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"Fundamental rights protection in the asylum procedures"

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To all the people who provided kind words,
late night company and support,
exhibited continuous understanding and patience
during the time that I was completely lost
in the world of words,
research and writing.
I do not forget the ones who
made this master's a possibility in the first place.

M, A, N, V, K, O and D
thank you,

I couldn't have done it without you.

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List of abbreviations

AG	Advocate General
APD	Asylum Procedures Directive (Directive 2013/32/EU)
APR	Asylum Procedures Regulation (Regulation (EU) 2024/1348)
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EU	European Union
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECHR	European Convention on Human rights
RCD	Reception Conditions Directive (Directive 2013/33/EU)
RD	Returns Directive (Directive 2008/115/EC)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
QD	Qualification Directive (Directive 2011/95/EU)
The New Pact	Pact on Migration and Asylum
The Court	The European Court of Justice

Introduction

In July of 2021, a little girl began her journey from the Syrian border, travelling on foot through Turkish territory, with the aim of crossing the sea to access the European Union and eventually reach her planned destination, that of the United Kingdom. Her passage was no simple affair, for she was greeted by millions of individuals -including some very influential dignitaries- with celebrations, joyful events, and cheers of welcome. Other times, though, she was faced with reservation, the recipient of racist and xenophobic responses, drawing negative attention and even inciting violent behaviors. Her name is Amal, translating to "hope" and she is made out of wood and mechanical contraptions. Amal is a puppet figure of young, refugee girl, trying to escape the horrors of warfare and reach a safe haven, a place of safety, peace and access to education. Comprising the central figure of a very ambitious art project titled "The Walk", she has become an international symbol of compassion and of the promotion of human rights, with the aim of shifting the narrative surrounding refugees and applicants for international protection[1].

The above legal term is used to define a group of individuals in need of international protection, owing to "well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group" or faced with "real risk of suffering serious harm", should they remain or return, after having fled, to their country of nationality or habitual residence[2]. Undeniably, due to the traumatic experience of their flight from situations of armed conflict, torture and inhuman or degrading treatment in conjunction with the inescapable lack of essential knowledge of linguistic norms, cultural and social traditions and, most importantly, the legal background of the State in which they eventually reach for the requesting of international protection, they are considered as a particularly underprivileged and vulnerable group of individuals, meriting special treatment and appropriate protection[3].

The establishment of a legal framework that recognizes this need and encompasses the necessary, appropriate and adequate procedural and substantive safeguards for the realization and effective provision of international protection, is a core objective of national legislative systems globally, in accordance with international obligations and protective standards. In the EU, the aim of establishing a "common policy on asylum, subsidiary and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement" is fleshed out in the foundational Treaties[4], ensuring its character as an objective of constitutional value. The realization of the latter was achieved through the creation of a Common European Asylum System (CEAS), inclusive of "a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and

[1] See 'The Walk (Little Amal) | Little Amal' <https://www.walkwithamal.org/>.
[2] Article 2, cases (d) and (f) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337.
[3] *ECtHR, M.s.s v Belgium and Greece, (2011), App No 30699/09*, para 251.
[4] Article 78, paragraph 1 of the Treaty on the Functioning of the European Union 2012 (OJ C).

content of the refugee status"[5]. This has led to the adoption of a set of specific legislative measures, which, according to the Commission, can be considered as "…one of the most protective and generous asylum systems in the world[6]".

Whether the protection of the fundamental rights of applicants for international protection is of such a high level as to warranty an affirmation of the aforementioned, bold proclamation, must be asserted, following an analytical and comparative assessment of the procedural and substantive entitlements recognized to those particularly vulnerable individuals under EU law. The latter comprises no straightforward or simple task, in light of the thoroughly contradictory policy objectives intertwined in the rationale behind the adoption of the totality of secondary law instruments in this field of EU law. In particular, this assessment is made on the premise of a delicate balancing act, one between migration and asylum management on one hand and the protection of fundamental rights on the other[7]. The direction at which the scale tips is not always evident and cannot be considered as consistent throughout the EU asylum acquis. The recent legislative reform, resulting in the adoption of a thoroughly new legislative background, incorporated into the New Pact on Migration and Asylum, serves only as a complication to what comprises an already multifaceted examination and legal analysis.

In this light, the focus of this dissertation will be the conduct of a comparative assessment between the currently applicable and the recently adopted legislative framework, as implemented and supplemented by jurisprudential considerations of the European Court of Justice (ECJ), for the purpose of asserting and critically evaluating the standard of fundamental rights protection offered by the EU legislator to applicants for international protection. The examination will initiate through a presentation of the EU procedural asylum acquis (Part I), departing from an analysis of the novel right to asylum, incorporated in article 18 of the EU Charter of Fundamental Rights (EU CFR). An assessment of the accessibility and effectivity of the asylum procedures will then occur, centered around the procedural guarantees foreseen in secondary law, for the facilitation of the navigation and participation of asylum seekers in the examination processes, followed by an analysis of the realization of the right to an effective remedy in the recourse of the asylum procedures. The second part of this thesis revolves, alternatively, around the existent possibilities for the application of some of the most fundamental, substantive rights that are proclaimed in the EU Charter, in the EU asylum acquis (Part II), inclusive of an examination of the applicability of the foundational principle of human dignity, the absolute prohibition of being subjected to torture or inhuman and degrading treatment, as well as the seminal right to liberty and security in cases relating to refugee protection. The final chapter concludes with a presentation of the social and economic benefits recognized to applicants, through provisions of EU secondary law.

[5] 'European Council, Presidency Conclusions, Tampere European Council, 15–16 October 1999', para 14.
[6] Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM (2016) 197 final, *pg. 5.*
[7] Janine Silga, 'The Fragmentation of Reception Conditions for Asylum Seekers in the European Union: Protecting Fundamental Rights or Preventing Long-Term Integration?' (2018) Freedom, Security&Justice: European Legal Studies (2018), n.3, pgs. 87–115, *pg. 90.*

Part I: Procedural Guarantees and safeguards in the EU Asylum Acquis

<u>Chapter A:</u> A general assessment of the accessibility and effectivity of the EU procedural asylum acquis.

1. Accessing the common European asylum procedures: a protected right or a fragile concept?

The significance of the right to seek asylum has been proclaimed and extensively stressed at various instances by the bodies and agencies of the European Union. The European Council itself, during the summit for the creation of a Common European Asylum System (CEAS), affirmed and emphasized the need for "absolute respect" of the right to asylum[8]. In the proclamations, the contradictory nature of Europe's traditions with a denial of such a freedom to "…those whose circumstances lead them justifiably to seek access to our territory…" was highlighted, as was the establishment of a harmonized system, founded on the respect of the principle of non-refoulment and the provision of guarantees to those "who seek protection in or access to the European Union" [9]. The relevance of the above conclusions with the interpretation of EU asylum law has further been proclaimed by the Court[10] and becomes evident, given their consideration in the preamble of the majority of legislative initiatives adopted in the context of the CEAS.

The continuous assertation on the part of both the EU and the Member States on the observance of the right to asylum and the principle of non-refoulement, comes in immediate conflict with repeated practices that directly or implicitly undermine the compliance with the relevant provisions[11]. In fact, following the 2015 refugee crisis, the emergence of policies aimed either at a complete deterrence of admittance of applicants for international protection to the EU territory or at a prevention of effective access to the asylum procedures for those already present, has become more than commonplace[12].

At the same time, one cannot ignore the implicit acknowledgement of the above practices from the EU, ranging from complete ignorance, trivial political proclamations[13], lack of initiation of infringement proceedings,[14] to explicit reactions in the form of externalization of its migration and

[8] 'European Council, Presidency Conclusions, Tampere European Council, 15–16 October 1999' (n 5), *para 13*.
[9] ibid, *paras 3, 13.*
[10] See, for instance *Case C-31/09, Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal, (2010), ECLI:EU:C:2010:351*, paras 12 and 36-38.
[11] Iris Goldner Lang and Boldizsár Nagy, 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' (2021) 17 European Constitutional Law Review, pgs 442-470, *pg. 442*
[12] Madalina Moraru, 'The EU Fundamental Right to Asylum: In Search of Its Legal Meaning and Effects' in Maribel González Pascual and Sara Iglesias Sánchez (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice, pgs. 139-158* (Cambridge Univrsity Press 2021), *pg. 139*
[13] Daily Sabah with AA, 'EU Commission Calls on Greece to Investigate Migrant Pushbacks'; 'European Parliament-Investigate Pushbacks of Asylum-Seekers at the Greek-Turkish Border, MEPs Demand'.
[14] Lang and Nagy (n 11), *pg. 450.*

asylum policies or conclusion of legally dubious statements with third counties[15]. The recent legislative reforms, also function as an indication of the Union's willingness to prioritize the prevention of secondary movements, speed and efficiency of asylum procedures and swift removal of third country nationals, to the detriment of rights and procedural guarantees. In consideration of the above, it is questionable whether the dedication to the preservation of the right to asylum in conjunction with the assertation of the principle of non-refoulement, remain a priority in EU asylum policy, especially one that must be "absolutely respected". In fact, it may not be far-fetched to claim that those practices signify a gradual abandonment of the above proclaimed commitments, reducing their practicality to a point where they obtain merely theoretical value, regulating the legal status of those lucky enough to gain access to the asylum procedures in the first place[16].

In consideration of the challenges that are ever more present regarding the accessibility of the EU asylum procedures, the importance of providing some clarification as to the scope and content of the EU right to asylum, has never been more relevant. The above right finds concrete expression both in EU primary law, through its incorporation in article 18 of the Charter (Part 1.1.), as well as in various provisions of secondary law pertaining to the possibility of accessing asylum in the EU (Part 1.2.).

1.1. *The fundamental right to asylum in EU primary law: a significant safeguard or a theoretical proclamation?*

The right to asylum is explicitly provided for in the EU legal order through its proclamation in article 18 of the Charter. Particularly, the right to asylum is defined in relation with the Refugee Convention and its Protocol, as well as through an express mention of the EU Treaties[17]. Regarding the former, it must be noted that an extensive analysis of international refugee law falls beyond the scope of this chapter. In any case, the peculiarity of the reference to an instrument of public international law which, in itself, contains merely an implicit acknowledgement of the right to asylum[18], is noteworthy.

According to the explanations attached to the Charter[19], the above provision is based on article 78 of the TFEU, which establishes the aim of the Union's asylum policy, as including the provision of "appropriate status to any third-country national requiring international protection" and the respect for the principle of non-refoulement. However, this clarification offers minor guidance, especially considering the broad and unclear formulation of article 18 CFR, which leads to

[15]'European Council (2016), Press Release "EU-Turkey Statement, 18 March 2016"' ; Mauro Gatti and Andrea Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law', *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Sergio Carrera, Juan Santos Vara, and Tineke Strik, 2019).

[16] Moraru (n 12), *pg. 140.*

[17]Article 18 of the Charter of Fundamental Rights of the European Union 2012 (OJ C) 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 on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').*"

[18] Indeed, the Geneva Convention of 28 July 1951 includes no article explicitly recognizing a right to asylum to applicants for international protection. However, in recital 1 of its preamble, there is a direct reference to the Universal Declaration of Human Rights, as a source of inspiration for the Convention. The latter, is the only international law instrument recognizing a right to asylum, declaring, in its article 14(1) that "everyone has the right to seek and to enjoy in other countries asylum from persecution".

[19] Explanations relating to the Charter of Fundamental Rights, OJ C 303 2007.

significant ambiguity as to a variety of legal issues. Specifically, no reference is made to the scope of application, the subjects, the components or legal effects of this right[20]. At the same time, the CJEU's input has been minimal and mostly inconsequential, further proliferating uncertainty and skepticism as to the exact contribution of the right to asylum. In this light, the risk of perceiving the right to asylum as legally inconsequential cannot be considered abstract[21].

1.1.1. Ambiguities regarding the territorial and personal scope of the right to asylum.

One of the issues that initially attracted significant attention, pertains to the territorial reach of the EU right to asylum[22]. The possibility for clarifying the applicability of the latter outside the EU, in the territory of third countries, was provided to the Court in the case of *X and X*[23], notorious for its narrow interpretation of EU legislation and validation of a low standard regarding the accessibility of the EU asylum procedures.

In this context, the provision of humanitarian visas to persons of Syrian nationality, for the purpose of ensuring their access to the asylum procedure of the relevant Member State, was considered by the applicants as a positive State obligation, arising from article 18 CFR[24]. Despite the optimal opportunity presented for the amplification of the right to asylum in a manner that is "real and effective", as opposed to "theoretical or illusory"[25], the Court abstained from following a broad interpretation, not adopting a protective stance on the matter. Instead, it adhered to an evasive approach, justified on the inapplicability of the Charter to the legal issue at hand[26]. The outcome was a limitation of the scope of EU asylum legislation, as non-inclusive of cases where the lodging of applications for international protection takes place at representations, such as consular offices or embassies, of the Member States in third countries[27]. Thus, the Court effectively diminished the practical enforceability of the right to asylum, in cases where applications are not made "at the territory, borders, territorial waters or transit zones of the Member States"[28]. The implications of this stance on the accessibility of the common asylum procedure, especially in situations where there is a risk of exposure of third country nationals to inhumane or degrading treatment, are evident. Borrowing the words of Advocate General Mengozzi, the denial of the potential that could be awarded to asylum seekers to follow safe and "legal routes for the exercise of their right to seek international protection", cannot be accepted as consistent with the Union's credibility and foundational values[29].

Another matter, of a thornier nature, that remains unregulated by EU law and has led to division among scholars and commentators, revolves around the personal scope of application of article 18 CFR. The wording of the latter, which lacks a specified subject, provides no clarification on whether the right to asylum corresponds to an individual right of persons seeking international protection or to a mere reaffirmation of the Member States' sovereign entitlement for the

[20] Moraru (n 12), *pg. 141.*
[21] ibid, *pg. 141.*
[22] ibid, *pg. 142.*
[23] *Case C-638/16 PPU, X and X v État belge, (2017), ECLI:EU:C:2017:173.*
[24] ibid, para 23.
[25] *Opinion of Advocate General Mengozzi in case C-638/16, X and X v État belge, ECLI:EU:C:2017:93*, para 158.
[26] *Case C-638/16 PPU, X and X* (n 23), paras 45, 51.
[27] ibid, para 49.
[28] ibid.
[29] *Opinion of AG Mengozzi in case C-638/16* (n 25), paras 163-165.

determination of the outcome of asylum procedures[30]. Particularly, the assimilation of the latter with a State prerogative or its consideration as an individual right to seek, gain access or be granted asylum, are both potential interpretations of the aforementioned Charter article[31], leading to the attainment of opposing legal outcomes.

Traditionally, the right to asylum has referred to the discretion afforded to sovereign States to autonomously organize their system for granting international protection, resulting from the exercise of absolute control over their territory and those existing within its confines[32]. In what has been criticized as a failure of refugee and human rights law, instruments of international law were formulated in a meticulous way in order ensure that an enforceable right to be granted asylum, parallel to a State obligation, could not be recognized to applicants for international protection[33].

Nevertheless, in the context of Union law, the above conclusion can be disputed, considering that the right to asylum has been included in the text of an instrument whose main purpose consists of the consolidation and fortification of fundamental rights protection in the EU[34]. Particularly, since the aim of the Charter is the visibility and reaffirmation of human rights "…as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the (ECHR), the Social Charters adopted by the Union … and the case-law of the (CJEU) and of the (ECtHR)…"[35], it would be contradictory to assume that article 18 introduces anything other than an individual freedom to asylum seekers. Indeed, the absence of any Charter provision referring to rights attributed to Member States is notable and provides a clear indication as to the intention of the drafters for the codification of an individual right to asylum[36].

The lack of clarity arising from the formulation of the above article, might be an indication of a political unwillingness on the part of Member States to solidify such a conclusion in primary law, a fact which does not suffice for its negation[37]. This is further supported upon examination of the negotiations preceding the adoption of the Charter, which included discussions on what categories of individuals would be subject to the right of asylum[38], essentially leading to an exclusion of nationals of Member States from the personal scope of this right, currently verified through Protocol (n 24)[39]. The very existence of those deliberations can adequately ascertain that the right

[30] Violeta Moreno-Lax, 'The EU Right to Asylum: An Individual Entitlement to (Access) International Protection' in Violeta Moreno-Lax (ed), *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law, pgs 337–394* (Oxford University Press 2017), *P. 373*

[31] Amanda Musco Eklund, 'An EU Right to (Seek) Asylum: An Analysis of Whether the Right to Asylum in the EU Charter Entails a Right to Seek Asylum' (2020) 1 Europarättslig tidskrift pgs 135-149, *pg. 138.*

[32] Laura Bacon, 'To What Extent Can the Right to Asylum Be Limited by a State's Sovereign Right to Control Its Borders? A Comparative Assessment of the Lawfulness of European National Asylum Law and Procedure' (2016) 22 Te Mata Koi: Auckland University Law Review, pgs 69-105, *pg. 76.*

[33] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014), *pgs.33-34.*

[34] Recital 4 in the preamble of the EU Charter of Fundamental Rights.

[35] ibid, recital 5 in the preamble.

[36] María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union's Law' (2008) 27 Refugee Survey Quarterly, pgs 33-52, *pg. 41.*

[37] ibid, *pg. 42.*

[38] Moreno-Lax (n 30), *pg. 374-375.*

[39] Protocol (No 24) on asylum for nationals of Member States of the European Union, (2008), OJ C 115 2008.

to asylum is constructed as a right of third country nationals and not as a simple validation of the sovereign entitlement of States to grant asylum.

1.1.2. Potential clarifications on the content of article 18 of the Charter: a right to seek or to be granted asylum?

Following the assertation of the individual character of the right to asylum, as an entitlement provided to applicants for international protection, uncertainties arise as to its exact content. Since the wording of the legislative text provides no guidance, there is significant division as to whether the right to asylum corresponds to a right to seek asylum, through territorial admittance, or, crucially, a right to be granted asylum, in the form of a positive obligation imposed on the administrative authorities of the Member States[40].

The broad formulation of article 18 CFR remains, once more, open to interpretation, leading to a significant variation of opinions, that make the reaching of a consensus quite challenging. Meanwhile, the direct reference to the TFEU provides an additional source of dissenting opinions. An extensive right to be granted asylum, upon the conversion of the relevant qualification criteria, has been considered to stem from the positive obligation imposed on Member states pursuant to article 78 TFEU, for the provision of an appropriate asylum determination system[41]. In direct contradiction to this deduction are the opinions of several authors who fail to locate the added value of the right to asylum in relation to the already existent right to apply for the recognition of refugee status in international and secondary law legislation[42], especially considering that the Charter's own purpose is defined as a "reaffirmation" of existing human rights[43]. Thus, article 18 has been criticized as being merely declaratory, excluding the addition of supplemental substantive requirements for the granting of asylum.

The position that appears to be accepted in the most widespread manner, pertains to the assimilation of article 18 CFR with a right to seek and apply for asylum[44]. Indeed, an interpretation of the right to asylum in accordance with the need of ensuring access to the asylum procedures for the purpose of facilitating the lodging of applications for international protection, appears to be in accordance with the main objective of the CEAS, that of providing territorial protection[45]. However, such a limitation of the essential content of the right to asylum raises significant questions as to what differentiates it from the principle of non-refoulement. The latter has been considered to implicitly include an obligation for territorial admittance, albeit temporarily, that corresponds to an individual right to seek international protection[46].

A more liberal interpretation of the right to asylum, capable of overcoming the above dilemma, can be based on its inclusion in a separate article, not forming part of the fundamental principle of

[40] Moraru (n 12), *pg. 141.*
[41] Musco Eklund (n 31), *pg. 140.*
[42] Moreno-Lax (n 30), *P 372.*
[43] Recital 4 in the preamble of EU Charter of Fundamental Rights.
[44] William Thomas Worster, 'The Contemporary International Law Status of the Right to Receive Asylum' (2014) 26 International Journal of Refugee Law, pgs. 477-499, *pg. 477.*
[45] Moreno-Lax (n 30), *P 377.*
[46] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement' in Erika Feller, Frances Nicholson and Volker Türk (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003).

non-refoulement[47]. Particularly, the potentially broad nature of this fundamental right can be established, if the components of the principle of non-refoulement are considered as a mere minimum standard for its interpretation, beyond which the right to asylum can be expanded, from a simple possibility to gain territorial access to a further entitlement of asylum seekers to be granted asylum[48].

The uncertainty prevalent in this particular area of asylum law is aggravated through the CJEU's evasive approach[49]. Notably, the Court's impact on the interpretation of article 18 CFR has been minimal, not for lack of opportunities presented for the provision of much needed clarity on the scope and content of the right to asylum. Admittedly, in an effort to justify its constricted contribution, it must be mentioned that the majority of cases in the context of which article 18 CFR was brought forth, related to situations with a sensitive political undertone, that raised the need for the assurance of a more cautious interpretative stance by the Court[50]. In any case, this apathy is a sentiment not shared by a majority of Advocate Generals, whose contributions on the methods for interpretation of the right to asylum offer remarkable tools for highlighting its added value[51]. In fact, this dipole of jurisprudential avoidance on the one hand, coupled with expressive activism on the part of Advocate Generals, constitutes a general pattern when issues pertaining to an interpretation of the right to asylum are presented.

A pertinent opportunity for the clarification of the scope of the right to asylum was initially presented to the Court at a time preceding the legally binding nature of the Charter[52]. In the delivery of an opinion that can be characterized as inspiring, Advocate General Maduro proceeded to the adoption of a highly protective approach as to the relevant legal issue, pertaining to the scope of subsidiary protection. His position can be applauded for its explicit recognition of the right to asylum as a principle of constitutional importance in the EU, one stemming from "the general principles of Community law… the constitutional traditions common to the Member States and the ECHR"[53]. Particularly, in a noteworthy interpretation, based on a purposeful reading of the applicable provisions, the AG clarified that the "fundamental right to asylum", through the effective provision of international protection to third country nationals, constitutes one of the primary objectives of the Qualification Directive, and is of particular importance for the formation of a legal ruling[54]. Nevertheless, the Court's silence on the matter, lacking any reference to the right to asylum as highlighted by the AG, instead endorsing a stance based on a liberal interpretation of the relevant secondary law provision[55], is disheartening.

[47] Particularly, the principle of non-refoulement is codified in article 19 paragraph 2 of the EU Charter of Fundamental Rights. following the establishment of the right to asylum in article 18 of the latter.
[48] Moraru (n 12), *pg. 146, 148.*
[49] ibid, *pg. 149-150.*
[50] ibid, *pg. 154.*
[51] Musco Eklund (n 31), *pg. 141.*
[52] *Case C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, (2009), ECLI:EU:C:2009:94.*
[53] *Opinion of Advocate General Poiares Maduro in Case C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, (2008), ECLI:EU:C:2008:479*, para 21.
[54] ibid, para 33.
[55] *Case C-465/07, Elgafaji* (n 52), paras 43, 44.

In light of the general ambiguity, there has been a growing number of referrals to the CJEU[56] from national courts which maintain doubts as to the scope, content and effects of the right to asylum. However, even in circumstances where article 18 CFR was explicitly invoked by the domestic judiciary[57], the Court purposefully evaded addressing the right to asylum, resorting to a general utilization of a variety of other provisions for the substantiation of its judgements. In a characteristic example, where the Court was faced with the precise question of "what the content of the right to asylum under Article 18 of the Charter" is[58], no answer was provided, on the justification that the latter article was deemed irrelevant and inappropriate for the consideration of the legal issue under examination[59]. This position can be presumed as a direct devaluation of the right to asylum with the potential risk of completely diminishing its significance[60].

It must be noted that the Court's silence on the matter has been observed in cases whose factual background related to endeavors of persons seeking international protection to gain territorial access to the EU[61]. By contrast, in a series of more recent judgments, where the presence of asylum seekers in the territory of the Member States was already actualized, a bolder jurisprudential stance has been followed, providing some clarification on the content of this controversial right[62]. Notably, in a very recent judgement of high importance, the potential to seek asylum from the Member State in which applicants are present, irrespective of whether this presence is substantiated at the territory, borders or transit zones, through the possibility to make applications for international protection, was considered as the core of the right to asylum and a precondition for its effective enjoyment by third country nationals[63]. At the same time, certain secondary law provisions, relating to the provision of assistance to asylum seekers by charitable organizations or legal advisors, for the purpose of facilitating the lodging of applications for international protection, were deemed to give "concrete expression" to the right enshrined in article 18 CFR[64].

Furthermore, the Court has expanded the right to asylum, from a mere entitlement to seek asylum, as analyzed directly above, to a right to be granted asylum in specific circumstances. In the judgement of *Ibrahim*, the state practice of systemic rejections of applications, without the condition of an actual and personal examination being satisfied, amounted, according to the Court, to a violation of article 18 CFR[65]. The gravity of this statement, considering its contribution to the broadening of the material scope of the right to asylum, is indisputable. The Court's evaluation supports the supposition that the right to asylum, as consolidated in primary law, encompasses an

[56] See: *Joined cases C-411/10 and C-493/10, N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, (2011), ECLI:EU:C:2011:865*; *Case C-528/11, Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet, (2013)*; *Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov, (2019)*.
[57] *Joined cases C-411/10 and C-493/10, N.S. and M.E.* (n 56), para 114.
[58] *Case C-528/11, Halaf* (n 56), para 25 (2).
[59] ibid, paras 40-42.
[60] Moreno-Lax (n 30), *pg. 373.*
[61] Moraru (n 12), *pg. 151.*
[62] *Case C-652/16, Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Ogla Ahmedbekov v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite, (2018), EU:C:2018:801*; *Case C-720/17, Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl, (2019), ECLI:EU:C:2019:448*; *Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, Ibrahim and others* (n 56); *Case C-823/21, European Commission v Hungary, (2023), ECLI:EU:C:2023:504*.
[63] *Case C-823/21, European Commission v. Hungary* (n 62), paras 44, 52.
[64] *Case C-821/19, European Commission v Hungary, (2021), ECLI:EU:C:2021:930*, para 99.
[65] *Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, Ibrahim and others* (n 56), para 99.

enforceable entitlement of applicants to be granted asylum, when the conditions laid down in secondary law for the attainment of refugee statues are fulfilled[66].

Despite the above positive progress, the implications of the Court's consistent unwillingness to utilize article 18 CFR for the facilitation of territorial access to the EU asylum procedures, is a particularly concerning reality. Indeed, how can the substantiation of a right to be granted asylum be celebrated, when at the same time, the possibilities for asylum seekers to lodge applications for international protection, as a preceding step, are efficiently jeopardized not only through state practices and deterrence techniques, but also, as a result of the exclusion of accessibility opportunities from the scope of this potentially impactful right?

1.2. *The facilitation of effective access to the asylum procedures in EU secondary law.*

The discretion stemming from Member States' sovereign right to regulate the entry of third country nationals into their territory has been effectively limited by the existence of secondary law provisions on the harmonization of the procedures relating to asylum[67]. The Asylum Procedures Directive[68] is a legal instrument containing detailed requirements for the purpose of safeguarding the possibility of persons seeking international protection to lodge their applications, ensuring that specific guarantees are in place for different categories of applicants and aiming at the attainment of harmonized standards with regard to border procedures.

The existence of guarantees pertaining, specifically, to the accessibility of the common asylum procedures as well as a broad regulation of entry requirements in relation to the lodging of applications for international protection, located in the provisions of the APD, are only an indication of the above. Simultaneously and in contrast to the reduced visibility of the right to asylum, as it stems from primary law and analyzed above, the utilization of provisions which essentially reaffirm this right in secondary law has been significantly more extensive by the Court[69].

1.2.1. Ensuring the accessibility to the asylum procedures in light of existent provisions, state practices and jurisprudential engagement.

As an initial remark, the need of ensuring the appropriate and correct identification of persons in need of international protection is specifically stressed out in the APD. Particularly, the latter constitutes one of the main objectives of the Directive, the attainment of which is inherently tied to the existence of a variety of procedural safeguards[70]. Ensuring the effective access of asylum seekers to the harmonized procedures is deemed crucial for the recognition of their status and the determination of the applicable rules. According to article 6, paragraph 2 of Directive 2013/32/EU,

[66] *Case C-652/16, Ahmedbekova* (n 62), para 47; *Case C-720/17, Bilali* (n 62), para 36.
[67] Galina Cornelisse, 'Territory, Procedures and Rights: Border Procedures in European Asylum Law' (2016) 35 Refugee Survey Quarterly, pgs. 74-90, *pg. 89.*
[68] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180.
[69] See particularly: *Case C-823/21, European Commission v. Hungary* (n 62); *Case C-808/18, European Commission v Hungary, (2020), ECLI:EU:C:2020:1029*; *Case C-36/20 PPU, Ministerio Fiscal v VL, (2020), ECLI:EU:C:2020:495*.
[70] Recital 25 in the preamble of Directive 2013/33/EU.

"…Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible". For that purpose, a further possibility of efficient communication with the competent authorities of the Member States as well as the dissemination of information regarding the functioning of the asylum system, are listed amongst the factors necessary for the achievement of facilitated access to the procedures[71].

The APD categorizes the provisions on access to the procedure and the communication of guidance regarding the procedural asylum system as the core principles and guarantees made available to applicants[72]. Initially, in order to achieve compliance with the obligation to make the lodging of applications for international protection a reality for every person with legal capacity[73], significance is attributed to the detection of circumstances which indicate the intention of third country nationals to file an application, at border crossing points, transit zones or even, detention facilities[74]. The practical enforcement of the latter includes the provision of interpretative services as well as the appropriate training of national officials, whose position marks them as the first point of contact with third country nationals[75]. At a second stage, in order to ensure that access to the procedures is granted to those seeking international protection, the provision of information as to the conditions, methods and places where applications can be lodged must be assured, irrespective of the location, which may include detention facilities, border crossing points, transit zones or external borders.

The latter applies in conjunction with ensuring that counseling organizations, volunteers or legal advisors have an opportunity to establish contact with those persons, for the purpose of facilitating their effective access to the asylum procedures [76]. The importance of this safeguard is especially evident, considering its characterization as a concrete expression of the right to asylum enshrined in article 18 of the Charter by the CJEU[77]. In fact, as underlined by the Court, the limitation of communication of those organizations or individuals with third country nationals, enacted through the criminalization of their activities, which, in turn, functions as a substantial deterrent for the provision of assistance services, cannot be justified under EU law[78].

Furthermore, the term "authority competent under national law" which may be the recipient of a request for international protection[79] is to be interpreted in the broadest way possible so as to ensure the accessibility of the asylum procedures, through the accurate detection of such an intention. That is especially evident, in consideration of the fact that the likelihood of lodging such applications to "other authorities", not competent to proceed to their registration under national law, was predicted by the legislator and included in the text of the Directive[80]. The legislative intention for the adoption of an open definition is further inferred from the indicative character of

[71] Recitals 25, 28 in the preamble of Directive 2013/33/EU.
[72] Reference is made to article 6 and 8 of Directive 2013/32/EU.
[73] As per article 7, paragraph 1 of Directive 2013/32/EU.
[74] ibid, recital 28 in conjunction with article 8, paragraph 1.
[75] ibid, recitals 26, 28 and article 8 paragraph 1.
[76] ibid, article 6, paragraph 1(3) and article 8, paragraph 2.
[77] *Case C-821/19, Commission v. Hungary,* (n 64), para 99.
[78] ibid, paras 98, 144.
[79] Article 6, paragraph 1, subparagraph 1of Directive 2013/32/EU.
[80] ibid, subparagraph 2. See also, *Case C-36/20 PPU, VL* (n 69), para 57.

the list of national authorities incorporated into the relevant provision[81], leading to the conclusion that there was no intention of their limitation to administrative authorities[82]. As additionally verified by the Court, this broad interpretation of the term supports the conclusion that applications for international protection may also be received by judicial authorities[83]. Indeed, the prohibition of such a deduction, whereby domestic courts or tribunals were hindered from receiving such applications, and further directing them for the purpose of their registration, would amount to a significant impediment for the effective access of asylum seekers to the asylum procedures[84].

At the same time, the accessibility of the procedure is heavily reliant on the existence of appropriate time limits within which an application for international protection must be lodged, registered and, subsequently, processed[85]. This deadline must be in accordance with the principle of effectiveness, suitable for ensuring that asylum seekers are able to avail themselves of the relevant protective status and fitting for the correct conduct of the examination procedure[86]. The duration of the time limit available must, thus, not be extremely short, to the point where asylum seekers and applicants for subsidiary protection are effectively deprived of a genuine opportunity for the submittance of an application[87]. As underlined by the Court, where the procedural limitations set by the domestic legislator have the effect of compromising the effectivity of the rights attributed to applicant, especially with regard to the request and, where appropriate, the granting of international protection, such a limitation cannot be justified under EU law[88].

In consideration of the fact that the majority of applications for international protection take place at the borders or transit zones on the Member States, the provision of specific rules applied for their examination at those locations, both in substance and as to their admissibility, is in line with the objectives of the Directive[89]. Since border procedures entail a risk as to the possibilities for accessing the asylum procedures, in light of the legal fiction of non-entry inherent in their definition[90], their function is regulated in a detailed manner in the APD. In particular, the use of border procedures is only permitted in specific, well-defined circumstances which are listed in an exhaustive manner[91], a fact emphasized by the Commission itself[92]. Simultaneously, automatic recourse to the border procedures for the examination of applications is precluded, with the

[81] In particular, article 6, paragraph 1(3) of Directive 2013/32/EU contains an explicit mention to *"…the police, border guards, immigration authorities and personnel of detention facilities…"* as potential recipients of applications for international protection.
[82] *Case C-36/20 PPU, VL* (n 69), paras 57, 60, 61.
[83] ibid, paras 59, 68.
[84] ibid, para 67.
[85] A detailed presentation of those deadlines is substantiated in article 6 of Directive 2013/32/EU. See also: *C-360/16, Bundesrepublik Deutschland v Aziz Hasan, (2018), ECLI:EU:C:2018:35*, para 76.
[86] *Case C-429/15, Evelyn Danqua v Minister for Justice and Equality and Others, (2016), ECLI:EU:C:2016:789*. paras 39, 40.
[87] ibid, para 46.
[88] ibid, paras 48, 49. In this specific case, national legislation which provided for a time limit of 15 days after the notification of a negative decision on an asylum application for the subsequent lodging of an application for subsidiary protection, was precluded.
[89] Recital 38 of Directive 2013/32/EU.
[90] Cornelisse (n 67), *pgs. 74-75.*
[91] Article 43 paragraph 1 of Directive 2013/32/EU.
[92] European Commission, Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast), COM (2011) 319 final, (2011), Annex, *pg. 11*.

inexistence of permits or presentation of forged documents by applicants able to show good cause not being possible grounds for its justification[93].

It must be noted that the safeguards related to the accessibility of the asylum procedures are severely undermined by State practices intended to minimize the number of third country nationals that gain territorial access to the EU. Crucially, the introduction of stringent visa requirements, the conduct of systemic interceptions and pushback operations at the borders, transit zones or even the high seas[94], the construction of physical walls[95] or the reintroduction of border controls[96], comprise only a handful of the various techniques employed by States and endorsed by the institutions of the EU for the prevention of territorial admission. Meanwhile, where the above practices fail to ensure a complete hindrance of entries, existent secondary law provisions, especially those stemming from the above Directive, are utilized in such a way as to exclude a large number of applicants from the asylum procedures, through the extensive use of special procedures, accelerated determination methods, broad application of inadmissibility criteria or the exploitation of the notions of "safe third country" or "safe country of origin" [97]. While the conformity of deterrence practices with the principle of non-refoulment and the aforementioned secondary law provisions on access to the procedure, is dubious at best, the latter policies, while forming part of EU law, are often misused, leading to a decreased adherence to protection standards[98].

A prime example of a persistent state practice that led to a severe restriction of possibilities for accessing the asylum procedures was addressed by the Court in the landmark 2020 judgement of *European Commission v. Hungary*[99]. In particular, the national system establishing the conditionality of registering applications for international protection upon the making of the latter at specified, restricted locations, was under judicial scrutiny, following the Commission's skepticism on the practical inaccessibility of those locations[100]. The contested domestic legislation limited the possibilities for third country nationals and stateless persons to make such applications and gain access to the asylum system of Hungary, by requiring the mandatory expression of that intent in person to the Hungarian authorities, in two distinctive and defined transit zones[101]. Thus, the actual presence of asylum seekers at those locations, situated in close proximity with the Serbian border, was a substantial prerequisite for the making of asylum requests and the initiation of the relevant deadline for their registration[102].

It must be noted that the specification of assigned locations, in which applications for international protection may be lodged, as well as the necessity for individual presence of applicants in these locations, is not only noncontradictory but even in conformity with EU secondary law, afforded

[93] Recital 21 in the preamble of Directive 2013/32/EU.
[94] Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law, pgs 235-284.
[95] Ainhoa Ruiz Benedicto, Pere Brunet, *Building Walls: Fear and Securitization in the European Union* (2018).
[96] 'European Commission - Temporary Reintroduction of Border Controls' <https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en>.
[97] Lang and Nagy (n 11), *pgs. 449-450.*
[98] ibid, *pg. 460.*
[99] *Case C-808/18, Commission v. Hungary* (n 69).
[100] ibid, paras 76, 77.
[101] ibid, paras 87, 108.
[102] ibid, para 109.

as a discretion to the national authorities[103]. Nevertheless, as was essentially clarified, this possibility explicitly relates to the lodging of such applications and is therefore not applicable in relation to the possibilities of making asylum requests, in the form of expressing the relevant intent[104]. This differentiation was crucial for the determination of the judgement, providing the court with the basis for further elaboration on the notion of "making" an application, as the sole declaration of will for the receipt of international protection, excluding the establishment of any further administrative formalities[105].

In this context, Hungary's compliance with the legal requirements of ensuring the access of applicants to the asylum procedures, through guaranteeing their potential to effectively make applications for international protection, was examined in light of the "consistent and generalized administrative practices" aimed at a restriction of territorial admission to the two transit zones in question[106]. Specifically, a practical impossibility of being granted entry in the designated locations for lodging applications was verified, as a result of the establishment of lengthy and progressively increasing waiting lists, coupled with the arrangement of maximum numbers of entries and stable reduction of daily authorized admissions of third country nationals in those areas[107]. In light of those findings, the conclusion of incompatibility of the domestic administrative policies with the requirement of accessibility, stemming from article 6(1) of the APD, is unsurprising[108].

The Court's stance can be applauded for being in line with protective standards, despite the highly political undertone of the proceedings. By sufficiently demonstrating that systemic and radical national practices, with the actual effect of a complete deprivation from asylum seekers of the ability to submit asylum requests, cannot be tolerated under EU law, it assured an active stance on the significance of ensuring an effective, straightforward and realistic access to the common system for international protection, which constitutes the very aim of article 6(1) of the APD[109] and, implicitly, an essential component of the right to asylum.

This latter deduction was unequivocally established by the Court in a more recent case relating to the ever more extensive saga of Hungarian administrative deterrence practices, in which an explicit reference to the interdependent relationship between article 6(1) APD and 18 CFR was substantiated[110]. By equating the denial of the possibility for making applications for international protection with a deprivation of effective enjoyment of the right to seek asylum pursuant to article 18 CFR[111], the Court adjudicated against the compatibility with the latter EU law requirements of the state practice under examination[112].

[103] See article 6, paragraph 3 of Directive 2013/32/EU.
[104] *Case C-808/18, Commission v. Hungary* (n 69), para 96.
[105] ibid, paras 97, 98.
[106] ibid, paras 106, 107, 118.
[107] ibid, paras 114-117.
[108] ibid, paras 119, 128.
[109] *Case C-36/20 PPU, VL* (n 69), para 82; *Case C-808/18, Commission v. Hungary* (n 69), para 104; *Case C-823/21, European Commission v. Hungary* (n 62), para 46.
[110] See *Case C-823/21, European Commission v. Hungary* (n 62), para 44.
[111] ibid, para 52.
[112] ibid, para 70.

The foreseeability and appropriateness of this ruling is evident, if the nature of those policies is briefly noted. Particularly, in an effort to hinder the territorial access of third country nationals, the making of an asylum request was made conditional upon the previous lodging of a declaration of such an intent in Hungarian embassies located in third countries and the subsequent issuance of travel documents, enabling the entry of those applicants to Hungarian territory[113]. Only in confirmation of both of those requirements could further registration and processing of an application take place, effectively denying applicants already in the territory, borders or transit zones of the ability to access the asylum procedures. This factual background provided the Court with the optimal opportunity to, once more, underline that the right to make an application, corresponding to an absolute obligation of Member States to ensure effective access, includes the expression of an intention for the receipt of international protection, with the establishment of supplemental administrative formalities being precluded[114].

The Court's continuous efforts towards the attainment of a more active role in the abolition of State deterrence practices, are further illustrated in the most recent case of *X v. Staatssecretaris van Justitie en Veiligheid*[115]*,* in which policies of pushbacks enacted by Member States at land borders were explicitly addressed. The magnitude of this unprecedented judgement and its implications for the right to asylum and accessibility of the relevant procedures are significant. The Court was firm in its position on the incompatibility, with article 9 of the APD, of practices which lead to the effective removal of third country nationals from EU territory and the subsequent denial of any opportunity for making and lodging requests for international protection[116]. By characterizing the accessibility of the procedure for granting international protection as "…one of the cornerstones of the Common European Asylum System…" and an integral part of the right to asylum enshrined in article 18 CFR[117], the latter is elevated by the Court to a positive and definitive requirement on part of the States, one that must be acknowledged and whose limitation cannot simply be justified. That is especially evident considering that the illegal status of the entry or stay of applicants in the territory of the respective Member, the degree of success of their asylum claim or, more importantly, the pronouncement of martial law or a state of national emergency due to a mass influx of third country nationals, have all been considered and rejected by the Court as potential exceptions, able to justify the restriction of effective access to the procedures[118].

1.2.2. Locating provisions impacting the accessibility of the asylum procedures in the New Pact on Migration and Asylum.

The potential impact of the changes brought forth, following the adoption new Asylum Procedures Regulation[119], particularly on the accessibility of the common asylum procedures, can be characterized as negligeable. Indeed, the core guarantees regulating the possibility for third

[113] ibid, paras 37, 50.
[114] ibid, paras 43, 51.
[115] *Case C-392/22, X v Staatssecretaris van Justitie en Veiligheid, (2024), ECLI:EU:C:2024:195*.
[116] ibid, para 50.
[117] ibid, para 51.
[118] *Case C-72/22 PPU, MA v Valstybės sienos apsaugos tarnyba, (2022), ECLI:EU:C:2022:505*. Para 75; *Case C-808/18, Commission v. Hungary* (n 69), paras 97, 98; *Case C-821/19, Commission v Hungary, (2021), EU:C:2021:930*, para 136; *Case C-392/22, X v. Staatssecretaris van Justitie en Veiligheid* (n 115), para 51.
[119] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

country nationals to effectively make applications for international protection, have been largely retained.

One of the most prominent novelties in relation to the access of individuals requesting international protection to the common system for asylum, is the explicit distinction between the notions of "making", "registering" and "lodging" of the relevant applications. The new provisions can be applauded for the partial codification of the CJEU's case law and the provision of clarification on the now three step approach to be followed for safeguarding the effective function of the common procedures. The process of making an application for international protection is explicitly defined in broad terms, as consisting of the expression of such an intent to the authorities of the Member States, without any supplemental formalities or restrictions as to the manner or method utilized by those seeking protection[120]. In fact, the use of specific language, pinpointing this request in fixed or exact terms, is explicitly not required, with the substantiation of a fear of persecution or suffering of serious harm, should the third country national be subjected to a removal, sufficing for the communication of the intent to benefit from international protection[121]. At the same time, the establishment of an obligation towards domestic authorities, to clearly ask on the intention of such individuals to make an application, for the dissolution of any arising doubts as to whether specific declarations amount to such an expression, is noteworthy[122].

The safeguard of registering an application for international protection "as soon as possible" is preserved, with further, detailed rules on the exact timeframes as well as the conduct of this registration being included in the main legislative text[123]. Similar provisions are provided for the last phase, that of lodging the request, defined as the act that formalizes the latter[124]. Meanwhile, the provision of adequate and appropriate assistance to applicants whose special needs are detected, including potential dependency or applications on behalf of minors, is recognized as a component for the "genuine and effective access" to the procedures, while specialized rules are still in place for third country nationals who are detained or present in border crossing locations[125].

Nevertheless, the fact that the use of border procedures has been considerably enhanced in the context of the APR, through the establishment of the mandatory recourse to the latter in specified circumstances, cannot be left unmentioned. In particular, the obligatory nature of the utilization of border procedures is triggered, where it can be reasonably considered that applicants, acting in bath faith, proceeded to an intentional misleading of the domestic authorities, through the presentation of false information or documentation as well as the deliberate destruction of the latter, with the aim of preventing their identification; where there is a necessity for safeguarding national security or public order in the respective Member State, endangered by applicants' behavioral patterns; where applicants' nationality is established in relation to country of origin or former habitual residence for which asylum recognition rates are lower than a specific

[120] ibid, article 26, paragraph 1.
[121] ibid, recital 27 in the preamble which particularly states that: "…It should be possible to express the wish to receive international protection from a Member State in any form, and the individual applicant need not necessarily use specific words such as 'international protection', 'asylum' or 'subsidiary protection…".
[122] Article 26, paragraph 1(1) in conjunction with recital 27 in the preamble of Regulation (EU) 2024/1348.
[123] ibid, recital 28 and article 27.
[124] ibid, recital 29 and article 28.
[125] ibid, recital 20 and articles 30, 31, 32.

percentage[126]. In light of the broad formulation of the latter provisions, essentially encompassing a significant percentage of asylum cases, it must be reasonably expected that large numbers of claims for international protection will fall within the scope of application of mandatory border procedures. Thus, the latter will most likely comprise the focus of the application of the new APR, aimed at the accomplishment of speedy examinations, potentially to the detriment of the effectiveness of the asylum procedures. In light of already documented State practices focusing on the limitation of the number of asylum requests that can be made in their territory, the possibility for an enhanced utilization of border procedures might provide fertile ground for the expansion of abusive practices. Whether the novel mechanism provided for, with the purpose of monitoring and ensuring fundamental rights compliance in relation to border procedures[127], will suffice and prove to be effective in its foreseen mission, remains to be established.

The need for the existence of "seamless and efficient" links between all stages of the procedure regulating irregular arrivals has been underlined by the legislator[128]. Therefore, the examination of further legislative instruments complimenting the APR in the New Pact, for an assessment of their potential effects on the accessibility of the asylum procedures, may prove valuable. Reference is made to the new Screening Regulation[129] as the legislative initiative deemed most relevant in this regard. The necessity for ensuring that the provisions of the Screening Regulation do not negate the effective, actual and quick access of applicants for international protection to the asylum system, is more than pressing, especially considering that the assessments made at this initial stage significantly impact the course of the procedure[130].

A detailed analysis of this new legal instrument falls beyond the objective of this chapter. Instead, for the purposes of the matter under examination, the relevance of this Regulation is established in conjunction with its relation to the asylum procedures. The intricate relationship between the two instruments becomes evident, through an examination of the scope of application of the Screening regulation and its practical impact on the asylum system. In particular, the latter covers the mandatory control of third country nationals who have gained territorial access in an unauthorized manner, including those individuals with the intention of lodging applications for international protection[131]. At the same time, it cannot be disputed that the majority of applications for asylum or subsidiary protection are made at border crossing points or transit zones, locations which, de facto, constitute the main points of entry for third country nationals and persons seeking international protection[132]. The implications of this are significant, in further consideration of the enhanced use of the border procedures foreseen in the APR. The external borders of the EU will, thus, function, as stations for controlling the territorial admission of third country nationals and, consequently, their access to the asylum procedures, through the establishment of a system of

[126] See article 45, paragraph 1, referring to article 42, paragraph 1, cases (c), (f) and (j) of Regulation (EU) 2024/1348.
[127] Recital 71 and article 43, paragraph 4 of Regulation (EU) 2024/1348.
[128] ibid, recital 57.
[129] Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 2024.
[130] Lyra Jakuleviciene, 'EU Screening Regulation: Closing Gaps in Border Control While Opening New Protection Challenges?' (*Odysseus Blog on the Pact on Migration and Asylum*), *pg. 3.*
[131] Article 1, paragraph 1(a) of Regulation (EU) 2024/1356.
[132] Recital 57 of Regulation (EU) 2024/1348.

mandatory filtration, categorization and direction of those individuals to the appropriate legal procedure[133].

In consideration of the above, doubts are raised as to whether adequate safeguards will be put in place for ensuring the effective access of those individuals seeking the benefits of international protection to the correct procedures. As practice has determined, administrative authorities at the borders may not always be equipped with the appropriate knowledge, information and training so in order to effectively differentiate between protective asylum standards and the legal status regulating immigration. Nevertheless, the avoidance of wrongful determinations is of outmost importance[134]. Simultaneously, uncertainties arise as to how the evasion of purposeful techniques that aim to prioritize speed, effectiveness or a reduction in the number or territorial entries, to the detriment of protective asylum standards, can be ensured. A look at the main objective of this Regulation, which revolves around the fortification of controls of all third country nationals crossing EU's external borders, for the further purpose of identifying threats to national security[135], is a particularly disconcerting indication as to the relevance of the above reservations. Thus, the skepticism that has been expressed, in relation to a possible abolition of the legitimate boundaries between the protective norms for applicants for international protection and the legal status of migrants does not appear to be unfounded[136].

2. Procedural guarantees for enabling the navigation and participation of applicants for international protection to the asylum procedures.

Third country nationals that find themselves at the territory, borders or transit zones of the EU for the purpose of seeking and benefiting from international protection, are most probably unacquainted with the linguistic norms, cultural traditions, regional practices and, importantly, the legislative background of the area in which they are present[137]. In light of the vulnerability inherent in their situation, the provision of information on the national procedural system, notification of the obligations accompanying their territorial presence, access to legal assistance and representation with reduced or no cost, constitute some of the conditions upon which the realization of their rights as asylum seekers is based. At the same time, ensuring the individual character of the examination, through the extensive and personal assessment of the available evidence as well as the effective participation of applicants in the relevant procedures, is of outmost importance for making the navigation of the common asylum procedures an actuality.

Thus, this chapter comprises an analysis of the secondary law provisions formulated for the purpose of ensuring that applicants have all the available tools for the navigation of the complex asylum procedures (Part 2.1.), as well as for ensuring their right to be heard and partake in examinations with heavy impacts on their personal situation (Part 2.2.).

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[133] Jean-Pierre Cassarino and Luisa Marin, 'The Pact on Migration and Asylum: Turning the European Territory into a Non-Territory?' (2022) 24 European Journal of Migration and Law, *pg. 2.*
[134] Jakuleviciene (n 130), *pg. 2.*
[135] Article 1 of Regulation (EU) 2024/1356.
[136] Jakuleviciene (n 130), *pg. 1.*
[137] Barbara Mikołajczyk, 'The Maze of Legal Support in the New Pact on Migration and Asylum' (*EU Immigration and Asylum Law and Policy*), *pg. 1.*

2.1. *Legal support provisions for the effective navigation of the asylum procedures.*

2.1.1. Provision of information, legal assistance and aid in the framework of the Asylum Procedures.

The detection of "international protection needs" of asylum seekers and individuals requesting subsidiary protection is characterized by the legislator as beneficial for Member States and applicants alike[138]. For that purpose, the provision of assistance and legal support is incorporated into the legislative text of the APD, varying in intensity, owing to the different stages of the asylum procedure in which applicants are situated.

Accordingly, as an initial step, unrestricted access to information on the legal and procedural system of asylum, with due regard to the particularities of each individual case and without the imposition of financial burdens upon applicants, is a core obligation at first instance[139]. The content of this information must be sufficient for ensuring that third country nationals have a comprehensive understanding of the procedural stages to be followed, as well as the obligations imposed on them by EU and domestic legislation[140]. The lack of knowledge on the latter would, undoubtedly, infringe the fairness of the overall asylum system. At the same time, the dissemination of outdated, wrongful or inaccurate information by unofficial sources or even in the form of misinterpretation and rumors, a possibility that is far from unrealistic, can significantly undermine the effectiveness of the common asylum procedures and must, thus, be evaded[141].

Consequently, procedural safeguards are in place to ensure that the minimum composition of the legal information provided consists of a detailed presentation of the legal position at pivotal stages of the procedure[142], the rights available for the effectiveness and impartiality of the examination, the potential consequences of non-compliance with imposed obligations or directions by the authorities and the deadlines definitive for the continuation of the asylum assessment[143]. Equally, the notification of the adoption of a decision on the application for international protection by the competent administrative bodies, accompanied by information of the ways the latter can be challenged in the case of rejection, is of significance[144]. At the same time, the legislative text provides for supplemental communication of the evidence and sources of information that was considered by the authorities for the formulation of a decision on the merits, in relation to the situation prevalent in the countries of origin of applicants[145].

This right to free legal and procedural information is, however, not an absolute requirement for the domestic authorities. In fact, its provision is dependent upon the previous making of a relevant request by the applicants[146], a fact considered highly problematic, raising doubts as to its actual

[138] Recital 22 in the preamble of Directive 2013/32/EU.
[139] ibid, article 19, paragraph 1.
[140] ibid, recital 22 in the preamble and article 12, paragraph 1, case (a).
[141] Hilda Ruokolainen and Gunilla Widén, 'Conceptualising Misinformation in the Context of Asylum Seekers' 57 Information Processing & Management.
[142] Recital 25 of Directive 2013/32/EU.
[143] ibid, article 12, paragraph 1, case (a).
[144] ibid, article 11, paragraph 2; article 12, paragraph 1, cases (e), (f); recital 25 in the preamble.
[145] ibid, article 12, paragraph 1, case (d).
[146] ibid, article 19, paragraph 1.

implementation and implications for third country nationals that prove to be in state of complete ignorance as to its existence in the first place. That is especially aggravated in consideration of the fact that the provision of legal assistance and counselling at the initial stage of the examination of application, services which would undoubtedly facilitate access to such information, is not complimentary but conditional upon the financial capabilities of each applicant or dependent upon the discretion of the domestic legislator[147]. Meanwhile, the APD recognizes further possibilities for temporal, monetary restrictions or, even, exclusion from free legal and procedural information, owing to the financial situation of specific applicants[148].

The second instance of proceedings, following the filing of an appeal against a negative administrative decision on applications, is accompanied by the substantiation of enhanced procedural safeguards, not limited to a mere provision of information. In particular, the establishment of free legal assistance and representation by expert and trained individuals, is an obligation imposed on Member States[149]. The two terms do not coincide, relating instead to distinctive services that must be made available to applicants for international protection. Legal assistance refers to possibility of consultation with legal advisors on a variety of issues of concern to asylum seekers[150], including the accessibility to information on the procedural requirements, obligations and rights, as analyzed above. At the same time, legal representation relates to the potential to have the same legal counselors and advisors work as mediators for the effective communication of applicants with the domestic authorities, whether administrative or judicial[151]. The context of this combined right is defined as including, as a minimum standard, the arrangement and organization of the essential documents as well as the preparation of a hearing before a court or tribunal of first instance[152].

The complementarity of this right is established as a rule, with the purpose of eliminating its dependency on financial constraints of applicants, thus ensuring the fairness and accessibility of the procedure[153]. Nevertheless, the provision of numerous circumstances upon which a limitation of the free character of the right to legal assistance and representation can be justified, generates the risk of altering its effect as a rule, to the point where it becomes illusory. This is especially manifested in the recognized possibility for a complete restriction from the right to free legal assistance and representation of applicants whose remedy is considered by a judicial or other competent authority as having "...no tangible prospect of success"[154]. At the same time, an assessment of the existence of sufficient funds is an explicit ground for the limitation of this right, while an exclusion of further appeals or rehearings from its scope of application is provided, subject to the unrestricted discretion of the national legislator[155]. The imposition of monetary or temporal constraints to the provision of assistance and support or the request of a complete reimbursement, in the case of improvement of applicants' financial situations, further amount to a

[147] ibid, article 22, paragraph 1; article 20, paragraph 2.
[148] ibid, article 19, paragraph 2; article 21, paragraph 2, case (a), paragraph 4, case (a) and paragraph 5.
[149] ibid, article 20, paragraph 1.
[150] 'European Council on Refugees and Exiles, "The Application of the EU Charter of Fundamental Rights to Asylum Procedural Law", 2014', *pg. 58.*
[151] ibid.
[152] Article 20, paragraph 1 of Directive 2013/32/EU.
[153] ibid, recital 23 in the preamble.
[154] ibid, article 20, paragraph 3.
[155] ibid, article 21, paragraph 2.

denunciation of the free character of this right[156]. Since access to legal support is considered as an integral component for recognizing the needs of applicants and ensuring the accessibility of the procedures, one may ponder upon the broad nature of the above restrictions, which can effectively limit the utilization of this right by linking its enjoyment with purely financial considerations.

Despite the aforementioned concerns, the APD can, nevertheless, be applauded for the establishment of supplemental guarantees, tailored to the needs of specific categories of individuals affected by various circumstances of vulnerability. In fact, the inclusion of those rights can be characterized as a core element of EU protection standards, given their essential contribution to the effective navigation of the procedures by those applicants, whose ability to substantiate and support their claim is severely undermined by physical hindrances[157]. The detailed function, content and scope of those guarantees have attracted scholarly attention, given their significance for ensuring the effective access of those persons to an appropriate and fair procedure[158]. The individual circumstances whose existence indicates the necessity for the application of special procedural guarantees are indicatively spelled out, in a broad manner, as inclusive of "…age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence"[159]. Meanwhile, the content of those special guarantees consists primarily of ensuring the correct detection of particular needs, a swift assessment of vulnerability aspects in applicants[160], the provision of support that suffices for their ability to "…benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure"[161] as well as the exemption from the potential application of border or accelerated procedures[162]. The extensively detailed provision of procedural guarantees applicable in the case of unaccompanied minors is also noteworthy[163].

2.1.2. Reinforcement of legal support in the new Asylum Procedures Regulation through the introduction of a right to legal counselling.

The majority of procedural safeguards afforded to applicants for international protection, relating, specifically, to the right to receive information, enjoy legal assistance and representation as well as special guarantees, have been retained in the context of the Asylum Procedures Regulation[164], resulting in a maintenance of protective standards. What is of particular importance and cannot be left unmentioned, is the reinforcement of the rules pertaining to legal support and aid in the administrative stage of the asylum procedures, through the introduction of the right to "free legal

[156] ibid, article 21, paragraphs 4 and 5.
[157] Minos Mouzourakis, 'Adjudication of Procedural Safeguards for Vulnerable Asylum Seekers in Greece: Case Law and Systemic Non-Compliance' (2023) 35 International Journal of Refugee Law, pgs 213-232, *pg. 213.*
[158] Luc Leboeuf, 'The Juridification of "Vulnerability" through EU Asylum Law: The Quest for Bridging the Gap between the Law and Asylum Applicants' Experiences' (2022) 11 Laws 45.
[159] Article 2, case (d) and recital 29 in the preamble of Directive 2013/32/EU.
[160] Article 24, paragraph 1 of Directive 2013/32/EU specifically states that: "Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees".
[161] Article 24, paragraph 3 of Directive 2013/32/EU.
[162] ibid, paragraph 3, subparagraph 2 and recital 30 in the preamble.
[163] ibid, article 25.
[164] See, specifically, articles 8, 15-19, 20-23 of Regulation (EU) 2024/1348.

counselling"[165]. This notion is unfamiliar in EU law and comprises a noteworthy novelty of the new Regulation. As explicitly stipulated, the need of providing "…good quality information and legal support which leads to more efficient and better-quality decision-making" necessitates the facilitation of access to legal counselling[166]. The substantiation of this right is to be realized "as soon as possible", following the registry of an application for international protection[167] and must be available for the duration of the administrative procedure.

Despite the fact that a clear definition of legal counselling was not integrated in the legislative text, clarifications are provided as to its content. In particular, the notification of information on the rights and obligations of applicants, as an element of the provision of guidance on and explanation of the administrative procedure, is now explicitly provided for[168], enhancing opportunities for third country nationals to gain access to the necessary information. Simultaneously, legal counselling expressly consists of the granting of assistance for the effective lodging of applications on international protection as well as general guidance on the use and rationale of various procedures for examining applications, the applicable regime regulating inadmissibility rules and information on the conditions for challenging negative decisions[169].

The impact of this new right in ensuring actual opportunities for applicants to efficiently navigate the complex legal procedures relating to asylum, is critical. Indeed, where the intricacies of the APD allowed for the possibility of a complete exclusion from much needed procedural and legal information, given the restricted potential for legal support provided in the stage of examination, the APR conveys valuable means to overcome some of the most problematic points impeding the accessibility of the asylum system. This was especially highlighted in the final explanatory memorandum published following the adoption of the New Pact, through the clarification that "the right to information is backed by a new right to free legal counselling"[170]. Thus, the introduction of a supplemental safeguard that goes beyond the mere provision of information and is applicable in the recourse of all procedures, including those of border and responsibility determination, can only be construed as a positive development.

At the same time, the erasure of the possibility to make the granting of free legal counselling dependent upon the financial situation of applicants, excluding it where the appropriate resources are existent, as is the case with legal information in the APD, cannot remain unmentioned. Certainly, no such provision can be located in the text of the new legislative instrument[171], in what can be characterized as an encouraging advancement. Indeed, the decoupling of the provision of legal guidance, individual support and information, as the core content of this new right, from pecuniary considerations, allows for the conclusion that there is significant potential for the enhancement of applicants' navigation of the asylum procedure[172]. Nevertheless, this potential cannot be considered as fully realized, in light of the preservation of the discretion to impose

[165] ibid, articles 15 and 16.
[166] ibid, recital 16 in the preamble.
[167] ibid.
[168] Article 16, paragraph 2, case (a) of Regulation (EU) 2024/1348.
[169] ibid, case (b).
[170] 'Explanatory Memo on the Pact on Migration and Asylum, 14 May 2024' (*European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_24_1865>.
[171] See article 16, paragraph 3 of Regulation (EU) 2024/1348.
[172] European Council on Refugees and Exiles: 'The Guarantees of the EU Charter of Fundamental Rights in Respect of Legal Counselling, Assistance and Representation in Asylum Procedure', *pg. 5.*

monetary and temporal restrictions as well as the amplified circumstances upon which a limitation of the right to free legal counselling can be justified, which now include the detection of an intention to "…delay or frustrate the enforcement of a return decision…" by making a subsequent application[173].

The significant enhancement of applicants' procedural rights, allowing for potential to be awarded more effective legal support in the recourse of the asylum procedures cannot be denied and must be viewed as a positive development in the new Pact. Nevertheless, challenges remain, through the maintenance of crucial exceptions, raising concerns as to the accessibility and overall fairness of legal representation, especially regarding financially constrained applicants.

2.2. *Assessing provisions on the effective participation of asylum seekers in the procedures through a comparative examination of the existing and the reformed legal framework.*

Initially, the physical presence of applicants for international protection in the territory of the examining Member State is of outmost importance and a since qua non condition for ensuring their genuine participation in the procedure and the individual character of the application assessment. Indeed, should third country nationals that have previously lodged requests for protection be promptly restricted to locations that make their effective communication with the competent authorities impossible, their access to the asylum procedures in the first place would be void of meaning. That is recognized in the legislative text of the Asylum Procedures Directive, where it is clearly stated that the right of applicants to remain in the territory of Member States, during the recourse of the examination and until a final determination on their request has been made, is a minimum prerequisite for the effectiveness of the procedures[174]. It must be noted that the notion of "remaining" includes the stay of those individuals at the borders or in transit zones, thus not guaranteeing a right to enter the territory of Member States[175]. Nonetheless, the effect of averting the categorization of applicants for international protection as "illegally staying" for the time period between the making of a request until the adoption of a decision[176], is crucial for enabling their efficient participation in the examination procedures. Thus, the right to remain "for the sole purpose of the procedure"[177] is the basis upon which the remainder of procedural safeguards on such involvement are founded.

2.2.1. The requirement of conducting a personal interview and an individualized assessment.

The possibility of asylum seekers to present and defend all appropriate and relevant elements for the substantiation of their application is safeguarded, through the provision of a personal interview, as an initial step, preceding the adoption of an administrative decision by the determining authority[178]. Its central role in the examination and assessment procedures, enabling applicants' participation and facilitating their right to be heard, is evident. Its conduct may relate both to the

[173] Article 16, paragraph 3, case (a).
[174] Recital 25 in the preamble, article 9, paragraph 1 and article 46, paragraph 5 of Directive 2013/32/EU.
[175] ibid, article 2, case (p) specifically states that: "…remain in the Member State means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for international protection has been made or is being examined".
[176] *Case C-181/16, Sadikou Gnandi v État belge, (2018), ECLI:EU:C:2018:465*, para 40.
[177] Article 9, paragraph 1 of Directive 2013/32/EU.
[178] Article 14 of Directive 2013/32/EU; Article 12 of Regulation (EU) 2024/1348.

admissibility[179] as well as the merits[180] of applications and managed by trained personnel of the administrative body responsible for the examination and assessment of applications for international protection. In fact, the necessity of ensuring appropriate knowledge of those conducting the interviews on potential hindrances and realistic struggles that adversely impact the ability of applicants to participate in an effective manner, is explicitly provided for by the EU legislator[181]. Simultaneously, during the interview, aptitude and competency for the consideration of all circumstances relating to the applications, whether personal, sensitive or general, must be assured[182].

For the purpose of safeguarding the possibility to be heard for every applicant and ensuring that the conduct of interviews is not dependent upon the whims of the national legislator, the mandatory nature of this right is established. Particularly, the deprivation of an individual interview is only permitted under specified circumstances, relating to the sufficiency of available evidence or the personal incapability of the applicant to be involved, owing to "…circumstances beyond his or her control"[183]. In any case, the non-conducting of such an interview shall not, in itself, comprise a negative indicator, affecting the outcome of the examination procedure[184], while additional opportunities shall be presented to applicants, for submitting supplemental elements, in support of their claim[185].

The physical presence of applicants during the conduct of the interview, through the establishment of the exceptional character of video conferences, limited to the occurrence of legitimate and duly justified circumstances, has been elevated to a mandatory requirement in the context of the more recent legislative reform, justified on the necessity of enduring an "optimal environment for communication"[186]. The provision of supplemental technical and legal safeguards in the event of impersonal interviews, including an individual assessment of the suitability of this method of examination with due regard to every applicant's personal circumstance, has further been established[187]. Meanwhile, in contrast to the APD, the provision of audiovisual recordings of interviews has now obtained an obligatory character, with special regard being made to the evasion of technical hindrances with the potential of disrupting and adversely affecting the complete and intelligible nature of the recording[188].

[179] Article 34 of Directive 2013/32/EU; article 11 of Regulation (EU) 2024/1348.
[180] Article 14, paragraph 1 of Directive 2013/32/EU; article 12 of Regulation (EU) 2024/1348.
[181] Article 14, paragraph 1, subparagraph 2 of Directive 2013/32/EU; article 13, paragraph 8, case (a) of Regulation 2024/1348.
[182] In particular, article 15, paragraph 3 case (a) of Directive 2013/32/EU, states that: "Member States shall ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability". At the same time, article … paragraph 7, case (a) of Regulation (EU) 2024/1348 adds the "…the situation prevailing in the applicant's country of origin…and special procedural needs" amongst this indicative list.
[183] Article 14, paragraph 2 of Directive 2013/32/EU.
[184] ibid, paragraphs 3 and 4.
[185] ibid, article 14, paragraph 2, subparagraph 2.
[186] Recital 15 in the preamble and article 13, paragraphs 10 and 12 of Regulation (EU) 2024/1348.
[187] Recital 15 in the preamble and article 13, paragraph 10, subparagraph 2 of Regulation (EU) 2024/1348.
[188] Recitals 14 and 15 in the preamble and article 14, paragraph 2 of Regulation (EU) 2024/1348; See, in contrast, article 17, paragraph 2 of Directive 2013/32/EU.

Provisions on ensuring confidentiality, respect for data protection and privacy requirements have been retained in the Asylum Procedures Regulation[189], as has the necessity of ensuring the services of appropriately trained interpreters, for safeguarding that accurate and comprehensive communication with the applicant is realized[190]. The further enhancement of legal support available during the conduct of personal interviews, through ensuring the physical presence of applicants' legal advisers and the provision of appropriate assistance in a mandatory manner, contrary to the APD, must be applauded[191].

Crucially, the effectiveness and suitability of the assessment is dependent upon the individual, objective and impartial character of the examination[192]. In particular, personal circumstances, including but not limited to the applicant's "background, age, gender, gender identity and sexual orientation[193]", must provide the basis for the adoption of an appropriate decision on the request for international protection. The necessity for ensuring the personal nature of the examination has been extensively highlighted by the Court, in what can accurately be characterized as settled case law.

Specifically, a detailed assessment of the totality of actions deemed by applicants as amounting to persecution or serious harm must be ensured[194], while the conduct of a single examination of numerous applications lodged separately by members of the same family has been deemed to be in contradiction with the requirement of an individualized assessment[195]. Equally, the preclusion of generalized assessments, on account of projective phycological and personality tests for the determination of applicants' personal circumstances, including their sexual orientation, has been further highlighted by the Court[196]. Specifically, the use of experts' conclusions in the recourse of the examination procedures is not problematic per se, as long as the final determination on the asylum request is not solely dependent on the latter but rather consists of an individualized assessment of the applicant's credibility or clarifications as to the lack of provision of evidence[197]. Similarly, as explicitly underlined by the Court, the adoption of a decision on applications for international protection on the sole basis of "…stereotyped notions associated with homosexuals…" cannot suffice for the fulfillment of the requirement of an individualized assessment, on account of applicants' personal circumstances[198]. The Court has further emphasized the requirement of an individualized evaluation of evidence capable of bringing about the exclusion of individuals from the granting of international protection, owing to the

[189] Article 13, paragraph 3 of Regulation (EU) 2024/1348 in comparison with article 15, paragraph 2 of Directive 2013/32/EU.
[190] Recital 14 in the preamble and article 13, paragraph 5 of Regulation (EU) 2024/1348; article 15, paragraph 3, case (c) of Directive 2013/32/EU.
[191] Recital 14 and article 13, paragraph 4 of Regulation (EU) 2024/1348. See, respectively, article 15, paragraph 4 of Directive 2013/32/EU, according to which the possibility to allow the presence of third parties, including legal advisers, is a matter of national discretion.
[192] Article 34, paragraph 2 of Regulation (EU) 2024/1348; Article 10, paragraph 3 of Directive 2013/32/EU.
[193] Article 34, paragraph 2, case (d) of Regulation (EU) 2024/1348.
[194] *Joined Cases C-71/11 and C-99/11, Bundesrepublik Deutschland v Y and Z, (2012), ECLI:EU:C:2012:518*, para 68.
[195] *Case C-652/16, Ahmedbekova* (n 62), paras 58, 65.
[196] *Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal, (2018), ECLI:EU:C:2018:36*, para 71.
[197] ibid, paras 41 and 69.
[198] *Joined Cases C-148/13 to C-150/13, A and Others v Staatssecretaris van Veiligheid en Justitie, (2014), ECLI:EU:C:2014:2406*, para 62.

commitment, incitement or participation in the conduct of serious crimes[199]. Specifically, the relevant activities, the nature of the offences committed or the extend of the applicant's participation in criminal acts must be made subject to thorough examinations, with the sole reliance on their involvement in the activities of a terrorist organization for the adoption of a decision, being precluded[200].

The above exemplifies the importance attributed by the Court to the requirement of an individual and personal examination in the context of the common asylum procedures. Indeed, the latter appears to form part of the very structure of the asylum determination process and a core safeguard afforded for the facilitation of the participation and consideration of applicants in the latter.[201]

2.2.2. Safeguarding the right to be heard by ensuring access to the personal file of the applicant.

An inherent part of the possibility of applicants of international protection to effectively partake in the asylum determination procedures is their ability to make their opinions, observations and considerations on the competent authority's assessment known, at a timeframe preceding the adoption of a decision on the merits of their application. As has been highlighted by the Court, this entitlement, which comprises a crucial element of the right of asylum seekers to be heard, must be fully safeguarded during the recourse of the individualized assessment, conducted in the framework of the CEAS[202]. Significantly, the right to be heard, as a general principle of EU law and a core component of the defense rights of applicants, requires that the possibility of every individual to make their views known throughout the administrative procedure is effectively secured[203].

The realization of the above right in the context of the administrative proceedings necessitates the creation of a "thorough and factual" report or transcript, in which the entirety of elements and evidence considered by the competent authorities are incorporated[204] and the content of which is available for commentary or for the provision of clarifications by the applicant[205]. The establishment of a corresponding obligation on the domestic, administrative authorities to take full consideration of the written comments and observations presented by the applicant in an unprejudiced and cautious manner, providing, where needed, thorough justification for the outcome, is crucial for the facilitation of an understanding of the reasons resulting in rejection, thus ensuring the rights of defense of applicants[206].

In this light, one of the most important procedural safeguards consists of the possibility foreseen in the asylum procedures for applicants, their legal counsellors, advisers or representatives to gain

[199] *Joined cases C-57/09 and C-101/09, Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09), (2010), ECLI:EU:C:2010:661*, para 99.
[200] ibid, para 94.
[201] Jean-Yves Carlier and Luc Leboeuf, 'The Prohibition of Collective Expulsion as an Individualisation Requirement', *pg. 471.*
[202] *Case C-277/11, M M v Minister for Justice, Equality and Law Reform and Others, (2012), ECLI:EU:C:2012:744*, para 89.
[203] *Case C-348/16, Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano, (2017), ECLI:EU:C:2017:591*, para 34.
[204] Article 17, paragraph 1 of Directive 2013/32/EU; article 14, paragraph 1 of Regulation (EU) 2024/1348.
[205] Article 17, paragraph 3 of Directive 2013/32/EU; article 14, paragraph 3 of Regulation (EU) 2024/1348.
[206] *Case C-277/11, M. M.* (n 202), para 88.

access to the content of the file created on the application, which, at the very least, incorporates the above-mentioned report[207]. At the same time, the effectiveness of the right to be heard necessitates the requirement that this access is made available in a timely manner and, as specifically stated in the APR, "…as soon as possible after the interview and in any case in due time before the determining authority takes a decision"[208]. The rationale behind the mandatory nature of the right to access the file of the applicant, revolves around the necessity of ensuring the individual character of the assessment, by allowing the determining authority to have full and correct knowledge over the entirety of the relevant personal circumstances[209]. For that purpose, it is evident that the possibility of corrections or submission of supplemental evidence must be safeguarded.

A refusal to disclose information on the basis of which an assessment on an application has been made, is only possible, in light of specifically stated exceptions, relating to reasons of national security, the protection of individuals acting as informants or otherwise directly affected by the latter and, as added in the APR, where that information is classified, under national law[210]. Even in those cases, a complete ban of access, leading to an impossibility of utilization of information comprising the ground upon which an application was rejected, cannot be justified under the principle of effectiveness, the right to sound administration and the right to an effective remedy[211]. As underlined by the Court in a recent judgement, the non-absolute character of the right to gain access to the applicants file, while justified in specified cases, cannot be allowed to result in a complete deprivation of the effectiveness and meaning of the fundamental right to defense, recognized to individuals under EU law[212]. In light of the necessity for the provision of a realistic and concrete opportunities to applicants to gain access to such knowledge, this right to information must comprise, at the very least, the substance of the decisive elements upon which a decision on the application is based[213]. Nor can the deprivation of an applicant's right to be heard be validated under the justification that, in the context of preceding procedures for the determination of refugee status, that same right was realized in the manner that makes their hearing in the present process for the assessment of subsidiary protection a mere formality[214]. Thus, where two separate procedures are provided for in domestic legislation, applicants' rights to make their views known before the adoption of a decision on either, must be safeguarded in the context of both[215].

The necessity for safeguarding the individual character of the asylum examination, through ensuring the effective conduct of a personal interview and the realization of applicants' right to be heard is thus especially prioritized in the asylum procedural acquis, as showcased through the

[207] Article 17, paragraph 5 and 23, paragraph 1 of Directive 2013/32/EU; article 14, paragraph 6 and 18, paragraph 1 of Regulation (EU) 2024/1348.
[208] Article 14, paragraph 6 of Regulation (EU) 2024/1348.
[209] *Case C-560/14, M v Minister for Justice and Equality Ireland and the Attorney General, (2017), ECLI:EU:C:2017:101*, paras 32, 37; *Case C-348/16, Moussa Sacko* (n 203), para 35.
[210] Article 23, paragraph 1, subparagraph 2 of Directive 2013/32/EU; article 18, paragraph 2 of Regulation (EU) 2024/1348.
[211] *Case C-159/21, GM v Országos Idegenrendészeti Főigazgatóság and Others, (2022), ECLI:EU:C:2022:708*, paras 53, 60.
[212] ibid, para 51.
[213] Ibid, para 46, 53.
[214] *Case C-277/11, M. M.* (n 202), para 90.
[215] ibid, para 95.

enhancement of procedural safeguards introduced with the APR and the protective stance adopted by the CJEU in this respect.

<u>Chapter B:</u> The right to effective judicial protection as a "safeguard" for ensuring respect of all substantive rights and procedural guarantees in the asylum procedures.

1. Assessing the right to an effective remedy in the existent legal framework.

The gravity attributed to the right to effective judicial protection through its characterization by the CJEU as "the essence of the rule of law[216]" is undisputable, given that its absence or ineffective implementation would inevitably entail the nonsensical nature of all substantive rights and procedural guarantees recognized in the EU legal order, leaving them void of any consequence, mere empty letters of law[217]. Indeed, the practical enforcement of all other rights and procedural guarantees accredited to individuals relies heavily on the existence of an effective remedy against administrative or judicial decisions with adverse impacts on their legal interests. That is especially relevant in the field of asylum law, considering the substantial implications for asylum seekers that a negative decision on their application for international protection entails.

The principle of effective judicial protection, initially materialized and enforced by the CJEU as a general principle of EU law[218], finds concrete expression in a plethora of legislative initiatives in the EU legal order[219]. Its foundation is now linked, at a constitutional level, with EU primary law in two characteristic instances. Article 19 (1) subparagraph 2 TEU introduces the requirement of Member States for the provision of "remedies sufficient to ensure effective legal protection in the fields covered by Union law" while in article 47 of the CFR the conditions to be met for the efficient access of individuals to an effective remedy and to a fair trial are explicitly specified. As a preliminary remark, it is worth noting that the reliance of the CJEU on article 19 TEU in cases relating to asylum and migration has been minimal and mostly inconsequential[220], in stark contrast with the latter Charter provision, one that has, on a variety of occasions, provided the Court with the necessary roadmap for the interpretation and correct application of various provisions relating to the right to an effective remedy in the asylum procedures.

As a preliminary remark, in light of what can now be characterized as the CJEU's settled case-law, article 47 CFR is assimilated with the principle of effective judicial protection, in that the former is a "reaffirmation" of the latter in EU primary law[221]. Thus, terminology such as "the right

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[216] See *Case C-72/15, PJSC Rosneft Oil Company v Her Majesty's Treasury and Others, (2017), ECLI:EU:C:2017:236*, para 73; *Case C-64/16, Associação Sindical dos Juízes Portugueses, (2018), ECLI:EU:C:2018:117*, para 36.

[217] Alicja Słowik, 'Multiple Sources of Right to an Effective Remedy in EU Migration and Asylum Law: Towards Common Standards on Judicial Protection?' [2024] Maastricht Journal of European and Comparative Law 1-26, *pg. 2.*

[218] See *Case 222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, (1986),* paras 18-19; *Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, (2010),* paras 29-31; *Case C-175/11, H. I. D. and B. A. v Refugee Applications Commissioner and Others, (2013)*, para 80.

[219] Luis Arroyo Jiménez, 'Effective Judicial Protection and Mutual Recognition in the European Administrative Space' (2021) 22 German Law Journal, pgs 344-370, *pg. 345.*

[220] Słowik (n 217), *pg. 5.*

[221] *Case C-194/19, H. A. v État belge, (2021), ECLI:EU:C:2021:270*, para. 43; C*ase C-752/18, Deutsche Umwelthilfe eV v Freistaat Bayern, (2019),* para 34; *Case C-562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida, (2014),* para 45.

to an effective remedy", "right or principle to effective judicial protection" and "right to access to justice" will be used in an interchangeable manner in the context of this chapter.

In the current legal framework, the right to an effective remedy and, consequently, the possibility to access appeal proceedings, has further been incorporated into a number of secondary law provisions pertaining to asylum. Particularly, applicants for international protection are legally equipped with the instruments for challenging a variety of administrative or judicial decisions with an adverse effect on their legal position. Those include, inter alia, the judicial review of any final decision inclusive of a rejection on their application for international protection[222], the challenging of a transfer decision to the Member State responsible for the examination of their application[223], the contestation of the grounds for their imposed detention[224], the challenging of a decision not to provide free legal assistance and representation[225] or of one implying the withdrawal or reduction of material benefits awarded to them[226].

It is important to note that each of the legal instruments incorporating the right to an effective remedy is governed by specific technical considerations as to the scope and nature of the available remedy, a fact which has led to a significant amount of ambiguity and uncertainty in the national judicial systems and a significant number of referrals to the CJEU[227].

In this chapter, the analysis will be focused on the scope of judicial review awarded to asylum seekers in the context of the Asylum Procedures Directive (Part 1.1.) as well as the possibility to challenge decisions implying the transfer of applicants to the Member State responsible, pursuant to the Dublin III Regulation (Part 1.2.). To that effect, the progressive jurisprudential and legislative evolutions in each respective sub-area of asylum law will provide the guide for the composition of my examination.

1.1. *The right to an effective remedy in the context of the Asylum Procedures Directive.*

1.1.1. Ensuring the effective access of asylum seekers to a judicial remedy

The adoption of the Asylum Procedures Directive (APD)[228] aimed at the creation of a harmonized system of asylum procedures as well as the strengthening of the procedural acquis applicable, enabling asylum seekers to effectively access and navigate the legal stages following the lodging of their application for international protection. The directive is quite inclusive of various procedural guarantees intricately connected with the exercise of the right to effective judicial protection[229].

[222] Article 46 of Directive 2013/32/EU.
[223] Article 27 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180.
[224] Article 9, paragraph 3 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJL 180.
[225] ibid, article 20, paragraph 3.
[226] ibid, article 26.
[227] Słowik (n 217).
[228] Directive 2013/32/EU.
[229] See especially Chapters II and V as well as the analysis above, in Section 2, Chapter A of Part I.

The principle of access to an effective remedy finds concrete expression in the above Directive in Chapter V thereof, through the inclusion of a harmonized set of rules governing the exercise of the right to an appeal against first instance decisions. Crucially, the legislator's intent, highlighting the importance attributed to the provision of an effective remedy in the context of the asylum procedures, is evident from the very preamble of the Directive, through the clarification that the existence of a remedy against "…decisions taken on an application for international protection…" is a reflection of a "…basic principle of Union Law[230]".

Generally, article 46 of the APD can be characterized as detailed, providing for a sufficient level of harmonization. That is especially evident when measured against the provisions of its predecessor[231], an instrument criticized by the Commission itself for contributing to the proliferation and maintenance of significant disparities between Member States practices, leading to the conclusion of non-achievement of "fair and efficient asylum procedures", which allow for an elevated risk of "administrative error"[232]. The latter results are non-surprising, given the wide procedural discretion allowed to the national authorities under the 2005 Directive, as is apparent from the scheme and, notably, the choice of wording by the legislator[233], which did not require the mandatory provision of minimum rules governing i.e. time-limits for the filing of an appeal, the right to remain pending the outcome of the remedy, the grounds for challenging specific types of decisions[234]. Remarkable, those factors amount to some of the most crucial facets of the right to an effective remedy afforded to asylum seekers.

The level of discretion recognized to Member States was reduced visibly in the Asylum Procedures Directive. Admittedly, article 46 of the latter provides for a set of very comprehensive rules, constituting one of the most detailed provisions of secondary law giving concrete expression to the principle of effective judicial protection[235]. Paragraph 1 imposes an obligation to the Member States to ensure access of asylum seekers to the national judicial system for the challenging of a variety of negative decisions taken on their applications. The adoption of the latter on the admissibility or on the merits, whether relating to the withdrawal of international protection or to decisions taken at the borders or in transit zones of the Member States, is irrelevant[236].

The right to access a court or a tribunal has been recognized expressly by the Court to asylum seekers, forming an essential part of the principle of effective judicial protection[237]. Admittedly, the accessibility of a judicial remedy depends heavily upon the existence of specific preconditions in the domestic legal order that do not render the exercise of rights that individuals derive from

[230] Recital 50 in the preamble of Directive 2013/32/EU.
[231] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326.
[232]'Commission, "Report on the Application of Directive 2005/85/EC of 1st December 2005 on Minimum Standards on Procedures in Member States", COM (2010) 465 Final', *pg. 15.*
[233]See article 39 of Council Directive 2005/85/EC. The exclusive use of phrases like "shall provide, where appropriate, rules…", "may lay down time-limits", "Member States may also lay down in national legislation the conditions…" indicate the unwillingness of the legislator to impose limitations on the procedural autonomy of Member States.
[234] ibid, article 39, paragraphs 2, 3, 4.
[235] Słowik (n 217), *pg. 7.*
[236] Article 46, paragraph 1 of Directive 2013/32/EU.
[237] *Case C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration, (2011), ECLI:EU:C:2011:524*, para 69.

EU law "practically impossible or excessively difficult"[238]. A lack of knowledge on the publication of a negative decision on the application for internation protection, the immediate expulsion of an asylum seekers notwithstanding the outcome of an appeal or the provision of extremely short time limits for the filing of a remedy in the first place, constitute some factors that aggravate the inaccessible character of a judicial remedy in the context of the asylum procedures[239].

The APD includes procedural guarantees in order to ensure that the remedy made available to applicants of international protection is in line with the principle of effectiveness, regarding all of the above factors. To begin with, the written notification of decisions entailing a rejection of an application is an obligation imposed on Member States, along with the provision of the appropriate justification and reasoning upon which the national authorities based their determination[240]. Applicants derive a further right to be made aware of ways provided for in the domestic legal order for challenging a negative decision, "in a language that they understand or are reasonably supposed to understand"[241]. Undoubtedly, the importance of the above duty cannot be disputed, given that without the provision of information on available remedies, asylum seekers would find themselves in an impossible situation, effectively being denied access to the judicial system of the Member State in which they are present and deprived of the exercise of one of the most crucial rights afforded to them by the EU legislator[242].

To that end, the Court has introduced a series of safeguards, in the instance where communication with asylum seekers proves challenging or impossible, for reasons owing to a non-compliance with the obligation of applicants to provide all relevant information on their current address or place of residence[243]. In a case where, in the absence of such notification, national law dictated the service of decisions to the address of the administrative authority liable for the assessment of the applications for international protection[244], compliance with the principle of an effective remedy led, according to the Court, to the collective existence of the following safeguards. Given that the reception at the above address amounts to the initiation of the time limit for the filing of an appeal against a negative decision, the applicant must have been informed on the consequences of their noncompliance with their notification obligation while, at the same time, their accessibility to the head office of the administrative authority must be ensured in such a way, as to not make the reception of the decision at a later time "excessively difficult"[245].

Furthermore, access to the appeal proceedings can often be rendered impossible, when the time to limits within which exercise of the right an effective remedy is possible are extremely short. In

[238] The principle of effectiveness in combination with the principle of equivalence, has been established by the Court as a limitation to the principle of national procedural autonomy. See, for instance: *Case C-33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, (1976), ECLI:EU:C:1976:188,* para 5*; Case C-45/76, Comet BV v Produktschap voor Siergewassen, (1976), EU:C:1976:191*, para 13*; Joined Cases C-87/90, C-88/90 and C-89/90, A. Verholen and others v Sociale Verzekeringsbank Amsterdam, (1991), ECLI:EU:C:1991:314,* para 24.

[239]European Council on Refugees and Exiles, "The Application of the EU Charter of Fundamental Rights to Asylum Procedural Law", 2014 (n 150), *pg. 142.*

[240] Article 11, paragraphs 1 and 2 of Directive 2013/32/EU.

[241] ibid, article 11, paragraph 2 and article 12, paragraph 1, (f).

[242] See to this effect *Case C-651/19, JP v Commissaire général aux réfugiés et aux apatrides, (2020), ECLI:EU:C:2020:681*, para. 29.

[243] Article 13, paragraph 2, case (3) of Directive 2013/32/EU.

[244] *Case C-651/19, JP* (n 242), paras. 18, 19, 25.

[245] ibid, paras 46, 47.

this domain, the Directive provides little to no harmonization. Particularly, the national legislator is equipped with a considerate margin of appreciation, since it is stated that "Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right…"[246]. The lack of a minimum standard coupled with the legal ambiguity around the term "reasonable", can bring about discrepancies between the Member States, encouraging practices that implicitly sacrifice asylum seekers' access to appeal proceedings for the sake of speed and efficiency in the processing and examination of applications.

Nevertheless, the express inclusion of the principle of effectiveness in the same article, according to which "the time limits shall not render… impossible or excessively difficult" the exercise of the applicant's right to an effective remedy, must be highlighted. The latter corresponds to a codification of jurisprudence, in which the far-reaching effects of national procedural discretion have often been limited by the CJEU's broad interpretative stance, ensuring a higher level of protection for asylum seekers[247]. The Court has in multiple occasions put domestic legislation, including detailed rules affecting the exercise of the right to a remedy, to the test, measuring it against requirements of effectiveness[248].

The latter principle provided the benchmark for the examination of the national legislation in the case of *Samba Diouf*[249], in which the Court had to assess the differential rules put in place within the same national system depending on the applicability of an accelerated or ordinary procedure for the examination of applications[250]. Particularly, the time limit for bringing actions was shortened to half in the case of accelerated procedures, a fact that was deemed reasonable by the Court, given the nature, function and reason of existence of the latter.[251] Nevertheless, it was highlighted that in any case "…the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action[252]". Despite the national procedural rules in question passing the Court's effectiveness and proportionality tests, it was underlined that this ruling was not absolute, were the individual circumstances of the case to render the time limit provided practically insufficient[253]. Thus, the Court passed the ball to the national judge, allowing for the drawing of a more protective conclusion, based on the specific characteristics and uniqueness of the factual background before them.

Similarly, a time limit of 10 days provided for in national legislation for instigating appeal proceedings against a decision asserting the inadmissibility of a subsequent application for international protection, was deemed in compliance with the preconditions of article 47 CFR only when "genuine access" to the procedural safeguards that EU law recognizes to applicants for international protection could be guaranteed by the national judiciary, within the above time period[254]. The sacrifice of procedural guarantees put in place by the EU legislator for the effective safeguarding of asylum seekers' rights can, thus, not be justified by reasons pertaining solely to

[246] Article 46, paragraph 4 of Directive 2013/32/EU.
[247] Alžbeta Králová, 'Legal Remedies in Asylum and Immigration Law: The Balance between Effectiveness and Procedural Autonomy?' (2018) 16 Central European Public Administration Review, pgs 67-79, *pg. 77.*
[248] See supra (n 238), on the principle of effectiveness.
[249] *Case C-69/10, Samba Diouf (n 237).*
[250] ibid, para 65.
[251] ibid.
[252] ibid, para 66.
[253] ibid, para 68.
[254] *Case C-651/19, JP* (n 242), paras 66, 67.

the expediency and need for effectiveness of the asylum processes. The latter can only acquire significance when the standard of protection and the quality of the procedure are not diminished[255].

It is, lastly, important to note, that ensuring access to an effective remedy requires the automatic suspensive effect of the appeal. It is not difficult to illustrate how the immediate and rapid removal of the asylum seeker from the territory of the Member State in which an application for international protection has been lodged, after the adoption of a negative decision, would render the possibility of accessing a remedy extremely problematic, if not illusive [256]. In the context of the recast Asylum Procedures directive, applicants now possess the right to remain in the territory of the Member State in which they are present, as long as the time limit for challenging a decision entailing a rejection of their application has not elapsed[257]. This possibility is extended after the exercise of the right to an appeal, pending the outcome of the judicial assessment of the remedy[258].

There exist, however, several circumstances that result in an exception to the aforementioned rule. Specifically, the occurrence of cases in which the application is rejected on grounds of inadmissibility, considered manifestly unfounded, taken in the context of border procedures or adopted following accelerated proceedings, mark the transformation of that right into a discretion for the national authorities[259]. Even in those instances and until a final decision has been reached on whether the applicant may remain, they cannot be subjected to an expulsion or removal[260]. Meanwhile, for border procedures, the EU legislator opted for the inclusion of two additional safeguards, making the above exception conditional upon the provision of the essential legal assistance, interpretation and time for the preparation of argumentation in favor of remaining as well as the examination of the negative decision by the judicial authority both of fact and law[261].

The automatic suspensive effect pending the outcome of an appeal has, however, been characterized by the Court as applicable only in first instance proceedings. In fact, it has been underlined that the obligation of the Member States pursuant to article 47 CFR ends with ensuring access to an effective remedy against a decision entailing the rejection of an application for international protection[262]. Accordingly, no requirement for the provision of appeal proceedings against first instance judicial decisions upholding a negative decision can be read in from the letter, scope or scheme of the Asylum Procedures Directive[263]. Since the organization of the national procedural system cannot be such as to make the establishment of a second level of jurisdiction mandatory, nor can there be exact, harmonized rules for the functioning of such appeals[264]. Thus, even when the domestic legal system provides for such a remedy, through the introduction of a

[255] 'Chiara Favilli, "Overview and Summary of the Obligations of the EU Institutions and State Authorities with Regard to the Charter in the Field of Asylum. Proposals for Possible Improvements in EU Legislation and Policies", in A. Crescenzi, R. Forastiero, G. Palmisano (Eds) 'Asylum and the EU Charte of Fundamental Rights (2018), pgs 79-95'.
[256] Anne M Reneman, 'EU Asylum Procedures and the Right to an Effective Remedy' (2013), *pg. 129.*
[257] Article 46, paragraph 5 of Directive 2013/32/EU.
[258] ibid.
[259] ibid, article 46, paragraph 6.
[260] ibid, article 46, paragraph 8.
[261] ibid, article 46, paragraph 7.
[262] *Case C-180/17, X and Y v Staatssecretaris van Veiligheid en Justitie, (2018), ECLI:EU:C:2018:775*, para 25.
[263] ibid, para 30; *Case C-69/10, Samba Diouf* (n 237), para 69.
[264] *Case C-180/17, X and Y* (n 262), para 23.

second level of adjudication, there exists no obligation to equip applicants for international protection with a right to remain, by supplementing appeal with automatic suspensive effect[265].

1.1.2. Scope and intensity of judicial review available to asylum seekers

Safeguarding the accessibility of a judicial remedy and the possibility of asylum seekers to bring acts before national courts and tribunals is only the first step towards ensuring effective judicial protection in the asylum procedures. At a second stage, the quality of the review available must be assessed. Addressing the scope and intensity of the judicial review afforded in the context of the Asylum Procedures Directive is, however, not a simple and straightforward task, in light of the general wording of secondary law provisions, reliance on national legislation for the provision of detailed procedural rules and the lack of a general harmonized EU standard[266]. And yet, questions relating to the role to be fulfilled by the national judges during appeal proceedings, the extend of the judicial assessment in asylum procedures or the legal effects of a potential unwillingness of the administrative authorities to comply with decisions taken at first instance, are ever more relevant[267].

During the first phase of the CEAS, the available secondary law provided little guidance and even less harmonized standards. In fact, besides the admittance of a requirement for an "effective remedy before a court or a tribunal", the applicable article of the former Directive lacked any further mention on the scope or intensity of the judicial review that should be made available to asylum seekers[268]. This shortage, coupled with the Court's initially limited examination of the matter can be attributed to the fact that the determination of the intensity and effects of a remedy is a core concept of national procedural autonomy[269].

The lack of harmonization was partially remedied by the CJEU, in its now historical judgement of *Samba Diouf*, in which the Court was faced with an evaluation of whether a right to an appeal against a decision to examine an application for international protection following an accelerated procedure could be recognized to the applicant in question[270]. The ruling in this particular case is a result of a purposeful reading and interpretation of the aforementioned Directive provision in conformity with the requirements of article 47 CFR[271]. Through a characterization of a decision to submit an application to such a procedure as a preparatory act, against which no legal remedy need be provided by national law, the aforementioned question was answered in the negative[272]. Nevertheless, the Court dissolved any lingering doubt as to whether the judiciary is merely limited to an examination of the correct application of law or able to delve into an assessment of the relevant factual background. The Court emphasized that the reasons for using the accelerated procedure, which are essentially the same as those for rejecting the application, must be subject to judicial review, further linking the effectiveness of a judicial remedy with the possibility of the

[265] ibid, para 26.
[266] Marcelle Reneman, 'Asylum and Article 47 of the Charter: Scope and Intensity of Judicial Review' in A Crescenzi, R Forastiero and G Palmisano (eds), *Asylum and the EU Charter of Fundamental Rights (2018)*.
[267] ibid, *pg. 59.*
[268] Article 39 (1) of Council Directive 2005/85/EC.
[269] Reneman, 'EU Asylum Procedures and the Right to an Effective Remedy' (n 256), p*g. 266.*
[270] *Case C-69/10, Samba Diouf* (n 237), para 27.
[271] ibid, para 49.
[272] ibid, paras 42, 43.

national judge to review the legality of the final decision "as regards both the facts and the points of law"[273]. *Samba Diouf* thus clarified that the scope of the judicial review in the context of the asylum procedures is expanded to an assessment of the facts of each individual case.

It was further concluded that, in order for the right to an effective remedy to not be violated, the legality of the final decision adopted on the merits of the application must be subject to a "thorough" judicial review, one particularly including an examination of the "reasons which led the competent authority to reject the application for asylum as unfounded"[274]. Besides the clarification that the reasoning of the administrative authorities must be judicially reviewed in a comprehensive manner, however, no further explanation or elaboration was offered by the Court at that instance.

The quality of the judicial remedy available to asylum seekers was significantly enhanced in the Asylum Procedures Directive. Currently, the scope of judicial protection has been expanded by the EU legislator to explicitly include a "full and ex nunc examination of both facts acts and points of law"[275]. According to the Court, the evidence which was considered or had the potential to be taken into account by the determining authority fall under the scope of the term "full"[276]. National courts or tribunals are able to conduct a broad assessment, when seized with an appeal against a negative decision on an application for international protection. Such an examination must be thorough and meaningful, not limited to the legality of the decision but also in consideration of the factual material and evidence. The accuracy, consistency and content of the latter must be judicially reviewable for the attainment of a complex assessment on each application for international protection[277]. Thus, the legislator has built effectively on the concept of a "thorough" review that was substantiated by the Court, with the aim of ensuring a higher level of procedural protection to asylum seekers.

On a more specific note, the CJEU has ruled that the national court or tribunal seized with an appeal against a negative administrative decision has the power, in the context of a "full and up-to-date assessment", to examine possible grounds of inadmissibility itself, such as the fact that the applicants enjoy sufficient protection in a third country[278]. Particularly, that judicial authority should "rigorously examine" whether the conditions for inadmissibility have been satisfied "by inviting, where appropriate, the determining authority to produce any documentation or factual evidence which may be relevant"[279].

The effectiveness of this full and rigorous examination would be further endangered, if national legislation was allowed to freely impose restrictive time limitations, compelling the shift conclusion of judicial proceedings. Admittedly, the provision of time limits in this particular case

[273] ibid, para 57.
[274] ibid, para 56.
[275] Article 46 paragraph 3 of Directive 2013/32/EU.
[276] *Case C-585/16, Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite, (2018), EU:C:2018:584*, para 113; *Case C-652/16, Ahmedbekova* (n 62), para 92; *Case C-56/17, Bahtiyar Fathi v Predsedatel na Darzhavna agentsia za bezhantsite, (2018), EU:C:2018:803*, para 64.
[277] Reneman, 'EU Asylum Procedures and the Right to an Effective Remedy' (n 256), *pg. 292.*
[278] *Case C-585/16, Alheto* (n 276), para 120; *Case C-564/18, LH v Bevándorlási és Menekültügyi Hivatal, (2020), EU:C:2020:218*, paras 67, 68.
[279] *Case C-585/16, Alheto* (n 276), para 121; *Case C-564/18, LH* (n 278), para 69.

is left explicitly to the discretion of the national authorities[280]. Decisions on applications for international protection must be reached "as soon as possible" without that undermining, however, the adequate and comprehensive character of the examination[281]. In light of this, a mandatory time limit of 60 days imposed on the appellate court adjudicating against negative decisions, was deemed inconsistent with EU law by the Court, in the case where the particularity of the case or the judicial burden make it impossible for the procedural guarantees of the APD to be effectively observed within that time frame[282]. Thus, when the practical effectiveness of the substantive and procedural rules and guarantees afforded to applicants in the context of the above Directive cannot be ensured by the judicial bodies hearing an appeal within the set time-limit, the disapplication of the national legislation is "imperative" and "obligatory"[283].

When it comes to the judicial authority's obligation to conduct an "ex nunc" examination in the appeals phase, the latter has been considered to cover the assessment of any evidence coming to light following the adoption of the administrative decision[284]. This includes the addition of new grounds upon which the application for international protection is based, made at first during the appeals phase[285]. Relevant proof must be taken into account by the judiciary, notwithstanding the fact that they allegedly refer to a time before the adoption of the negative decision or, even, predate the lodging of the application, so long as they are "presented in a sufficiently specific manner" and significantly differ from evidence already assessed by the administrative bodies[286].

Nevertheless, the letter and phrasing of article 46 (3) APD still remains unclear on the determination of the legal effects the annulment of a negative administrative decision on an application entail. Particularly, there is no clarification on whether the assessment of the administrative authority should be replaced with a judicial decision, allowing the national judge to adjudicate on the granting of international protection, or whether the case should be referred to the determining authority[287]. Given this lack of guidance in the legislative framework, the Court has stepped up, using article 47 CFR as its primary tool for supplementing the gap left behind by the legislator[288].

In the case of *Alheto*[289], the CJEU was faced with the issue of whether article 46 (3) of the APD can be interpreted in such a way as to allow the court or tribunal hearing an appeal to rule on the meris of the asylum case at hand, following the annulment of the decision of the administrative body[290]. Initially, it was underlined that the introduction of a common standard for the deprivation of the powers of the quasi-judicial or administrative authority was not the aim of the relevant

[280] Article 46, paragraph 10 of Directive 2013/32/EU.
[281] ibid, recital 18 in the preamble.
[282] *Case C-406/18, PG v Bevándorlási és Menekültügyi Hivatal, (2020), EU:C:2020:216*, para 32.
[283] *Case C-564/18, LH* (n 278), paras 75, 77; *Case C-406/18, PG* (n 282), para 34, 37.
[284] *Case C-652/16, Ahmedbekova* (n 62), para. 93; *Case C-585/16, Alheto* (n 276), para 111; *Case C-56/17, Fathi* (n 276), para 64.
[285] *Case C-652/16, Ahmedbekova* (n 62), para 98.
[286] ibid, paras 102, 103
[287] Reneman, 'Asylum and Article 47 of the Charter' (n 266), *pg. 60.*
[288] For more clarifications on supplemental character of article 47 CFR see: Matteo Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States' in Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's perspective* (Hart Publishing 2022).
[289] *Case C-585/16, Alheto* (n 276).
[290] ibid, para 144.

Directive[291]. Rather, the Court left the possibility open to the Member States to provide for the referral of the casefile back to the administrative bodies, allowing the matter to remain in the sphere of national procedural autonomy[292]. However, in order to ensure the practical effectiveness of article 46 (3) APD, applied in conjunction with the preconditions of article 47 CFR, the Court ruled that the national procedures should be arranged in such a way as to provide for the adoption of a new decision "…within a short period of time (which) complies with the assessment contained in the judgment annulling the initial decision"[293]. The Court justified its stance in the need of preventing the administrative authority from reaching a decision that opposes the judicial assessment or that is adopted after the lapse of a significant amount of time, further increasing the need for a new assessment[294].

What are, however, the consequences and legal effects of national authorities' refusal to comply with a judicial decision pursuant to 46 (3) APD? How limited is the extend of first instance court's power regarding the dissent of the asylum authorities?[295] Can the domestic judicial authority amend the administrative decision and rule itself on whether asylum should be granted or rejected? Those were the questions the Court concerned itself with in the case of *Torubarov*[296]. Specifically, the factual background of the case revolved around the consistent non-compliance of the Hungarian Immigration and Asylum Office with the decisions of the appeals court on the merits of the relevant application. After the annulment of two negative decisions, rejecting the application for international protection and the persistence of the national administrative authority to not consider the results of the judicial assessment made by the appellate court, following a full and ex nunc examination of both facts and points of law, the above questions were referred to the CJEU[297].

The court was clear that domestic legislation which deprives from the national judiciary the jurisdiction to effectively ensure compliance with its previous judgement from the administrative authorities equates to a denial, in practice, of access to an effective remedy to applicants for international protection and an impairing of the very effectiveness of EU law[298]. Thus, in its ruling, it concluded that at issues such as those in the main proceedings and where no new evidence exists that can objectively justify the need for a new assessment, the administrative body is bound by the evaluation of the appellate court and its reasoning, having no further "discretionary power" on whether protection must be granted or not[299]. Therefore, a national court or tribunal seized of an appeal is "…required to vary a decision of the administrative or quasi-judicial body…" that was adopted in direct opposition to its previous judgement[300]. The national judge is thus equipped with the power of substituting the latter with their own decision on the merits of an application for

[291] ibid, paras 145, 146.
[292] ibid.
[293] ibid, para 148.
[294] ibid, para 147.
[295] Evangelia (Lilian) Tsourdi, 'Of Legislative Waves and Case Law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy' 12 Review of European Administrative Law pgs. 143-166, *pg. 164.*
[296] *Case C-556/17, Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal, (2019), ECLI:EU:C:2019:626*, paras 37, 38.
[297] ibid, paras 23-32.
[298] ibid, paras 71-73.
[299] ibid, para 66.
[300] ibid, paras 74, 77.

international protection, unhindered by national law that potentially prohibits such a conclusion, through the possibility of disapplication of the latter[301].

It is evident from the above judicial stance that the Court places the effectiveness of the judicial protection reserved to asylum seekers at the core of its reasoning for the broadening of the scope of the judicial remedy available in the context of the Asylum Procedures Directive. At determining the extend of the power first instance judicial authorities hold in the case of annulled administrative decisions, the Court created the above two-tier standard. The national judiciary is to conduct a comprehensive evaluation of both facts and points of law in order to reach the conclusion that the administrative authority faulted at the determination of merits of the asylum application, while, simultaneously, not vested with the power to conduct such an assessment itself[302]. In the case, however, where the judicial decision is not respected, a decision whose effects are binding for the administrative bodies, then the possibility of its substitution by the first instance authority is established, leading to the conclusion that the right to an effective remedy encompasses not only the right to access to a court but also the enforceability and execution of such decisions[303]. The necessity of a two-tier test, which does not, in a straightforward manner, give broad powers to the judiciary instantly, is understandable, given the unwillingness of both Member States and Court to significantly minimize the principle of national procedural discretion[304].

1.2. *The scope of the judicial review against acts in the context of the Dublin Regulation.*

The dynamic nature of the right to an effective remedy, entailing a possibility to challenge transfer decisions in the context of the Dublin III Regulation[305], is illustrated via the extensive jurisprudence, legal reforms and constantly evolving adjustments on the scope of judicial review available, through the progressive transformation of the CEAS. Indeed, the scope of the right to an appeal has been ever-changing, with the CJEU contributing significantly to the clarification and filling of gaps left by the legislator.

1.2.1. Limitation of the scope of judicial remedies available to applicants for international protection against transfer decisions in the first phase of the CEAS.

The first phase of the CEAS marked a limitation to the right to access to justice against a decision made pursuant to the then applicable provisions of the Dublin II Regulation[306] to such a degree, as to be at odds not only with international protective standards, but also effectively contradicting certain tenets of EU law[307]. That restrictive approach, rooted both in the above legislative text and

[301] ibid, paras 77, 78.
[302] *Case C-406/18, PG* (n 282), para 23.
[303] E Frasca, 'Commentary on CJEU (Grand Chamber), Judgment of 29 July 2019, Torubarov, C-556/17 in Rule of Law Concerns Regarding Systems of Judicial Review in Asylum Cases: On the Binding Effect of Judicial Decision and the Fundamental Right to an Effective Remedy, Cahiers de l'EDEM, (September 2019)' UCLouvain.
[304] Tsourdi, 'Of Legislative Waves and Case Law' (n 295), *pg. 165.*
[305] See especially article 27 of Regulation (EU) No 604/2013.
[306] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national 2003 (OJ L 50).
[307] Silvia Morgades-Gil, 'The Right to Benefit from an Effective Remedy against Decisions Implying the Return of Asylum-Seekers to European Safe Countries: Changes in the Right to Appeal in the Context of the European Union's

reinforced by the CJEU through the adoption of a particularly confining interpretative stance towards the scope of judicial review afforded to asylum seekers, can primarily be attributed to the need of maintaining the relevance of the principle of mutual trust between Member States, tipping the scale against fundamental rights protection[308].

The weak nature of the procedural safeguards entailed in the Dublin II Regulation, relating to access to judicial review by asylum seekers, can easily be observed when measured against current rights protection standards[309]. More specifically, article 19 (2) of the Dublin II Regulation contained a rather vague mention to remedies available for contesting a transfer decision, by stating that it "…may be subject to an appeal or a review." The broad discretionary power allowed to the national authorities, paired with the conceptualization of the former Regulation as an "inter-state" instrument, merely containing harmonizing provisions addressed to the Member States, for the establishment of a common procedure for determining State responsibility[310], did not allow for the affirmation that individuals derive enforceable rights from it.

This conclusion was partially mitigated by the CJEU, by a line of jurisprudence initiated from the critical judgement of *N.S. and M.E.*[311], in which the possibility of non-transferring asylum seekers to the Member State responsible was founded, through a timid recognition that exceptions to the assumption of mutual trust can exist, when the transfer entails a risk of violation of the principle of non-refoulement. Such a derogation was only justified on the existence of exceptional deficiencies in the asylum system of the responsible Member State, that raise "…substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of (Article 4 of the Charter of Fundamental Rights of the European Union)…" [312.] From this remark it is easy to substantiate an implied right of asylum seekers to refuse their transfer to the Member State responsible for the examination of their application, pursuant to the above criteria.

Thus, this ruling was the basis upon which the Court synthesized its subsequent jurisprudence on the interpretation of the Dublin II Regulation and the possibility of asylum seekers to contest the correct application of the determination criteria contained therein. Respectively, the question of whether a right of judicial review against the adoption of a transfer decision can be attributed to applicants, was answered in the affirmative by the Court, in the case of *Abdullahi*[313]. However, it was underlined that the choice of criterion in the context of the Dublin Regulation could only be questioned if systemic deficiencies in the asylum system of the responsible Member State can be established amounting to a real risk of a violation of article 4 CFR[314].

Dublin System Vis-à-Vis International and European Standards of Human Rights 255-280' (2017) 19 European Journal of Migration and Law, *pg. 279.*

[308] *Joined cases C-411/10 and C-493/10, N.S. and M.E.* (n 56), paras 79, 80; *Case C-394/12, Shamso Abdullahi v Bundesasylamt, (2013), ECLI:EU:C:2013:813* (ECJ), para 53.

[309] See specifically article 27 of Dublin III, as analyzed bellow in paragraph 1.2.2. of Section 1, Chapter B in Part I.

[310] Nathan Cambien, 'Effective Remedies and Defence Rights in the Field of Asylum, Migration and Borders' in Maribel González Pascual and Sara Iglesias Sánchez (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021), *pg. 164*

[311] *Joined cases C-411/10 and C-493/10, N.S. and M.E.* (n 56).

[312] ibid, paras 94, 106.

[313] Case C-394/12, *Shamso Abdullahi v Bundesasylamt,* (2013), ECLI:EU:C:2013:813.

[314] ibid, paras 60, 62.

This position was repeated and reinforced soon thereafter by the Court[315], in a ruling which further affirmed the non-existence of an obligation of the Member State in which the asylum seekers is present to examine itself an application for international protection[316]. To be more precise, human rights deliberations were deemed irrelevant in the context of determining whether an obligation to invoke the sovereignty clause can be read in, when a situation that makes the transfer to the Member State responsible impossible was identified[317]. Thus, instead of admitting the mandatory nature of the state right for assuming responsibility, ensuring a higher level of protection for asylum seekers in the case of systemic deficiencies, the Court merely asserted that the State in which the latter are present must continue to examine the responsibility criteria pursuant to the Regulation[318]. That is not to imply, however, that respect for fundamental rights was absent from the Court's reasoning, since it was additionally clarified that when the procedure for the determination of responsibility "… takes an unreasonable length of time…" in the latter Member State[319], leading to a deterioration of the applicant's position, the above discretion is converted into an obligation[320].

Despite the seemingly progressive step towards fundamental rights protection, the above judgements, in reaffirming the strict *N.S.* criteria, upraised the collective existence of systemic deficiencies as well as the real risk of violation of article 4 CFR to sine qua non conditions for the admissibility of judicial remedies for questioning the correct application of the Dublin criteria. It is disputable whether the significantly high standards to be met for the exercise of the right to a remedy against transfer decisions could be characterized as fulfilling the effectivity criteria of article 47 CFR at that time.

That was certainly not the opinion of the international human rights Court, as is apparent from the landmark case of *Tarakhel*[321], published just one year after the above ECJ judgements. The ECtHR, seized with a case concerning the suspension of a removal order against the asylum seeker in question to Italy, the Member State deemed as responsible according to the Dublin Regulation criteria, did not shy away from directly opposing the CJEU's strict interpretative stance. Unbothered by a commitment to safeguard the principle of mutual respect of fundamental rights between Member States, importance was rather attributed to the need for the provision of "special protection" to asylum seekers, given the vulnerability of their situation[322]. Thus, in its determination of the case, the ECtHR effectively negated the high benchmark adopted by the CJEU, by completely evading any sort of mention to the existence of "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers" as a prerequisite for the suspension of the transfer decision[323]. Instead, the definitive factor is the conduct of a "thorough

[315] *Case C-4/11, Bundesrepublik Deutschland v Kaveh Puid, (2013), ECLI:EU:C:2013:740,* para 30.
[316] ibid, paras 36, 37.
[317] Mattias Wendel, 'The Refugee Crisis and the Executive: On the Limits of Administrative Discretion in the Common European Asylum System' (2016) 17 German Law Journal 1005-1032' (2016) 17 German Law Journal, *pg. 1019.*
[318] *Case C-4/11, Kaveh Puid* (n 315), paras 33, 36.
[319] ibid, para 35.
[320] Wendel (n 317), *pg. 1019.*
[321] *ECtHR, Tarakhel v Switzerland, (2014), App No 29217/12*.
[322] ibid, paras 118, 119.
[323] ibid, para 104.

and individualized examination of the situation of the person concerned", resulting in a finding of "real risk" of violation of article 3 ECHR[324].

The above reveals the tension that existed between the two European courts regarding the scope and degree of judicial scrutiny awarded by EU law to applicants in the context of the Dublin proceedings[325].

1.2.2. The increasingly protective jurisprudential stance on the scope of judicial review in the context of the Dublin III proceedings.

The legal framework of procedural guarantees awarded to asylum seekers was notably strengthened by the entry into force of the Dublin III Regulation[326], a legal instrument which brought about a new standard for judicially reviewing transfer decisions. Specifically, besides the codification of the aforementioned jurisprudence in article 3 (2) subparagraph (2) of the Regulation, ensuring the preclusion of transferring individuals in the case of systemic deficiencies in the responsible state, the new article on the right to a remedy against a transfer decision was significantly more detailed as to its scope. Particularly a "…right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal…" was established[327]. The protective intent of the legislator is further made apparent considering the explicit mention of article 47 CFR in recital 19 of the preamble, according to which the right to an effective remedy must be exercised, covering "…both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred".

Hence, an appeal can now be brought against a transfer decision based on a variety of legal grounds, not restricted to a real risk of violation of the substantive human right included in article 4 of the CFR, effectively negating the need of meeting the threshold of the *N.S.* and *Abdullahi* criteria. This conclusion was not drawn automatically nor was it self-explanatory for the Member States, following the adoption on the new legal framework, as can be showcased by the large number of preliminary references addressed to the CJEU on the interpretation of article 27[328].

The opportunity provided for the assurance of a more rights-based approach considering the above change in legislation, was first seized by the Court in the case of *Ghezelbash*[329]. Given its direct contrast with the Court's previous jurisprudence, as analyzed above, the importance of the latter judgement is evident. Indeed, the Court, early on, effectively overturned its ruling in *Abdullahi*, by denying any relevance between the two judgements, in light of the reform of the Dublin Regulation, which was deemed to no longer be of a purely intergovernmental nature[330]. In fact, the general transformation of the Dublin system, through the inclusion of a wide arrange of new

[324] ibid.
[325] Morgades-Gil (n 307), *pg. 275*
[326] Regulation (EU) No 604/2013.
[327] ibid, article 27.
[328] Słowik (n 217), *pg. 8.* See also: *Case C-63/15, Mehrdad Ghezelbash v Staatssecretaris van Veiligheid En Justitie, (2016), CLI:EU:C:2016:409*; *Case C-394/12, Abdullahi* (n 308); *Case C-670/16, Tsegezab Mengesteab v Bundesrepublik Deutschland, (2017), ECLI:EU:C:2017:587*; *Case C-155/15, George Karim v Migrationsverket, (2016), ECLI:EU:C:2016:410*.
[329] *Case C-63/15, Ghezelbash* (n 328).
[330] ibid, para 51.

procedural guarantees and the strengthening of applicants' rights, in a way that allows their participation in the determination process, were deemed crucial[331]. The CJEU, relying heavily on recital 19 of Dublin III, later proceeded to a broad interpretation on the scope of judicial protection awarded to asylum seekers pursuant to article 27, justifying its position in the protective objectives included in the Regulation[332]. The practical achievement of the latter was deemed largely dependent on the possibility of bringing an appeal contesting, inter alia, the incorrect application of the determination criteria, without any formalities[333].

Thus, the scope of the judicial remedy against transfer decisions is notably amplified, through the elimination of the "systemic deficiencies"[334] and "real risk" criteria, as is further apparent from the Courts note of the explicit lack of a link existing between article 27 and 3(2) of the Dublin III Regulation[335]. In this respect, the need for ensuring the proper application of the determination criteria, as well as the general protective scheme that characterizes the Dublin III legislative reform, have been extensively underlined in the Court's reasoning[336].

This protective trend set forth by the Court, favoring a broad interpretation on the scope of judicial remedies in the Dublin III determination procedures, is made ever more evident in subsequent jurisprudence, through the progressive admittance of new grounds upon which an appeal against a transfer decision can be based[337]. For instance, the failure of Member States to meet the time limits applicable for the lodging of a take charge request[338], the triggering of a new determination procedure pursuant to article 19 (2) of Dublin III[339] as well as the expiry of the six-month time period provided for the conducting of the transfer of an asylum seeker to the responsible Member State[340] have all been accepted by the Court as adequate legal basis for contesting transfer decisions.

A new ground for the suspension of a transfer decision was admitted by the Court, by, once more, following a broad interpretative stance on the scope of article 27 Dublin III, in the *H. A. vs État Belge case*[341]. Article 47 of the CFR was explicitly invoked by the CJEU, for the determination of whether the emergence of new evidence, submitted at first after the adoption of a transfer decision, could constitute a ground for the contesting of the lawfulness of the latter[342]. Naturally, the Court underlined the importance and function of recital 19 in the preamble of Dublin III and attempted to examine the preliminary question through a combined reading of the latter with the prerequisites of article 47 CFR[343]. In its ruling, it ascertained that reliance on circumstances which arise

[331] ibid, paras 46-49.
[332] ibid, paras 52, 61.
[333] ibid, para 53.
[334] See also *Case C-578/16 PPU, C K and Others v Republika Slovenija, (2017), ECLI:EU:C:2017:127*.
[335] *Case C-63/15, Ghezelbash* (n 328), para 37.
[336] See for example: *Case C-63/15, Ghezelbash* (n 328), para 34*; Case C-578/16 PPU, C. K. and Others* (n 334)*,* para 62.
[337] Słowik (n 217), *pg. 13.*
[338] *Case C-670/16, Mengesteab* (n 328).
[339] *Case C-155/15, Karim* (n 328).
[340]*Case C-201/16, Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl, (2017), ECLI:EU:C:2017:805*; *Joined Cases C-323/21, C-324/21 and C-325/21, Staatssecretaris van Justitie en Veiligheid v B , F and K v Staatssecretaris van Justitie en Veiligheid, (2023), ECLI:EU:C:2023:4*.
[341] *Case C-194/19, H A v État belge, (2021), ECLI:EU:C:2021:270.*
[342] ibid, para 25.
[343] ibid, para 33.

subsequently to the adoption of a transfer decision and which are of a decisive nature for the correct functioning of the Regulation, must be ensured and made available to asylum seekers through the mandatory provision of an effective and rapid remedy[344]. As long as this was provided, the stage of the national procedure provided for the consideration of subsequent evidence was considered irrelevant[345].

The Court's expansive case-law on the scope of article 27 Dublin III, as illustrated above, has attracted significant attention due to its, somewhat, conflicting character with the principle of national procedural autonomy. It has been argued that the reference to article 47 CFR in cases falling within the context of EU asylum law can reach past the point of simply conducting an equivalence and effectiveness test, oftentimes leading to the creation of new remedies or interfering with the procedural organization of Member States' judiciary[346]. This is specifically evident in the more recent I and S judgement[347], a judgement with significant rights protection connotations, where the Court needed to navigate carefully for the effective extension of the scope of article 27 Dublin III[348].

The complexity of *I and S* lies in the fact that, although it revolved around the examination of the judicial review available to the applicant, the adoption of a transfer decision was irrelevant to the factual background. Specifically, the situation at hand was governed by article 8 (2) of the Dublin III Regulation, on the criteria for the determination of the Member State responsible in the case of an unaccompanied minor[349]. The latter, upon his arrival in Greece and the lodging of an application for international protection, contested the applicability of the aforementioned article, leading to the submittance of a take charge request from the Greek authorities to the Netherlands, where the minor's relative was residing[350]. Upon receiving a negative decision, the minor and his relative sought to challenge the latter, leading to referral to the CJEU of the question of whether articles 27 Dublin III or 47 CFR require the existence of a remedy against a decision refusing a take charge request[351]. Given that the sole dependence on secondary law did not suffice, the Court relied heavily on article 47 CFR for the assurance of its affirmative ruling[352]. More specifically, it was first underlined that although contesting a take charge decision did not expressly stem from article 27, which in turn refers only to "transfer decision(s)"[353], the latter provision must be "…interpreted and applied in compliance with fundamental rights"[354]. Following an analogy to a hypothetical, reverse situation, where the minor had managed to lodge his application in the Netherlands, therefore able to avail himself of a remedy against a transfer decision to Greece[355], the Court

[344] ibid, para 35, 49.
[345] ibid, paras 37, 42, 49.
[346] Bonelli (n 288), *pg. 81-98.*
[347] *Case C-19/21, I, S v Staatssecretaris van Justitie en Veiligheid, (2022), ECLI:EU:C:2022:605*.
[348] Słowik (n 217), *pg. 14*
[349] Article 8(2) of Regulation (EU) No 604/2013. reads as following: "Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor."
[350] *Case C-19/21, I and S* (n 347), paras 14, 15.
[351] ibid, paras 16, 21.
[352] ibid, paras 36, 42.
[353] ibid, para 32.
[354] ibid, para 33.
[355] ibid, para 43.

successfully widened the scope of article 27 Dublin III, so as to include an appeal against new types of decisions[356].

This limitation of national procedural autonomy which, in turn, corresponds to an empowering of the national judiciary for the admittance of remedies against various types of actions, not limited to transfer decisions in the Dublin proceedings[357], signifies the gravity of this case.

It is, nevertheless, important to note that the common denominator in the majority of the above case-law is the reliance of the Court on recital 19 of Dublin III[358]. Since the necessary safeguards for effective judicial protection have been incorporated into the legislative text, given that article 27 of Dublin III must be read "in the light" of the former, explicit references to article 47 CFR are lacking[359]. This cannot be considered incidental and may indicate an apprehension on part of the CJEU to use primary law as a direct source for the interpretation of secondary law provisions relating to access to an effective remedy in the recourse of the Dublin proceedings. However, the cost of this hesitancy may be high, since the ever-progressive jurisprudence of the Court is made dependent upon subsequent legislative trends that potentially offer lower standards of protection[360]. In fact, this danger is far from imaginative, considering the significant changes brought about in reference to the new Pact on Immigration and Asylum, as analyzed bellow[361].

2. Implications for the right to an effective remedy arising in connection with the New Pact on Migration and Asylum

2.1. *Assessment of the right to an effective remedy in the context of the Asylum Procedures Regulation*

The shift in legislation, following the adoption of the new Pact on Migration and Asylum has been critically assessed in academic circles and met with a general semblance of disapproval. For the analysis in this chapter, an examination of the procedural safeguards included in the new Asylum Procedures Regulation[362], and, specifically, those relating to ensuring effective judicial protection to asylum seekers, is of particular relevance.

As a preliminary remark, it must be noted that the scope and intensity of the judicial review available to asylum seekers has remained unchanged in the Asylum Procedures Regulation. A "full and ex nunc examination of both facts and points of law" remains the main rule[363]. However, the chance to provide further clarification, by regulating the extend of powers awarded to the judiciary, especially in the cases of annulment of negative administrative decisions, was not seized by the

[356] ibid, para 55.
[357] Słowik (n 217), *pg. 21.*
[358] *Case C-201/16, Shiri* (n 340). para 35; *Case C-670/16, Mengesteab* (n 328), para 43; *Case C-155/15, Karim* (n 328), para 19.
[359] Słowik (n 217). *pg. 14.*
[360]Marcelle Reneman, 'No Turning Back? The Empowerment of National Asylum and Migration Courts under Article 47 of the Charter' in Matteo Bonelli and Mariolina Eliantonio (eds), *Article 47 of the EU Charter and Effective Judicial Protection (2022), pgs. 141-158*, vol 1, *pg. 155.*
[361] See part 2.2.1. in Chapter B, Part I.
[362] Regulation (EU) 2024/1348.
[363] Article 67, paragraph 3 of ibid.

legislator. Thus, in the absence of securing a minimum level of harmonization regarding the relationship between the administrative or quasi-judicial bodies and the judiciary, adjudicating at first instance, there is a continuation of dependency on the jurisprudence of the CJEU, as analyzed above[364], for the prevention of practices that allow applicants to remain in a state of limbo, in the wake of cases of administrative non-compliance[365].

In relation to the right to an effective remedy attributed to asylum seekers, the amendments contained in new Regulation have been criticized heavily. Particularly, it has been claimed that the weakening of the accessibility of the remedy against decisions entailing a rejection of an application, is a key issue in the new Regulation, bringing about a general corrosion of this one of the most crucial rights available to applicants[366]. The establishment of very specific time limits for challenging such decisions, significantly short, as well as the limitation of the automatic suspensive effect, pending the outcome of an appeal, are the main points of concern[367].

2.1.1. Diminishing deadlines for challenging decisions entailing a rejection of an application for international protection.

The deadlines proposed and finally adopted by the EU legislator, for the initiation of appeal proceedings, sparked a considerable amount of debate[368], given the significant limitations imposed to Member States' national procedural autonomy. The notion of "reasonable" time limits, as is the rule in the framework of the current Directive[369] is not only notably absent, but, on the contrary, has been completely replaced by detailed provisions, laying down specific temporal targets within which the Member States may exercise their discretion. Predominantly, there is an obligation to the national legislator for setting down a national deadline of no less than two weeks and no more than one month in duration, as a main rule, within which applicants for international protection, persons subject to withdrawal of international protection and persons recognized as eligible for subsidiary protection may challenge any of the negative decisions provided thereof[370].

However, there is an exceptional limitation to the already short time frame established above, in the case where the examination of applications takes place according to any of the following special procedures. Specifically, should the rejection of an application occur on grounds of inadmissibility, for the reason that it was implicitly withdrawn, or deemed unfounded or manifestly unfounded under the conditions that the use of an accelerated procedure is justified, a time frame of no less than five days and no more than ten days is applicable[371].

In light of the above, and in consideration of the fact that the process for notifying asylum seekers on the adoption of a negative decision relating to their application is left completely to the whims

[364] See paragraph 1.1.2. of Chapter B, Part I.
[365] See, for instance, *Case C-556/17, Torubarov* (n 296); *Case C-406/18, PG* (n 282).
[366] European Council on Refugees and Exiles, 'Comments on the Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, (2024)', *pg. 93.*
[367] ibid.
[368] ibid, *pg. 94.*
[369] Specifically, article 46, paragraph 4 of Directive 2013/32/EU.
[370] Article 67, paragraph 7, case (b) of Regulation (EU) 2024/1348.
[371] ibid, case (a).

of the national legislator[372], one comes to wonder how safeguarding the procedural guarantees of applicants with regards to the asylum procedures will remain a possibility. What is especially concerning, is the fact that the use of special procedures has been significantly extended in the New Pact, with a broadening of circumstances giving rise to a rejection of applications as inadmissible or justifying the use of accelerated procedures[373]. Thus, it is not far-fetched to reach the conclusion that the time limit of two weeks to a month, the longest provided for in the new Regulation, constitutes the rule only theoretically[374]. Nor can the reliance of asylum seekers on other remedies of general application, potentially provided for in national law[375], be deemed appropriate to balance out the significantly limited deadlines of five to ten days that will, most likely, be applicable in the majority of instances.

On those considerations, how can the sufficient and suitable preparation of an appeal remain unaffected, when the asylum seeker, a person usually in a very vulnerable position, unaware of the national legal system or even the language, processes merely five to ten days, to initiate, organize, lodge and, generally, carry out a complex legal defense[376]? On the contrary, the harmonized provision of minimum 30 days for the lodging of appeal proceedings, as has been proposed by the European Council on Refugees and Exiles[377], would have been, by far, preferential, both for ensuring the access of asylum seekers to an effective remedy and for safeguarding the appropriate preparation of the applicant's appeal and, thus, the quality of the judicial proceedings.

The mandatory nature of setting specific deadlines in national law, within which the appellate court or tribunal, examining negative decisions on applications, must complete their adjudication, should also not go unmentioned. Whereas in the currently applicable Directive the regulation of the duration of appeal proceedings is a possibility for the domestic legislator[378], the wording of the new provision in the Regulation does not allow for the drawing of a similar conclusion. Effectively, Member States "shall lay down in their national law reasonable time limits for the court or tribunal to examine decisions in accordance with Article 67(1)"[379]. Undoubtedly, this can be characterized as a means of endorsing the efficiency of the procedures, through the introduction of a mandatory limitation of the timeframe available to the national judge for the completion of the judicial review. Nevertheless, the implications of the transformation of the above discretion to an obligation appear to be equalized through the insertion of a new safeguard, that of ensuring the "adequate and complete examination" of the appeal[380]. This seems to be in line with the Court's jurisprudence, pursuant to which, should the protection of substantive and procedural guarantees of asylum

[372] ibid, article 67, paragraph 8.
[373] Prof. Vincent Chetail & Mariana Ferolla Vallandro do Valle, 'The Asylum Procedure Regulation and the Erosion of Refugee's Rights'.
[374] ibid, *pg. 4*
[375] Recital 87 in the preamble of Regulation (EU) 2024/1348.
[376] Prof. Vincent Chetail & Mariana Ferolla Vallandro do Valle (n 373).
[377] European Council on Refugees and Exiles, 'Reforming EU Asylum Law: The Final Stage, ECRE's Analysis of the Most Important Unresolved Issues in the Legislative Reform of the Common European Asylum System (CEAS) and Recommendations to the Co-Legislators.', *pg. 19.*
[378] Article 46, paragraph 10 of Directive 2013/32/EU.
[379] Article 69 of Regulation (EU) 2024/1348.
[380] ibid.

seekers be endangered by the need for a swift cessation of proceedings, the principle of effectiveness requires the disapplication of the relevant national provision[381].

2.1.2. Limitation of the right to remain pending the outcome of appeal proceedings

A supplemental matter that raises significant concern in the new Asylum Procedures Regulation relates to the right to remain of applicants for international protection, pending the outcome of appeal proceedings. Initially, it is significant to mention that the suspensive effect of appeals is a matter now regulated to a greater extend, in a more comprehensive and far-reaching manner, a fact made evident from its separation from the main article on judicial remedies. The problematic character of the new Regulation lies in the fact that, following a substantial change in pre-existing rules, the automatic suspensive effect of appeals against negative administrative decisions has been restricted in numerous occasions to such an effect, as to potentially establish a general presumption of non-suspension in asylum proceedings[382].

Primarily, as with the existing legal framework[383], both the deadline for lodging an appeal as well as the timeframe for the completion of the judicial review on the latter, lead, in principle, to the suspension of any removal or expulsion order of applicants or persons subject to the withdrawal of international protection[384]. However, the European co-legislator opted for the expansion of occurrences which lead to a limitation of this rule. In fact, when the rejection of an application has been the result of an assessment of inadmissibility, characterization as unfounded or manifestly unfounded in the context of accelerated or border procedures or as implicitly withdrawn, the right to remain in the territory of the Member State shall not be granted to the above persons[385]. The same applies in relation to subsequent applications deemed unfounded or manifestly unfounded, without the additional need for the use of a special procedure[386].

The above exceptions are accompanied by specific safeguards, consisting primarily of the need to respect the principle of non-refoulement as well as the possibility to be, nevertheless, permitted to remain, following a request from the applicant or the person subject to withdrawal of international protection[387]. The effectiveness as well as the practicality of those precautions remain doubtful, given the substantial burden placed upon the applicant to provide plausible and adequate proof for the application of the principle of non-refoulement in their individual case[388]. The inclusion of a new set of procedural guarantees, however, upon the ex officio examination of the applicants' right to remain, in the case of applicability of the aforementioned exceptions, is deemed as a positive development[389]. The most crucial right awarded to asylum seekers in those cases, is the protection from removal from the territory until the expiry of the deadline for filing a request to remain or, additionally, pending the judicial outcome of such a request[390]. Nonetheless, the absolute character of that right is far from guaranteed in the case of repeated applications, if the lodging of the appeal

[381] See *Case C-406/18, PG* (n 282); *Case C-564/18, LH* (n 278).
[382] Prof. Vincent Chetail & Mariana Ferolla Vallandro do Valle (n 373), *pg. 5.*
[383] Article 46 paragraph 5 of Directive 2013/32/EU.
[384] Article 68, paragraphs 1 and 2 and recital 92 of Regulation (EU) 2024/1348.
[385] ibid, paragraph 3, cases (a), (b), (c).
[386] ibid, case (d).
[387] ibid, article 68, paragraph 4.
[388] Prof. Vincent Chetail & Mariana Ferolla Vallandro do Valle (n 373), *pg. 5.*
[389] Article 68, paragraph 5 of Regulation (EU) 2024/1348.
[390] ibid, case (d).

has taken place with an abusive intent, solely for the purpose of the postponement or frustration of an imminent return decision with the effect of immediate removal[391]. Once more, reservations remain as to the feasibility of safeguarding the principle of non-refoulement in this situation, in addition to the provision of different sets of rules for various classifications of applicants, and the conformity of the latter with rule of law considerations[392].

An additional consideration to be made in this context, is the now inclusion of the CJEU's case-law relating to the non-existence of an obligation to endow a potential second level of adjudication with automatic suspensive effect[393]. The text of the new Regulation explicitly excludes appeals challenging first or subsequent judicial decisions upholding negative decisions on applications for international protection[394], marking yet another limitation on the suspensive effect of judicial remedies available in the asylum procedures and crystalizing low protective standards in the reformed legislative text.

2.2. *Restriction of the scope of the judicial remedies available under the new Regulation on Asylum and Immigration Management.*

Following the adoption of the New Pact on Immigration and Asylum, the Dublin III Regulation and its provisions on the determination of the Member State responsible for examining applications for international protection, were repealed and wholly replaced by the Regulation on Immigration and Asylum Management[395]. In relation to the principle of effective judicial protection, the new rules are characterized by a significant narrowing of the scope and intensity of the judicial remedy available against transfer decisions as well as a general reduction of the quality and practicality of the judicial review, through the shortening of deadlines and a limitation of the right to remain of asylum seekers[396]. In fact, the changes following the 2024 legislative reform have the potential to effective impact the operation of the Dublin system in its entirety[397].

As a preliminary remark, it is not far-fetched to claim that the legislative reforms included in the new Asylum and Immigration Management Regulation indicate not only the discontent of the Member States with recent jurisprudential evolutions, but also an inclination to reinstate the intergovernmental structure of the determination rules[398].

The provision of a judicial remedy against transfer decisions in the context of the new Regulation is severely undermined by the restrictive stance adopted by the co-legislator. In a manner that is quite puzzling, especially in light of jurisprudential evolutions in this particular field of asylum legislation[399], the scope of the appeal available against such decisions is confined to a great effect, diminishing safeguards and, essentially, leveling the intensity of judicial protection previously

[391] ibid, article 68, paragraph 6.
[392] European Council on Refugees and Exiles (n 377), *pg. 19*
[393] See *Case C-180/17, X and Y* (n 262), as analyzed above, in paragraph 1.1.1. of Chapter B, Part I.
[394] Article 68, paragraph 7 and recital 94 of the preamble of Regulation (EU) 2024/1348.
[395] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.
[396] See article 43 of Regulation (EU) 2024/1351, in comparison to article 27 of Regulation (EU) No 604/2013 604.
[397] Steve Peers, 'The New EU Asylum Laws: Taking Rights Half-Seriously' [2024] Yearbook of European Law.
[398] ibid, *pg. 26.*
[399] See above paragraph 1.2.2. of Chapter B, Part I.

afforded to applicants. Specifically, while a judicial remedy is still available, the judicial assessment of the court or tribunal seized with the contestation of a transfer decision, is reliant upon the removal in question resulting in the occurrence of a number of specified conditions[400]. Those are explicitly limited to the existence of a real risk of violation of article 4 CFR, the emergence of circumstances postdating the adoption of the transfer decision, that are of pivotal importance for the correct application of the Regulation, as well as the protection of a set of distinctive rights, relating to private and family life, the principle of the best interest of the child and the protection of persons in a state of dependency[401.]

The restriction of the scope of the available remedy to the potential infringement of the above fundamental rights of the applicants is intended to be in accordance with article 47 of the Charter as well as the relevant jurisprudence of the CJEU[402], a fact that is enigmatic, in consideration of the increasingly broad interpretative stance followed by the Court in relation to the Dublin III Regulation[403]. The right to an effective remedy against transfer decisions appears to be stripped of its autonomous character, triggered only in connection with the endangerment of specific substantive rights, with other legitimate interests of applicants, relating to procedures that adversely affect their position, becoming irrelevant[404]. This limitation not only seems unconnected to existent case law but is even deemed directly contradictory with the Court's ever protective position, which has, admittedly, been trending towards the elevation of asylum seekers as subjects of enforceable rights, derisive from the Dublin provisions.

In view of the above, it is to be asserted whether the Court will remain consistent with its ever-protective stance which, so far, has favored a broad interpretation for safeguarding asylum seekers' interests, in the detriment of national procedural discretion. This possibility appears doubtful, considering the Court's practice of using the provisions of secondary law as its inspiration, with mere implicit references to the protective standards of the Charter, as analyzed above[405]. Simultaneously, the possibility of a reduction in the number of cases ultimately reaching the Court in the wake of the above changes, should not be ignored[406]. In a more disconcerting note, it remains uncertain whether the compatibility of the new amendments with the prerequisites of article 47 CFR will have the possibility to be judicially asserted, given the diminished scope of the right to an effective remedy, which will potentially bring about the inadmissibility of a variety of actions, not based on a risk of violation of the limited rights and guarantees specifically provided for in the new legislation.

[400] Article 43, paragraph 1 of Regulation (EU) 2024/1351.
[401] ibid, cases (a), (b) and (c).
[402] ibid, recital 62 in the preamble.
[403] See, for instance, *Case C-63/15, Ghezelbash* (n 328).
[404] Morgades-Gil (n 307), *pgs. 274, 275.*
[405] See above, paragraph 1.2.2. of Chapter B, Part I.
[406] Peers, 'The New EU Asylum Laws' (n 397), *pg. 26.*

Interim conclusion

The above analysis has been undertaken, with a focus on the existent procedural guarantees and safeguards afforded under primary and secondary law to applicants for international protection. As has been observed, the legal framework on the accessibility and effectiveness of the EU asylum procedural acquis contains significant entitlements, allowing for the participation, navigation and access to the examination processes in a protective manner, with a special focus on the promotion of legal information, assistance and representation to those particularly vulnerable individuals, equipping them with appropriate and necessary legal tools. At the same time, the existence of provisions for the realization of the fundamental right of effective judicial protection, with the aim of promoting the genuine and practical enforcement of the entirety of procedural rights encompassed in secondary law, can only be applauded.

Nevertheless, under no circumstance is the absolute character of the above safeguards guaranteed, evident in the express provision of significant exceptions, as foreseen in the relevant legal framework. At the same time, their effective enjoyment is severely undermined by national practices, aimed at the prevention of territorial admittance, through the limitation of the number of third country nationals that gain access to the EU. The contribution of the CJEU proves invaluable in those situations, through the assurance of a highly protective and broad interpretative stance, aimed at the elimination of policies that have the potential to thoroughly undermine the very premises of the EU asylum acquis, promoting, instead the enforcement of a harmonized standard of protection.

The Court's influential stance adopted so far may, however, not suffice for the negation of the negative impact of the limitations introduced in the new Pact on Migration and Asylum, as regards procedural rights protection. The significant narrowing of the scope and intensity of the judicial remedy available against transfer decisions as well as a general reduction of the quality and practicality of the judicial review, through a restriction of the automatic, suspensive effect of appeals as well as a limitation of the available time-limits for the actual enforcement of the right to an effective remedy, are particularly disconcerting and in direct contradiction with the Court's jurisprudential evolutions and current positions in this field of EU law. The expansion of procedural guarantees relating to the provision of enhanced legal support during the examination procedures as well as the provision of clearer guidelines for accessing legal aid cannot be considered to adequately offset the above concerning legislative amendments. Thus, the balancing act conducted by the EU co-legislator, between fundamental rights protection and the efficiency and swiftness of the asylum procedures, appears to be tilting towards the latter.

Part II: Substantive rights in the EU asylum system.

Chapter A: Core human rights ensured to applicants for international protection in accordance with primary law.

1. Assessing asylum in the light of the individual right and general principle of dignity.

The legal imprint of human dignity in the context of EU law is, undoubtedly, one of constitutional importance[407]. Its dualistic nature as an independent right[408] and general principle[409] is evident in consideration of its thorough incorporation in the EU legal framework. Human dignity is the standard against which every aspect of legislative regulation in the Union is measured, safeguarded in numerous provisions of primary law. The proclamation of its absolute and inviolable character, one that must be "respected and protected", even in cases of a justified restriction of other rights and guarantees, is incorporated into the very introduction of the Charter[410], signifying its contribution as an "indivisible, universal value" at the very foundation of the Union[411]. Dignity is placed at an equal footing with the principles of democracy, freedom, equality and the rule of law[412], claiming the first position in the order of foundational values embedded in article 2 TEU. As a guiding principle, human dignity comprises the foundation upon which a majority of further rights and freedoms are based, encompassing, at a minimum, the right to life, to the integrity of person, the prohibition of torture and inhumane or degrading treatment as well as the prohibition of slavery and forced labor[413].

The same principle constitutes a core value in the area of freedom, security and justice, as highlighted by the Commission[414]. Respect for its fundamental requirements is a core objective, substantiating a minimum standard of treatment of third country nationals, including applicants for international protection in the EU[415]. In fact, a commitment to ensure a dignified treatment of asylum seekers has been undertaken by the totality of secondary law legislative initiatives adopted in the context of asylum policy, through the proclamation, in their preambular text, of full respect for human dignity and the promotion of the application of core human rights included in the Charter[416]. Supplementarily to this general declaration, a requirement for ensuring a "dignified

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[407] Matej Avbelj, 'Human Dignity and EU Legal Pluralism', *Research Handbook on Legal Pluralism and EU Law, pgs. 95-110* (Gareth Davies and Matej Avbelj, 2018), *pg. 95.*
[408] Proclaimed in article 1 of the EU Charter of Fundamental Rights.
[409] *Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, (2004), ECLI:EU:C:2004:614*, para 34.
[410] Article 1 of the EU Charter of Fundamental Rights.
[411] Recital 2 in the preamble of the EU Charter of Fundamental Rights of the European Union reads: "*Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity…".*
[412] Article 2 of the Treaty on European Union, OJ C 326 2012. and recital 2 in the preamble of the CFR.
[413] See Title I of the EU Charter of Fundamental Rights, under the heading "Dignity".
[414] Communication from the Commission to the European Parliament and the Council on an area of Freedom, Security and Justice serving the citizen, COM (2009) 262 final, *pg. 7.*
[415] Nika Bačić Selanec and Davor Petrić, 'Migrating with Dignity: Conceptualising Human Dignity Through EU Migration Law' (2021) 17 European Constitutional Law Review, pgs 498-516, *pg. 501.*
[416] See: recital 60 in the preamble Directive 2013/32/EU; recital 35 of Directive 2013/33/EU; recital 16 of the Preamble to Directive 2011/95/EU; Recital 24 of the Preamble to Regulation (EU) No. 604/2013.

standard of living" and dignified treatment of detained applicants, the conditionality of withdrawal of reduction of material reception conditions upon the upkeeping of a such a dignified standard[417] or the dignified and respectful conduct from national authorities towards the physical and psychological integrity of applicants, especially regarding medical examinations or searches[418], are some of the more specific obligations imposed on Member States in secondary law.

The application of the right to human dignity is typically realized by the Court's jurisprudence, through its utilization as an interpretative principle for provisions of secondary law in the field of asylum, in conjunction with an assessment of alternative fundamental rights and principles[419]. The fabrication of EU asylum rules through the lens of human dignity, which is often construed as the underlining aim of those provisions, often takes place in judgements whose main objective revolves around the collective application of article 1 with articles 4 or 7 of the Charter[420]. Since those provisions have been characterized as giving concrete form to the generalized principle of human dignity, the following analysis will focus on a jurisprudential examination of the utilization of prohibition of torture and inhumane or degrading treatment (Part 2.1.) as well as the protection of private life (Part 2.2.) respectively, for the purpose of assessing the Court's impact in the enhancement of applicants' rights.

1.1. *Ensuring respect for the prohibition of torture and inhuman or degrading treatment as a fundamental aspect of human dignity through broad interpretative jurisprudential traditions.*

The close connection between the foundational principle of human dignity and the prohibition of torture or inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter has been thoroughly emphasized by the Court[421], in that the latter is a significant consequence of the requirements of the former. Combined, articles 1 and 4 of the CFR have expressly been considered as fundamental values of the Union and its Member States, respect of which must be ensured by every piece of secondary law legislation, undeniably including legal instruments adopted in the context of asylum policy.

The utilization of the above primary law considerations for the establishment of a particularly protective and human rights oriented jurisprudential stance is not an uncommon practice in the CJEU's case-law. In particular, article 4 of the Charter has been extensively used as a tool for the crystallization of a various State prohibitions in the occasion of potential risks of violation of its non-absolute character, especially in the recourse of the Dublin determination procedures, where the transfer of applicants in the Member State responsible entails such a risk. Simultaneously, a reading of secondary law provisions, especially those relating to the standards for the qualification of third country nationals as beneficiaries of international protection, under the light of this fundamental human right, has often led to the adoption of a thoroughly broad interpretative stance,

[417] Recitals 11, 18, 25 in the preamble of Directive 2013/33/EU.
[418] Articles 13, paragraph 2, case (d) and 25, paragraph 5 of Directive 2013/32/EU.
[419] Davor Petrić, 'Dignity, Exceptionality, Trust. EU, Me, Us' (2020) 26 European Public Law, pgs. 451-476, *pg. 457-460.*
[420] Selanec and Petrić (n 415), *pg. 503.*
[421] *Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldăraru v Ge, neralstaatsanwaltschaft Bremen, (2016), ECLI:EU:C:2016:198*, paras 85-87; *Case C-353/16, MP v Secretary of State for the Home Department, (2018), ECLI:EU:C:2018:276*, para 36.

encompassing as many categories of applicants as possible within the legally protective confines of EU asylum law.

1.1.1. The prohibition of torture and inhuman or degrading treatment as a limitation to the principle of mutual trust.

The effectivity and protective nature of the CEAS is significantly undermined by structural weaknesses inherent in the design and implementation of the asylum procedures relating to the determination of the Member State responsible for the examination of applications, as highlighted by the substantial strain placed upon the Dublin arrangements following the 2015 crisis[422]. In fact, as has been claimed, the Dublin III Regulation has proven to be "manifestly unworkable"[423], unable to meet one of its core objectives, that of ensuring effective protection of applicants' fundamental human rights[424]. As recognized in the legislative text, a risk of violation of the rights afforded and guaranteed to applicants in accordance with the Charter is inherently tied with the endangerment of the smooth functioning of the Dublin system, by the existence of deficiencies or a complete collapse of the national asylum systems[425].

This risk is further enhanced by the central position awarded to the principle of mutual trust in the EU legal order. Characterized by the Court as a fundamental premise in the EU, crucial for the functioning of the area of freedom, security and justice, the latter principle relates to the implication that the foundational values of the Union as codified in article 2 of the TEU[426], are recognized, respected and observed in all domestic legal orders of the Member States[427]. Thus, a legal presumption is established, excluding the possibility to question or inspect whether such a fundamental rights observance is essentially realized, justified on the need of ensuring 'institutional balance' and preserving the autonomy of the Union[428]. Despite the undoubtedly vital function of the principle of mutual recognition, its application in conjunction with the provisions of the Dublin Regulation during the first phase of the CEAS ultimately led to the unwelcome outcome of a de facto deprivation from applicants of their most fundamental human rights, through the substantiation of a risk of systemic violations of the principle of non-refoulement following their transfer to Member States in whose asylum system significant flaws were prevalent.

This inherent contradiction between the observance of the principle of mutual trust and the necessity of safeguarding the fundamental human rights of applicants for international protection was initially showcased in the historic judgment of the CJEU in *N.S. and M.E.*[429]. Renowned for

[422] Georgios Anagnostaras, 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection' (2020) 21 German Law Journal, pgs. 1180-1197.
[423] ibid, *pg. 1181.*
[424] See recitals 9, 13, 14, 19 and 24 in the preamble of Regulation (EU) No 604/2013.
[425] ibid, recital 21 in the preamble.
[426] Article 2 of the Treaty on the Functioning of the European Union. particularly states that: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
[427] *Case C-216/18 PPU, LM, (2018), ECLI:EU:C:2018:586*, paras 35, 36; *Joined cases C-411/10 and C-493/10, N.S. and M.E.* (n 56), paras 78, 79, 83.
[428] *Opinion 2/13 of the Court on the Accession of the European Union to the ECHR of 18 December 2014, EU:C:2014:2454*. para 192; *Case C-216/18 PPU, LM* (n 427), para 37.
[429] *Joined cases C-411/10 and C-493/10, N.S. and M.E.* (n 56).

its impact in the promotion of article 4 of the CFR as a principle capable of bringing about a limitation to the principle of mutual trust, it established the now fundamental rule of the impossibility to conduct a transfer of asylum seekers to the Member States normally responsible under the determination criteria, where the domestic authorities, including the judiciary, of the examining State "…cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment..."[430]. The novel character of this judgement cannot be denied, considering that it allowed for the prevalence of human rights considerations in the recourse of the transfer procedures, thus effectively tipping the scale towards the observance of a more protective stance, one not based on what may manifest as blind faith between Member States to the detriment of asylum seeker's guarantees. Nevertheless, a high threshold was simultaneously established through what eventually evolved as the substantiation of the existence of "systemic deficiencies" as an essential minimum legal requirement for the justification of this restriction of mutual recognition, leading to a risk of a severe dilution of the absolute nature of the prohibition included in article 4 of the Charter[431]. Particularly, as highlighted by the Court, "…it cannot be concluded…that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States…"[432]. In fact, it was suggested that any other conclusion would amount to the negation of the main objectives of the Dublin provisions as well as an effectual deprivation of their substance[433].

In light of this jurisprudence and what can only be considered as a logical after-effect of its main rationale, uncertainty dominated the legal field as to the precise definition, function and significance of the notion of "systemic deficiencies", which often resulted in its utilization as a supplemental and essential requirement for rebutting the presumption of fundamental rights observance in the recourse of the Dublin procedures[434]. This ambiguity was further aggravated following the codification of the *N.S.* case-law in the text of the Dublin III Regulation and the formulation of the existence of 'systemic flaws in the asylum procedure and in the reception conditions' as an apparent precondition for the realization of a real risk of applicants being subjected to a risk of inhuman or degrading treatment[435]. At the same time, the contradictory developments in international law, crystallized through the complete absence of a need to establish systemic breaches in analogous jurisprudence of the ECtHR related to the possibility of non-conducting Dublin transfers[436], was a further blow to the fundamental principle of legal certainty and illustrated a necessity for the assertation of higher protective standards in the EU legal order, especially in light of the non-derogable nature of article 4 CFR.

This necessity was eventually realized by the Court in the influential judgement of *C.K.*, significant for its effect of overturning its preceding position and expressly eliminating the need of existence

[430] ibid, paras 86, 106.
[431] Evangelia Tsourdi and Cathryn Costello, '"Systemic Violations" in EU Asylum Law: Cover or Catalyst?' (2023) 24 German Law Journal, pgs. 982-994, *pg. 985.*
[432] *Joined cases C-411/10 and C-493/10, N.S. and M.E.* (n 56), para 82.
[433] ibid, para 85.
[434] Tsourdi and Costello (n 431), *pg. 986.*
[435] Article 3, paragraph 2, subparagraph 2 of Regulation (EU) No 604/2013.
[436] See *ECtHR, Tarakhel v. Switzerland* (n 321)., analyzed above in paragraph 1.2.1. of Section 1, Chapter B in Part I.

of systemic flaws in the procedures of the responsible Member State for the suspension of the implementation of transfer decisions, where the possibility of a violation of article 4 of the Charter as a consequence of the enforcement of that transfer is not thoroughly and absolutely excluded[437]. When confronted with an examination of its rationale against the wording of the article 3 (2) (2) of the Dublin III Regulation, the Court expressly stated that "…that provision cannot, therefore, be interpreted as excluding the possibility that considerations linked to real and proven risks of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, might … have consequences for the transfer of a particular asylum seeker"[438]. In fact, the contradictory character of such an interpretation with the absolute nature of the prohibition of inhuman or degrading treatment was expressly highlighted, as was its contradiction with the need of ensuring that a real and proven risk of suffering such treatment is not disregarded "…under the pretext that it does not result from a systemic flaw in the Member State responsible"[439]. Thus, it was established that were the transfer of an asylum seeker with an acutely severe illness, as was the factual background of the case, would have the effect of substantiating a "…real and proven risk of a significant and permanent deterioration in their state of health...", a fact which amounts to a violation of article 4 of the Charter, that fact alone is capable of impeding the enforcement of the transfer decision, the existence or lack of systemic deficiencies in the asylum system of the responsible Member State notwithstanding[440].

The rights-based approach followed by the Court in the aforementioned case comprises a positive development that must be the subject of appraisal for its highly protective stance and thorough reaffirmation of the significance and absolute character of the fundamental right incorporated in article 4 of the Charter, to the detriment of the requirements of mutual trust. Nevertheless, the consistent emphasis placed on the justification of this stance under the light of the specific and exceptional circumstances of the case, rationalized in the seriousness of the state of health of the applicant in the main proceedings, raises doubts as to its applicability in subsequent jurisprudence, with a dissimilar or a less exceptional factual background[441].

This exceptionality requirement was further necessitated in the case of *Jawo*[442] for the affirmation of a possibility of non-enforcement of a transfer decision under the Dublin Regulation. In particular, the Court's initial affirmation that a substantial risk of suffering treatment, contrary to the prerequisites of article 4 CFR, owing to the quality of living conditions prevalent in the responsible Member State to which beneficiaries for international protection are, eventually, subjected to[443], is a welcome reaffirmation and enhancement of the *C.K.* jurisprudence. Indeed, as underlined, the time period at which the risk of violation of the absolute prohibition of article 4 of the Charter materializes, whether it be during the transfer or at any given subsequent stage, is irrelevant for the affirmation of the existence of such a risk within the common asylum system which must be considered in a holistic manner[444]. Nevertheless, a subsequent requirement was

[437] *Case C-578/16 PPU, C K and Others v Republika Slovenija, (2017), ECLI:EU:C:2017:127*, paras 71, 96.
[438] ibid, para 92.
[439] ibid, para 93.
[440] ibid, paras 73, 74.
[441] Šeila Imamovic and Elise Muir, 'The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?' (2017) 2017 2 European Papers - A Journal on Law and Integration, pgs. 719-728, *pg. 724.*
[442] *Case C-163/17, Abubacarr Jawo v Bundesrepublik Deutschland, (2019), ECLI:EU:C:2019:218*.
[443] ibid, paras 83, 84, 90.
[444] ibid, paras 88, 89.

introduced, justified, expressly, on the necessity of those deficiencies attaining "a particularly high level of severity", affirmed following a thorough examination of all the circumstances relevant for the factual background of the case[445]. Thus, an exceptionality and individualization criterion was once again validated for rebutting the presumption of mutual trust, materializing, in this specific judgement, in the existence of a situation of "extreme material poverty that does not allow (applicants) to meet (their) most basic needs…and that undermines (their) physical or mental health or puts (them) in a state of degradation incompatible with human dignity"[446]. A significantly restrictive interpretation of what constitutes degrading living conditions, through the equalization of the notion with a situation such as the one in the main proceedings, effectively establishes a high threshold to be reached, disregarding alternative living situations which, although not reaching the level of severity demanded, still comprise an effective deprivation of quality material provisions.

The analysis of the above judgements allows for the conclusion that the gravity of the rights violation at hand or the severity of the breach in the domestic asylum system is relevant for the examination of whether a limitation to the principle of mutual trust is permissible in any given case[447]. No generalized criteria have been established, providing insightful guidance and applicable in an automatic manner where there are indications that the transfer of applicants withing the functioning of the Dublin system may bring about violations of the fundamental right not to be subjected to torture or inhuman and degrading treatment. That is undoubtedly a testimony to the gravity that is placed by the Court on the principle of mutual recognition in the EU legal order and, especially, for the operation of the area of freedom, security and justice, evident in the rationale of some of its most influential cases[448]. Therefore, while the impact of this jurisprudence for safeguarding the right to be free from such treatment cannot be completely negated, the high threshold simultaneously established leads to a necessity for the Court to revisit and cautiously loosen the strict requirements in place. This appears to be the only manner in which the absolute and ever-present nature of the prohibition codified in article 4 CFR can be effectively safeguarded in the context of the asylum procedures.

A significant development that must not be left unnoticed and that is of high relevance for the matter under examination, is the formulation of the provision corresponding to article 3 (2) (2) of the Dublin III Regulation in the new Asylum and Migration Management Regulation[449]. Specifically, the notion of "systemic deficiencies" is completely absent from the text of the relevant provisions, which, instead, lists the "…a real risk of violation of the applicant's fundamental rights that amounts to inhuman or degrading treatment within the meaning of Article 4 of the Charter…" as the sole determining factor on the basis of which the impossibility to enforce a transfer decision to the responsible Member States can be substantiated[450]. This advancement

[445] ibid, para 91.
[446] In para 92 of *Case C-163/17, Jawo*, those needs were indicatively specified as inclusive of "…food, personal hygiene and a place to live".
[447] Anagnostaras (n 423), *pg. 1192.*
[448] See, indicatively: *Case C-163/17, Jawo* (n 442), para 82; *Case C-578/16 PPU, C. K. and Others* (n 334), paras 70, 95.
[449] Article 16, paragraph 3 of Regulation (EU) 2024/1351.
[450] ibid.

can only be positively asserted, enforcing the above necessity of the Court to assure a higher protective standard in this field of asylum law.

1.1.2. Broadening of the scope of application of the qualification criteria as a jurisprudential tendency.

One of the most valuable tools in the Court's arsenal for safeguarding the absolute character of the prohibition of torture and degrading or inhumane treatment, as a direct consequence of a violation of the principle of non-refoulement, consists of the adoption of a particularly broad interpretative stance on various notions and terms relating to the conditions for granting international protection. This corresponds to the objective of encompassing as many categories of applicants within the legally protective confines of the Qualification Directive[451], in light of the devastating consequences that an incorrect recognition of refugee needs, inappropriate dismissal of eligibility or wrongful application of the qualification criteria can have on the very lives of those vulnerable individuals. A close examination of the Court's willingness to ensure and enhance applicants' potential to effectively benefit from international protection in the EU, indicates that judicial efforts are concentrated on widening the scope of application of the conditions for affirming both the existence of a well-founded fear of being persecuted, as the reason that can lead to the recognition of refugee status, and that of a real risk of suffering serious harm, upon which subsidiary protection status can be based.

Initially, the emergence of a broad interpretative stance on the legal concepts of 'serious harm' and 'armed conflict' is traced to a compilation of judgements whose main objective related to the substantiation of the required conditions within the meaning of article 15 (c) of the QD, for the affirmation of a need to provide subsidiary protection. At the outset, mention must be made to the impactful judgement of *Elgafaji*[452]*,* dating back to 2009. Confronted with a need of clarification as to the exact content of the notion of "a serious and individual threat to the life"[453] of applicants in their country of origin, reservations were harbored by the national judiciary as to the conditionality of this threat upon the necessity of evidentiary provision, ascertaining that the third country national is "…specifically targeted by reason of factors particular to their circumstances"[454]. Following a comparative assessment of the types of potential harm foreseen by the text of article 15 of the QD, the Court underlined that the risk of harm covered by the case under consideration is of a more generalized nature, as showcased by the lack of specification of indicative acts of violence, its association with a general situation of "international or internal armed conflict" as well as the explicit utilization of the term "indiscriminate" in the text of the provision[455]. This interpretation allowed the Court to reach its seminal conclusion, by ruling on the substantiation a "serious and individual threat to life" in the case where the "degree of indiscriminate violence characterizing the armed conflict taking place…" is of such high intensity, that the mere presence of the applicant in the territory of their country of origin, personal

[451] Directive 2011/95/EU.
[452] *Case C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, (2009), ECLI:EU:C:2009:94.*
[453] Article 15, case (c) of Directive 2011/95/EU, which states that serious harm consist of "…serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".
[454] *Case C-465/07, Elgafaji* (n 452), para 30.
[455] ibid, paras 33, 34.

circumstances notwithstanding, suffices for the affirmation of a real risk of them suffering such a threat. Thus, the Court effectively widened the application of article 15 (c) of the QD, ensuring that the return of an applicant to a location of high intensity, indiscriminate violence is precluded, pursuant to the requirements of non-refoulment.

An affirmation and further development of the above jurisprudential interpretation occurred in the context of a much more recent judgement, whose main objective revolved around the lawfulness of a domestic legislation providing for the conditionality of the application of article 15 (c) of the QD, upon an additional criterion[456]. In particular, a quantitative assessment of casualties, resulting in a minimum ratio between deceased or wounded and the total population of the affected area, needed to be initially conducted[457]. Thus, only where this highly specific and additional threshold was reached, was there a potential for successfully invoking a "serious and individual threat to life"[458]. Following a reiteration of the *Elgafaji* deductions, the Court rejected the sole application of this criterion as the determining factor for the purpose of ascertaining the existence of such a threat. As underlined, a systematic, automatic and general rejection of a "serious and individual threat to life" cannot be sufficiently justified, where this quantitative deduction is not realized[459]. The dubious reliability of the criterion, which failed to take into consideration the realistic hindrance of obtaining impartial sources of information, as well as the subsequent possibility that its application may easily bring about an unlawful refusal of domestic authorities to grant international protection[460] were both grounds relied upon by the court for the validation of its position. Simultaneously, acceptance of such an additional criterion would, undoubtedly, be contrary to the individual character of the asylum examination. As underlined by the Court, "…even if that application does not rely on factors specific to the applicant's situation…such an application must be subject to an individual assessment, in respect of which a whole series of factors must be taken into account"[461].

This highly protective and broad interpretative stance is partially offset, by the Court's judgement in case of *X and others*[462], in which it was pinpointed that a comprehensive appraisal of both the circumstances relevant to the situation in the country of origin, relating, indicatively, to "…the general level of violence and insecurity…", as well as personal considerations and the individual position of the applicant, form cumulative conditions for the assessment of applications for international protection[463]. Initially, the Court's elimination of the distinctive character of the third type of serious harm codified in article 15 (c), appears unconvincing and quite contradictory to its preceding case-law. As underlined, although "…that provision covers a 'more general' risk of harm than those referred to in points (a) and (b) of the same article...", the relevance of the individual position and personal circumstances of applicants is established "…irrespective of the specific type of serious harm, within the meaning of that Article 15"[464]. Simultaneously, the Court proceeded to an express differentiation between situations where the degree of indiscriminate

[456] *Case C-901/19, CF and DN v Bundesrepublik Deutschland, (2021), ECLI:EU:C:2021:472*, para 17.
[457] ibid, para 30.
[458] ibid, para 21.
[459] ibid, para 33.
[460] ibid, paras 35, 37.
[461] ibid, paras 40, 41.
[462] *Case C-125/22, X and Others v Staatssecretaris van Justitie en Veiligheid, (2023), ECLI:EU:C:2023:843*.
[463] ibid, para 55.
[464] ibid, paras 40, 43.

violence is so exceptionally high that applicants need not prove that they are specifically affected and other, "less exceptional situations" where individual considerations remain relevant[465]. In fact, it was emphasized that this provision may related to other circumstances, in which "…a level of indiscriminate violence (is) lower than that characterizing such exceptional situation…", and in the context of which a case-by-case analysis of personal factors, such as "…the applicant's private, family or professional life…" is mandatory for the materialization of a real risk of serious harm[466].

In light of this categorization, the Court appears to be highlighting the exceptionality of its preceding case-law, diminishing the applicability of the *Elgafaji* and *CF and ND* protective jurisprudential position to cases reaching a particularly high threshold. Simultaneously, the Court's brief and simple dismissal of the potential guidance to be provided by the application of the fundamental principle of non-refoulment and the prohibition of torture and inhuman or degrading treatment or punishment, for the determination of the scope of the requirement to systematically and thoroughly examine all relevant factors, cannot be left unmentioned. While their relevance to the application of the QD was not disputed, it was expressly asserted that "…the said provisions do not provide, in the context of the answer to the present question referred for a preliminary ruling, any further specific guidance…"[467]. At the same time, it must be mentioned that, relating to case (b) or article 15, a requirement of a "clear degree of individualization" was established, which cannot be weakened by the intensity of the indiscriminate violence occurring in the applicant's country of origin[468]. Thus, in the context of torture or inhuman or degrading treatment, a high burden of proof falls on applicants' shoulders, that cannot be offset by the severity of the national situation at the country of origin.

In a second set of judgements, revolving, this time around an interpretation of the serious harm suffered in the context of article 15 (b) of the QD, the Court followed a protective but simultaneously conditionally restrictive interpretative stance, for ensuring the absolute nature of the prohibition of torture or inhuman or degrading treatment. In particular, in the judgement of *MP,* the Court was seized with an examination of whether the mental and phycological after-effects of torture endured by an applicant for international protection can lead to an affirmation of the existence of serious harm, where the recurrence of that risk, should the applicant be removed to their country of origin, is unlikely[469].

Initially, a simple rejection of the substantiation of serious harm, on the basis of indications that the torture suffered will not be repeated or continued, cannot be justified under the combined application of the foundational rights incorporated in articles 1 and 4 of the CFR, especially in consideration of the relevant factual background, indicating that the applicant's phycological state can be significantly aggravated to the point of the affirmation of a serious risk of him committing suicide if returned[470]. Even in this circumstance, however, the substantial, significant and permanent aggravation of the applicant's mental health was not deemed a sufficient enough to reach the high threshold for the affirmation of inhuman or degrading treatment[471]. Instead, for the

[465] ibid, para 41, 42.
[466] ibid, paras 64, 67.
[467] ibid, para 54.
[468] ibid, paras 71, 74.
[469] *Case C-353/16, MP* (n 421), para 26.
[470] ibid, paras 35, 36.
[471] ibid, para 49.

substantiation of eligibility for subsidiary protection, a real risk of the applicant being intentionally deprived of appropriate care for the physical and mental after-effects of that torture in his home country needed to be affirmed, as an additional, cumulative criterion[472].

Initially and without a closer observation, the Court's judgement in *MP* seems to be in line with preceding jurisprudence, in the context of which an inability to substantiate serious harm within the meaning of article 15 of the QD of seriously ill applicants was established, if the deterioration of their health did not result from the intentional deprivation of health care in the country of origin, should the applicant be returned[473]. In fact, as was expressly underlined, the harm suffered by an individual for the realization of a need to be granted subsidiary protection "…cannot therefore simply be the result of general shortcomings in the health system" or result from an absence of appropriate treatment in the country of origin[474]. Nevertheless, In *MP*, the Court drew a distinction, justified by the fundamental importance of the prohibition of torture and inhuman or degrading treatment laid down in Article 4 of the Charter, as well as the particular severity of the situation at hand, where there was a risk of endangerment to the applicant's life, as a result of persistent post-traumatic after-effects of torture suffered[475]. Furthermore, in a subtle yet firm way, the Court elaborated on the conditions to be considered by the national judge, for the determination of the adequacy of the healthcare available in the country of origin, taking account of the level of preparedness of national authorities for enabling rehabilitation as well as eliminating discriminatory policies of healthcare access for particular ethnic groups of individuals with MP's characteristics[476]. This provision of specified guidance to the national judiciary can only be welcomed, since it paves the way for establishment of a more harmonized, protective framework in accordance with the need of those particularly vulnerable individuals, suffering from the lack of protection against torture or inhuman treatment.

The judgement of *WS,* one of the most influential rulings of the Court in the fight against domestic violence, cannot be left unmentioned. Its impact on broadening the scope of application of article 15 (a) and (b) of the QD is significant, since it ensures that the potential infliction of acts of violence or an endangerment of the life of female applicants by members of their own family or community, owing to alleged non-conformity with cultural traditional or religious norms, falls under the definition of "serious harm", thus being capable of bringing about the recognition of subsidiary protection status[477]. Indeed, as affirmed by the Court, the fact that this violence is the result of actions of non-state actors cannot lead to an exclusion of their comprising 'execution' or 'torture or inhuman or degrading treatment or punishment' within the meaning of cases (a) and (b) of article 15 of the QD[478]. Even more importantly, *WS'*s most seminal contribution consists of the consideration of victims of domestic violence as forming part of a "particular social group", thus falling within the protective confines of refugee status[479]. Following references to the CEDAW and the Istanbul Convention, whose relevance is established in consideration of their ratification

[472] ibid, para 52, 58.
[473] *Case C-542/13, Mohamed M'Bodj v État belge, (2014), ECLI:EU:C:2014:2452*, paras 36, 47.
[474] ibid, paras 35, 36.
[475] *Case C-353/16, MP* (n 421), paras 47, 48.
[476] ibid, para 57.
[477] *Case C-621/21, WS v Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet, (2024), ECLI:EU:C:2024:47*, para 80.
[478] ibid, paras 76, 77.
[479] ibid, para 62.

of the totality of Member States as well as the accession of the EU itself to the latter, the Court reached the above conclusion by confirming the application of both of the cumulative conditions under article 10(1)(d) of the QD in the case at hand[480]. In the words of the Court, "…the fact that women have escaped from a forced marriage or, for married women, have left their homes, may be regarded as a 'common background that cannot be changed' within the meaning of this provision", while their 'distinct identity' may be affirmed, given that "…women may be perceived as being different by the surrounding society and recognized as having their own identity in that society, in particular because of social, moral or legal norms in their country of origin"[481].

This jurisprudential stance was reaffirmed and further enhanced in the very recent judgement of *K and L*[482], in what can be characterized as a one of the most discernible rights-oriented rulings of the Court in the field of asylum. Faced with the claims of two sisters of Iraqi nationality relating to the adoption, on their part, of the norms, values and conduct of what was characterized as 'Western society' owing to their prolonged stay in the relevant Member State during the period needed for the assessment of their applications of international protection[483], the Court was called upon to examine whether the common characteristic of genuinely identifying with the fundamental value of equality between women and men can lead to the existence of a "particular social group" within the meaning of the QD[484]. Once more, the Court initiated its analysis by emphasizing the need of ensuring consistent interpretation of secondary law with international protective standards, including the Istanbul Convention and the CEDAW, as well as article 21 (1) of the Charter, which prohibits discrimination on the grounds of, inter alia, sex[485]. Drawing inspiration from those legislative instruments and painting a definition of equality between women and men on the basis of a collective reading of the latter, the Court emphasized that this fundamental value presupposes "…a desire to benefit from that equality in her daily life…being free to make her own life choices…which are fundamental to her identity"[486]. Thus, the fact that a woman has remained in the territory of a host Member State during a stage in her life crucial for the formation and establishment of her identity, as a result of which she has genuinely come to identify with the fundamental value of equality between women and men, is capable of leading to this being characterized as a "belief that is so fundamental to identity or conscience that a person should not be forced to renounce it" within the meaning of the QD[487].

The preceding analysis allowed the Court to formulate its ruling in highly broad and protective manner, affirming the existence of a "particular social group" in the case where the fundamental value of gender equality has been internalized and the consequential substantiation of a reason for persecution, capable of bringing about the recognition of refugee status[488]. As has been claimed, the connection established by this pivotal ruling between the recognition of women's rights and

[480] ibid, para 44.
[481] ibid, paras 51, 53.
[482] *Case C-646/21, K and L v Staatssecretaris van Justitie en Veiligheid, (2024), ECLI:EU:C:2024:487.*
[483] ibid, para 24.
[484] ibid, para 34.
[485] ibid, paras 36-38.
[486] In particularly, in paragraph 44 of *Case C-646/21, K and L* it is expressly stated that those choices may refer, indicatively, to: "…to her education and career, the extent and nature of her activities in the public sphere, the possibility of achieving economic independence by working outside the home, her decision on whether to live alone or with a family, and the free choice of a partner".
[487] *Case C-646/21, K and L* (n 482), para 45.
[488] ibid, para 64.

criteria of territorial presence rather than citizenship, must be noted[489]. Simultaneously, the elevation of the principle of gender equality as one of the core values of the EU[490], appears to have occurred at a very crucial timing, in consideration of recent political evolutions in Afghanistan, which have already given rise to two pending and joined preliminary cases of *AH* and *FN*, relating to the possibility of eliminating the requirement of an individualized assessment for women requesting asylum on account of "…an accumulation of discriminatory acts and measures adopted by a country against women and girls to restrict or even prohibit, inter alia, their access to education and healthcare, their gainful employment, their participation in public life and politics, their freedom of movement and freedom to take part in sports…"[491]. Whether the Court's position will be in alignment with the very influential Opinion of AG Richard De La Tour, whose finding that the collective implementation of acts with the effect of depriving "women and girls of their most basic rights in society" is contrary to the fundamental principle of human dignity[492], remains to be seen.

1.2. *Application of the right to ensure respect for individuals' integrity of person and private life in the recourse of assessment and examination procedures.*

Article 7 of the CFR proclaims and reaffirms the fundamental right of ensuring respect for individuals' "private and family life, home and communications". Pursuant to well established case-law, the notion of "private life" is perceived as broad, not limited to an exhaustive definition[493]. At its core, it incorporates aspects of an individual's physical, social or sexual identity, as well as the physical and psychological integrity of a person, with elements such as name, sexual identity or orientation falling within its protective sphere[494]. As highlighted by Advocate General Sharpston, an integral part of an individual's identity, at the core of their private life and thus protected under article 7, is their right to define their sexual orientation and identity[495]. In fact, his consideration of sexual orientation as a matter of a complex nature, which ought to be indisputably accepted, without establishing a need for supplemental examination, is crucial[496].

In the field of EU asylum law, the right to respect a third country national's private life, is of specific relevance regarding the assessment of statements made in the recourse of asylum procedures as to an applicant's sexual orientation, for the substantiation of core elements of a request[497]. At the same time, article 7 CFR, in conjunction with the fundamental principle of human dignity, is often utilized by the Court for the attainment of a protective interpretative status

[489] Virginia Lemme, CJEU Delivers Pivotal Decision on Women's Rights and International Protection: Judgment C-646/21, Int'l J. Const. L. Blog, Jun. 25, 2024.
[490] Türkan Ertuna Lagrand, 'A Further Step to Gender-Sensitive EU Asylum Law: The Case of "Westernised Women"' (*EU Law Analysis*, 2024).
[491] *Opinion of Advocate General Richard De La Tour in Joined Cases C-608/22 and C-609/22, (2023), ECLI:EU:C:2023:856*, para 79.
[492] ibid.
[493] See *ECtHR, Van Kuck v Germany, (2012), App No 35968/97*, para 69 and case law cited thereof.
[494] ibid.
[495] *Opinion of Advocate General Sharpston on Joined cases C-148/13 to C-150/13, A (C-148/13), B (C-149/13) and C (C-150/13) v Staatssecretaris van Veiligheid en Justitie, (2014), ECLI:EU:C:2014:2111*, para 36.
[496] ibid, para 38.
[497] See *Joined Cases C-148/13 to C-150/13, A and Others* (n 190), para 64; *Joined Cases C-199/12 to C-201/12, Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel, (2013), ECLI:EU:C:2013:720*, para 54.

as to the rights of this particularly vulnerable group of applicants, whose persecution occurs owing to a part of themselves so inherent in their identity, that they cannot be forced to renounce[498].

1.2.1. The impact of sexual orientation, inherent in the right to respect for applicants' private life in the establishment of refugee protection.

At the outset, the consideration of sexual orientation and gender identity as grounds for persecution upon which the granting of international protection can be established in EU asylum law, is of outmost importance. In fact, the Qualification Directive[499] expressly includes sexual orientation and gender related aspects as special characteristics to be considered for the affirmation that applicants form part of a particular social group[500]. As emphasized in the text of the recast Directive, for the purpose of establishing a common concept on the notion of a "particular social group", issues related to sexual orientation, arising in the context of specific legal traditions or customs that aggravate circumstances of gender related violence, must be given due consideration for the affirmation of applicants' "well-founded fear of persecution"[501].

This explicit recognition of sexual orientation and gender identity as "innate characteristics… so fundamental to one's identity or conscience that a person should not be forced to renounce them[502]" not only substantiates a justifiable ground for the right of those applicants to be granted asylum, but also validates the establishment of a specifically protective regime corresponding to a special need of protection of those individuals. That is evident in the legislative text of several instruments regulating asylum policy in the EU, through the inclusion of specific references to sexual orientation for the justification of additional and appropriate procedural safeguards. Specifically, the APD explicitly establishes an obligation to ensure that interviewers, in the context of asylum procedures, have received the proper training and are capable of taking into account personal circumstances, including applicants' sexual orientation or gender identity, surrounding their application[503]. At the same time, the prohibition of gender-based violence in accommodation facilities is expressly provided for, as is the consideration of LGBTQ+ individuals for the definition of vulnerability in the RCD[504].

The impact of sexual orientation as a ground for persecution, the consideration of homosexuals as belonging to a "particular social group" and the subsequent affirmation of the necessary requirements for the recognition of refugee status of those individuals, was questioned in the renowned judgement of *X, Y, Z*[505]. The premise of the case revolved around the requests for international protection filed by three distinct individuals from various national backgrounds, on the ground that their respective domestic legal orders criminalized acts of homosexuality, resulting

[498] *Joined Cases C-199/12 to C-201/12, X, Y, Z* (n 497), para 46.
[499] Directive 2011/95/EU.
[500] ibid, article 10, paragraph 1, case (d), subparagraph 3, which states: "… a particular social group might include a group based on a common characteristic of sexual orientation… Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group".
[501] Recital 30 in the preamble of Directive 2011/95/EU.
[502] ibid, article 10, paragraph 1, case (d), subparagraph 2.
[503] Article 15, paragraph 3, case (a) of Directive 2013/32/EU.
[504] Article 18, paragraph 4 and article 21 of Directive 2013/33/EU.
[505] *Joined Cases C-199/12 to C-201/12, X, Y, Z* (n 497), paras 37, 41.

in the existence of a well-founded fear of being persecuted on account of their sexual orientation[506]. In the examination of whether the notion of a particular social group encompasses homosexual individuals, the Court proceeded to a textual analysis of the applicable secondary law provisions[507], following a cumulative application of the innate characteristics as well as social perception conditions contained thereof[508]. The Court initially underlined that sexual orientation is so fundamental an aspect of one's identity, that no one should be forced to renounce it, a fact that was considered as "common ground"[509]. Meanwhile, it was stated that the perception of sexual orientation as a trait atypical and distinctive to such a degree, as to constitute a separate social group, establishes that is falls within the scope of the above definition[510]. The express inclusion of sexual orientation into the very text of the directive as well as the existence of criminal legislation penalizing homosexual acts by the relevant domestic authorities, facilitated the Court in reaching the latter conclusion[511]. The judicial affirmation of the existence of a "particular social group" in the case of third country nationals with a homosexual orientation, can only be appraised.

At a second stage, the Court was faced with ambiguity on whether the direct criminalization of actions on the sole criterion of sexual orientation can, in itself, be considered as an act of persecution, leading to the immediate application of the provisions of the Qualification Directive[512]. Regrettably, a narrower interpretative stance was followed by the Court in its analysis of this highly relevant question. In particular, by making reference to secondary law provisions regulating the scope of potential acts of persecution, which mandate a "sufficiently serious violation of basic human rights" or a "sufficiently severe" accumulation of measures with a similar effect, thus necessitating the suffering of a human rights infringement reaching a significant level of seriousness[513], it effectively established a particularly high threshold for protection. Consequently, the existence of criminal provisions penalizing actions for the sole rationale that they are conducted between individuals of the same sex was not deemed sufficient for the substantiation of a general conclusion of persecution[514].

The assessment of sexual orientation under primary law considerations, through its connection with the rights under articles 7 and 21(1) of the CFR, further failed to bring about a higher protective status, since the Court eagerly and expressly pinpointed the non-absolute nature of the latter[515]. Despite the promising character of a reference to the Charter, the simplistic and avoidant manner in which the dismissed the application of those fundamental rights cannot be left unmentioned. Simultaneously and in consideration of the fact that, as established above, sexual orientation remains at the core of individuals' identity, an aspect which in turn falls under the protective scope of a multitude of alternative non-derogable human rights, human dignity and the

[506] ibid, paras 24-26.
[507] Article 10, paragraph 1, case (d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304. The latter provisions is almost identical in content with the current article 10 of Directive 2011/95/EU.
[508] *Joined Cases C-199/12 to C-201/12, X, Y, Z* (n 497), para 45.
[509] ibid, para 46.
[510] ibid, para 47.
[511] ibid, paras 48, 49.
[512] ibid, para 50.
[513] ibid, paras 51-53.
[514] ibid, para 55.
[515] ibid, para 54.

prohibition of inhumane or degrading treatment included, the Courts failure to live up to the optimal opportunity presented for the establishment of a high protective stance is even more evident[516]. The constraint of sexual orientation within the confines of rights that can be limited appears inappropriate.

The disassociation from protective standards was, however, not complete, given the Courts further position that a sanction of imprisonment accompanying such legislative provisions, a sanction of purely punitive character, falls within the scope of a disproportionate of discriminatory punishment, constituting, on its own, an act of persecution within article 9 (1) of the Directive[517]. Thus, where the actual imposition of such a sanction is determined to be applicable in a generalized and practical manner in the country of origin, the prerequisites of persecution are realized[518]. Nevertheless, the necessity of establishing an evidentiary confirmation of cases of actual enforcement of confinement, fails once more, to take into consideration various possibilities, ranging from the functioning of the national penal system in a corrupted way, the non-existence, inaccuracy or even falsification of recorded information on criminal convictions or even the current non imposition of imprisonment which in no way guarantees the lack of its implementation in the future[519]. Simultaneously, in deliberation of the discriminatory effect inherent in the rationale behind laws criminalizing sexual activity between individuals of the same sex, undoubtedly augmenting a sense of marginalization, stigma and, significantly, degrading treatment, the mere existence of this legislation appears persecutory in effect[520]. In light of this, the Court's narrow interpretation cannot easily be justified.

The Court's ruling of this highly impactful judgement was not concluded in this point. In consideration of the fact that the applicants in the main proceedings had made reference to a generalized risk of persecution, whose substantiation on the basis of rights violations already suffered on account of their sexual orientation was not yet realized, skepticism was established regarding the possibility of differentiating between homosexual acts either falling or not within the scope of the Directive[521]. Specifically, the referring Court was hesitant, given the applicants' possibility to avoid persecution, as was the factual background thus far, by concealing or restraining their sexual identity upon return to their countries of origin[522].

Following a broad interpretation in its assessment, based on a textual analysis, the Court failed to locate any legislative provisions intended to exclude or limit certain acts connected to applicants' expression of sexual orientation from the scope of the relevant provisions[523]. Furthermore, a comparative examination of the applicable provision on persecution on the grounds of religious beliefs allowed for an analogous conclusion that the notion of sexual orientation cannot be

[516] International Commission of Jurists (ICJ), 'X, Y and Z: A Glass Half Full for "Rainbow Refugees"? The International Commission of Jurists' Observations on the Judgment of the Court of Justice of the European Union in X, Y and Z v. Minister Voor Immigratie En Asiel', *pgs. 13-14.*
[517] *Joined Cases C-199/12 to C-201/12, X, Y, Z* (n 497), paras 56-57.
[518] ibid, para 59.
[519] International Commission of Jurists (ICJ) (n 516), *pg. 18.*
[520] 'Observations by Amnesty International and the International Commission of Jurists on the Case X, Y and Z v Minister Voor Immigratie, Integratie En Asiel (C-199/12, C-200/12 and C-201/12) Following the Opinion of Advocate General Sharpston of 11 July 2013', *pg. 4.*
[521] *Joined Cases C-199/12 to C-201/12, X, Y, Z* (n 497), paras 62, 63.
[522] ibid, paras 64, 65.
[523] ibid, paras 67, 68.

interpreted as exclusively applicable in the sphere of one's private life but must simultaneously be allowed to be fully expressed in the context of their public life[524]. Building on this analysis, a requirement of members of a particular social group connected via shared sexual orientation to conceal the latter was, rightfully, deemed incompatible with the principle of recognition of a "characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it". Equally, an analogous prerequisite for exercising restraint exceeding the measure of self-limitation justifiably foreseen from heterosexual individuals, so as to avoid the realization of a risk of persecution cannot be taken into account for the establishment of the latter[525]. Thus, the Court affirmed the preclusion of the possibility of domestic authorities to "reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation".

The utilization of heterosexuality as a comparable component for the affirmation of an inexistence of a distinction between individuals on the basis of their sexual orientation[526], is highly impactful and can only be positively regarded. Furthermore, the emphasis places on the nature of sexual orientation as a fundamental characteristic of applicants' identities, evident throughout the rationale of the judgement is highly influential. Despite the detected shortcomings, manifested as missed opportunities for the effective characterization of domestic laws criminalizing individuals on the sole ground of their sexual orientation, the overall sentiment left is that of a positive initiation towards the right direction.

1.2.2. Critical evaluation of credibility methods and evidentiary assessment under the light of human dignity and respect for one's private life.

The evaluation of statements made and documentation brough forth in the recourse of the examination of applications for international protection is provided for on the basis of generalized and broad criteria. The dual obligation imposed on applicants, on the one hand, to duly present all the elements required for the substantiation of their application and on Member States, on the other, for an assessment of the latter in compliance with the conditions provided in the Qualification Directive, is established at the outset[527]. Those conditions relate, in particular, to the requirement of conducting an individualized assessment with the simultaneous consideration, at minimum, of the relevant facts, legislative background and regulations of the country of origin, evidentiary documentation provided by the applicants, specific circumstances around their personal situation and individual position including their activities after departing from the country of origin, as well as potential intentions of exploitation of the asylum system[528]. Meanwhile, the inexistence of evidentiary provision or documentation for the corroboration of applicants' proclamations cannot lead to an automatic rejection of the asylum request, where specific conditions, related to applicants' conduct, plausibility and general credibility can be established[529].

As is evident from the above, the decision on whether international protection must be granted or not may be heavily dependent upon an assessment of applicants' "general credibility", considering

[524] ibid, para. 69.
[525] ibid, paras 72-75.
[526] International Commission of Jurists (ICJ) (n 516), *pg. 19.*
[527] Article 4, paragraph 1 of Directive 2011/95/EU, titled "Assessment of facts and circumstances".
[528] ibid, paragraph 3.
[529] ibid, paragraph 5.

the high probability of a lack of documentary evidence of individuals forced to flee in a manner of haste. That is especially relevant in the case of third country nationals exhibiting unconventional sexual orientation or gender identity traits, whose practices of concealment by making efforts to fit into conservative societal norms in their home countries for the purposes of evading persecution, is more than common[530]. In fact, as has been admitted in the context of judicial proceedings before the CJEU, the provision of evidence on applicants' sexual orientation for the support of their declarations is so rare a phenomenon in practice that the majority of assessments occurs on the basis of the overall coherency, plausibility and credibility of applicants[531]. Thus, credibility assessments are an unavoidable part of application examinations when LGBTQ+ individuals are involved, exposing them to a risk of an elevated burden of proof due to the mere aspect of their sexual orientation[532]. This often discriminatory reality is further aggravated by the legislative lack of detailed regulation on the specific methods utilized by domestic authorities for the conduct of the credibility assessments[533], ultimately allowing for significant national discretion.

An examination of the potential limitations imposed on the discretion with due regard to primary law and human rights considerations was undertaken by the Court in the influential judgement of *A and others*[534]. The rejection of three applications for international protection owing to a lack of demonstration of credibility, by reason of vagueness, implausibility and superficiality of the applicants' proclamations on their homosexual tendencies[535], provided the most appropriate opportunity for a determination on the suitability of credibility methods utilized in the context of the individualized assessment. That was ascertained, through the observance of those applicants' willingness to undertake 'tests', partake in the performance of homosexual acts or provide video documentation of intimate acts with persons of the same sex, in an effort to demonstrate the truth of their declared sexual orientation[536]. Understandably, reservations were raised as to the possibility of domestic authorities to accept such evidence, in light of the right to human dignity and respect for applicants' private life pursuant to the Charter[537].

Right at the outset, the applicants' argumentation regarding the substantiation of an obligation to the competent authorities to establish their declared sexual orientation on the sole basis of their declarations[538] was rejected by the Court, which, in turn, characterized those proclamations as the mere staring point of the assessment process[539]. Nevertheless, the relevance of articles 1 and 7 of

[530] Evangelia (Lilian) Tsourdi, 'Guidelines on the Transposition of the Asylum Qualification Directive: Protecting LGBTI Asylum Seekers', *pg. 6.*
[531] *Joined Cases C-148/13 to C-150/13, A and Others* (n 198), para 36.
[532] Maria Guadalupe Begazo, 'The Membership of a Particular Social Group Ground in LGBTI Asylum Cases Under EU Law and European Case-Law: Just Another Example of Social Group or an Independent Ground?' in Arzu Güler, Maryna Shevtsova and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration, pgs. 165-184* (Springer International Publishing 2019), *pg. 182.*
[533] Andrea Mrazova, 'Legal Requirements to Prove Asylum Claims Based on Sexual Orientation: A Comparison Between the CJEU and ECtHR Case Law' in Arzu Güler, Maryna Shevtsova and Denise Venturi (eds), *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration, pgs. 185-207* (Springer International Publishing 2019), *pg. 188.*
[534] *Joined Cases C-148/13 to C-150/13, A and Others* (n 198).
[535] ibid, paras 23, 26, 28, 29.
[536] ibid, paras 24, 28.
[537] ibid, para 40.
[538] ibid, paras 34, 39.
[539] ibid, para 49.

the CFR in the context of the proceedings was emphasized, by underlining the need of application of the relevant provisions of secondary law with full respect for the requirements of the Charter. In fact, those fundamental rights as well as the underlining duty of cooperation of the authorities for the corroboration of the accuracy of the elements that make up an asylum claim[540], comprised the guides around which the Court constructed its judgement.

Of particular importance is the explicit preclusion of utilization of stereotyped notions on homosexuals, for the affirmation of applicants' sexual orientation[541]. While their usefulness was not negated by the Court, sole reliance on stereotypical notions for the conclusion of a lack of credibility was deemed directly contradictory to the fundamental need for safeguarding the individualized and personal character of the examination[542]. The impactful nature of this conclusion cannot be left unrecognized, especially in consideration of the fact that a negative decision based solely on preconceived conception is heavily dependent upon the determining authority's subjective and necessarily biased determination[543]. Thus, the objective and lawful character of the determination on international protection cannot be guaranteed. Nevertheless, the explicit definition of the notion, as referring particularly to knowledge on local or regional organizations advocating for the protection of the rights of homosexuals as well as the details of their operation is an unwelcome limitation of the protective status established in this context.[544]

Similarly, enquiring after intimate details as to applicants' sexual practices, which fail to account for sentiments of shame or violation of privacy as well as cultural reservations on behalf of which the provision of answers in a comfortable and liberal manner is hindered, was considered inapplicable in light of the fundamental right to respect for private and family life[545]. At the same time, the proclamation of the directly contradictory character of the fundamental principle of human dignity with the potential acceptance of evidentiary elements such as those proposed by the applicants, consisting of the conduct of sexual performances, utilization of video documentations of intimate acts or the undertaking of tests, was established[546]. Pursuant to the Courts rationale, not only does this acceptance have limited to no probative value, but at the same time it has the potential to establish a certain precedent, authorizing the de facto and generalized submittance of similar elements by LGBTQ+ applicants[547]. Any determination not declaring of the undignified nature of those evidentiary provisions and the subsequent inability to be utilized, would undoubtedly and effectively raise the burden of proof for applicants with a non-conventional sexual orientation in a discriminatory, undignified and unlawful manner.

The Courts evaluation concluded on an assessment of the impact a late disclosure of applicants' sexual orientation has for the affirmation of a risk of persecution. Following an emphasis of the sensitive nature of an individual's sexuality, as an indisputable part of their personal identity, which must be considered in the context of an individualized assessments, a requirement of

[540] ibid, para 56.
[541] ibid, para 60.
[542] ibid, paras 62, 63.
[543] Janna Weßels, 'Sexual Orientation in Refugee Status Determination, Refugee Studies Centre, 2011'. *pg. 35.*
[544] European Database of Asylum law, 'Summary of CJEU - Joined Cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid En Justitie'.
[545] *Joined Cases C-148/13 to C-150/13, A and Others* (n 190), paras 35, 63.
[546] ibid, para 65.
[547] ibid, para 66.

revealing the latter at the first possible moment could not be asserted[548]. In fact, the conclusion of a lack of credibility cannot be undertaken merely on account of applicants' reservation to disclose such an intimate part of their life at the outset[549].

The Court's limitation of its analysis to an examination of the particular domestic practices directly relevant to the proceedings at hand admittedly did not provide for criteria and guidance for a generalized determination of the appropriateness of the assessment at any given case. Nevertheless, it allowed for the assertation of precluded methods of examination which inherently lead to rights violations[550]. By setting a high threshold of protection, through what can only be applauded as a highly protective and rights-oriented judgment, a set of undignified, violating, discriminatory practices were thoroughly dismissed. At the same time, a reference to Advocate General Sharpston Opinion, relating to the utilization of 'tests' for the determination of applicants' sexual orientation, although not specifically included in the Court's evaluation, must not be ignored. Following an explicit reference to the elimination of homosexuality as a medical or psychological condition as well as the inexistence of any recognized medical examination capable of ascertaining individuals' sexuality, AG Sharpston proclaimed a direct contradiction of such an assessment method with the right to ensure integrity of persons, codified in article 3 of the CFR[551]. Simultaneously, AG Sharpston claimed that the utilization of medical test could not be justified in light of the right to privacy and family life, failing to pass a necessity and proportionality assessment since "…by definition, such a test cannot achieve the objective of establishing an individual's sexual orientation"[552]. Thus, reliance on this assessment method for the determination of applicant's sexual orientation as a potential ground for the recognition of refugee status, would result in violation or the fundamental rights protected under article 7 and 3 of the Charter.

A similar conclusion was reached in the subsequent judgement of *F*[553]*,* in which the Court was called upon to provide an assessment of the lawfulness of utilizing psychologists' expert reports, concluded on the basis of projective personality tests, indicative of applicants' sexual orientation[554]. The Court's analysis initiated from an assertation of the relevance of article 7 CFR in the context of the examination of the proclamations made by applicants as to their sexual orientation and a subsequent interpretation of article 4 of the QD in the light of the latter[555]. Underlining the potential adverse implications that a refusal to undergo this assessment method may imply for the determination of applicants' future position as well as the realistic inexistence of consent, which although expressly provided, cannot necessarily be considered as freely given, an interference with applicants' private life was subsequently substantiated[556]. Thus, following the appropriate conduct a necessity test in the context of the proceedings, the Court proclaimed its reservations as to the reliability of experts' reports "in the light of the standards recognized by the international scientific community"[557]. At the same time, the serious interference with the

[548] ibid, para 71.
[549] ibid, para 69.
[550] Mrazova (n 533), *pg. 191.*
[551] *Opinion of Advocate General Sharpston on Joined Cases A (C-148/13), B (C-149/13) and C (C-150/13) v Staatssecretaris van Veiligheid en Justitie* (n 495), para 60.
[552] ibid, para 61.
[553] *Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal, (2018), ECLI:EU:C:2018:36.*
[554] ibid, para 47.
[555] ibid, paras 49, 50.
[556] ibid, para 52-54.
[557] ibid, para 58.

applicant's private life was deemed disproportionate to the aims pursued[558], leading to a conclusion of the unlawful character of both the preparation and the utilization of the projective personality tests referred to in the proceedings[559].

Nevertheless, in a more controversial manner, the Court refrained from ruling on a complete contradiction of the use of generalized experts' report, other than the above, with primary law requirements. In particular, locating an absence of limitations on available examination means, based on a textual analysis of the QD, the utilization of experts reports in the determination procedures was not only deemed permissible[560], but also considered potentially valuable for assessment of the of facts and circumstances relevant to the asylum claim, without necessarily prejudicing the fundamental rights of applicants[561]. In any case, in consideration of the importance of the right to respect of individuals' private life and the principle of human dignity[562], the need of ensuring the appropriateness of the assessment, adapted in relation to specific features for each category of applicants[563] as well as the requirement for an individualized assessment[564], the Court established a series of limitations for the lawful utilization of experts reports in the asylum determination procedures. Those safeguards were formulated through a prohibition of sole dependence on the latter by the competent administrative or judicial authorities, the safeguarding of the non-binding nature of the subsequent conclusions on those bodies as well as a general requirement of consistency with the fundamental rights and guarantees of the Charter[565].

The positive achievements of the above jurisprudential stance, resulting in tipping the scale towards the protection of fundamental rights in the recourse of the examination procedures, is offset by what can be considered as a missed opportunity to establish harmonized standards, through the overall prohibition of substantiating decisions on international protection solely on the basis of experts' reports conclusions. The necessary result of the above consists of ascertaining a wide margin of appreciation of states for the utilization of a method in which the informed consent of applicants cannot be indisputably ensured[566].

It is important to note that the above analyzed jurisprudence is now reflected in the text of the new Qualification Regulation, through the express establishment of an obligation imposed to the competent authorities, to utilize credibility assessment methods in a manner consistent with the right to human dignity and respect for private and family life pursuant to the Chapter[567]. Additionally, and with specific regard to sexual orientation or gender identity, it is now provided that "applicants should not be submitted to detailed questioning or tests as to their sexual

[558] ibid, paras 59-60.
[559] ibid, paras 60-69.
[560] ibid, para 34.
[561] ibid, para 37.
[562] ibid, para 35.
[563] ibid, para 36.
[564] ibid, para 41.
[565] ibid, paras 42, 45, 46.
[566] Mrazova (n 533), *pg. 193.*
[567] Recital 42 in the preamble of Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council 2024.

practices"[568]. This jurisprudential codification in the preambular text can, although formulated in a broad and generalized manner, can only be perceived as a positive development. Simultaneously, the notion of 'membership of a particular social group' now expressly comprises of individuals with a common characteristic of sexual orientation, as is evident from the substitution of the word 'might' with that of 'shall'[569]. Notably, a reference to gender expression is made in addition to sexual orientation and gender identity[570], in line with societal evolutions.

Undeniably, the contribution of the Court in the protection of fundamental rights linked with the principle of human dignity cannot be denied. Jurisprudential evolutions have undoubtedly fostered a more human rights-oriented approach in EU asylum law, promoting a legal environment where the integrity and dignity of individuals are paramount. It can only be expected, that in light of significant impact of articles 1, 4 and 7 of the Charter and the Courts continued reliance on primary law consideration that missed opportunities detected so far will have the potential to be fully realized in future case-law.

2. Safeguarding the right to liberty and security of asylum seekers through strict regulation of detention policies.

The right to liberty, comprising one of the most vital human rights, is omnipresent in the international and European legal scene[571]. Codified explicitly in primary law as an entitlement of "liberty and security of person" afforded to every individual[572], it has been and remains the object of extensive legislative regulation in the EU legal order. In consideration of the fact that implementation of EU law and, significantly, the functioning of the asylum acquis, must be realized in accordance with fundamental rights and guarantees of the Charter[573], the relevance of this right becomes evident. Undeniably, the majority of legal instruments adopted within the field of asylum law, contain express legal basis for the justification of detention policies affecting applicants for internation protection, that must be measured against the prerequisites of the right to liberty[574]. Thus, a strict regulation of the conditions in accordance with which the deprivation of liberty of applicants for international protection can be considered lawful in the context of the asylum procedures, is crucial, given the implications that arbitrarily imposed detention entails for the security, dignity and physical and mental wellbeing[575] of those particularly vulnerable individuals.

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[568] ibid.
[569] In particular, article 10, paragraph 1, subparagraph 2 of Regulation (EU) 2024/1347 provides: "Depending on the circumstances in the country of origin, the concept of membership of a particular social group as referred to in point (d) of the first subparagraph *shall* include membership of a group based on a common characteristic of sexual orientation…"
[570] ibid.
[571] Cathryn Costello, 'Immigration Detention' in Cathryn Costello (ed), *The Human Rights of Migrants and Refugees in European Law, pgs 279-314* (Oxford University Press 2015), *pg. 280.*
[572] Article 6 of the EU Charter of Fundamental Rights.
[573] Article 51, paragraph 1 of the Charter.
[574] Justine N Stefanelli and Elspeth Guild, 'The Right to Liberty in the Field of Migration, Asylum and Borders' in Maribel González Pascual and Sara Iglesias Sánchez (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice, pgs 100-118* (Cambridge University Press 2021), *pg. 102.*
[575] See, to that effect: Trine Filges and others, 'The Impact of Detention on the Health of Asylum Seekers: An Updated Systematic Review: A Systematic Review' (2024) 20 Campbell Systematic Reviews.

The delicate balancing act that must be performed by the EU legislator, for the rationalization, on the one hand of the portrayal of asylum seekers as subjects of detention and managing, on the other, a restriction of Member States' discretionary power to impose measures of deprivation of liberty, in line with primary law objectives[576], is depicted in the detailed codification of the lawful grounds for detention in various legislative provisions in the area of asylum. Nevertheless, the effectivity of EU law derived safeguards is often undermined, given the lack of a comprehensive and precise depiction of detention tendencies across the many EU states[577]. Indeed, a complete absence of numerical provision from national authorities or, frequently, incorrect transmission of statistical information leads to a proven inability to make accurate estimations on the number of asylum seekers that are effectively and unlawfully deprived of their liberty in the recourse of the asylum procedures[578]. The latter undeniable impedes with ensuring efficient compliance with protective standards.

The same attempt for the preservation of the importance of the right to liberty with a simultaneous effort to safeguard the efficient character of the asylum procedures, is further showcased in the CJEU's extensive jurisprudence on the matter[579]. The Court has, in numerous occasions, served as a gatekeeper of Charter protected rights, in light of state practices that realistically and directly contradict EU law. Its impact for preventing the utilization of detention as a generalized management tool, imposed in an automatic manner, on the totality of asylum seekers is prominent[580]. On this basis, a legal and jurisprudential examination of the permissible grounds upon which detention of asylum seekers can be justified (Part 1.1.) as well as an assessment of the procedural safeguards and conditions that must be upheld for the duration of this confinement (Part 1.2.), will be the focus of this chapter.

2.1. *Conditions under which the lawful nature of asylum seekers' deprivation of liberty can be justified in the existing legal framework.*

The deprivation of liberty of applicants for international protection is subject to strict limitations, pursuant to the requirements arising from article 6 CFR and their incorporation into various provisions of secondary legislation pertaining to asylum detention. The legislative instrument encompassing the most thorough and detailed rules on the matter is the Reception Conditions Directive[581], whose objective of observance of the fundamental rights and principles included in the Charter, with an explicit mention of intention to respect and promote article 6 thereof, is codified in its preamble.[582]

The legal definition provided for in the context of the above Directive for the detainment of applicants is crafted in moderately broad terms, remaining subject to various interpretative norms and establishing a more sophisticated protective status. In particular, the deprivation of an

[576] Cathryn Costello and Minos Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (2016) 35 Refugee Survey Quarterly, pgs. 47-73, *pg. 47.*
[577] ibid, *pg. 48.*
[578] 'European Council on Refugees and Exiles: Asylum Statistics in the European Union: A Need for Numbers, (2015), AIDA Legal Briefing No. 2', *pg. 7-8.*
[579] Stefanelli and Guild (n 574), *pg. 101.*
[580] Evangelia (Lilian) Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?' (2016) 35 Refugee Survey Quarterly, pgs 7-28, *pg. 17.*
[581] Directive 2013/33/EU.
[582] Recital 35 in the preamble of Directive 2013/33/EU.

applicant's freedom of movement by means of confinement within a "particular place" comprise the core elements of the notion of detention[583]. At the same time, the detention of applicants for international protection, where considered lawful under the RCD, can only be realized is "specialized detention facilities", distinct from prison accommodation[584]. The adoption of this general and unconstrained term, not limited to specific prison facilities or other incarceration accommodations, allows for the expansion of the scope of application of detention to locations which, while not fulfilling the stereotypical criteria of such institutions, amount, in effect, to confinement[585]. That is especially beneficial, in consideration of various practices employed by the Member States for the application of mass imprisonment of third country nationals at border crossing points or transit zones[586].

2.1.1. A presentation and analysis of the permissible grounds for detaining applicants for international protection.

Automatic recourse to detention measures, leading to the confinement of the totality or a significant percentage of asylum seekers present in the territory of Member States, on the basis of generalized criteria, is not permissible under both international and European law standards. In fact, the detainment of applicants for international protection is only justifiable under precisely and explicitly specified circumstances, regulated, to a large extend, by the provisions of the RCD, in what constitutes a significant limitation of Member States' discretion.

Crucially, the substantiation of the rule that the mere act of making an application for international protection cannot constitute a lawful ground for the imposition of detention of asylum seekers, is of outmost importance[587]. Ensuring that a direct criminalization of requesting asylum or subsidiary protection is absolutely prohibited, by determining that "Member States shall not hold a person in detention for the sole reason that he or she is an applicant…"[588], is a fundamental principle in line with international protective standards, around which the entirety of the reception system is fabricated. In contrast, as expressly provided, the confinement of applicants can only be justified "…under very clearly defined exceptional circumstances…", as a measure of last resort and in full respect with the principles of necessity and proportionality[589]. Therefore, from the moment where the status of a third country national as an applicant for international protection is established, the limitation of the right to liberty at the domestic level can only be justified on the basis of the specifically enumerated grounds[590].

It must be noted that the provision of specific grounds for detention is supplemented by a requirement of individualization, with due regard to the personal circumstances of each case, as well as a strict proportionality and necessity test, relating to "both to the manner and the purpose"

[583] ibid, article 2, case (h) which specifically states that: "…'detention': means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement".
[584] Article 10, paragraph 1 of Directive 2013/33/EU.
[585] Tsourdi, 'Asylum Detention in EU Law' (n 580), *pg. 15.*
[586] See especially *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, (2019), ECLI:EU:C:2020:367*. paras 68-70 as analyzed above, in paragraph 2.1.2. of section 2, Chapter A in Part II.
[587] Recital 15 in the preamble of Directive 2013/33/EU.
[588] ibid, article 8, paragraph 1.
[589] ibid, recital 15 in the preamble and article 8 paragraphs 2 and 3.
[590] Article 8, paragraph 6 of Directive 2013/33/EU. See also *Case C-36/20 PPU, VL* (n 69), para 113.

of the detention[591]. Specifically, the detainment of asylum seekers functions, in an obligatory manner, as a solution of last resort, in the absence of alternative measures of a non-custodial or a less coercive nature[592]. In fact, those measures, which, indicatively consists of "…regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place…", must be explicitly provided for in domestic legislation, in a manner respectful towards applicants' fundamental rights[593]. A lack of application of the above conditions will, thus, lead to a conclusion or arbitrariness of the imposed confinement.

Undoubtedly, a rigorous examination of each of those grounds for detention cannot be evaded, especially in consideration of their broad formulation paired with the necessity of narrow interpretation for the achievement of an adequate protective status[594]. To that end, the determination or verification of applicants' identities or nationalities, in conjunction with the determination of the essential elements for the substantiation of their claim, where there is a "risk of absconding", constitute the first two grounds contemplated in the RCD[595]. Regarding the latter, the absence of a clear definition of the notion of absconding in the text of the Directive is to be remarked[596]. Should reference to the Returns Directive[597] be considered adequate for the provision of interpretative guidance, such a term could incorporate the necessity of "objective criteria defined by law" based on which an individual intention to abscond may be established[598]. On the other hand, the wide formulation of the first basis, not accompanied by clarifications on the specific categories of information that may be covered by its application, raises quite a few reservations.

The validity of those grounds was contested in the landmark case of *K. v Staatssecretaris van Veiligheid en Justitie*[599]. In particular, the Court was called upon to examine whether the limitations imposed on the right to liberty as a consequence of the above reasons for detention, were in compliance with the fundamental rights guaranteed by the Charter and, specifically, article 6 thereof[600]. In order to conduct this impactful assessment, the Court followed a proportionality test in accordance with article 52(1) CFR[601], by inspecting the necessity and measuring the general scheme and purpose of those grounds against the requirements of the latter[602]. For the review of the aim of the imposed detention and, subsequently, a determination of its potential contribution to the attainment of "objectives of general interest recognized by the Union", which, in this case, consist of ensuring the proper function of the CEAS[603], the Court initially took note of the specific

[591] Recital 15 and article 8, paragraph 2 of Directive 2013/33/EU.
[592] Recital 20 and article 8, paragraph 2 of Directive 2013/33/EU.
[593] ibid, article 8, paragraph 4.
[594] Costello and Mouzourakis (n 576), *pg. 62.*
[595] Article 8, paragraph 3, cases (a) and (b) of Directive 2013/33/EU.
[596] Tsourdi, 'Asylum Detention in EU Law' (n 580), *pg. 21.*
[597] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348.
[598] ibid, article 3, paragraph 7.
[599] *Case C-18/16, K v Staatssecretaris van Veiligheid en Justitie, (2017), ECLI:EU:C:2016:84*.
[600] ibid, paras 31-33.
[601] In particular, article 52, paragraph 1 of the EU Charter of Fundamental Rights reads: "*Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".*
[602] *Case C-18/16, K* (n 599), para 34.
[603] ibid, para 36.

obligations imposed to applicants in the recourse of the asylum procedures[604]. Admittedly, the requirement of cooperation and provision of all necessary documents, explanations and information to the competent authorities, as one of those core responsibilities, presupposes the availability and possibility of establishing effective communication with applicants[605]. Thus, the limitation of movement of those individuals by means of confinement, undoubtedly allows for the achievement of this aim, by ensuring that the possibility to interview and further eliminate the potential of secondary movements of applicants is realized.[606]

Having established that the detainability of applicants pursuant to the two grounds under consideration is capable of contributing to the proper function of the Union system of asylum and, in light of the significant implications that interference with the right to liberty entails, the Court further stressed the need of conducting a strict and proportionality necessity test[607]. For this purpose, the conditionality for their application upon specific requirements, resulting in the establishment of a "strictly circumscribed framework" was deemed crucial[608]. In particular, the Court clarified that detention in order to verify applicants' identities is only permissible where the communication of this information did not occur, by reason of their failure to provide the necessary documentation[609]. Simultaneously, confinement for the determination of crucial elements for the substantiation of the request must be preceded by the existence of a risk of absconding[610]. This analysis facilitated the conclusion of the validity of the above grounds in light of the requirements of article 6 CFR, through an affirmation that a fair balance has been struck by the legislator between the right to liberty and the requirements inherent in the proper function of the CEAS[611]. However, the infringement of a general and abstract obligation of cooperation with the national authorities which was considered sufficient for the endorsement of a legal ground for detention[612], as well as the sole mention to the notion of abscondment, without the simultaneous provision of any clarification as to the scope and details of the term, are some disappointing points in the Court's analysis.

The ruling in *K* was largely based on a preceding judgement, in which the Court was engaged with the challenging of the validity of an alternative ground for the confinement of asylum seekers, relating to the protection of national security or public order[613]. In the case of *JN*[614], one of the first judgements provided in the context of asylum detention and characterized as seminal[615], the achievement of a fair balance between the contradicting objectives under examination was once again established. Following an interpretation similarly grounded upon a proportionality and necessity test for the justification of this ground as a potential limitation to the right to liberty, the

[604] ibid, para 38, containing an explicit mention to article 13, paragraph 1 of Directive 2013/32/EU.
[605] *Case C-18/16, K* (n 599). para 39.
[606] ibid
[607] ibid, para 40.
[608] ibid, para 41.
[609] ibid, para 42.
[610] ibid.
[611] ibid, paras 47-49.
[612] Giuliana Monina, '"Judging" the Grounds for Detention of Asylum Seekers: Discrepancies between EU Law and the ECHR. An Analysis of the CJEU Decisions of K. v. Staatssecretaris van Veiligheid En Justitie & J.N. v. Staatssecretaris van Veiligheid En Justitie', *Asylum and the EU Charter of Fundamental Rights (2018). pg. 167.*
[613] Article 8, paragraph 3, case (e) of Directive 3013/33/EU.
[614] *Case C-601/15 PPU, J N v Staatssecretaris van Veiligheid en Justitie, (2016), ECLI:EU:C:2016:84.*
[615] Steve Peers, 'Detention of Asylum-Seekers: The First CJEU Judgment' (*EU Law Analysis*).

rigorous legal framework encompassed in the RCD for ensuring the exceptionality, legitimacy and individuality of detention as a measure was emphasized by the Court[616]. At the same time, the protection of rights, freedoms and interests of the general public, when endangered by the individual conduct of applicants, was deemed as inherent in the very nature of the notions of national security and public order, thus resulting in the affirmation of their appropriateness for the restriction of the right to liberty[617]. Due regard was also paid to settled jurisprudence establishing a narrow interpretation on the terms of national security and public order, as a further safeguard between the discretion of national authorities to resort to detention measures and the applicant's right to liberty[618]. Thus, the application of the ground for confinement included in case (e) of Article 8(3) of Directive 2013/33 can be substantiated only where "…the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned"[619].

The above stance was reaffirmed in the fundamental judgement of *M.A.*[620], relating to a more thorough examination of the circumstances able to trigger the application of the notions of public security or public order for the justification of asylum detention. The relevance of the factual background is evident, considering that the declaration of state emergency, owing to a max influx of aliens in the territory of the concerned Member State, was utilized for the justification of generalized detention, on the ground of illegal entry, imposed indiscriminately on third country nationals, irrespective of their intention to benefit from internation protection[621]. Following an assertation of the significant limitations imposed on national discretion for the utilization of confinement methods relating to asylum seekers[622], the Court reiterated its jurisprudence of the exhaustive nature of the list of grounds included in article 8, paragraph 3 of the RCD[623], pinpointing the absence of illegal entry and stay as a potential justification of detention from the legislative text[624]. Nevertheless, the Court did not simply limit its ruling to the above conclusion but proceeded to an examination of whether the illegal nature of the presence of an applicant for international protection may correspond to a threat to public security or public order, thus eliminating the arbitrary nature of the imposed detention[625]. The results of the judicial assessment are not surprising. Following a reiteration of its analysis in *J.N.,* a "sufficiently serious threat affecting a fundamental interest of society or the internal or external security" of that Member state cannot be efficiently substantiated by the sole fact that the applicant entered the territory in an unlawful manner, without the occurrence of an individualized assessment for that purpose[626].

The deprivation of liberty of third country nationals that have expressed their intention to benefit from international protection can further be justified, in the context of a return procedure under Directive 2008/115/EC, for the purposes of preparation or conducting of the relevant removal process, under strict conditions relating to the established intent of those individuals for the delay

[616] *Case C-601/15 PPU, J. N.* (n 614), paras 52, 57, 63.
[617] ibid, paras 53, 55.
[618] ibid, para 64.
[619] ibid, paras 65, 66, 67 and case law cited there.
[620] *Case C-72/22 PPU, M.A.* (n 118).
[621] ibid. paras 16-19, 79.
[622] ibid, para 81.
[623] ibid, para 83.
[624] ibid, para 84.
[625] ibid, para 85.
[626] ibid, paras 86-89, 90.

or frustration of the implementation of the return decision[627]. This corresponds to the willingness of Member States to deter the making of applications with an abusive objective in the cases where the line between the policies of asylum and migration becomes less evident[628]. Nevertheless, in consideration of the fact that the issuing of a return decision, especially in the recourse of the border procedures, might realistically deny third country nationals the possibility to apply for international protection, irrespective of any such intention[629], in conjunction with the unconstrained power that a broad interpretation of this ground would grant the domestic authorities, further safeguards were incorporated into the text of the Directive. In fact, ensuring that an effective opportunity is granted to those individuals for accessing the asylum procedures on the basis of objective criteria as well as the substantiation of fraudulent intent on "reasonable grounds" are prerequisites for the application of this justification[630].

Lastly, the RCD explicitly provides for the possibility of applicants to be apprehended and placed in detention for the purpose of determining the existence of a right to enter the territory of Member States[631] as well as in accordance with article 28 of the Dublin III regulation[632] . Regarding the latter, it must be mentioned that the mere application of the Regulation in a specific case does not suffice for the justification of detention measures[633]. Instead, the sole ground upon which the deprivation of liberty of an applicant in the recourse of the determination procedures may occur, consists of the substantiation of a "significant risk of absconding" for the purpose of ensuring the unimpeded function of the transfer procedures[634]. As with the RCD, the safeguards of an individualized assessment, proportionality, necessity and inexistence of alternative, less coercive measures, form a central part of this provision[635].

In contrast to the RCD, a definition of absconding forms part of the text of the Regulation. In particular, the notion consists of the existence of justified causes for the affirmation of an intention, on the part of or a third-country national or a stateless person subject to a transfer procedure, to abscond, substantiated on the basis of "objective criteria defined by law"[636]. The legal effects of the absence of specification of such criteria, although not occurring from the legislative text, were defined by the Court in its renown judgement of *Al Chodor*[637]. In light of the inexistence, in domestic legislation, of specified criteria in conformity with which, a significant risk of absconding may be determined, the Court was faced with an examination of whether the sole fact of that absence, amounted to the disapplication of article 28 Dublin III[638]. This assessment was made even more challenging, given the existence of national settled case-law validating a

[627] Article 8, paragraph 3, case (d) of Directive 2013/33/EU.
[628] Tsourdi, 'Asylum Detention in EU Law' (n 580), *pg. 26.*
[629] ibid, *pg. 27.*
[630] Article 8, paragraph 3, case (d) of Directive 2013/33/EU.
[631] ibid, case (c).
[632] ibid, case (f).
[633] Article 28, paragraph 1 of Regulation (EU) No 604/2013.
[634] ibid, article 18, para 2.
[635] Recital 20 in the preamble and article 28, para 2 of Regulation (EU) No 604/2013.
[636] ibid, article 2, case (n).
[637] *Case C-528/15, Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others, (2017), ECLI:EU:C:2017:213*.
[638] ibid, paras 23, 24.

consistent administrative practice of imposition of detention, on the basis of individualized, objective criteria[639], characterized by predictability and a lack of arbitrary elements[640].

Following a purposeful examination and a highlighting of the establishment of a highly protective system of safeguards for asylum seekers, evident in the Regulation's provisions[641], the Court underlined the dire implications of interference with the fundamental right to liberty, which must be made subject to a set of strict conditions[642]. Indicatively, and in accordance with international standards, those safeguards consist of "…the presence of a legal basis, clarity, predictability, accessibility…", for the main purpose of ensuring protection against arbitrariness, through a lack of "bad faith or deception on the part of the authorities"[643]. On a consideration of the type of legal act that suffices for ensuring the latter safeguards, the necessity for setting predetermined limitations on the discretion afforded to domestic authorities[644], in a manner that ensures the binding and foreseeable character of those restrictions was determined [645]. Thus, the Court established the necessity of laying down the criteria for substantiative a "risk of absconding" in a national binding provision of general application, negating the argument that a settles administrative practice suffices[646], the absence of which brings about the unlawful nature of the imposed detention[647].

The significance of the above judgement for the affirmation of the impact of human rights considerations both in the general context of the asylum procedures and in light of the fundamental character of the right to liberty, is evident and must be appraised[648]. That is especially crucial, on account of the already disconcerting nature of detainability under the Dublin Regulation, which, amounting to removal, has been considered to undermine, in essence, the protective status afforded to applicants for international protection, ensuring their right to be guarded against refoulement[649]. The relevance of this statement can be established by scrutinizing the intensified risk of deprivation of liberty to which applicants may be liable, depending on the Member State that constitutes the recipient of the transfer. A pertinent example, as has been demonstrated by the European Council on Refugees and Exiles, relates to the detainment of the totality of asylum seekers subjected to a Dublin transfer from Poland in the first half of 2015[650].

The strictly exhaustive nature of the permissible grounds for detention has been emphasized and further verified by settled case-law of the Court, in which it was rigorously underlined that each of the various basis supporting recourse to detention "meets a specific need and is self-standing"[651]. Thus, the deprivation of liberty for the reason of insufficient state resources and an unavailability

[639] ibid, 29.
[640] ibid, para 22.
[641] ibid, paras 33-35.
[642] ibid, para 39.
[643] ibid, paras 38, 40.
[644] ibid, para 42.
[645] ibid, para 44.
[646] ibid, paras 43, 45.
[647] ibid, paras 46, 47.
[648] Steve Peers, 'Immigration Detention and the Rule of Law: The ECJ's First Ruling on Detaining Asylum-Seekers in the Dublin System' (*EU Law Analysis*).
[649] Costello and Mouzourakis (n 576), *pg. 66.*
[650] 'Asylum Information Database-European Council on Refugees and Exiles: Country Report Poland, November 2015', *pg. 64.*
[651] See *Case C-36/20 PPU, VL* (n 69), para 104 and cited case-law.

of positions at humanitarian reception centers, since excluded from the above provision, was deemed contrary to the requirements of the RCD, unable to be justified by the principles or objectives of the latter[652]. Equally, as underlined in a highly impactful judgement of the CJEU, the inability of applicants to provide for their basic necessities, lacking essential means of subsistence, is precluded from the scope of article 8 (3) of the RCD and cannot function as a justification for the deprivation of their liberty, being in direct contrast not only with the core content of the material reception conditions but also with the principles and objectives of the Directive[653].

2.1.2. An examination of guarantees and conditions of detention for confined applicants.

The limitation of Member States' powers to indiscreetly place applicants for international protection in detention, corresponding to the need of safeguarding, to the furthest extend possible, the right to liberty of those individuals, is reinforced through the provision of specific guarantees and a strict regulation of the conditions of detention. In particular, a full respect of human dignity, in general terms is explicitly substantiated, establishing a need to provide reception conditions meticulously tailored to the needs of detainees[654]. Where the provision of reception guarantees is compromised due to actual and practical hindrances relating, indicatively, to geographical considerations, temporary derogations may be justified, following an individual examination of the severity, duration and potential effects on the applicant concerned[655]. Despite the non-absolute character of the obligation to ensure material reception conditions for confined applicants, the above guarantees appear to be in accordance with the protective standards of the Directive in general.

One of the most crucial safeguards incorporated into the legislative text relates to the maximum duration of confinement, which must be as short as possible and only in the duration of applicability of the permissible grounds for detention, without the possibility of exceeding the time reasonably necessary for the conclusion of the relevant procedures[656]. However, despite the provision that the continuation of detention cannot be justified on potential delays or obstructions in the administrative procedures, with must be completed with "due diligence" by the competent authorities[657], the lack of a predetermined length for the deprivation of liberty and the subsequent reliance on national discretion appears highly worrisome. What is noteworthy is that a recommended provision for a need to state the maximum duration of the imposed detention in the body of the detention order, while included in the proposal for the RCD[658], did not form part of the final text. The Court's failure to establish a more protective status when seized with the optimal opportunity to do so, is also disappointing. In fact, by ruling that the non-specification, in domestic legislation, of a time period after the end of which detention is to be automatically and obligatorily be considered unlawful is in line with EU law requirements, under the condition that the prerequisites of article 9 RCD are realized[659], the Court merely reaffirmed the relevant provisions,

[652] ibid, paras 106, 107.
[653] *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and others* (n 586). paras 255, 256.
[654] Recital 18 in the preamble of Directive 2013/33/EU.
[655] ibid, recital 19.
[656] ibid, article 9, paragraph 1 in conjunction with recital 16.
[657] ibid, article 9, paragraph 1, subparagraph 2.
[658] COM(2008) 815 final, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast). article 9.
[659] *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and others* (n 586), paras 264, 265.

providing no added value to the matter. Nevertheless, it is doubtful whether the elimination of state arbitrariness can be ensured and enforced with a sole reliance on those generally and broadly formulated guarantees.

Detention in the context of Dublin transfer appears to be more meticulously regulated. As with the RCD, confinement "shall be for as short a period as possible" with a mandatory release of the applicant at the time when the transfer decision is implemented[660]. The legislative text incorporates specific time limits for the completion of the procedure, relating to the submission of a take charge or take back request, the necessitation of an urgent response and the execution of the transfer as soon as practically possible and latest within six weeks from the aforementioned request[661]. Non-compliance with these deadlines brings about the obligatory termination of the detention[662].

The obligation of Member States to account for the availability of effective remedies in the form of a judicial review of the legality of the imposed detention, is of outmost importance. As explicitly stated, "Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant"[663]. A necessary consequence of the above requirements consists of the immediate release of the detained applicant, where the unlawful nature of their confinement is substantiated in the recourse of judicial proceedings[664]. Thus, a complete absence, in national legislation, of provisions foreseeing the above possibility was deemed to be in breach of EU law imposed obligations[665]. Subsequently, the prevention of applicants for international protection, whose liberty has been deprived in an unlawful manner, to gain effective access to a judicial authority is not only directly contradictory to the above provisions of secondary law but, as expressly underlined by the Court, "…undermine the essential content of the right to effective judicial protection, guaranteed in Article 47 of the Charter"[666]. Thus, in circumstances where no judicial remedy for the review of the lawfulness of the imposed detention is made available to applicants, EU law directly authorizes the domestic judiciary to assume competence and substitute with their own legally binding decision that of the administrative body on account of which the confinement was ordered, ruling on the immediate termination of the detention if necessary[667].

Simultaneously and indicatively in the cases of prolonged confinement or the emergence of new circumstances or decisive evidence, a review by a judicial authority of the lawfulness of the continuation of the detention must be conducted at "reasonable intervals of time", whether *ex officio* or following a request by the applicant[668]. The importance of this provision was highlighted

[660] Article 28, paragraph 3, subparagraph 1 of Regulation (EU) No 604/2013.
[661] ibid, subparagraphs 2 and 3, which particularly state that "…the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application… The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply in such cases. Such reply shall be given within two weeks of receipt of the request… the transfer of that person … shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request…"
[662] Article 28, paragraph 3, subparagraph 4 of Regulation (EU) No 604/2013.
[663] Article 9, paragraph 3, subparagraph 1 of Directive 2013/33/EU.
[664] ibid, paragraph 3, subparagraph 2.
[665] *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and others* (n 586). paras 260, 261.
[666] ibid, para 290.
[667] ibid, paras 293, 294.
[668] Article 9, paragraph 5 of Directive 2013/33/EU.

in the more recent judgement of *C, B* and *X*[669]*,* characteristic for the protective stance adopted in relation to the right to an effective remedy in the context of detention of asylum seekers. In this incredibly seminal ruling, the Court was faced with an examination of the scope and intensity of the powers afforded to the national judiciary, particularly pertaining to the possibility of the latter to take into consideration the administrative authority's failure to comply with the conditions and safeguards for the lawful nature of the detention, irrespective of their invocation from the concerned individual[670]. Following, pursuant to its now settled position, a validation of the gravity of the right to liberty, the Court highlighted the protective nature of the relevant secondary law provisions[671], inclusive of safeguards and necessary guarantees to that purpose[672]. An emphasis of the direct link between primary and secondary law in the sphere of the case under examination, through a characterization of the relevant provisions as giving "concrete form" to the Charter rights of liberty and an effective remedy[673], was the basis upon which the Court constructed its affirmative ruling on the matter. In particular, as validated by the Court, the effectivity of the legal system designed for the safeguarding of the above core rights is highly dependent upon the possibility of the competent judicial authority to rule "…on all matters of fact and of law relevant to the review of the lawfulness…". In fact, a limitation of this power to the mere consideration of to the conclusions adduced by the administrative authority for the imposition of the detention, precluding from its examination "…any facts, evidence and observations which may be submitted to it by the person concerned…" or, more importantly, "…any other element that is relevant for its decision should it so deem necessary…" cannot be justified under the combined requirements of primary and secondary law considerations[674].

Besides the obvious elevation of human rights considerations in the context of asylum detention, illustrated in the above case, the possibility for the creation of new judicial remedies through a significant empowering of the domestic judiciary and the corresponding limitation of national procedural discretion comprise points of interest and consideration. In light of the willingness of the Court to confer supplementary procedural instruments to national courts or tribunals, by following a significantly broad interpretation and allowing for the widening of their jurisdiction[675], a highly protective intention is established, in line with the importance of the right to liberty.

Lastly, it must be noted that the conditions of detention of applicants for international protection, when applicable, are strictly regulated by the legislative text of the RCD. Supplementary to the definition of "detention" as incorporated in article 2 (h) of the Directive and analyzed above, the distinction between "specialized detention facilities" and prison accommodation is established, with the provision that only the former constitutes an acceptable location for the confinement of applicants[676]. The use of the latter for the purpose of deprivation of the liberty of those individuals can only take place as a means of last resort and in any case by ensuring the separation of applicants

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[669] *Joined Cases C-704/20 and C-39/21, Staatssecretaris van Justitie en Veiligheid v C and B and X v Staatssecretaris van Justitie en Veiligheid, (2022), ECLI:EU:C:2022:858*.
[670] ibid, para 71.
[671] See para 76 of *Joined Cases C-704/20 and C-39/21, C, B and X* (n 669)., in the context of which, reference was made to article 15 of of Directive 2008/115, article 8 and 9 of Directive 2013/33/EU and article 28 of the Dublin III Regulation.
[672] ibid, paras 75-77.
[673] ibid, paras 81-83.
[674] ibid, para 87.
[675] Słowik (n 217), *pg. 24.*
[676] Article 10, paragraph 1 of Directive 2013/33/EU.

from ordinary prisoners or third country nationals who have not lodged a request for international protection[677]. More detailed rules on the provision of information and the communication of detainees with third persons are further foreseen[678], as are specified provisions for the detention of vulnerable persons and of applicants with special reception needs[679].

The thorough analysis of the components which lead to the substantiation of detention, as one of the core subjects of the renown *FMS* judgement[680], cannot remain unmentioned. Faced with an assessment of the consistent practice from the Hungarian authorities of obliging third country nationals that have lodged requests for international protection, thus earning the status of applicants, to remain in transit zones bordering neighboring countries, surrounded by high fences and barbed wire, restricted within minimal spaces, under constant monitoring from law-enforcement authorities[681], the Court had to take a deeper look into the definition of detention in the RCD. Drawing upon a distinction between a mere restriction and a complete deprivation of the freedom of movement[682], a division of "degree or intensity and not one of nature or substance"[683] the Court characterized detention as a "coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter"[684]. The conclusion of not being able to distinguish between that depiction of detention and the domestic practices under consideration was, thus, justified, effectively making the permanent stay of applicants in the relevant transit zones dependent upon the observance of the above analyzed safeguards[685].

2.2. *Balancing additional safeguards against the enhancement of permissible grounds for detention in the new Pact on Migration and Asylum.*

2.2.1. Locating provisions that reaffirm and enrich procedural safeguards for detained applicants in the reformed legislative text.

The 2024 Reception Conditions Directive[686], completely replacing the RCD, is the legislative instrument in the new Pact containing the majority of provisions on the possibilities for detaining applicants for international protection. The fundamental safeguard relating to the impossibility of the imposition of confinement measures for the mere fact of lodging applications for international protection is retained, accompanied by two additional safeguards. Particularly, it is now established that detainment on the basis of nationality is precluded, leading to the unlawful nature

[677] ibid.
[678] ibid, article 10, paragraphs 4 and 5.
[679] ibid, article 11.
[680] *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and others* (n 586).
[681] ibid, paras 68-70, 226.
[682] ibid, para 217.
[683] ibid, para 220.
[684] ibid, para 223.
[685] ibid, paras 227, 231.
[686] Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection.

of imposed confinement, while an express clarification as to the non-punitive nature of detention is incorporated into the relevant provision[687].

In light of the codification of an identical definition on detention[688], it must be assumed that the jurisprudence of the Court analyzed above, especially regarding the obligation to remain in transit zones, remains applicable. The requirements of necessity, proportionality and individuality for an affirmation of the lawful nature of detention are ever-present[689]. Especially noteworthy is the addition of an innovative provision, substantiating an obligation on part of the Member States for taking into consideration obvious or detectable indications, including "signs, statements or behavior" patterns, that lead to an affirmation of special reception needs of applicants, on the basis of which the continuation or readjustment of the imposed detention must be contemplated[690]. Furthermore, the inclusion of a new obligation to the domestic authorities, to explicitly include, in a written manner, the justification on the non-applicability of less coercive measures and, subsequently, the nature of confinement as a last resort in the detention order, can only be considered as a positive development[691].

The opportunity to establish a higher protective status for applicants through the inclusion of predefined time limits for the termination of the imposed detention was not seized by the legislator, ascertaining the enhanced procedural discretion afforded to Member States in this field of asylum law[692]. Nevertheless, a more precise legal system has been incorporated in the reformed text with relation to the time limits for the judicial review of the confinement measures. Particularly, the notion of a "speedy judicial review" is now clarified, in view of the provision of a deadline of 15 or, in the case of exceptional situations, 21 days from the commencement of the detention in accordance with which judicial proceedings must be concluded[693]. As an additional safeguard, should the above time limits not be respected by the domestic authorities, a clear obligation for the immediate termination of the detention is substantiated[694]. Furthermore, the requirement of an ex officio, automatic review of the detention in the case of unaccompanied minors is a novelty of the new Directive.

2.2.2. Direct and implicit expansion of the permissible grounds for detention in the 2024 Reception Conditions Directive.

Crucially, the exhaustive nature of the permissible grounds for detention has, in principle, not been altered[695], but is nevertheless, affected by the expansion of those justifications, through the inclusion of an additional basis for the confinement of applicants. The latter relates explicitly to

[687] ibid, article 10, paragraph 1 and recital 26 in the preamble.
[688] Article 2, paragraph 9 of Directive (EU) 2024/1346.
[689] ibid, article 10, paragraph 2.
[690] ibid, paragraph 3.
[691] Article 11, paragraph 2 of Directive (EU) 2024/1346 explicily states that: "The detention order shall state the reasons in fact and in law on which it is based as well as why less coercive alternative measures cannot be applied effectively".
[692] Article 11, paragraph 1 of Directive (EU) 2024/1346 refers to detention for only "…as short a period as possible…" and only for as long as the grounds set out in Article 10(4) are applicable.
[693] Article 11, paragraph 3 of Directive (EU) 2024/1346.
[694] ibid, paragraph 3, subparagraph 2.
[695] That is evident through the inclusion of the term "only" in the text of article 10, paragraph 4 of Directive (EU) 2024/1346.

the necessity of ensuring compliance with the revised obligation of applicants to reside in a specific location, determined through an individual decision[696]. Thus, were such an imposed requirement is not respected by an asylum seeker, leading to the establishment or continuation of a risk of absconding, measures on their confinement may be lawfully ordered[697]. A risk of absconding is a mandatory condition, upon which the justification of detention on this ground can be realised, as explicitly noted in the preamble of the Directive, leading to the verification that the sole fact of non-compliance with the obligation to reside in a predetermined location does not suffice[698]. The inclusion of this newly presented ground for detention appears quite puzzling, given the implicit retributory character inherent in its application, as a countermeasure for applicants' non-compliance with the above specified obligation. Indeed, in affirmation of the latter conclusion, one wonders at its direct contradiction with the explicit requirement of the non-punitive nature of detention that has been added, as mentioned above.

In contrast to the 2013 RCD, a definition of the risk of absconding has not only been incorporated into the legislative text, but more concrete circumstances leading to its substantiation have been indicatively provided, in light of the dire consequences that the recognition of such a risk entails for applicants. In particular, 'absconding' expressly encompasses both a deliberate action and factual circumstances that are "not beyond the applicant's control", leading the unavailability, in the form of a failure to acknowledge or respond to requests made under the secondary law provisions cited thereof[699], with the administrative or judicial authorities[700]. Deserting the territory of the Member State where there is a lack of prior approval from the competent authorities, is foreseen as an aggravating factor for the affirmation of an act of absconding[701]. The provision of a separate definition on the 'risk of absconding' is noteworthy, consisting of the collective occurrence of "specific reasons and circumstances in an individual case, which are based on objective criteria defined by national law", leading to indications that the applicants may resort to acts of absconding as clarified above[702]. Further factors to be considered for the definition of the term in domestic legislation are indicatively provided, as inclusive of the applicant's general cooperation or compliance with procedural obligations, their links in the Member States, or the rejection of their application on grounds of inadmissibility or as manifestly unfounded[703]. The provision of concrete guidance in the form of this indicative list as well as the clarification that the conclusion of such a risk is based on a comparative application of various factors[704] can only be considered as a positive improvement, leaning towards a tendency for the establishment of a higher level of harmonization.

In conjunction with the addition of a new basis for the justification of detention, an alteration that is quite obvious, a closer examination of the formulation of some of the existent grounds reveals the implicit widening of the opportunities for utilization of confinement methods in the asylum procedures. Particularly, the need of assessing applicants' right to enter the territory "in the context

[696] As per article 9, paragraph 1 of Directive (EU) 2024/1346.
[697] Article 10, paragraph 4, case (c) of Directive (EU) 2024/1346.
[698] See ibid, recital 28 in the preamble.
[699] See recital 25 in the preamble in which reference is made to Regulations (EU) 2024/1348 and (EU) 2024/1351.
[700] Article 2, paragraph 12 and recital 23 in the preamble of Directive (EU) 2024/1346.
[701] ibid.
[702] Article 2, paragraph 11 of Directive (EU) 2024/1346.
[703] ibid, recital 24 in the preamble.
[704] ibid.

of a procedure"[705], refers explicitly, in the reformed legislative instrument, to such an evaluation being conducted in the context of "a border procedure in accordance with Article 43 of Regulation (EU) 2024/1348[706]". In consideration of the fact that the utilization of such procedures in the new Pact has been significantly amplified, through the provision of specified circumstances which lead to its mandatory application[707], there is a high possibility that the lawful character of the confinement of applicants at the EU's external borders, a practice that has been quite prevalent in state policies, will be an increasingly disconcerting reality.

A similar pattern is detected following an assessment of the last permissible ground for detention of applicants, explicitly referring to the revised Dublin rules[708]. A closer examination of article 44 of the Regulation on Asylum and Migration Management, reveals the expansion of the basis upon which the confinement of applicants for international protection, subject to a transfer decision, may be justified, that goes beyond the already analyzed risk of absconding[709]. In a quite concerning fashion and in line with the general trend for enhancing this possibility, evident in the reformed legislative text, detaining asylum seekers is now justified when the need for the protection of national security and public order arises[710]. Undeniably, the Court's case-law and the subsequent narrow interpretation on the latter notions is still deemed applicable and functions as a safeguard for the limitation of arbitrariness in the context of asylum detention. Nevertheless, the enhancement of the possibilities to detain applicants in the Dublin procedures, already deemed dubious in the context of the current legal framework, appears as a particularly unnerving development.

Overall, although significant safeguards have been retained in the reformed legal instrument, in light of the importance attributed to the fundamental right of liberty of asylum seekers, concerns arise regarding the expansion of permissible grounds for detention and, particularly, the explicit link now established between the protection of national security and public order and the justification of detention measures, giving fertile ground for the rise or continuation of potential abusive practices as well as the enhancement of a risk for imposition of arbitrary detention. Thus, a precarious balance between the overall effectiveness of the asylum procedures and the preservation of individual liberties is created. The efficiency of safeguards incorporated in secondary law provisions ultimately hinges on their implementation at the national level, necessitating vigilance to ensure that the rights of asylum seekers are not effectively compromised.

[705] As is the formulation of article 8, paragraph 3 of Directive 2013/33/EU.
[706] See article 45 of Regulation (EU) 2024/1348, referring to article 43 paragraph 1 in conjunction with 42, paragraph 1, cases (c), (f) of (j).
[707] Article 10, paragraph 4, case (d) of Directive (EU) 2024/1346.
[708] Article 10, paragraph 4, case (g) of Directive (EU) 2024/1346, refering explicitly to article 44 of Regulation (EU) 2024/1351.
[709] Article 44 of Regulation (EU) 2024/1351 corresponds to article 28 of Regulation (EU) No 604/2013.
[710] Article 44, paragraph 2 of Regulation (EU) 2024/1351.

<u>Chapter B:</u> Socio-economic rights of applicants safeguarded in provisions of secondary law.

1. Locating socio-economic rights of applicants for international protection in the existing legal framework.

The fragile, transitional position of asylum seekers, characterized by pragmatic uncertainty and legal doubt as to future developments is especially reflected in reception policies and the subsequent standards laid down in EU secondary law[711]. Indeed, the lodging of an application for international protection marks the commencement of a precarious legal status, in anticipation of either a potential acceptance of the application and a subsequent possibility for legitimate residence or a definite rejection, followed by the adoption and execution of a return order. The objective of creating a uniform system for the regulation of this intermediate situation, aimed at the provision of "an equivalent level of treatment as regards reception conditions" of asylum seekers throughout the Union, has been recognized and proclaimed as one of the key elements of the CEAS[712]. This legal ambition seeks to be materialized through the establishment of "…high protection standards and fair and effective procedures…"[713], ensuring that, irrespective of the Member State in which an application for international protection is lodged, the quality, level and content of socio-economic rights available to asylum seekers will be remain unaffected, grounded in the existence of uniform and harmonized standards.

The overambitious nature of the above objectives is made evident by the pragmatic variations in protection standards, inherent in the reliance on numerous domestic, socio-economic systems, oftentimes resulting in dissimilar and unequal access to rights depending on the Member State in which applicants find themselves awaiting, throughout the duration of the asylum assessment procedures[714]. Nevertheless, the creation of a thoroughly harmonized system of reception conditions has never been assumed as a realistic potential or a desirable outcome in the EU. In fact, as emphasized by the Commission in the context of the recent reform of the CEAS, in light of unavoidable differences in the national, social and economic systems of the Member States, the main objective in the area of reception conditions revolves around the enhancing, "as much as possible" of harmonized standards[715]. The latter comprise of the legal rules regulating the personal and temporal scope of applicability of the relevant secondary law provisions (Part 1.1.) as well as those establishing a minimum content of the socio-economic rights foreseen and awarded to applicants (Part 1.2.).

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[711] Lieneke Slingenberg, 'Reception Conditions for Asylum Seekers: Inherent Duality', *Research Handbook on EU Migration and Asylum Law, pgs 204–224* (Evangelia Tsourdi and Philippe De Bruycker, 2022).
[712] 'Council of the European Union, The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens, Doc 17024/09, 2009', para 6.2.
[713] Recital 5 in the preamble of Directive 2013/33/EU.
[714] Silga (n 7), *pg. 88.*
[715] Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM (2016) 197 final, *pg. 11.*

1.1. *An analysis of the scope of application and the level of protection afforded to asylum seekers in accordance with the Reception Conditions Directive.*

The establishment of uniform conditions for the reception of applicants for international protection throughout the EU is realized by way of the provisions of the Reception Conditions Directive[716]. Substantiating minimum standards of treatment through the granting of a full set of measures to applicants[717], the Directive regulates various legal aspects of the rights and entitlements awarded to the latter, with the provision of detailed rules as to its scope of application, the level of protection and the specific content of the social and economic rights included in the legislative text.

1.1.1. Personal and territorial scope of application of the Reception Conditions Directive.

During the early years of the CEAS, the emergence of significant legal reservations as to the personal and temporal applicability of the 2003 Reception Conditions Directive[718] led to the persistence of serious uncertainties around the matter of its scope. In particular, the provision of material reception conditions to detained individuals, applicants of subsidiary protection or, importantly, to applicants subjected to a transfer in the context of the determination procedures or for the enforcement of a return order, was a matter of significant discord between Member States[719]. Following jurisprudential evolutions, providing for legal clarifications on the majority of the above contested aspects of the RCD's predecessor, the legislative text of the recast and currently applicable instrument provides significant insight into the matter of its scope of application.

Initially, the applicability of the RCD to "…all third-country nationals and stateless persons who make an application for international protection…"[720], in conjunction with the direct reference to relevant provisions of the Qualification Directive[721], as well as a consideration of the express enhancement of the personal scope of the Directive to allow for the inclusion of applicants for subsidiary protection[722], makes the latter fact an indisputable reality. The inclusivity of all categories of applicants for international protection within the protective confines of the RCD, is explicitly justified on the necessity of safeguarding equal treatment as well as guaranteeing consistency within the EU asylum acquis[723], a legal commitment indicative of legislative willingness for a genuine harmonization of treatment principles, exceeding mere minimum standards[724]. Such a conclusion was drawn up and further validated by the Court, before its express inclusion in the legislative text. Specifically, following a purposeful reading of the 2003 Directive,

[716] Directive 2013/33/EU.
[717] ibid, article 2, case (f).
[718] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31.
[719] Evangelia Tsourdi, 'Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity' (2015) 29 Journal of immigration, asylum and nationality law, pgs. 9-24, *pg. 14.*
[720] Article 3, paragraph 1 of Directive 2013/33/EU.
[721] In particular, the "making of an application for international protection" within the context of article 3 of Directive 2013/33/3U, is to be read in conjunction with article 2, case (a) of the latter, making an explicit reference to article 2, case (h) of Directive 2011/95/EU, which states: "'application for international protection' means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status…".
[722] See recital 13 in the preamble of Directive 2013/33/EU.
[723] ibid.
[724] Silga (n 7), *pg. 89.*

relating to the objective of ensuring full compliance with the fundamental rights and freedoms incorporated in the EU Charter, the Court underlined that "…the directive provides for only one category of asylum seekers, comprising all third-country nationals or stateless persons who make an application for asylum…"[725]. Nevertheless, as has been highlighted, the actual realization of equal treatment is often effectively hindered by the unfeasibility of establishing fully harmonized standards, incorrect or ineffectual transposition into the domestic legal order of relevant secondary la provisions as well as the innate differentiations of applicants observed in those provisions, as a result of their categorization depending on their position in the asylum system[726].

It must be noted, that, irrespective of the type of request that has been made, whether relating to the attainment of refugee status or the benefiting from subsidiary protection, the affirmation of the status of an applicant in the first place, in strict legal terms and in line with the provisions of the Qualification Directive, is crucial in this regard. Should an application for international protection not be considered as "made", despite the existence of the totality of circumstances that have the potential to lead to the recognition of international protection needs, the applicability of the RCD cannot be established. That was emphasized by the Court, in a judgment concerning the possibility of conferring specific social benefits, deriving from the text of the Qualification Directive, to seriously ill individuals, granted leave to reside in the territory of the relevant Member State under national legislation[727]. In particular, such an option was foreseen in the domestic legal order, on account of preventing the subjecting of third country nationals to a real risk of harm to their life, physical integrity or potential inhuman or degrading treatment, owing to the unavailability of appropriate medical treatment for their illness in country of origin or previous residence[728]. As underlined by the Court, the provision of a protective status under national law, other than the need for international protection within the meaning of the QD, does not fall within the scope of the latter[729]. In fact, it was considered that any other interpretation would run counter to the general scheme and objectives of the relevant legislative instruments, leading to the provision of protection to "…third country nationals in situations which have no connection with the rationale of international protection"[730]. Although the above case related to the provision of social welfare in accordance with the provisions of the QD, its relevance for the matter under examination is evident, in consideration of the fact that the recognition of international protection needs precedes and includes as a logical step the application of the RCD. Thus, an analogous interpretation in similar factual circumstances relating to the grant of the socio-economic rights incorporated in the latter, should such a case arrive before the Court, can be expected.

On a second note, the dependence of the availability of the reception conditions and the socio-economic rights which they encompass on the existence of a right to remain of applicants in the territory of the Member States that is responsible for the examination of their asylum request, is an additional requirement[731]. An analysis of the legal framework regulating the above right falls

[725] *Case C-179/11, Cimade and Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, (2012), ECLI:EU:C:2012:594*., paras 40, 42.
[726] Silga (n 7). *pg. 90.*
[727] *Case C-542/13, M'Bodj* (n 473), para 25.
[728] ibid, para 12.
[729] ibid, para 46.
[730] ibid, para 44.
[731] Recital 8 in the preamble and article 3, paragraph 1 of Directive 2013/33/EU.

outside the scope of this chapter and has been undertaken at an earlier stage of this thesis[732]. Nevertheless, the justifiable perplexity around the timeframe that marks the initiation of such a right to remain and is based on the existence of various term for "making", "registering" or "lodging" an application, is clarified in the text of the RCD, which clearly states that the "…material reception conditions are available to applicants when they make their application…"[733]. Thus, the Court's case-law as to the notion of making an asylum request, relating to the expression of an intention to benefit from international protection[734], is fully applicable in this context and indicates the temporal applicability of the socio-economic rights contained within.

Importantly, the rejection of an application for international protection at first instance and the subsequent adoption of a return decision, in accordance with Directive 2008/115, does not prevent the application of the RCD nor does it bring about the discontinuation of the provision of the entitlements contained therein. The latter forms part of a jurisprudential conclusion adopted following a broad interpretation of the meaning of an "authorization to remain" in the territory of a Member State. In particular, in the case of *Gnandi,* the Court went at great lengths for the establishment of a legal rationale justifying the distinction between the illegal character of the stay of a third country national and an authorization to remain, departing from the position that the two notions can mutually co-exist[735]. As underlined, illegality of the stay of a third country national, following the rejection of an asylum request and triggering of the application of the Returns Directive, does not preclude the potential for the existence of lawful possibilities for that individual to remain, especially in the case where the negative decision has been contested in the form of a judicial appeal or owing to the necessity of respecting the principle of non-refoulement, through a postponement of the removal[736]. Borrowing the words of the Court, acceptance of a different interpretation, "…to the effect that a stay may not be regarded as illegal solely on account of the authorization to remain…would be contrary to the objective of establishing an effective removal and repatriation policy"[737].

This interpretative stance, although, undoubtedly, quite perplexing and initially intricate, must be applauded, for it allows for the inevitable conclusion of the application of the material reception conditions to third country nationals subjected to a removal order, pending the adoption of a final decision on their application[738]. This was expressly asserted by the Court, whose confirmation that individuals with an authorization to remain in the territory of the responsible Member State who are staying there illegally, retain their status as applicants for international protection and are thus entitled to benefit from the rights arising under the RCD[739]. This marks a further improvement of the legal position of those individuals who find themselves in an in-between situation, through an enhancement of the personal scope of application of the Directive.

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[732] See paragraph 2.2. of Section 2, Chapter A in Part I.
[733] Article 17, paragraph 1 of Directive 2013/33/EU.
[734] For an analysis on the notion of "making an application for international protection" see paragraph 1.2.1. of Section1, Chapter A in Part I.
[735] *Case C-181/16, Gnandi* (n 176), paras 44, 45.
[736] ibid, para 47.
[737] ibid, para 50.
[738] Silga (n 7), *pgs. 101-102.*
[739] *Case C-181/16, Gnandi* (n 176), para 63.

With regard to the territorial scope of application of the RCD, the express applicability of the latter "…in all locations and facilities hosting applicants…"[740], including at the border, in the territorial waters or in the transit zones of a Member State[741], as well as the necessity for the provision of specifically tailored reception conditions to detained applicants, in light of their particular needs and their situation[742], allows no room for the contestation of the applicability of the protective provisions of the RCD in all circumstances entailing a deprivation of liberty off asylum seekers[743]. At the same time, a combined examination of the provisions affirming the application of the RCD "…during all stages and types of procedures concerning applications for international protection…"[744], as well as the explicit reference to the latter in the preamble of the Dublin III Regulation[745] leaves no doubts as to the applicability of the reception conditions standards for applicants subjected to a transfer procedure.

These explicit proclamations in the legislative texts of both instruments are of significance, given that this particular matter had given rise to serious legal uncertainties among Member State in the context of the Regulation's predecessor. In fact, the question of the existence of a state obligation for granting minimum conditions for the reception of asylum seekers to those applicants in respect of whom the provisions of the Dublin Regulation are activated, found its way before the CJEU back in 2012[746]. In this judgement, initiating from the observation of an inexistence of any provision in the then applicable Directive 2003/9 suggesting that an application for international protection has been lodged only when submitted to the authorities of responsible Member State[747], the Court underlined the Directive's main objective of ensuring respect with the rights and principles of the Charter and, especially, the fundamental right to human dignity[748]. It further proceeded to a negation of a possibility to justify the exclusion of applicants subjected to a transfer procedure from the enjoyment of those minimum requirements on argumentations relating to the swiftness of the Dublin procedures, which can in no way be certainly assured[749]. Thus, following a further clarification that the right to remain, as the main precondition for the provision of the reception standards, is associated not only with relation to the Member State in which the application for asylum is being examined but also to that in which it was lodged, the Court affirmed the obligation for ensuring the effective provision of minimum reception conditions in the recourse of the Dublin proceedings[750]. Even more importantly, the Court underlined that the state obligation to that end is existent and affirmed until the actual transfer of the asylum seeker by the requesting Member State takes place[751].

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[740] Recital 8 in the preamble of Directive 2013/33/EU.
[741] ibid, article 3, paragraph 1.
[742] ibid, recital 18 in the preamble.
[743] Tsourdi, 'Reception Conditions for Asylum Seekers in the EU' (n 719), *pg. 15.*
[744] Recital 8 in the preamble of Directive 2013/33/EU.
[745] Recital 11 in the preamble of Regulation (EU) No 604/2013 states that: 'Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection should apply to the procedure for the determination of the Member State responsible as regulated under this Regulation, subject to the limitations in the application of that Directive'.
[746] *Case C-179/11, Cimade and GISTI* (n 725), para 36.
[747] ibid, para 40.
[748] ibid, para 42.
[749] ibid, paras 44, 45.
[750] ibid, paras 47, 50.
[751] ibid, para 55.

The most crucial contribution of the above judgement and the rationale behind its analysis, despite the lengthy time-period that has lapsed since its publication and its explicit reaffirmation in the text of both the RCD and the Dublin III Regulation, relates to the Court's protective interpretative stance, formulated on the basis of article 1 of the Charter. In particular, the Court expressly dismissed the potential of depriving applicants, in relation of whom a transfer decision has been adopted, of the protection of the minimum material reception standards laid down by the RCD, "…even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State…"[752]. As was noted, only such a legal position can be considered in line with the general scheme and purpose of this Directive and, more importantly, with "…the requirements of Article 1 of the Charter, under which human dignity must be respected and protected…"[753]. The same rationale was followed in a much more recent judgement, in light of which the preclusion of national legislation, excluding applicants for international protection from accessing the labour market on the sole ground that they are subjected to the determination procedures under the Dublin III Regulation, was substantiated[754]. As was, once again, verified by the Court almost a decade later, human dignity comprises a foundational standard that must be maintained, whose applicability cannot be justified under any circumstances, much less in relation to the fact that asylum seekers await for a decision on the determination of the Member State responsible for the examination of their application[755]. The impact of this statement is evident, given that it establishes a direct link between the assurance of minimum socio-economic rights to applicants at every stage of the asylum procedures and the fundamental principle of human dignity, as safeguarded in primary law.

1.1.2. Level of material reception standards that must be made available to applicant for international protection.

As already highlighted, the Reception Conditions Directive establishes an obligation for the provision of minimum reception standards to applicants awaiting a decision on their request for international protection, which must be made available during the entirety of the examination procedures, and whose deprivation for even a minimal amount of time is not justifiable. Supplemental to the mandatory nature of the provision of those reception conditions, minimum requirements as to their quality and standard of protection are substantiated in the Directive, in accordance with the fundamental objective for ensuring respect for the rights and observance of the principles recognized in the Charter, with a special focus on the promotion of the application of human dignity[756]. As expressly proclaimed, "standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down"[757]. Thus, it is crucial that material reception conditions are adequate in nature for guaranteeing applicants' subsistence and ensuring that their physical and mental health is protected in a dignified and appropriate manner[758].

[752] ibid, para 56.
[753] ibid.
[754] *Joined Cases C-322/19 and C-385/19, KS and Others v The International Protection Appeals Tribunal and Others, (2021), ECLI:EU:C:2021:11*, para 73.
[755] ibid, para 69.
[756] Recital 35 in the preamble of Directive 2013/33/EU.
[757] ibid, recital 11 in the preamble.
[758] ibid, article 17, paragraph 2.

The notion of material reception conditions is fleshed out, in the introduction of the Directive, as inclusive of "…housing, food and clothing … and a daily expenses allowance"[759]. The provision of these minimum requirements can take the form of financial allowances, vouchers, take place in kind or, in a manner combining the latter[760]. Further details as to the financial determination of that provision, where it occurs in the form of allowances or vouchers, are foreseen, with the main safeguards being that of ensuring adequate standards of living, comparable to those of nationals[761]. It is important to note that while the provision of material reception conditions in kind has been considered as "generally adequate" for meeting the fundamental objective of ensuring a dignified standard of living, their availability in the form of financial allowances has been deemed as "inadequate to ensure the health and/or subsistence of asylum-seekers"[762].

In consideration of the latter, as well as the general divergencies existent in the domestic socio-economic systems and the unclear formulation of the relevant provision in the RCD, the need for judicial guidance eventually arose. Following an emphasis on the principle of human dignity, the Court had the opportunity to affirm the necessity, where material reception conditions are provided in the form of financial allowances, to ensure their sufficiency for safeguarding a dignified standard of living, adequacy for the effective protection of their health and capability to ensure their subsistence[763]. In a more specific note, with due regard to the need of ensuring family unity and in accordance with the principle of the best interest of the child, the Court provided further elaborations, underlining that the financial provisions available in this form to asylum seekers must be appropriate for enabling them to secure accommodation on the private market, safeguard the housing of minors with their parents and the preservation of the interests of persons having specific needs[764]. Thus, the level of financial assistance awarded to applicants for international protection, when not provided in kind, must meet a minimum threshold, in accordance with the principle of human dignity and the core objective of safeguarding living conditions that do not amount to inhuman or degrading treatment.

In spite of the above asserted safeguards, leading to a minimum standard of dignified living, the provision of material reception conditions is not an absolute entitlement of applicants. In fact, a variety of exceptions to the mandatory nature of their provision, ranging from monetary limitations to a complete withdrawal, are foreseen in the Directive. Initially, the availability of material requirements and health care can, depending on the wide discretion afforded to domestic authorities, be made subject to a determination of the financial situation of each applicant, which, when deemed sufficient, may lead to their non-provision, the requirement of appropriate financial contributions or the requesting of a full refund[765]. Simultaneously, the possibility of an absolute withdrawal or reduction of material reception conditions, subject to specific preconditions and safeguards, is a proclaimed possibility. Particularly, with the aim of preventing cases of abuse of the reception system, the specification of circumstances which can lead to such a restriction is

[759] Article 2, case (g) of Directive 2013/33/EU.
[760] ibid.
[761] ibid, article 17, paragraph 5.
[762] Odysseus Academic Network, 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States', *pgs. 27-29.*
[763] *Case C-79/13, Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others, (2014), ECLI:EU:C:2014:103*, para 42.
[764] ibid, paras 41, 45, 46.
[765] Article 17, paragraphs 3 and 4 of Directive 2013/33/EU.

underlined as part of the aims of the Directive[766]. A detailed and exhaustive account of those conditions is presented in the text of the latter, relating, inter alia, to an unauthorized abandonment of the place of residence, non-compliance with the duty of cooperation with the domestic authorities, the lodging of a subsequent application or an unjustifiable delay to proceed in the lodging in the first place after arrival in the Member State as well as a deliberate concealment of funds[767]. It is also provided, that sanctions may be imposed in this context owing to the exhibition of "seriously violent behavior" or a breach of the rules of accommodation centers[768]. However, a further definition or specification of the nature of those sanctions is not provided in the legislative text. The Court has, once again, provided important insight into the matter, by clarifying that material reception conditions can be included in the scope of the notion of sanctions under this provision[769].

Nevertheless, the withdrawal of material reception conditions is not subject to the unrestrained national discretionary power, but dependent upon the respect of specified safeguards, associated with the individual, objective and impartial character of the assessment made and the written justification of the subsequent decision, adopted on the grounds of the particular situation of the applicant[770]. As underlined, the adoption of such a decision is a necessary prerequisite for the realization of a reduction or withdrawal of material conditions[771]. At the same time, even in circumstances of a complete deprivation from the benefits of those material advantages, the standard of a dignified living as well as the potential to access healthcare must be ensured, as a minimum[772].

It must be noted that the obligation to provide a dignified standard of living for applicants for international protection corresponds, as the core objective of the RCD, analogically, to the absolute minimum established by the Court's jurisprudence, relating to a prohibition of subjecting those individuals to a situation of "extreme material poverty", "that does not allow them to meet their most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines their physical or mental health or puts them in a state of degradation incompatible with human dignity"[773]. The applicability of the judicial rationale utilized in influential judgments such as *Jawo* or *Ibrahim* to the living standards that must be provided in the recourse of the examination procedures relating to the reception of asylum seekers, is undeniable, especially considering the Court's endorsement of the prohibition of being subjected to inhuman or degrading treatment at any stage of the asylum procedure[774].

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[766] ibid, recital 25 in the preamble.
[767] ibid, article 20, paragraphs 1-3.
[768] ibid, paragraph 4.
[769] *Case C-233/18, Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers, (2019), ECLI:EU:C:2019:956*, para 43.
[770] Article 20, paragraph 5 of Directive 2013/33/EU.
[771] ibid, paragraph 6.
[772] Article 20, paragraph 5 of Directive 2013/33/EU clearly states that: "…Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants".
[773] *Case C-163/17, Jawo* (n 442), para 92; *Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, Ibrahim and others* (n 56), para 90; *Case C-233/18, Haqbin* (n 769), para 46.
[774] *Case C-163/17, Jawo* (n 442), paras 88, 89.

This has been further asserted by the Court in the judgement of *Haqbin*, in which it was clarified that the withdrawal of material reception conditions imposed as a sanction, owing to violent behaviour or a breach of accommodation rules on part of applicants, cannot have the effect of a complete deprivation of those requirements, related to housing, food or clothing, that allow the latter to care for their most basic needs[775]. Drawing inspiration from the fundamental principle of human dignity and the subsequent necessity for the promotion of article 1 of the Charter, it was underlined that even the "…most stringent sanctions, whose objective is to punish, in criminal law, the breaches or behaviour referred to in Article 20(4) of the directive…" cannot lead to the subjection of applicants to a state of "extreme material poverty"[776]. The Court has, thus, thoroughly acknowledged the intricately linked notions of human dignity and welfare, through the validation that the establishment of a minimum of material resources is a necessary precondition for ensuring a dignified standard of living and the essential safeguarding of other fundamental rights.

1.2. *A presentation of the specific socio-economic rights and material reception conditions foreseen in the context of the Reception Conditions Directive.*

1.2.1. Content of the core rights necessitated for ensuring a dignified standard of living.

As specifically analyzed in the preceding chapter, the reception conditions available to asylum seekers during this uncertain, in-between stage of the asylum procedures, must comprise of the provision of those benefits, appropriate for ensuring the protection of applicants' most basic needs, relating, at the very least, to housing, food, clothing and access to health care. Regarding the former, the RCD foresees specific rules for those situations where housing is provided in kind. Given that that has been observed as a rule at the majority of Member States[777], the regulation of housing modalities has significant impact in practice.

In particular, the types of premises utilized for the purpose of hosting applicants must be in accordance with one of the specifically provided forms, comprising of either "accommodation centers which guarantee an adequate standard of living", "private houses, flats, hotels" adapted to the demands of those individuals or other premised used for the examination of applications at the border[778]. Exceptions to this rule can only be allowed, in duly justified cases, as a matter of last resort, for as short a period as possible and, indicatively, where "housing capacities normally available are temporarily exhausted"[779]. Even in those circumstances, it must be noted that detention centers or any other locations provided for the accommodation of confined applicants, cannot be considered as an acceptable form of alternative housing, given that, as the Court has highlighted, applicants cannot be deprived of their liberty for reasons other than those exhaustively provided[780], much more as a result of a lack of sufficient housing opportunities in the relevant Member State. As particularly underlined, "…the grant to an applicant for international protection without the means of subsistence of housing in kind, within the meaning of Article 18, cannot have

[775] *Case C-233/18, Haqbin* (n 769), paras 47, 48.
[776] ibid, paras 46, 48.
[777] Odysseus Academic Network (n 762), *pg. 26.*
[778] Article 18, paragraph 1 of Directive 2013/33/EU.
[779] ibid, paragraph 9.
[780] *Case C-36/20 PPU, VL* (n 69), paras 108, 109, 113.

the effect of depriving that applicant of his or her freedom of movement…", by risk of running counter to the very principles and objectives of the RCD and undermining the essential content of material reception conditions provided[781].

At the same time, the proper and adequate training of stuff working at those accommodation centres, relating to the basic needs of applicants as well as confidentiality rules, must be ensured[782]. Even more crucially, gender specific considerations must be made and effective measures implemented for the prevention of "assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres"[783]. Lastly, it must be mentioned that the potential of transferring asylum seekers between accommodation centres and housing facilities is only foreseen following a necessity test[784]. Nevertheless, in the case where a transfer order has been issued in accordance with the Dublin procedures, irrespective of the initiation of appeal proceedings, moving applicants to specialised reception facilities, as a preparatory step to the transfer itself, is not precluded under the requirements of EU law[785].

On a second not, access to healthcare must be ensured to applicants "under all circumstances", including, as a minimum content, "emergency care and essential treatment of illnesses and of serious mental disorders"[786]. This holistic view of individuals portrayed in the RCD, lacking a distinction between physical and mental wellbeing, is noteworthy[787].

1.2.2. Economic rights afforded to applicants in the context of the Reception Conditions Directive.

Socio-economic support and integration of applicants for international protection is highly dependent upon their potential to access the labor market and secure a sufficient income that allows for the covering of their most basic needs. The objective of promoting self-sufficiency and the subsequent limitation of discrepancies between the various domestic legal systems, is particularly acknowledged in the preamble of the RCD[788]. The necessity of making provision for the realization of such access is grounded on primary law considerations and, more specifically, the need of ensuring respect for the fundamental right of human dignity. This has been asserted and validated by the Court, which has established a critical link between the possibility to work and human dignity, by underlining that the enjoyment of the most basic human needs, including housing and accommodation of one's family, is made possible through the existence of income[789]. To reiterate the rationale behind its position, the Court expressly stated that "work clearly contributes to the preservation of the applicant's dignity, since the income from employment enables him or her not

[781] *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and others* (n 586), paras 254, 255.
[782] Article 18, paragraph 7 of Directive 2013/33/EU.
[783] ibid, paragraphs 3 and 4.
[784] ibid, paragraph 5.
[785] *Case C-92/21, VW v Agence fédérale pour l'Accueil des demandeurs d'asile (Fedasil), 2021, ECLI:EU:C:2021:258*, para 45; *Case C-134/21, EV v Agence fédérale pour l'Accueil des demandeurs d'asile (Fedasil), (2021), ECLI:EU:C:2021:257*, para 45.
[786] Article 19, parahraph 1 and article 20, paragraph 5 of Directive 2013/33/EU.
[787] Selanec and Petrić (n 415), *pg. 507*.
[788] Recital 23 in the preamble of Directive 2013/33/EU.
[789] *Joined Cases C-322/19 and C-385/19, KS* (n 754), para 69.

only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family"[790].

In this light, the fundamental requirement of ensuring effective access to the labour market for asylum seekers accommodated in their territory is foreseen in the legislative text of the RCD. Nevertheless, the conditions of such access are far from being considered harmonized or particularly protective. In fact, an obligation to ensure such access is only substantiated, for the national authorities, once the time period of 9 months has elapsed, from the date when the application for international protection was lodged, in the absence of a decision on the latter at first instance and where the applicant cannot be considered to be at fault for such a delay[791]. The need for adopting a narrow interpretation of the latter notion has been highlighted by the European Council on Refugees and Exiles, grounded in the evasion of an interpretative stance with the effect of rendering the content of this right practically futile[792].

Simultaneously, the conditions according to which the ability of those individuals to secure work will be realized, are a matter falling within the broad, discretionary power of the domestic legislator, while the prioritization of a wide category of other individuals, inclusive of, inter alia, Union citizens and legally residing persons, is expressly provided for[793]. The sole safeguard incorporated into the text of the RCD, relates to the inability of withdrawing access to the labour market, once it has been granted, in the case where a judicial remedy against a negative decision has been filed, until the notification of a negative decision on the latter[794]. However, it must be noted that this can only be applied, where the appeal in this instance has suspensive effect[795], effectively negating the absolute character of that prohibition. It must be noted that access to vocational training is foreseen as a possibility untethered to the accessibility or not of the labour market to applicants for international protection[796].

At the same time, the provision of schooling and education to minor children of applicants and to applicants who are minors, must be ensured under stricter and more protective conditions, at a standard similar to those enacted for the education of Member States own nationals and "for so long as an expulsion measure against them or their parents is not actually enforced"[797]. Special safeguards, for the purpose of facilitating the effective access of those minors to the national, education system, are provided, taking the form of ensuring their participation in any necessary preparatory classes, including, expressly, language courses[798]. Lastly, the postponement of the period at which such access must be granted, is regulated under specific rules and can only be justified in the context of the expressly stated time frame[799]. The importance of these provisions is

[790] ibid.
[791] Article 15, paragraph 1 of Directive 2013/33/EU.
[792] European Council on Refugees and Exiles (ECRE), 'Information Note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying down Standards for the Reception of Applicants for International Protection (Recast), (2015)' *pg. 29*.
[793] Directive 2013/33/EU, paragraph 2.
[794] ibid, paragraph 3.
[795] ibid.
[796] Directive 2013/33/EU, article 16, paragraph 1.
[797] ibid, article 14, paragraph 1.
[798] ibid, paragraph 2, subparagraph 2.
[799] Article 14, paragraph 2, subparagraph 1 of Directive 2013/33/EU states that: "…Access to the education system shall not be postponed for more than three months from the date on which the application for international protection was lodged by or on behalf of the minor".

undoubtful, in consideration of the delicate situation of minor applicants, whose vulnerable position is further aggravated by the impressionable and sensitive character of their age.

2. Assessing the changes introduced as to the socio-economic benefits awarded to applicants for international protection with the recent, reformed Reception Conditions Directive.

The adoption of the new Pact on Migration and Asylum, undoubtedly marks the initiation of new legislative era in the field of international protection, effectively reshaping the EU asylum acquis. The inclusion of a new legal instrument, regulating the reception conditions that must be made applicable to those individuals who are awaiting the conclusion of the examination process and the notification of a decision on the rejection or acceptance of their asylum request, could not have been omitted from the scope of the legislative reform. The 2024 Reception Conditions Directive[800] is the only instrument in the CEAS that has retained its nature, not having undergone the transformation to a Regulation, after the characteristic, novel fashion of the new Pact. This can potentially be attributed to the reality of the existence of unavoidable divergencies between the Member States' social and economic systems, which makes the potential of a full harmonization seem like a far-fetched illusion, as already analyzed in the initial remarks of this section.

Undeniably, the text of the new Directive encompasses significant variations as to the currently applicable norms. Those changes comprise, on the one hand, of a significant enhancement in the protection standards of specific categories of applicants, while, on the other, they introduce impactful limitations as to the scope of application of the reception conditions of others[801]. An assessment of the provisions introducing those adjustments is thus necessary, for an examination of the balance that has been struck.

2.1. *Limitation of the scope of application of the 2024 Reception Conditions Directive regarding categories of applicants.*

Initially, it must be noted that the provisions relating to the temporal and territorial scope of application of the new Directive have remained mostly unchanged, given that it still applies "…during all stages and types of procedures for international protection, in all locations and facilities housing applicants and for as long as they are allowed to remain…"[802], which must, necessarily, include its application including during the procedures of the Screening Regulation[803]. An important addition relates to the express clarification that the availability of the material reception conditions must be ensured for applicants "from the moment they express their wish to apply for international protection to officials of the competent authorities"[804], following the

[800] Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection, OJ L, 2024/1346.
[801] Lieneke Slingenberg, 'The New EU Reception Conditions Directive: More Welfare Conditionality for Asylum Seekers' (*EU Immigration and Asylum Law and Policy*), *pg. 1.*
[802] Recital 7 in the preamble and article 3 paragraph 1 of Directive (EU) 2024/1346.
[803] Regulation (EU) 2024/1356.
[804] Directive (EU) 2024/1346, recital 7 in the preamble in conjunction with article 19, paragraph 1, which reads: "Member States shall ensure that material reception conditions are available to applicants from the moment they make their application for international protection in accordance with Article 26 of Regulation (EU) 2024/1348".

codification of the Court's jurisprudence on the concept of "making" an application and ensuring that sole reliance on the latter is no longer needed.

The most crucial change enacted, relates to the explicit exclusion of a possibility of application of the new Directive during the Dublin procedures. In particular, article 21 introduces a new rule, in direct contradiction to already well-established case-law, that at the moment when a transfer decision is notified to applicants, triggering the initiation of proceedings under Regulation (EU) 2024/1351[805], entitlement to reception conditions is automatically discontinued and can only be provided by the responsible Member State in accordance, with the determination rules contained therein. It is, nevertheless stated, that the "…this shall be without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter, and international obligations"[806].

Initially, the direct reference to the Charter as well as to a standard of living in accordance with EU law, which is, undoubtedly, inclusive of jurisprudential assertations on the prohibition of subjecting applicants to situations of "extreme material poverty", can only be evaluated positively. Nevertheless, the significant limitation introduced as to the provision of reception conditions and, particularly, the provision of material benefits, the accessibility of the labour market, language courses and vocational training, strikes as a quite disconcerting development, effectively overturning the Court's jurisprudence on the matter and raising legal uncertainties as to the legality of its inclusion in the legislative text. It must be recalled that Court has effectively linked the provision of reception benefits, including the accessibility to the labour market, with the requirements of article 1 of the Charter, which substantiates the fundamental and absolute principle of human dignity. In fact, as already noted, a necessitation for respect and protection of the latter right led to the exclusion of domestic legislation which provided for limitations of the socio-economic benefits, even for a temporary period of time, on the sole ground of application of the determination criteria[807]. The directly contradictory character of the provisions of the new RCD with the latter jurisprudence is evident. Whether the mere provision of a necessity to respect a "standard of living in accordance with Union law" will suffice for the negation of the above jurisprudential conclusions and the adoption of a stricter interpretative stance by the Court from the moment of application of the reformed legal instrument, remains to be seen.

2.2. Enhancement of the level of protection as to applicants' socio-economic rights, in the provisions of the reformed legislative text.

The level of material reception requirements that must be made available to applicants is not only retained but further enhanced. The minimum standard guaranteeing their subsistence as well as adequate protection of their physical and mental health has been enriched by the addition of a direct reference to the rights of those individuals in accordance with the EU Charter[808]. The inclusion of primary law and rights-oriented considerations in the relevant provision must be applauded. The definition and basic content of "material reception conditions" has been further

[805] Regulation (EU) 2024/1351, which repeals the Dublin III Regulation in its entirety.
[806] Recital 9 in the preamble and article 21 of Directive (EU) 2024/1346.
[807] *Case C-179/11, Cimade and GISTI* (n 725), para 56.
[808] Article 19, paragraph 2 of Directive (EU) 2024/1346.

augmented, to include "personal hygiene products"[809] while the notion of "daily expenses allowance", a periodic provision of monetary nature, has been introduced as an alternative form in which the former may be made available, for the purpose of "ensuring a minimum degree of autonomy of applicants in their daily life"[810]. At the same time, the right to access healthcare, through the inclusion of more detailed rules especially in comparison to the simple formulation of its predecessor, is applicable irrespective of whether applicants are subjected to a transfer procedure, must be of adequate quality and is now additionally inclusive of treatment with regard to reproductive care[811]. Further provisions are introduced for ensuring that appropriate care is made available to minors and applicants with special reception needs. Regarding the former, it is expressly stated that minor applicants must receive the same type of healthcare as provided to the nationals of each respective Member State[812], effectively excluding the possibility of discriminations on account of nationality and the legality of residence of those particularly vulnerable individuals. In relation to the latter, necessary medical attention must be provided, tailored to the needs of specifically vulnerable asylum seekers, indicatively in the form of rehabilitation, assistive medical devices and a particular emphasis on mental health care[813].

In this note, it must further be mentioned, that the potential of accessing the national educational system recognized to minor children of applicants or applicants who are minor must now, expressly, be safeguarded under the "same", instead of "similar", conditions as those foreseen for nationals[814]. As laid down in the legislative text, "the education of minors shall, as a rule, be integrated with that of Member States' own nationals and be of the same quality"[815]. Further considerations of the specific needs of minors, the child's right to education and access to healthcare must be made during the application of this provision[816].

Access to the labour market of applicants for international protection is now facilitated, through the replacement of the 9-month rule with that of 6 months from the registering instead of lodging of an application, ensuring swifter possibilities for entering the job market[817]. Even more importantly, a novel addition has been made, establishing a requirement of equal treatment of asylum seekers with that of Member States' own nationals in association to a wide range of employment conditions, relating, inter alia, to basic terms of employment such as working hours, minimum wage and dismissal, health and safety requirements at the workplace; freedom of association and affiliation, albeit with a mention to public policy and public security; recognition of diplomas and certificates and education or vocational training[818]. Additionally, a state obligation is further established for ensuring entitlement of applicants for international protection, who are occupied in the labour market of Member States, to social security benefits yet again under the terms of equal treatment. Despite the subsequent provisions on limitations to this newly established

[809] Article 2, paragraph 7 of Directive (EU) 2024/1346 provides such a definition: "'material reception conditions' means the reception conditions that include housing, food, clothing and personal hygiene products provided in kind, as financial allowances, in vouchers, or as a combination thereof, as well as a daily expenses allowance;".
[810] Article 2, paragraph 8 of Directive (EU) 2024/1346.
[811] ibid, article 22, paragraph 1.
[812] ibid, paragraph 2.
[813] ibid, paragraph 3.
[814] ibid, article 16, paragraph 1.
[815] ibid, paragraph 2.
[816] ibid.
[817] ibid, article 17, paragraph 1.
[818] ibid, paragraph 3.

principle of non-discrimination, its inclusion in the first place in such a legislative instrument, regulating a temporary, in-between situation of third country nationals with the intention of benefitting from international protection, can only be celebrated from a human rights perspective.

Crucially, the significant limitations observed in the preceding chapter appear to be partially offset by the substantial enhancement of the material, social and economic benefits available to those categories of applicants not excluded from the 2024 Reception Conditions Directive's scope of application. At the same time, the minimum standard of protection that be ensured can justifiably be claimed to allow no room for policies of "forced destitution"[819]. The sole loose end that remains to be unraveled in future jurisprudential evolutions, is the relevance of the Court's ardent emphasis on the principle of human dignity for those categories of applicants subjected to transfer procedures and thus, excluded from the enjoyment of material reception benefits and access to employment under this new instrument.

[819] Slingenberg (n 801), *pg. 6.*

Concluding remarks

As stated by the Commission, "…The EU has one of the most protective and generous asylum systems in the world[820]". The above legal analysis is a representation of efforts, grounded on a comparative assessment of the existing and reformed legal framework that comprises the Common European Asylum System, as implemented and supplemented by jurisprudential considerations of the European Court of Justice, to assert and critically evaluate the truthfulness and accuracy of this impactful proclamation. Throughout the recourse of the legal examination conducted, the EU's conflicting policy objectives, those of balancing fundamental rights protection against migration management objectives, with the underlining aim of ensuring the limitation of secondary movements, are ubiquitous, intertwined within the rationale of the adopted secondary law provisions. As already asserted, the direction at which the scale tips in this balancing act is not consistent and a straightforward general conclusion cannot be reached in uncomplicated and swift manner.

Undeniably, the asylum acquis comprises of a robust legal system of procedural guarantees and entitlements, applicable in a holistic way throughout the entirety of the asylum processes, with the aim of ensuring the access, effective participation and navigation of the complex legal framework applicable at each stage of the asylum examination procedures, in accordance with primary law considerations, relating particularly to the right to asylum, the prohibition of non-refoulement as well as the right to be heard. Procedural assurances, such as the provision of legal information, legal assistance and representation, the safeguarding of the individual, objective and personal character of the examination of asylum claims as well as the facilitation of the accessibility of the asylum procedures in the first place, are foreseen and further enhanced following the adoption of the New Pact on Migration and Asylum. Indeed, as has been showcased, the introduction of a new right to receive legal counselling during the initial stages of the procedure, is of outmost importance for ensuring the effectiveness of the assessment processes, equipping individuals with no prior background on the language, cultural or societal traditions and, importantly, legal norms, with enhanced tools for ensuring the accurate examination of their claims.

At the same time, assurances as to the respect of the fundamental right of effective judicial protection are incorporated into the legislative text of the majority of legal instruments adopted under the CEAS, with the aim of promoting the genuine and practical enforcement of the entirety of procedural rights encompassed thereof. Guarantees as to the notification of negative decisions adopted on asylum applications, safeguards as to deadlines foreseen for the enforcement of the right to an effective remedy as well as the provision of legal requirements for allowing applicants to remain in EU territory until a final decision on their claim for international protection has been adopted, comprise some of the main protective developments of the EU procedural asylum acquis.

The procedural entitlements afforded to applicants for international protection in the recourse of the asylum procedures are necessarily accompanied and enhanced with substantive human rights, foreseen in primary law, through their incorporation in the EU Charter, as well as provided for in

[820]Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM (2016) 197 final, *pg. 5.*

secondary law, laying down necessary minimum standards of protection. The fundamental requirement of ensuring, at all stages of the procedure and under all circumstances, a dignified standard of living for asylum seekers, making their suffering from situations of extreme material poverty unjustifiable under EU law protective values, is a guiding principle against which State socio-economic policies are to be measured. The reform introduced in the new Pact in this context, comprising of the establishment of an improved and more protective socio-economic status for asylum seekers, introducing equal treatment as a fundamental aspect of reception conditions and ensuring swifter and more effective access to the labour market as well as the national education system, is a development that can only be reviewed in a positive manner.

The above allows for an initial conclusion of the existence of an enviable and highly inclusive system of protection of third country nationals having filed applications and requests for international protection in the EU. Nevertheless, such a proclamation is significantly compromised by other aspects of the asylum acquis, primarily aimed at the achievement of swift, effective and efficient examinations, leading to a speedy review of asylum claims and safeguarding the core objective of limiting secondary movements of asylum seekers between EU States. The latter purpose underlines the rationale behind the majority of amendments that have been brought forth with the recently adopted Pact on Migration and Asylum.

In particular, the limitation of deadlines available for the contestation of negative decisions adopted on asylum requests in conjunction with the severe restriction of the automatic, suspensive effect of such a remedy, to the point of potentially establishing a general presumption of non-suspension in asylum proceedings, is quite disconcerting for the effective exercise of the foundational right to effective judicial protection. Uncertainties arise as to the impact of those combined procedural limitations on the effective preparation and exercise of judicial remedies against decisions which adversely affect applicants' legal positions, as well as the essential conformity of those developments with the requirements of non-refoulement.

At the same time, the unsettling diminishing of procedural safeguards as well as substantive rights foreseen for those applicants subject to the determination procedures, especially in the case where a transfer decision under the revised Dublin rules has been adopted, comprise a new trend in the recently adopted legislative reform. In relation to the principle of effective judicial protection, the new rules are characterized by a significant narrowing of the scope and intensity of the judicial remedy available against transfer decisions as well as a general reduction of the quality and practicality of the judicial review. The grounds upon which the contestation of the correct application of the responsibility determination criteria can be justified are essentially restricted to a few, specifically provided for circumstances, in direct contradiction with jurisprudential evolutions in this aspect of EU law, which tend to favor protective interpretative standards over the unchecked considerations of national procedural discretion. Equally, the exclusion of those applicants, against whom a transfer order has been adopted, from the enjoyment of the material reception conditions as well as socio-economic rights under the reformed Reception Conditions Directive, directly contradicts the settled case-law grounded on the very principle of human dignity and raises significant doubts as to the lawful character of this legislative incentive.

The enhancement of the utilization of border procedures, giving rise to crucial reservations as to their impact on the accessibility as well as effectivity of the asylum procedures is another

legislative option undertaken in the New Pact. Simultaneously, the expansion of permissible grounds upon which the deprivation of liberty of asylum seekers can be justified, is another point of concern, especially in consideration of the explicit link established between the protection of national security, public order, as well as the utilization of the enhanced border procedures and the justification of detention measures. Undeniably, those grounds, falling within the scope of national, uncontrolled discretionary powers, allow for the rise or continuation of potential abusive practices as well as the enhancement of a risk of imposition of arbitrary detention at the EU's external borders, as a new reality.

Given that the CJEU, as a central actor in the EU legal scene, acted and continues to operate as a guardian for the endorsement of rights and guarantees awarded to asylum seekers, located in EU secondary law provisions, as well as the main legal force for the effective implementation of rights incorporated in the Charter, the effects of the above legislative reforms, often directly contradictory to its settled jurisprudential stance, remain to be asserted.

In any case, an affirmation of the Commission's proclamations on the significant level of protection afforded by the EU to asylum seekers cannot be reasonably made, following the extensive legal and jurisprudential analysis undertaken by this thesis. The enhanced procedural and substantive safeguards incorporated in various provisions of the New Pact, while worthy of appraisal, do not appear sufficient for the negation of the restrictive approach introduced by the recent legislative reform, on the matter of fundamental rights protection. The scale appears to have tilted towards the achievement of swift, efficient asylum procedures, able to handle claims for international protection in an expedited manner, with the elevation of the objective of preventing secondary movements as the sole, most crucial objective to be achieved with the changes introduced. This aim, contradictory in nature to that of securing a high standard of protection for those particularly vulnerable individuals, seems to be the obvious 'winner' of the balancing act between migration and asylum management and human rights, to the detriment of entitlements and safeguards recognized under EU law to applicants for international protection.

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