The Right to an Effective Remedy in Dublin Asylum Procedures in the EU: Shaping its Contours through the Jurisprudence of the CJEU and the ECHR

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I. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY AGAINST DUBLIN DECISIONS IN THE 1ST PHASE OF THE CEAS: EU Law

A. EU Law on effective remedies:

A.1. Primary Law

Article 19 TEU

*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*

Article 47 Charter Fundamental Rights EU

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

General Principle of EU Law since Johnson’1986 (also UPA’2002; Schmrems’2015, etc.)

“the very existence of effective judicial review designed to ensure compliance with provisions of EU Law is inherent in the existence of the rule of law”
A. EU Law on effective remedies:

A.1. Primary Law

Article 19 TUE
Article 47 Charter Fundamental Rights EU
General Principle of EU Law since Johnson’1986

A.2. Secondary Law

- **Dv on minimum standards on Procedures 2005/85/EC:** Article 3: Member States shall ensure that applicants for asylum have the right to an **effective remedy** before a court or tribunal, against (...) a decision taken on their application for asylum...

- **Dublin II Regulation 343/2003:** Article 19: 1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State. /2. This decision **may be subject** to an appeal or a **review.** Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.
I. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY IN THE 1ST PHASE OF THE CEAS: CJEU Jurisprudence

B. CJEU Case Law interpreting the DIIReg’2003:

B.1. The right to have access to a substantive determination asylum procedure?

- Not entirely: All the implicated States (sending or receiving State) can return an asylum seekers to a S3C (article 3.3 DIIR)
- Asylum seekers do not have any individual right vis-à-vis any specific State = Mutual trust =No specific duty-bearer
- CJEU Cases: Abdullahi’2013/ Puid’2013

B.2. The right to receive a correct decision / that results from a proper implementation of norms?

- Not entirely, as well: Only if “Systemic flaws”....
I. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY IN THE 1ST PHASE OF THE CEAS: CJEU Jurisprudence

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60. In such a situation, (...) the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter (see, to that effect, N.S. and Others, paragraphs 94 and 106, and Case C-4/11 Puid [2013] ECR, par. 30).
I. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY IN THE 1ST PHASE OF THE CEAS: Primary and Secondary EU Law

In the 1st phase of the CEAS the right to benefit from an effective remedy were interpreted as an *autonomous right* (non linked to the claim that a HR were breached) *excepting in cases on non-substantive decisions*:

- **Decisions based on the *D II Regulation***: Admissibility/Scope of the review limited to “systemic flaws” entailing a real risk of breach of Article 4 of the Charter (inhuman or degrading treatment –*N.S.&M.E; Abdullahi; Puid cases-*) => Strong *ethical conception* of rights

- **Decisions on the application of accelerated procedures** (if the grounds for this decision can be reviewed in the remedy against the further substantive decision –*Diouf case-* )
II. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY IN THE 2\textsuperscript{OND} PHASE OF THE CEAS: Changes in EU Secondary Law

A. EU Secondary Law on effective remedies:

A.1. Directive 2013/32/EU on common procedures

- Art. 46 = Art. 39 “effective remedy” of the previous version +
  - MS shall ensure that an effective remedy provides for a full and \textit{ex nunc} examination of both facts and points of law
  - MS shall allow applicants to remain pending the outcome of the remedy…

A.2. \textit{Dublin III} Regulation 604/2013

- \textit{New} Article 27: “The applicant (...) shall have the right to an \textbf{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”
  - + reasonable period for exercising this right
  - + right to remain in the MS pending the outcome of the appeal
  - + free of charges legal and linguistic assistance
II. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY IN THE 2\textsuperscript{OND} PHASE OF THE CEAS: CJEU Jurisprudence

B. CJEU Case Law on Art. 27 of \textit{DIII} Reg. :

B.1. The \textit{right to have access} to a substantive determination asylum procedure?

- \textit{Mirza’2016}: Even having accepted its responsibility according to the \textit{DIIIIR}, MS retain the right to transfer as seekers to \textit{S3C} (art.3.3)

B.2. The right to receive a correct decision / that results from a \textit{proper implementation of norms} ?

- \textit{Ghezelbash’2016 / Karim’2016}
- \textit{Mengesteab’26-7-2017}
II. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY IN THE 2\(^{\text{ND}}\) PHASE OF THE CEAS: CJEU Jurisprudence

B. CJEU Case Law on Art. 27 of \textit{DIII} Reg. :

B.1. The right \textit{to have access} to a substantive determination asylum procedure ?

B.2. The right to receive a correct decision / that results from a proper implementation of norms ?

- \textit{Ghezelbash’2016}:
  
  ... must be interpreted as meaning that (...) an asylum-seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility
  
  ✓ Recital 19 of the Preamble: “\textit{oriented HR approach}”
  
  ✓ New procedural rights for AsySeek: \textit{Evolution of entire Dublin system}
  
  ✓ \textit{Mutual trust} cannot be blind..
II. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY IN THE 2\textsuperscript{ND} PHASE OF THE CEAS: CJEU Jurisprudence

B. CJEU Case Law on Art. 27 of \textit{DIII} Reg. :

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B.2. The right to receive a correct decision / that results from a \textit{proper implementation of norms} ?

\textit{Mengesteab’26-7-2017}

Art.27 of the \textit{D III} Reg. makes no distinction between the rules which can be relied on in the context of the remedy for which it provides, and that recital 19 of that regulation refers, in general terms, to review the application of that regulation.

Moreover, the restriction of the scope of the judicial protection afforded by the \textit{Dublin III Regulation} (...) would not be consistent with the objective, set out in recital 9 of that regulation, of strengthening the protection for applicants for international protection, since that strengthened protection is manifested principally by the grant, in essence, of procedural safeguards for those applicants.
III. THE RIGHT TO BENEFIT FROM AN EFFECTIVE REMEDY NEXT / 3RD PHASE OF THE CEAS: Proposals for a Dublin IV Regulation

European Commission COM(2016) 270 final/2

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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):

The scope of the effective remedy should be limited to an assessment of whether applicants ‘fundamental rights to respect of family life, the rights of the child, or the prohibition of inhuman and degrading treatment risk to be infringed upon.'
1. Asylum seekers should be considered as subjects of EU Law, as the legal system of an integration organization -Asylum seekers are subjects of EU Law because they are right-holders according to the rules of the CEAS

a. Subsidiary protection if conditions described in Dv 2011/95/EU are met
b. Rights to information, personal interview, guarantees... R DIII 604/2013
1. Asylum seekers are subjects of EU Law/right-bearers according to the rules of the CEAS

2. Asylum seekers should continue to benefit from the right to an effective remedy as subjects of EU Law
   - Subjects of EU Law should benefit from an effective remedy to contest:
     a. Decisions breaching substantive HR
     b. Incorrect decisions, that do not respect the rules of the Regulation
In EU Law, not only substantive Human Rights (ethical conception of rights), but also:

- HR
- Procedural rights
- Guarantees
- Legitimate interests in the correct application of norms having an impact in personal status...

1. Asylum seekers are subjects of EU Law/right-bearers according to the rules of the CEAS
2. Asylum seekers should continue to benefit from the right to an effective remedy as subjects of EU Law
3. Properly interpreted, the Dublin Regulation should function as the European tool for determining before which European state asylum seekers will satisfy their right to accede to a procedure aimed at determining their status as refugees or beneficiaries of Int. Protection
   - Individual right to have each application for Int. Protection examined by a concrete State in the European area
   - S3C based only on EU criteria / decision
1. Asylum seekers are subjects of EU Law/ right-bearers according to the rules of the CEAS
2. Asylum seekers should continue to benefit from the right to an effective remedy as subjects of EU Law
3. Properly interpreted, the Dublin Regulation should function as the European tool for determining before which European state asylum seekers will satisfy their right to accede to a procedure aimed at determining their status as refugees or beneficiaries of Int. Protection
4. In the 2nd phase of the CEAS the rights benefiting asylum seekers were enhanced and clarified in the DIIIReg = Asylum seekers were recovered as subjects of EU Law. The 3rd phase of the CEAS risks to abandon this achievement, in line with a fair interpretation of Human Rights.