

National Courts and the Independent and Rigorous Scrutiny

7.1 Towards a Coherent Set of Standards for Use by National Courts

The previous chapters were aimed at discovering standards on judicial scrutiny and evidence in international and European asylum law. To find such standards, treaty and EU law provisions on or relevant to national (judicial) proceedings were analyzed. In addition, the assessment in expulsion cases as performed by the HRC, the ComAT and the ECtHR was analyzed in order to discover the standards on judicial scrutiny and evidence applied by these international treaty monitoring bodies and court.

From the discovered standards on national judicial scrutiny, a common denominator appeared. A national judicial remedy in cases concerning the expulsion of asylum seekers is ECHR-compliant if it performs an ‘independent and rigorous scrutiny’ of the protection claim.¹ It is ICCPR-compliant if it considers the claim for protection ‘thoroughly and fairly’² CAT-compliance is ensured when a national judicial remedy offers an ‘effective, independent and impartial review’ of the decision on expulsion.³ On many occasions the UNHCR has expressed its opinion that national judges dealing with asylum cases should be able to ‘obtain a personal impression of the applicant’ and that ‘appeal or review proceedings should involve points of fact, including credibility, and points of law’.⁴ Finally, in *Samba Diouf* (2011), the CJEU ruled that the final decision on an asylum claim must be the subject of a ‘thorough review on the merits of the claim’ by the national court.⁵ Thus, the common denominator following from international and EU asylum law is that national

1 See, for some recent examples, ECtHR, *Muminov v. Russia*, 11 December 2008, Appl. No. 42502/06, para. 10; *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, Appl. No. 30471/08, para. 108; ECtHR, *Hirsi Jamaa and others v. Italy*, 23 February 2012, Appl. No. 27765/09, para. 198.

2 See, for example, HRC, *Dawood Khan v. Canada*, 10 August 2006, No. 1302/2004, para. 5.3.

3 See, for example, ComAT, *Agiza v. Sweden*, 20 May 2005, No. 233/2003, paras. 13.6 and 13.7.

4 See, for example, submission of the UNHCR in the case of *Mir Isfahani v. the Netherlands*, Appl. No. 31252/03, May 2005, www.unhcr.org/refworld/docid/454f5e484.html, last visited 23 December 2012, paras. 31–42.

5 CJEU, *Samba Diouf*, 28 July 2011, C-69/10, paras. 56, 61.

courts are required to offer an independent and rigorous (thorough) scrutiny of the asylum refusal.

The central question in this chapter is how national asylum courts can live up to this requirement. In order to find an answer to this question, the results of the analysis conducted in the previous chapters are now brought together with the aim of defining more exactly what a 'rigorous and independent national judicial scrutiny' is about.

The first question looked at in this chapter, in Section 7.2, is how the treaties studied in this book and EU asylum law relate to each other. This question is addressed in order to make clear how national asylum courts are bound by the procedural obligations flowing from the treaties and EU asylum law.

After that, in sections 7.3 and 7.4, an attempt is made to integrate into a coherent whole the standards on judicial scrutiny and evidence flowing from international and EU asylum law, with the objective of arriving at a coherent set of standards ready for use by national asylum courts.

One question that will be looked at in this exercise is whether the standards on judicial scrutiny and evidence featuring in the assessment in expulsion cases as performed by the HRC, the ComAT and the ECtHR, are binding on national asylum courts, in the sense that national courts must work in exactly the same way. Other questions that will be looked at are whether a hierarchy of international sources and supervisors exists, what to do in case of conflicting standards, and whether cross-references are acceptable.

A basic presumption underpinning the analysis in this chapter is that in many asylum cases coming before national asylum courts within the EU, both refugee protection (Articles 1 and 33 RC, Article 18 of the EU Charter) and subsidiary protection (Articles 7 ICCPR, 3 CAT, 3 ECHR, Articles 4 and 19 of the EU Charter) will be invoked in parallel, as in many EU countries both types of protection are dealt with in the same single procedure. Such a 'one-stop shop' procedure exists, for example, in Belgium, the Netherlands, the UK, Poland, Spain and Italy.⁶ As a result, all the treaties and instruments covered by this study are relevant to and applicable in such cases. (A two-step procedure exists in Ireland, where separate applications for asylum and for subsidiary protection are required and these applications are dealt with in separate subsequent procedures.⁷)

6 See for a description of different national procedures in the countries mentioned here Zwaan (2008, pp. 57–161).

7 See, for example, CJEU, *M.M. v. Minister for Justice, Equality and Law Reform*, 22 November 2012, C-277/11, paras. 28, 29.