

Table of Contents

<i>Acknowledgements</i>	v
<i>List of Abbreviations</i>	xiii
1. Introduction: In Search of EU Standards for Asylum Procedures.....	1
1.1 Adequate and Fair Asylum Procedures in the EU: State of the Art	1
1.2 In Search of EU Standards for Asylum Procedures	10
1.2.1 Protection of Fundamental Rights in the EU Legal Order.....	10
1.2.2 Scope of Application of the Charter and General Principles of EU Law.....	12
1.2.3 Function of EU Fundamental Rights and General Principles.....	14
1.2.4 Sources of Inspiration of EU Fundamental Rights and General Principles.....	15
1.3 Aim of the Study	18
1.4 Scope and Limitations of the Study.....	20
Part I Preliminary Issues	25
2. The Common European Asylum System and the Applicability of EU Procedural Standards.....	27
2.1 The Common European Asylum System and its Legal Basis.....	28
2.1.1 Legal Basis of EU Asylum Legislation.....	28
2.1.2 Policy Framework: The Common European Asylum System	29
2.2 The Procedures Directive	32
2.2.1 Scope of Application.....	35
2.2.2 Overview of the Provisions of the Procedures Directive.....	36
2.2.3 Level of Harmonisation and Discretion of Member States.....	38
2.3 The Qualification Directive.....	39
2.3.1 Scope of Application.....	40
2.3.2 Overview of the Qualification Directive's Provisions.....	40
2.4 Applicability of EU Fundamental Rights	41
2.4.1 Testing the Legality of (Minimum) Standards.....	41
2.4.2 Interpreting and Filling in Gaps in EU Asylum Legislation.....	44
2.5 The Role of National Courts and the Court of Justice.....	45
2.5.1 Legality Review of EU Legislation	45
2.5.2 Interpretation of EU Law	47
2.5.3 The Important Role of the National Courts as EU Courts.....	47

3.	The Subsidiary Role of International Treaties as Sources of Inspiration for EU Fundamental Rights	49
3.1	International Treaties versus EU Fundamental Rights	50
3.1.1	Might EU Fundamental Rights provide a Lower Level of Protection?	50
3.1.2	Might EU Fundamental Rights provide Broader Protection?	52
3.2	International Treaties and the Common European Asylum System	53
3.2.1	The European Convention on Human Rights	53
3.2.2	The Refugee Convention	54
3.2.3	The International Covenant on Civil and Political Rights	55
3.2.4	The UN Convention against Torture	55
3.2.5	The UN Convention on the Rights of the Child	56
3.2.6	Direct Application of International Treaties?	57
3.3	The Weight of International Treaties in the Case Law of the Court of Justice	58
3.3.1	The Judgments of the ECtHR	60
3.3.2	Council of Europe Documents	64
3.3.3	UNHCR Documents and EXCOM Conclusions	65
3.3.4	The Views of the UN Committees	66
3.3.5	Should Non-binding Documents be taken into Account?	68
3.4	The Relative Weight of International Treaties as Sources of Inspiration	69
4.	The EU Right to an Effective Remedy and Related Procedural Rights and Principles	72
4.1	Limitations to the Procedural Autonomy of Member States	73
4.2	The Link between EU Procedural Rights and Principles	76
4.3	The EU Right to an Effective Remedy	81
4.3.1	Provisions of International Law inspiring the EU Right to an Effective Remedy	82
4.3.2	Application to Asylum Cases	85
4.3.3	Effectiveness	87
4.3.4	Institutions Responsible for Providing Effective Remedies	89
4.3.5	Effect in the National Legal Order	90
4.3.6	The Right of Access to a Court or Tribunal	92
4.3.7	The Right to Equality of Arms and Adversarial Proceedings	93
4.4	The EU Right to Good Administration	94
4.4.1	Provisions of International Law inspiring the EU Right to Good Administration	96

4.4.2	The Right to be Heard	96
4.4.3	The Duty to State Reasons	98
4.5	Three Basic Concepts.....	101
4.5.1	Balancing of Interests	102
4.5.2	Assessing the Overall Fairness of a Procedure	103
4.5.3	The Subject Matter of the Procedure.....	105
4.5.3.1	The Nature of the Rights Claimed	106
4.5.3.2	General Circumstances of the Party Concerned	108
4.5.3.3	Personal Circumstances of the Party Concerned	109
5.	Preliminary Conclusions and Methodology used for the Following Chapters.....	111
5.1	Method for Defining the Meaning of the EU Right to an Effective Remedy	113
Part II	Key Issues of Asylum Procedures.....	115
6.	The Right to Remain on the Territory of the Member State	117
6.1	The Right to Remain during the Examination of the Asylum Claim	118
6.2	The Right to Remain during the Time Necessary to Lodge the Appeal	122
6.3	The Right to Remain during the Appeal Proceedings	124
6.3.1	The Right to Interim Protection	126
6.3.1.1	The Case Law of the Court of Justice	126
6.3.1.2	Obligations Stemming from the ECHR, the ICCPR, CAT and the Refugee Convention.....	132
6.3.1.3	Subconclusion: The Right to Interim Protection	137
6.3.2	The Meaning of Automatic Suspensive Effect.....	139
6.3.2.1	The Case Law of the Court of Justice	139
6.3.2.2	Obligations Stemming from the ECHR.....	140
6.3.2.3	Subconclusion: The Meaning of Automatic Suspensive Effect	142
6.4	Synthesis of Findings	143
7.	The Asylum Applicant's Right to be Heard on his Asylum Motives.....	146
7.1	The Right to a Personal Interview in First Instance Proceedings	148
7.1.1	Dependent Adults	154
7.1.2	Accompanied and Unaccompanied Minor Asylum Applicants	155
7.2	Requirements as to the Conduct of the Interview.....	159
7.2.1	Language of the Interview	160
7.2.2	The Right to a Free and Competent Interpreter	162
7.2.3	The Competence of the Interviewer	163

7.2.4	Gender Sensitive Interviews	165
7.2.5	Child-friendly Interviews	166
7.3	The Asylum Applicant's Right to be Heard following the Personal Interview	168
7.3.1	The Right to Comment on the Report of the Interview	168
7.3.2	The Right to Comment on the Fact-finding and Risk Assessment	171
7.4	The Right to an Oral Hearing before a Court or Tribunal.....	174
7.5	Synthesis of Findings	179
8.	The Burden and Standard of Proof and Evidentiary Assessment.....	183
8.1	The Standard of Proof	185
8.2	The Burden of Proof.....	195
8.2.1	Adducing Evidence and Dispelling Doubts	195
8.2.2	Producing Evidence: A Shared Duty.....	202
8.3	Individual Assessment and the Use of Presumptions.....	208
8.4	Assessing the Credibility of the Applicant's Statements	212
8.5	Evidentiary Assessment.....	226
8.5.1	Expert Reports.....	232
8.5.2	Country of Origin Information Reports	234
8.5.3	Medical Evidence	239
8.6	Synthesis of Findings	244
9.	Judicial Review of the Establishment and Qualification of the Facts.....	249
9.1	Limitation of Judicial Review to Points of Law?	251
9.1.1	Case Law by the Court of Justice	251
9.1.2	Obligations Stemming from the ECHR, CAT and ICCPR	252
9.1.3	Subconclusion: Limitation of Judicial Review to Points of Law?	254
9.2	Thorough Review of the Assessment of the Facts.....	255
9.2.1	Case Law by the EU Courts.....	257
9.2.2	Obligations Stemming from the ECHR, CAT and ICCPR.....	267
9.2.2.1	Intensity of Judicial Review under the Right to an Effective Remedy	268
9.2.2.2	The Subsidiary Role of the ECtHR, ComAT and HRC in Asylum Cases.....	272
9.2.2.3	The Right to a Fair Trial	279
9.2.3	Subconclusion: Thorough Review of the Assessment of the Facts	282
9.3	The Relevant Moment in Time: <i>ex tunc</i> or <i>ex nunc</i> Review?	284
9.3.1	The Case Law of the Court of Justice	285
9.3.2	Obligations Stemming from the ECHR, CAT and ICCPR.....	288
9.3.3	Subconclusion: The Relevant Moment in Time	290
9.4	Synthesis of Findings	291

10.	The Use of Secret Information in Asylum Cases	294
10.1	The Use of Secret Information under EU Law	296
10.2	Obligations for the National Courts of Member States under EU Law.....	300
10.3	Competition Cases and the Protection of Business Secrets	305
10.3.1	The Right of Access to the File.....	305
10.3.2	The Right to Confidentiality	310
10.3.3	Confidentiality versus Access to the File	311
10.3.4	Judicial Review	314
10.3.5	Subconclusion: The Use of Secret Information in EU Competition Cases.....	316
10.4	EU Sanctions and the Protection of National Security	317
10.4.1	Legal Framework and Scope of Judicial Review	319
10.4.1.1	Anti-terrorism Sanctions based on UN Security Council Resolutions	319
10.4.1.2	Autonomous Anti-terrorism Sanctions	320
10.4.1.3	Autonomous Sanctions against Third States	322
10.4.2	The Right to be Heard	323
10.4.2.1	Possible Limitations to the Right to be Heard	324
10.4.2.2	Possible Compensation for the Absence of a Hearing	325
10.4.2.3	Application to Specific Cases	326
10.4.3	The Obligation to State Reasons.....	328
10.4.3.1	Possible Limitations to the Statement of Reasons.....	329
10.4.3.2	Possible Compensation for a Lack of Reasons	330
10.4.3.3	Application to Specific Cases	331
10.4.4	The Right to an Effective Remedy	335
10.4.4.1	Disclosure of Evidence to the EU Courts.....	337
10.4.4.2	Possible Limitations to the Right to an Effective Remedy.....	338
10.4.4.3	Possible Compensation for Limitations to the Rights of the Defence during the Appeal	338
10.4.5	Subconclusion: The Use of Secret Information in EU Sanction Cases.....	340
10.5	The Use of Secret Information under International Law.....	341
10.5.1	The ECtHR's Case Law on Secret Information	344
10.5.2	The Right to Adversarial Proceedings: Level of Procedural Protection.....	347
10.5.3	Limitations of the Right to Adversarial Proceedings	350
10.5.4	Confidentiality versus the Right to Adversarial Proceedings.....	356
10.5.5	Subconclusion: The Use of Secret Information under International Law	366
10.6	Synthesis of Findings.....	368

Part III	Conclusions	373
11.	Towards a Common and Fair European Asylum Procedure?	375
11.1	EU Procedural Law: Common Principles, Specific Applications	376
11.1.1	Common Procedural Principles.....	376
11.1.2	Specific Applications: The Three Basic Concepts	378
11.1.2.1	Balancing of Interests	378
11.1.2.2	The Overall Fairness of the Procedure	379
11.1.2.3	The Subject Matter of the Proceedings.....	380
11.1.3	Wider Applicability of the Methodology	382
11.2	The Procedures Directive: An Important Step Forward	382
11.2.1	The Potential Impact of the EU Right to and Effective Remedy	385
11.2.2	Broader Protection than the ECHR	387
11.2.3	Supervision and Practical Support for Member States	388
11.2.4	Subconclusion: The Procedures Directive, An Important Step Forward	390
11.3	A Set of EU Procedural Standards for Asylum Procedures.....	390
11.4	Enforcing the EU Right to an Effective Remedy in Practice.....	395
11.5	Towards Fair Asylum Procedures in Europe	396
	Bibliography	397
	<i>Index</i>	404