Chapter 3 – Guaranteeing Procedural Standards

Substantive rights need procedural safeguards in order to be effective. Such procedural standards encompass provisions ensuring that individuals are heard before decisions are taken that may adversely affect their legal position, that reasons are given for such decisions, and that the latter are subject to appeal through effective legal remedies. These safeguards recognize the affected person's agency as a legal subject and, thus, his or her human dignity.

In an objective dimension, procedural rights are inherently related to the rule of law, guaranteeing the supremacy of law as well as the equal and predictable application of legal norms to individual cases. The EU has committed itself to respect the rule of law as one of its core values, on equal level with human dignity, freedom, democracy, equality, and respect for human rights (Art. 2 TEU). This foundational value is also reflected in the Union's objectives guiding the creation of an Area of Freedom, Security and Justice, of which the EU's migration policy is a part: respect for fundamental rights, fairness toward migrants from third countries, and the facilitation of access to justice are supposed to be its cornerstones (Art. 3(2) and 67 TFEU).

Ensuring due process of law is one of the most important expressions of any public authority's respect for the rule of law. In the EU legal order, these standards are recognized as fundamental rights. The EU Charter provides for a right to good administration, including certain procedural rights (Art. 41 EU-CFR) as well as a right to an effective remedy and to a fair trial (Art. 47 EU-CFR). According to the EU Court of Justice, these provisions express general principles of EU law.[339]

Accordingly, EU institutions and bodies as well as Members States' authorities must meet the procedural guarantees stipulated in the Charter in all situations governed by EU law. The EU has, therefore, assumed full legal responsibility, and is politically accountable, for ensuring that these standards are observed in all administrative and judicial proceedings that fall within the substantive scope of EU migration law, irrespective of the

339 On the right to good administration, see CJEU, Case C-604/12, *H. N. v. Ireland* (EU:C:2014:302), at para. 49; C-230/18, *PI* (EU:C:2019:383), at para. 57; on the right to an effective remedy: C-556/17, *Torubarov* (EU:C:2019:626), at para. 55.

fact that such processes are mostly conducted by Member States' bodies. As a consequence, all substantive Human Rights of migrants discussed in this study are accompanied by procedural guarantees derived from EU constitutional law. As we shall explain in more detail below, some of these constitutional guarantees mirror Human Rights that are specific to migrants and are recognized as procedural Human Rights per se.

Does the Union live up to these ambitious commitments toward migrants and, if not, how can it make sure it does?

3.1 Structural challenges and current trends

In the context of migration governance, the recognition of a comprehensive set of procedural rights and a strict respect for the rule of law have long been alien to most legal systems, including those of EU Member States. These systems have traditionally been marked by a notorious exceptionalism regarding immigration proceedings. Full protection by procedural guarantees (as well as by substantive rights) were reserved to citizens, allowing for largely unbound discretionary powers of state authorities vis-à-vis foreigners. This exceptionalism was even more marked toward non-residents, that is, when dealing with applications from persons staying abroad.

The belated and still partial assertion of procedural safeguards in immigration proceedings only started after the Second World War, spurred by three, largely simultaneous developments: the constitutionalization of domestic legal systems, with an increasing importance of the rule of law (or *Rechtsstaat* or *État de droit*) in general; the rise of international Human Rights law and its transformative effect on domestic legal systems; and – arguably the most important driver in this respect – the Europeanization of migration law.[340] Today, as a consequence of this Europeanization, numerous EU legal acts provide for specific procedural safeguards and legal remedies in the context of migration law. They concern, inter alia, applica-

340 Bast, 'Of General Principles and Trojan Horses: Procedural Due Process in Immigration Proceedings Under EU Law', 11 *German Law Journal (GLJ)* (2010) 1006; Rochel, 'Working in Tandem: Proportionality and Procedural Guarantees in EU Immigration Law', 20 *GLJ* (2019) 89.

tions for Schengen visas,[341] the refusal of entries at border crossings,[342] the rejection of applications for residence permits for family reunification[343] as well as for long-term residence,[344] and of a number of residence permits related to labor migration (among others, applications to issue, amend or renew a single permit to reside and work in a Member State,[345] applications for EU Blue Cards,[346] and for residence permits for the purposes of research, studies, training, voluntary service, pupil exchange schemes, or educational projects and au pairing[347]). A specific set of procedural provisions apply once an asylum claim is presented – for example, the right to a personal interview.[348] Furthermore, pursuant to the Return Directive Member States must provide for effective remedies to challenge decisions related to return.[349]

The EU has thus already assumed responsibility to safeguard procedural rights regarding a large spectrum of migration statuses and situations, even if some of the explicit regulations in the respective acts may fall short of the level of protection required by EU fundamental rights and/or Human Rights. This raises the question of where the Union must close remaining gaps of protection by comprehensively providing for procedural rights of

341 Art. 32(3) Regulation 810/2009 establishing a Community Code on Visas (Visa Code).

342 Art. 14(3) Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

343 Art. 5(4), Art. 18 Directive 2003/86/EC on the right to family reunification (Family Reunification Directive).

344 Art. 7(2), Art. 10, Art. 20 Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (Long-Term Residents Directive).

345 Art. 8 Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (Single Permit Directive).

346 Art. 11(3) Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card Directive), replaced by Directive 2021/1883 as of 19 November 2023.

347 Art. 34 Directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) (REST Directive).

348 Art. 14, 46 Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Qualification Directive).

349 Art. 13 Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive). For a recent application, see CJEU, Cases C-924/19 PPU and C-925/19 PPU, *FMS* (EU:C:2020:367), at para. 127 et seq.

migrants. This question is all the more pressing as procedural rights have a particularly widespread impact, as they can come into play at all possible stages of immigration proceedings. Most notably, the following types of decisions may lead to the denial or loss of a particular immigration status:

- decisions on visa applications and on admission at the border (decisions on admission)
- decisions on the renewal or extension of residence permits
- decisions on the termination of residence, particularly expulsion and deportation.

Note that we are applying a wide notion of 'decision' for the purposes of this chapter. The failure of an authority to give a person access to a proper procedure amounts to a decision as well.

Today, procedural guarantees seem to be largely respected by Member States in respect of decisions on renewing or extending an existing residence permit. Similar standards are often violated or even negated, however, when it comes to decisions on the admission of migrants (visa applications or territorial admission at the borders) or on the termination of residence. Here, 'immigration exceptionalism' seems to persist as a historically shaped and bequeathed mindset. This chapter therefore focuses on the latter two issues.

While this chapter is mainly concerned with decisions taken by Member States' authorities, an area of growing tension concerns situations where the EU administration is directly involved as an actor. The last two decades have not only produced a general 'agencification' of EU governance but also a particular rise of EU agencies as key actors involved in 'hybrid' (or 'mixed') administrative decision-making in the field of migration.

Trend 1: Denial of procedural standards for decisions on admission

We observe a persistent pattern of denying procedural guarantees in proceedings that may lead to refusing the admission of migrants. This pattern is particularly marked when the place of decision-making is located outside the territory of the Member State, or in close proximity to the external border.

First, in what amounts to a long-term structural deficit, notoriously little attention is given to procedural standards in visa application procedures conducted at Member States' consular or diplomatic missions. The Visa Code (Regulation 810/2009) contains some procedural guarantees, but

it only applies to short-stay visas (so-called Schengen visas).[350] There are no equivalent horizontal provisions for long-stay visas (so-called national visas, although the ground of admission may be governed by EU law). Procedural guarantees for applications for residence permits defined in EU legislation (such as Art. 5(4) of the Family Reunification Directive[351] and Art. 11(3) of the Blue Card Directive[352]) are potentially thwarted by Member State laws and practices excluding or limiting procedural rights. For example, a provision in the German Residence Act (*Aufenthaltsgesetz*) waives the requirement to specify the reasons for the decision and to inform applicants about available redress procedures and the time limit for bringing an action, when rejecting applications for national visas (Sec. 77(2) German Residence Act).[353]

---

350 Even regarding the application procedures for Schengen visas, Member States have in some instances tried to limit these guarantees by narrow interpretations of EU law – for example, by excluding access to court procedures in the case of the refusal of a visa application: Art. 5(4) of the Polish *Prawo o postępowaniu przed sądami administracyjnymi* (Law on proceedings before the administrative courts) of 30 August 2002.

351 Cf. Art. 5(4) of the Family Reunification Directive: 'The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged. In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended. Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State.'

352 Art. 11(3) of the Blue Card Directive: 'Any decision rejecting an application for an EU Blue Card, a decision not to renew or to withdraw an EU Blue Card, shall be notified in writing to the third-country national concerned and, where relevant, to his employer in accordance with the notification procedures under the relevant national law and shall be open to legal challenge in the Member State concerned, in accordance with national law. The notification shall specify the reasons for the decision, the possible redress procedures available and the time limit for taking action.' The new Blue Card Directive 2021/1883, in effect as of 19 November 2023, redrafts this provision, slightly reinforcing the procedural safeguards in requiring Member States to 'provide an effective judicial remedy, in accordance with national law'.

353 Sec. 77(2) of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory: 'Denial and restriction of a visa and passport substitute before the foreigner enters the federal territory shall not require any statement of grounds or information on available legal remedies; refusal at the

Second, the trend of avoiding asylum jurisdiction (described in Chapter 1) usually encompasses the denial of any individual procedure – that is, such denials amount to decisions of collective non-admission to the territory at the land or sea border. The fact that such decisions do not necessarily qualify as 'decisions' according to the terms of procedural codes is precisely the point of concern. Several manifestations have already been mentioned above, such as the support for pull-back measures conducted by third countries or non-disembarkation-policies toward refugees saved at sea by the closure of ports to SAR vessels (see Chapter 1). In the same vein, individual procedural guarantees are violated by Member State practices of forcible – 'hot' – returns of migrants in immediate proximity to borders, such as the long-running Spanish practice of controlling the border of the Spanish exclaves of Ceuta and Melilla,[354] or the more recent practice of push-backs from Croatia to Serbia or Bosnia and Herzegovina.[355] Similarly, accelerated asylum procedures in transit zones (see Chapter 2) may also lead to an infringement of procedural rights.[356]

Yet even when border guards actually apply EU law to entry decisions at external border crossing, the applicable procedural guarantees often remain rather general and vague. While Art. 14(2) of the Schengen Borders Code (Regulation 2016/399) requires a 'substantiated decision stating the precise reasons for the refusal' for adverse entry decisions, ticking boxes in a standard form is generally supposed to fulfill the requirement. Moreover, the refusal is supposed to take immediate effect. In this regard, Art. 14(3) of the Schengen Borders Code does not set precise conditions for satisfying the guarantee of an effective remedy.

---

border shall not require written form. Formal requirements for the denial of Schengen visas shall be determined by Regulation (EC) No 810/2009.'

354 See, e.g., López-Sala, 'Keeping up Appearances: Dubious Legality and Migration Control at the Peripheral Borders of Europe: The Cases of Ceuta and Melilla', in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union* (2020) 25.

355 European Council on Refugees and Exiles (ECRE), 'Widespread Pushbacks and Violence Along Borders in the Balkans Continues', Press release, 20 December 2019, available at https://www.ecre.org/widespread-pushback-and-violence-along-borders-in-the-balkans-continues/; ECRE, 'Croatia: Further Evidence of Systemic Push-Backs at the Border with Bosnia', Press release, 5 June 2020, available at https://www.ecre.org/croatia-further-evidence-of-systemic-push-backs-at-the-border-with-bosnia/.

356 See, e.g., CJEU, Cases C-924/19 PPU and C-925/19 PPU, *FMS* (EU:C:2020:367).

Trend 2: Deportation procedures without adequate procedural guarantees

We also observe a persistent pattern of insufficient procedural guarantees in proceedings that may lead to the termination of residence.

The most critical issue in this regard is the procedures of forced returns. Such deportations or 'removals' (the term employed by EU legislation)[357] regularly involve coercive measures, including the use of physical force, by Member State officials. They may lead to irreversible harm on the side of the deported person when she or he fears individual persecution or general insecurity in the destination country. Deportations carry an inherent risk of leading to violations of substantive Human Rights. It is, therefore, essential to provide for comprehensive procedural safeguards in EU law as well as their strict implementation by Member States. Neither requirement, however, is currently fully satisfied.

First, the lack of sufficiently clear procedural guarantees concerns EU legislation on return decisions. According to the Return Directive, such return decisions must precede the actual deportation and should also usually provide for a certain period for voluntary departure.[358] The right to be heard before taking a return decision is not explicitly provided in the Return Directive; it was inferred by the CJEU from general principles of EU law.[359] The Commission's proposal of 2018 for a recast Return Directive still does not contain any such clause.[360] Moreover, the Return Directive currently fails to provide for suspensive effect of appeals against return decisions concerning applicants for international protection.[361]

An even more pressing issue, however, is the actual execution of deportations. Despite being regulated in some detail by the Return Directive, Member States' actual enforcement of returns frequently leads to violations of procedural standards such as safeguards for sufficient access to legal assistance, or even respect for the suspensive effects of appeals against deportation decisions. For example, the European Committee for the Pre-

357 See, e.g., Art. 8 Return Directive.
358 Art. 6–7 Return Directive.
359 CJEU, Case C-249/13, *Boudjlida* (EU:C:2014:2431), at para. 28 et seq.
360 Proposal for a recast Return Directive, COM(2018) 634, 12 September 2018, at 79; European Parliament Research Service, The proposed Return Directive (recast): Substitute Impact Assessment (2019), at 79, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf.
361 Leading to possible violations of Art. 18, 19, 47 EU-CFR, see CJEU, Case C-181/16, *Gnandi* (EU:C:2018:465), at para. 54.

vention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) mentions in a 2019 report that in 2017 and 2018 seven persons were unlawfully deported from Germany while legal proceedings that had suspensive effect were still pending before a court.[362]

Such cases are often not recognized by the public because of a lack of independent observation. Despite the fact that Art. 8(6) of the Return Directive requires Member States to install an 'effective forced-return monitoring system', an FRA report revealed that in 2018 four Member States did not sufficiently do so, providing either no monitoring at all (Cyprus), a monitoring system belonging to the branch of government responsible for return (Slovakia and Sweden), or a system that only covers parts of the country (Germany).[363]

Trend 3: Blurring accountability by agencification of EU migration policy

An increasing cause of concern is the lack of accountability of EU agencies involved in mixed proceedings implementing EU migration law.

With more than 40 agencies at present, the increasing involvement of EU agencies in European executive governance – its 'agencification' – has become a general trend of EU policy since the 1990s. The term describes a structural process of functional decentralization within the EU executive, shifting executive powers away from the EU Commission and usually implying a higher degree of Member States' control via the agency's governing bodies. This goes hand-in-hand with a process of federal centralization – increasing involvement of EU bodies in composite administrative procedures involving both Member State and EU authorities. EU agencies have their own legal personality and enjoy a certain degree of administrative and financial autonomy. Agencies assist in the implementation of EU law and policy, collect information, provide scientific advice, and help with the coordination of Member State authorities. In some instances, agencies can adopt legally binding acts if the founding legislative act so provides.

362 See for example: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the German Government on the visit to Germany, 9 May 2019, at 8–9, available at https://rm.coe.int/1680945a2d.

363 FRA, Forced return monitoring systems: 2019 update (2019), available at https://fra.europa.eu/en/publication/2019/forced-return-monitoring-systems-2019-update.

EU agencies are a well-known feature of EU composite administration, first developed in the field of governing the internal market. In migration policy, the involvement of agencies in 'mixed' or 'hybrid' procedures of decision-making is a more recent phenomenon. Since the establishment of Frontex in 2004 (renamed 'European Border and Coast Guard Agency' in 2016)[364], EASO in 2010[365] and eu-LISA (EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice) in 2012,[366] agencies have played an increasing role in the implementation of EU migration policy.[367]

Due to the nature and structural features of EU agencies, this development poses a number of obstacles to the full respect for procedural safeguards, particularly concerning access to justice. Legal and political accountability for the decision taken is notoriously blurred, most notably by the structural entanglement of different actors.

The main task of Frontex is to support EU Member States in controlling the external borders of the Union and the Schengen area (see also Chapter 1). It does so by the deployment of European Border Guard Teams and the coordination of maritime operations or operations at external land borders. In 'joint operations' it coordinates the deployment of staff and equipment from one Member State in another EU Member State, or even in third countries. In such instances of operational cooperation between the agency and Member States, responsibility is often diffused – despite a moderately increased level of scrutiny since the 2018 renewal of Frontex's founding Regulation.[368] In recent years, evidence for the involvement of

364 See Regulation 2019/1896 on the European Border and Coast Guard (Frontex Regulation).

365 See Regulation 39/2010 establishing a European Asylum Support Office (EASO Regulation).

366 See Regulation 1726/2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA).

367 Tsourdi, 'Beyond the 'Migration Crisis': The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies', in J. Pollak and P. Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis* (2021) 175.

368 M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms* (2018), at 1, available at https://sas-space.sas.ac.uk/9187/.

Frontex officers in push-back operations, such as at the maritime Greek-Turkish border, has been abundant and sparked public criticism.[369]

EASO was originally more focused on gathering and sharing information among EU Member States – for example, on 'best practices in asylum matters' or on countries of origin of persons applying for international protection.[370] In recent years, it has considerably expanded its operational powers.[371] It has become more operationally involved in the asylum procedure (for which Member States remain primarily competent), as in the case of interviews conducted by deployed experts. This has nourished uncertainty as to the procedural rights available to migrants in such cases.[372]

In the case of eu-LISA, the agency allows for data exchange among EU Member States by providing the IT systems Eurodac (European Dactyloscopy – a fingerprint database for the identification of asylum seekers), SIS (Schengen Information System, containing certain information and alerts on persons, such as when a person's entry is to be refused) and VIS (Visa Information System, including information on applicants for visas to enter the Schengen area). Eu-LISA is also scheduled to set up a new large-scale IT system in 2022 for the automatic monitoring of the border crossing of third-country nationals, the Entry/Exit System (EES).[373] A variety of questions regarding such interoperable system remain unanswered –

369 See, e.g., European Parliament: LIBE Committee, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, Working Document, 14 July 2021, available at https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2021/07-14/14072021FinalReportFSWG_EN.pdf; L. Karamanidou and B. Kasparek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex* (2020), at 55 et seq., available at https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex.

370 See., e.g., Art. 3 and 4 EASO Regulation.

371 On EASO, see Nicolosi and Fernandez-Rojo, 'Out of Control? The Case of the European Asylum Support Office', in M. Scholten and A. Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order* (2020) 177.

372 Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office', 1 *European Papers* (2016) 997, at 1024, available at http://www.europeanpapers.eu/en/e-journal/bottom-up-salvation-from-practical-cooperation-towards-joint-implementation.

373 Based on Regulation 2017/2226 establishing an Entry/Exit System (EES).

for example, how to effectively ensure the right to access one's own data and have incorrect data rectified.[374]

Overall, the structure of such 'mixed administration' between agencies and Member State administrations, the entanglement of multiple actors in general, and the complex legal structure of the agencies lead to a lack of transparency and of information, making it difficult to determine who is actually responsible for potential rights violations.

To make matters worse, the conditions of admissibility for actions brought before the CJEU by individuals against measures taken by agencies are very restrictive (see Art. 263(4) TFEU). This is particularly true of the criteria for determining a reviewable act, the criteria for determining direct and individual concern caused by such acts, and the short time limit of two months for filing an action.[375]

3.2 Legal evaluation

3.2.1 General framework

In universal Human Rights law, procedural guarantees tend to be rather general and/or fragmentary compared to substantive rights. Procedural guarantees under customary international law form only a thin layer of International Migration Law. This relates to the prohibition of arbitrary detention, certain due process guarantees concerning the removal of migrants, and respect for human dignity in the enforcement of immigration control.[376] However, a growing awareness of the international community is reflected in the Global Compacts. The Global Compact for Migration restates that 'respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance' (GCM, para. 15) and establishes the non-binding objective to strengthen certainty and pre-

374 FRA, Fundamental Rights and the Interoperability of EU Information Systems: Borders and Security (2017), at 33 et seq.; R. Bossong, *Intelligente Grenzen und interoperable Datenbanken für die innere Sicherheit der EU: Umsetzungsrisiken und rechtsstaatliche Anforderungen* (2018), at 28 et seq., available at https://www.swp-berlin.org/fileadmin/contents/products/studien/2018S04_bsg.pdf.

375 M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms* (2018), at 10 et seq., available at https://sas-space.sas.ac.uk/9187/https://sas-space.sas.ac.uk/9187/.

376 V. Chetail, *International Migration Law* (2019), at 132 et seq.

dictability in migration procedures (GCM, para. 28). In the Global Compact on Refugees, States have acknowledged the importance of the rule of law in general (GCR, para. 9) as well as of procedural safeguards for identifying international protection grounds, particularly for those with specific needs (GCR, para. 59–61).

In universal Human Rights treaties, the ICCPR contains a general right to recognition as a person before the law (Art. 16 ICCPR) as well as a right to a fair trial and certain rights of the accused in criminal procedures (Art. 14 and 15 ICCPR). Stand-alone guarantees regarding administrative proceedings are not explicitly mentioned. In respect of migrants, the ICCPR stipulates a prohibition of arbitrary expulsions, but only of foreigners who are 'lawfully in the territory' of the State (Art. 13 ICCPR). In a similar vein, the 1951 Refugee Convention contains procedural safeguards against expulsions for refugees 'lawfully' in the territory of a Contracting State (Art. 32 Refugee Convention). A rare exception is the UN Convention on the Rights of the Child, which requires States to provide children with a comprehensive right to be heard in all judicial and administrative proceedings (Art. 12 CRC).

The ECHR contains a number of important provisions entailing procedural rights. However, most of them correlate with limitations *ratione materiae* or *ratione personae*. The right to a fair trial (Art. 6(1) ECHR), pursuant to its wording, only applies to 'civil rights and obligations' and to 'criminal charges', and thus not to immigration court proceedings per se. Art. 13 ECHR provides for the right to an effective remedy against any violation of Convention rights. Yet, because the right to an effective remedy is not an autonomous right but an auxiliary one, it can only be claimed in connection with a substantive right derived from the Convention. In addition, implied procedural guarantees that exceed the standard of Art. 13 ECHR can be derived from the prohibition of refoulement laid down in Art. 3 ECHR (see Chapter 1).

European Human Rights law provides for certain procedural guarantees that are applicable to migrants regardless of whether they are seeking international protection. Procedural safeguards relating to expulsion of aliens are provided by the 1984 Protocol No. 7 to the ECHR, ratified by all EU Member States except for Germany and the Netherlands. According to Art. 1(1) Protocol No. 7 ECHR, any 'alien lawfully resident' in a Convention State may only be expelled when such a decision was reached 'in accordance with law' and on the condition that she or he was allowed to

submit reasons against the expulsion, have the case reviewed, and to be represented for these purposes.[377]

In light of the increasing importance of ensuring actual access to procedures with respect to the territorial admission in Europe, a procedural safeguard that has been under the spotlight in the past years is the 1963 Protocol No. 4 to the ECHR, ratified by all EU Member States except for Greece. Art. 4 of Protocol No. 4 ECHR simply states: 'Collective expulsion of aliens is prohibited.' As this provision outlaws any form of collective expulsion without the qualification of lawful residency, it applies to all persons irrespective of their immigration status. While the corresponding guarantee in unwritten universal Human Rights law is mostly regarded as a substantive right accorded to a group of persons, the case-law of the ECtHR has developed implied procedural guarantees protecting individual migrants, including but not limited to persons seeking international protection. Following the jurisprudence of the ECtHR, the provision requires a 'reasonable and objective examination of the particular case of each individual alien'.[378] Such a sufficiently individualized examination requires that each person 'has a genuine and effective possibility of submitting arguments against his or her expulsion' as well as an appropriate examination of those arguments by the state authorities involved.[379]

It is noteworthy that the ECtHR interprets the concept of expulsion not in a narrow but in a wider sense, encompassing different forms of removal, among other things in extraterritorial situations.[380] In its 2020 Grand Chamber judgment in the case *N.D. and N.T. v. Spain*, the ECtHR confirmed the view that the term 'expulsion' also covers non-admission of aliens at state borders,[381] notwithstanding its ultimate rejection of the application in the instant case on the basis of the applicants' own conduct

377 Exceptions are possible according to Art. 1(2) for reasons of public order or national security.

378 See, e.g., ECtHR, *Čonka v. Belgium*, Appl. no. 51564/99, Judgment of 5 February 2002, at para. 59.

379 ECtHR, *Khlaifia and others v. Italy*, Appl. no. 16483/12, Judgment of 1 September 2015, at para. 238 and 248.

380 ECtHR, *Hirsi Jamaa and others v. Italy,* Appl. no. 27765/09, Judgment of 23 February 2012; *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020, at para. 166 et seq.

381 ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020, at para. 173.

and conditional upon a supposedly present 'genuine and effective access to means of legal entry'.[382]

It follows that, according to the ECHR – and, hence, in European migration policy at large – any decision by public officials on the territorial admission of migrants must be sufficiently individualized in order to comply with the prohibition of collective expulsion.[383] In this sense, Art. 4 Protocol No. 4 ECHR constitutes a general due process clause in European migration law and, thus, a procedural corollary to the right to juridical personality in immigration proceedings.[384] The rights enumerated in Art. 1 Protocol No. 7 ECHR can serve as a point of reference for determining this minimum standard. This standard encompasses the rights to submit reasons against a decision adversely affecting the migrant, to have one's case reviewed, and to be represented for these purposes. Save for the carve-out in *N.D. and N.T. v. Spain*, the precise scope of which is still subject to debate, the requirement of lawful residence stipulated in Art. 1(1) Protocol No. 7 ECHR has become immaterial in order to avoid collective expulsions. In effect, the standards laid down in Protocol No. 7 constitute the procedural yardstick for all decisions granting or refusing lawful immigration status.[385]

The EU should not have any difficulties in meeting the minimum procedural guarantees derived from international Human Rights law. The relevant provisions are mirrored, specified, and, in many respects, extended by the fundamental rights laid down in the EU-CFR.

With regard to administrative procedures, Art. 41 EU-CFR sets a high standard by providing for a right to good administration,[386] comprising,

382 Ibid., at para. 201.

383 Leboeuf and Carlier, 'The Prohibition of Collective Expulsion as an Individualisation Requirement', in M. Moraru, G. Cornelisse and Ph. de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (2020) 455.

384 For a comparison with the American Convention on Human Rights, see Campbell-Duruflé, 'The Right to Juridical Personality of Arbitrarily Detained and Unidentified Migrants After the Case of the Guyaubin Massacre', *Revue Québécoise de droit international* (2013) 429, at 439.

385 Note that the ECHR may also apply to visa procedures, following the case-law of the former European Commission of Human Rights which ruled that a State may be held responsible under the ECHR for acts of visa officials in its embassy: EComHR, *X v. Germany*, Appl. no. 1611/62, Decision of 25 September 1965, Yearbook 8 (1965) 158, at 163.

386 It is not clear whether or not this right can also be considered as being part of the corpus of customary international law and/or a general principles of

among other things, the right to be heard and the obligation of the administration to give reasons for its decisions. Technically, Art. 41 EU-CFR is merely directed at EU institutions and bodies.[387] However, the CJEU has acknowledged that the right to good administration constitutes a general principle of EU law,[388] hence it applies also to Member State authorities when acting within the scope of EU law. This is particularly true for the right to be heard as part of the so-called 'rights of defence', which have been developed in the CJEU's case-law as cornerstones of any administrative proceedings governed by EU law.[389] While these rights have originally been recognized in proceedings that may lead to an administrative sanction, they have since been extended also to adverse decisions taken upon the initiative of the potential beneficiaries.[390]

As far as the right to an effective remedy is concerned, Art. 47 EU-CFR provides for a comprehensive guarantee that exceeds the standard established by Art. 13 ECHR in various respects. In particular, the effective remedy must be 'before a tribunal' (as compared to remedy 'before a national authority', which may be a quasi-judicial body), and any rights granted by EU law entail this protection (rather than the enumerated Convention rights, as provided by Art. 13 ECHR).[391]

Given that EU constitutional law generally provides for a higher level of protection in terms of procedural rights, both at the administrative and the judicial stages of immigration proceedings, one may even argue that there is no point in identifying the extent to which respect for these rights is required by Human Rights law. However, as our analysis of current trends

---

law within the meaning of Art. 38(1) of the ICJ Statute; see B. Fassbender, *Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure That Fair and Clear Procedures are Made Available to Individuals and Entities Targeted With Sanctions Under Chapter VII of the UN Charter*, available at https://www.un.org/law/counsel/Fassbender_study.pdf. As far as the EU is concerned, however, the relevance of deciding this controversy is diminished by the applicability of Art. 41 EU-CFR.

387 CJEU, Cases C-141/12 and C-372/12, *YS* (EU:C:2014:2081), at para. 67.

388 CJEU, Case C-604/12, *H. N. v. Ireland* (EU:C:2014:302), at para. 49.

389 CJEU, Case C-166/13, *Mukarubega* (EU:C:2014:2336), at para. 45.

390 CJEU, Case C-277/11, *M.M.* (EU:C:2012:744), at para. 87; on the development of the case-law, see St. Bitter, *Die Sanktion im Recht der Europäischen Union* (2011), at 37–89.

391 For more recent case-law on the scope of Art. 47 EU-CFR, see CJEU, Case C-556/17, *Alekszij Torubarov v. Bevándorlási és Menekültügyi Hivatal* (EU:C:2019:626); Cases C-133/19, C-136/19 and C-137/19, *B. M. M.* (EU:C:2020:577).

and persistent patterns demonstrates, the EU and its Member States are not immune to the legacy of 'immigration exceptionalism'. Recalling that a basic layer of procedural guarantees owed to migrants is part of Human Rights law may be instrumental in overcoming this legacy, even in a polity that proudly claims to be 'a Union based in the rule of law'.

3.2.2 Specific issue: Application of procedural standards on visa decisions

On the basis of our construction of Art. 4 Protocol No. 4 ECHR as a general due process clause, it follows that all decisions of state officials on the territorial admission of non-resident foreigners, irrespective of their status or the nature of their claim, must be adequately individualized and respect certain procedural safeguards (see above, 3.2.1). Accordingly, the prohibition of collective expulsion would in principle also provide for procedural rights regarding visa decisions governed by EU law.

This conclusion may be challenged based on the ECtHR judgment in the *M.N. and others v. Belgium* case. According to the ECtHR, the Convention does not apply to visa applications filed at embassies and consulates abroad by persons seeking international protection. This follows from Art. 1 ECHR, which limits the applicability of the Convention to persons within the 'jurisdiction' of a Contracting Party. The Court holds that such jurisdiction, understood as territorial or extraterritorial effective authority or control, is not exercised by Convention States vis-à-vis foreign nationals who apply for a humanitarian visa at one of their diplomatic and consular missions.[392] While in the instant case the Court ruled out a potential violation of Art. 3 ECHR, the same rationale arguably applies to Art. 4 Protocol No. 4 ECHR.

However, we counter the presumed insignificance of Human-Rights-based procedural standards in the context of visa procedures by making two legal observations. First, the ECtHR's finding regarding the lack of jurisdiction in the *M.N.* case determines whether a Convention State (in this case, Belgium) has violated its treaty obligations under public international law. Given that the EU is not a party to this Convention anyway, this sheds no light on the issue as to whether the EU, and EU Member States when implementing EU law, meet the relevant obligation *in terms of substance*. We would like to recall here the argument developed in the introductory

392 ECtHR, *M.N. and others v. Belgium,* Appl. no. 3599/18, Grand Chamber Decision of 5 May 2020, at para. 112 et seq.

chapter that a strong assumption of homogeneity between the substance of Human Rights and the legal obligations under EU law applies, regardless of any international obligation on the part of the EU.

Second, the criteria for establishing the scope of application of EU fundamental rights and the jurisdiction under the ECHR are not identical. Accordingly, the ECtHR rationale regarding the construction of Art. 1 ECHR does not necessarily apply to the EU Charter of Fundamental Rights.[393] According to Art. 51(1) EU-CFR, Charter provisions are addressed to the EU and its Member States 'when they are implementing Union law'. According to our knowledge, neither territorial nor other forms of effective control has played a role in the relevant case-law of the CJEU. Rather, the jurisprudence of the CJEU is guided by the assumption that the scope of EU law (and hence, of the Charter) is determined by the scope of EU powers to the extent that the EU has actually exercised them. In other words, it is unthinkable that the EU has enacted any legislation the implementation of which is not limited by EU fundamental rights.

Accordingly, to the extent that the issuance or refusal of visas is covered by the EU Visa Regulation or any other piece of EU legislation, such action constitutes implementation of EU law in the sense of Art. 51(1) EU-CFR, irrespective of where the acting authority or the applicant sits.[394] In the case of such visa applications, the safeguards of Art. 4 Protocol No. 4 and Art. 1(1) Protocol No. 7 ECHR are thus not only mirrored but also extended and rendered applicable by the EU-CFR, in particular the right to good administration (Art. 41 EU-CFR), comprising the right to be heard and the obligation of the administration to give reasons for its decisions. Only in those instances where EU law, as it stands, does not provide for relevant legislation that triggers the application of EU fundamental rights, such as the issuance of 'humanitarian visas' pursuant to a contested ruling of the CJEU (see Chapter 1), does the rationale not apply.

For national visas (long-term visas), this means that decisions by Member States' consular or diplomatic missions constitute implementation of EU law if they are the pre-entry stage of a decision on granting a residence right defined by an EU instrument, such as decisions on a long-term

393 V. Moreno-Lax, *Accessing Asylum in Europe* (2017), at 292–294, with reference to pertinent CJEU case-law.

394 Moreno-Lax, 'Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge (Part II)', *EU Migration Law Blog* (2017), available at http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/.

visa for family reunification or a Blue Card. Consequently, in such cases the procedural guarantees following from the right to good administration must be respected. In some instances, certain aspect of this right are already specified in the relevant legal acts, e.g., in Art. 5(4) Family Reunification Directive.[395] National provisions limiting procedural rights in application procedures for long-term visas (such as Sec. 77(2) German Residence Act, mentioned above) are subject to the primacy of EU law and, hence, rendered inapplicable whenever the matter falls within the substantive scope of EU law.[396]

Short-term (Schengen) visas are comprehensively determined by EU law. In this regard, it is questionable whether the duty to give reasons is sufficiently reflected in Art. 32(2) Visa Code. This provision merely requires Member State officials to tick boxes on a list in a standard form. The same provision also renders it difficult to legally challenge refusals of Schengen visa without having a substantiated explanation for the refusal at hand. This puts into question the *effect utile* of the right to an effective remedy (Art. 47 EU-CFR). While this issue is not yet decided by the CJEU, there is ample case-law stressing the functional link between the duty to give reasons and the right to an effective remedy.[397] The CJEU already ruled that – contrary to the practice of some Member States – Art. 32(3) of the Visa Code, read in the light of Art. 47 EU-CFR, requires Member States to provide for an appeal procedure against decisions refusing visas, including a right to judicial review.[398]

---

395 R. Hofmann (ed.), *Ausländerrecht* (2nd ed. 2016), commentary on Sec. 77 AufenthG, at para. 3.

396 As to Sec. 77(2) German Residence Act (*Aufenthaltsgesetz)*, an administrative circular acknowledges certain procedural rights in cases of family reunification (see Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz vom 26. Oktober 2009, Sec. 77(2), available at http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_26102009_MI31284060.htm). However, this administrative circular has limited legal effect and refers only to German constitutional law (Art. 6 German Basic Law), not to EU law.

397 See, most notably, CJEU, Cases C-402/05 P and C-415/05 P, *Kadi I*, at para. 71–333; Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, at para. 97–137.

398 CJEU, Case C-403/16, *Soufiane El-Hassani* (EU:C:2017:960), at para. 42. Yet, many problems remain regarding the effectiveness of remedies against the refusal of Schengen visa, e.g. in cases of visa representation by another (Member) State, see CJEU, Case C-680/17, *Sumanan Vethanayagam, Sobitha Sumanan, Kamalaranee Vethanayagam* (EU:C:2019:627).

3.2.3 Specific issue: Decisions on territorial admission at land and sea borders

As far as push-back operations are concerned, they clearly violate the prohibition of collective expulsion (Art. 4 Protocol No. 4 ECHR, mirrored by Art. 19(1) EU-CFR), as entire groups of people are returned without adequate verification of the individual identities and circumstances of the group members. This follows from established case-law of the ECtHR on push-back operations on the high seas[399] and even inside the EU.[400] Push-backs often also constitute a breach of procedural guarantees implied in the principle of non-refoulement (Art. 3 ECHR, mirrored in this respect by Art. 19(2) EU-CFR) – as no individual assessment of the migrant's situation takes place regarding potential grounds for granting international protection – as well as a violation of Art. 13 ECHR (right to an effective remedy, mirrored by Art. 47 EU-CFR).[401]

As to the Spanish practices of 'hot returns' of migrants who crossed the fences separating the Spanish exclave of Melilla from Morocco, the ECtHR's Grand Chamber in 2020 revoked its 2017 Chamber decision in *N.D. and N.T. v. Spain*, finding no breach of the Convention in the particular cases.[402] The reasoning of the judgment is highly contextual, referring to the specific conduct of the applicants (storming the border fences together with a larger group of people) as well as supposedly available alternatives to access Spanish territory using legal pathways. In its ensuing case-law the ECtHR has clarified that being part of a group that has entered the territory without authorization does not, in itself, preclude the person from claiming a right not to be expelled collectively.[403] In any event, the aforementioned carve-out may only be considered regarding the application of Art. 4 Protocol No. 4 ECHR and not of Art. 3 ECHR. Whenever there is an arguable claim of refoulement risk, the procedural

399 ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012.
400 ECtHR, *Sharifi and others v. Italy and Greece*, Appl. no. 16643/09, Judgment of 21 October 2014.
401 ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012.
402 ECtHR, *N.D. and N.T. v. Spain*, Appl. no. 8675/15 and 8697/15, Grand Chamber Judgment of 13 February 2020.
403 ECtHR, *Shahzad v. Hungary*, Appl. no. 12625/17, Judgment of 8 July 2021, at para. 61.

dimension of Art. 3 ECHR always requires a thorough assessment of the individual circumstances (see Chapter 1).

However, it is not only the operational practice of push-backs that seems problematic; so too do the legal provisions in EU legislation regarding the treatment of migrants at the border requesting access to the territory. Most notably, Art. 14(3) of the Schengen Borders Code, while specifying that complaints against entry decisions shall *not* have a suspensive effect, does not set precise conditions for satisfying the guarantee of effective remedy. In particular, Art. 14(3) of the Schengen Borders Code does not specify that the possibility for remedies to not have suspensive effect only applies once it has been established that none of the grounds for international protection apply and the refusal does not violate relevant international law such as the Geneva Convention or the Convention on the Rights of the Child[404] (cf. Art. 4 Schengen Borders Code). At the same time, the right to an effective remedy as laid down in Art. 47 EU-CFR requires in such cases the possibility of obtaining a judicial order establishing suspensive effect of a remedy in an interim injunction before a court.

3.2.4 Specific issue: Scope of procedural safeguards in the Return Directive

The Return Directive provides for certain procedural safeguards that may be invoked in proceedings before national courts by those affected by return decisions (Art. 12–14 Return Directive). Among other things, a certain form is prescribed for such decisions; they must be issued in writing, give reasons, and provide information about legal remedies (Art. 12(1) Return Directive). However, the Return Directive does not contain an explicit right to be heard before a return decision is taken. Instead, the CJEU had to confirm that such a right to be heard 'is required even where the applicable legislation does not expressly provide for such a procedural requirement'.[405] This follows from the rights of the defence as a general principle of EU law.[406] The CJEU also made it clear that the right to be heard serves to enable the persons concerned to express their point of view on the legality of their stay and to provide information that might justify a return decision not being issued, particularly where such a decision may

404 Cf. CRC, *D.D. v. Spain*, Communication No. 4/2016, CRC/C/80/D/4/2016.
405 CJEU, Case C-166/13, *Mukarubega* (EU:C:2014:2336), at para. 49.
406 Ibid., at para. 45.

pose a threat to the rights of the person concerned enshrined in Art. 5 of the Return Directive (non-refoulement, best interests of the child, family life, and state of health).[407]

The current proposal for a recast Return Directive still does not contain any such (horizontal) provision on the right to be heard.[408] Although in the light of the CJEU case-law cited above the right to be heard must be respected under any circumstances, an explicit provision in the new Return Directive would significantly enhance legal clarity and access to legal safeguards.[409]

Instead, the Commission proposal for a recast Return Directive contains a considerable tightening of the provision on voluntary departure. The new Art. 9(4) would oblige Member States to automatically refrain from granting a voluntary period of departure, among other things, where there is a risk of absconding or a risk to public policy. This is contrary to the CJEU jurisprudence on the matter, which states that 'the right to be heard before the adoption of a return decision implies that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced'.[410] Art. 9(4) of the proposed new Return Directive is, therefore, in breach of the right to be heard as guaranteed by EU constitutional law.[411]

Another procedural safeguard that plays a crucial role in the context of returns is the right to an effective remedy (Art. 13 ECHR, Art. 47 EU-CFR). Art. 13(1) of the Return Directive repeats this right 'to appeal against or seek review of decisions related to return … before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence'. What seems to

407 CJEU, Case C-249/13, *Boudjlida* (EU:C:2014:2431), at para. 47–51. On the substantive implications of these references to Human Rights and EU fundamental rights, see below, Chapter 5.

408 European Commission, Proposal for a recast Return Directive, COM(2018) 634, 12 September 2018.

409 European Parliament Research Service, The proposed Return Directive (recast): Substitute Impact Assessment (2019), at 79 et seq., available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf.

410 CJEU, Case C-249/13, *Boudjlida* (EU:C:2014:2431), at para. 51.

411 European Parliament Research Service, The proposed Return Directive (recast): Substitute Impact Assessment (2019), at 80.

be problematic about Art. 13 of the Return Directive, as it stands, is not only that it does not require judicial review (contrary to Art. 47 EU-CFR) but that it also lacks a provision guaranteeing automatic suspensive effect in the case of a potential violation of the principle of non-refoulement.

According to the case-law of the ECtHR on Art. 13 ECHR, effectiveness of the remedy requires that the person concerned should have access to a remedy with automatic suspensive effect when there are substantial grounds for fearing a real risk of treatment contrary to the right of life (Art. 2 ECHR) or the prohibition of torture (Art. 3 ECHR) in the case of a return.[412] In a similar vein, the CJEU decided that, despite the lack of an explicit provision in the Return Directive, the applicant for international protection must be guaranteed a remedy enabling automatic suspensory effect, based on the right to asylum (Art. 18 EU-CFR), the principle of non-refoulement (Art. 19(2) EU-CFR), and the right to an effective remedy (Art. 47 EU-CFR).[413]

The Commission's proposal for a new Return Directive clarifies in its Art. 16(1) that there is a right to 'judicial review' (as compared to administrative or other) to appeal return decisions. In Art. 16(3) and Art. 22(6), it would provide for an automatic suspensive effect of appeals in cases where there is a risk of breach of the principle of non-refoulement by the enforcement of return decisions. However, this shall not apply where 'no relevant new elements or findings have arisen or have been presented', as compared to the asylum procedure (Art. 16(3)(3) and Art. 22(6)(1) Proposal for a recast Return Directive). Depending on the interpretation in the Member States, this may lead to exclusion of the automatic suspension in cases where, for example, a serious health condition and absence of treatment in the country of origin was raised in the asylum procedure but was not sufficient to grant subsidiary protection.[414]

412 ECtHR, *De Souza Ribeiro v. France*, Appl. no. 22689/07, Judgment of 13 December 2012, at para. 82.

413 CJEU, Case C-181/16, *Gnandi* (EU:C:2018:465), at para. 52–56.

414 European Parliament Research Service, The proposed Return Directive (recast): Substitute Impact Assessment (2019), at 85, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf.

3.2.5 Specific issue: Monitoring of deportations by EU Member States

As to the execution of return decisions by actual deportations, Art. 8(4) of the Return Directive acknowledges that Member States may – as a last resort – use coercive measures to carry out the removal of a third-country national. However, such measures must be proportionate and shall be implemented in accordance with the fundamental rights of the person concerned. At the same time, Art. 8(6) Return Directive merely states that 'Member States shall provide for an effective forced-return monitoring system'. It does not prescribe in any detail what such a system should look like. It thus grants wide discretion to Member States.[415] However, the FRA considers a system 'effective' in the sense of Art. 8(6) Return Directive only when the monitoring entity is separate from the authority in charge of returns, which was not the case in all EU Member States in 2018 (see above, Trend 2).[416]

In line with general recommendations of the UN Human Rights Council,[417] all EU Member States should establish independent forced-return monitoring mechanisms with a wide scope of monitoring activities. The EU would have to provide a binding and detailed list of minimum requirements that such institutions must fulfill in order to be 'effective'.[418] However, the Art. 10(6) of the Commission's proposal for a recast Return Directive[419] does not suggest any amendment in this respect. Consequently, the determination of the shape and details of the monitoring systems will continue to be left to the discretion of the Member States.

3.2.6 Specific issue: Accountability of EU agencies

Procedural safeguards also come into play regarding the scrutiny of actions by EU agencies. Here, international Human Rights are particularly rele-

415 Cf. European Commission, Recommendation 2017/2338 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks, at para. 42.
416 FRA, Forced Return Monitoring Systems: 2019 Update (2019).
417 UN Human Rights Council: Report of the Special Rapporteur on the human rights of migrants, A/HRC/38/41, 4 May 2018, at para. 78–79.
418 For a non-binding list, see European Commission, Recommendation 2017/2338 establishing a common 'Return Handbook', at para. 42–43.
419 European Commission, Proposal for a recast Return Directive, COM(2018) 634, 12 September 2018.

vant in their iterations as fundamental rights enshrined in the EU-CFR. As bodies of the EU, the provisions of the EU-CFR are directly applicable to all agencies (Art. 51(1) EU-CFR). Consequently, the right to good administration (Art. 41 EU-CFR) and to an effective remedy (Art. 47 EU-CFR) form the most important yardsticks for the evaluation of procedural guarantees in the context of possible rights violations by EU agencies toward migrants.

The shortcomings in the fulfillment of the requirements set up by Art. 41 and 47 EU-CFR can be illustrated by looking at the legal framework and practice of Frontex. Following amendments in the year 2011, the Frontex Regulation today contains a number of institutional and procedural safeguards for the protection of human and fundamental rights in the context of Frontex activities. A consultative forum on fundamental rights was established, comprising among others representatives of EASO, the FRA, and UNHCR (Art. 108 Frontex Regulation). Furthermore, the position of a fundamental rights officer, appointed by the management board (Art. 109 Frontex Regulation), was created. In 2016, following a 2013 own-initiative report of the European Ombudsman[420] supported by the European Parliament,[421] these instruments were supplemented by a complaints mechanism, providing the ability to file individual complaints against Frontex actions to the Frontex fundamental rights officer (Art. 111 Frontex Regulation).

Another possibility for addressing fundamental rights issues is to file a complaint to the European Ombudsman. The European Ombudsman examines complaints about maladministration by EU institutions and bodies, and can also conduct inquiries on her/his own initiative (Art. 228 TFEU, Art. 43 EU-CFR). The European Code of Good Administration,[422] drafted by the European Ombudsman and adopted in 2001 as a resolution by the European Parliament, serves as a specification of the right to good administration enshrined in Art. 41 EU-CFR, and thus as a basis for the work of the Ombudsman. However, the European Ombudsman

420 European Ombudsman, Decision closing own-initiative inquiry OI/5/2012/BEH-MHZ, 12 November 2013, available at https://www.ombudsman.europa.eu/en/decision/en/52477.

421 European Parliament, Resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, 2017/C 399/01, available at https://www.europarl.europa.eu/doceo/document/TA-8-2015-0422_EN.html.

422 European Ombudsman, The European Code of Good Administrative Behaviour (2015), available at https://www.ombudsman.europa.eu/de/publication/en/3510.

has no binding powers to compel compliance with her/his decisions. The Ombudsman has limited authority, reduced to offering recommendations, warnings, or advice to EU institutions and bodies. Correspondingly, the European Code of Good Administrative Behavior is not a legally binding instrument.[423] Furthermore, complainants must be either EU citizens or residents to have legal standing (Art. 43 EU-CFR). Thus, the administrative procedures installed by the Frontex Regulation and the complaints mechanism with the European Ombudsman can complement, but not replace, the possibility of judicial review as the core of the right to an effective remedy guaranteed by Art. 47 EU-CFR.[424]

The CJEU, according to Art. 263(1) TFEU, reviews the legality of acts adopted by bodies or agencies of the EU intended to produce legal effects vis-à-vis third parties. This review can also be initiated by a natural or legal person who is addressed by the act or to whom it is in other ways of direct and individual concern (Art. 263(4) TFEU). However, in the case of Frontex these requirements are nearly impossible to meet due to the structural features of Frontex operations. These are notoriously marked by an involvement of a plethora of multi-level authorities, often consisting of (local and deployed) officials from different (host and guest) Member States, Frontex staff, and actors from third countries (such as the Libyan coast guard). Given these complicated structures, it is legally and practically all but impossible for individuals to prove that the ultimate operational control in a particular situation rested with Frontex rather than with officials of third countries or of the host Member State, even though Frontex is widely regarded as playing a predominantly coordinating role. However, its acts are not final and supposedly do not have legal effects vis-à-vis individuals (see Chapter 1).[425]

A lack of information, on the side of the individual affected, about the details of Frontex operations often contributes to the difficulty of substan-

423 N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (2018), at 33.

424 J. Rijpma, *The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?* (2016), at 30, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf.

425 M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law* (2018); R. Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (2016); M. Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen* (2014), at 337 et seq.

tiating her or his claim. While the principle of transparency and the rights of individuals to access documents of EU bodies (Art. 15 TFEU, Art. 42 EU-CFR), as concretized by secondary EU law,[426] also apply to Frontex (Art. 114(1) Frontex Regulation), and while persons without residence in the EU also have the right to address the agency and receive an answer (Art. 114(4) Frontex Regulation), there is no obligation of result and the content of the answer is left to the discretion of Frontex.[427]

Taken together, these circumstances render the guarantee of Art. 47 EU-CFR in the case of Frontex operations ineffective in practice, and leave individual migrants affected by these operations without proper access to justice, understood as the possibility of obtaining independent and binding judicial review.[428]

These problems could be mitigated by introducing an appeal procedure regarding the decisions of complaints against Frontex actions filed with the Frontex fundamental rights officer (Art. 111 Frontex Regulation). This remedy should provide for full judicial review of such cases by the CJEU. EU primary law already allows for this possibility, as acts setting up agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these agencies intended to produce legal effects in relation to them (Art. 263(5) TFEU). A good example of such a provision is Art. 94 of Regulation 1907/2006 (REACH Regulation),[429] which gives individuals the right to have decisions by the European Chemicals Agency reviewed by the CJEU.[430]

---

426 Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.

427 M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms* (2018), at 7, available at https://sas-space.sas.ac.uk/9187/. Furthermore, challenging such decisions before a court may come with a high financial risk for persons who claim their fundamental rights, as was shown by a 2019 judgment of the General Court: CJEU, Case T-31/18, *Izuzquiza* (EU:T:2019:815).

428 On the parallel issue of EU agencies' involvement in the administration of 'hot spots' at EU borders, see Ziebritzki, 'The Integrated EU Hotspot Administration and the Question of the EU's Liability', in M. Kotzur et al. (eds), *The External Dimension of EU Migration and Asylum Policies* (2020) 253.

429 Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH Regulation).

430 M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms* (2018), at 5–6, available at https://sas-space.sas.ac.uk/9187/.

However, access to justice is also rendered difficult by the multiplicity and divergence of existing legal bases for the plethora of EU agencies. This plurality impedes transparency, accessibility, and predictability of procedural guarantees, not to mention requiring consistent interpretation of the relevant norms by the CJEU. In this respect, the far more numerous decentralized (or 'regulatory') agencies (like Frontex, EASO, or eu-LISA) must be distinguished from executive agencies, the latter being created by the European Commission for a fixed period. As to executive agencies, Regulation 58/2003[431] lays down common provisions on liability (Art. 21 Regulation 58/2003), the legality of acts (Art. 22 Regulation 58/2003), and access to documents and confidentiality (Art. 23 Regulation 58/2003). A similar horizontal regulation providing for common procedural guarantees for decentralized agencies could significantly increase the ability to hold EU agencies accountable and thus serve the *effet utile* of Art. 41 and 47 EU-CFR.

3.3 Recommendations

Recommendation 1: Provide comprehensive procedural safeguards for visa applications

Courts at all levels of European migration governance are called upon to safeguard the procedural rights of migrants in all immigration and asylum proceedings. Art. 41 EU-CFR sets high standards for safeguarding due process in EU migration law, which reflects and expands the Human Rights protected by Art. 4 of Protocol No. 4 and Art. 1 of Protocol No. 7 ECHR. According to Art. 41 EU-CFR and the corresponding guarantee recognized as a general principle of EU law, any processing of a visa application that is substantively governed by EU law must respect the right to be heard and the duty to submit reasons for a decision adversely affecting the applicant, and would have to provide for the possibility of review and representation before the competent authority.

As to EU legislation, the already existing sectoral provisions guaranteeing procedural rights in the case of refusal of a long-term visa should be supplemented by a horizontal provision applicable to all applications for

431 Regulation 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.

granting a right to reside as far as the scope of EU law is affected, including applications for long-term (national) visas.

Recommendation 2: Clarify and strengthen procedural guarantees at the borders

Art. 14(3) of the Schengen Borders Code lacks legal clarity in respect of the guarantee of effective remedy. This provision should be reformulated accordingly. Due consideration is particularly to be given to the suspensive effect of legal remedies. In order to guarantee the Human Right to an individual assessment of one's case – including possible exceptional circumstances – it must always be possible to obtain a judicial order establishing suspensive effect of a remedy in an urgent preliminary ruling procedure.

Recommendation 3: Guarantee sufficient procedural rights when terminating residence

The revised Return Directive[432] should contain a clear and explicit reference to the right to be heard, especially as far as the rights enshrined in Art. 5 of the proposed new Directive ('Non-refoulement, best interests of the child, family life and state of health') are concerned, preferably in a horizontally applicable provision.[433] In a similar vein, Art. 9(4) of the Proposal should not be adopted, as a provision obliging Member States to automatically refrain from granting a voluntary period of departure (e.g., when there is a risk of absconding or to public policy) is in breach of the right to be heard according to the interpretation of the CJEU.

Moreover, the Return Directive should be amended so as to include ECtHR and CJEU case-law on the automatic suspensive effect of appeals against return decisions posing a real risk of a violation of the non-refoulement principle. The wording of the proposed amendments (Art. 16(3) and Art. 22(6) of the Commission proposal) may, however, render the changes ineffective. Most notably, the EU legislature must ensure that the require-

---

432 Cf. European Commission, Proposal for a recast Return Directive, COM(2018) 634, 12 September 2018.

433 European Parliament Research Service, The proposed Return Directive (recast) (2019), at 79, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf.

ment of 'new elements or findings' (cf. Art. 16(3)(3) and Art. 22(6)(1) Proposal for a recast Return Directive) will not lead to a very narrow interpretation by Member States of the scope of automatic suspensive effect.

Unlike the Return Directive as it stands (Art. 8(6)) or the Commission proposal for a recast Directive on the same matter (Art. 10(6)), the EU should provide a binding and detailed list of minimum requirements for forced-return monitoring mechanisms. In order to render this institution effective, its shape and independence should not be left to the discretion of the Member States.

Recommendation 4: Guarantee a right to an effective remedy against EU agencies

In face of the trend toward an agencification of EU migration policy, the EU must ensure that the relevant actors in the field remain accountable and their actions are legally reviewable. In order to achieve this aim, the EU should adopt a horizontal regulation for all EU agencies, including a general minimum standard for safeguarding procedural rights.

Such a horizontal provision is important to increase transparency as a precondition to effective and adequate access to justice. Such a horizontal regulation should be reinforced by procedural safeguards for the specific contexts of Frontex, EASO, and eu-LISA.