Judicial Protection and the New European Asylum Regime

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1. Introduction

Refugee status determination (RSD) is, at the national level, carried out in asylum procedures. These are procedures of administrative justice, to which, on the one hand, general procedural norms of the administrative legal framework and, on the other hand, distinct procedural norms of national aliens legislation apply. The nature of RSD gives rise to demands on robust judicial protection. The vast interests embedded in the procedure on the sides of as well states as applicant require real, objective and effective possibilities for review and remedy. The national character of RSD, nevertheless, leaves it for each state to decide in which manner to meet these requirements.

From the outsets of Community negotiations on the European framework for RSD, the European Union has also emphasized the need for inclusion of rules regarding judicial protection in the EC legislation on the field.

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European examples of the divergent practices can be found for instance in German and UK practice. Whereas the German asylum procedure confines the appellate stages of the asylum procedure to the general administrative courts in the Länder, the UK practice relies on a specialized First-Tier Asylum and Immigration Chamber of the First-Tier and Upper Tribunal.

Also the directive on asylum procedures included from the very first draft an Article regarding the right to judicial protection in the Common European Asylum Procedure. See Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 39. In the proposals for a recast of the directive, presented in October 2009, judicial protection is given yet more attention. See Proposal for a Directive of the European Parliament and
expansion, through Article 47 of the Charter of Fundamental Rights of the European Union, of the demand for a fair trial to be valid also for RSD places yet again an emphasis on the right to judicial protection also in asylum matters.\textsuperscript{4} Thus, judicial protection is indeed a matter of interest for the EU in the developments on the asylum field. However, as the process towards the Common European Asylum System has been struggling to come to terms with divergent national traditions and cultures, the EU has been forced to make use of numerous means of convergence. Today, ‘hard law harmonisation’ is far from the only path towards integration and also judicial protection has been regulated using various means of convergence also outside the traditional ‘hard law’.

The focus of this Article lies in the intermission between the need for robust judicial protection and the strivings of the EU towards the common. There is a two-fold question that is of importance when considering this relationship: Firstly, can adequate standards of judicial protection at the national level be guaranteed in the midst of the various measures of integration currently presented in the field of asylum and immigration? And, if such standards indeed can be achieved, which are the means for doing so? These questions are motivated as judicial protection, despite being a question of uttermost importance, has been given very little attention in the practical integration of the Member States’ asylum procedures.\textsuperscript{5} The effects of the integration are, however, at the same time virtually irreconcilable and measures taken are difficult to revise. To this respect, the recognition of the fact that the choice of measure of convergence indeed has a direct effect on the rights of the individual asylum seeker in terms of judicial protection is important.

Secondly, we may ask to which extent judicial protection and the procedures of review within the Members States are themselves the objects of harmonizing measures? How does the employment of different mechanisms of integration affect the possibilities for approximation of the appellate level of decision-making in asylum matters within the EU? This article will explore the effects of different measures of convergence on judicial protection in asylum procedure. This article will, however, not analyze the general question regarding the desirability of harmonization of appellate level asylum procedures.

\textsuperscript{4) Charter of Fundamental Rights of the European Union, 2000/C 364/01.}
\textsuperscript{5) The attention of, for instance, the Asylum Procedures Directive (Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status) towards judicial protection is the only measure within the Common European Asylum System with a direct impact on judicial protection.