Adjudicating Migrants' Rights: What Are European Courts Saying?

The European Court of Justice Shaping the Right to Be Heard for Asylum Seekers, Returnees, and Visa Applicants: An Exercise in Judicial Diplomacy

Madalina Moraru*

This article analyses a decade of jurisprudence of the Court of Justice of the European Union (CJEU, the Court) to show how the Court has shaped asylum seekers' and immigrants' right to be heard and to determine the added value of its jurisprudence to the protection of the right to be heard at EU and domestic levels. The article asks whether the CJEU has developed a specific conception of this right and whether this conception aligns with any of the existing scholarly characterisations of the CJEU's approach to migration: activism, passivism, idiosyncratic, or favouring the interpretation of governments or referring courts. The article finds that, taken together, the CJEU's judgments have shed light on the scope of application of the right to be heard and enhanced the overall protection of this right for asylum seekers, returnees, and visa applicants by crafting common standards of when and how to hear individuals and by delimitating tasks between administrative authorities and courts. The CJEU has thus filled significant gaps in EU secondary legislation on the protection of the right to be heard; established good conduct principles for administrative hearings; and empowered domestic courts to ensure the legal accountability of the executive and effective remedies for third-country nationals.

* Director of the Centre for Migration Studies at the Law Faculty, Masaryk University, Czech Republic, and Assistant Professor at the Centre for Judicial Cooperation of the European University Institute. The author would like to thank the Judicial Studies Institute members at the Masaryk University, Federica Casarosa, Jasper Krommendijk, Paola Pannia, Marcella Ferri, and the anonymous reviewers for their valuable comments. This research was supported by the project 'The Role of Courts in Shaping Migrants' Rights' MUNI/J/0815/2021 funded by Masaryk University and its Research Support Programme MUNI Award in Science and Humanities JUNIOR.

Nevertheless, the domestic implementation of the right to be heard, as shaped by the CJEU, is still incoherent.

Keywords: Court of Justice of the European Union; preliminary reference procedure; right to be heard; EU Charter of Fundamental Rights; general principles of EU law; visas, asylum, immigration, return procedures; remedies

TABLE OF CONTENTS

I. Introduction: Background to the Increasing Litigation on the Right To Be Heard before the CJEU

At a moment when the reform of the Common European Asylum System (CEAS)[1] and the Return Directive[2] is in stalemate due to divergent domestic political interests, the judiciary, as politically neutral and impartial arbitrators between human rights and states' migration interests, have become the forum of last resort for solving at least some of the many issues affecting the functioning of the CEAS. This article analyses a decade of jurisprudence of the CJEU to show how the Court has shaped asylum seekers' and immigrants' right to be heard and the impact of its judgments on domestic jurisprudence.

These cases highlight some critical socio-legal realities. Notably, more and more Member States have limited the number of both administrative and judicial hearings in asylum and immigration proceedings before adopting an administrative decision that could negatively impact the rights of individuals[3] based on the rationale of migrants abusing rights and a governmental focus on reducing irregular migration.[4] In addition to reducing hearings before administrative authorities and courts, a practice of *de facto* disregarding final judgments that were enforcing hearing rights has developed in certain jurisdictions, further undermining asylum seekers' right to be heard.[5]

---

1 See Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum' COM (2020) 609 final (2020 Pact on Asylum and Migration).

2 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L348/98 (Return Directive).

3 See, for instance, Elisa Enrione, 'Domestic Asylum Procedures between EU Law and Populist Parties' Agenda: A Growing Challenge to A Growing Challenge to Asylum Seekers' Human Rights? The Cases of Italy, Sweden and the UK', Master Thesis 2019, 157 <https://unipd-centrodirittiumani.it/public/docs/Master_thesis _Elisa _Enrione.pdf> accessed 7 April 2022.

4 Loïc Azoulai, 'Europe Is Trembling. Looking for a Safe Place in EU Law' (2020) 57 Common Market Law Review 1675.

5 See Case C–556/17 *Toubarov* EU:C:2019:626. On Poland, see Monika Szulecka, 'The Undermined Role of (Domestic) Case Law in Shaping the Practice of

The limitations on asylum and immigration hearings in terms of quantity, length, and procedural thoroughness are the result of iterative processes between the Member States' ministries of internal affairs and the European Commission, which already started to emerge in the aftermath of the refugee crisis. For instance, in 2017 the European Commission issued recommendations to the Member States on how to enhance the effective implementation of the Return Directive. One of the proposed solutions was a new, harmonised, common return procedure which merges the hearing regarding the return decision with that related to the asylum claim.[6] This recommendation was subsequently endorsed in a 2017 report of the European Migration Network (EMN) on effective returns,[7] and later on codified by the proposal for an Asylum Procedures Regulation of the 2020 Pact on Asylum and Migration.[8]

However, this effort to design more flexible and speedy immigration proceedings does not take into account the social realities of asylum proceedings. In several jurisdictions, these can take at least 3 years,[9] a period so long that changes in the security of the country of origin, or in the private and family life or health of the third country national might occur in the

Admitting Asylum Seekers in Poland' [2022] (special issue) European Journal of Legal Studies 171.

6 Commission Recommendation (EU) 2017/432 of 7 March 2017 on Making Returns More Effective when Implementing the Directive 2008/115/EC of the European Parliament and of the Council [2017] OJ L66/19, recommendation 12.

7 European Migration Network, *The Effectiveness of Return in EU Member States: Challenges and Good Practices Linked to EU Rules and Standards – Synthesis Report* (European Migration Network 2017) (EMN 2017 Report on Effective Returns). The EMN is composed of national contact points appointed by national governments.

8 Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU' COM (2016) 467 final, arts 53, 54; Commission, 'Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU' COM (2020) 611 final.

9 See, for instance, the arguments of the Belgian governments in Case C-233/19 *B v CPAS de Liège* EU:C:2020:397. See also Case C-756/21 *International Protection Appeals Tribunal and Others*, pending.

meantime. These changes, in turn, may justify an individual re-assessment of the legality of return. The separate hearing of asylum seekers and immigrants is thus essential for preventing violations of the principle of *non-refoulement*,[10] a non-derogable right, particularly when the return proceedings take place long after the finalisation of asylum adjudication.[11] Moreover, oral statements are often the sole evidentiary proof that these individuals' narratives are credible.[12] In addition, in-person hearings help administrative authorities and courts to clarify the complex social, legal, and cultural circumstances on the basis of which the correct immigration status is determined.[13]

The essential role played by the right to be heard in immigration status determination (ISD) proceedings has been recognised, to a certain extent, by EU secondary law, which requires the Member States to provide several guarantees: a mandatory right to oral hearing by the administrative authorities assessing asylum claims;[14] additional hearing guarantees for minor asylum seekers;[15] a right to appeal negative asylum administrative decisions before a domestic court;[16] and a right for irregularly staying third-country nationals to appeal a return-related administrative decision before a court or

---

10 Case C-277/11 *MM v Minister for Justice, Equality and Law Reform and Others* EU:C:2012:253 (*MM (1)*), Opinion of AG Bot; Case C-585/16 *Alheto* EU:C:2018:584, paras 145-49; Case C-517/17 *Addis* EU:C:2020:225, Opinion of AG Hogan, para 74.

11 See Charter of Fundamental Rights of the European Union [2012] OJ C326 (EU Charter), art 19(2).

12 The asylum applicant is often not in possession of documentary or testimonial sources and can commonly base his or her application only on his or her own statements. See *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR 1992).

13 Nick Gill and Anthony Good (eds), *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Macmillan 2019).

14 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection [2013] OJ L180/60 (Recast Asylum Procedure Directive), art 14.

15 See Recast Asylum Procedure Directive, art 24; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast) [2013] OJ L180/96 (Recast Reception Conditions Directive), art 23.

16 Recast Asylum Procedure Directive, art 46.

administrative authority.[17] In addition, the right to be heard is recognised as part of various fundamental rights enshrined in the EU Charter of Fundamental Rights (EU Charter): the right to good administration (Article 41(2)); the right to an effective judicial remedy (Article 47(2)); and the rights of the child (Article 24). It is also guaranteed as part of the general principles of EU law of good administration and rights of defence, and as part of the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights (ECHR).[18]

This complex normative overlap of the various legal sources enshrining the right to be heard has raised questions of authority and conflict-resolution at the national level,[19] which have been answered in different ways by the Member States, and by domestic courts, as will be shown below. Heated political debate and judicial disagreements have developed within and across the Member States about the number of necessary hearings, about the timing, content, and conduct of administrative and judicial hearings, and about effective remedies in immigration procedures. In the politically charged context of prioritisation of irregular migration and incoherent domestic jurisprudence, the CJEU's approach has been decisive in solidifying common outcomes, ensuring both effective implementation of EU law and the fulfilment of human rights obligations.

Regarding the CJEU's jurisprudence on the right to be heard, the few academics who have approached the topic have classified the Court's interpretation as judicial activist,[20] or as restrictive or idiosyncratic

---

17 Return Directive, art 13.

18 Bucura C Mihaescu Evans, 'I. "The Right to Be Heard" as a Sub-Component of Good Administration' in *The Right to Good Administration at the Crossroads of the Various Sources of Fundamental Rights in the EU Integrated Administrative System* (1st edn, Nomos 2015).

19 This falls within the more general debate on normative hierarchy in legal pluralism, see Kaarlo Tuori, 'On Legal Hybrids and Perspectivism', in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014).

20 Paul Craig, 'EU Administrative Law - The Acquis European Parliament Study' (European Parliament 2010); Mihaescu Evans (n 18).

interpretation.[21] These opinions fit into the wider migration scholarly debate, where competing conceptions have developed on the CJEU's role: activist human rights interpretation;[22] passive towards protecting migrants' rights;[23] deferential to governmental views;[24] administrative rather than constitutional;[25] or judicially autonomous from Member States' political preferences.[26] This literature on the CJEU's role in asylum and migration has mostly overlooked the national context of the referrals for preliminary ruling, and the subsequent implementation of the CJEU's preliminary rulings, or addressed only some of the CJEU's preliminary rulings on the right to be heard in asylum and immigration. In light of these sustained contestations and the limited contextual analysis of the CJEU's preliminary rulings, this article holistically analyses all of the Court's judgments[27] on perhaps the most

---

21 Marie-Laure Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights' (2015) 17 European Journal of Migration and Law 104; Chiara Favilli, 'The Standard of Fundamental Rights Protection in the Field of Asylum: The Case of the Right to an Effective Remedy between EU Law and the Italian Constitution' (2019) 12 Review of European Administrative Law 167.

22 Geert de Baere, 'The Court of Justice of the EU as a European and International Asylum Court' (2013) Leuven Centre for Global Governance Studies Working Paper No. 118; Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015); Andrew Geddes and Peter Scholten, *The Politics of Migration and Immigration in Europe* (Sage 2016).

23 Iris Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law?' in Tamara Ćapeta, Iris Goldner Lang and Tamara Periš (eds), *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart Publishing, forthcoming in 2022).

24 Lisa Heschl and Alma Stankovic, 'The Decline of Fundamental Rights in CJEU Jurisprudence after the 2015 "Refugee Crisis"' in Wolfgang Benedek, Philip Czech, Lisa Heschl, Karin Lukas and Manfred Nowak (eds), *European Yearbook on Human Rights* (Intersentia 2018).

25 Daniel Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) 44 European Law Review 139.

26 Marie De Somer, *Precedents and Judicial Politics in EU Immigration Law* (Springer 2018).

27 That is from January 2012, when the CJEU delivered its first judgment on the right to be heard in asylum proceedings, and until September 2021 – the date this article was submitted.

essential right in immigration status determination (ISD) proceedings: the right of asylum seekers, returnees, and visa applicants to be heard by administrative authorities and courts before the latter adopt decisions affecting their stay in the EU and fundamental rights.

The article aims to establish how the CJEU has shaped the right to be heard, and asks, in particular: whether the CJEU's conceptualisation of this right tends to endorse the interpretation put forward by the referring courts or that of the government of the referring state; whether the interpretation of the right to be heard in ISD proceedings is similar to the judicial interpretation of this right as developed in other public law fields; and whether or not the CJEU's judgments enhance the level of protection of the right to be heard in ISD proceedings as stipulated by EU secondary legislation. When assessing the shape given by the Court to the right to be heard, the article takes into consideration the inherent competence limitations faced by the CJEU under the EU law principle of national procedural autonomy.[28] The article also explores the outcome of preliminary rulings by the CJEU on the domestic jurisprudence of the countries in which the reference originated.

Using a contextualist approach,[29] the article claims that the CJEU's interpretation of the right to be heard does not conform to only one of the

---

[28] The CJEU has limited jurisdiction to establish remedies, only as required by the principles of equivalence, effectiveness and effective judicial protection, since the establishment of remedies falls under domestic competences. See Case C-33/76 *Rewe* EU:C:1976:188. Additionally, the CJEU's jurisdiction depends on the national courts requesting preliminary rulings, and the referral behaviour of national courts varies greatly. See Arthur Dyevre, Monika Glavina and Angelina Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' (2020) 27 Journal of European Public Policy 912.

[29] This means assessing the CJEU's judgments within the national legal, jurisprudential and political context of the reference for a preliminary ruling; and tracing the impact of the CJEU judgments at the national level. The article builds on the contextualist approach as promoted by Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75(1) American Journal of International Law 1; Joseph Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403; Alec Stone Sweet, *The Judicial Construction of Europe*

aforementioned judicial approaches, but rather that the Court has moved in different directions, displaying traces of activist, constitutional, and restrictive interpretation in its judgments. The article argues that judicial diplomacy is the overarching approach, whereby the CJEU shapes the right to be heard as a compromise between various conflicting domestic judicial preferences without fully endorsing the interpretation of any of the main actors involved in the preliminary reference procedure.[30]

To support this claim, the article first shows how the CJEU has displayed activist and constitutional interpretations by recognising a new right to be heard for asylum seekers and returnees directly on the basis of the EU law general principle of the rights of defence and Article 47(2) of the EU Charter (section II). Next, the article illustrates a different form of judicial diplomacy, whereby the CJEU tempered its previous activist interpretation of the right to be heard with instances of deference towards national discretion in shaping the form and content of the hearing by administrative authorities (section III). Finally, the article argues that, in shaping the remedy for violations of the EU fundamental right to be heard, the CJEU has exercised both activist interpretation by extending the judicial review powers of national courts, but also restrictive interpretation as regards the burden of proof (section IV). In conclusion, the article argues that the CJEU has not only shed light on the relationship between the overlapping norms on the right to be heard of asylum seekers, returnees, and visa applicants, but that it has also widened the scope of the right to be heard and added guarantees to those that already exist in various strands of EU asylum and immigration secondary legislation on the basis of the general principle of rights of defence and Article 47 of the EU Charter. Nevertheless, various factors are identified

(Oxford University Press 2004); Karen Alter, *The European Court's Political Power* (Oxford University Press 2009).

30 Domestic judgments leading up to the reference for a preliminary ruling and those implementing the CJEU preliminary rulings have been provided by judges and lawyers within the framework of the framework of the ACTIONES, e-NACT and ReJUS projects funded by the European Commission. Summaries of most of the individual judgments can be found in the following databases: 'CJC Database' (EUI Centre for Judicial Cooperation) <https://cjc.eui.eu/data/> accessed 7 April 2022; 'Database Index' (Re-Jus Judicial Training Project) <https://www.rejus.eu/content/database-index> accessed 7 April 2022.

as influencing the outcome of the preliminary ruling on domestic jurisprudence, which may lead to further jurisprudential convergence or divergence regarding the interpretation of the right to be heard.

II. The CJEU's Legislative Gap-Filling Role: Recognising New Rights to be Heard in Asylum and Immigration Proceedings

The organisation of hearings by administrative authorities during ISD proceedings falls, in principle, under Member States' procedural autonomy.[31] This default principle has been interpreted by the Member States as allowing for broad limitations on the EU right to be heard in asylum and immigration proceedings. For instance, even if asylum seekers are conferred a right to be heard by administrative authorities,[32] some Member States do not organise an administrative hearing when the asylum seeker is considered to come from a safe third country.[33]

In immigration proceedings, the Return Directive allows Member States to merge the administrative decision regarding the legal status of third-country nationals with the decision to return those whose stay was found to be illegal.[34] Some Member States take advantage of this procedural flexibility by issuing a single decision that merges several ISD-related decisions. For example, in Hungary, a third-country national might be issued a single administrative decision combining a refusal of the application for international protection, a return or removal decision, and an entry ban.[35] While the combined procedure increases procedural efficiency, it might not ensure the right to be heard in relation to each of the legal statuses attributed to a third-country national. The shortcomings of combining immigration procedures are an increased risk of misqualification of legal status (e.g. an

---

31 Case C-161/15 *Bensada Benallal* EU:C:2016:175, para 24.

32 See Recast Asylum Procedure Directive, art 14.

33 This was the case in Germany under Recast Asylum Procedure Directive, art 33(2)(a). See more in *Addis* (n 10).

34 See Return Directive, art 6(6).

35 See Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others* EU:C:2020:294, Opinion of AG Pikamäe, para 77.

asylum seeker might be considered a returnee),[36] and an increased risk of violation of the principle of *non-refoulement*,[37] as well as of other human rights such as the right to private and family life.[38] Despite these shortcomings, more Member States[39] have adopted the combined ISD procedure following the recommendation of the European Commission,[40] based on the thinking that multiple hearings are merely delaying or even jeopardising the finalisation of procedures.[41] Furthermore, the 2020 Pact on Asylum and Migration will make the single, combined hearing the default European model.[42]

The CJEU has been the *ultima ratio* for defending the shrinking right to be heard of asylum seekers and immigrants. National courts from Ireland and France have asked the CJEU whether third-country nationals should be afforded a right to be heard *before* assessing various different legal statuses (i.e. refugee, subsidiary protection, returnee), or whether the executive combined model of one hearing is in line with EU law requirements. In 2011, the Irish High Court asked the CJEU to settle judicial divergences in Ireland but also

---

36 European Parliament Study on The Return Directive 2008/115/EC, European Implementation Assessment (20 June 2020) (EP Study 2020).

37 See, for instance, the CJEU in Case C-249/13 *Boudjlida* CLI:EU:C:2014:2431, para 68.

38 Due to the fact that third-country nationals do not have the opportunity to inform about changes occurred in the private and family life, their health or the political situation of the country of origin or habitual residence as part of the right to be heard. See *MM (1)*, Opinion of AG Bot (n 10), para 43; Case C-560/14 *MM (2)* EU:C:2016:320, Opinion of AG Mengozzi, paras 58-60.

39 See the EMN 2017 Report on Effective Returns (n 7) section 6.4.

40 See Recommendation 12(a) of Commission Recommendation (EU) 2017/432 (n 6).

41 See Case C-166/13 *Mukarubega* EU:C:2014:2031, Opinion of AG Wathelet, para 87; the governments' observations in *Boudjlida*(n 37); Case C-181/16 *Gnandi* EU:C:2018:465.

42 For a detailed analysis, see Madalina Moraru, 'The New Design of the EU's Return System under the Pact on Asylum and Migration' (EU Migration Law Blog, 14 January 2021) <https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/> accessed 7 April 2022.

among courts from different Member States[43] regarding the number of hearings in the Irish two-step procedure for international protection. It asked whether asylum seekers have a separate right to be heard before the assessment of their subsidiary protection claim;[44] and whether public authorities should disclose their intentions and evidence to asylum seekers.[45] In *M.M.(1)*, the Court held that it is necessary for the applicant to be heard again for the purpose of considering his or her application for subsidiary protection, and that the previous hearing for the purpose of refugee status determination is insufficient to fulfil the requirement of the EU fundamental right to be heard as protected by Article 41(2) of the EU Charter.[46] This new right to be heard was established directly on the basis of Article 41(2) EU Charter, thus filling a gap in the Qualification Directive[47] and Irish implementing legislation.

The referring court interpreted the CJEU's judgment as requiring Ireland to introduce a new right to an oral hearing before the administration adopts a decision on the claim for subsidiary protection. However, the CJEU did not refer *expressis verbis* to a right to an oral hearing, but only to the more general right to be heard, which can take various other forms, such as written statements. The expansive interpretation of the referring court sparked a

---

43 The Irish High Court was of a different opinion than the Dutch Council of State. Compare, for instance, *Ahmed v Minister for Justice, Equality and Law Reform* [2011] IEHC 560 with the Dutch Council of State jurisprudence from 2007. For an analysis, see Madalina Moraru, *Rejus Casebook – Effective Justice in Asylum and Immigration* (University of Trento 2018) 66 <https://www.rejus.eu/sites/default/files/content/materials/rejus_casebook_effective_justice_in_asylum_and_immigration.pdf> accessed 7 April 2022 (ReJus Casebook).

44 The Irish High Court did not address this precise question. See more in Jasper Krommendijk, 'Irish Courts and the European Court of Justice: Explaining the Surprising Move from an Island Mentality to Enthusiastic Engagement' (2020) 2 European Papers 825.

45 Case C-277/11 *MM v Minister for Justice, Equality and Law Reform and Others* EU:C:2012:744, para 55 (*MM (1)*).

46 Ibid para 90.

47 Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third-Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 (Qualification Directive).

new round of requests for a preliminary ruling at the initiative of the Irish Supreme Court.[48] This time, the CJEU was asked whether its previous finding of a right to a separate hearing in *M.M.(1)* implied a right to an oral hearing before the assessment of the subsidiary protection claim. The CJEU rejected this interpretation of the right to be heard in *M.M.(2)*, but the Court nevertheless confirmed the obligation to ensure the right of asylum seekers to be heard within the procedure assessing the subsidiary protection claim separately from the refugee status procedure.

Following this back-and-forth between the Irish courts and the CJEU, the Irish legislator decided to change its two-step procedure for international protection to the single-step approach followed by most Member States.[49] While one might thus think that the intense judicial interaction has strengthened the protection of the right to be heard, in practice, the new one-step approach has actually eased the Irish government's procedural tasks. It is thus no longer required to organise two separate hearings, but only one oral hearing to assess both refugee and subsidiary protection status.[50]

The *M.M.(1)* preliminary ruling provoked a snowball of horizontal and vertical judicial interactions that allowed the CJEU to continue shaping the EU fundamental right to be heard across different phases of the ISD proceedings, and across Member States with diverse hearing systems. For instance, the *M.M.(1)* preliminary ruling was interpreted by some of the French first instance administrative courts as requiring an obligation on the Prefecture to hear a third-country national not only in the context of the rejection of a residence permit, but also to make a return decision.[51] This judicial interpretation introducing a mandatory additional hearing was contrary to the case-by-case view of hierarchically superior French

---

48 C-560/14 *M v Minister for Justice and Equality* EU:C:2017:101 (*MM (2)*).

49 Irish International Protection Act 2015 of 30 December 2015. See more in ReJus Casebook (n 43) 70.

50 Starting in 2016, the Irish International Protection Act replaced the dual system with a single procedure for assessing asylum and subsidiary protection claims in parallel. See above (n 49).

51 Brigitte Jeannot, 'Le droit d'être entendu : une application décevante en droit des étrangers' (Syndicat des Avocats de France, October 2015) <http://lesaf.org/wp-content/uploads/2016/03/4-droit-des-etrangers-octobre-2015.pdf> accessed 5 May 2022.

administrative courts.[52] Since the administrative tribunals did not convince the courts of appeal of their interpretation of the right to be heard based on the *M.M.(1)* preliminary ruling,[53] the administrative Tribunals of Melun[54] and Pau[55] asked the CJEU to confirm their interpretation of the EU fundamental right to be heard. The purpose of the referral was thus to obtain the CJEU's endorsement of a national judicial interpretation divergent from the more restrictive interpretation of the right to be heard supported by the executive and hierarchically superior courts.[56]

---

52 Such as: courts of appeal and the French Council of State. Courts of appeal recognised a certain margin of discretion to national (administrative and judicial) authorities to decide on a case-by-case basis whether or not to hear third-country nationals in return-related cases. See Administrative Court of Appeal of Lyon, *Préfet de l'Ain v Luc BG,* n°12LY0273, 14 March 2013. For a commentary on this approach see, Marc Clement, 'Droit d'être entendu, droit de la défense et obligation de quitter le territoire : à propos de l'arrêt CAA Lyon du 14 mars 2013' (ELSJ, 29 April 2013) <http://www.gdr-elsj.eu/2013/04/29/asile/droit-detre-entendu-droit-de-la-defense-et-obligation-de-quitter-le-territoire-a-propos-de-larret-caa-lyon-du-14-mars-2013-m/> accessed 7 April 2022. From 1991, the Council of State followed a restrictive interpretation of rights of defence in immigration proceedings, whereby it excluded the application of EU general principles of law to expulsion cases and exempted the administration from a prior adversary procedure in immigration cases; see Council of State, *Préfet de Police v. Demir*, n°120435, 19 April 1991; CE, *Hammou* n° 306821-30682, 19 October 2007; *Barjamaj*, n° 307999, 28 November 2007; *Silidor*, n° 315441, 26 November 2008.

53 The French administrative courts of appeal had not considered it useful to submit a preliminary question following the judgment of the Lyon Administrative Court of 14 March 2013. See CAA Lyon 14 March 2013, *M Halifa*, n° 12LY02704; CAA Lyon 14 March 2013, *Préfet de l'Ain c/ M Bepede Guehoada*, n° 12LY02737 – 12LY02739; CAA Nancy 16 May 2013, n° 12NC01805; CAA Marseille 8 June 2013, n° 12MA04450.

54 The referring court in Case C-166/13 *Mukarubega* EU:C:2014:2336.

55 The referring court in *Boudjlida* (n 37).

56 For a similar judicial strategy of involving the CJEU, see the approach of the Czech Supreme Administrative Court in *Al Chodor* case, No. 29/2015/SZD/LJ (Case C-528/15 *Al Chodor* EU:C:2017:213). For a detailed analysis of the strategy see Madalina Moraru and Linda Janku, 'Czech Litigation on Systematic Detention of Asylum Seekers: Ripple Effects across Europe' (2021) 23 European Journal of Migration and Law 284.

In *Mukarubega* and *Boudjlida,* the CJEU did not fully endorse the referring court's interpretation. The Court held that, in principle, a third-country national should be heard before any individual measure is taken that adversely affects him or her.[57] However, where national authorities have exercised the margin of discretion to simultaneously adopt a decision determining a stay to be illegal and a return decision, as afforded to them by the Return Directive,[58] 'those authorities need not necessarily hear the person concerned specifically on the return decision'.[59] Nevertheless, the CJEU established clear requirements that national administrations must fulfil before they decide to skip a second hearing, namely:

> that [a] person had the opportunity to effectively present his or her point of view on the question of whether the stay was illegal, and whether there were grounds which could, under national law, entitle those authorities to refrain from adopting a return decision,[60]

either because of errors in assessment or because of new evidence.[61] As long as public authorities comply with the substantive content of the right to be heard, its procedural design – whether in the shape of one or multiple hearings – was left to the Member States' decision, just as the Return Directive had envisaged.

The CJEU thus initially displayed a judicial activist approach by recognising a new right to be heard to returnees on the basis of the EU general principle of rights of defence, which was then tempered by a deferential approach towards Member States' policy choices as guaranteed under Article 6(6) of the Return Directive. Therefore, the *Mukarubega* case represents a partial success of the referring court to impose its interpretation over hierarchically superior courts: the CJEU's preliminary ruling did invalidate the French Council of State's restrictive interpretation.[62] However, the case-by-case

---

57 Case C-349/07 *Sopropé* EU:C:2008:746, para 49; *Mukarubega* (n 54) paras 46-48.

58 See Return Directive, art 6(6).

59 See *Boudjlida* (n 37) para 54 (also stated in *Mukarubega* (n 54) para 60).

60 Ibid.

61 *Boudjlida* (n 37) para 37.

62 That is, of automatic rejection of an administrative hearing before the adoption of a return decision. See n 48.

approach followed by the majority of French courts of appeal[63] was legitimised over the mandatory hearing approach proposed by the referring first instance administrative courts.

Domestic courts from Belgium,[64] Greece,[65] Lithuania,[66] and the Netherlands[67] subsequently used the preliminary rulings on the French references to expand the scope of the right to be heard in domestic ISD proceedings. These courts interpreted the preliminary rulings as requiring a mandatory administrative hearing in relation to each of the return-related decisions the administration can adopt, regardless of whether the domestic return procedure is combined or separate. Exceptions would be allowed only if they conform to the good administration principles of clarity, foreseeability, and transparency in administrative decision-making. While these courts have not engaged in direct dialogue with the CJEU, their citation of preliminary rulings originating in other jurisdictions has nevertheless helped to enhance the protection of the right to be heard. For instance, in Belgium, the Aliens Office began to send a formal letter to invite foreign nationals to express their views before withdrawing their right to stay.[68]

In terms of fundamental rights protection, the continuous judicial dialogue with domestic courts has helped the CJEU to refine its position on the legal source for the asylum seekers' and irregular migrants' right to be heard by

---

63 Whereby the necessity of a second administrative hearing is to be established on a case-by-case basis.

64 Belgian Council of Alien Law Litigation (CALL), case No 126.219, judgment of 25 June 2014; CALL, case No. 230.293, judgment of 24 February 2015; CALL, case No 233.257 judgment of 15 December 2015. These cases are summarised in the REDIAL database. 'REturn Diretive DIALogue (European University Institute) <euredial.eu> accessed 7 April 2022.

65 See, for instance, Thessaloniki Administrative Court, case No 717/2015.

66 Case No eA-2266-858/2015 of 7 July 2015. For a commentary, see Irmantas Jarukaitis and Agnė Kalinauskaitė, 'The Administrative Judge as a Detention Judge: The Case of Lithuania', in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds) *Law and Judicial Dialogue on the Return of Irregular Migration from the European Union* (Hart 2020) 237.

67 See Madalina Moraru and Geraldine Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural safeguards', Migration Policy Centre Redial Research Report 2016/03, 11-13.

68 Ibid.

domestic authorities. After a Charter activist phase,[69] the Court reverted to the general principle of the rights of defence as legal source for the application of the right to be heard in domestic asylum and immigration procedures. The right to be heard in migration proceedings thus follows other fields of EU administrative law, such as customs, competition, and terrorism-related sanctions.[70] As regards the level of protection of the right to be heard conferred by Article 41(2) of the EU Charter and the general principle of rights of defence, the Court seems to recognise a functional equivalence of the two legal sources.[71] Notably, the Court held that the 'right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person'.[72] Furthermore, the observance of the right to be heard is required even where the applicable EU secondary legislation does not expressly call for it.[73]

In conclusion, the jurisprudence analysed in this section shows, first, an activist CJEU which has recognised a new right to be heard *before* public authorities adopt decisions negatively affecting the rights of asylum seekers and returnees during ISD proceedings. This apparent judicial activism, however, has a constitutional legal basis in the CJEU's role of reviewing the conformity of EU secondary legislative acts[74] and their domestic implementation[75] with fundamental rights as guaranteed by general

---

69 In the first preliminary rulings on the right to be heard, the CJEU cited EU Charter (n 11), art 41(2) as legal basis. See *MM (1)* (n 45); Case C-604/02 *HN* EU:C:2014:302 (on the more general right to good administration).

70 Angela Ferrari Zumbini, 'The Power to Tax without Due Process of Law' (2019) 11 Italian Journal of Public Law 119.

71 Of the same opinion, see also French Council of State, *Ouda,* n°375423, 5 June 2015; Evangelia Lilian Tsourdi, 'Of Legislative Waves and Case Law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy' (2019) 12(2) Review of European Administrative Law 143.

72 See, *inter alia*, Case 17/74 *Transocean Marine Paint Association v Commission* EU:C:1974:106, para 15; Case C-7/98 *Krombach* EU:C:2000:164, para 42; Case C-249/07 *Sopropé* EU:C:2008:746, para 36.

73 *Sopropé* (n 72) para 38.

74 Consolidated Version of the Treaty on the Functioning of the European Union [2013] OJ C326, art 263.

75 Ibid arts 260, 267.

principles of EU law and the EU Charter.[76] As regards the multi-layered overlapping sources of the right to be heard, the CJEU has brought legal clarity to the scope of application of the right to be heard by piecing together the relevant EU Charter provisions and the general principles of rights of defence and good administration in a perfectly matching puzzle. In its constitutional role, the CJEU requires domestic authorities to ensure the safeguards on the right to be heard, irrespective of the form of the administrative hearings. At the same time, the CJEU displayed a deferential side by recognising the Member States' procedural freedom to decide on the form of hearing as long as they guarantee the right to be heard. In a nutshell, the CJEU's shaping of the scope of application of the right to be heard thus represents a compromise between Member State authorities' different conceptions of procedural fundamental rights.

III. The CJEU Shaping Common Rules for the Conduct of Domestic Administrative Hearings: Instances of Constitutional, Activist, and Deferential Interpretation

The previous section has shown a particular instance of the CJEU's judicial diplomacy, one that combines constitutional thinking, that is recognising new rights to be heard on the basis of general principles of EU law, with a deferential interpretation which has allowed Member States to continue the one-hearing practice in narrow and limited situations.

In practice, however, the national discretion confirmed by the CJEU, whereby various administrative hearings can be merged into one, has resulted in the blurring of the domestic duties of good administration and in a lower level of protection of the principle of *non-refoulement*. Several reports[77] and scholars[78] note how the merged administrative hearing practice did not result in full incorporation of the right to be heard guarantees. For instance, Member States do not regularly impose a duty on the administration to

---

76 As established by Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

77 EMN 2017 Report on Effective Returns (n 7); EP Study 2020 (n 36).

78 Valeria Ilareva 'The Right to be Heard: The Underestimated Condition for Effective Returns and Human Rights Consideration' in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migration from the European Union* (Hart 2020) 351.

conduct an *ex officio* assessment of the risk of *refoulement* outside the rigid limits of international protection claims assessed under the Qualification Directive,[79] although other circumstances could also trigger violations of the principle of *non-refoulement*.[80]

This section will show that, following several preliminary references, the CJEU has developed common rules on the content of the hearing, that is the questions to be addressed and avoided as well as the circumstances to be assessed during administrative hearings, and the form of the administrative hearing, in particular its orality and adversarial nature.

1. Oral or Written Administrative Hearings in ISD Proceedings?: Activist and Deferential Interpretations

EU secondary law on asylum and immigration does not impose a common format for administrative hearings throughout ISD proceedings. Falling under the purview of the Member States' procedural autonomy, domestic administrative hearings can be organised in the format of an oral interview,[81] or an assessment of written observations. In asylum and immigration procedures, where the applicant's statements play a central role and where it is often impossible to provide documentary evidence, practitioners underline the importance of a personal hearing to verify the consistency, plausibility, completeness, and exhaustiveness of an individual's narrative, which together determine the credibility of the claim.[82] Although an oral hearing has been held to be the fullest possible expression of the right to be heard in asylum adjudication,[83] the use of other hearing formats, especially within subsequent

---

79 See more in EP Study 2020 (n 36) 50-53.

80 See for instance the CJEU conclusions in *Boudjlida* (n 37) para 68. See also Case C-562/13 *Abdida* EU:C:2014:2453; Case C-239/14 *Tall* EU:C:2015:824.

81 The only exception is the first administrative hearing during asylum adjudication, which has to be in an oral format (i.e. interview). See Recast Asylum Procedure Directive, art 14(1).

82 Joined Cases C-148/13, C-149/13 and C-150/13 *A, B and C* EU:C:2014:2111, Opinion of AG Sharpston, para 68; *MM (2)*, Opinion of AG Mengozzi (n 38); Luciana Breggia, 'L'audizione Del Richiedente Asilo Dinanzi al Giudice: La Lingua Del Diritto Oltre i Criteri Di Sintesi e Chiarezza' [2018] Questione Giustizia 193; Gill and Good (n 13).

83 See *MM (2)*, Opinion of AG Menozzi (n 38) para 58.

ISD proceedings such as subsidiary protection or return procedures, has proliferated throughout Europe in pursuit of procedural efficiency.[84]

National courts confronted the technical question of establishing the conditions under which an oral administrative hearing is mandatory against the backdrop of divergent Member State approaches. The issue of protecting the orality of hearings arose in proceedings where an individual had already been heard once by administrative authorities, but a new administrative oral hearing was requested in relation to a subsequent and different immigration procedure (e.g. subsidiary protection or return).

Conflicting domestic judicial views on whether an administrative hearing should be organised in an oral or written format triggered a request for a preliminary ruling. The Irish Supreme Court, disagreeing with the interpretation of the *M.M.(1)* preliminary ruling by the High Court,[85] asked the CJEU to clarify whether its ruling implied that only oral hearings could completely fulfil the right to be heard.[86] In *M.M.(1)*, the CJEU did not expressly require the administrative hearing before the assessment of subsidiary protection to be held in an oral format, but only ruled that a separate right to be heard should be recognised.[87] The CJEU continued this line of functional interpretation of the right to be heard in *M.M.(2)*.[88] Notably, the CJEU accepted written observations in a template questionnaire as potentially a sufficient guarantee for the protection of the right to be heard in the Irish two-step system of international protection. Diverging from the Opinion of the Advocate General,[89] the Court held that the personal interview conducted during the context of an asylum application

---

84 For more details, see the EMN 2017 Report on Effective Returns (n 7).

85 See *MM v Minister for Justice* [2013]IEHC 9. For a full summary, see 'Ireland, M v Minister for Justice and Equality, (C-277/11 and C-560/14)' (EUI Centre for Judicial Cooperation) <https://cjc.eui.eu/data/data/data?idPermanent=350> accessed 7 April 2022.

86 The previous section discussed the *MM (1)* and *MM (2)* only from the perspective of the CJEU recognising a right to be heard in addition to the EU secondary norms on asylum, whereas this section discusses these two judgments from the perspective of the format of the hearing, that is oral versus written.

87 See *MM (1)* (n 45) para 95.

88 See *MM (2)* (n 48) para 28.

89 See *MM (2)*, Opinion of AG Mengozzi (n 38) para 58.

could be relevant and, thus, used in the context of a subsequent application for subsidiary protection.

Nevertheless, the CJEU required that an

> interview must also be arranged if it is apparent — in light of the personal or general circumstances in which the application for subsidiary protection has been made, in particular any specific vulnerability of the applicant, due for example to his age, state of health or the fact that he has been subjected to serious forms of violence — that [an interview] is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application.[90]

In conclusion, the CJEU established that for those who need it most – vulnerable groups of asylum seekers and immigrants – the right to be heard should commonly be interpreted as implying a right to an oral hearing. Furthermore, it clarified that administrative hearings may be conducted in written format as long as they can guarantee the principle of individual assessment required by Article 4(3) of the Qualification Directive.[91] Once again, the CJEU signalled that national procedural autonomy cannot be absolute, instead limitations are imposed by the right to an individual hearing. The CJEU's diplomatic attempt at conflict resolution by prioritising only some asylum seekers and immigrants as deserving of a right to an oral hearing raises issues regarding the legitimacy of its definition of 'vulnerability'. Whereas the ECtHR looks at all asylum seekers as 'vulnerable',[92] the CJEU seems to consider 'vulnerable' only those asylum seekers with special needs.

---

90 See *MM (2)* (n 48) para 51.

91 For a confirmation of the mandatory nature of the principle of individual assessment in relation of administrative hearings of asylum seekers, even those coming from a 'safe third country'. See Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim* EU:C:2019:219, para 98.

92 See *Tarakhel v Switzerland* App No 29217/12 (ECtHR, 4 November 2014; Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2020) 38 Netherlands Quarterly of Human Rights 12.

2. Judicial Shaping of the Adversarial Principle During Administrative Hearings: The Long-Awaited Constitutional Vision

ISD proceedings are a hybrid adjudication process involving both administrative and judicial bodies, where the judiciary exercises a supervisory function vis-à-vis the administration following an appeal lodged by the third-country national. Certain characteristics of administrative adjudication in these proceedings[93] have prompted questions about the extent to which administrative hearings should follow the fair trial guarantees applicable to judicial hearings, such as the adversarial principle.[94] Domestic courts noticed that in other administrative law fields (e.g. competition law and smart sanctions), the CJEU recognised that certain components of the adversarial principle should also apply to administrative hearings. For instance, a person adversely affected by an individual measure must be placed in a position to analyse all relevant information relied on against them,[95] and the individual must have the opportunity to express their views[96] following a period of reflection which is sufficient, but which also allows the administrative authority to act effectively.[97] Furthermore, if necessary, the aid of a legal counsel should be available during the administrative phase of adjudication.[98]

Following a request for preliminary ruling from a French first instance court, the CJEU had the opportunity to confirm whether the safeguards of the adversarial principle should apply cross-sectorially.[99] Mr Boudjlida complained of a lack of opportunity to effectively express his point of view

---

93 Such as: the mandatory nature of administrative adjudication, unlike the judicial phase; the wide fact-finding powers of the administration; and the binding legal force of their decision, which can be final if it is not appealed before the courts, and result in decisions which can breach the principle of *non-refoulement*.

94 The CJEU defined the adversarial principle as the principle according to which 'the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them'. See Case C-300/11 *ZZ v Secretary of State for the Home Departmen*t EU:C:2013:363, para 54.

95 Joined Cases C-100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* EU:C:1983:158, paras 14-23.

96 Joined Cases C-46/87 and 227/88 *Hoechst* v *Commission* EU:C:1989:337, paras 52, 56.

97 Case C-28/05 *Dokter and Others* EU:C:2006:408, paras 73-79.

98 See *Hoechst* (n 96) paras 14-16.

99 *Boudjlida* (n 37).

regarding his legal status before the Prefect adopted a return decision. In particular, he complained that the administration did not disclose the evidence held against him, did not offer a sufficient period of reflection to prepare for the interview, and that he did not benefit from the assistance of a legal counsel.

Based on the different aims pursued by administrative proceedings in competition *versus* asylum and immigration, the CJEU rejected the full application of the adversarial principle as part of the right to be heard in return proceedings. The following components of the adversarial principle were rejected by the Court: the right to call and cross-examine witnesses;[100] to be warned, prior to the interview, that the administration is contemplating adopting a return decision; to have access to information on the basis of which the administration depends for justification for that decision; and to be given a period of reflection.[101] Nevertheless, the CJEU did recognise some of the guarantees of the adversarial principle as applicable in ISD proceedings. Notably, the third-country national has the right to be informed, before the administrative hearing, of the objective(s) of the interview, and of the possible consequences for the legal status of the individual.[102] In addition, the CJEU also recognised the right to use assistance provided by a defender or legal counsel during the administrative phase of return procedures, even if only at the individual's own expense.[103]

The CJEU's restricted acknowledgement of the applicability of the adversarial principle in ISD proceedings did not lead to a general lowering of the standards surrounding the right to be heard at the national level. For instance, the Irish legislator adopted a legislative amendment (operative from 24 November 2013) enhancing the adversarial principle in the context of subsidiary protection procedures.[104] The following rights of asylum seekers were thus recognised by the Irish legislator: to be informed of any recommendations to grant or refuse subsidiary protection; to be sent any

100 *MM (2)* (n 48) para 55.

101 *Boudjlida* (n 37) para 55.

102 Ibid para 62.

103 Ibid.

104 ReJus Casebook (n 43) 70.

supporting documentation; and the right to request an oral hearing and to call witnesses upon appeal.[105]

The approach of the CJEU to the application of the adversarial principle in regular asylum and return proceedings[106] should be differentiated from the Court's approach in cases where denial of a legal status was based on threats to national security or public policy. In this latter category of cases, the Court has recognised a high threshold of disclosure of evidence by the public authorities, similar to competition and 'smart sanctions' cases. In *ZZ,* the CJEU held that an individual holding both EU citizenship and a third country's nationality

> must be informed of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress ineffective.[107]

The application of this threshold of evidence disclosure in cases falling outside the ambit of EU citizenship has long been the subject of cross-nationally divergent jurisprudence.[108] Recently, the CJEU clarified that its interpretation of the obligation of disclosure of evidence developed in the *ZZ* case also applies in the field of the common visa policy.[109] Notably, the right to good administration, as a general principle of EU law, requires the administration to give reasons for its decisions refusing a visa application based on Article 32(1)(a)(vi) grounds of the Visa Code.[110] In addition, the right to an effective remedy laid down in Article 47 of the EU Charter requires public authorities to disclose evidence to the extent that the concerned visa applicant must be able: (i) to ascertain the specific grounds on which the

---

105 Ibid.

106 As in *Boudjlida* (n 37) and *MM (2)* (n 48).

107 *ZZ* (n 94) para 63.

108 For instance, the UK and Polish Supreme Administrative Court did not expand the ZZ principles outside EU citizenship related cases. See ReJus Casebook (n 43) 140-47.

109 Joined Cases C-225/19 and C-226/19 *RNNS and KA* EU:C:2020:951.

110 Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas [2009] OJ L243/1, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council [2013] OJ L243/1.

refusal is based; and (ii) to identify the Member States that objected to the application. In line with the judgment delivered by the ECtHR[111] one month before the aforementioned *R.N.N.S and K.A* case, the CJEU developed a constitutional view of a common principle of *audiatur et altera pars* which applies to all cases where the legal status of an individual is rejected or denied based on threats to public policy or national security.

3. Towards a Pre-Determined Administrative Hearing Procedure: The CJEU's List of Questions to be Addressed during Administrative Hearings

In a series of preliminary rulings starting with the *M.M.(1)* case, the CJEU has clarified that administrative and judicial authorities have both positive and negative obligations regarding the questions to be addressed to asylum seekers and returnees during hearings. Standards imposed by the judiciary are more detailed for return-related hearings given that the Return Directive does not include provisions on returnees' right to be heard. Asylum-related EU secondary legislation, on the other hand, does provide for guidelines on the conduct of asylum hearings. For instance, the Recast Asylum Procedure provides for minimal common guidelines, referring to gender and vulnerability issues, the presence of an interpreter, and the right to read and ask questions related to the report of the interview drafted by the competent administrative authority.[112] In addition, Article 4 of the Qualification Directive provides circumstances that public authorities must assess as part of the credibility assessment.[113]

The duty of cooperation incumbent upon administrative authorities[114] has been used by the CJEU to set out positive obligations for administrative authorities, such as the obligation to address questions and collect evidence from asylum seekers that would ensure complete, up-to-date, or relevant information about the general situation in the country of origin or transit countries that relates to the substantiation of the asylum application.[115] On

---

111 *Muhammad and Muhammad v Romania* App no 80982/12 (ECtHR, 15 October 2020).

112 See Recast Asylum Procedure Directive, arts 15-17.

113 See n 47.

114 See Qualification Directive, art 4(1).

115 *MM (1)* (n 45) para 66.

the basis of the same duty of cooperation, the CJEU requires national authorities to ask questions aimed at ensuring the respect of fundamental rights, such as Article 1 (human dignity), Article 4 (prohibition of torture and other ill treatments), and Article 7 (respect for private and family life) of the EU Charter.[116] Human dignity issues have often been raised in hearings of health-related asylum claims, which have been recognised as pertaining to vulnerable asylum applicants.[117] Following the CJEU's preliminary ruling in the *Ahmedbekova* case*,* Articles 4 and 7 of the EU Charter, in conjunction, have been held to require an assessment of an application for international protection on an individual basis, 'taking into account the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family ties to the person at risk, himself exposed to such a threat'. In conclusion, regarding positive hearing obligations of administrative authorities in asylum proceedings, the CJEU required a thorough and rigorous check of the personal circumstances of the individual asylum applicant, including questions pertaining to the protection of fundamental rights, in particular Articles 1, 4, 7, 24 and 47 of the EU Charter. The Court consistently rejected the adoption of negative asylum decisions based on pre-determined mathematical formulas or general assessments or statements.[118]

Regarding negative hearing obligations, in the *A, B and C case,* the CJEU set out key principles by excluding questions and evidence (e.g. videos or photos) regarding the applicants' sexual life or practices[119] on the basis of Articles 1 and 7 of the EU Charter.[120] These prohibited types of evidence and questions do not, however, exonerate administrative authorities from carrying out in-depth hearings. On the contrary, the CJEU emphasised that the interview should be designed to assess the personal or general circumstances surrounding the application, 'in particular, the vulnerability of the applicant,

---

116 Joined Cases C-199/12 to C-201/12 *X, Y, Z* EU:C:2013:720; Joined Cases C-148-150/13 *A.B.C* EU:C:2014:2406.

117 See Case C-353/16 *MP* EU:C:2018:276. The list of questions to be addressed in health-related asylum claims will be further clarified in a pending case, Case C-756/21 *X v IPAT*.

118 See in particular Case C-901/19 *CF and DN* EU:C:2021:472.

119 Joined Cases C-148-150/13 *ABC* EU:C:2014:2406.

120 Ibid.

and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant'.[121] While the Court did not reject the use of expert reports (e.g. forensic psychologists' expert opinion) in the assessment of facts and circumstances of asylum claims based on sexual orientation grounds, it clearly found the use of projective personality tests in sexual orientation asylum cases to be inappropriate.[122] Relying on Principle 18 of the Yogyakarta Principles (protecting individuals from medical abuses based on sexual orientation or gender identity), and on Articles 1, 4, and 7 of the EU Charter, the CJEU clarified that a final asylum decision must be based on the individual assessment of all personal circumstances pertaining to each case, including sexual orientation matters.[123]

The CJEU's list of questions and circumstances has been completed by domestic courts when implementing the *A, B and C* preliminary ruling. Dutch courts clarified the information that public authorities have to include in their decisions on the basis of the right to good administration: the questions addressed; how weighing of evidence regarding persecution on grounds of sexual orientation was performed; and the statements held to lack credibility which influenced the final administrative decision. The absence of such information was considered a breach of transparency by the reviewing domestic courts, justifying judicial annulment of the administrative decision.[124]

The CJEU has further shaped the content of the right to be heard by also defining a non-exhaustive list of minimum questions in return-related proceedings. Namely, the administrative authorities have to obtain: the third-country national's view on the legality of his or her stay; facts that could justify the authorities to refrain from adopting a particular return-related

---

121 Ibid para 70.

122 Case C-473/16 *F* EU:C:2018:36.

123 Ibid para 62; 'The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (The Yogyakarta Principles, March 2007) <http://yogyakartaprinciples.org/ wp-content/uploads/2016/08/principles_en.pdf/> accessed 7 April 2022.

124 See 'European Union, CJEU, A, B and C, Judgment of 4 December 2014' (EUI Centre for Judicial Cooperation) <https://cjc.eui.eu/data/data/data?idPermanent=336> accessed 7 April 2022.

decision, in particular information that could correct an error or add information as regards his or her personal circumstances;[125] facts that justify exceptions to the expulsion;[126] social circumstances of the irregular migrant, including the best interests of the child, family life and the state of health of the individual concerned and risks of *non-refoulement*;[127] the third-country national's view on the detailed arrangements for his or her return, including the possibility to extend the period of voluntary departure under Article 7(2) of the Return Directive.[128] In addition, the CJEU clarified the legal force of evidence in return proceedings. Notably, public authorities cannot base their return-related decisions solely on the criminal record or prior rejection of an asylum claim, or on illegal stay or entry. The hearing must go beyond addressing these aspects.[129]

The impact of the CJEU's judgments has been particularly felt in those jurisdictions that had systematically conducted summative hearings.[130] First, domestic courts gained a concrete EU code on administrative hearings as standard for the legality review of administrative decisions. Second, domestic judicial review of the duty of good administration became more inquisitorial in order to ensure the right to good administration as an individual, concrete right. Notably, the Supreme Administrative Courts of Lithuania and Bulgaria[131] interpreted the duty of good administration as also including a

---

125 *Boudjlida* (n 37) paras 37, 55.

126 Ibid para 47.

127 Ibid para 48. As regards the states of health that are relevant for both the suspension of return and for recognition of subsidiary protection, see respectively *Abdida* (n 80); Case C-353/16 *MP v Secretary of State for the Home Department* EU:C:2018:276.

128 *Boudjlida* (n 37) para 51.

129 Ibid.

130 Such as Italy. See Alessia di Pascale, 'Can a Justice of Peace be a Good Detention Judge? The Case of Italy' in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migration from the European Union* (Hart 2020) 301.

131 Supreme Administrative Court of Bulgaria, *Gladkih v the Director of Regional Directorate of Border Police,* case No 11574/2011; Supreme Administrative Court of Lithuania, *ZK v Kaunas County Police Headquarters*, case No A-2681/2012, decision of 3 September 2013; *MS v. Migration Department under the Ministry of Interior*, case No A-69/2013, decision of 20 June 2013. For a summary of these cases see

duty to give returnees a period of reflection that ensures sufficient time to gather necessary evidence, as well as a duty to properly inform individuals of the purposes of the hearing to be held.

In a nutshell, the CJEU developed a code of conduct on administrative hearings in ISD proceedings based on Article 47 of the EU Charter and general principles of EU law, in particular good administration and rights of defence. In spite of the CJEU's constitutional contribution to enhance rule of law standards during asylum and immigration hearing procedures, the transformative effect of the Court's jurisprudence has had more impact on domestic judicial review than on EU legislation.[132]

IV. Remedies for Procedural Irregularities in Administrative Hearings: Traces of Constitutional, Activist, and Deferential Interpretation

The previous sections have shown how the CJEU and its dialogue with domestic courts have contributed to the recognition of new rights to be heard in domestic ISD proceedings by fleshing out their content and form. Nevertheless, these achievements would remain wholly theoretical in the absence of effective remedies for violations of the right to be heard. The current migration context, characterised by increasing fast-track asylum and

Madalina Moraru and Geraldine Renaudiere, 'REDIAL Electronic Journal on Judicial Interaction and the EU Return Policy: Articles 12 to 14 of the Return Directive 2008/115' (2016) REDIAL Research Report 2016/04 <https://cadmus.eui.eu/bitstream/handle/1814/43924/MPC_REDIAL_2016_04.pdf> accessed 7 April 2022.

[132] See See Daniel Thym (ed), 'Special Collection on the "New" Migration and Asylum Pact' (EU Immigration and Asylum Law and Policy, October 2020-February 2021) <https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/> accessed 31 March 2022.

immigration policies,[133] limitation of domestic judicial review,[134] and executive non-compliance with domestic judgments[135] has been endangering the system of effective remedies for violations of the right to be heard. Article 47 of the EU Charter and the general principle of EU law of rights of defence have been instrumental in the CJEU's clarification and enhancement of judicial hearing obligations and review powers of domestic courts over administrative decisions, which have ultimately led to ensuring effective judicial remedies and the respect of the rule of the law of in both asylum and return proceedings.

At the national level, procedural irregularities in the conduct of administrative hearings – be it mere shortcomings or absence of a hearing – are often considered 'minor' faults that do not automatically lead to annulment of the administrative decision unless they affect its substance.[136] *G&R* is the first case where the CJEU assessed the appropriate remedy for lack of hearing a returnee before the administrative authority adopted the prolongation of pre-removal detention by 12 months. The CJEU agreed with the referring Dutch Council of State that such an irregularity should not automatically lead to the annulment of an administrative decision. Instead, following its previous approach in competition and terrorism-related caselaw, the CJEU held that such an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for the contested irregularity, the outcome of the procedure might have been different.[137] While the CJEU established a common remedy for violations of the right to be heard across public law fields, it introduced an

---

133 See, for instance, International Centre for Migration Policy Development, *The Asylum Appeals Procedure in Relation to the aims of European Asylum Systems and Policies* (International Centre for Migration Policy Development 2020). See also Giusepe Campesi, 'The EU Pact on Migration and Asylum and the Dangerous Multiplication of "Anomalous Zones" for Migration Management' (ASILE Blog, 20 November 2020) <https://www.asileproject.eu/the-eu-pact-on-migration-and-asylum-and-the-dangerous-multiplication-of-anomalous-zones-for-migration-management/> accessed 7 April 2022.

134 Elisa Enrione (n 3).

135 See, for instance, Case C-556/17 *Torubarov* EU:C:2019:626; Szulecka (n 5).

136 For instance, in the Netherlands and Germany, according to the legal context provided in Case C-383/13 PPU *G&R* EU:C:2013:533 and *Addis* (n 10).

137 See *G&R* (n 136) para 40.

additional safeguard in immigration cases.[138] Notably, the CJEU established a duty on national courts to *ex officio* assess whether,

> in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.[139]

This judicial empowerment could be interpreted as a refinement of the CJEU's previous approach on remedies developed in competition and taxation, but also as a compromise between ensuring enhanced protection of the right to be heard when absolute human rights are at issue, and respect of the principle of national procedural autonomy.

In the field of asylum, Article 46(3) of the Recast Asylum Procedure Directive provides for more extensive review rights compared to the above-mentioned judicial review powers in return-related proceedings. This provision stipulates that domestic courts should carry out 'a full and *ex nunc* examination of both facts and points of law'. At the national level, the potential of this Article has been significantly limited by inherent features of the predominant asylum adjudication model of non-inquisitorial administrative proceedings[140] and rule-of-law backsliding. In a series of preliminary rulings originating from Bulgaria,[141] Germany,[142] and Hungary,[143] the CJEU has clarified the meaning of EU law notions of 'full' and 'ex nunc' judicial review required under Article 46(3) in line with the hierarchically superior norm of Article 47 of the EU Charter.

The first case where the CJEU addressed the oral judicial hearing powers and obligations of domestic courts is the *Sacko* case, concerning manifestly

---

138 Compare the preliminary ruling in *G&R* (n 136) para 40 (CJEU uses 'must') with the preliminary ruling in Case C-129/13 *Kamino* EU:C:2014:2041, para 81 (CJEU uses 'may'). On the CJEU shaping the right to be heard in the field of custom duties, see more in Zumbini (n 70).

139 Ibid.

140 See ReJus Casebook (n 43) 209-215.

141 *Alheto* (n 10).

142 *Addis* (n 10).

143 *Torubarov* (n 135).

unfounded or other inadmissible asylum applications.[144] An Italian legislative reform from 2017 introduced the system of video-recording an asylum seeker's administrative interview, which had been considered as rendering oral judicial hearings necessary only in exceptional circumstances. However, this technology had not been effectively implemented so that courts only received the transcript of the administrative interview, but not the video-recording tape.[145] Italian courts disagreed on whether they should hold oral judicial hearings as a rule in these circumstances.[146]

In *Sacko*, the CJEU followed a deferential interpretation of the right to be heard by holding that a right to an oral judicial hearing in asylum proceedings cannot be derived from Article 47 of the EU Charter or a systematic reading of Articles 12, 14, 31, and 46 of the Recast Asylum Procedure Directive, even if the administration had not submitted a video recording of the interview with the asylum seeker in the case file. However, the CJEU allowed domestic courts to dismiss the appeal without hearing the asylum applicants in strict circumstances, that is only if an oral hearing was conducted according to the guarantees set out in Articles 14-17 of the Recast Asylum Procedure Directive, if the report or the transcript of the interview was placed in the case file in accordance with Article 17(2) of the Recast Asylum Procedure Directive, and as long as domestic courts considered it unnecessary to organise an oral hearing to ensure a full and *ex nunc* examination of both facts and points of law as required under Article 46(3) of that Directive. Nevertheless, the CJEU's findings should be confined to the specific circumstances of the case, which involved an asylum application considered manifestly unfounded at the domestic level.

---

144 Case C-348/16 *Sacko* EU:C:2017:591.

145 Gabriele Serra, 'Mancanza di videoregistrazione del colloquio dinanzi alla Commissione territoriale e obbligatorietà dell'udienza di comparizione delle parti nel giudizio di protezione internazionale: la posizione della Corte di cassazione' (Questione Giustizia, 13 September 2018) <https://www.questionegiustizia.it/articolo/mancanza-di-videoregistrazione-del-colloquio-dinan_13-09-2018.php> accessed 7 April 2022.

146 See the referral order sent by the Tribunal of Milano. Angelo Danilo De Santis, 'L'eliminazione dell'udienza (e dell'audizione) nel procedimento per il riconoscimento della protezione internazionale. Un esempio di sacrificio delle garanzie' [2018] (2) Questione Giustizia 206.

This careful manoeuvring of the CJEU between two opposite principles – national procedural autonomy and human rights protection – resulted in a great deal of uncertainty on the precise application of the *Sacko* judgment in the Italian context. The Italian referring court decided to organise an oral hearing in an accelerated asylum procedure because it found the information submitted by the administration to be incomplete and insufficiently up-to-date for the court to effectively ensure its EU law mandate under Article 46(3) of the Recast Asylum Procedure Directive.[147] However, neither the *Sacko* preliminary ruling, nor the referring court's follow-up judgment managed to unify the Italian jurisprudence on the necessity of oral judicial hearings in asylum adjudication.[148] Several years from the delivery of the preliminary ruling in the *Sacko* case, the Italian jurisprudence continued to diverge due to conflicting interpretations of the preliminary ruling by the Italian supreme court (Court of Cassation).[149]

The CJEU caselaw following *Sacko* has dealt with judicial powers and duties of oral hearings and review within the wider context of the separation of powers between the executive and the judiciary, and rule of law issues in asylum and immigration. The lower the executive accountability guarantees, the more intrusive is the CJEU's re-design of the national system of remedies. For instance, in *El Hassani*,[150] where the Polish administration was entirely exempted from a judicial review of its visa refusals, the CJEU required the conferral of a right to judicial appeal to rejected visa applicants on the basis of Article 47 of the EU Charter.

---

147 For a summary of this decision, see Martina Flamini, 'The Right to be heard in international protection proceedings before the Italian Judge', in Federica Casarosa (eds), *The Practice of Judicial Interaction in the Field of Fundamental Rights – The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar 2022) 288.

148 See Cristina Dallara and Alice Lacchei 'Street-level Bureaucrats and Coping Mechanisms. The Unexpected Role of Italian Judges in Asylum Policy Implementation' (2021) 26(1) South European Society and Politics 83.

149 Ibid. The Cassation Court has only very recently taken a unified approached on the mandatory nature of oral judicial hearing. See Sez 1, n 01785/2020, Rv 656580-01.

150 Case C-403/16 *El Hassani* EU:C:2017:960.

Within a rule-of-law backsliding context, where administrative authorities repeatedly disregard final judgments in asylum adjudication, the CJEU fills the gap in the effective protection of Article 47 of the EU Charter by empowering domestic courts to draw on international sources outside the confines of national procedural law.[151] When administrative authorities aim to bypass judicial review of their decisions on return procedures by disguising new decisions as mere amendments of previous ones, the CJEU re-designs the shape of the national remedy to compensate for shortcomings in the rule of law system. For instance, in *FMS and others,*[152] the CJEU required Hungarian law to extend the right to appeal to those third-country nationals whose country of return had been changed by the public authority compared to the issued return decision. Administrative authorities thus cannot be exempted from judicial review of their decisions in ISD proceedings, nor can judicial review be entirely deprived of its inquisitorial nature. In the *Mahdi* case,[153] Bulgarian courts were recognised to have the power to assess, on their own initiative, new facts and legal elements outside the evidence provided by the administration in pre-removal detention proceedings. In addition, they were recognised to have the power to establish additional remedies to those recognised at the national level, such as the power to establish alternative measures to pre-removal detention, or to release an irregularly staying third-country national from pre-removal detention.

The CJEU has further shaped the requirements for holding an oral judicial hearing in *Alheto*.[154] Notably, the Court held that an oral judicial hearing is mandatory in asylum adjudication, even if not expressly required under domestic law, when a court intends to examine a new ground of inadmissibility, which has not been examined by the competent administrative authority, based on new evidence that has come to light after the appeal of the administrative decision. Article 47 of the EU Charter would require an interpretation of the 'full and ex nunc' examination set out in Article 46(3) of the Recast Asylum Procedure Directive, under which a domestic court can handle the asylum application exhaustively 'without there

151 See *Torubarov* (n 135).

152 Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and others* EU:C:2020:367.

153 C-146/14 PPU *Mahdi* EU:C:2014:1320.

154 *Alheto* (n 10).

being any need to refer the case back to the determining authority'.[155] The CJEU clarified that if additional evidence compared to the one analysed by the administrative authority is taken into account by a domestic court, then an oral judicial hearing is necessary in order to allow the individual to express, in person and in a language with which he or she is familiar, his or her view concerning the applicability of that ground to his or her particular circumstances.[156] In *Alheto*, the Court also added essential safeguards for the respect of the rule of law in asylum which has experienced a growing domestic backlash within the context of executive aggrandizement and non-compliance with judicial assessments.[157] The CJEU underlined that the effectiveness of Article 46(3) of the Recast Asylum Procedure Directive would be undermined if, following a decision of a court including full assessment of the asylum application, the competent administrative or quasi-judicial authority disregards that assessment or does not adopt a decision within a short period of time.[158]

The CJEU's approach to remedies was further clarified in the context of remedies for lack of administrative hearings in accelerated asylum proceedings. In *Addis,*[159] the German authorities decided to deport a rejected asylum seeker without hearing him, although he had argued that his transfer would amount to a violation of his rights under Article 4 of the EU Charter due to precarious living conditions in the Member State of transfer. The CJEU required judicial annulment of the administrative decision and that the case be sent back to the administration to conduct the individual and oral hearing according to the rules set out in Articles 14-17 of the Recast Asylum Procedure Directive. This finding establishes a higher protection of the right to be heard in accelerated asylum proceedings compared to pre-removal detention proceedings, as set out in the *G&R* case. The reasons for the CJEU's change of remedy could be, first, the importance of the mandatory individual oral interview within the asylum adjudication, which does not

155 Ibid para 112.

156 Ibid paras 114, 130.

157 Evangelia Lilian Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) 17 European Constitutional Law Review 471; and Szulecka (n 5).

158 *Alheto* (n 10) para 148.

159 *Addis* (n 10).

differentiate between admissibility and merits assessment; and, second, the asylum seeker's allegation of a risk of violation of his absolute fundamental right to prohibition of ill-treatments under Article 4.[160] The CJEU noted that a personal interview run by the administration within asylum adjudication benefits from a wide range of guarantees,[161] which neither the Directive nor domestic law guarantee during the judicial hearing (e.g. orality, and interview with a same-sex officer). As long as the judicial hearing cannot ensure the full range of guarantees provided by the Recast Asylum Procedure Directive during administrative hearings, domestic courts are required to set aside the administrative decision as null, rather than performing a hearing with lower guarantees than under the administrative phase of asylum adjudication.

In conclusion, the remedies developed by the CJEU for violations of the right to be heard in ISD proceedings illustrate first, a constitutional vision whereby the same remedy for violation of the right to be heard should be recognised across EU policies (e.g. migration, competition, trade sanctions).[162] However, variations exist in the CJEU jurisprudence. Notably, in *G&R,* the constitutional ambition resulted in a restrictive interpretation of the right to be heard, even if the right to liberty or the principle of *non-refoulement* was at issue. However, in *Alheto* and *Addis*, the CJEU refined its constitutional vision of the right to heard by including annulment of administrative decision and mandatory judicial hearing as remedies for violation of the right to be heard by the administrative authorities in asylum adjudication. Judicial empowerment to establish new remedies, which have traditionally been reserved for the executive, appears to be the solution found by the CJEU to an ineffective system of national remedies stemming from rule of law shortcomings.[163] In this way, the Court actively re-designed

160 See, in particular *Addis* (n 10) para 54.

161 See Recast Asylum Procedure Directive, arts 15-17.

162 That is: an infringement of the right to be heard results in annulment only if, had it not been for the contested irregularity, the outcome of the procedure might have been different. *G&R* (n 136).

163 For instance, a new right to judicial review was recognised in *El Hassani* (n 150) and a duty to organise oral judicial hearings when new grounds of inadmissibility are considered in *Alheto* (n 10). In addition, the Court extended judicial hearing powers beyond the limits of administrative evidence (*Mahdi* (n 153), *Abdida* (n 80), Case C-652/16 *Ahmedbekova* EU:C:2018:801 and *Alheto* (n 10) and guaranteed the

domestic ISD proceedings to ensure a delicate balance of powers between the administration and the judiciary. However, the CJEU showed judicial deference to domestic policy options when the principles of equivalence, effectiveness, and effective judicial protection are respected.

V. Conclusions: The CJEU's Judicial Shaping of the Right to be Heard - Achieving a Delicate Balance between Divergent Interests?

The right to be heard of asylum seekers, returnees and visa applicants has been a highly politicised topic. This right falls within two areas of law – procedure and immigration – which have long been considered by the Member States as falling within their exclusive competences. The right has been further politicised by being increasingly presented as a hindrance to effectively combating irregular migration and preventing threats to national security. Countering the executive-driven model of hearing rights, domestic courts have acted as rule of law guarantors, interpreting the right to be heard also in light of EU primary and secondary legislation. Within this context of divergent interests – fighting irregular migration vs. protection of fundamental rights, and primacy of EU law over respect of national procedural autonomy – the CJEU has had to decide on the scope, content, and effects of the EU fundamental right to be heard in domestic ISD proceedings. By exercising judicial diplomacy, the Court has reconciled various conflicting interests, principles, and policies by using constitutional, activist, and deferential interpretations of the right to be heard. Ultimately, the scope of the right to be heard in ISD proceedings has gained precision and enhanced protection through the judicial interactions between the CJEU and domestic courts.

The constitutional mindset of the CJEU has manifested in the development of common principles governing the scope of application of the right to be heard, the conduct of administrative hearings, and remedies. These migration-specific principles have then gained constitutional status by also

---

preservation of judicial hearing powers that courts used to possess before executive or legislative reforms adopted in response to the so-called refugee crisis (*Sacko* (n 144) and *Torubarov* (n 135)).

being applied in other EU law areas.[164] Fundamental rights as guaranteed by general principles of EU law of rights of defence and good administration, as well as Article 47(2) of the EU Charter have been invoked by the CJEU as legal basis for recognising new rights to be heard for asylum seekers, visa applicants and returnees. The CJEU held that even if 'the applicable legislation does not expressly provide for such a procedural requirement',[165] domestic authorities are obliged to confer the right to a hearing before they adopt a decision on the legal status that could negatively affect the individual's rights.

As part of its constitutional role, the CJEU has established the necessity of orality of administrative hearing for vulnerable categories of asylum seekers (*M.M.(2)*). It has developed a common prototype of hearing guidelines derived from fundamental rights (*M.M(1), A, B and C)*, and it became the guarantor of the rule of law at the domestic level by re-establishing the balance of powers between executive and judiciary in the enforcement of EU law. This development has been particularly prominent in those asylum and migration cases occurring against the background of rule-of-law backsliding (e.g. *Torubarov*, *FMS and others*). The CJEU has thus reinstated domestic courts in their constitutional role of ensuring checks and balances in an executive-dominated field. On the basis of the right to an effective judicial remedy, enshrined in Article 47 of the EU Charter, domestic courts can thus organise judicial hearings as compensation for irregularities in administrative hearings beyond the limits of domestic procedural laws (*G&R* and *Sacko*). Furthermore, they have an obligation to organise oral hearings as corollary of the adversarial principle when they examine new grounds of inadmissibility in asylum adjudication for the first time (*Alheto*). The CJEU has also extended the judicial review of domestic courts to new facts and evidence beyond those submitted by the administration (*Mahdi*, *Alheto*, and *Ahmedbekova*), and

---

164 For instance in consumer protection, see Case C-472/11 *Banif Plus Bank* EU:C:2013:88; C-119/15 *Biuro* EU:C:2016:987. See more in Federica Casarosa, *ReJus Casebook on Effective Justice in Consumer Protetion* (University of Trento 2018) <https://www.rejus.eu/sites/default/files/content/materials/rejus_casebook_effective_justice_in_consumer_protection.pdf> accessed 7 April 2022.

165 *MM (1)* (n 45) para 86.

recognised the reformatory powers[166] of domestic courts beyond the limits of procedural law (*Torubarov* and *Mahdi*). Immigration fields that were under discretionary executive control have been brought within the judicial review purview (*El Hassani*), and courts were recognised as the sole authority competent to provide for effective legal remedies in return proceedings in spite of the more permissive wording of the Return Directive (*FMS and others*).[167]

In its constitutional role, the CJEU has manifested both an activist and deferential or restrictive interpretation of the human right to be heard. The legislative gap-filling role exercised by the CJEU, particularly regarding the right to be heard of returnees, might seem like a manifestation of judicial activism, similar to the re-design of division of powers between the administration and judiciary on the basis of the EU law general principle of rights of defence and Article 47(2) of the EU Charter.[168] However, this manifestation of judicial activism is tempered by a restrictive interpretation of the right to be heard regarding the actual number of administrative hearings in combined asylum and return proceedings; the orality of judicial asylum hearings; and the type of remedy for violations of the right to be heard. On these issues, the CJEU has respected the policy choices made by the Member States within the margin of discretion afforded by the relevant EU secondary legislation on asylum and immigration. As long as Member States comply with the tryptic of requirements – equivalence, effectiveness, effective judicial protection of the right to be heard – and more recently with rule of law safeguards, the Court will not challenge the design of immigration procedures (e.g. the merging of hearings in relation to asylum and return procedures into one single administrative hearing as in *Boudjlida* and *Mukarubega*), nor will it impose the principle of orality to judicial hearing (*Sacko*). However, as highlighted above, when rule of law guarantees are

166 By reformatory powers, this article refers to the power to recognise international protection as such, thus going beyond the mere power of quashing the administrative decision, which is commonly describe as cassatory power. For more, see Ida Staffans, 'Evidentiary Standards of Inquisitorial Versus Adversarial Asylum Procedures in the Light of Harmonization' (2008) 14 European Public Law 615.

167 *FMS and others* (152) para 129.

168 As exemplified in *El Hassani* (n 150), *Alheto* (n 10) *Torubarov* (135) and *Addis* (n 10).

imperilled, the CJEU establishes wide judicial review and reformatory powers to compensate for illegitimate executive overreach (*Torubarov* and *FMS and others)*.

National courts have started preliminary reference procedures in an attempt to legitimise[169] their own specific interpretation of the right to be heard against the opposing views of the executive,[170] hierarchically superior courts,[171] majority judicial opinion,[172] or even the CJEU.[173] The Court has thus had to reconcile not only diverging interpretations between judiciary and the executive, but also diverging domestic judicial preferences on the correct interpretation of the right to be heard. The CJEU has not fully endorsed the opinions put forward by the referring courts, be they expansive fundamental rights interpretation (e.g. *Boudjlida* and *Mukarubega*), self-restrained (*Sacko*), executive deferential (*G&R*), or Charter-centred (*Mahdi*). Nevertheless, when essential elements of the rule of law were at issue, such as judicial independence, the CJEU has shown a higher endorsement of domestic courts' views formulated in the referrals (*Torubarov*, *FMS*). The outcome is a construction of the right to be heard by the CJEU that is different from the various interpretations put forward by the referring courts and the Governments. Nevertheless, this has not always resulted in ensuring the full potential of fundamental rights protection, as shown by the remedy established in the *G&R* case. The CJEU could have further adapted the remedy by placing the burden of proof on the infringing public authorities, and still be considered as acting in compliance with the EU law principle of procedural autonomy. Notably, the CJEU has refined this initial approach to

---

169 On legitimation theory as motivation for cooperating with the CJEU, see Juan A. Mayoral, 'Judicial empowerment expanded: Political determinants of national courts' cooperation with the CJEU' (2019) 25 European Law Journal 374. This work expands on previous judicial empowerment theories developed by Weiler (n 29); Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41.

170 The Bulgarian Administrative Court of Sofia in *Mahdi* (n 153) and the Hungarian Administrative and Labour Court of Pécs in *Torubarov* (n 135).

171 See, for instance, the Tribunal of Melun and Pau in *Mukarubega* (n 54) and *Boudjlida* (n 37).

172 Tribunal of Milan in *Sacko* (n 144). See also Dutch Council of State in *G&R* (n 136), in reply to a developing opposing judicial view.

173 See Irish Supreme Court in *MM (2)* (n 48).

the remedy in more recent caselaw (e.g. *FMS and others* and *Alheto*). The preliminary rulings delivered within the rule of law and migration crises have strengthened the judicial empowerment theory as a solution for effective remedies.

Nevertheless, the reality of domestic judicial implementation of CJEU judgments show that, despite the prolific judicial interactions, the shape of the right to be heard has developed unevenly across the Member States. This is mainly due to the different domestic judicial understandings of the national discretion recognised in the preliminary rulings. While some jurisdictions show a high convergence of judicial views on the shape of the right to be heard,[174] others still disagree on key issues.[175] Various factors seem to influence domestic judicial convergence, such as the clarity of operational guidance and benchmarks phrased by the CJEU, the consistent interpretation of the supreme courts, and the extent of judicial review and remedial powers of domestic courts.[176] In this context, judicial interaction could further serve to settle judicial disagreement and set standards for policy-making with which the EU institutions would be wise to engage in the ongoing legislative reform of asylum and migration governance.

---

174 Such as Lithuania, Belgium, Bulgaria.

175 For instance, see the case of Italy in the follow-up to the *Sacko* (n 144) preliminary ruling, as described in section IV.

176 In Italy, for instance, unlike the other jurisdiction, the supreme court had delivered varied interpretations of the *Sacko* (n 144) preliminary ruling; Italian asylum judges enjoy the widest judicial review and remedial powers across the Member States.