration harmonisation process was presented. The White Paper on the Completion of the Internal Market contained timetables for the establishment of the single or internal market.¹⁶ It contained plans on the dismantling of internal borders between Member States and agreement on how to control the external borders of the Community. The goals of the Commissions White Paper were incorporated in the Single European Act (SEA).¹⁷

The Schengen agreement was signed in 1985 because the establishment of the internal market and the abolishment of the remaining barriers of free movement of persons were expected to create some security risks.¹⁸ The content of the agreement was the abolition of controls at common internal

¹⁵ Opinion 2/94 Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759 para. 23-36.

¹⁶ The White Paper from the Commission to the European Council, Milan 28-29 June 1985, COM 85 310.

¹⁷ Single European Act, 9 September 1985, OJ (1987) L 169/1.

¹⁸ The Schengen Agreement of 14 June 1985. Agreement between the Governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at the common frontiers, OJ L 239.

frontiers between signatory states. As compensatory measures for lifting the internal border controls, the control of external frontiers of the Schengen area was strengthened, accompanied by an array of “flanking” measures designed to enhance security within the Schengen area. The most significant flanking measures are; control instruments such as harmonisation of visa policies, carrier sanctions, certain domestic alien’s legislation on information exchange under the Schengen Information System (SIS) and already containing rules on responsibility for examining asylum applications (a Dublin type mechanism, Title II, Chapter 7). A common zone of free movement for EU citizens was opened. The Schengen Convention was signed in 1990 and became operative in 1995.

2.2.2 The Dublin Convention

The Dublin Convention was the first serious attempt of the Member States to co-ordinate asylum policy within the European Union.¹⁹ The underlying principle of the Convention is to provide a framework within which Member States can ensure that an asylum applicant gets only one opportunity to have an asylum application considered. This presupposes that the Member States asylum laws and procedures are harmonised and that the same asylum application made in any Member State will have the same outcome. The Dublin Convention was supposed to create the concept of burden sharing between the Member States but it turned out to be more of a burden shifting instead.²⁰ When the Convention did not turn out to be what the Member States expected they did a few insignificant changes and instead of a Convention it is now in the form of a regulation within the framework of Community legal order (Dublin Regulation also called Dublin II).

2.2.3 The Maastricht Treaty

After the entry into force of the Maastricht Treaty, the law and policy on third country nationals was divided between the First pillar and the Third Pillar. The division between the two pillars created new challenges for the Community and for the Member States. The competence of the Union was laid down in Title VI of the TEU/Maastricht called: “Co-operation in the fields of Justice and Home Affairs”. Article k.1 stated that issues of asylum policies; rules on the passage of persons of the external borders of Member States; and the exercise of control thereon; immigration policy and policies towards third country nationals, are issues of common interests for the Member States. Unanimity was required in the council for decision-making on these issues. Furthermore, the ECJ had no competence to rule on measures adopted under the third pillar.

¹⁹ Convention Determining the State Responsible For Examining Applications For Asylum Lodged In One Member States of the European Communities, OJ C 254.

²⁰ Noll; “Formalism v. Empirism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law”, *Nordic Journal of International Law*, Vol 70 No 1, 2001, p. 182.

The Maastricht Treaty was not sufficient. The new Title VI was nothing other than the formalization of slightly modified intergovernmental co-operation. Not a Convention was adopted under the third pillar. The Maastricht era ended in 1999 and the Amsterdam Treaty entered into force.

2.2.4 The Amsterdam Treaty

This treaty moved the issue of asylum from the third pillar to the first pillar where EU institutions play a more prominent role. The fundamental change brought about by the Amsterdam Treaty is that influential legislative tools of Article 251 EC Treaty, such as regulations, directives and decisions, are available. The Commission has the sole right of initiative. There is a 5-year transitional period and under this period decisions are still made on the basis of unanimity in the Council.²¹

Article 2 TEU clearly locates “appropriate measures with respect to asylum” within the “area of freedom, security and justice...”. So far as refugees are concerned, the Council is required, again within five years of the Treaty’s entry into force, to adopt measures on asylum, in accordance with the 1951 GC and other relevant treaties in the following areas:

1. Criteria and mechanisms for determining Member State responsibility to consider an asylum application;
2. Minimum standards on the reception of asylum seekers;
3. Minimum standards with respect to the refugee definition; and
4. Minimum procedural standards for granting or withdrawing refugee status.

These are the four building blocks of the European Community law on asylum. Furthermore the Council is also required to adopt measures on refugees and displaced persons within the following areas:

5. Minimum standards for giving temporary protection to displaced persons and;
6. Burden sharing.²²

The word “minimum” is being repeated. This to ensure that the individual Member States still holds on to considerable powers hence, the standard adopted is the lowest common denominator.

At the Tampere European Council of 1999, the EU declared its intention to establish a common European asylum system based on the full and inclusive application of the 1951 GC. Protocols to the Treaty state that the UK, Ireland and Denmark can “opt out” of participating in these measures. The ability of the UK, Ireland and Denmark to “opt out” means that adopted measures or interpretive decisions from the ECJ does not apply to them.²³ UK and Ireland can decide to “opt in” whenever they want and they have done so on

²¹ Article 67 EC Treaty.

²² Article 63 EC Treaty.

²³ Irish-British Protocol, Article 2, Danish Protocol, Article 2.

measures taken in the area of asylum.²⁴ Denmark has adopted the Schengen Convention so they are in a special position. Denmark “opted out” and did not ask for the alternative to be able to “opt in”, except when the question is about the Schengen acquis.

By the communitarization of asylum and immigration issues, the Dublin Convention changed form into a regulation (DII). Consequence of having a community instrument is the advantages deriving from the status of Community law: primacy over divergent national law, direct effect and the availability of judicial mechanisms under the treaties to ensure a uniform interpretation of the rules in question. The application of Community rules in national legal practice also automatically benefits from the national system of legal review and legal protection which is not necessarily ensured with regard to the implementation of an international treaty, in so far it has not been incorporated in national law.²⁵

For example, if a country like Denmark would like to be part of the DII provisions they can not, because of their “opt out”. Hence, there are already discussions that parallel Conventions may be entered into force to extend the scope of the system of responsibility for asylum applicants to other countries.²⁶ If an intergovernmental instrument would be created with exactly the same provisions as DII but without a supranational judicial mechanism (ECJ has no jurisdiction because of there “opt out”), then the interpretation of this instrument is left to national courts and differentiation in legislation and case law will lead to differences in judicial protection for individuals within EU.²⁷ There are number of other questions arising from this complex system of flexibility. For instance, can Denmark challenge DII or any other measure under Title IV on which they did not “opt in”? These measures will be interpreted by the ECJ and thereby probably substantially change its original meaning. The same rules will continue to apply in the relationship between Denmark and other Member States in the original meaning as obligations of international law treaty with no direct effect and no priority over national law. This could create some problems. Would Denmark be bound by any interpretation made by ECJ on DII provisions? The ECJ have the tendency to broaden its jurisdictional power and the Court’s approach will probably be influenced by different political and economic elements that are very hard to foresee.²⁸

On another front, the EU has agreed on a Charter of Fundamental Rights at the European Council in Nice in December 2000, this is a political and non-

²⁴ Irish-British Protocol, Article 3(1).

²⁵ See the example of the ECHR in the UK.

²⁶ A provision for this is made in Declaration I of the minutes of the conference at which the convention was signed.

²⁷ O’Keefe, “Can the Leopard change its spots? Visas, Immigration and Asylum – Following Amsterdam” in D O’Keefe and P Twomey (eds) *Legal Issues of the Amsterdam Treaty* (1999) 271, 284.

²⁸ Peers, “Who’s Judging the Watchmen? The Judicial System of the ‘Area of Freedom Security and Justice’ ” Vol. 18, *Yearbook of European Law*, 1998, p. 338.

legally binding instrument.²⁹ The Charter includes, amongst other rights, right to asylum. The article of concern is Article 18 of the Charter, which reads:

"The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community".

As we have seen the fundamental change brought about by the Amsterdam Treaty is that legislative tools of Article 251 EC Treaty are available. The Community has adopted several directives on asylum issues and a few are under negotiation. Two of these directives are the Qualification Directive and the Procedure Directive. The final parts of this chapter will give us a short introduction of these two draft Directives. This to be able to exemplify, in the following chapters of thesis, possible future cases emanating from these Directives in the ECJ.

2.2.5 The Qualification Directive

Article 63 (1c) EC Treaty obliges the Council to adopt minimum standards with respect to the qualification of third country nationals as refugees. The draft Directive consists only of minimum standard, which means that the Member States can have more liberal rules on the definition of refugees. This is contrary to the idea of a harmonised refugee definition under the 1951 GC in Community law. It is difficult to see how agreements can be reached on the other directives without deciding whom they apply to.

The main aim of the Directive is to ensure that the laws and policies of the Member States are harmonised to provide a minimum level of protection to persons determined to be Convention refugees or beneficiaries of subsidiary protection. The goal of the harmonisation is to prevent refugee flows to certain Member States based solely on differing levels of protection in their legal framework.³⁰ The Directive sets out the applicable rules for determining refugee status and subsidiary protection, but does not cover persons permitted to stay on purely compassionate grounds, on the basis that this does not relate to an international protection need.³¹ It is of crucial importance to maintain the distinction towards refugee status according to the 1951 GC and subsidiary protection. This distinction must be operationalised so that the scope of application of the 1951 GC is respected, avoiding that this principle instrument of refugee protection be relegated to a de facto subsidiary protection mechanism. Article 63 (1) EC Treaty makes it

²⁹ See in chapter 4.3 how this non-legally binding Charter still can have binding effect.

³⁰ "Explanatory memorandum" in proposal (n1) 4.

³¹ UNHCR Executive Committee 18: th Meeting, "Complementary forms of protection: Their nature and relationship to the international refugee protection regime", UN doc EC/50/SC/CRP. 18 (9 June 2000).

clear that measures adopted on asylum issues have to be in accordance with the 1951 GC, and consequently other protection measures for refugees and displaced persons shall be placed in a secondary position.³² This priority between the Convention refugee status and subsidiary forms of protection was also recognised by the Tampere European Council.³³

Special attention must be drawn to the obligation to give *reasons for negative decisions*, as stated by the provision in Article 7 (d) of the Procedure Directive. If a state refuses to recognise a refugee claimant as a Convention refugee, and grants him/her subsidiary protection instead, this must clearly be such a negative decision that has to be accompanied by reasons. Furthermore, it is very important that refugee claimants who have been granted subsidiary protection are entitled to a separate appeal in which they can uphold their principal application for recognition of Convention refugee status. As stated above, access to such an appeal is restricted in Article 32 of the Procedure Directive.

There are many positive elements in this Directive. There are also provisions that are in breach of the Member States international obligations. A refugee is defined as "a third country national or a stateless person" who fulfils the requirements of Article 1 A of the 1951 GC. The exclusion of EU nationals is a violation of the provisions of Article 3 of the 1951 GC, which prohibits any discrimination, based on the ground of nationality. Indeed, it is extremely unlikely that EU nationals may have a valid claim to apply for asylum, by virtue of article 42; States parties to the 1951 GC may neither limit the personal scope of Article 1, nor make any reservation to Article 3.

As stated in Article 15 of the Directive, persecution outside the country of origin is not recognised. As a consequence, persons who may not be removed by virtue of other relevant provisions of the ECHR (such as Articles 6 and 8) will not fall within the scope of the Directive. The ECtHR has clearly established that the responsibility of contracting States could be engaged in case of indirect refoulement.³⁴ In the *Loizidou* case, the Court has further developed its reasoning by stating that "(...) *the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory*".³⁵

³² Cf. Article 63 (2) EC Treaty.

³³ In the presidency conclusions 13, reaffirming "the importance the Union and the Member States attach to absolute respect of the right to seek asylum", the European Council agreed to "work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement". Tampere European Council, 15 and 16 October 1999, SN 200/99, p. 3.

³⁴ ECtHR, *Cruz Varas vs. Sweden* (1991), para. 69.

³⁵ ECtHR, *Loizidou vs. Turkey* (1995), para. 62.

2.2.6 The Procedure Directive

The draft Directive on asylum procedure lies in the heart of the asylum system. The final Articles of the Directive are still under negotiation. The text represents improvements of procedure standards in some areas, but still allows for practices which put refugees in danger, *inter alia*, detention and safe country of origin lists that can harm the individual, the safe third country practice and accelerated procedures with insufficient legal and procedural safeguards to prevent refoulement are all allowed.³⁶ Worse, it is likely that the limited rights that are provided for will be undercut by Member States in the future negotiations. The key elements of this Directive risk violating either the 1951 GC or the ECHR or both. Here the EU diverts from international principles such as the principle of non-refoulement, *inter alia*, when it comes to the extensive possibilities to derogate from the principle of suspensive effect of appeals, that is allowed under Articles 39(2) and (3) of the draft Directive and in certain cases of border procedure, where no minimum principles or guarantees appear to apply and access to the asylum procedure can be denied altogether. The second part of the Directive makes derogations, of the general procedures, possible through optional provisions and exemptions. These are exceptions that don't help the harmonisation process. It allows Member States to retain their national rules. Because of the latest suggestions from the UK government on so called "Protection Zones", an amendment process is taking place now so that the Directive also covers border procedures.

Even if the Directive on Procedures consists of minimum rules and its purpose is not full harmonisation, it gives some Member States a tendency to reduce and question well-established protection principles, such as the principle of non-refoulement or suspensive effect of appeal. Furthermore, access for all asylum applicants to the procedure is not sufficiently guaranteed. Member States are given too much discretion concerning the detention of asylum applicants, risking a breach of Article 5 of the ECHR.

³⁶ Baneke; "The rights of asylum seekers in the new EU Area of Freedom, Justice and Security, What Progress since Tampere?" *European Policy Centre Publication*, Challenge Europe 5, "Building a European area of Freedom, Security and Justice".

3 The European Court of Justice

As we have already discussed, the Treaty of Amsterdam has accredited the ECJ to interpret and rule on the validity of Community instruments adopted in the field of asylum. The next chapter provides us with a short overview of the organisation of the ECJ. This is followed by an analysis of what binding instruments mean in EC law. My focus will be on directives, this to clarify the rights that a directive in general gives an individual against the state. This leads us to the main part of the thesis, which is a thorough analysis of the remedies available before the ECJ.

3.1 The Composition of the Court

Judicial control and supervision in the Community is exercised by the European Court of Justice (ECJ)³⁷ and the Court of First Instance.³⁸

The ECJ consists of fifteen Judges, assisted by nine Advocate Generals.³⁹ An odd number of Judges is maintained so the full court can sit and still be able to reach a majority decision. All the judges sign all the decisions of the Court, whether they were in the minority or in the majority, so it is impossible to know whether the decision was reached by a bare majority or by unanimity. This is the most important protection the judges have against national pressure, that there is only one "judgement of the Court".

The duty of the Advocate General is "acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice."⁴⁰ This he does by delivering an opinion, after the case has been heard and normally at a later hearing, in which he gives the judges his view of the case and tries to help them to reach their judgement. The Advocate Generals opinion is not binding upon the Court.

The ECJ has to see that the Council and the Commission, as the decision taking and policy-making organs of the Community, keep within their powers under the Treaties. It has to restrain Member States who act in breach of the Treaties. The Court exercises powers of judicial review not only over administrative acts but also over Community legislations, such as regulations or directives of the Council or Commission. The power of the Court can be divided into three categories: the settling of disputes, the giving of binding opinions and the giving of preliminary rulings. Probably the most important aspect of the ECJ's jurisdiction is its power to lay down binding

³⁷ Articles 4(1) EC, 7 ECSC, and 3 Euratom.

³⁸ By virtue of Articles 168 (a) EC, 32 (d) ECSC, and 140 Euratom.

³⁹ Articles 165 and 166 EC, 32 and 32a ECSC, and 137 and 138 Euratom.

⁴⁰ Articles 166 EC, 32a ECSC, and 138 Euratom.

interpretation of the provisions defining its jurisdiction.⁴¹ This gives the ECJ possibility to develop its jurisdiction when there is a gap of protection.

3.2 The Scope of Directives

A fundamental element of EC law is the principle of supremacy. The Treaty signed in Rome on 25 March 1957 establishing the European Economic Community (EEC) did not explicitly establish the supremacy of Community law over the laws of Member States. It was the ECJ that through its case law established the principle of supremacy. The landmark decision was *Costa vs. ENEL* in which the Court stated that according to this principle, EC law has priority over national law. This means if there is a conflict between EC law and national law, EC law will prevail.⁴²

Another cornerstone of Community law that has been laid down by the ECJ is the principle of direct effect, which means that the Community constitutes a legal order that confers rights on individuals.⁴³ This has a close connection with the notion of direct applicability. When direct applicability states that EC law is a part of the Member States own internal systems, direct effect entitles private parties to rely on rights derived from a Community measure and to invoke these rights in their national courts even if the measure in question has not been implemented by national legislation.⁴⁴

The general conditions for Community law to have direct effect are that the provision must be *unconditional* and *sufficiently precise*. A provision is not unconditional if the right it grants is dependent on the judgement or discretion of an independent body. However, the ECJ can decide that a provision is unconditional even where its application is conditional on the exercise of discretion by an independent body if that discretion is subject to judicial control.⁴⁵ When it comes to the second general condition, it is argued that, a provision is sufficiently precise if Community law provides “workable indications to the national court”.⁴⁶

Article 249 EC Treaty states that a directive is binding in relation to the result that must be achieved by each addressed Member State, but the Member States can freely choose the form and method for implementation. In *Van Duyn vs. Home Office* the ECJ established that directives could have direct effect and the Court had two main arguments for its conclusion.⁴⁷

⁴¹ Rasmussen; *European Court of Justice*, 1998, p. 46.

⁴² *Costa vs. ENEL*, Case 6/64, [1964] ECR 585.

⁴³ *Van Gend en Loos vs. Nederlands Administratie der Belastingen*, Case 26/26, (1963) ECR 1.

⁴⁴ Brealey and Hoskins, foreword by Judge David Edward; *Remedies in EC Law*, London, 1994. p. 26.

⁴⁵ *Van Duyn vs. Home Office*, Case 41/74, [1974] ECR 1337.

⁴⁶ Pescatore, “The Doctrine of “Direct Effect”: An Infant Disease of Community Law”, *European Law Review*, Vol 8, 1983, p. 155.

⁴⁷ *Van Duyn vs. Home Office*, Case 41/74, [1974] ECR 1337.

Firstly, the ECJ stated that, “it would be incompatible with the binding effect attributed to a directive by Article 249 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned.” Secondly, the Court said that the useful effect of a directive would be weakened if individuals were prevented from relying on it before their national courts.⁴⁸

It was for a long time uncertain if the doctrine of direct effect of directives also included the horizontal effect⁴⁹ of directives. A more secure foundation was laid in the *Ratti* case.⁵⁰ The ECJ repeated in this case both of the arguments given in the *Van Duyn* case and added a third. The Courts third argument was that, the time limit for implementation of the directive must have expired without the relevant part of the directive being correctly and completely implemented into the law of the Member State.⁵¹ Here the ECJ referred to the concept of a “defaulting State”.

In conclusion, an individual can rely on a directives direct effect against a state if the relevant provisions of the directive are unconditional, sufficiently precise and have not been adequately implemented into national law. The individual has been made a direct participant in the European integration process, mostly, because of the principles of supremacy and direct effect.

In the area of asylum the Community has adopted the method of minimum harmonisation. As the name implies, the Member States must comply with the minimum requirements of the directive concerned, but are free to apply stricter or more far-reaching requirements. Such partial harmonisation has expressly been approved by the ECJ.⁵²

3.3 Remedies Before the European Court of Justice

Under the EC Treaty the ECJ key functions are:

1. To rule at the request of the Commission,⁵³ or of another Member State,⁵⁴ on the alleged failure to fulfil an obligation under the Treaty;
2. to review the legality of Community acts;⁵⁵
3. to establish a failure to act by one of the institutions;⁵⁶

⁴⁸ Ibid p.1348.

⁴⁹ Horizontal effect is when individuals are able to rely on the direct effect of Treaty provisions against other individuals.

⁵⁰ *Pubblico Ministero vs. Ratti*, Case 148/78, [1979] ECR 1629.

⁵¹ Ibid.

⁵² Case 37/83, *Rewe-Zentrale AG vs. Director of the Landwirtschaftskammer Rheinland* [1984] ECR 1229 at 1249.

⁵³ Article 226 EC Treaty.

⁵⁴ Article 227 EC Treaty.

⁵⁵ Article 230 EC Treaty.

4. And to give preliminary rulings concerning the interpretation of the Treaty and the validity and interpretation of acts of the institutions of the Community.⁵⁷

3.3.1 Actions under Articles 226 and 227

Infringement proceedings can be broken down into four stages. The first phase starts with an informal discussion between the Commission and the Member State. Most of these cases are initiated by a complaint from an individual but a sizable amount of cases are detected by the Commissions own investigations.

If the matter is not resolved at the informal stage⁵⁸ the Commission sends a formal letter, which states the infringement, committed by the State, to that State. Third the Commission delivers a reasoned opinion on the matter, after that the State has submitted its observations, this consists of a deadline for compliance by the Member State. The reasoned opinion establishes the legal arguments that the Commission will rely on in possible future proceedings in the ECJ.

Fourth, the case is referred to the ECJ if the State does not confirm with the opinion of the Commission. This is a unique role given to the Commission in the Community institutional framework, as guardian of the treaties.⁵⁹ The Commission has discretion whether or not to initiate proceedings against a Member State.⁶⁰ The Court of Justice has ruled out the possibility of bringing a claim against the Commission for failure to start infringement proceedings.⁶¹ The Commission usually tends to bring infringement proceedings for failure by a Member State to implement a directive. The field of asylum is very sensitive for the Member States. It will be a great deal of focus on the Commissions strategy in this field of Community law.

As to Article 227 the procedure for an action brought by one Member State against another alleging failure to comply with Community law is very unlikely to be used in the asylum field.

3.3.2 Judicial Review of EC Acts: Article 230 EC Treaty

Article 230 EC Treaty provides that:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, or acts of the Council, of the Commission and of the ECB, other than recommendations and

⁵⁶ Article 232 EC Treaty.

⁵⁷ Article 234 EC Treaty.

⁵⁸ A third of cases are resolved at the informal stage.

⁵⁹ Dashwood and White; "Enforcement actions under Articles 169 and 170 EEC", *European Law Review*, Vol. 14, 1989, p. 388.

⁶⁰ *Commission vs. Belgium*, Case 324/82, [1984] ECR 1861, para. 12.

⁶¹ *Star Fruit Company vs. Commission*, Case 247/87, [1989] ECR 291, para. 11.

opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in action brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the European Parliament, by the Court of auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this article shall be instituted within two months of publication of the measure, or of its notification to the plaintiff, or in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 230 EC Treaty sets out four general conditions which must be satisfied before an act can be challenged. The four conditions are the following:

1. The act is to be of a kind which is open to challenge at all,
2. the institution or person making the challenge must have standing to do so,
3. there must be a procedural or substantive illegality of a type mentioned in Article 230 (1),
4. The challenge must be brought within the time limit indicated in Article 230 (5).

Furthermore, the list of revisable acts specified in Article 230 EC Treaty is not exhaustive. What is required is an act binding in law, and the Court has always been prepared to look behind the label of an act to its substance.⁶² The *IBM case* illustrates that the act must bear legal effects, that is “according to the consistent case law of the Court any measure the legal effects of which are binding on, and capable of affecting the legal interests of the applicant by bringing about a distinct change in his legal position is an

⁶²*Société des Usines à Tubes de la Sarre vs. High Authority*, Joined Cases 1 and 14/57, [1957 and 1958] ECR 105.

act or decision which may be the subject of an action under article 230 EC Treaty for a declaration that it is void”.⁶³

3.3.2.1 Grounds for Annulment

The five grounds of illegality enumerated by the Treaties are:

1. lack of competence;
2. infringement of an essential procedural requirement;
3. infringement of the Treaty;
4. infringement of any rule of law relating to the application of the Treaty;
5. Misuse of powers.

The European Court of Justice have admitted that any proven infringement of Community law, common principles of Member States constitutions and international law, is falling within the fourth ground.⁶⁴ Article 233 EC Treaty states that the institution whose act has been declared void shall be required to take the necessary measures to comply with the Court’s judgement.

3.3.3 Locus Standi in the ECJ

The task of the ECJ is to ensure the uniform interpretation and application of Community law, in order to protect individuals from any infringement of their rights by institutions of the Union. Unlike the procedure in Article 234, Article 230 provides a direct way for individuals to have standing. In Article 234 procedure, the individual is depending upon the willingness of national courts to make a reference to the ECJ, which is very time-consuming process, as it requires proceedings in at least two court levels. Article 230 (4) states that:

*”Any legal or natural person may, under the same condition, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”*⁶⁵

The wording of the paragraph shows a clear intention of behalf of the legislator to prohibit applicants from bringing proceedings which seek to challenge regulations. In this section I will try to examine how the ECJ has interpreted the wording of this provision, specifically the requirements of direct and individual concern.⁶⁶

Individuals, *unprivileged applicants*, do not have the same unfettered ability to stand before the ECJ in judicial review proceedings as the Commission, Council, Member States or the Parliament (the *“privileged applicants”*). To allow such access to the Court (although this would probably be in the

⁶³ *International Business Machines Corporation vs. Commission*, Case 60/81, [1981] ECR 2639, para. 9.

⁶⁴ Brown & Jacobs; *The Court of Justice of the European Communities*, 1995, p. 144.

⁶⁵ Article 230 (4) EC Treaty.

⁶⁶ See also the discussion on Jégo-Quére case in chapter 4.

interests of justice) for individuals, it would be to open a potential floodgate of litigation. By giving the Article very particular wording, the author of the Treaty sought to preclude a barrage of litigation.

When interpreting the text of Article 230 (4) strictly, the three criteria's required to establish standing before the Court are; first, that direct concern must be demonstrated, secondly, that the separate requirement of individual concern must be fulfilled. In practice these two criteria's often overlap. Third, there must be a decision. When a regulation is challenged the Court has failed to make a clear statement on whether there must be a decision of direct and individual concern to them.⁶⁷

3.3.3.1 Distinction between Regulations and Decisions

Article 230 (4) has been understood as meaning that individuals cannot challenge genuine legislative acts and only those to whom they are addressed can challenge administrative acts.⁶⁸

Prima facie, the distinction between regulations and decisions are quite obvious; where the contested measure concerns specific and identifiable persons it shall be considered a decision and where it concerns categories of persons indiscriminately, it shall be considered a regulation.⁶⁹ It has, however, been argued that the word "decision" within the meaning of Article 230 does not refer to the meaning given in Article 240. Instead, it has been submitted that the Court should interpret this word to mean an act in general (sometimes this non-technical sense of the word is employed in other areas in the Treaty). However this argument was firmly rejected by the Court as it stated that, by virtue of the fact that Article 230 also makes specific reference to regulations, recommendations and opinions, the word "decisions" should be interpreted in its technical sense.⁷⁰

3.3.3.2 Direct Concern

The text of paragraph four also requires that direct concern must be demonstrated by the applicant where he seeks standing to challenge a decision in the form of a regulation or a decision which is addressed to a third person. The Court in the case of *Les Verts vs. Parliament* described

⁶⁷ Ward; *Judicial Review and the Rights of Private Parties in EC Law*. 2000, p. 213. (Authors Stephen Weatherill and Paul Beaumont state in their book *EC LAW* that a non privileged applicant attacking a regulation also has to prove direct and individual concern).

⁶⁸ *Confédération Nationale des Producteurs de Fruits et légumes vs. Council*, Case 16, 17/62, [1962] ECR 471.

⁶⁹ As found by the court in *Producteurs de Fruits vs. council* [1975] ECR 1393. Here the Court stated that a regulation was identified by the fact that it applied to "categories of persons viewed abstractly and in their entirety". In *Plaumann and co vs. Commission* [1963] ECR 95 the Court stated that "decisions are characterised by the limited number of persons to whom they are addressed. It continued " In order to determine whether or not a measure constitutes a decision must inquire whether that measure concerns specific persons".

⁷⁰ *Confederation Nationale des Producteurs de Fruits ET Legumes vs. Council*, Case 16,17/62, [1962] ECR 471.

direct concern as being established where there was "a complete set of rules which are sufficient in themselves and require no implementing provisions" and added that where this was the case the measure in question must be automatic and leave no room for discretion.⁷¹ The Court of Justice interprets direct concern to mean that the addressee is left no latitude of discretion, i.e. that the decision affects the applicant without the addressee being necessitated to take any decision himself. By deduction, the applicant must show that the detrimental effect complained of was a reasonably foreseeable outcome of the contested measure and also that the effect incurred was not in any way incurred as a result of discretion practised by a third party. For example, in the case of *Alcan vs. Commission*, the applicant was not directly concerned as the decision, addressed to Belgium and Luxembourg, left discretionary powers in the hands of these Member States. Therefore it was not certain that the regime permitted by the decision would have any consequence for the applicant.⁷²

Although this is the general rule, if the applicant can provide evidence which shows that the third parties discretion when implementing the measure is "entirely theoretical", direct concern may be accepted by the Court. This was the issue in question in the case of *Piraiki vs. Commission*.⁷³ Here the applicants, Greek producers of cotton yarn, sought the annulment of a decision given by the Commission to French authorities concerning restrictive quotas of the product. The Court rejected the argument forwarded by the Commission that the applicant did not exhibit direct concern because the French authority had discretion not to introduce such a quota system. The Court stated that this was "entirely theoretical" because France had sought a system of import quotas more strict than which was finally granted. This entitled the applicant to standing.⁷⁴ Where the third party does have a genuine discretion in how it applies the Community measure, then those potentially affected by the measure do not have direct concern.⁷⁵

3.3.3.3 Individual Concern

The first case where the analysis of the notion "individual concern" arose was in the case *Plauman vs. Commission*.⁷⁶ The Commission disputed the admissibility of the application on various grounds, one of which was particularly interesting. The Commission thought that the decision was not of individual concern to the applicant.⁷⁷

In this case, the Court formulated the "Plaumann test", which specifies how much individualization the Court will require of a person. In other words, the test considers how distinguished the plaintiff is from other persons falling

⁷¹*Les Verts vs. Parliament*, Case 294/83, [1986] ECR 1339.

⁷²*Alcan Aliminum Raeren vs. Commission*, Case 69/69, [1970] ECR 394, para. 8110.

⁷³*Piraiki-Patraiki vs. Commission*, Case 11/82 [1985] ECR 207.

⁷⁴ *Ibid*, para. 242.

⁷⁵*Mannesmann-Röhrenwerke vs. Council*, Case 333/85, [1987] ECR 1381.

⁷⁶*Plaumann vs. Commission*, Case 25/62, [1963] ECR 95.

⁷⁷ *Ibid*, para. 100.

within the scope of application of the regulation in question in that particular case. In this case the Court said that:

*“Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.”*⁷⁸

The question at issue is: what are the characteristic that individualizes the applicant from all other persons? The Court did not give any answer to this question other than that a mere factual interest in the annulment of the measure was not enough.

In conclusion, the chances that an asylum seeker would be able to challenge any rules of the Procedure Directive or the Qualification Directive through this remedy are very limited. Directives have never been challenged through annulment proceedings. It is clear from the wording of Article 230 (4) that decisions are the only acts which can be challenged by private parties. Furthermore, directives lay down general standards and it is very difficult to prove individual concern in the context of Article 230 (4) when the applicant wants to challenge a directive.

Article 249 EC Treaty states that Member States are vested with discretion when it comes to “choice of forms and methods” for their implementation of directives. Therefore it is impossible for an asylum seeker or any other applicant to show that a directive constitutes “a complete set of rules which are sufficient in themselves and require no implementing provisions”.⁷⁹ It is also very difficult to think of a situation where a natural or legal person is directly or individually concerned by a directive, but the case law on regulations proves that, in some cases; private applicants have locus standi to challenge provisions in a regulation, despite its general nature.⁸⁰ The second positive trend is that the case law on the effects of directives has been very liberal and there is no reason why such a trend could not be transported to the area of judicial review of those measures. In *Alcan vs. Commission* the Court stated, referring to Article 173, that “the aim of this provision is to ensure legal protection of individuals in all cases in which they are individually concerned by an EEC measure-in whatever form it appears which is not addressed to them.”⁸¹ This statement would mean that directives could also be reviewable by private parties who are directly and individually concerned by those acts.

⁷⁸ Ibid, para. 107.

⁷⁹ *Les Verts vs. Parliament*, Case 294/83, [1986] ECR 1339.

⁸⁰ *Sofrimport vs. Commission*, Case C-152/88, [1990] ECR I-2477.

⁸¹ *Alcan vs. Commission*, Case 69/69, [1970] ECR 385.

3.3.4 Preliminary Rulings

The direct applicability of EC law in combination with the preliminary ruling has developed into the most effective instrument for individuals to ensure that the Member States follow and apply EC law.⁸² The system of references for preliminary rulings on the validity of Community acts has enabled individual litigants, through their national courts, to bring before the ECJ questions as to the validity of general Community legislation which they could not have challenged directly.⁸³ This procedure is available to national courts, not to the parties appearing before such courts, so the parties before the national court may go beyond the scope of the questions referred by the national court.⁸⁴

There are three different preliminary procedures:

1. Article 234 EC Treaty provides the standard procedure.
2. Article 68.1 EC Treaty allows preliminary rulings in the field of visas, immigration and asylum.
3. Finally, under Article 35 TEU the Court has the competence to give preliminary rulings on police and judicial co-operation matters.

I will focus on the second type of procedure for preliminary rulings and will only consider preliminary rulings in the field of asylum, and not on visas and immigration, because of the limitations of this paper. In order to examine preliminary ruling in the field of asylum we must examine this subject in the light of the case law of Article 234.⁸⁵

A significant innovation introduced by the Treaty of Amsterdam under Title IV EC Treaty is the competence that has been given to the ECJ to give preliminary rulings and advisory opinions in asylum matters.⁸⁶ The conditions for preliminary rulings in this area are stated in Article 68 (1), which states that:

Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the Community based on this Title is raised in a case pending before the court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

⁸² Quitzow; ” ”Private enforcement” i EG-rätten – en studie av medlemstaternas skadeståndsansvar i samband med överträdelse av gemenskapsregler”, *Juridisk Tidskrift*, 1996-97 nr 3, p. 682.

⁸³ *Petroni vs. ONPTS*, Case 24/75, [1975] ECR.1149. The case involved validity of provisions of Regulation 1408/71 on social security for migrant workers.

⁸⁴ *Hessische Knappschaft vs. Singer*, Case 44/65, [1965] ECR. 965.

⁸⁵ Article 234 ECT (former Article 177).

⁸⁶ Hailbronner, *Immigration and Asylum law and Policy of the European Union*, 2000, p. 94.

The ECJ itself defined the aim of Article 234 as a way to ensure that EC law is the same in each Member State.⁸⁷ In the standard procedure, any national court that wishes can send a request for a preliminary ruling. Unfortunately, preliminary rulings are limited in the field of asylum, Article 68.1 EC Treaty allows preliminary rulings only by request of national courts or tribunal against whose decisions there are no judicial remedies under domestic law. This limitation is quite threatening to the coherence of the legal order in the European Community, as it gives permission to lower level courts to interpret Community law in whatever way they see fit. This system will not be any help to asylum cases which do not have the financial aid to be taken to appeal,⁸⁸ or which do not have suspensive effect on appeal. The limitation of ECJ's jurisdiction shows that administrative action taken at the supranational level is thought to require less judicial control than administrative action at the national level, a position that is very hard to justify. Under Article 234, courts of last instance are under an obligation to make such a request, but in the fields of asylum and immigration the courts "shall" send for a request *only if* it considers it necessary in order to give a judgement. Some commentators have concluded that seeking an ECJ ruling is optional.⁸⁹ This conclusion argues against the wording and context of the Article.⁹⁰ The margin of appreciation under Article 68 (1) EC Treaty is limited because the drafters opted for the word "shall" in opposition to inclusion of the term "may request", which was used in Article 35.3 TEU where ECJ competence was regulated. Where a national court has recognized that it is encountered with a question of interpretation under Article 68 (1) EC Treaty, it is obligated to refer the case to the ECJ.⁹¹

There is an exception to Article 68 in its second paragraph, stating that when law and order or internal security are at stake for Member States, the ECJ has no jurisdiction with regard to the free movement of persons. On this issue, the ECtHR has stated in the *Chahal* and *Ahmed* case that no derogation can be made from Article 3 of ECHR; this is an absolute right, even where internal security issues are at stake.⁹² Therefore, a different standard of judicial control is being applied to Community law than that which is binding upon the Member States as parties to the ECHR notwithstanding the Treaty's own references to the ECHR.

⁸⁷ *Rheinmühlen- Düsseldorf vs. Einfuhr –und Vorratsstelle*, Case C-166/73, [1974] ECR 33.

⁸⁸ The draft Directive on minimum Procedures does not give the applicant free legal aid for appeals.

⁸⁹ See C.C. Gialdino, "Schengen et le troisième pilier: le contrôle juridictionnel organisé par le traité d'Amsterdam", *Revue du Marché Unique Européen* ", 1998, pp. 105-6.

⁹⁰ *Ibid*, pp 106-7.

⁹¹ Noll; *Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, 2000, p. 143.

⁹² ECtHR, Case of *Chahal vs. the United Kingdom* (1996), ECtHR, Case of *Ahmed and Others vs. the United Kingdom* (1998).

The Council, Commission or any Member State can also seek a preliminary ruling from the ECJ on questions of interpretation. But this is only applicable to future judgements.⁹³

3.3.4.1 Characterisation of National Court

Since the power to make a reference is conferred only on courts and tribunals, it is vital to know what constitutes a court or a tribunal. It is for the ECJ to decide whether a body is a court or tribunal for the purposes of Article 68(1). The ECJ takes a number of factors into consideration when making this decision, including whether the body:

1. Is established by law,⁹⁴
2. Is permanent,⁹⁵
3. Has a compulsory jurisdiction,⁹⁶
4. Consists of an interpartes procedure,⁹⁷
5. Applies rules of law,⁹⁸
6. Is independent.⁹⁹

Furthermore, under Article 68.1, only the last instance of a national court or tribunal may request a preliminary ruling, so the determination that a court is a court of last resort has become particularly important in asylum cases. This issue has not yet been discussed by the ECJ, even under Article 234 EC Treaty. The Court has however in obiter dictum said that the answer is whether the applicant has the possibility to overturn the decision of a national court.¹⁰⁰

The last instance tribunal in Sweden in asylum cases is the Aliens Appeals Board. The Aliens Appeals Board is neither an administrative court nor a public court. The Swedish government have stated that if the board fulfils the requirements, for example oral hearing of the cases before it, then it can be considered a “court or tribunal” that can ask for a preliminary ruling from the ECJ.¹⁰¹ But this is not that simple, just because national law considers an organ a “court or a tribunal” does not mean that it is a “court or a tribunal” within the meaning of Article 234 EC Treaty. What constitutes a “court or a tribunal” is a question of Community law and must be answered by reference to general criteria applicable to all Member States rather than by reference to national law.¹⁰² The European Court of Justice may have to examine Swedish law that governs the composition, status and function of the Aliens

⁹³ Article 68 (3).

⁹⁴ *Vaassen vs. Beambtenfords voor het Mijbedriff*, Case 61/65, [1996] ECR. 261.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Costa vs. ENEL*, Case 6/64, [1964] ECR

¹⁰¹ SOU 1999:16. Ökad rättsäkerhet i asylärenden, s. 226.

¹⁰² Brown & Jacobs, *The Court of Justice of the European Communities*, 1995, p. 209.

Appeals Board to be able to determine if it can be regarded as a “court or a tribunal” within the meaning of Article 234.

Analysing the different factors that the ECJ have taken into consideration in its earlier case law to determine what constitutes a “court or a tribunal” of the Member States, one can see that the Aliens Appeals Board does not fulfil all of them. It is a body established by law, is permanent, has a compulsory jurisdiction, applies rules of law, is an independent body but the board does not have an interpartes procedure. The Aliens Appeals Board as it stands today is not competent and sufficient enough to handle asylum appeal cases. Reports from the Committee against Torture show that Sweden has been breaching the CAT numerous times, because the Aliens Appeals Board decision in certain cases has breached the principle of non-refoulement. There is a proposal to replace the Aliens Appeals Board with a special court.¹⁰³

3.3.4.2 When can a National Court ask for a Preliminary Ruling?

The court or tribunal may do so only under certain conditions. First of all, the reference must concern a question of Community law: this includes matters, which affect people or property in the countries of the Common Market. Individuals do not have the right to appeal to the ECJ; it is for the national court alone to make the decision to refer.¹⁰⁴ Furthermore, the national court must consider the ECJ’s answer necessary to enable it to give a judgement. Whether “a decision on the question is necessary to enable a court to give judgement” is for the national court to make. Their discretion in that respect is final. The question raised must be conclusive for the case. If the same point has already been decided by the ECJ in a previous case the national court can follow that previous decision.¹⁰⁵

Although a preliminary ruling is not formally binding on courts other than the court to which it is addressed, it should be regarded as a highly persuasive authority and should be followed. But the ECJ is not bound by any of its previous decisions. In *Costa vs. ENEL*, the ECJ stated that if a question is imperfectly formulated it does not deprive the Court the power to extract from the question those matters relevant to the interpretation of the Treaty.¹⁰⁶ In *Telemarsicabruzzo SpA*, the ECJ stated that to give a useful reply to the referred question, it is necessary for the national court to describe the factual and legislative background of the question.¹⁰⁷

If a national court thinks that a previous decision of the Court may have been wrong or there are new factors to be noticed by the Court, the national court can consider it necessary to re-submit the point to the ECJ.

¹⁰³ SOU 1999:16.

¹⁰⁴ Brown & Jacobs, *The Court of Justice of the European Communities*, 1995, p. 202.

¹⁰⁵ *CILFIT vs. Ministry of Health*, Case 283/81, [1982] ECR 3415, para. 14.

¹⁰⁶ *Costa vs. ENEL*, Case 6/64, [1964] ECR 585.

¹⁰⁷ *Telemarsicabruzzo SpA vs. Circostel, Ministero delle Poste e Telecomunicazioni & Ministero della Difesa*, Case 320/90, [1987] ECR 2545.

There are three groups of cases established in which the ECJ can declare a preliminary ruling inadmissible:

1. If there is obviously no connection between the referred question and the original case and the decision they are asking for is irrelevant.¹⁰⁸
2. If the proceedings before the submitting court were already finished when the question for the preliminary ruling was sent to the ECJ.¹⁰⁹
3. If it is obviously not a genuine dispute, but a fake one, only brought up to invoke a statement of the Court regarding a special problem.¹¹⁰

A national court may also consider the point as reasonably clear and free from doubt. So if there is no need for interpretation of Community law, the national court may decide the case without asking the ECJ, following the rule that a national court is only allowed to apply but not to interpret Community law. In 1987, the Court decided in the *Foto-Frost* case that it alone had competence to hold a provision of Community law to be invalid.¹¹¹ Since then, if a national court doubted the validity of a provision of secondary Community law, it had to either ask the ECJ to rule on that issue or ignore the doubts and apply the provision as it stood. According to the “acte clair” doctrine a clear provision does not require interpretation. Consequently, since the Court must be consulted on questions of “interpretation” only, clear acts cannot be submitted to it under Article 68(1). If these conditions are satisfied, the national court will suspend proceedings and will, on its own initiative notify the Court of the decision to refer the matter. Finally, the preliminary ruling of the Court is, in its own words, binding on the national court hearing the case in which the decision is given. This jurisdiction is exclusive to the ECJ; the Court of First Instance cannot give a preliminary ruling.¹¹²

In conclusion, the question of a uniform interpretation of the refugee definition will be one of the most important elements of the European harmonisation process where the ECJ will have an important role through its binding interpretations of Community rules. The European Court of Justice is the first supranational judicial organ to be granted explicit competence to rule on the interpretation of the 1951 GC. The ECJ only has the competence to determine whether the Community institutions have transgressed the limits imposed by the 1951 GC for the treatment of refugees. The Court does not have the jurisdiction to determine whether Member States are acting in accordance with their obligation under the 1951 GC.

Another issue is whether the existing procedure established by the Amsterdam Treaty is adequate to provide for an efficient judicial review of an individual’s rights in asylum matters. The demarcation of lower lever

¹⁰⁸ *Gmurzynska-Bscher vs. Oberfinanzdirektion Köln*, Case C-231/89, [1990] ECR I-4003.

¹⁰⁹ *Fratelli Pardini SpA vs. Ministero del commercio*, Case C- 338/85, [1988] ECR 2041.

¹¹⁰ *Foglia vs. Novello I*, Case C-104/79; *Foglia vs. Novello II*, C-244/80.

¹¹¹ *Foto-Frost*, Case 314/85, [1987] ECR 4225.

¹¹² *Brown & Kennedy; The Court of Justice of the European Communities*, 1994, p. 152.

courts possibilities to ask for a preliminary ruling means also that asylum seekers possibilities to have their rights protected decreases. It is not always possible for asylum seekers to take their case all the way up to the court or tribunal of last instance. Especially when the Procedure Directive doesn't guarantee financial aid or suspensive effect on appeals. One can easily draw the conclusion that this would be more of an exemption than a rule. This limitation is also threatening to the coherence of the legal order in the European Community, as it gives permission to lower level courts to interpret Community law as they wish.

Presume for example that an asylum seeker applies for refugee status in one of the Member States and that state examines if she/he fulfils the requirements of the refugee definition that is stated in the Qualification Directive. If the refugee definition in the Qualification Directives was meant to be interpreted broadly but the first instance authority in that country makes a narrow interpretation of the definition, this can mean that the individual loses a right that she/he is entitled to. This kind of unfortunate misinterpretations could be prevented if the lower level courts could ask for a preliminary ruling and have the true meaning of the definition explained to them by the ECJ.

4 The Right of Access to Judicial Review

In the previous chapters, we saw that EC law sometimes confers rights on individuals and that those rights can be relied upon before national courts. However, for Community law to be fully effective, it is not enough that certain rights can be relied on. It is as important that the individual relying on a Community right gets access to an effective remedy before a judge and that the court really tries his case. In this chapter we will see how an individual can rely on the principle of right of access to judicial review and a fair trial.

4.1 The Johnston Case¹¹³

In the *Johnston case*, Marguerite Johnston had been deprived, under Northern Irish law, of any chance of enforcing her rights under the Equal Treatment Directive,¹¹⁴ because the chief constable was not prepared to employ women on the basis that women police officers were prohibited from carrying firearms. The United Kingdom courts were purportedly displaced from hearing her claim by a certificate issued by the Secretary of State certifying that refusal to continue to provide Ms Johnston with fulltime employment was done for the purpose of 1) safeguarding national security and 2) protecting public safety and public order. The ECJ stated that this was not allowed.

The question in this case was how far the Member States must go to ensure effective judicial remedy when an individual's right under Community law is breached. The ECJ held that Member States "must take measures which are sufficiently effective to achieve the aim of the equal treatment directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned" and "It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law".¹¹⁵

The Court's ruling at the very minimum, laid down a fundamental obligation on Member States to secure the availability of avenues for securing judicial review of Member States laws that allegedly breach effective EC measures. The Court went even further in this judgement and asserted that "all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive".¹¹⁶

¹¹³ *Johnston vs. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, [1986] ECR 1651.

¹¹⁴ Council Directive No 76/207 OJ 1976 L39/40.

¹¹⁵ *Johnston Case*. See also *Heylens Case* 222/86, [1987] ECR 4097.

¹¹⁶ *Johnston Case*, paragraph 19.

4.2 The Heylens Case¹¹⁷

Another interesting case on this issue is the *Heylens case*. Heylans was a Belgian national who worked as a football trainer in France. His Belgian trainer's diploma was, however, not recognised by the French authorities. He could not challenge that decision in accordance with French law. Heylens continued to work as a trainer and was therefore prosecuted. The case came before the ECJ, which once again referred to the right to an effective judicial remedy in Articles 6 and 13 of the ECHR. The Treaty gave Heylens a fundamental right to free access to employment. In order for that right to be effectively protected there had to be a remedy of a judicial nature available for Heylens against the national authority's decision refusing access to the French market.¹¹⁸

From the *Johnston* and *Heylens* cases it is clear that when an individual has a right under Community law and that right might have been infringed, she/he has the right to have the case tried before a national court. These principles are unconditional, meaning that they don't require further measures by the European Community or national institutions. They have direct effect by their nature. It must be possible for an individual to get judicial control on any decision by a national authority, which deals with application of Community law at the national level.¹¹⁹ Indeed, this requirement of judicial control reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR.¹²⁰ National courts often seem to be unaware of the fact that they are obligated to apply these general principles of Community law and review national measure if they come within the framework of Community law.¹²¹

In December 2000 the European Union adopted the EU Charter of Fundamental Rights.¹²² Even if it has been adopted as a none legally binding document, it has already improved the status of fundamental rights, including the right to an effective remedy in the Community.¹²³

The newly adopted EU Charter, Article 47, states:

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

¹¹⁷ *UNECTEF vs. Heylens*, Case 222/86, [1987] ECR 4097.

¹¹⁸ *Ibid.*, para. 14.

¹¹⁹ Nergelius; *Förvaltningsprocess, Normprövning och Europarätt*, 2000, p. 39.

¹²⁰ See note 111, para 18.

¹²¹ Craig and De Búrca; *The Evolution of EC Law*, 1999. p. 186.

¹²² Charter of Fundamental Rights at the European Council in Nice in December 2000, OJ 2000 C 364/1.

¹²³ See CFI's discussion in the Jégo-Quére case (T-177/01).

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.”

These provisions stem directly from Article 6 (Right to a fair trial) and Article 13 (Right to an effective remedy) of the ECHR. The same principle is stated in the ICCPR, but this right has a wider field of applicability in the EU Charter. An effective remedy must be available not only when rights recognized in the Charter are breached, but also when “the rights and liberties guaranteed by the laws of the Union” are breached, whatever the source of the said rights are (primary law, secondary law or general legal principles of the Union). The requirements in Article 47 of the Charter also takes precedence over the provisions in the ECHR and the ICCPR, since the Charter not only requires “effective” or “useful” remedies to be made available, even when they are exercised before an authority other than a Court, but it must be possible to obtain a remedy “in a Court of law”. This means that for any right granted to an individual by the legal order of the European Union, the right of access to a court must be recognized in the case of a dispute concerning the existence of the said right or its extent. Article 47 also governs contentious administrative matters and complements Article 41 of the Charter (Right to Good Administration) by providing for an opportunity to initiate proceedings against administrative measures. This is outside the scope of ECHR Article 6.

The Johnston and the Heylens cases concerned lack of judicial remedies in the Member States, but how does this principle affect access to the Community Courts? In a recent case the Court of First Instance (CFI) applied the principle of Right to effective remedy to the Community courts and made a more liberal interpretation of the concept of “individual concern”, which is the number one admissibility requirement for individuals who want to bring an action for annulment of Community acts not addressed to them under Article 230 (4) EC Treaty.¹²⁴

The requirement of “individual concern” has been a nearly impossible hinder for individuals seeking judicial review of Community acts of general application, the reason for this is the restrictive interpretation of this requirement made by the Courts themselves.

4.3 The Jégo-Quéré Case¹²⁵

In June 2001, the Commission, concerned about the state of preservation of hake, based on the 1992 Council Regulation adopted a regulation fixing a

¹²⁴ For further reading on this requirement, see chapter four.

¹²⁵ T-177/01 *Jégo-Quéré et Cie* [2002]. Available at <http://www.curia.eu.int>.

minimum mesh (100-mm) for trawling beam in specific geographic areas.¹²⁶ Jégo-Quéré et Cie was a French company specialised in the fishing of whiting. This company was using nets with an 80-mm mesh in their vessels. The 2001 Regulation was seriously affecting the fishing activities of the company, so they decided to challenge the legality of two provisions of the regulation. The company's arguments on the substantive grounds were that these provisions breached the principle of proportionality and equality and the duty to provide reasons. Before the case can be argued on the merits, their action must be declared admissible. The CFI dismissed several of the company's arguments, such as, that the regulation was not a true regulation instead it was "a bundle of decisions".¹²⁷ But this argument is not necessary, as even a true regulation can be challenged.¹²⁸ After exhaustion of the more traditional arguments, the company's lawyers went for a more daring argument, and pleaded that the company have no alternative remedies if they would be denied standing to challenge the 2001 Regulation. This would constitute a breach of the Right to a fair trial guaranteed by Article 6 of the ECHR.

The Court of First Instance started its reasoning by referring to the European Court of Justice case law,¹²⁹ recalling that the Treaty had set up a complete system of remedies which granted the ECJ the task of controlling the legality of acts taken by Community institutions, and according to which access to justice is a "constitutive element of a Communauté de droit", and as such is guaranteed within the Community legal order.¹³⁰ The Court of First Instance also relied upon the opinion of Advocate General Jacobs in the *UPA case* to modify its case law. The submitted opinion of Advocate General Jacobs in the *UPA case* suggested that a private applicant should be individually concerned "where, by reasons of his particular circumstances, the measure has, or is liable to have, substantial adverse effect on his interests".¹³¹ The Court of First Instance made several references to the Advocate General's opinions but still adopted a different interpretation of individual concern from that of the Advocate General. The Court examined what alternatives the individuals have under EC law to bring a case before one of the Community Courts. One alternative to an annulment action is Article 234 EC Treaty preliminary reference procedure. As we have seen in the previous chapter this procedure can be used by individuals to challenge Community acts indirectly. Individuals can bring actions before national courts against national measures of implementation or application of a contested Community act, bringing up the question of the legality of the Community act on which these domestic measures are based. The national judge should then refer the question of validity of the Community measures to the ECJ, as it cannot decide on it itself. The problem is that in some cases, in particular where regulations, by nature self-sufficient acts, are at stake, there may be no

¹²⁶ No 1162/2001 of 14 June 2001, OJ [2001] L 159, 4.

¹²⁷ T-177/01 *Jégo-Quéré et Cie*, para. 19.

¹²⁸ *UNICME vs. Council*, C-123/77, [1978] ECR 845, para. 7.

¹²⁹ *Les Verts v. Parliament*, C-294/83, [1986] ECR 1339, para. 23.

¹³⁰ T-177/01 *Jégo-Quéré et Cie*, para. 41.

¹³¹ C-50/00, nyr. Available at <http://www.curia.eu.int>.

national application or implementation measures at national level which could be challenged before the national judge. It is not necessary to have a national measure, as long as it is possible to bring the matter before a national court, that is if such a procedure is available. The real problem is therefore when such a procedure does not exist.¹³²

The second alternative is Article 241 EC Treaty by challenging a Community measure implementing the disputed act, on the ground that the disputed act was unlawful. Since an individual could not reasonably be expected to have recourse to such remedies, the CFI concluded that, “in the light of Articles 6 and 13 of the ECHR and of Article 47 of the EU Charter of Fundamental Rights, these procedures cannot anymore be considered guaranteeing to individuals a right to an effective remedy allowing them to challenge the legality of Community provisions of general application which directly and individually affects their legal situation”.¹³³ The use of the word anymore by the CFI signals that circumstances have changed. The CFI continued that, “a person is to be regarded as individually concerned by a Community measure of general application that concerns him directly, if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and the position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.”¹³⁴

The Court of First Instance took the view that the requirement of “individual concern” needed to be interpreted more broadly, the applicant would otherwise be denied the right to an effective remedy, which is a right recognised by the constitutional traditions common to the Member States, Article 6 and 13 ECHR and Article 47 of the EU Charter of Fundamental Rights.

In the appeal of the *UPA case* (they were denied access to court for lack of individual concern in the CFI) to the ECJ, (during this time the CFI had made a wider interpretation of the requirement of “individual concern” in the *Jégo-Quére* case) the Court agreed that the EU was a community based on the rule of law and that individuals were therefore entitled to effective judicial protection. According to the ECJ it is the Member States responsibility to establish a system of legal remedies and procedures, which ensures respect for the right to effective judicial protection. Furthermore, the ECJ stated that current rules do not allow an interpretation according to which a direct action for annulment is available at EU level whenever an examination by the Court would show that national procedural rules do not allow an individual to bring proceedings against a contested measure. If so, the court would have to examine national procedural rules, which go beyond

¹³² Granger; “Towards a liberalisation of standing conditions for individuals seeking judicial review of Community acts: *Jégo-Quére et Cie SA v Commission and Unión de Pequeños Agricultores v Council*”, *Common Market Law Review*, Vol. 66 No 1, 2003, p. 124.

¹³³ T-177/01 *Jégo-Quére*, para. 47.

¹³⁴ *Ibid.*, para. 51.

its jurisdiction. So the ECJ in the UpA case did not follow CFI's line in *the Jégo-Quééré case*.

The Jégo-Quééré decision by the CFI has been appealed by the Commission,¹³⁵ and the CFI's new formula was not explicitly taken up by the ECJ in this case either, but the Court seems to leave the door open for further developments towards a liberalisation of standing conditions. The Jégo-Quééré case provides a good illustration of how a political, non legally binding document, the EU Charter of Fundamental Rights, can still produce legal effects, by providing support for major changes in the case law. This case constitutes the first "legislative" use of the Charter.

Development work in this area requires careful considerations, as there is a fine balance to be found between various objectives, such as the protection of individuals, the respect for the rule of law, the effectiveness of Community decision-making, the principle of legal certainty, the coherence of the system of judicial remedies and the Community and national courts missions and workload.¹³⁶

In conclusion, in order for a remedy to be effective in asylum cases, national courts and the ECJ must take into account the special situation of asylum seekers, i.e. in terms of access to an interpreter and legal aid. Asylum Procedures in general have, until now, been outside the Communities jurisdiction and been primarily a matter for the individual Member States.¹³⁷ As a consequence the Community rights haven't been enforced in a uniform manner throughout the Community. Now, we have the Directive on procedures in the field of asylum. Article 38 in the Procedure Directive sets out the asylum seekers right to an effective remedy before a court of law. Through this Directive, Community rights in the area of refugee determination and subsidiary protection will be subject to the same minimum procedural rules in every Member State. The Directive sets out only minimum guarantees, but just because the Directive sets a low level of protection, i.e. no right to suspensive appeal and no legal aid guarantees, it is not the end of an asylum seekers rights through the Community legal order. The principles of effective remedy and a fair trial in the Union charter takes us above and beyond the low standard put in the Procedure Directive. These principles have direct effect by their nature. They are unconditional, meaning that they don't require further measures by the European Community or national institutions. It must be possible for an individual to get judicial control on any decision by a national authority, which deals with application of Community law at the national level.¹³⁸ Indeed, this requirement of judicial control reflects a general principle of Community law stemming

¹³⁵ See Commissions Minutes of the 1574: th meeting, PV (2000) 1574 Final, Brussels 10 July 2002, 16.

¹³⁶ See note 133.

¹³⁷ Van Gerven; "Of Rights, Remedies and Procedures", *Common Market Law Review*, Vol. 37, 2000, p. 521.

¹³⁸ Nergelius, *Förvaltningsprocess, Normprövning och Europarätt*, 2000, p. 39.

from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR.

5 The Role of Evidence

The role of evidence is a crucial part of a fair trial. The following chapter deals with rules of evidence and the burden of proof in the European Court of Justice.

5.1 Role of Evidence in Proceedings before the European Court of Justice

The role of evidence in a procedure before the Court of Justice is to present the existence of facts from material which can be either primary or secondary. A primary fact constitutes a direct understanding of facts, and secondary means that the perception of facts is gained indirectly through a conclusion drawn from some other fact or general experience or practice.¹³⁹

The nature of proceedings before the Court, a combination of accusatorial and inquisitorial processes, makes the fact-finding dependent on the proceedings and the way the case is pleaded.¹⁴⁰ The court has the obligation to seek facts when the public interests in a Member State are affected; otherwise it does not seek facts on its own initiative.¹⁴¹ This means that if a judgement has repercussions on more than the interest of the parties, the Court has a power to investigate the questions of fact that are raised, even against the wishes of the parties. This does not necessarily mean that the Court does investigate the facts. The obligation to ensure that justice is in conformity with the law does not bind the Court to make far-reaching investigations on issues of facts if the parties do not dispute the facts.¹⁴²

Because of the increased workload, the Court has developed the notion of “ipse dixit”, which means that the Court tends to rely on that the parties are capable to present the facts more than relying on evidence. The attitude of the Court is that if both parties have access and the ability to, present relevant information that is not disputed between the parties, there is no reason for the Court to intervene with its own investigations. This is also a way, when the parties are Member States or Community institutions, for the Court to show that the Member States and Communities institutions are trustworthy.

¹³⁹ *Watgen v. Caisse de pension des Employés Privés*, Case 64/85, [1988] ECR 2435 para. 2446- 2447. Lasok K.P.E. *the European Court of Justice- Practice and Procedure*, Second edition, Butterworth & co. London.1994 p. 345.

¹⁴⁰ Lasok; *The European Court of Justice- Practice and procedure*, 1994, p. 344.

¹⁴¹ André; “Evidence before the Court of Justice with special reference to the *consten/ Grundig* decision”, *Common Market Law Review*, Vol. 5, (1967/68), p. 43. Case 13/60 *Geitling Ruhrkohlen Verkaufsgesellschaft mbH v. High Authority* [1962] ECR 83.

¹⁴² See note 85, p. 345.

The situation is different when a private party is involved; for example, in an action against a Community institution or in references for a preliminary ruling. It's not as easy to get access to different documents for such persons. There is then no equivalence of position. In these cases it would be risky to rely totally on "ipse dixit". The Court can also use presumptions when determining a case, by using presumptions the Court rely more upon facts deriving from earlier judgements, or claims done by intervening Member States, rather than on evidence, to reach a solution.¹⁴³

To find out more about the role of evidence in the ECJ it is important to make the distinction between non-contentious proceedings, which are references for a preliminary ruling, and contentious proceedings.

5.1.1 Non-Contentious Proceedings

In these proceedings the role of evidence depends on the nature of the case. This means that in non- contentious proceedings, fact-finding is inquisitorial rather than accusatorial and in these cases there is no evidential burden of proof.

In a proceeding for a preliminary ruling there are three categories of fact that can be identified;

1. those relating to the admissibility of the reference;
2. those relating to the dispute between the parties before the national court;
3. Those relating to the answer to the question of law put to the court.

My focus will be on categories 2 and 3.

The parties to the proceedings in the national court are able to bring forward evidence before the national court. They are not allowed to bring forward any evidence before the ECJ.¹⁴⁴

5.1.1.1 Facts relating to the Dispute between the Parties

The Courts jurisdiction is determined by order for reference. The national court has exclusive jurisdiction over the facts relating to the case before it. The facts in the case before the referring court create the question about Community law and can influence how the Court approaches the question of law referred to it.

The ECJ has an obligation only to examine questions of law, not the facts that shall be investigated. The Advocate General, in *Denkavit Futtermitel v Finanzamt Warendorf*, expressed that there is a possibility for the Court to correct facts that have been found by the national court, as long as it has to

¹⁴³ Ibid.

¹⁴⁴ *Campus Oil Ltd v Minister for Industry and Energy*, Case 72/83, [1984] ECR 2727, para. 11.

do with interpretation of Community law.¹⁴⁵ When it comes to facts that may be relevant for the validity of an act of an institution, the Court may make its own investigations. Furthermore, in situations where interpretation of Community law is relevant, it may be unsafe if the national referring court is to present the only facts that are going to be the ground for the validity.

5.1.1.2 Facts Relating to the Reference

As we already know, the main reason for asking for a preliminary is to consider a matter of public interest. The Court exercises a discretionary power and can choose between trusting the evidence that is conceded by a party that has knowledge of the facts or seeking evidence on its own, for example by ordering a measure of inquiry. Usually a question of this nature is not posed to the referring court but decided by the Community institutions. The Court does not only consider if the party concerned has knowledge of the facts, but it also takes other relevant factors into account, such as the importance of the facts in question.

Facts relating to the solution of the interpretation problem are within the exclusive jurisdiction of the Court. The Court is not bound by findings made by the national court. If the ECJ decisions on validity of a Community provision were merely based on referring courts findings, it would be very difficult for the ECJ to ensure that the law is observed properly.¹⁴⁶

How deeply it is necessary to investigate the material questions of fact depends on the wording of the question referred to the Court. A national court must clearly state the questions, but the question of validity can be given an extensive interpretation.¹⁴⁷ The Court is not bound to consider every possible argument. When a judgement declares a measure valid, the Court never expressly states that a measure is valid; it only states that no cause has been shown to cast doubt on the validity of the measure. Therefore, it is always possible to challenge the validity of a measure again on the ground of another fact not considered by the court. Usually the questions are phrased in general terms.

The Courts answer to the question binds the referring court with regard to the question of law and it binds the referring court on the basis of the principle of “res judicata”.

5.2 Burden of Proof in the ECJ

One can understand the “burden of proof” in two ways:

¹⁴⁵ *Denkavit Futtermittel GmbH vs. Finanzamt Warendorf*, Case 36/79, [1979] ECR 3439, para. 12 and para. 3461 Advocate General Reischl.

¹⁴⁶ Lasok; *The European Court of Justice- Practice and procedure*, 1994 p. 352.

¹⁴⁷ *Internationale Crediet- en Handelsvereniging NV Rotterdam vs. Minister Van Landbouw en Visserij*, Case 73 and 74/63, [1964] ECR I, para. 26 and 28.

1. *The legal burden*, burden of proving ones case. That one party is obligated to meet the criteria that are stated in the law. This type of burden exists only when the proceedings are contentious.¹⁴⁸
2. *The evidential burden*, the burden of adducing evidence to prove a fact. The evidential burden exists as soon as there are facts to be proved, no matter what kind of proceeding it is. But the allocation of this burden depend on the character of the proceedings, whether they are inquisitorial or accusatorial. If a party does not fulfil the requirements of the evidential burden, i. e. sufficient evidence to raise an issue, the case can be dismissed.¹⁴⁹

The general rule in Community law that determines the party on whom the burden of proof lies is that each party proves the fact upon which his claim is based.¹⁵⁰ In references for a preliminary ruling, the party who raises an issue, whether through oral or written observation to the Court must prove that the assertions of fact he makes are true. For example, in cases *Firma Albert Ruckdeschel & Co and Diamalt AG v Hauptzollamt Hamburg-St Annen*, the Council and the Commission did not supply sufficient evidence to support certain assertions made by them. The Advocate General Capotori said: “*in the circumstances the conclusion must be drawn that there is no evidence of the facts to which the two institutions attached importance*”. There is a tendency to request co-operation between the parties in order to avoid cases which are wrongly decided on the basis of the burden of proof.¹⁵¹ If a reasonable degree of certainty is not attained, in the end the Court can ask for a measure of inquiry. Fact-finding is a result of a far-reaching interplay between the parties as well as between the parties and the Court. The Court can reduce the inequality between the parties to prove facts in the case. In *Mirossevich v. High Authority*, the Court consulted an expert and found that the overall picture showed that the facts produced constituted a serious presumption in favour of the applicant. It was up to the defendant to rebut the presumption but he did not have enough evidence to change the presumption. This shows that the burden to adduce evidence can be shared between the parties and that the burden of proof can shift during the proceedings.¹⁵²

5.3 The Standard of Proof

What evidence can be used and what standard of proof is required? The Community law does not have any specific rules on the use of evidence. All means of proof can be used except for evidence obtained improperly.¹⁵³

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ This is also expressed in the maxim *ei incumbit probatio qui dicit, non qui negat*.

¹⁵¹ Lasok; *The European Court of Justice- Practice and Procedure*, 1994, p. 422.

¹⁵² Ibid, p. 421.

¹⁵³ Learnets and Arts; *Procedural law of the European Union*, 1999, p. 382.

It is unclear what standard of proof is required and this depends also on the specific rule in question. Clearly, the Court must be convinced of the existence of the facts in the case, but what is necessary to convince the Court? The ECJ does not seem to have decided on a specific formula for the standard of proof. In the *Mirossevich* case the Court referred to a “serious presumption”.¹⁵⁴ In *Usines de la Providence v High Authority Advocate General Roemer* referred to “convincing proof” and “complete proof”.¹⁵⁵ It is important for the legal certainty that the Court identifies a standard of proof.

¹⁵⁴ *Mirossevich vs. High Authority*, Case 10/55, [1954] ECR 333. Para, 343-344.

¹⁵⁵ *Fonderies et Usines de la Providence SA vs. High Authority*, Case 51/63 [1965] ECR 911. Para, 961.

6 Conclusions

By the communitarization of asylum issues influential legislative tools such as directives became available. The Qualification Directive sets out the applicable rules for determining refugee status and subsidiary protection. The aim of this Directive is to prevent refugee flows to certain Member States based on differing levels of protection that they provide. This Directive is positive in many ways both for the Member States and for the asylum seekers. A harmonised refugee definition will reduce "asylum shopping" and established criteria's from the 1951 GC that have been questioned by certain Member States, *inter alia*, Germany that did not recognise persecution from non state agents, are stated as a minimum requirement in this Directive. One important distinction that the Member States must keep in mind is the difference between refugee status according to the 1951 GC and subsidiary protection. This distinction must be operationalized so that the scope of application of the 1951 GC is respected, avoiding that this principle instrument of refugee protection would be relegated to a de facto subsidiary protection mechanism. If a state refuses to recognise a refugee claimant as a Convention refugee, and grants him/her subsidiary protection instead, this must clearly be such a negative decision that has to be accompanied by reasons, as stated by the provision in Article 7 (d) of the Procedure Directive. Furthermore, it is very important that refugee claimants who have been granted subsidiary protection are entitled to a separate appeal in which they can uphold their principal application for recognition of Convention refugee status. Unfortunately, access to such an appeal is restricted in Article 32 of the Procedure Directive, as it stands today.

The Procedure Directive is aiming to harmonise asylum procedures in all Member States. First of all, the Directive consists of minimum rules, this to be sure that the individual Member State still holds on to considerable powers. Second, because of the unanimity requirement in the Council, the standards adopted are the lowest common denominator. The low standards in the Procedure Directive gives some Member States a tendency to reduce and question well-established protection principles, such as the principle of non-refoulement and right to suspensive effect on appeal. In my point of view the only positive outcome of this Directive is that it is a binding instrument that is under the ECJ's jurisdiction, otherwise the rights of asylum seekers have been cut down and not even binding principles of international law, such as the principle of non-refoulement, is respected.

The Treaty of Amsterdam has accredited the ECJ to interpret and rule on the validity of Community instruments adopted in the field of asylum. The remedies that are available before the ECJ in this area of law are not that sufficient except for preliminary rulings on interpretation of the instruments adopted. Article 230 provides a direct way for individuals to have standing under certain conditions. These requirements are that direct concern must be demonstrated, there must be a decision and the decision that the applicant

wants to challenge must be of individual concern. The possibilities that an asylum seeker would be able to challenge any rules of the Procedure Directive or the Qualification Directive through this remedy are very limited. Directives have never been challenged through annulment proceedings. It is clear from the wording of Article 230 (4) that decisions are the only acts which can be challenged by private parties. Directives lay down general standards and it is very difficult to prove individual concern in the context of Article 230 (4) when the applicant wants to challenge a directive.

Another way for asylum seekers to make sure that the Member States follow and apply the Procedure Directive and the Qualification Directive correctly is through preliminary rulings. The most obvious advantage of preliminary ruling is that applicants do not have to fulfil the requirements of direct and individual concern. Therefore both individual and general Community acts may be challenged. Unfortunately, access to the ECJ for reference of preliminary rulings are limited in the field of asylum, Article 68.1 EC Treaty allows preliminary rulings only by request of national courts or tribunal against whose decisions there are no judicial remedies under domestic law. This limitation is quite threatening to the coherence of the legal order in the European Community, as it gives permission to lower level courts to interpret Community law in whatever way they see fit. This system will not be any help to asylum cases which do not have the financial aid to be taken to appeal, or which do not have suspensive effect on appeal. The limitation of ECJ's jurisdiction shows that administrative action taken at the supranational level is thought to require less judicial control than administrative action at the national level, a position that is very hard to justify.

The problem with EU asylum law and policy for individuals is not only the limitation of the ECJ jurisdiction; it is also that EU is not subjected to any external control when it comes to human rights standards. When the ECJ delivers a judgement or gives a preliminary ruling, it is final. There is no other organ where the individual can have their asylum claim tried regarding its consistency with human rights standards. Incorporating the protection provided by the ECHR into Community law can solve this problem. Additionally, a clear link to the 1951 GC is required to assure that the ECJ will take rulings in the light of refugee law standards, primarily as developed by the executive authority and the office of UNHCR.

After the five years of transitional period, rules concerning ECJ's jurisdiction will be reassessed. The ECJ has a heavy workload today and it takes a very long time to get a preliminary ruling from the Court. This is not acceptable in the special situation of asylum seekers. There must be more resources made available for the ECJ especially with regard to the new competence and soon the new enlarged Europe. In the long-term perspective it also seems necessary to reassess procedural questions to ensure proper judicial protection, such as, the standing of private applicants under Article 230 EC Treaty. Compared with the past, the positive aspects of this supervisory mechanism cannot be underestimated.

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