

*Judicial Training Project  
Fundamental Rights In Courts and Regulation (FRICoRe)*

# **FRICORE CASEBOOK**

## **EFFECTIVE JUSTICE, INTERNATIONAL PROTECTION AND FUNDAMENTAL RIGHTS IN ASYLUM AND MIGRATION**



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## INTRODUCTION: A BRIEF GUIDE TO THE CASEBOOK

### *Cross-project methodology*

The FRICoRe Casebook on *Effective justice, international protection and fundamental rights in asylum and migration* builds upon and complements the Rejus Casebook on *Effective justice in asylum and immigration*, released in 2018 and available [online](#). Compared with the Rejus one, the FRICoRe analysis focuses on a few selected issues that have raised high attention in the most recent dialogue between the Court of Justice and the National Courts, starting with the legality of detention in the course of asylum proceedings, the extent of the right to an effective remedy in international protection, and the scope of national security as legitimate ground for denial of the refugee status. A first overview on the impact of the current pandemic on effective protection of asylum seekers and immigrants is also provided in the last chapter. Due references to the Rejus Casebook are available when appropriate.

This Casebook's methodology builds upon the collaborative venture developed in previous projects of judicial training and, more recently, in the Re-Jus project. The core element of its methodology concerns the active dialogue established between **academics and judges of various European countries** on the role of the Charter and the one of its article 47, here particularly developed in the field of immigration and asylum law. In continuity with previous projects, including Re-Jus, this collaboration combines rigorous methodologies with judicial practices, and provides the trainers with the sort of rich comparative material that should always characterize transnational trainings. Training includes not only the transfer of knowledge, but also the creation of a learning community composed of different professional skills. Like in previous experience, this casebook is due to evolve both in content and in method over time, with additional suggestions arising from its use in training events.

We firmly believe that transnational training of judges should be based on a rigorous analysis of **judicial dialogue** between national and European courts and, when existing, among national courts. In the field of international protection, this dialogue is due to involve or at least to impact on decisions taken by competent national administrative authorities. Indeed, in the CJEU's view, the right to an effective remedy and article 47 CFR may imply that administrative bodies no longer have a discretionary power as to the decision to grant or refuse the protection sought in the light of the same grounds as those that were submitted to a court or tribunal, finding that the applicant must be granted such protection; otherwise Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, as well as Articles 13 and 18 of Directive 2011/95, would be deprived of all their practical effect. In these circumstances, decisions subject to judicial review may be set aside and, eventually, replaced by courts in order to ensure effective protection of asylum seekers (*Torubarov v. Bevándorlási és Menekültügyi Hivatal*, C-556/17).

Moving from the perspective of judicial dialogue, we investigate the full life cycle of a case, from its birth with the preliminary reference, to its impact in different Member States. We examine the ascendant phase and analyse how the preliminary reference is made, and whether and how it is reframed by the Advocate General and the Court. We then analyse the judgments and distinguish them according to the chosen degree of detail when they provide guidance both to the referring court and to the other courts that have to apply the judgments in the various Member States.

Indeed, judicial dialogue develops both vertically and horizontally, at both national and supranational levels. Preliminary references represent the main driver of this dialogue. Linked with preliminary references procedures, horizontal interaction among national courts takes place when the principles identified by the CJEU are applied in pertinent cases, mostly in the same and sometimes in connected fields. Also depending on the type of reference enacted, the guidance provided by the CJEU may consist in specific rules or in general principles to be applied. Very frequently the latter may consist in the principle of effectiveness or the one of equivalence, due to be balanced against the principle of national procedural autonomy.

Diverging approaches may be provoked by the same CJEU's judgment and a national vertical dialogue may emerge, involving constitutional courts, higher courts and first instance courts. The horizontal dimension of this dialogue may be observed only indirectly when, starting from the same decision of the Court of Justice, possibly different outcomes are examined in different Member States. In this respect, for example, the Casebook examines the different impact of both the CJEU's and the ECtHR's jurisprudence on national caselaw as regards the extent to which 'systemic deficiencies' and 'individual violations' of Article 4 Charter can act as limitation to Dublin transfer to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of the person's state of health (*C.K. and others*, C-578/16 PPU). Furthermore, the Casebook also examines the scope of the right to be heard in asylum proceedings depending on the different intersection between the administrative and the judicial phase at national level (recently, *Addis v. Bundesrepublik Deutschland* (2020, C-517/17)) and the impact of CJEU's ruling in the mentioned *Torubarov* case, referred by a Hungarian Court, upon Dutch caselaw.

Comparing different stories, taking into account national specificities, enables national courts to better anticipate the impact of EU law on the adjudication of national cases, even in jurisdictions that are different from the one of the referring court. This is why the **comparative perspective** provided by this Casebook may clarify the impact of the judgment or of a cluster of judgments addressing the same issue (for example the scope of the right to be heard in return proceedings) on the case law of Member States different from the one of the referring court. In some cases, the impact can be examined through judgments expressly referring to the CJEU's decisions; in other cases, the Casebook suggests interpretative tools to address issues discussed in national case law through the lens of the CJEU's decision. The **impact analysis** is very important for judges other than the referring one. Their effort to interpret and to adapt the judgment to their national legal context is often underestimated. While formally the CJEU judgments are binding on Member State courts, their application requires a careful analysis of which substantive and procedural rules may be affected by the judgment, in particular the application of Article 47 of the Charter and the principle of effectiveness.

Based on the methodology adopted in Re-Jus and now in Fricore, the analysis does not only focus on single CJEU judgments but also on **clusters of judgments** around common issues. Often, CJEU judgments touch on many questions depending upon how the preliminary references are framed, and it might be more effective to choose a subset of complementary issues and examine them in sequence across several cases, rather than to focus on a single judgment. This approach may add a bit of complexity, but it reflects the problem-solving approach, rather than the conventional doctrinal perspective. The internal coordination of chapters ensures the possibility of reconstructing the judgment across different chapters.

The casebook is complemented by a [Database](https://www.fricore.eu/content/database-index) (https://www.fricore.eu/content/database-index) that endorses the methodological approach of judicial dialogue, giving continuity to the one established in the Re-Jus Project and integrating the whole set of materials therein developed. It is organized around EU judgments and their impact on national legal systems. Two series of national judgments are examined in the Database: those directly concerning cases brought before the CJEU within a preliminary reference procedure, and those that apply or take into consideration the CJEU case law when addressing national cases outside of a referral procedure. Hence, the database is specific, and it reflects the idea that judicial dialogue is a pillar of EU law.

We would like to encourage in training courses organized by national schools both the use of the Casebook and that of the Database, which is subject to constant updating during the course of the project, thanks to contributions coming both from the Schools of the Judiciary and from the workshops' participants.

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## EXECUTIVE SUMMARY

This casebook analyzes CJEU caselaw related to the fundamental rights of third-country nationals legally or illegally staying on the territory of a Member State. It is more precisely focused on the right of the former to effective justice in the meaning of Article 47 CFR to the extent that EU law is applicable to them. It is then centered on the principles that emerge from CJEU preliminary rulings and judicial dialogue with other Courts, such as the European Court of Human Rights and National courts, to guarantee the access to justice to foreign nationals. Issues raised by the application at the national level of EU Law on asylum and migration, as enshrined in the *Return Directive*, the *Family Reunification Directive*, the *Qualification, Procedures and Reception Condition Directives*, and the *Dublin III Regulation*, are exposed, as well as the ways to resolve them in a manner compatible with CJEU's requirements. Since most of those requirements have already been analyzed and summarized in the [Rejus Casebook on Asylum and Immigration](#) released in 2018, the present casebook will only explore the most recent (2018-2020) questions referred to the Court. Given this time restriction and the cases published by the Court during this period, the following pages are focused only on some of the challenges posed by Article 47 CFR with Member States' jurisdiction on the entry, stay and removal of third-country nationals.

This casebook is divided into three parts. The first two parts are devoted to general issues that Member States are generally confronted with in the field of immigration and international protection. **Part One** is thus devoted to the right to effective justice of third-country nationals in the event of detention, removal, expulsion or Dublin transfer. **Part Two** analyzes the right to effective justice of asylum seekers and foreign nationals to whom national authorities have granted an international protection – as refugee in the meaning of the 1951 Geneva Convention or as beneficiary of a subsidiary protection in the meaning of the Qualification Directive. **Part Three** offers an insight into two of the Member States' major concerns of the last years regarding foreign nationals' rights and States' vital interests: the protection of national security and of public policy and the protection of public health.

**Part One** is made of two chapters.

**Part One's first chapter** is devoted to third-country nationals' rights under Article 47 CFR in the event of detention. The detention of foreign nationals is lawful only if due conditions occur as laid down by EU Law, in particular in Chapter IV of the *Return Directive* (hereinafter RD), Article 26 of the *Procedures Directive* (hereinafter, PD) and Article 8 of the *Reception Condition Directive* (hereinafter RCD). During the period under observation, the CJEU issued a landmark case on this question, which defines the power of National Courts' to rule on the lawfulness of detention and to provide for measures apt for an effective protection, even though national law does not confer such a jurisdiction to domestic courts. This chapter also explores the definition of "detention", the conditions of its lawfulness, and the application of the proportionality test to measure the maximum length of detention.

**Part One's second chapter** elaborates on foreign nationals' rights in the event of collective expulsion, return and Dublin proceedings. It relies on CJEU caselaw regarding the right to be

heard in collective expulsion cases and return proceedings, the suspensive effect of appeal in return proceedings, and the extending judicial review in Dublin transfers.

**Part Two**, which is devoted to the right to effective justice in asylum proceedings, is divided into three chapters.

The **first chapter** clarifies the personal scope of the *Reception Condition Directive*, which is a necessary previous step for National courts to assess the lawfulness of proceedings regarding third-country nationals who are willing to apply for international protection. During the period under observation, the CJEU considerably broadened the personal scope of the *RCD*, obliging National Courts to assess the lawfulness of a third-country national's detention under this text, rather than under the *Return Directive*, as soon as the former claims his/her intention to apply for international protection, even though he/she does so in front of an authority that is not competent to register such a claim.

The **second chapter** is focused on the right to an effective remedy and the right to be heard of asylum seekers.

**Firstly**, it exposes the conditions under which an application for international protection can be declared inadmissible at the administrative stage, without conducting a personal interview of the applicant. This possibility exists only if the appeal procedure allows the applicant to set out in person all of his/her arguments and if National courts have the power to take those arguments into account to alter the decision of inadmissibility.

**Secondly**, it analyzes CJEU's caselaw on time-limit and suspensory effect of appeal against a decision of inadmissibility. *On the first point*, this development explains that Article 46 PD, read in light of Article 47 CFR, does not preclude national legislation to set a 10 days time-limit to lodge an appeal against a decision declaring inadmissible a subsequent application for international protection. *On the second point*, it recalls that when a Member State offers a second level of jurisdiction to applicants for international protection whose application has been rejected, EU law does not require States to confer on that remedy an automatic suspensory effect, even in the case where the person concerned invokes a serious risk of infringement of the principle of non-refoulement.

**Thirdly**, this chapter answers the question of the sufficient interest of the beneficiary of a subsidiary protection to lodge an appeal against a decision which recognized him/her as a refugee in the meaning of the 1951 Geneva Convention. The CJEU indeed held that such a sufficient interest exists as soon as under the applicable national legislation, the rights and benefits afforded by each international protection status are not genuinely identical.

**Lastly**, the second chapter of this casebook unravels the powers of national courts or tribunals to vary administrative decisions on the grant of international protection, and to substitute their decision to administrative bodies when those powers are not expressly conferred to them by the national legislation. It also analyzes CJEU caselaw related to the power of National courts to disapply national legislation which is contrary to applicants for international protection's right to effective justice.

**Part Three** of the casebook presents the challenges raised in the field of EU law of asylum and migration by threats to national security and public health issues.

The **first chapter** analyzes how national security and public policy issues are connected with the right of third-country nationals to effective justice.

*Firstly*, it relies on CJEU case law to define the concept of public policy and how it can allow Member States to reject an application for entry and residence under the *Family Reunification Directive*. It also exposes the obligations of National authorities, in light of Article 47 CFR, when they refuse to issue a visa because another Member State objected to the issuing of this visa on public policy grounds.

*Secondly*, this chapter explains the consequences of the refusal or withdrawal of the refugee status on grounds of national security, public order or danger to the community of the host member State, and National courts' obligation as to the evidence that can be taken into account in such cases.

The **second chapter** addresses the question on how the current pandemic interferes with third-country national's rights to access to justice. It thus exposes the EU Commission's recommendation and guidelines, and States practices regarding the closure of external and internal borders and the restrictions thereof.

## MAIN QUESTIONS ADDRESSED

This casebook analyzes caselaw concerning the following questions:

### **PART I – EFFECTIVE JUSTICE AND IMMIGRANTS RIGHTS IN THE EVENT OF DETENTION, REMOVAL, EXPULSION OR DUBLIN TRANSFER OF MIGRANTS**

- Does article 47 CFR require National Courts to rule on the legality of detention and provide for measures apt for an effective protection even though the applicable national law does not provide for them?
- Are third-country nationals held in transit zones at States' borders in “detention” within the meaning of the *Reception Condition* and *Return Directives*?
- How does the proportionality test and the lack of cooperation of a third-country national affect the length of his/her detention?
- Is detention allowed on the ground of a third-country national's inability to provide for his/her needs?
- What is the impact of Article 47, read in conjunction with the right to a legal remedy as enshrined in Article 13 of the Return Directive, upon return proceedings?
- Does a judicial appeal in asylum adjudication have an automatic suspensive effect on the whole return procedure in the framework of domestic coupled asylum and return procedure?
- What is the extent of National courts' powers to reject a Dublin transfer in cases of insufficient medical care in the Member State of transfer?

### **PART II – EFFECTIVE JUSTICE AND THE RIGHT TO AN INTERNATIONAL PROTECTION**

- In the light of article 47, are national courts allowed to declare an application for international protection inadmissible without conducting a personal interview of the applicant?
- Is a time limit of 10 days to bring an action against a decision of inadmissibility acceptable under the *Procedures Directive* read in the light of article 47 CFR and the principle of effective judicial protection?
- When Member States offer a second level of jurisdiction to applicants for international protection whose application has been rejected, are those States required by EU law to give an automatic suspensive effect to such proceedings?
- Does the right to an effective remedy require national courts to admit appeals against a decision granting a legal status similar, but not identical, to another one?

- Does Article 47 confer on national courts and tribunals the power to vary administrative decisions on the grant of international protection?
- In the light of article 47 CFR, shall national courts and tribunals disapply national laws that require them to issue a ruling in a period of time too short to ensure an effective examination of the case?

### **PART III – ASYLUM & MIGRATIONS IN CRISIS TIMES**

- Do national authorities have to assess that a third-country national poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society to refuse or withdraw his/her residence permit?
- In the light of Art. 47 CFR, what are the powers of National courts when an appeal is lodged against a decision that refused a Schengen visa on ground of an objection raised by another Schengen Member State?
- How to balance national security interests of Member States with the rights a third-country national is entitled to once recognized as a refugee?

## LEGISLATIVE MAP

### Primary law

Article 78 TFEU ([EU common policy on asylum, subsidiary protection and temporary protection](#))

Article 79 TFEU ([EU common immigration policy](#))

Article 4 CFR ([Prohibition of torture and inhuman or degrading treatment or punishment](#))

Article 47 CFR ([Right to an effective remedy and to a fair trial](#))

Article 52 CFR ([Scope and interpretation of rights and principles](#))

### Secondary legislation

Directive 2003/86/EC of 22 September 2003 on the right to family reunification (*hereinafter*, “*Reunification Directive*”).

Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (*hereinafter*, “*Return Directive*” or “*RD*”).

Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (*hereinafter*, “*Qualification Directive*” or “*QD*”).

Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (*hereinafter*, “*Procedures Directive*” or “*PD*”).

Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (*hereinafter*, “*Reception Condition Directive*” or “*RCD*”).

Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (*hereinafter* “*Dublin III Regulation*”).