ACCESS TO AN EFFECTIVE REMEDY – PRACTICAL CONSIDERATIONS

Good afternoon. Firstly, I would like to thank the LIBE Committee for inviting me to deliver a presentation at this important hearing, a hearing that comes at a very crucial time in the life of the Common European Asylum System. From our perspective on the ground, as NGOs and lawyers working with asylum-seekers and refugees, we see this current stage as one full of potential but also as one full of risk: potential to strengthen levels of protection and access to human rights dangerously close to a risk of basing asylum in the EU exclusively on considerations of security, border management and increasingly negative public sentiment.

It is in fact from this ground perspective that I would like to approach today's hearing. It is definitely a useful exercise to analyse the right of access to an effective remedy in the light of its formulations in various legal instruments and court judgements. Yet I think it is just as useful to occasionally step away from technical negotiations and really try to understand the implications of the Directives and their standards on asylum-seekers, refugees and the people and organisations working with them. I want to ask the questions: where is access to an effective remedy important? And what are the daily challenges we are facing in accessing such remedies?

In an international human rights context access to an effective remedy has been defined as having the aim of *"enforcing the substance of human rights and freedoms in whatever form they might happen to be secured in in the domestic legal order"*. Several judgements from international and regional human rights bodies establish the defining criteria we are all familiar with. Summarily, any such effective remedy must be prompt, effective in as well as in practice, accessible, impartial and independent, must be enforceable, and

must lead to a cessation of or reparation for the human rights violation concerned.

From a European perspective, the right to an effective remedy is enshrined in Article 47 of the Fundamental Rights Charter. Furthermore, the Court of Justice has often reiterated that this right is *"a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."* Of course, the importance of the jurisprudence of the European Court of Human Rights in defining the nature and content of the right is strengthened by the EU Charter's close affiliation to the European Convention. The eventual accession by the EU to the Convention will further strengthen this bond.

But let's give a context to 'access to an effective remedy'. Let's place it in the scenarios that are relevant to today's hearing.

An overview of the asylum instruments will reveal that the precise term 'right to an effective remedy' is primarily used in the context of the asylum procedure. Chapter V of the Procedures Directive lists various decisions from which Member States are obliged to provide the right to an effective remedy before a court or tribunal. These include admissibility decisions, border decisions and decisions not to further examine subsequent applications. The Chapter also provides for the time limits within which the second instance decision should be taken. As we all know, at the moment there are on-going negotiations on the Commission's proposals to amend the Procedures Directive, yet I will not be exploring or analysing these proposals today.

Although it is in the Procedures Directive that we find the specific formulation *"access to an effective remedy"*, there are several other instances where such

access is of crucial importance to asylum-seekers attempting to seek protection in the EU. In all of these situations, asylum-seekers are faced with decisions taken by governmental authorities, decisions that affect one or more aspects of their lives. The importance of highlighting these various situations lies in the need to ensure the right to challenge these decisions within a framework that lives up to the effective remedy criteria.

The challenges could start from very early on, from even before access to EU territory has been authorised. Decisions to individually or collectively prohibit asylum-seekers from crossing external borders, on the basis of lack of appropriate documentation for example, require effective scrutiny to assess whether they are in conformity with the right to seek asylum, as also protected in the EU Charter. Stringent border controls and even extra-territorial border checks in third countries are examples of such precarious situations. As are measures adopted on the high seas by Member States operating alone or within the context of joint patrols and operations. Clearly, Frontex and the concerns highlighted in the recent Human Rights Watch report come to mind. In these contexts, generally occurring far from scrutiny and with limited or inexistent access to NGOs and lawyers, how can we speak of access to an effective remedy?

Once on the territory and having filed an asylum application, asylum-seekers are covered by the Reception Directive. Access to effective remedies is also crucial at this stage. The Directive grants considerable discretion to Member States in how to deal with asylum-seekers. Detention is not prohibited and under Chapter III Member States may decide to reduce or withdraw reception conditions. Chapter V does in fact mention the possibility of asylum-seekers appealing decisions relating to Directive benefits, but so many practical considerations come to mind.

What kind of information is being provided to asylum-seekers on the extent of their rights under the Directive? Are they informed of the possibility to appeal a decision to have their material reception conditions withdrawn? If they are so informed, has the information been provided in writing or in any other way? What language was used to convey the information? The standard Directive phrase *"in a language the applicants may reasonably be supposed to understand"* is just silly and results in situations where important information on rights and on appeals procedures are provided in writing and in a minimum number of languages. These methods effectively exclude large numbers of illiterate persons and persons who simply don't speak the language they are reasonably supposed to understand.

This could be further exacerbated in situations where asylum-seekers are detained for all or most of the procedure. Detention is by definition a means of isolation, and in the context of accessing an effective remedy, a means of isolation from most of what is necessary to exercise this right. What information exchange with the outside world is possible from within a detention centre? What is the level of access to the centres by NGOs and lawyers? Is it possible for detained persons to know of and engage private legal services? How does a detained and illiterate Somali or Afghan woman or minor, for example, fill in the necessary forms with the stipulated deadlines to challenge the quality and nature of their reception conditions?

Minors and other vulnerable persons are of course faced with further decisions against which they should be able to appeal. Age assessment decisions, and decisions establishing or denying the vulnerability of persons are generally taken by administrative authorities who may or may not have the competence and expertise to effectively do their job. When these decisions imply release from detention or access to specialised support services, the

importance of the right to seek effective redress against a possibly unfair decision is evident.

Within the asylum procedure several challenges are faced by lawyers and NGOs assisting asylum-seekers in presenting their claims. The current Procedures Directive provisions do not offer much in terms of support but rather grant substantial discretion to state authorities, discretion that could render access to the appeals procedure problematic and at times extremely frustrating. Again, we find the requirement for information and for the first instance decision to be provided *"in a language the applicants may reasonably be supposed to understand"*. Access to documentation by the applicant or by his or her lawyer is subject to discretionary elements that could impede the presentation of in-depth appeals submissions. Reference here is particularly being made to access on equal footing to the documentation used in the claim's assessment, including country of origin information and expert input on issues such as authenticity of documents.

In this specific context, it is impossible to understate the importance of the requirement that the appeals procedure has automatic suspensive effect. Faced with a potential removal order, an asylum-seeker rejected at first instance and submitting an appeal should remain protected from *refoulement* throughout the appeals procedure. Any formulation of the appeals procedure that somehow negates or prejudices this protection runs the risk of exposing the applicant to the human rights violations he or she fears.

Another scenario where access to an effective remedy has proven to be necessary is in the context of a Dublin transfer from one EU MS to another. The now famous M.S.S. case shed light on the lack of effectiveness of the current appeal system; with the consequence that MSS was in fact exposed to treatment contrary to the European Convention. It is evidently problematic

that the suspensive effect of a Dublin appeal is not automatic but is left in the hands of the court or competent body receiving the appeal – and only if national law allows this. In our new consciousness that fellow Member States might not be treating asylum-seekers in accordance with even the most basic of standards, there should be a strong acknowledgement for need to ensure access to an effective remedy for persons in the Dublin II process.

Once again, however, we can raise the same questions raised earlier. How are persons pending a Dublin return informed of the possibility to challenge this decision? Is it at all possible for them to identify a lawyer willing to assist and actually initiate remedy proceedings? And once again, detention looms darkly over these situations as in many cases asylum-seekers are detained at airports or in other remote or inaccessible locations pending their transfer. How effective can any remedy be under such circumstances?

In the short time available I've tried to make a quick list of various scenarios where we have asylum-seekers being the subjects of administrative decisions. I am trying to highlight the fact that access to an effective remedy should not be simply construed in the limited context of asylum procedures but should be a guaranteed right in all of these situations. There are of course other areas one could mention where access to effective remedies are relevant for asylum-seekers and beneficiaires of protection…family reunification for example as well as general access to other civil, political, econoic, social and cultural rights…but in the interests of brevity I'll have to limit myself to the situations covered.

My idea however is not to merely present a list of challenges but to identify possible responses, responses from the perspective of a practitioner and NGO. From our perspective, we certainly primarily advocate for an implementation of the general criteria mentioned earlier regarding the

definition of an effective remedy…meaning prompt, effective in law as well as in practice, accessible, impartial and independent, must be enforceable, and must lead to a cessation of or reparation for the human rights violation concerned.

To these elements, by way of complementarity and completeness, we'd also like to emphasise the horizontal issues I've been referring to:

1. With clever use of existing funding mechanism and through NGO partnerships, there should be absolutely no excuse to not providing information that is clear, intelligible and that takes into account the linguistic and diversity composition of asylum-seekers;
2. Lawyers and NGOs offering assistance to asylum-seekers should be granted full access to asylum-seekers and to all materials used in the determination of their situations. This not only in the context of the asylum procedure *per se* but also in age assessment procedures, Dublin returns, detention centres, etc.;
3. All entities responsible for receiving and determining appeals, whether judicial, semi-judicial or quasi-judicial should be required to have the appropriate technical expertise necessary to carry out their functions. In this regard, efforts like the European Asylum Curriculum and other capacity-building activities to be conducted by EASO should not only target asylum authorities but the wider spectrum of decision-makers.

Thank you,
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Director