The added value of Art. 47 CFR and general principles of EU law in asylum and immigration adjudication

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Judicial Training Project

Roadmap To European Effective Justice (Re-Jus): Judicial Training Ensuring Effective Redress To Fundamental Rights Violations

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Methodology and scope of the ReJus Casebook

- *Impact of* ***Art. 47 CFR*** and ***general principles of EU law*** (*good administration, rights of defence, equivalence, effectiveness and proportionality*) on national asylum and immigration laws, jurisprudence and administrative practice.
- *Full circuit of a case*: National case (referral)

CJEU+ECtHR

National implementation

- *Bottom-up*: national courts express or implicit use of Art. 47 CFR/equivalent rights +general principles
- *Horizontal judicial dialogue:* national judges as European Union law judges in direct dialogue on similar EU related issues

Methodology and scope of the ReJus Casebook

Examine the contribution of Art. 47 EU Charter and general principles to:

- C*larification* of vague/incomplete/inconsistent EU notions set out in EU secondary legislation in asylum and return proceedings;
- *Establishing* higher standards for guarantees of effective justice leading to concrete duties on national authorities;
- *Limitation* of the procedural autonomy of the MSs on the basis of FRs guarantees;
- *Enhancement* of national remedies for violations/limitations of FRs.

Vertical application and binding nature of Art. 47 CFR: dealing with Protocol 30 (opt out)

- Uncertainty of courts regarding the legal nature of the CFR due to Protocol 30 (UK and Poland)

  "The Charter does not extend the ability of the CJEU, or any court of tribunal of Poland or of the UK, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles tat it reaffirms."

Leading case on the scope of application of the CFR in asylum: *N.S. and others* (C-411/10)

CJEU clarified that the CFR is a binding instrument for the **UK** and **Poland**: MSs cannot evade the CFR requirements when acting within the limits of permitted derogations from EU sec leg.

Added value of Art. 47 CFR compared to Arts. 6 and 13 ECHR in asylum and immigration

Substantive scope wider than civil and criminal claims (see Art. 6 ECHR)

Independent status (Art. 13 ECHR)

Ensuring an effective judicial remedy

Consequences of the vertical application of the CFR

- **Effects as any other piece of EU law**:
  - Supremacy over any EU secondary law and national implementing legislation which is inconsistent with the CFR (standard of validity for both the EU secondary legislation and national implementing legislation);
  - Directly effective at national level if it fulfils the *Van Gend en Loos* requirements (Art. 47 CFR);
  - Can be used to interpret and enforce EU law at national level;
  - Enhanced remedies: national remedies "*must be determined in a manner that is consistent with Art. 47 CFR, which constitutes a reaffirmation of the principle of effective judicial protection.*" *(Abdida, para. 45);*
  - Effects as any other EU law. i.e. allows disapplication of national laws.

The principle of effectiveness in asylum evidentiary procedural law

Main common standards set by Art. 4 Recast QD – duty of cooperation as an expression of the principle of effectiveness

- *Vague EU notions: 'well-founded fear'; 'real risk of serious harm'; 'good reason' for not lodging asylum application* ***'as soon as possible'***

Potential of the principle of effectiveness is to clarify abstract EU notions, normative inconsistencies, fill legal gaps and ensure convergence of national case law

Requirements of the principle of effectiveness in asylum evidentiary procedures

- ***AG Mengozzi : "the procedural autonomy is subject to the limit imposed by the principle of effectiveness, which consists of the need to guarantee effective access to the rights conferred by the legislation on specific procedures." (M.M.(1) C-277/11)***
- ***CJEU: Scope of the duty of cooperation****: "the fact remains that it is the duty of the MS to cooperate with the applicant at the stage of determining the relevant elements of that application."* (*M.M. (1),* para.65)
- ***CJEU clarification of 'as soon as possible' (C-148-150/13, A.B.C):***

  The credibility of an asylum applicant cannot be undermined by him not revealing his sexual orientation with the first occasion – this would amount to "failing to have regard to the duty of cooperation." *(para. 71)*
- ***ECtHR: MSs' evidentiary procedural rules "shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such a procedure" (F.G. v Sweden, appl. 43611/11)***

  When assessing the requirements of effectiveness: "It is also important to take into account ***all the difficulties which an asylum-seeker may encounter abroad when collecting evidence****."* (J.K. v Sweden, para. 97)

The principle of effectiveness contributing to the development of a common model of investigative judicial powers in asylum adjudication

- ***Onus probandi* - *ECtHR (F.G. v Sweden)*:**
  - nat. authorities have to assess all information brought to their attention, *even if the applicant does not wish to rely on certain evidence* (in casu, conversion from Islam to Christianity)
  - burden of proof shifts from the applicant to the **Migration Court** to dispel doubts about the cause of injuries after the applicant produced a medical certificate although not prepared by an expert in assessment of torture injuries

The effect of the principle of effectiveness of ECHR rights (*J.K. v Sweden* + *R.C. v Sweden)*

should be disapplication leading to the shift of the burden of proof from the applicant to the courts or national authorities

A common model of investigative judicial powers and procedural rights in asylum adjudication

- The duty of cooperation as an expression of the principle of effectiveness requires a more active role of national authorities
- Common judicial inquisitorial powers with the help of the principle of effectiveness:
  - Duty to consider *ex officio* complete, up to date and relevant evidence, COI (***M.M. (1),*** para. 66; ***Sofia City Admin. Court***);
  - Duty to consider *ex officio* both generalised risk of harm and individual threats as grounds for possibly recognising SB under Art. 15(c) Recast QD (*Elgafaji* and *Diakité* ; ***ICC***);
  - Prohibited elements of evidence (*A, B, C*): asylum applicant may not be questioned on the details of their sex lives, nor can evidence including videos, pictures of sex acts be accepted.

A common model of investigative judicial powers and procedural rights in asylum adjudication

- New investigative powers are developed by national courts in order to determine the credibility of the individual:
  - ***Tribunal of Catanzaro*** suggested the claimant to actively attend the activities of an LGBT organisation and postponed its decision on the recognition of IP on the basis of persecution on sexual orientation for several weeks after re-hearing the applicant.

    The positive reaction of the applicant and of the report of the organisation have determined the Court to find Article 4(5)(b) QD conditions applicable and thus the applicant worthy of the benefit of the doubt.
- Arts. 47 +19(2) CFR as grounds for protecting the procedural freedom of beneficiaries of SB
  - **CC of Slovenia** declared unconstitutional the nat. leg. that would limit the grounds that could be invoked for the renewal of SB

Added value of the right to be heard in asylum and return proceedings

Right to be heard in ADMINISTRATIVE ASYLUM phase:

- **Art. 14 Recast APD – norm, with only 2 exceptions**
- **EU primary law:**

  Right to be heard is part of both Art. 41(2) CFR + 'rights of defence' =fundamental principle of EU law applicable in all proceedings "which are liable to culminate in a measure adversely effecting a person" (*M.M.(1)*)

- EU Institutions -Art. 41(2) CFR + general principle (*Boudjlida,* para. 32)
- MSs when acting within the scope of EU law – only the general principle of rights of defence (*M.M.(1) and Boudjlida*)

The right to be heard must be respected even when no requirement to do so is expressly stipulated by law *(M.M.(1), para. 86)*

Right to be heard during administrative phase asylum

(*M.M.(1) +(2)*)- Relative FR; personal interview MUST BE HELD:

- *The nat authority is not in a position to reach a dec. with full knowledge of facts*
- *Personal circumstances of the applicant: e.g. vulnerability due to age, health conditions or being a victim of violence*

CJEU content of the right to be heard:

- ✓ *the right to make known his views in writing or in person effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely (M.M.(1), para. 87);*
- ✓ *right to comment on the elements pertinent to the case (ibid)*
- ✓ *credibility needs to be addressed as regards SB (High Court of Ireland)*
- ✓ *invitation to comment upon any adverse/negative credibility findings made by the administration (High Court of Ireland)*
- X *Call and cross-examine witnesses*
- X *No obligation to share in advance the admin's arguments for rejection*

RIGHT TO BE HEARD before a court in asylum proceedings

1. No express requirement in Art. 46(3) Recast APD
2. The mere fact that judicial review is available at a later stage does not in itself remedy the infringement of the right to be heard committed during the issuing of the admin. decision (AG, *G&R*)
3. Relative FR

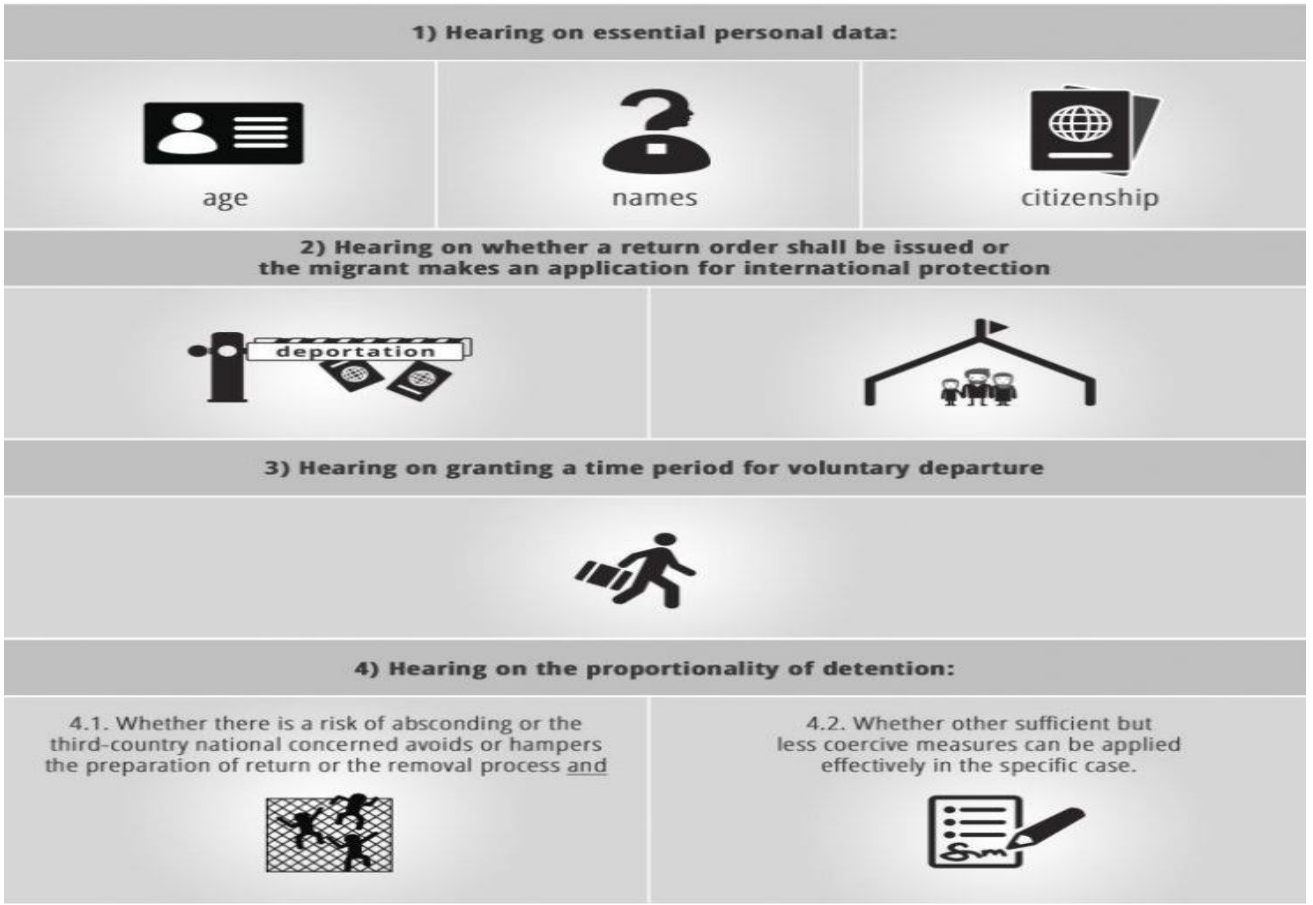
Added value of Art. 47 CFR clarified in Moussa Sacko:

- The purpose of the oral hearing is to enable the court to fulfil its obligations under Art. 46(3) Recast APD
- ACCELERATION of proceedings cannot be in detriment of the applicant's right to an effective judicial protection (para. 45)
- CJEU circumstances where oral hearing MUST BE HELD:

When it is necessary in light of the obligations of full and ex nunc assessment of the adjudicating judges + vulnerability of the individual (similar to those in the administrative phase)

Right to be heard during return proceedings

In respect of what should the migrant be heard before the issuance of an immigration detention order



What are the consequences of violation(s) of the right to be heard?

Landmark case: G&R (C-383/13 prorogation of pre-removal detention) – generally applicable in cases of violations of right to be heard (*Moussa Sacko, para. 38*)

Relative nullity, not every procedural irregularity will lead to an annulment of all or part of the decision

- only if, had it not been for such an irregularity, the outcome of the procedure might have been different (application by analogy of the competition law dev. test) **BUT at issue RIGHT TO LIBERTY**

- Not recognising this power of assessment to national courts would be tantamount to undermine the effectiveness of the RD (para. 41)

What are the consequences of violation(s) of the right to be heard?

Austrian CC: quashing the judgment of the Asylum Court for not hearing the individual due to lack of credibility; rejected the arguments of the AC

- The applicant was too young and unexperienced to the company chauffeur
- The employer was the object of persecution and the 'brotherly relations 'could not suffice

German FC – quashed the judgment of the Administrative Court for lack of hearing in Dublin transfer case; criticised for not addressing a PR

Impact of Art. 47 CFR on the rights of TCNs in national security cases

Landmark case *ZZ (C-300/11)*

1. MSs even when acting within an area where they retain powers, e.g. State security, have to comply with Art. 47 CFR, since they are derogating from EU law (no full discretion);
2. The national court must have the right to review both the reasons for non-disclosure of evidence and the full decision of public aut.;
3. Min guarantees: the person must be informed of the "essence of the grounds which constitute the basis of the decision";
4. 'Essential grounds': details on links to terrorist activities, time and location of a contested behavior (*Kadi II*);

Romania – the compatibility of the domestic procedure of lawyers' obtaining security clearance challenged in light of Art. 6+13 ECHR

Poland (SAC) – refusing to address a PR to clarify the meaning of 'essential grounds'

Impact of Art. 47 CFR and general principles on judicial review powers

- Landmark case on the nature and extent of judicial control of detention measures - ***Mahdi (C-146/14 PPU)*** :
  - Duty of individual assessment;
  - A set of 3 types of evidence that need to be assessed:
    1. Facts and evidence adduced by the administrative authority
    2. Observations submitted by the parties
    3. ANY OTHER ELEMENT that the court find relevant
  - Judicial review powers cannot be limited to quashing the administrative detention, but they can substitute the administrative decision with their own if less coercive measure are effectively available
  - In no circumstance can this judicial review power be confined to the matters adduced by the administration;

Impact of Art. 47 CFR and general principles on judicial review powers

- ***Impact of Mahdi*** – extending judicial control powers
  - reformatory powers to establish alternative measures ex officio (referring nat. court + other nat. courts, see Dutch Council of State)
  - disappl of nat. leg. – closed hearing (*Bulgarian SAC)*
- ***Cross-sectorial impact of Mahdi*** - detention within Dublin III procedure
  - *Administrative Court of Slovenia:* a best practice example of applying a rigorous scrutiny test to detention measures (+Mahdi empowering the national judge to assess ex officio the legality of the national legislation on the basis of which the detention is adopted in light of FRs and EU sec legis.
- **Principle of proportionality**: examples of gradation of alternative measures (ascending measures: *Lithuanian SAC, Tribunal of Turin, CA of Bucharest*)

Art. 47 CFR legitimising reformatory powers

- Compensation for unlawful asylum detention: *Poland*
  - *SAC* –approving compensation contrary to opposing domestic judicial decisions;
  - CA – increasing the amount of compensation + establishing criteria for a just and fair amount of compensation
- Art. 47 CFR right to have the case adjudicated within a reasonable time as shield against the nat. governments limitation of judicial reformatory powers:
  - *Budapest Public Administration and Law Court*: consistent interpretation
  - *Slovakian SAC* – pending PR (C-113/17)

Impact of Art 47 CFR on the right to remain in the EU – suspensive effect of appeal

- *Automatic suspensive effect of the appeal* only for regular asylum procedure (Art. 46(5) Recast APD) + Dublin transfer (Art. 27(3) Dublin III Regulation)
- Accelerate asylum proceedings, return proceedings – option to the MSs – *ex officio or separate individual application*
- Added value of Art. 47 CFR:

1. +Art. 19(2) CFR (RETURN) → CJEU (*Abdida*, C-562/13): Obligation to grant ipso jure suspensive effect to the appeal if the removal would entail "a risk of grave and irreversible deterioration of state of health" (no available medical treatment in the CO)

A general obligation to grant suspensive effect of appeal in case of risk of refoulement (also outside medical cases, see ECtHR, EC Recommendation and Return Handbook)

2. +Art. 19(2) CFR (ASYLUM) → CJEU (*Tall*, C-239/14): extending the obligation to grant ipso jure suspensive effect of appeal also to negative asylum decisions delivered in accelerated procedures if they entail a risk of refoulement

Divergent national jurisprudence
Unclear impact of Art 47 CFR on the scope of suspensive effect of appeal in asylum and return proceedings

Uncertainties regarding the impact of *Tall* and *Abdida* at national level:

1. (*Poland, divergent jurisprudence*) - does the negative asylum decision expose the TCN to a risk of refoulement in a system with separate administrative decisions for asylum and return proceedings?
2. What AUTOMATIC suspensive effect of appeal means?

compatibility of domestic procedures opting for suspensive effect of appeal via individual separate applications (e.g. SK, LT, NE) (*pending C-175/17*)

3. Decreasing the levels of appeal in asylum adjudication to which suspensive effect is recognised (IT, EE)

What possible grounds for the suspensive effect of the appeal?

- Only absolute FRs or also relative ones?

+Arts 7, 24 CFR – suspensive effect of appeal (SAC Estonia)

Conclusions added value of Art. 47 CFR

- Art. 47 CFR and general principles help to accommodate different domestic asylum and immigration adjudication systems
- *Vertical and horizontal judicial dialogue* **a common model of judicial investigative, review and reformatory powers is progressively** developed in the EU to secure effective justice in asylum and immigration
- *Concrete outcomes of the use of Art. 47 CFR and general principles of EU law:*

  Enhanced national remedies:

  - *Consideration ex officio of suspensive effect of appeal against a return or asylum decision*
  - *Wider investigative powers for administrative judges: e.g. new COI; suggested actions testing credibility*
  - *Judicial review powers: new elements (grounds for IP, facts) not raised by the parties*
  - *Reformatory powers: beyond quashing; setting new outcomes/remedies*

THANK YOU FOR YOUR ATTENTION and COLLABORATION!

The right to access to court – multifaceted guaratees

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The right to access to court – multifaceted guarantees

1. A right to have access to an independent and impartial Court
2. A right to have effective access to a Court despite impediments caused by national procedural rules that:
   - preclude the full accessibility to a judge (prohibitive limitations);
   - make the access to a judge excessively difficult (restrictive limitations - specific focus to time limits in lodging appeals in asylum proceedings).
3. The right to have access to a judge must be effective. MSs have a duty to remove material obstacles that affect the concrete possibility to access justice (specific focus on free legal assistance).

The right to have access to a judge that must be independent and impartial

- Leading case: in *HID and B.A.* (C-175/11) the CJEU qualified the **Irish Refugee Appeal Tribunal** as a court for the purposes of Art. 39 of the 2005/85 directive, despite several doubts concerning its independence.
- CJEU: the "court" notion should be interpreted in light of the meaning of "court" under the preliminary reference clause, according to recital 27 of the QD . The effectiveness and independence of the administrative and judicial system of each MS must be assessed as a whole.
- These references have been omitted in the new Recast directive. The notion of "court" under Art. 267 TFEU and the notion of court under the recast directive (+Art, 47 CFR) may have a different scope as the two norms do not perform the same function.
- Explanations to Art. 47 CFR do not mention Art. 267 TFEU. ECtHR case law under Art. 6 ECHR shall be considered.
- Indication also stemming from the Committee of Ministers of the CoE (recommendation 12/2010 – role of the Councils for judiciary).
- At the MS level: many quasi-jurisdictional bodies perform appeal functions – are they Courts under art. 46 RPD? (see Greece – Independent Appeals Committees).

2. Effective remedy and prohibitive limitations to access a Court

- To what extent can Art. 47 CFR ensure access to a court, when national legislation does not ensure such a guarantee?
- The **Tribunal of Turin (order 3790/2016 24th May 2016)** allowed an action brought by a detained asylum seeker against the on-going detention. National law admits only ex officio review at regular interval of time
- The **Polish Supreme Administrative Court** has addressed a **preliminary reference** to the CJEU in order to know whether the exclusion of judicial review of a visa decision is conform with the right to appeal as set out in the Visa Code as interpreted in light to Article 47 CFR. Still pending (**C-403/16**), AG Bobek opinion: art. 47 CFREU must be interpreted in the way that MS cannot exclude the possibility of review of judicial review of visa refusal

3. Restrictive limitations to access to justice in procedural norms: the case of time limit to lodge the appeal in asylum procedures

- Many MSs introduced short time limits to lodge an appeal within the accelerated asylum procedures.
- Art. 46(4) Recast APD: MSs shall provide for reasonable time limits.
- Guidelines are to be found in *Danqua* (C-429/15) and the *Diouf* (C-69/10): time limits shall comply with the right to an effective remedy.
- This entails the application of a proportionality test: due regard to **individual conditions of the party, the complexity of the procedure** and of the **legislation to be applied**, etc.
- Duty of the national judge: *to carry out this evaluation and to decide whether the time limit had the result to render the right to an effective remedy extremely difficult to exercise*.
- See ECtHR case-law: I.M. v. France (n. 9152/09): violation of Arts. 5 + 13 due to the decision to assess a first asylum application under the fast-track procedure.
- Cases in the Italian case-law where the appeal has been considered legitimate even if lodged beyond the time limit due to language understanding problems.
- **Czech SAC** decision (122/2015, 30 June 2015): too short time limit for lodging a complaint having regard to the lack of legal assistance in detention facilities – quashing the first judge decision that considered the appeal inadmissible.

4. The Right to an effective remedy and positive duties on Member States to make the access to a judge effectively available: LEGAL AID

- Under the Recast APD (art. 20-21) legal aid is subject to several limitations: a) only in appeal procedures; b) MS are allowed to grant L. Aid only to persons lacking resources; c) **legal aid not granted to applicants with no tangible prospect of success**.
- The Tribunal of Milan (Decree n. 35445, 28 June 2017): the current practice of many Italian bar associations - which systematically consider legal aid's requests to bring appeal as clearly unfounded is contrary to the right to an effective remedy. Art. 47 used to interpret extensively the national procedural rules as to avoid a declaration of inadmissibility, due to the lack of formal requirements in the legal aid request.
- Czech SAC (122/2015, 30 June 2015): too short time limit for lodging a complaint having regard to the lack of legal assistance in detention facilities – quashing the first judge decision that considered the appeal inadmissible.

Age assessment procedure: A paradigmatic context for the effective implementation of EU standards

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Age assessment procedure and the «inner» role of right to an effective remedy and good administration

The relevance of the issue considering the absence of specific ECJ case-law and direct/express reference to Art. 41/47 CFR:

a) The pivotal principles enshrined at the EU law level (CFR, secondary law): best interest of child, presumption of minor age in case of doubt, medical evaluation as last resource means (Directive 2011/36/EU; *Turin* and *Venice* judgment)

b) The existence of settled ECtHR jurisprudence (+ pending case-law, *Darboa*)

c) The cross-sectorial nature of the issue: functional and decisive within different contexts in which minors' fundamental rights are at stake (status determination, special reception conditions, detention)

d) The distinctiveness of a «indirect»/«inner» role of principles of effective remedy and good administration: *shall age assessment be considered a priviledged context in which the expansive nature of such principles can be effectively and proactively implemented by national judges (seldom facing a lack of ad hoc remedies)*?

Areas in which Arts. 41 and 47 CFR may play a more direct role for « national judges»

a) Right to appeal against an unlawful age assessment (in terms of methods and individual's rights – art. 47 CFR)

b) Right to be promptly and formally informed and notified on age assessment outcomes (precondition for the right to appeal/effective remedy – Art. 47 CFR – *Darboe Camara v Italy*, pending)

c) The duty for national authorities to properly guarantee the right to a good administration during the procedure, in terms of length of the assessment, accessibility to evidence and outcomes by part of individual involved (see Art. 41 CFR – see also ECtHR *Mahamed Jama v Malta; Abdullhai Elmi v M*alta)

d) The duty for national authorities to fairly and adequately make use of age assessment outcomes in related evaluation procedures (good faith in status determination, detention, criminal lability - Art. 41 CFR; art. 5 ECHR)

Common standards as emerging from national jurisprudence (Points to consider – Chapter 7 Rejus Casebook)

Requirements under the **right to an effective remedy**:

a) the right to be assisted during the procedure and duly and promptly informed on the age assessment outcomes, in order to effectively exercise the right to appeal against the decision (proactive role of courts)

b) judicial review in this context is not limited to procedural aspects, but can also go to check the legitimacy of the evaluation made by public administration on the ground of assessment outcomes (fettering of discretion)

c) The right to challenge administration's measures (detention, access to reception system, determination of individual status) directly and autonomously on the ground of the illegitimacy of age assessment procedure or the way in which competent public officers made use of assessment outcomes (**AA, R (on the application of) v Secretary of State for the Home Department & Anor**, 2016)

Common standards as emerging from national jurisprudence (Points to consider – Chapter 7 Rejus Casebook)

Requirements under the **principle of good administration**:

d) The merit of the decision can also be the object of review by judges as it the administration cannot have full discretionary powers (AA, R (on the application of) v Secretary of State for the Home Department & Anor ([2016]). Competent national authorities are called to interpret adequately the assessment outcomes, according to the principle of good faith (**Spanish Supreme Court**, case n. 3186/2013, 17 June 2013)

e) Judges can assess not only the legal but also the scientific rationale and reliability of the age assessment procedures implemented by national authorities, thus ensuring to a vulnerable category of people (in many cases, unaccompanied minors) with an effective remedy against an inconsistent determination of age (**Tribunal of Turin**, Third Section (Penal), 27 January 2014; "**Merton**" case, UK High Court of Justice, 2003)

f) The refusal to consent to medical examinations based exclusively on physical appearance can be considered unreasonable, when it is necessary to enable national authorities to react against an appeal brought against age assessment outcomes (**London Borough of Croydon v Y, Court of Appeal**, 26 April 2016).