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„Right to effective remedy according to Article 47 of the Charter in secondary EU law in relation to a situation of mass influx of asylum seekers“

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(the text prepared for an oral presentation)

I was asked to prepare a presentation on the subject of Article 47 of the Charter in situation of mass influx. As it is usual in such occasions, I will only share with you my views or more precisely a methodology that I usually apply to resolve legal questions related to EU law on asylum.

Art. 47 of the Charter and mass influx of asylum seekers:

- political context: non-refoulement and/vs. non-entrée (border procedures/transit zones *de lege lata);*

- step-by-step methodological approach [see: IARLJ-Europe/EASO Judicial Analysis: Part 3 of the "Introduction to the CEAS" (Chapter I) and forthcoming "Access to Procedure and Non-Refoulement" (Chapter IV)].

In this methodological sense my presentation may be put in the context of the Part 3 of the Chapter on the "Introduction to the CEAS" which we have produced recently based on the contract between EASO and the European Chapter of the IARLJ. In that Part we discussed the interplay between EU law, ECHR and national law. Since my presentation relates also to the access to procedure, the forthcoming Chapter IV on "Access to Procedure and Non-Refoulement" of the core judicial training material will explore those issues more thoroughly.

I haven't had yet a case on my table, where I would adjudicate on effective legal remedy in situation of mass influx although between October 2015 and February 2016 around 450.000 refugees crossed Slovenia in the so called humanitarian corridor. Therefore, my explanations of methodological steps will be rather forward looking and experimental. Nevertheless, they might be to some extent relevant for actual asylum situations at the borders in Hungary, Poland, Switzerland. *De lege ferenda* this subject could be relevant in the near future at the borders of Austria, Slovenia and perhaps Croatia. James Hathaway and Thomas Gammeltoft-Hansen were probably right in their

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working paper published in 2014 that states have somehow shifted their attention from the principle of non-refoulement to the various non-entrée policies. [1]

I will deal with methodological questions as regards mass influx and the right to effective legal remedy step-by-step based on the existing EU legislation, therefore, *de lege lata.*

Let's assume that we have an asylum seeker, whose application for international protection has been rejected together with many other applications of asylum seekers who arrived in mass influx and which have been processed highly probably at the border or in the transit zone of the Member State. Usually, when I get the case, the starting point for me is the question whether a certain issue comes within the scope of EU law.

First methodological question:

- Does the case come within the scope of EU law?

- Primary EU law (Art. 51(1) of the Charter) / general principle of EU law / secondary EU law (Temporary PD, Art. 46 of the RPD, Art. 27 of the Dublin III Regulation).

Of course, there is Article 47 of the Charter of Fundamental rights of the EU (hereinafter: the Charter) which sets the right to legal remedy. But, this provision in itself may not be necessarily enough to conclude that a contested legal issue comes within the scope of EU law. Apart from the Art. 47 of the Charter, I have to check also the secondary EU law. From the standpoint of secondary EU law, I would first notice that the Temporary Protection Directive (2001/55/EC), which was designed and adopted for the circumstances of mass influx, has not been politically activated and, therefore, is not applicable in the given case.[2] As a consequence, only the Recast Procedures Directive (2013/33/EU, hereinafter: the RPD) or the Regulation 604/2013 (hereinafter: the Dublin III Regulation) may be relevant.

The existing Dublin III Regulation does not regulate any kind of pre-Dublin procedure at the border. The so called pre-Dublin procedure is relevant *de lege ferenda*. It is introduced in the existing proposal for the amendments of the Dublin III Regulation.[3] Article 27 of the Dublin III Regulation regulates the right to effective remedy against the transfer decision for all situations - even for mass

1 Hathaway, C., James, Gammeltoft-Hansen, Thomas, 2014, Non-Refoulement in a Workd of Cooperative Deterrence, Law & Economics Working Papers, University of Michigan Law School.

2 Article 2(d) of the Temporary Protection Directive defines mass influx as an *„arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Ciommunity was spontaneous or aided, for example throughan evacuation programme.“*

3 Article 3(3) of the proposal for a regulation of the European Parliament and of the Council establishing /.../ person (recast), Brussels, 4.5. 2016, COM(2016) 270 final, 2016/0133 (COD).

influx. For the purpose of this presentation, I will leave aside the provision on effective legal remedy under the Dublin III Regulation, because the methodology for examining the right to effective legal remedy under the Dublin III Regulation is actually the same as it is in the case of the right to effective legal remedy under the RPD.

Article 46 of the RPD regulates the right to effective legal remedy and this includes effective remedy against decisions taken at the border or in the transit zones. Furthermore, recital 60 of the RPD mentions Article 47 of the Charter.[4] Therefore, there is no doubt that the discussed issue comes within the scope of EU law, in order words, in hypothetical situation of mass influx a contested negative decision of the administrative authority would implement EU law.

As a consequence of this, in a judicial procedure, I am not allowed to use the methods of interpretation that I usually apply in domestic administrative disputes. I have to use methods of interpretation that have been introduced by the CJEU in its case law,[5] this includes all relevant principles of application of EU law, such as indirect and direct effect of directives and primacy of EU law.[6]

The second methodological question:

Is there any explicit/implicit limitation of the right to effective remedy in situation of mass influx in the secondary EU law?

The second methodological question is a continuation of the first one. I have to ask myself whether there are any limitations of the right to effective remedy in the secondary EU law for the situations of mass influx. If there are some limitations, then this could raise the issue of validity of secondary EU law from the standpoint of Article 47 of the Charter in conjunction with the principle of proportionality from Article 52(1) of the Charter.

"Large number" of applications "simultaneously" filed (mass influx):

Art. 6(5) PD: speedy registration;

4 The recital 60 says that RPD respects the fundamental rights and in particular seeks to ensure full respect of human dignity and to promote the application of Article 47 of the Charter.

5 See, for example: Case C-238/81, CILFIT, para. 16-20; C-8/55; C-70/88, Chernobyl; 2/74, *Reyners v. Belgium*; 6/72, Continental Can; C-43/75, *Defrenne*; C-495/03, paras. 39, 45; C-257/00, *Givane*, para. 37; C-292/89; C-378/97; C-1/99.

6 For more on this, see: Statement on Detention of Asylum Seekers and Irregular Migrants and the Rule of Law, European Law Institute, 2016, section 3.3. (forthcoming - not yet available).

Art. 14(1) PD: who conducts personal interview;
Art. 43(3) PD: at which stage of procedure provisions on inadmissible applications and accelerated procedure may be used.

However, a quick reading of the secondary law leads me to the conclusion there are no explicit limitations of the right to effective legal remedy. Situation of mass influx is not *terminus technicus* and it is not a term that would be mentioned in the RPD. What is mentioned in the RPD is the situation when simultaneously a large number of applications for international protection are filed.
For example, Article 6(5) is relevant only for the extension of the deadline for registration of applications. It has nothing to do with eventual limitation of the right to effective legal remedy. Article 14(1) allows personal interview to be conducted by personnel of another authority, which is not the determining authority. Article 43(3) of the RPD defines at which stage of procedure provisions on inadmissible applications and accelerated procedure may be used.[7] This is not a limitation of the right to effective legal remedy in situation of mass influx.

Nevertheless, I see three possible options for limitation of effective legal remedy in the RPD in the context of mass influx.

<u>Three options for limitation of Art. 47 of the Charter (mass influx):</u>
(a) the text of Article 46 of the RPD,
(b) provisions such as Art. 9(2) (right to remain) or Art. 20(3) (free legal aid) of the RPD which regulate particular elements of effective legal remedy;
(c)provisions which regulate particular elements of the right to good administration (for example: Art. 8, 11(1)(2), 12(1)), 14., 33. and 34 of the RPD) as general principle of EU law (see Art. 41 of the Charter and recital 39 of the RPD).

The first possibility for limitations is, of course, the text of Article 46 of the RPD itself. The option b) relates to eventual limitations of certain aspects or elements of the right to effective legal remedy that can be part of other provisions in the RPD. For example, the right to remain in the Member State can be denied during the court proceedings in cases of subsequent applications or when the

7 Article 43, paragraph 3 says: „*In the event of arrivals involving a large number of third-country nationals or stateless persons lodging applications for international protection at the border or in a transit zone, which make it impossible in practice to apply there the provisions on inadmissible applications and accelerated procedure, those procedures may also be applied where and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zones."*

safe third country concepts are used.[8] Furthermore, under Art. 20(3) of the RPD Member States may provide that free legal assistance and representation is not granted where the applicant´ s appeal is considered by a court or tribunal or other competent authority to have no tangible prospects or success. In principle – and I underline – in principle I do not think that these two provisions *per se* are in contradiction with the Article 47 of the Charter in conjunction with the principle of proportionality from Article 52(1) of the Charter. However, in practice, depending on a particular circumstances of the given case, those provisions could be applied in a way that the right from Article 47 of the Charter would be disproportionally infringed. As regards the limitation under option b.), judgment of the CJEU in the case of *Tall* is relevant.

Option b.) - C-239/14, Tall, 17. 12. 2015:

MS may provide that an appeal against a decision refusing to take a subsequent application for asylum into consideration is devoid of suspensory effect (para. 49) as long as enforcement of that decision cannot as such lead to that national's removal (para. 56-58).

For example, in the case of *Tall* the CJEU developed interpretation that MS may provide that an appeal against a decision refusing to take a subsequent application for asylum into consideration is devoid of suspensory effect. However, this holds only if the enforcement of that decision cannot as such lead to that national's removal. The third-country national must be able to exercise his right to an effective remedy against the removal decision based on the Returns Directive (2008/115). This interpretation is a consequence of the interplay between the case-law of the ECtHR and EU law, since under the case-law of the ECtHR if an applicant has an arguable claim, a legal remedy must have an automatic suspensive effect even in a case of subsequent application.

Three options for limitation of Art. 47 of the Charter (mass influx):

(a) the text of Article 46 of the RPD,

(b) provisions such as Art. 9(2) (right to remain) or Art. 20(3) (free legal aid) of the RPD which regulate particular elements of effective legal remedy;

(c)provisions which regulate particular elements of the right to good administration (for example: Art. 8, 11(1)(2), 12(1)), 14., 33. and 34 of the RPD) as general principle of EU law (see Art. 41 of the Charter and recital 39 of the RPD).

8 See also the third sub-paragraph of Article (21(3)(b) of the PD.

The third option for limitation of Art. 47 of the Charter relates to possible limitations of the right to good governance - that is the right to legal protection, which corresponds to Article 41 of the Charter. Namely, significant limitations of the right to legal protection in procedure before administrative authority can directly affect the realization of the right to effective remedy before the competent court. In this respect the important provisions are, for example, those who regulate that applicants are informed in a language they reasonably suppose to understand of the procedure to be followed, that they receive the services of an interpreter for submitting their cases (Art.12(1)(b) RPD); that they have an opportunity for personal interview (Art. 14 RPD); that decisions on applications for international protection are given in writing (Art. 11(1) RPD) and in a language they reasonably understand (Art. 12(1)(f) RPD); that in case of negative decisions the reasons in fact and in law are stated in decision and information on how to challenge a negative decision (Art. 11(2) RPD); that they shall not be denied the opportunity to communicate with UNHCR (12(1(c) RPD); Art. 8 RPD is also important in this respect in case if applicants are detained; and, of course, the entire RPD is based on a concept that administrative decisions are taken individually, which is stated also in Article 4 of the Qualification Directive (2011/95).

However, these are general provisions, while as regards inadmissible applications for international protection, which are relevant for mass influx situation, there are some limitations in the RPD. But, these limitations are not introduced in the sense that the RPD would allow decisions to be taken collectively. Regarding the option c.) in the situations of procedures under Dublin III Regulation and in cases of inadmissible applications based on safe country concepts the following is relevant:

Option c.) - procedures under Dublin III Regulation and inadmissible applications based on safe country concepts (Art. 33. and 34 RPD):

- **no examination whether the applicants qualifies for international protection in accordance with QD;**
- **personnel other that the determining authority can conduct personal interview in procedures on inadmissible applications, but they must receive basic training, in particular with respect of int. human rights law.**
- **no personal interview in case of subsequent application.**

Provided that these provisions are properly used in practice, I do not see in them problems in the light of Article 47 of the Charter.

Let me turn now to option a)., which refers to the question whether the text of Article 46 of the RPD

regulates some limitations to the right to effective legal remedy against the decision of administrative authority.

The Art. 46 of the RPD is in fact rather difficult to digest intellectually. It is a very complex provision - with very specific nature and many cross references.

Option a.) - Art. 46(1) of the RPD:

1.„MS shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

a.) a decision taken on their application for international protection, including a decision:

i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status"

…

iii) inadmissible applications (safe third country, first country of asylum),

iv) applications related to the concept of European safe third country (see also Article 46(6) and second sub-paragraph of Article 46(4) of the RPD).

In my opinion, this does not mean that applicants have a right to effective remedy only against those decisions that are explicitly listed in sub-paragraphs of Article 46.[9] In my understanding, every final decision taken by administrative authority on application for international protection can be challenged before the court or tribunal. This is a right of an individual. The purpose of sub-paragraph a) is only to point out clearly that among others even decisions taken under accelerated procedure, decisions taken at the border or in transit zones or in cases of implicit withdrawal can be challenged before a court. The CJEU says in the case of *Tall*…

Tall, C-239/14, 17.12.2015, para. 51:

The characteristics of the remedy provided for in Article 39 of the 2005/85 PD must be determined in a manner that is consistent with Art. 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection and provides everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a court in compliance with conditions laid down in that article.

9 A different understanding could derive from paragraph 44 of the judgment in the case of *Tall*, where the CJEU says that Article 39 of the PD 2005/85 requires MS to ensure „*that applicants for asylum have the right to an effective remedy before a court or tribunal against the acts which are listed in Article 39(1) of that Directive*" (Tall, C-239/14, 17.12. 2015).

It is important to note, that in respect of the structure of Article 46 of the RPD, this provision does not differ from the previous provision of Article 39 of the Procedures Directive 2005/85. Based on the Procedures Directive 2005/85, the CJEU provided the following interpretation in the case of *Diouf:*

Diouf, C-69/10, 28. 7. 2011, paras. 41-42:

/.../ non-exhaustive list of decisions are contained in Art. 39 of the PD /.../

/.../ against decisions taken at the border for formal or procedural reasons, which amount to final decision rejecting the application /.../ applicants must have a remedy under Article 39(1) of the PD /.../.[10]

Based on the interpretation in Diouf judgment, only the so called preparatory decisions or decisions pertaining to the organisation of the procedure are not covered by the right o effective legal remedy.[11]

Mass influx and accelerated procedure (C-175/11, *H.I.D*, 31.1.2013):

Provision of accelerated procedure under PD 2005/85 does not preclude MS to prioritise certain categories of asylum applications defined on the basis of the nationality or country of origin (point 1 of the operative part of the judgment).

In relation to the situation of mass influx, judgement of the CJEU in the case of *H.I.D.* could be relevant, too. In *H.I.D.*, the CJEU decided that provision on accelerated procedure in the Procedures Directive 2005/85 must be interpreted as not precluding MS from examining by way of accelerated procedure certain categories of asylum applications defined on the basis of the criterion of the nationality or country of origin of the applicant.

As regards the second methodological question, I could conclude that there are no significant or

10 The CJEU says: „*It is clear from the wording of Article 39(1) of the PD and, in particular, from the non-exhaustive list of decisions contained therein, that the concept of a decision taken on the application for asylum covers a series of decisions which, because they entail rejection of an application for asylum or are taken at the border, amount to a final decision rejecting the application on the substance. Accordingly, the decisions against which an applicant for asylum must have a remedy under Article 39(1) of the PD are those which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude decision on the substance.*"

11 Ibid. para. 43.

problematic limitations in the secondary EU law of the right to effective legal remedy in situation of mass influx. There is one limitation or exclusion clause, which has nothing to do with mass influx situation (second sub-paragraph of Art. 46(2) of the RPD).[12]

Then, there is the third methodological questions. I have to examine what are the specific elements of the right to effective legal remedy that are regulated in the RPD? These are the following:

The third methodological step: elements of the right from Art. 46 RPD:

- **right to remain on the territory of the MS within the time limits for appeal or during the court proceedings except in circumstances under paragraph 6 of Art. 46 RPD (safe country concepts, presumption of withdrawal of application), where the applicant must file a request for the right to remain provided that he has the necessary interpretation, legal assistance and at least one week to prepare a request otherwise this right is granted ex officio ((second sub-paragraph of Article 46(7) RPD);**
- **MS shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether the applicant may remain (Art. 46(8) RPD);**
- **time limits must be reasonable and shall not render exercise of the right to remedy impossible or excessively difficult;**
- **decisions taken at the border procedures may be reviewed *ex officio*;**
- **a full and ex nunc examination of facts and points of law, including where applicable, an examination of international protection needs pursuant to Qualification Directive 2011/95 at least in appeals procedures before a court of first instance;**
- **MS may lay down time limits for the court to examine the decision of the determining authority (Art. 46(10) RPD);**
- **MS may lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn his remedy (Art. 46(11) RPD);**
- **free legal aid and representation in appeals procedures (Art. 20-23 of the RPD).**

The right to a fair trial and public hearing are not elements of effective legal remedy that would be explicitly included in the Article 46 of the RPD and, therefore, it remains to be seen how this issue will be interpreted by the CJEU in the light of the provision of the first sentence of Article 47(2) of

12 According to this provision, if the subsidiary protection status granted by the member state offers the same rights and benefits as those offered by the refugee status under Union and national law, then the member state may consider an appeal against the negative decision on refugee status as inadmissible on the grounds of insufficient interest on the part of the applicant in maintaining the proceedings, since that person holds subsidiary protection status.

the Charter,[13] since the right from Article 47(2) of the Charter is not limited to civil disputes.[14] However, the CJEU has already confirmed in the judgment in the case of *Tall* (para. 51), that characteristics of the remedy provided in Article 39 of the Procedures Directive 2005/85 must be determined in a manner that is consistent with Article 47 of the Charter. Furthermore, in the case of *M.M.*, the CJEU has put that "*the right to be heard"* in all proceedings is inherent in the fundamental principle of the right to defence and is now affirmed in Article 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to "*fair legal process in all judicial proceedings"*.[15] The CJEU further states that in accordance with its case-law, observance of "*the right to be heard*" is required even where the applicable legislation does not expressly provide for such a procedural requirement.[16] In defining the right to be heard in a procedure before administrative authority, the CJEU further developed an interpretation that the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely. That right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement or reasons for their decision.[17] Thus, it seems to be obvious that right to be heard (and to defence) needs to be differentiated from the right to public hearing (and a fair trial) even in the context of judicial proceedings. A further comparison with the interpretation of the right to be heard in the case of *Boudjlida* could confirm that

13 According to this provision, *„everyone is entitled to a fair and public hearing within a reasonable time by an independent andimpartial tribunal previously established by law."*

14 In contrast to this, based on settled case-law of the ECtHR (*Maaouia v. France*, paras. 33-41), by adopting Article 1 of Protocol no. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6(1) of the ECHR, which among other elements includes the right to a fair trial (and public hearing). For the criteria as regards a right to public hearing in civil and administrative (non-asylum and non-immigration) disputes, see, for example: *Dombo Beheer v. the Netherlands*, 27. 10. 1993; *Case of Fisher*, 26. 4. 1995, Series A, No. 312; *Case of Zumbotel v. Austria*, 21. 9. 1993, Series A, No. 268-A; *Case of Schuler-Zgraggen v. Switzerland*, 24. 6. 1993 odst. 58; Göc v. Turkey, 11. 7. 2002; Jussila v. Finland, 23. 11. 2006, para. 42; *Potocka and others v. Poland*, 4. 10. 2001; *Kaplan v. the United Kingdom*, No. 7598/76, *Bryan v. the United Kingdom*, 22. 11. 1995, No. 335-A.

15 C-277/11, *M.M.*, 22. 11. 2012, paras. 81-82.

16 Ibid. para. 86. See also: C-249/13, Boudjlida, 11. 12. 2014, para. 39; C-166/13, Mukarubega, 5. 11. 2014, para. 49.

17 C-277/11, *M.M.*, 22. 11. 2012, paras. 87-88. However, in the *M.G., N.R*, which relates to decision on detention, the CJEU states that *according to EU law, an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different. It follows that not every irregularity in the exercise of the rights of the defence in an administrative procedure extending the detention of a third country national with a view to his removal will constitute an infringement of those rights. Consequently, nor will every breach of, in particular, the right to be heard systematically render the decision taken unlawful /.../. to make such a finding of unlawfulness, the national court must - where it considers that a procedural irregularity affecting the right to be heard has occurred - assess whether, in the light of the factual and legal consequences of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end"* (C-383/13 PPU, M.G., N.R., 10. 9. 2013, paras. 38-40).

assumption. In *Boudjlida,* the CJEU says that in order to ensure that the person concerned is in fact protected, the purpose of that rule is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances in favour of the adoption or non-adoption of the decision or in favour of its having specific content.[18] As regards judicial proceedings in detention cases, the CJEU has developed an interpretation that judicial authority must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national. "*Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority concerned."*[19] Taking into account also case law of the CJEU in other (non-asylum and non-immigration) disputes on the right to public hearing and a fair trial, it is reasonable to conclude that from the standpoint of EU law the right to public hearing is much less important as the right to be heard and to defence in order to protect effectively rights concerned.[20] As regards the right to public hearing, it should be also recalled that, according to settled case-law, in the absence of EU rules concerning the procedural requirements, the MS remain competent, in accordance with the principle of procedural autonomy, to determine those requirements, whilst at the same time ensuring that the fundamental rights are observed and that the provisions of EU law relating to that measure are fully effective.[21]

As the further step in methodology, I usually take or check the parallel track, which is the case-law of the ECtHR in relation to Article 3 in conjunction with Article 13 of the ECHR. This is the fourth methodological step. Apart from Article 52(3) of the Charter[22] which sets the relation between the ECHR and the Charter, this method is visible in the approach of the CJEU in the case of *Tall*, where the CJEU says the following:

***Tall*, C-239/14, 17.12.2015, paras. 52 and 59:**

"***It is apparent from the explanations relating to Article 47 of the Charter that the first paragraph of that article is based on Article 13 of the ECHR /.../ The enforcement of a decision which is not***

18 C-249/13, Boudjlida, 11. 12. 2014, para. 37.

19 C-146/14 PPU, Mahdi, 5. 6. 2014, para. 62.

20 See, for example, judgments of the CJEU in cases 42/59 and 49/59, SNUPAT; opinions of AG and judgments in cases C-199/99 P and C-466/00; judgment in the case C-49/88; opinion of AG in case C-78/01; judgment in the case C-120/97.

21 C-146/14 PPU, Mahdi, 5. 6. 2014, para. 50. This paragraph has been included in the text after the oral presentation based on the question and discussion during the London workshop.

22 Article 52(3) of the Charter states that in so far as the Charter contains rights which corresponds to rights guaranteed by the ECHR, the meaning and the scope of those rights shall be the same as those laid down by the ECHR. This shall not prevent Union law providing more extensive protection.

likely to expose the TCN concerned to a risk of ill-treatment contrary to Art. 3 ECHR, does not constitute a breach of the right to effective judicial protection as provided for in Article 39 of Directive 2005/85 read in the light of articles 19(2) and 47 of the Charter."

In the paragraph 54, the CJEU also cites case-law of the ECtHR and, therefore, it is clear that the CJEU takes case-law of the ECtHR as a criterion to determine compatibility of national legislation and interpretation of secondary EU law in the light of the Charter. So, this is the fourth methodological step.

The fourth methodological step (Art. 6(3) of the TEU, Art. 52(3) of the Charter)
Analysis of contested issue from the standpoint of case-law of the ECtHR;
What are the basic procedural guarantees based on the right to effective remedy under Art. 13 in conjunction with Article 3 of the ECHR and Art. 4 of Protocol 4 of the ECHR (prohibition of collective expulsion of aliens?

The following procedural guarantees of effective legal remedy under ECHR are taken from the case *Hirsi Jamaa and others v. Italy,* where the asylum seekers haven't reached yet the territorial water of Italy, however, the Italian authorities had exercised the effective control over those refugees at the open Sea. This is already a significant difference between EU law and ECHR. Under recital 26 and Article 3 of the RPD, only when persons are present in the territorial waters of a Member State, they should be disembarked on land and have their applications examined in accordance with the RPD. These elements of the right to effective legal remedy under ECHR are as follows:

Art. 13 ECHR in situation of mass influx under effective control by the MS (Hirsi Jamaa and Others, v Italy [GC] para. 197-198):
- a domestic remedy must deal with the substance of an arguable claim and must be able to grant appropriate relief;
- a remedy must be effective in law and in practice and does not depend on the certainty of a favorable outcome for the applicant;
- a remedy must have an automatic suspensive effect (in case of arguable claim);
- reviewing authority may not be a judicial authority;
- the applicant´s complaint must imperatively be subject to close scrutiny;
- close scrutiny means independent and rigorous scrutiny;
- possibility of suspending the implementation of the contested measure.

What does it mean that a remedy must be effective in law and in practice under ECHR?:

- applicants must have an access to procedure to identity them and to assess their personal circumstances before they would be returned,

- there must be interpreters and legal advisers so that applicants have access to sufficient information to enable applicants to gain effective access to the relevant procedures and to substantiate their complaints (*Hirsi Jamaa and Others*, paras. 199-205);

- ex nunc examination of facts: the court may have an obligation to examine new (relevant) facts and evidence that were not part of decision making process at determining authority (*Singh et autre c. Belgique*, para. 91, *Yoh-Ekale Mwanje c. Belgique*, para. 106);

- while remedy may be available in theory, its accessibility must not be limited by the automatic registration of application under the fact track procedure, by short deadlines imposed and by other practical and procedural difficulties in producing evidence (for example if the applicant is detained – *I.M. c. France*).

Then, there comes the fifth methodological step. This is the question whether there is any substantial difference between procedural guarantees of effective legal remedy under ECHR and procedural guarantees of effective legal remedy under EU law that could affect the given case.

The fifth and the sixth methodological steps:

- attempt to reconcile eventual differences between EU law and case-law of the ECtHR;

- EU law friendly and constitutional law friendly interpretation of national law;

- possible preliminary reference procedure.

Except as regards extra territorial obligations, I did not find any substantial discrepancy between basic principles of EU law and case-law of the ECtHR, and, therefore, no technique for reconcilitation between the two legal sources is needed if refugees are coming in mass by land. This is the moment when the national law comes in; and - if I ignore for this occasion the general problems of ineffectiveness and systemic injustice in burden sharing between Member States - the real danger as regards effective realisation of the right to legal remedy comes from national legislators and not from the EU legislator. The EU legislator usually just bring EU secondary law to the limits of acceptability from the standpoint of the Charter, while the final step over the edge of what is acceptable from the standpoint of human rights law is often done by national legislators.

This is normally the final step of my approach to legal analysis, when I have to give EU law

friendly and constitutional law friendly interpretation of the national law or sometimes I have to ignore national law and apply EU law directly if all necessary requirements for direct effect are fulfilled.

Perhaps, you have noticed that I was biased in my presentation, because I spoke only about limitations of the right to effective legal remedy in situation of mass influx. I did not put any attention to the situation of mass influx where *prima facie* recognition of refugee status may be granted either by judges or by decision makers. For example, (globally) in 2012 more than 1.120.000 refugees were recognised on a group basis and only 240.000 were recognised individually. The UNHCR has just published in the International Journal of Refugee Law guidelines on International Protection No. 11 on prima facie recognition of refugee status.[23]

The second thing that I have ignored in my presentation is the issue of conditions in which judges adjudicate asylum disputes in the actual time. The explained six-step approach shows the complexity and perhaps difficulty of this kind of disputes, where judges of the Member States must combine the three distinct legal sources and bring them into a coherent structure in each individual case; if judges do not have appropriate conditions for independent and quality performance of judicial service, this multilevel judicial approach cannot work properly.
It seems that in the future the EASO will be transformed into the Asylum Agency. It will monitor and "*verify the capacity of MS' asylum authorities, including the judicial system, to handle and manage asylum cases efficiently and correctly,"* as this is envisaged in the proposal for the new regulation on the Asylum Agency.[24] If this will be the case, then great and long lasting challenges will be put on the existing three stakeholders AEAJ, European Chapter of the IARLJ and the Asylum Agency, so that in this unique and innovative model of cooperation that we are developing for the last 6 years we will continue to preserve the rule of law, to respect separation of powers and judicial independence and to further develop proper mechanisms for judicial accountability.

23 Guidelines on International Protection No. 11. *Prima Facie* Recognition of Refugee Status, IJRL, 28, 2, pp. 322-335.

24 Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing regulation no. 439/201, Brussels, 4.5.2016 COM(2016) 271 final 2016/0131 (COD), Article 3(1)(c).