The impact of art. 47 EUCFR on the right to be heard in the international protection proceedings

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Abstract

Taking a cue from a decision ruled by the Court of Milan, where the personal hearing of the applicant for international protection has been crucial to achieve a correct final decision, we will highlight how the right to be heard in the asylum proceedings can be considered as part of the principle of effectiveness set by art. 47 EUCFR. However, its application in the common EU framework shows a lack of uniformity and that, today, doesn't ensure the principles stated in the Nice Charter. Thus, after having outlined the specific contents of the right to be heard, some proposals will be submitted as a way to reach, both through a partial implementation of the law and through soft-law practical guide-lines, a full enforcement of the right of defence and of the principle of effectiveness in these proceedings.

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1. The case: Court of Milan 21.3.2018 (n. 46509/2017)

The court of Milan has been involved in the cognition of the appeal presented by **C.R.**, born in China in 8.10.1991, against the denial decision rendered on her application for international protection by the competent territorial commission.

Indeed the applicant was heard, during the administrative phase of the proceeding, by the commission and referred that she had to expatriate from China because of the direct persecutions she would run into in her home country as part of the Zhao Hiu religious group (Assemblies of God).

She explained the commission that she converted in 2008 when, during a serious illness of his father, she got to know about Jesus by a teacher and started praying for her father health. After her father healed she kept on praying Jesus with her parents and took part to small praying groups in the houses of other prayers. In 2013, while she was praying with other friends, the police came into the place they were and arrested her. She has been detained for five days and suffered tortures and various kind of violence, until her father paid 15.000 yen, corrupting the police in order to set her free. Then, between 2013 and 2014, she went back to her home village, Yulin, where she has constantly been followed by the police which prevented her from joining praying gatherings. So, she decided to reach a friend in Xian, to try to keep on joining prayers group. Even there the police irrupted and they had to disown their faith: at that point she decided to seek asylum in Italy.

The italian territorial commission, after the audition, decided to deny the refugee status (provided by art. 2, d.lgs. 251/2007 - the Italian law in application of Geneva's 1951 Convention).

The decision was based on the exclusion of the applicant's individual risk to run into persecutions, on the ground that she was able to freely profess her faith for six years and that she didn't have any significant difference to the other believers.

We will now see why a proper hearing is essential and, in conclusion, how an adequate personal hearing has been crucial to get to the right final decision.

2. The right to be heard during the international protection proceedings in the EU law

The right to be heard, in general terms, can be said to be composed by three different rights:

- the right of the applicant to express before the court her/his reasons;
- the right to an oral hearing;
- the right to be personally heard.

These are distinct concepts, but usually connected. Nonetheless, the right to report the reasons to the court, which constitutes the core of the fair trial, does not necessarily imply the right of the party concerned to be heard personally, because it's the defender, as a rule, that expresses the party's reasons. Moreover, the right to be heard personally requires the celebration of a hearing, which is only one of the configurations that jurisdictional proceedings can assume.

The right to be heard in the EU framework derives from art. 47 of the European Union Charter of Fundamental Rights (EUCFR), which embodies the rights of defence and the right to an effective remedy in case of violations of EU rights and freedoms[1]. The Charter is obviously influenced by the

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[1] EUCFR, art.47: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an* ***effective remedy before a tribunal*** *in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and* ***public hearing*** *within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have* ***the possibility of being advised, defended and represented****. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure* ***effective access to justice***."

European Convention of Human Rights and insofar as it contains rights which correspond to those guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention, artt. 6[2] and 13[3].

Art. 47 EUCFR represents a system of procedural rights which are recognized in order to ensure effectiveness to the substantial rights and freedom provided in it, as for the right to asylum *ex* art. 18[4] and the right to *non- refoulment ex* art.19 [5]. In this perspective the realization of a European area of justice by virtue of the V Title of TFUE, through a concrete application of art. 47 EUCFR, has necessarily to pass by the establishment of common procedures finalized to guarantee individuals access to justice and a correct running of civil proceedings, as provided by art. 81 TFUE [6], even in the international protection field. Nonetheless the principle of sincere cooperation between EU and Member States, in order to comply with EU obligations, set by art. 4, par.3, TEU [7], imposes, given the international migratory situation, a rethinking of international protection proceedings provided by Member States individually and a deepening of the judiciary civil cooperation in this field.

The right to be heard as a natural derivation of the right of defence and the right to an effective remedy set by art. 47 EUCFR, has been several times considered by the CJEU, which underlined that "*respect for the rights of the defence is [...] a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question. <u>That principle</u>*

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[2] ECHR, art.6: "*1. In the determination of his civil rights and obligations or of any criminal charge against him, **everyone is entitled to a fair and public hearing** within a reasonable time **by an independent and impartial tribunal established by law**.*"

[3]ECHR, art. 13: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have **an effective remedy** before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*"

[4] EUCFR, Art.18: "***The right to asylum shall be guaranteed** with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.*"

[5] EUCFR, Art. 19:"*1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*"

[6] TFEU, Art.81:"1. *The Union shall develop **judicial cooperation in civil matters** having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include **the adoption of measures for the approximation of the laws and regulations of the Member States**. 2. For the purposes of paragraph 1, the European Parliament and the Council, [...] shall adopt measures, [...], aimed at ensuring: [...] (e) **effective access to justice**; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by **promoting the compatibility of the rules on civil procedure** applicable in the Member States[...];*" in this regard the European Parliament states that "*Individuals should not be prevented or discouraged from exercising their rights. The incompatibility and complexity of legal or administrative systems in EU Member States should not be a barrier*".

[7] TEU, art.4, par.3: "*Pursuant to the **principle of sincere cooperation**, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*"

*requires that the **addressees of decisions** which significantly affect their interests should be placed **in a position** in which they may effectively **make known their views**.*”[8]

Nonetheless, in the *Rewe* case, the Court clarified the width of the principle of Member States **procedural autonomy**, especially regarding the respect of the principle of effectiveness set by art. 47 EUCFR, recalling that *“...in the absence of Community [now, Union] rules governing the matter, it is for the domestic legal system of each member State to designate the courts and tribunals having jurisdiction and to lay down the detailed **procedural rules** governing actions for safeguarding rights which individuals derive directly from Community [now, Union] law, provided that such rules are not less favourable than those governing similar domestic actions (**principle of equivalence**) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (**principle of effectiveness**)”* [9].Thus the principle of procedural autonomy of Member States is limited by the respect of the principle of effectiveness set by art. 47 EUCFR.

Furthermore, in another case, the Court affirmed that in any proceeding a judicial appeal must be granted: *“[...] the second paragraph of Article 47 of the Charter provides that **everyone is entitled to a hearing by an independent and impartial tribunal**. Compliance with that right assumes that **a decision of an administrative authority** that does not itself satisfy the conditions of independence and impartiality **must be subject to subsequent control by a judicial body** that must, in particular, have jurisdiction to consider all the relevant issues [...]*”[10]. In relation to the international protection proceedings the right to be heard is also strictly connected with the opportunity to prove and show evidences necessary to get a positive final decision, as we will show in par. 6 and 7.

2.1 The right to asylum and the right to be heard in EU primary legislation

The status of refugee, and the subsequent right to asylum, is defined in general international law by the Geneva Convention of 1951 and its protocol of 1967[11].

The EU law system acknowledges the right in art. 18 EUCFR[12] in terms with the Geneva Convention on the status of refugees, and in relation to the European Union Functioning Treaty, which, in art. 78, recalls itself the Convention and the protocol[13].

[8] Court of Justice of the European Union, case C-161/15 *Benallal v. État belge*, par.33.

[9] Court of Justice of the European Union, case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*.

[10] Court of Justice of the European Union, case C-403/16, *Soufiane El Hassani* v. *Minister Spraw Zagranicznych*,, parr. 38 e 39.

[11] According to art. 1 of the Convention the term “refugee” shall apply to any person who: “ *[...] owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [...]*”.

[12] While a correspondent right is not provided by the ECHR.

Nonetheless the right to asylum is influenced by art. 51 EUCFR which establishes that: *"The **provisions of this Charter are addressed** to the institutions and bodies of the Union with due regard to the principle of subsidiarity and **to Member States only when they implement Union Law**."*[14]
In this regard the CJEU has pointed out that: "*The Charter does not confer any positive rights which are not otherwise recognised by Union law*" [15].
Art. 51 EUCFR, therefore, imposes the application of the Charter to member States only when they implement EU law, as when they establish conditions and procedures in order to recognize the right to asylum, provided in art. 78 TFUE[16].

2.2 The right to asylum and the right to be heard in EU secondary legislation

On the EU secondary legislation level, a pivotal role is played by the Common European Asylum System (CEAS), which originated by the Tampere European Council Presidency Conclusions of 1999[17].
CEAS is a legislative framework established by the EU, based on 'accordance' with the Convention relating to the Status of Refugees (Refugee Convention) that regulates and sets common standards in the field of international protection with a view to developing common concepts and criteria, and harmonising the interpretation and application of asylum law among EU Member States.
Compared to other regional asylum systems, such as those established within the African Union or in Central and Latin America, the CEAS is unique in regulating both procedural and substantive matters for international protection from entry into a Member State until final determination of protection status.

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[13] TFUE, art. 78, par.1: "*1. **The Union shall develop a common policy on asylum, subsidiary protection and temporary protection** with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of* non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*"

[14] EUCFR, art. 51, par.1, first sentence.

[15] Court of Justice of the European Union, case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*.

[16] Indeed by national acts implementing EU law and therefore cases falling within the scope of the Charter is generally intended: A) national measures that give effect to an obligation to take measures laid by a rule of EU primary or secondary law; B) national procedural provisions that allow for the legal protection, before domestic courts, of the rights conferred on individuals by Union law; C) the application of EU law rules, or of the national provisions giving them effect, by a national court or a national administrative authority; D) national measures that derogate from Union law rules by relying on the grounds for derogation explicitly provided by EU primary or secondary law, or based on the ECJ's case law on mandatory requirements; E) national provisions that clarify or further define notions contained in EU law measures.

[17] Tampere European Council Presidency Conclusions 1999: *"3. [...]It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn **requires the Union to develop common policies on asylum and immigration**,. [...] These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.4. **The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments**, and able to respond to humanitarian needs on the basis of solidarity.. [...]",* available at: http://www.europarl.europa.eu/summits/tam_en.htm.

In order to define common minimum standards for Member States on qualification for international protection, the content of the protection granted, and procedures for granting and withdrawing refugee status, several EU secondary legislative acts were adopted[18].

For our purposes two main directives come to our attention: the Qualifications Directive 2011/95, which gives the definitions of refugee and of person eligible for the subsidiary protection relevant within the EU framework[19], and the Recast Asylum Procedure Directive 2013/32, which regulates the proceedings for the recognition by the member states of those status and their subsequent prerogatives.

The right to be heard in the international protection proceedings is thus guaranteed by art. 14 of the mentioned Recast Asylum Procedure Directive, which provides a general right to a personal interview of the applicant before a decision is taken by the proceeding authority[20]. The provision, which also establishes specific exemptions to that right[21], however does not identify a specific nullity in case of its violation, affirming instead, in paragraph 3, that "***the absence of a personal interview*** *in accordance with this Article* ***shall not prevent*** *the determining authority* ***from taking a decision*** *on an application for international protection*".

The subsequent provisions of the Directive set up the general rules which Member States have to apply to personal interviews, as to allow applicants to present the grounds and elements needed to

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[18] In particular during the first phase of CEAS were adopted: The Eurodac Regulation, 2000; The Temporary Protection Directive, 2001; The Dublin II Regulation, 2003 ; The Reception Conditions Directive (RCD), 2003; The Qualification Directive (QD), 2004; The Asylum Procedures Directive (APD), 2005. During the second phase of CEAS new directives were adopted, amending or recasting secondary legislation: The Qualification Directive (recast) (QD (recast)), 2011; The Eurodac Regulation (recast), 2013; The Dublin III Regulation (recast), 2013; The Reception Conditions Directive (recast) (RCD (recast)), 2013; The Asylum Procedures Directive (recast) (APD (recast)), 2013.

[19] Directive 2011/95, Art. 2: *"[...](d)* ***'refugee'*** *means a third-country national who, owing to a* ***well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group****,* ***is outside the country of nationality and is unable or****, owing to such fear, is* ***unwilling to avail*** *himself or herself of* ***the protection of that country****, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;*

[…] *(f)* ***'person eligible for subsidiary protection'*** *means a third- country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned,* ***if returned to his or her country of origin,*** *or in the case of a stateless person, to his or her country of former habitual residence,* ***would face a real risk of suffering serious harm*** *as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country; [...]*"

[20] Directive 2013/32, Article 14, par. 1: "*Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a* ***personal interview*** *on his or her application for international protection with a person competent under national law to conduct such an interview[...].*"

[21] Directive 2013/32, Article 14, par. 2:"*The personal interview on the substance of the application may be omitted where:(a) the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available; or (b) the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control. When in doubt, the determining authority shall consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature. Where a personal interview is not conducted pursuant to point (b) or, where applicable, with the dependant, reasonable efforts shall be made to allow the applicant or the dependant to submit further information.*"

substantiate the application in accordance with Article 4 of Directive 2011/95 as completely as possible, including the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements[22]. It is also established the obligation for Member States to record and transcript the content of the personal interview, which shall be always available to the applicant[23].

The Recast Asylum Procedure Directive also provides, in order to fully implement the right of defence, a second instance proceeding, established by Chapter V, in particular by art. 46. Indeed the norm obliges Member States to ensure applicants the right to an effective remedy before a court or tribunal, against the negative first instance decision[24]. In this stage of the procedure no personal interview is mandatory according to the Directive and no other procedural conditions nor specific rules are set to protect and render effective the right to be heard of the applicant.

Nonetheless it is worth noting that a new proposal for a Regulation repealing the Recast Directive has been presented by the Commission to the Council and the Parliament in order to strengthen the Member States' cooperation in this area, establishing a common procedure for the international protection proceedings [25].

3. The application of the right to be heard in the light of the common UE framework

As previously seen, the right to be heard, has found a common discipline at a European level within the secondary legislation of the EU (Directive 2013/32 / EU procedures). The aim of unifying procedural guarantees, however, although is highly relevant in order to ensure the primacy and uniformity of EU law, cannot be said to be achieved today. In this sense, it lays down, in essence, the extreme variety of legal systems that characterize the various countries of the Union: the first differences already emerge in the administrative phase of the procedure.

Although, on a general level, it can be said that in all countries there is an Authority - or a specific body of the same - dedicated to this purpose, the models and procedures diverge significantly. The Irish[26] example - on which we will return later - is illuminating: until 2015, the national law provided for a peculiar "dual" system that allowed alternatively to request the recognition of refugee status and subsidiary protection with two autonomous and distinct administrative procedures, the second of which could only be activated following the rejection of the first application. Given the

[22] See Directive 2013/32, Articles 15 and 16.
[23] See Directive 2013/32, Article 17.
[24] See Directive 2013/32, Article 46.
[25] See the "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", available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A0467%3AFIN
[26] on the Irish system see the judgments of 22 November 2012, C-277/11, M.M .; of 31 January 2013, C-175/11, H.I.D. and B.A .; of 8 May 2014, C-604/12, N .; and 20 October 2016, C-429/15, Danqua

above, the greater distances are manifested in the c.d. jurisdictional stage, in which the principles and rules on jurisdiction in matters of asylum differ greatly. There are countries, such as Italy, where the right to asylum is considered a pure individual right, on the ascertainment of which, the civil court has jurisdiction. The Italian example, however, is recessionary since in most countries - Germany, France, UK - the protection of the right to asylum is entrusted to the administrative court. This distinction in two macro-groups, however, does not exhaust the number of models that can be found at a national level. For example, in Germany the administrative court in the procedure for the recognition of the right to asylum has powers of inquiry and has the power of knowledge and decision extended to the merit of the whole question, being able to confirm or reform the decision taken in the administrative phase. For example, a similar power is not attributed to the courts of France or Romania, although, even in this case, the judge has the possibility of carrying out investigations of his own. There are, instead, completely different rules for the English judge, who acts in a rigidly accusatory model, in which he does not cover any role in the evidentiary production. In addition to civil and administrative courts, asylum detention is in certain Member States falling under the competences of criminal courts (e.g. Hungary), or general courts (e.g. Poland).

It is right to assume, therefore, that these systemic distances entail a substantial difference in the various profiles that characterize the model of protection of a given legal position: in other words, in terms of asylum, at a national level, there are very different rules of judgment concerning the burden of proof, the standard of proof and the duty of cooperation of authority and judge. And it is in such a fragmented context, therefore, that an element of guarantee among the most important, as the right to be heard, is considered by the different national disciplines in completely different ways. From this point of view, although, as already mentioned, the European regulation on the subject of procedural guarantees in the field of asylum has set several specific standards, in the individual national legislation its transposition and interpretation is very different.

Firstly, with reference to the administrative phase, the right to be heard is present in a peculiar way in the cases in which the national laws combine several decisions on the status of the foreigner in related proceedings. It is the example of France or Belgium, countries in which the applicant, once heard in the first phase of the procedure, has no right to a new hearing before an expulsion order is issued against him; we will come back to the issues related to the implementation of European law in Ireland - at least until 2015 - which we have already partially mentioned.

It is pretty the same regarding to the subsequent judicial phase. If in some countries the possibility of a second audition is considered the rule - referring to Italy and France, countries where the decision is referred to the court - in other jurisdictions - such as in Finland or Belgium - the

national law places strict limits on the discretion of the judge[27]. Due to this reason, the following two paragraphs will highlight the dialogue between the national courts and the European Court, in order to point out the correct application of European rules, as a central element of the broader theme of compliance with the common principles of the right to defence and of the right to effective judicial protection.

4. Problems emerged in the practical implementation of the right to be heard in EU countries: the dialogue between national and European Court (CJEU)

Having briefly examined the differences between the different countries, it is now appropriate to study the most important issues arising in the vertical dialogue between National courts and the European Court, concerning the right to be heard. To do this, a preliminary distinction is necessary between the two phases, the administrative one - whose critical issues will be analyzed in the first paragraph - and the jurisdictional one - which will be dealt with in the following.

4.1 Problems in the administrative phase: the application of the art. 41 EUCFR

The main issue that emerged at a European level regarding the right to be heard in the first phase of the application concerns the extent of the duty of the national authorities to admit the hearing of the applicant. As already seen, the Recast Asylum Procedures Directive has been set out to put detailed safeguards to the right to be heard during the administrative phase of asylum proceedings.

Therefore, the critical issues related to this phase have developed precisely starting from the peculiarity of some national systems, since a hearing cannot be completely disregarded.

The most significant example in this regard is Ireland. As already mentioned, in that State the administrative procedure for the recognition of asylum or subsidiary protection used to be "dual" until 2015: in fact, in this context, there were two different proceedings respectively for the recognition of the right to asylum and, in case of a negative outcome, for the recognition of subsidiary protection. This means that following the rejection of the first application, a new hearing was not guaranteed in the phase relating to the request for subsidiary protection. Thanks to the instrument of reference for a preliminary ruling to the CJEU, the highest organ of uniform interpretation of European law has had the possibility to intervene on the issue, applying directly, from 2012[28], also to these procedures, the fundamental principles set out in the Charter of Nice.

[27]For further details on the differences in the judicial powers in inquisitorial versus adversarial administrative judicial procedures, see I Staffans, *Evidentiary Standards of Inquisitorial versus Adversarial Asylum Procedures in the Light of Harmonization*, European Public Law, Volume 14, Issue 4.

[28]C-277/11, M v Minister for Justice and Equality, Chamber Judgment of 22 November 2012 preliminary reference sent by the Irish High Court, ECLI: EU:C:2012:744; see also the Opinion of the Advocate General Bot, points 30-45 on a comparison of the scope of the right to be heard in other administrative and criminal proceedings.

In M.M. (C - 277/11) the CJEU has affirmed that the art. 41 of the Charter[29], entitled as the right to good administration, applies to the proceedings under examination, thus determining, even in the context of international protection, a significant extension of the individual guarantees for the applicants[30].

More specifically, the Court held that the content of art. 41 of the Charter includes the right to be heard before the national authorities "*in all proceedings which are liable to culminate in a measure adversely affecting a person*" (para. 85). This means that, thanks to the direct application of the Charter, "*the observance of that right is required even where the applicable legislation does not provide for such a procedural requirement*". As it is easy to understand, the latter principle has introduced a new approach, at a European level, in the field of asylum: the right to be heard, in fact, is today considered a guarantee that the Member States cannot disregard, in order to raise the level of protection of a fundamental right, as the right to asylum, and to ensure, on a general level, the uniform application in the Member States of the relevant European rules.

4.2 Problems in the judicial phase: the application of the art. 47 EUCFR

What said before with reference to the administrative phase does not find a punctual confirmation in the jurisdictional phase. As already anticipated, in fact, while the personal interview of an applicant for international protection is mandatory at the administrative stage, in pursuance of art. 14 of dir. 2013/32, such a requirement is not explicitly foreseeable with regard to the appeal procedures as set out in Chapter V of 2013/32 directive. In addition, the differences described above between the various jurisdictions of the Member States lead to a substantial divergence in the consideration of each individual national experience concerning the right to be heard at the appeal stage.

Also in this case, however, following a similar reasoning to that made before, the dialogue between the National courts and the CJEU has allowed a substantial extension of the guarantees for the applicant, so that today we can say we have reached a common point at a European level.

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[29]EUCFR, Art. 41: "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.*
This right includes:- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;- the obligation of the administration to give reasons for its decisions.
Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language".

[30]While in the *M.M.* preliminary ruling of 2012, the CJEU stated that Article 41 applied to asylum proceedings, in late 2014 (*Mukarubega and Boudjlida*), the CJEU corrected its approach and since then has consistently held that Article 41 which includes the right to be heard applies only to institutions, bodies, offices and agencies of the EU. However, the principle of good administration with a content equivalent to Article 41 EU Charter has been held to be applicable to the Member States when acting within the scope of EU law.

This result was recently achieved through the application to the asylum processes of art. 47 EUCFR, entitled as the right to an effective appeal and to an impartial judge[31]. Two rulings on the matter are of particular importance: the first was issued by a National Constitutional Court, the Austrian one, which, in two different proceedings[32], interpreted and directly applied to the proceedings under examination art. 47 of the Charter; the second ruling was issued by the European Court of Justice, which was preliminarily approached on the subject by an Italian court[33].

In the first case, the national constitutional judge, at first, stated that the art. 47 Charter is directly applicable in the asylum processes, since this rule, differently from art. 6 EHRC, applies to all types of proceedings, not just civil and criminal ones. Having established this assumption, the Austrian Court, in its ruling U466/11, went further, explaining the consequences of the direct application of the right to a fair trial in the appeal phase of international protection: more specifically, the Court asserted that, although art. 47 does not prescribe a right to the hearing in any case, the applicant's interview, in the second phase, must in any case be recognized as a fundamental guarantee which must be used in certain situations. From this point of view, the Austrian judge has valued the principle of proportionality - the cornerstone of the common European legal culture[34]- as a parameter for the assessment on the admission of the hearing,

A similar point came later, in the pronunciation *Sacko Moussa*, the CJEU, which, questioned by the Court of Milan on the correct interpretation of Articles. 12, 14, 31 and 46 of the Directive, in the light, obviously, of the principle set by art. 47 EUCFR, decided as follows. The hearing of the asylum seeker, in the opinion of the European Court, must be analyzed as a central guarantee in the broader perspective of the entire judgment carried out by the State, including the two phases, administrative and judicial. From this point of view, despite the fact that the interview is not compulsory during the judicial phase, it is not possible to exclude it at all, because otherwise the fundamental guarantee of art. 47 EUCFR would be disregarded. In light of these arguments, the reasoning already advanced by the Austrian Constitutional Court is found in all its strength: the admission of the hearing is left to the judge, who decides case by case, on the basis of a comprehensive evaluation of the concrete situation, taking into account what emerged from the compulsory interview during the previous phase. Precisely for these reasons the use of principle of proportionality by the judge assumes a central importance.

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[31] See note n. 1.

[32] Austria - Constitutional Court, U466/11 and U1175/12.

[33] CJEU preliminary ruling in Case C 348/16, Sacko Moussa.

[34] The principle of proportionality is laid down in Article 5 of the Treaty on European Union. The criteria for applying it are set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

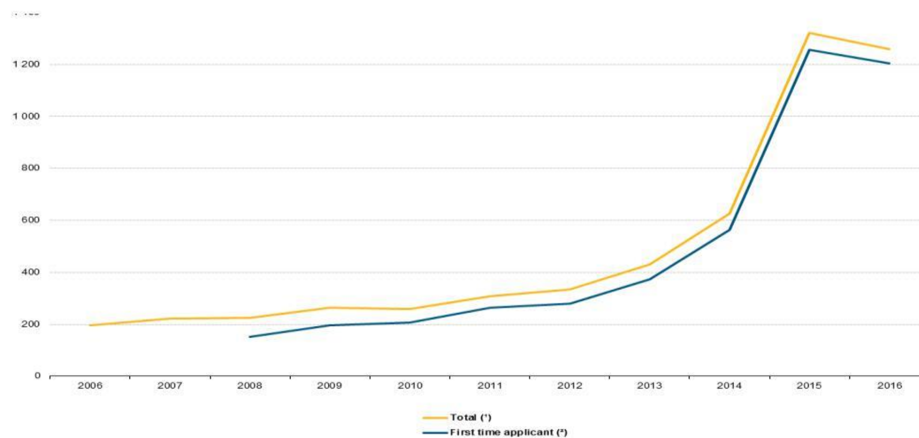
5. Asylum proceedings: data and analysis

In the light of the foregoing, it is appropriate to find a balance on the issue, between the various positions expressed at a national level by the legislators and the courts of the Member States, and at the European level. The problems analyzed above and their solutions all derive from the need to reconcile more interests that involve the topic under consideration.

On the one hand, as we have seen, there are the "system interests" of the Member States, which exercise the primary right to control borders by setting rules aimed at avoiding abuses of the asylum and immigration law; on the other hand, there are the requests for protection of human rights offered to migrants by international and European law.

The complexity of the context and the diversity of opinions, moreover, manifest themselves with great clarity if we analyze the numbers of the phenomenon under examination.

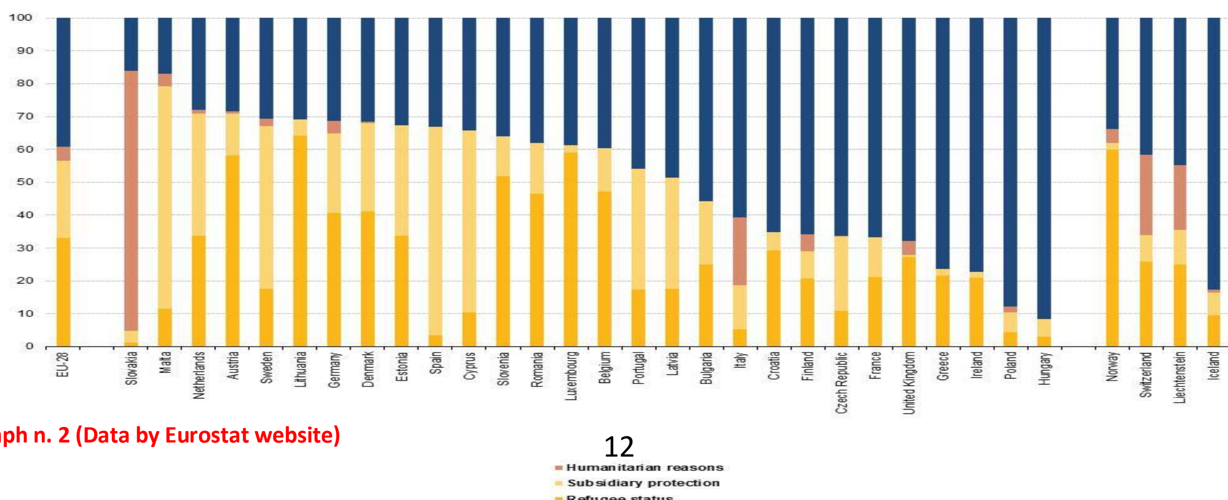
Graph n. 1 (Data by Eurostat website)



(¹) 2006 and 2007: EU-27 and extra-EU-27.
(²) 2006 and 2007: not available.
Source: Eurostat (online data codes: migr_asyctz and migr_asyappctza)

In 2016, 1.1 million first level decisions were adopted in all EU Member States, almost twice as many as in 2015 (593.000). Without any doubt, the largest number of decisions was taken in Germany, with almost three fifths (57%) of the total first-instance decisions in the EU-28 in 2016. To these are added the 221 thousand final decisions, once again with the largest share (56%) attributable to Germany (see Graph n. 1). This means, first of all, that there is a big difference between the number of requests made in any EU Member State.

But the most interesting data is revealed when the analysis invests the nature of the decisions taken. In this situation, in fact, the context is even more jagged. If we limit ourselves to the first instance

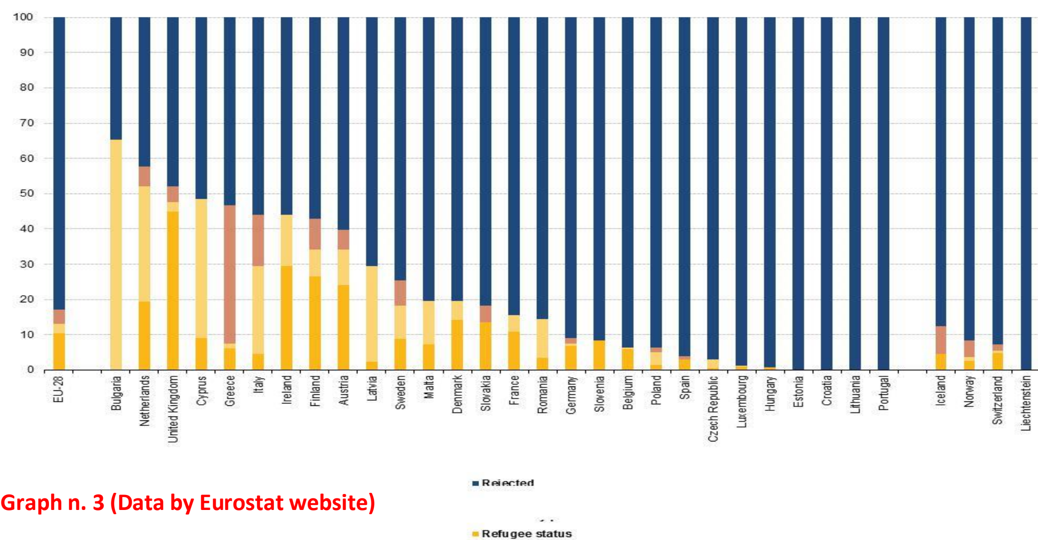


Graph n. 2 (Data by Eurostat website)

Note: based on original (not rounded) figures.
Source: Eurostat (online data code: migr_asydcfsta)

decisions, to the outcome of the administrative phase, in 2016 the three fifths (61%) had a positive result. However (Graph n. 2) there is a substantial difference between the Member States in relation to the shares of accepted decisions and the quotas of rejected decisions: the highest shares of first-instance positive decisions, registered in Slovakia and Malta with percentages above 80%, clash with the highest rejection quotas of other countries. In fact, in countries like Greece, Ireland, Poland and Hungary, there is a rejection rate of over 75%. It is difficult from this point of view - starting from the fact that there is a common framework - to explain how, in different countries, even if there are often similar migratory flows, we can find the same percentages - particularly high - respectively of first instance acceptance and rejection decisions.

But the situation does not improve if we analyze datas of final decisions, which would result in the outcome of the appeal phase.



Graph n. 3 (Data by Eurostat website)

Note: based on original (not rounded) figures.
Source: Eurostat (online data code: migr_asydcfina)

The share of final decisions (Graph n. 3) with a positive outcome (17%) was decidedly lower in the EU-28 in 2016 compared to the first-level decisions. Approximately 37.7 thousand people in the EU-28 obtained a final decision taken after appeal with a positive outcome in 2016. Only in three EU Member States the final positive decisions exceeded half in 2016: Bulgaria (65%), Netherlands (58%) and United Kingdom (52%), while the largest shares of definitive discards were recorded in Estonia, Croatia, Lithuania and Portugal, where all final decisions were negative.

In this case the most obvious considerations that emerge are two: firstly, the appeal phase, on a general level, gives a limited possibility of revision of the first instance decision; secondly, even in this circumstance, there is a very high difference between Member States on the quotas, respectively, of accepted decisions and rejected decisions. Once again, it is evident that the presence of different legal-political guidelines leads to an increasingly difficulty to look for a, at least partial, uniformity.

On this premise, the right to be heard represents a procedural guarantee that could improve the assessmente of positions on the ground.

The interview of the asylum applicant, according to the opinion of some, because of the difficulties involved in his prediction on various levels - first of all that of linguistic understanding and of the natural complexity of any comparison between cultures which very often are at the antipodes - would have the defect of lengthening the procedures, introducing the possibility of abuse and discretionarly widening margins of the deciding body. On the other hand, however, today's dominant orientation in Europe sees in the right to be heard an essential tool to ensure the full effectiveness of protection of a fundamental right such as asylum. What's more: in this perspective, the individual right to be audited is projected on an objective level, since the interview, by ensuring a more careful and rigorous assessment, makes it easier to have uniform decisions at a European level.

6. The right to be heard and the right to an effective remedy (art. 47 EUCFR): does the first, today, ensure the principle stated by the Charter of Fundamental Rights?

After having highlighted the importance of the principle of effectiveness (art. 47 EUCFR) in the EU system, as a way to ensure uniformity to the Member States civil procedure, and how the right to be heard in asylum proceedings is, on one hand, fundamental in the CJEU perspective, but, on the other hand, gives rise to uncertainty in the concrete application from the National Courts, we can infer that today the application of the right to be heard does not completely achieve the aims set by the Charter.

The right to an effective remedy means, with regard to asylum proceedings, that any applicant for international or subsidiary protection in any EU State has the right to have (at least) a similar proceeding with (hopefully) the same guarantees. So, if the EU immigration policies have brought to a certain level of uniformity of the national legislation through EU common regulation, as an immediate result of the importance given to human rights and the right to obtain the refugee status when those rights are endangered in the country of origin, the final outcomes of the national procedures in the Member States, as above analyzed, are instead too different. If the right of an effective remedy must be granted at the same level in all the European countries, the difference between the percentages of positive and negative decisions, both in first and final instance, as displayed in the graphics, leads to the conclusion that there is no effectiveness and, as a consequence, there is no uniformity (which is also in contrast with what stated by art. 4, par.3, TEU).

Given this, it is possible to affirm that, generally speaking, today's application of the right to be heard shows the following problems:

i. uncertainty about the cases in which the applicant's hearing is (in the judicial phase) preferable or, to a certain point, compulsory;

ii. conflict between a strict respect of the principle of reasonable duration of the proceeding and the right to be heard as mean to reach an effective judicial protection;

iii. uncertainty about the relation between the administrative and judicial phase and, in particular, about the importance and usefulness of repeating the hearing or using by the judge the personal statements issued by the applicant in the administrative phase, to ensure her/him an effective judicial protection;

iv. absence of guide-lines for a uniform and profitable hearing in all the countries.

The first issue **(i)** depends on the fact the CJEU admits that the right to a fair and public hearing is not absolute, and restrictions can be established: indeed there is the possibility for a judge to deem not necessary the hearing of the applicant, provided that this has occurred in the administrative phase and the judge does not deem necessary to conduct a new hearing for the purpose of ensuring full and *ex nunc* examination of facts and point of law. At the same moment, the Court states that *"failure to give the applicant the opportunity to be heard in an appeal procedure constitutes a restriction of the rights of the defence, which form part of the principle of effective judicial protection enshrined in Article 47 of the Charter"*[35]. In this situation, it is not completely clear when the judge is free to consider the opportunity to hear personally the applicant or when it is compulsory for him. It all depends on his interpretation of the completeness and clearness of the first hearing. Nevertheless a misunderstanding of the case-file or an error of assessment could bring to concrete a violation to the right of defence.

The second issue **(ii)** origins in the same article of the Nice Charter, which sets the principle of the reasonable duration of judicial proceedings as mean to ensure an effective remedy. Instead, a full implementation of the right to be heard is likely to delay the final decision on the refugee's application. Though, it is not clear why, in this case, a reasonable duration should prevail on the right of defence. If human rights protection has reached a high level in many fields, a full consideration of the applicant's instances should take precedence, to some extent, on the duration of the proceeding.

Another problem **(iii)** is strictly connected to the previous one. It is not clear how the administrative and the judicial phase are related and to which point the judge has the power to intervene in the claim, modifying it or using *ex officio* powers to provide evidence when the applicant has no

[35] CJEU, Case C 348/16, *Sacko Moussa*, paragraph 37.

adequate resources. Furthermore, an in-depth and effective reading of the case-file made in the administrative phase should be recommended in order to correctly assess the opportunity or the necessity of a second hearing. Everything is left, in the end, to the judge, who is called to exert a great responsibility in this evaluation.

The last issue **(iv)** refers to the hearing itself. There is no common hearing procedure, which brings also to different results in the proceedings. A standardized and pre-determined hearing procedure, based on the common experiences made by the Member States would probably bring closer to uniformity and, above all, would help to build a more effective hearing system.

7. Contents and meaning of the right to be heard: how a full implementation could bring to the "effet utile" of art. 47 EUCFR

In the light *of the above, we will now point out the principal contents of the right to be heard, and how a full application of this principle would help to find a solution to the issues explained.

In fact, it is a common ground that the right to be heard, which, as seen (page 3), is composed by three "under-rights" (right to express before the court the personal reasons, right to be personally heard, right to an oral hearing), may be linked with:

- the right of defence;
- the need to provide evidence about facts or legal requirements to be ascertained before the decision;
- the need to specify the claim or adapt it to the emergence of new elements within the limitations provided by the principle of "own initiative".

We've already seen how the current application of the right to be heard causes troubles to the judges, who struggle to secure an adequate level to the right of defence. In this sense, a correct implementation of the principles enshrined in art. 47 would help them to: (i) know when to hear the applicant in order to guarantee the right of defence; (ii) conduct a proper hearing, aiming at assessing the applicants' credibility; (iii) better understand the applicant's needs, so that judge could also resort to *ex officio* powers to "cooperate" with the applicants in obtaining evidence if the latter can't; (iv) ensure an effective remedy.

Beside this, the need to obtain evidence about the facts told by the applicant in the administrative phase emerges only in the appeal procedure. A second hearing, performed in a comfortable and appropriate setting could help the judge to direct the proceeding in the most effective way.

That's what happened in the *Sacko-Moussa* case, already mentioned, where the Italian judge, after hearing the appellant after the ruling set by the CJEU, found out the need to assess some elements which did not emerge during the administrative, that were related to socio-political situation in the

country of origin (Mali), changed meanwhile. Indeed, the assessment has to be done *ex nunc*, hence based on the situation of the applicant as it is in the moment of the judgment.

As a consequence, the judge should not only cooperate with the applicant in obtaining evidence through its *ex officio* powers, but also consider the claim in the light of the new elements. Moreover, this would enable the court to better evaluate the reliability and credibility of the applicant (possibly through an hearing setting that enables the participants of other professionals, such as interpreters, psychologists and cultural mediators) which in these proceedings play a key role for the final decision.

All of these would clearly bring the outcome of the proceeding closer to the *effet utile* of international protection regulation, leading the right of defence to a higher level of effectiveness, which is, finally, the objective of the EU legislation.

In conclusion, even if the right to be heard is not, as the CJEU states, an absolute right under art. 47 EUCFR, because it has to be balanced with other rights and with the Member States interests, a full implementation of it would, for sure, enhance the right of defence in the asylum proceedings.

8. A possible way to adjust the EU regulation of asylum and immigration procedures (Directive 2013/32/EU)

To sum up, art. 46 Directive 2013/32/EU does not contemplate as mandatory the hearing in the judicial phase of international protection proceedings, so it is not an absolute right, but the practical application shows how important it is and how careful has to be the judge when deciding whether hear personally the claimant or not. This happens because the subject falls under art. 47 of the Nice Charter, forcing judges to reach effectiveness and equality.

Given this, the judicial phase, which differs from one Member State to the other (as seen in par. 3, sometimes there's an administrative judgment, like in Germany, some other a civil one, such as happens in Italy, and some even a criminal judicial phase, as in Hungary), proves that courts autonomy is too wide and, for this reason, procedural rules should be better regulated at a common level, in order to lead to an effective uniform interpretation and application of the right of defence.

Procedural autonomy could be preserved: right to be heard can be implemented without forcing states to adopt a common civil procedure (which perhaps would be nevertheless desirable), but nowadays' proceeding are still too far from the principle of uniform interpretation and application of EU law[36]. Some models are accusatory (Hungary, United Kingdom), some others give the judge more powers to integrate the claim and to provide evidence of the applicant's conditions (Germany): common regulation or, at least, shared guide-lines may be able to bridge the gap.

[36] CJEU, Case C 399/11, *Melloni,* paragraph 58.

The CJEU itself states that the judge has to assess the need of a second hearing. That means that sometimes a personal hearing is highly desirable, but there are no common rules to follow. In this context redefining **in a more restrictive sense the cases when the claimant cannot to be heard** would be useful. Furthermore, although the CJEU stated that the courts have to assess if they have enough elements in the case-file to take the decisions, **a rule or guide-lines indicating when the evidence is complete or when it needs to be integrated would be highly welcome**. For example, the passing of a quite long (but determined) period of time, the mutation of the country of origin situation, an incomplete first hearing without a full analysis of all the elements of vulnerability (which must be pre-determined too), are strong indicators that a second hearing is absolutely necessary.

In addition to this, we have also pointed out that often the applicants, even if assisted by a lawyer, are not able to procure themselves evidence of their condition. **Introducing a rule of law which broadens judges' *ex officio* powers** could help the implementation of a *fair trial* in asylum cases. Providing documents and other kind of evidence isn't ever easy for refugees and, on the other side, this would also help judge to correctly assess their credibility, thereby taking care also of the Member States interests.

Both administrative, civil and criminal judges, are, in the European Union, supposed to be independent and impartial, as outlined in art. 47 EUCFR: for this reason they have to be trusted when exerting their powers, especially when, as in this case, they are subject to EU legislation and their task is to protect human rights.

However, we don't have to forget the fact that, being subject to art. 47 EUCFR and not to art. 41 EUCFR, the courts definitely provide a higher standard of guarantees, rather than those who act in the first (administrative) phase.

9. Soft-law proposals: harmonizing the hearing setting and improving the procurement of the COI

More than an adjustment of the EU regulation of asylum and immigration procedures, could perhaps do a renovation of the structure of the personal hearing. Under this point of view, the **lack of proper preparation which affects the judges**, who often don't have an adequate preparation neither to proficiently assess claimant's instances, neither to let the applicant feel comfortable and calm during the (eventual) personal hearing, is a considerable issue to exceed.

Therefore, a way to fix the issue could be the use of soft-law instruments, to set a more effective hearing setting. Guide-lines should **predetermine the layout of the hearing**, including which professionals have to be involved, such as **psychologists, interpreters and cultural mediators**. A

comfortable setting is the start of a profitable hearing. The applicant has to understand that the court's aim is to protect human rights and, thus, to grant international protection to those who really need it; but, at the same time, he has to be conscious that abuses cannot be accepted.

Within the EU institution a **hearing model** should then be studied. Contents of the interview and the order of questions play a key role. The hearing must give back, firstly what kind of person the applicant is, secondly what are the inner reasons of her/his claim and, thirdly, what does she/he specifically needs. What's more, all of this has to be done after letting him understand the situation and after creating a good environment during the hearing.

In addition to the planning of the hearing itself, how psychologists, interpreters and cultural mediators should be involved in the court's decision is another thing that should be previously fixed, once again to create a standardized and efficient hearing setting. They could certainly help judges to completely understand the issues and to find the right solution according to the law. In this process, the judges have a central role to guarantee the independence, impartiality and proportionality (according to EU and national legislation) of the final decision.

One last way to implement the balance between the right to be heard, the principle of effectiveness and all the other rights and principles involved in this proceedings, is to **improve the procurement of the COI (Country of Origin Informations)**. The website https://coi.easo.europa.eu/ helps judges to provide them, but they are sometimes no longer up to date. An efficient system to share this kind of information is central to obtain a correct assessment from the courts, but reliability and updating cannot be avoided.

For this reason, the European Asylum Support Office (EASO) in cooperation with the national asylum authorities of EU+ states (EU Member States plus Norway and Switzerland) could create an official and detailed database which the judges have to refer before taking the decision.

10. The application of the Right To Be Heard to the concrete case: decision and reasoning of Court of Milan 21.3.2018

We can now see how a personal hearing, in the case we've introduced at the beginning, has been crucial to the final decision of the Court of Milan.

During the judicial review of the administrative decision in front of the Court of Milan, the judge decided to hear personally the applicant, in virtue of the principle affirmed by the EUCJ in the case C 560-2014: "*an interview must nonetheless be arranged where specific circumstances, relating to the elements available to the competent authority or to the personal or general circumstances in which the application for subsidiary protection has been made, render it necessary in order to*

examine that application with full knowledge of the facts, a matter which is for the referring court to establish".

The new audition gave to the applicant the opportunity to clarify and specify some circumstances and facts, and led the Court to establish the reliability of mrs. C.R., both in relation to her inner credibility and the situation in her home country.

In regard of her inner credibility the Court found that the applicant's narration was focused, as the guidelines set by UNHCR request, on her individual religious experience, with specific reference to her conversion, the relative rituals and the core of her faith. The circumstances referred by the applicant about the constant fear with which she lived her faith and the tortures she had suffered during the detention were also confirmed by the clinical documents presented by the defense attorney, that proved that mrs. C.R. reported a post-traumatic stress disorder.

In relation to the declarations about the situation in the applicant's home country, the Court found that from 2005, when the *Religious Affairs Regulations* entered into force in China, several restrictions were introduced to the religious freedoms included a government control on the religion groups, which was strengthened by the new *Religious Affairs Regulations* in 2016. The overall situation, documented by Amnesty International and by several international human rights review very limited, if not excluded, the possibility for prayers to take part to underground churches, which were in some cases have been confiscated or destroyed. The government was also found to arrest, detain and torture participants of non registered groups or people who publicly defended religious freedoms.

Once affirmed the reliability of mrs. C.R., the Court found that the facts she referred gave rise to a risk of persecutions based on religion matters. Indeed the circumstances that she had to live her faith in a general fear clime, that she disguised herself in order to elude police control, that she had already been arrested and tortured because of her religion even if she didn't play any significant role within the housechurch, were found to integrate an individual risk for her safety.

At the same time, the general situation of her home country, where international observers reported the repression of the housechurches even through the arbitrary detention and tortures of the members, confirmed the existence of that risk, even in consideration of the public knowledge of the applicant religious beliefs in China after her arrest and police controls.

All these relevant circumstances, clarified by the personal hearing of the applicant in the judicial stage of the proceeding, brought the Court of Milan to recognize mrs. C.R.'s individual risk of direct persecutions because of her religion, and thus the status of refugee, in application of art. 1 of the Geneva Convention.