

IMPROVING ASYLUM PROCEDURES: COMPARATIVE ANALYSIS AND RECOMMENDATIONS FOR LAW AND PRACTICE

Detailed Research on Key Asylum Procedures Directive Provisions

A UNHCR research project
on the application of key provisions of the
Asylum Procedures Directive in selected Member States

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SECTION III: REQUIREMENTS FOR A DECISION BY THE DETERMINING AUTHORITY

Introduction

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Motivation of positive decisions

Monitoring of the quality of decisions

Provision of decision for dependants

Notification of written decision

Time frames for notification of a decision

Manner of notification

Notification of the decision in a language understood by the applicant

Provision of information on how to appeal

Annex 1: Audited decision issued following examination in the accelerated procedure in Slovenia

Introduction

The Charter of Fundamental Rights of the European Union sets out every person's right to good administration, including the "*obligation of the administration to give reasons for its decisions*".¹ This is relevant and particularly important with regard to decisions on international protection taken by state determining authorities in the asylum procedure.

The APD sets out explicitly in Article 9 (1) the requirement that all decisions on applications for asylum are given in writing. However, the APD only requires that the reasons, in fact and law, be stated in the decision "*where the application is rejected*,"² and not even then if the applicant is granted a status which offers the same rights and benefits under national and EU law as refugee status under the Qualification Directive.³

The APD does not define the meaning of 'rejected'. UNHCR notes that an application may be rejected on its merits following substantiation of the application by the applicant and examination of the application by the determining authority. However, in accordance with Articles 19 and 20 APD, a Member State is also permitted to reject an application on the grounds of explicit or implicit withdrawal, or abandonment of an application, notwithstanding the fact that the application was not substantiated by the applicant. Elsewhere in this report, UNHCR has expressed its view that, in the latter circumstance, a decision to discontinue the examination should be taken rather than a decision to reject.⁴ Nevertheless, UNHCR's research revealed that practice diverges across the 12 Member States of focus with some Member States taking a decision to discontinue and others taking a decision to reject depending on the circumstances. It is also unclear from the terminology whether Article 9 (2) APD applies to decisions of inadmissibility taken in accordance with Article 25 (2) APD. A decision to consider an application inadmissible, and therefore not examine whether the applicant qualifies for refugee status or subsidiary protection status, is not a 'rejection' of the application as such. Nevertheless, it is a negative decision which requires that reasons be stated and should be interpreted as falling within the scope of Article 9 (2) APD.

When an application is rejected, both Articles 9 (2) and 10 (1) (e) APD also require that the written decision provides information on how to challenge the negative decision. Regrettably, this important guarantee is however undermined by another provision, which provides an exception.⁵

Further requirements regarding the notification of the decision to the applicant are set out in Article 10 of the APD on guarantees for applicants for asylum.

UNHCR cautions against determining authorities prioritising the desire for expediency over the need for sound and well-reasoned written decisions. UNHCR has consistently expressed its view that good quality decisions in the first instance lend greater credibility to the fairness and efficiency of the asylum system overall, including the appeals system. With regard to negative decisions, the applicant needs to know the reasons in fact and law so that s/he can take an informed decision as to whether to exercise any right of appeal; and a well-reasoned decision will

1 Article 41 (2) of the Charter of Fundamental Rights of the European Union (2000/C 364/01).

2 Article 9 (2) APD.

3 Although in these latter cases, the reasons for not granting refugee status must be stated in the applicant's file to which the applicant must have access upon request.

4 See section 7 on the withdrawal or abandonment of applications.

5 Article 9 (2) APD provides an exception stating that "*Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant*".

inform the specific grounds upon which any eventual appeal should be based. A sound and well-reasoned first instance decision will also help to ensure that any appeal can be decided efficiently without infringing principles of due process or fairness. With regard to positive decisions, a reasoned decision would also assist with possible decision-making at a later stage concerning any application to renew the validity of a residence permit or any potential application of the cessation clauses. Moreover, in relation to both positive and negative decisions, well-reasoned decisions contribute to the transparency of decision-making, and efforts to monitor and improve quality and consistency both nationally and across the European Union. This is crucial as the European Union strives to establish a Common European Asylum System.

In this research project, UNHCR reviewed the status of transposition of Article 9 in the national legislation, regulations and administrative provisions of the Member States of focus. Moreover, UNHCR audited 1,155 decisions across the 12 Member States of focus in order to assess the structure and content of the decisions.⁶ UNHCR also found that in some Member States, the reasons for the decision are sometimes stated only very briefly in the decision notified to applicants, but greater detail on the reasons for the decision may be contained in a separate document in the case file. UNHCR found that such documents were not automatically sent to applicants or, if applicable, to their legal representatives with the notified decision. In some States, however, a request to access this information could be made following notification of the decision. For the purposes of this research, UNHCR also viewed such documents, where available, in relation to the decisions audited. This audit was supplemented by reviews of guidelines and templates for decisions where these existed in the Member States surveyed; and interviews with stakeholders in each Member State of focus. UNHCR also reviewed the status of transposition and implementation of Article 10 (1) (d) and (e) APD regarding notification of the decision. UNHCR's findings are set out in the pages which follow.

Provision of decisions in writing

Article 9 (1) APD provides that “*Member States shall ensure that decisions on applications for asylum are given in writing*”.

All Member States of focus in this research have transposed or reflected Article 9 (1) APD in national legislation, regulations or administrative provisions: namely Bulgaria,⁷ the Czech Republic,⁸ Finland,⁹ France,¹⁰ Germany,¹¹

⁶ These decisions related to applications lodged after 1 December 2007 (with the exception of 15 decisions audited in Bulgaria, 35 decisions audited in Greece, and 4 decisions audited in Spain) and included both positive and negative decisions in accordance with specific selection criteria. Details on the breakdown by Member State and the selection criteria employed, including the countries of origin to which the decisions related, are set out in the section on methodology (Annex to Part 2, on the CD-ROM containing this report).

⁷ Decisions are individual administrative acts in the meaning of Article 21 of the Administrative Procedures Code. The valid form for such is the written form regardless of their nature, if no explicit provision *a contrario* exists (Article 59 of the Administrative Procedure Code). No explicit provision *a contrario* exists.

⁸ Section 67 (2) CAP states that “*Decisions shall be issued in writing.*”

⁹ General rules regarding the nature of administrative decisions, including decisions taken in the asylum procedure, are to be found in the *Hallintolaki* (Act on Administrative Conduct 434/2003, as in force 23.4.2009). Guiding norms are laid down in sections 43 to 49 of this Act. Section 43 states that “*an administrative decision must be given in writing. The decision can be given orally, if this is strictly necessary because of the urgency of the matter. An oral decision must immediately also be given in writing, together with guidelines for corrections and appeal.*”

¹⁰ Article R. 723-2 *Ceseda* which states that “*The applicant is informed of the decision made by the Director General of the OFPRA by registered letter*” and Article L.723-3-1 *Ceseda* which states “*The OFPRA sends the asylum applicant a written notification of its decision.*”

¹¹ Section 31 (1) Sentence 1 APA: “*The decision of the Federal Office shall be issued in writing*”. Section 39 APA also states “*A written administrative act shall be accompanied by a statement of grounds. This statement of grounds must contain the chief material and legal grounds that led the authority to take its decision. The grounds given in connection with discretionary decisions should also contain the points of view which the authority considered while exercising its powers of discretion.*”

Italy,¹² the Netherlands,¹³ Slovenia,¹⁴ Spain¹⁵ and the United Kingdom.¹⁶ The requirement is implicit, rather than explicit, in the legislation of Belgium¹⁷ and Greece.¹⁸

UNHCR's audit of case files confirmed that decisions in writing were given on both positive and negative decisions in all the Member States surveyed.

The requirement to state reasons in fact and law for the decision

Article 9 (2) APD states:

“Member states shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision ...”

A majority of the Member States surveyed have legislative or other provisions that transpose or reflect the requirement under Article 9 (2) APD to state reasons in fact and law in, at least, negative decisions, namely: Belgium,¹⁹

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- 12 Article 9 of the d.lgs. 25/2008 which states that “decisions on applications for international protection are given in writing.”
- 13 Article 42 Aliens Act in conjunction with Article 1:3 General Administrative Law Act which states that a decision means a written decision of an administrative authority constituting a public law act.
- 14 Article 8 (basic procedural guarantee), indent 4 of the IPA: “In the procedure under this Act, each applicant shall enjoy the following guarantees: s/he shall receive a decision in writing from the competent authority within the time limit stipulated by this Act, in a language s/he understands.” Article 210 (4) AGAP stipulates that every decision shall be issued in writing, even if it was given orally.
- 15 Article 55(1) APL: “The administrative acts shall be in writing unless its nature requires or allows a different and more adequate way of expression and proof.”
- 16 Paragraph 333 of the Immigration Rules HC395: “Written notice of decisions on applications for asylum shall be given in reasonable time. Where the applicant is legally represented, notice may instead be given to the representative. Where the applicant has no legal representative and free legal assistance is not available, he shall be informed of the decision on the application for asylum and, if the application is rejected, how to challenge the decision, in a language that he may reasonably be supposed to understand.”
- 17 The Law of 11 April 1994 concerning the publicity of administrative acts and Article 32 of the Belgian Constitution gives persons the right to receive a copy of an administrative document in which they have a personal interest.
- 18 Article 7 (3) of PD 90/2008 is now replaced by Article 2 PD 81/09 which states that “where the application is rejected, the reasons in fact and law shall be stated in the decision.” The legislation is not explicit with regard to the written nature of the decision. Note that only paragraph 3 of Article 7 PD 90/2008 has been replaced by Article 2 of PD 81/09. Paragraphs 1 and 2 of Article 7 remain valid. Article 7 (1) PD 90/2008 is implicit with regard to the written nature of the decision since it states that “If the precise address of the applicant is unknown, the document (of the decision) shall be sent to the municipality of the location of the authority where the applicant first applied for asylum.”
- 19 Administrative acts by administrations within the meaning of Article 1 of the Law of 29 July 1991 concerning the formal motivation of administrative acts should be distinctively motivated in accordance with Article 2 of the Law of 29 July 1991. The motivation should state the considerations in fact and law upon which the decision is based and the motivation should to be sufficient (Article 3 of the Law of 29 July 1991). The Aliens Act also specifically refers to the obligation of the CGRA to motivate its decision. According to Article 57/6, § 2, as well as Article 62 of the Aliens Act the decision of the CGRA should be motivated with reference to the individual circumstances of the case.

Bulgaria,²⁰ the Czech Republic,²¹ France,²² Germany,²³ Greece,²⁴ Italy,²⁵ Slovenia,²⁶ Spain²⁷ and the United Kingdom.²⁸ The relevant legislation in Finland²⁹ and the Netherlands³⁰ does not explicitly require that the reasons be stated in fact and in law, but instead more generally requires that reasons be stated.

While the Member States of focus in this research have transposed or reflected Article 9 (2) APD in domestic law, the structure and content of decisions in practice varies markedly. UNHCR considers that in a number of Member States of focus, the requirements of Article 9 (2) APD have not been implemented effectively in practice. There are wide divergences in the extent to which decisions specify the material facts of the claim; reference the evidence assessed and the standard of proof applied; assess the credibility of the material facts; and apply the criteria for international protection under the Qualification Directive to accepted facts. There are also different or, in some cases, a lack of systems in place to monitor the quality of decisions.

²⁰ The general provision of Article 59 of the Administrative Procedure places an obligation on the deciding administrative body to include the grounds for the individual act in fact and in law. This formal requirement is formally satisfied as verified by the case files audit.

²¹ Section 68 (3) CAP: *“The reasoning shall contain reasons for a statement or statements in the decision, grounds for the issuance thereof, considerations directing the administrative body in its evaluation and its interpretation of legal regulations, and information on how the administrative body handled the proposals and objections of participants and their response to the grounds for the decision.”*

²² Article L. 723-3-1 *Ceseda* states that *“negative decisions should be reasoned in fact and in law”*.

²³ Even though the respective legal provision (Section 31 (1) 2nd Sentence APA) does not distinguish between negative (rejected) and positive decisions, in practice, only rejections are motivated. However, this is not based on the requirements of the Directive, but the general rules of administrative procedure which provide that: *“No statement of grounds is required:[...] when the authority is granting an application or is acting upon a declaration and the administrative act does not infringe upon the rights of another; [...]”* (Section 39 (2) No. 1 Administrative Procedure Act). Since the Federal Commissioner for Asylum Affairs has been abolished, an institution having the power to appeal against decisions granting protection, such an appeal against a positive decision is no longer foreseen by German law. The Internal Guidelines for the Asylum Procedure [under: “Decision” 1.1b) as well as the handbook (Handbook for Adjudicators “Decision”, 2.1.2, page 7) explicitly refer to this fact without mentioning the APD. Neither Article 9 (2) Sentence 2 to 4 APD nor Article 9 (3) APD have been transposed into German law.

²⁴ Article 7 (3) PD 90/2008: *“Where the application is rejected, the reasons, in fact and in law, shall be stated in the decision.”*

²⁵ Article 9 of the d.lgs. 25/2008: *“The decisions on applications for international protection are given in writing. The decision which rejects an application contains the reasons in facts and in law and information on how to appeal a negative decision”*.

²⁶ Article 214(1) of the AGAP:

“(1) Reasoning of the decision contains:

- 1. Explanation of requests of all parties and their allegations on facts;*
- 2. Ascertained actual situation and relevant evidence;*
- 3. Reasons crucial for assessment of every evidence;*
- 4. Citation of relevant legislation supporting the decision;*
- 5. In connection with ascertained actual situation – reasons, which lead to the decision, and*
- 6. Reasons for which certain request of the party was not granted”*.

²⁷ Article 54 (1) APL requires that *“The reasons in fact and law for the adoption of administrative acts shall always be briefly stated.”* Article 89 (3) states that the *“resolution shall include the decision adopted, stating the reasons in fact and law in the cases foreseen in article 54.”* Article 20 (1) (c) ALR regarding the admissibility procedure states that *“The inadmissibility decision shall state the reasons in fact and law and be individualized.”*

²⁸ Paragraph 336 of the Immigration Rules HC 395 state that *“Where an application for asylum is refused, the reasons in fact and law shall be stated in the decision and information provided in writing on how to challenge the decision.”*

²⁹ Section 44 (3) of the Act on Administrative Conduct 434/2004 requires that a written decision includes information about *“the motivations for the decision and individualised information about what the individuals are entitled or obliged, or how the matter has otherwise been decided ...”* but this generic guiding norm does not explicitly distinguish between reasons in law and fact.

³⁰ According to Article 3:46 General Administrative Law Act, a decision should be based on proper reasons. According to Article 3:47 General Administrative Law Act, the reasons should be stated when the decision is notified and, if possible, the statutory regulation on which the decision is based shall be stated at that same time. According to the table of correspondence, Article 9(2) APD is transposed in Article 3:48 General Administrative Law Act. According to this Article the reasons do not have to be stated if it can reasonably be assumed that there is no need for this. If, however, an interested party asks within a reasonable period of time to be informed of the reasons, they shall be communicated to him as quickly as possible.

Motivation of negative decisions in practice

Beyond requiring stated reasons in fact and in law for the negative decision, Article 9 (2) APD does not prescribe further requirements regarding the reasoning for the decision. However, Article 8 (2) (a) APD does require that “*decisions are taken individually, objectively and impartially*” and, therefore, the written decision should be a reflection of this requirement and the decision should be reasoned in fact and law with reference to the individual facts and circumstances of the applicant.

With regard to negative decisions, the written decision should permit the applicant to know for what specific reasons, and on what specific grounds, his/her application for international protection has been denied.

Therefore, with regard to negative decisions on the merits, it is UNHCR’s view that the written decision should state the material facts of the application. Moreover, the decision should set out sufficient details to permit the applicant to know the following:

The evidence which was taken into consideration during the examination of the application and decision-making, including both evidence gathered independently by the determining authority and oral and documentary evidence provided by the applicant;

- Which aspects of the evidence were accepted and which evidence was considered to be insufficient, or was not accepted by the determining authority, and an explanation of why the evidence was rejected; and
- The reason why the accepted evidence does not make the applicant eligible for refugee status/subsidiary protection in accordance with the criteria in the Qualification Directive.

As such, a well-drafted negative decision will:³¹

- Correctly identify the material facts of the application.
- State all the evidence assessed and demonstrate appropriate consideration of all the evidence adduced in support of the application.
- Demonstrate the application of the correct burden of proof, i.e. that no unreasonable expectations were placed on the applicant to ‘prove’ his or her claim, and shows an awareness of the shared duty to ascertain and evaluate the facts of the application.³²
- State and reference the objective country information used in the assessment of the application and apply that information appropriately to support conclusions reached.
- Assess the credibility of the material facts using appropriate methodology, and state clear conclusions as to the credibility of each material fact.
- State the standard of proof applied, and apply the benefit of the doubt appropriately.³³
- Demonstrate the correct interpretation and application of the relevant legal criteria for qualification for refugee and, if relevant, subsidiary protection status to the accepted facts.
- Demonstrate that if any standard paragraphs or wording are used, these are relevant and appropriately tailored to the individual facts.

³¹ “Key criteria for assessing the quality of asylum decisions, jointly agreed UKBA/UNHCR minimum standards for a system of quality assurance in the UK first-instance asylum decision-making process”, December 2008, annexed to UNHCR, ‘Quality Initiative Project: Sixth Report to the Minister’ (April 2009) available at: <http://ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/>

³² Paragraph 196 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating the Status of Refugees, revised 1992.

³³ Paragraphs 196 to 204 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating the Status of Refugees, revised 1992.

A decision which fulfils the above requirements will permit the applicant to take an informed decision as to whether to exercise any right of appeal and will highlight the specific grounds upon which any eventual appeal should be based.

In order to seek to evaluate implementation of Article 9 (2) APD, the methodology for this research included a sample audit of decisions made in all the Member States surveyed.³⁴ UNHCR audited a sample of 788 negative decisions i.e. granted neither refugee nor subsidiary protection status.³⁵ UNHCR recognizes that such a relatively small sample does not provide a comprehensive empirical basis on which to evaluate and compare state practice. However, information obtained through the audit of decisions does provide useful indications of an individual Member State's practice. Furthermore, the fact that in some states, practically all decisions exhibited the same deficiencies justifiably raises cause for concern. Moreover, in addition to information gathered through the audit of decisions and case files, UNHCR also evaluated other relevant sources such as internal and administrative guidelines, as well as decision templates and checklists where these existed.

The audit consisted of a detailed review of the structure and content of decisions in each country. However, the remitted audit did not permit an in-depth analysis of whether the law had been interpreted and applied correctly to the facts in all cases.

Overall, information obtained through the audit of decisions causes UNHCR to question whether several states are actually meeting in practice the requirement to provide individualised reasons in fact and law, following the refusal of an asylum application. The following paragraphs set out some of the specific concerns identified relating to practice in particular Member States.

An audit of 202 case files and decisions in Greece found that all but one³⁶ of the first instance decisions reviewed were negative, and contained a standard phraseology (not exceeding three paragraphs). The 201 negative decisions did not set out a summary of the material facts: did not reference any relevant country of origin information or other oral or documentary evidence considered; did not specify what aspects of any evidence gathered was considered to be credible or lack credibility; and did not apply any legal reasoning with regard to any facts. There was no other information in the case files which provided any evidence of the application of legal reasoning to the facts; and the facts, as stated in the application form, were severely limited.³⁷ The only difference between one decision and another was the name of the applicant, the named country of origin and the stated time limit for lodging an appeal. All 201 audited negative decisions stated:

“We decide that the application for international protection is rejected as manifestly unfounded and X³⁸ is not recognised as a refugee nor as eligible for subsidiary protection status because the subjective and objective elements

³⁴ In those Member States where more detailed reasoning for a decision is set out in a separate document in the case file, these were also reviewed.

³⁵ Belgium: 56 (included unfounded decisions and technical refusals), Bulgaria: 32 (9 of which taken in the accelerated ‘filter’ procedure. Excluded decisions to suspend or discontinue the procedure.); the Czech Republic: 60 (included rejected, manifestly unfounded, inadmissible and discontinued); Finland: 52; France: 45; Germany: 60; Greece: 201; Italy: 39 (excluded inadmissibility decisions); Netherlands: 36 (excluding 17 Dublin decisions reviewed); Slovenia: 58 (51 decisions in the accelerated procedure and 7 in the regular procedure); Spain: 107 (excluded 7 explicit and implicit withdrawal decisions which were reviewed); the UK: 42 (3 refused for administrative non-compliance, 6 refused as unfounded and 33 refused after full consideration). Note that, in Spain, 107 negative decisions were audited. Of these, 91 were negative decisions taken in the admissibility procedure. This is due to the fact that at the time of UNHCR’s research, an admissibility procedure was conducted in which decisions on the merits of an application were taken in the admissibility procedure as well as decisions on admissibility. The other 16 negative decisions audited were taken in the regular procedure.

³⁶ The exception being case CF11RQ1.

³⁷ See UNHCR’s concerns regarding interviews conducted in ADA in Greece in section 6 on interviews and interview reports.

³⁸ Name and nationality of the asylum applicant.

of the well-founded fear of persecution, necessary elements for the recognition of the refugee status according to Article 1 A 2 of the 1951 Geneva Convention, Article 17 of PD 90/2008 in combination with article 15 of PD 96/2008 are not met.

In particular, from the presented elements, it cannot be justified that the applicant suffered or will suffer any individual persecution by the authorities of his country for reasons of tribe, religion, ethnic group, social group or political opinion. The applicant abandoned her/his country in order to find a job and improve his living conditions.³⁹ The applicant neither showed nor handed in any national passport or any other travel documents that could prove or certify her/his identity.

Against this decision the applicant has the right to appeal before AB within thirty (30)⁴⁰ days after the day of serving of the decision. In case of not appealing in the above time frame, the decision shall be final.”

Decisions audited in other states revealed similar deficiencies to varying degrees, although they can be differentiated from the situation in Greece, as fuller information and reasoning was contained in the case file. However, UNHCR remains concerned that if full reasons in fact and law are not included in written decisions or are not attached to the decision, then this can frustrate the fairness and efficiency of the appeal process. It also negatively impacts on the transparency and accountability of decision-making and related efforts to improve this.

In France, on the basis of the decisions sampled, UNHCR observed that the written decisions notified to applicants were generally very short and, on average, had only nine lines dedicated to providing reasoning for the decision. Specific problems observed with regard to the written decisions included that while the decisions contained a summary of facts, these were not always stated in an individual or detailed manner, and often did not refer to the specific harm feared by the applicant upon return, but rather simply stated that the applicant “*fears for his/her security*”. It was also noted that sometimes the summary of facts in the decision omitted a specific fear of harm that had been stated by the applicant.⁴¹ Cases were also apparent where decisions failed to mention all the documents provided by the applicant to support his/her claim,⁴² and when they did, documents often had their authenticity denied without any accompanying explanation. Moreover, with regard to the reasons given for the negative decision, 33 of the 45 audited negative decisions simply stated that the application was rejected because the “*facts were not established*” (“*faits non établis*”). As such, it was not possible to deduce from the content of the decision which facts were established and which were not established, and why they were considered not established. For example, it was not clear in some cases whether an adverse inference had been drawn regarding an issue on which the applicant provided evidence; yet, the issue was never canvassed in the personal interview, if any. As such, an applicant would not know, from the decision alone, that this issue is relevant, and requires addressing on appeal.

Instead, in France, the legal reasoning was often more developed in parts IX and X of the interview form (which is part of the case file of the determining authority, OFPRA). But this part of the interview report is not systemati-

³⁹ In some decisions this phrase is used: “*It appears that the applicant abandoned her/his country in order to find a job and improve his living conditions.*”

⁴⁰ Or ten (10) days, depends on the procedure.

⁴¹ For example, in case file 3A (IRQ), the decision does not mention the fear of kidnapping of his daughter claimed by the applicant. In another case file, the decision mentions the applicant’s allegations regarding a property dispute, but not the political threats claimed by the applicant.

⁴² For example, case file 19R (AFG), case file 8R (GEO), case file 44R (GEO), case file 54R (KOS), case file 43R (KOS), case file 35R (KOS), case file 16R (SLK), case file 20R (RUS), case file 60R (RUS). Furthermore, in the case file 35R (KOS), the decision states “*the applicant who claims to be a national from Kosovo*”. This wording seems to imply that the protection officer doubts the nationality of the applicant, although an ID is produced and no comment is made about its authenticity.

cally transmitted to the applicant with the decision.⁴³ Instead, the applicant has to request access to the whole interview report in order to access this information. Applicants are not informed of their right, which derives from common administrative law, to request the whole interview report. Generally, only lawyers and NGOs providing legal assistance are aware of this right. Moreover, UNHCR's audit of the interview forms revealed that the quality of reasoning was varied. In some cases, even from the interview form it was not clear which facts were accepted and which were not, and why.

The audited written decisions relating to applications by applicants who are spouses contained very limited reasoning. With regard to the facts, the decisions simply stated “*the applicant's claimed reasons for fleeing are the same as her husband's*”, without stating what those reasons were. And the reason for the negative decision was stated as “*her case is indissociable from that of her husband, whose application has been rejected today.*” The information contained in the interview form was copied and pasted from the interview form of the husband and did not always correspond to the content of the spouse's interview.⁴⁴ Most of the written decisions on subsequent applications which were audited were poorly and stereotypically reasoned. Most of the decisions stated that the elements submitted by the applicant did not enable the establishment “*of the facts*”⁴⁵ or “*of the fear of persecution or serious threats*”⁴⁶ or that the “*new elements cannot be considered as founded.*”⁴⁷ No further reasoning was provided.⁴⁸

In Italy, the audit of decisions indicated that decisions were generally very brief and made a short reference, though insufficient, to the individual facts of the application. In some cases, there was no specific reference to the individual facts. One example of an audited decision stated:

“The applicant does not submit arguments which can confirm the relevance of his/her individual position in the context of the general situation reported. The applicant reports circumstances which give rise to a doubt with regard to the credibility of his/her statements during the personal interview. The circumstances reported by the applicant cannot be considered sufficient to support and justify a fear of persecution under Article 1A of the 1951 Geneva Convention. There is no evidence that the applicant has suffered or that s/he risks suffering serious harm if returned to the country of origin.” And if subsidiary protection was also denied: “*There is no need for complementary forms of protection with respect to the specific personal situation of the applicant.*”

From the written decision alone, it was not possible to ascertain whether the relevant criteria of the Qualification Directive with regard to refugee status and subsidiary protection status had been applied to the facts and the applicant could not know from the decision on what specific ground(s) the application had been rejected. Where the decision simply made a generic or brief reference to a lack of credibility, it could not be deduced from the decision why or which evidence submitted lacked credibility.⁴⁹ All case files contain a form, “*proposal from the rapporteur*”⁵⁰ which indicates the reasons for the decision although these reasons are often not developed

43 The whole report is contained in the case file which is transmitted to the CNDA when the decision is challenged before the court.

44 Case file 38R, case file 45R.

45 For example, case file 52R (AFG), case file 49R (SLK).

46 For example, case file 58R (DRC), case file 50R (PAK).

47 Case file 59R (SLK).

48 It is a concern that all eight case files which were audited concerning subsequent applications were examined in the accelerated procedure and the applicants were not invited to a personal interview, with no reason for the omission of the personal interview recorded in the case file. For further information see section 14 on subsequent applications.

49 D/04/M/ALG/N, D/05/M/MAR/N, D/06/M/NIG/N, D/09/M/NIG/N, D/18/M/IRQ/N, D/26/M/NIG/N, D/30/M/NIG/N, D/31/M/NIG/N, D/37/M/NIG/N, D/38/F/NIG/N, D/42/F/NIG/N, D/50/M/SRI/N, D/63/M/PAK/N, D/64/M/PAK/N; D/52/M/AFG/N, D/65/M/GUI/N, D/73/F/NIG/N.

50 The *Rapporteur* is the person who conducted the interview or the main interviewer when the interview is conducted by the panel collegially.

adequately. Any dissenting opinion by a member of the interview panel would be recorded and motivated in this form. Some CTRPIs also have a separate record of the minutes of the discussion by the panel or a brief assessment form. The contents of the case file, including the minutes of the panel discussion, are accessible to the applicant's legal representative upon request.

In Spain, none of the 113 negative decisions audited made any reference to the facts presented by the applicant on which the asylum claim was based. The legal reasoning provided in the decision relied almost exclusively on legally-specific standard paragraphs and did not apply the law to any facts.⁵¹ Inadmissibility decisions were limited to indicating the ground(s) for inadmissibility which was/were considered as fulfilled, reproducing almost literally the wording of the Asylum Law or the standard modules on which case reports are based.⁵² The decisions made no reference to any country of origin information or third country information which could have been taken into account in reaching the decision. Where subsidiary protection status was also denied, the audited decisions simply stated: *“Moreover, no humanitarian reasons and no reasons of public interest apply in order to allow stay in Spain under Article 17 (2) of the Asylum Law”*. The audited case files contained a more detailed report on each case which set out some reasoning for the decision. However, an analysis of these case reports revealed that, particularly with regard to negative decisions in the admissibility procedure, all the requirements for a well-reasoned decision were not satisfied.

In several states (Slovenia, the Czech Republic, Finland, and Spain) the quality of decisions varied depending on the type of procedure in which the application was examined.

Thus, in Slovenia, decisions taken in the regular asylum procedure were found to generally fulfil the requirement to set out reasons in fact and law. However, the vast majority of asylum applications in Slovenia are decided in the accelerated procedure and not the regular procedure.⁵³ With regard to the accelerated procedure, a serious failure to set out reasons in fact and law was observed in cases certified as manifestly unfounded. The Supreme Court of Slovenia has ruled that in the accelerated procedure, the determining authority need only ascertain facts and circumstances proving the existence of reasons for rejecting an application as manifestly unfounded on grounds defined in Article 55 of the IPA.⁵⁴ The audit confirmed that where applications were rejected as manifestly unfounded in the accelerated procedure, the determining authority stated limited facts and copy pasted *verbatim* Article 55 (grounds for rejecting application as manifestly unfounded) and Article 23 (assessment of facts and circumstances) of the IPA, and underlined (or sometimes not) those indents which were considered valid for rejecting the application in question. (See Annex I to this section for typical audited decision with regard to the legal grounds for the decision taken in the accelerated procedure in Slovenia). The written decisions, therefore, contained a series of legally-specific paragraphs, with no link made between the facts as briefly set out and the legal provisions applied to deny status.

Similar inconsistency was also observed in the Czech Republic, despite legislation requiring the same standard of reasoning in the regular procedure and other procedures (border etc). Decisions taken in the regular procedure generally provided reasons in fact and law.⁵⁵ However, very little information was apparent in inadmissibility deci-

51 107 (inadmissibility and rejection decisions) and 6 (decisions to grant subsidiary protection which did not include reasons for the denial of refugee status).

52 Note that at the time of UNHCR's research, an examination of the merits of an application was conducted in the 'admissibility' procedure, and applications could be rejected on their merits, on grounds extending beyond the admissibility grounds as provided for in Article 25 of the APD. See section 9 on prioritized and accelerated procedures for further information.

53 The audit found that only 7 of the 65 cases reviewed were dealt with under the regular procedure.

54 Up 106/2008, 17 April 2008.

55 20 out of 61 audited decisions provided all relevant facts whereas only two cases provided no individualised facts at all.

sions (including subsequent applications), making it impossible to determine if an individualised decision had in fact been taken. In particular, a significant number of applications deemed to be manifestly unfounded did not clearly demonstrate that they had been subjected to a proper individual examination.⁵⁶

In recent years Finland has witnessed an improvement in the quality of written decisions, although the audit revealed indications of inconsistency and remaining problematic practices. While some decisions were well reasoned with clear and logical argumentation, other decisions were observed to fall below the threshold of what might be judged as good reasoning. In particular, decisions rejecting applications for international protection on grounds of credibility, ‘safe country of asylum’ or origin, or which considered the application manifestly unfounded for other reasons, tended to rely rather heavily on standard paragraphs.

In Bulgaria, the audit of decisions indicated that requirements in legislation are to a reasonable degree being satisfied in practice, at least in relation to setting out the individual facts of the application. Although decisions were in general individualised, some problems were indicated with respect to very brief legal reasoning and the use of standard paragraphs, particularly those relating to country of origin information.⁵⁷ It was also apparent that most decisions granting subsidiary protection status had very similar, if not identical, reasoning in law and wording in each case.

In Belgium, the audited negative decisions set out both the facts as presented by the applicant and the reasoning for the decision which was specific to the facts. The decisions did not rely heavily on standard paragraphs, which were only used to relate specific issues and were used appropriately and tailored to the facts of the application. Most audited negative decisions cited a lack of credible evidence.⁵⁸ The decisions were explicit as to what evidence was not considered to be credible, but the decisions did not state what evidence was accepted as credible. Negative decisions with regard to subsidiary protection status were either based on the ground that the evidence relating to the applicant’s country or region of origin was not credible, or that the applicant came from a country or region which was not, or was no longer experiencing armed conflict within the meaning of the Aliens Act.⁵⁹ However, there were some shortcomings in the decisions audited, for example, poor referencing of applied country of origin information and a lack of reasoning as to why certain oral and documentary evidence was considered insufficient to affect the finding of a lack of credibility.

In the Netherlands, the audit indicated that in general, the negative decision does not set out all the grounds for the application as presented by the applicant or the detailed reasons for denying status with regard to the facts. Instead, reference is made to the intended decision which forms part of the decision. In addition, detailed reasoning was contained in the so-called Minute (an internal IND document) which, during the period of this research, was available to the applicant on request, but was not supplied automatically with the decision. However, since 14 July 2009, the IND has changed its policy and no longer grants the applicant access to the Minute. The motive for the change in policy is, according to the policy instruction, based on Article 43 (e) of the Personal

⁵⁶ 10 out of 16 manifestly unfounded cases were found to be insufficient, including cases XO27, XO12, XO21, XO22, X007, XO17, XO64 and X007.

⁵⁷ For example, 39 out of 62 audited decisions concerned Iraqi applicants which (with few exceptions) included reference to the same COI, quoting a COI Report on Iraq by SAR and the Statement of the MFA on Iraq. This provided the basis of the decision, even though not individually tailored to the facts of the application. Furthermore, the most common ground for granting humanitarian status to Iraqis was the second suggestion of Article 9 (a) – torture or inhuman or degrading treatment or punishment – and the standard paragraph on COI was irrelevant or at least not well reasoned to support this ground.

⁵⁸ Of the 56 negative decisions audited, 38 were based on a lack of credibility.

⁵⁹ Article 48/3, §2 (c) of the Aliens Act (Article 15 (c) of the Qualification Directive). The application of the criteria of under Article 15 (a) and/or (b) Qualification Directive (or Article 48/4 of the Aliens Act) is exceptional, and none of the decisions included in the audit made a reference to these criteria, according case managers: interview of 19 & 20 March 2009.

Data Protection Act (*Wet Bescherming Persoonsgegevens*), and the intent that the determining authority is not hampered in expressing its views or its reasoning by the knowledge that the applicant will have access to it.⁶⁰ Instead, a ‘professional summary’ should now be given to the legal representative upon request. Practice with regard to the content of the ‘professional summary’ could not be verified at the time of writing. Given the limited reasoning contained in the decision, UNHCR notes the importance that this ‘professional summary’ contains full reasons in fact and in law.

In Germany, the required form and structure of the written decision is explicitly set out for adjudicators in the handbook,⁶¹ and specific guidance is given about the required content of decisions. Negative decisions encompass a decision on constitutional asylum,⁶² on 1951 Convention refugee status as well as complementary forms of protection, i.e. subsidiary protection in accordance with the Qualification Directive, as well as two other forms of national protection.⁶³ UNHCR’s audit of decisions verified that the reasoning begins with a statement of the facts that have been found relevant by the adjudicator in the individual case, and a reference is made to the case file for further details.⁶⁴ Subsequently, with regard to each form of protection, the negative decision is stated, followed by the template regarding the respective legal requirements for each form of protection as well as the application of these legal requirements to the facts.⁶⁵ However, UNHCR’s audit revealed the following findings which are considered problematic:

- (i) It was observed that there is a heavy reliance on the use of standard paragraphs.⁶⁶ Almost 80 % of the average decisions audited was composed of standard paragraphs,⁶⁷ with only about 16 % dedicated to the specific factual reasons concerning refugee protection,⁶⁸ and very often only one or two sentences dedicated to the factual assessment regarding complementary protection forms.⁶⁹

60 IND-Work instruction nr. 2009/11 of 14 July 2009.

61 Handbook for Adjudicators “Decision”, especially overview 2.4.5, “Structure of a decision”, page 18. This form has been confirmed by the audit of case files.

62 Not covered by the APD.

63 Not covered by the APD.

64 The facts as set out in the decisions had an average length of between half a page and three-quarters of a page. It is stipulated in the handbook that the relevant facts on which the decision is based shall be given briefly and in a chronological order. They shall be designed in a strictly objective manner; undisputed facts shall be given in the indicative mode, disputable facts in the subjunctive form. Contradictions on which the decision is based have to be included, and submitted documents, plus their content, have to be listed. If references are made to cases of other family members or other asylum applicants, the respective reference numbers have to be cited, as well as the current stage of these proceedings. The portrayal of the fact should always end with a referral to the file (Handbook for Adjudicators “Decision”, 2.4.2, “Determination of facts”, page 13 and 14).

65 UNHCR’s audit, confirmed by the estimates of lawyers X2, revealed that the overall length of the reasoning runs from “four to ten pages” of which approximately two to ten lines of argumentation specifically relate to the individual facts.

66 The predominant use of ready-made templates for the phrasing of decisions seems to divert attention from the specifics of the case and seems to result in an examination of the facts brought forward by the applicant evaluated in light of their ‘compatibility’ with the given standard paragraphs. One of the stakeholders (X3) stated the following in this regard: “*The templates are not tailored to the case, but the case to the templates.*”

67 The templates either refer to legal requirements and therefore contain very legalistic language, or refer to the general situation in the country of origin.

68 Constitutional asylum, as well as 1951 Convention refugee status.

69 Please note that the following refers to the assessment of the facts under the respective legal provisions for complementary protection. The decision nevertheless contained a determination of facts that had been found relevant in the specific case. No assessment of facts provided: For example 00AFGo5; 00AFGo6; 01ERTo8; 01NIGo1; 00NIGo3. Length of assessment of facts 1 sentence: For example 01ERTo9; 00IRNo3; 00IRNo4; 01IRNo5; 00IRQo8; 01IRQo9; 01PAKo9; 00RUSo1; 00SOMo8; 00LKAo9; 00TURo1; 01TURo2; 00GHAo3; 01GHAo5; 01GHAo6; 00GHAo8; 00GHAo10. Length of assessment of facts: two sentences: For example 01GHAo2; 01GHAo4. Length of assessment of facts 1/4 page (nine to ten lines): For example 00AFGo9; 01ERTo4; 00IRNo1; 01PAKo8; 01RUSo3; 00GHAo1; 01GHAo9. Length of assessment of facts 1/2 page: For example 00/1IRNo9; 01SOMo7; 01LKAo10; 01GHAo7. Moreover, that this is only an average and divergent practice is, for example, clearly shown in case 00/1IRNo10. More than half of the decision (7.25 of 13 pages) is dedicated to the facts and reasons specific to the case; the reasoning specific to the case with regard to refugee protection amounted to 5 pages.

- (ii) Problems were also observed with regard to the content of the standard paragraphs. Many of the standard paragraphs referred to jurisprudence concerning cases of constitutional asylum. Given that the requirements of constitutional asylum and 1951 Convention refugee status differ in certain aspects, it is not self-evident that a specific aspect judged on under constitutional law would also apply to Convention refugee status.⁷⁰ Moreover, some of the decisions referred to were rather old,⁷¹ and it was not clear from the templates themselves whether the interpretation of the courts in those decisions was still valid. In addition, the wording of some templates showed that the concept of constitutional asylum was used as the starting point for the examination of Convention refugee status.⁷²
- (iii) The decisions often contained only an account of the facts as presented by the applicant rather than a conclusive analysis of which concrete facts were deemed to fulfil the respective criteria and which not, as well as which facts were considered credible or not, and for what reason.⁷³ In practice, despite the statement of legal criteria in the templates, a detailed and comprehensive application of the relevant legal criteria to the facts was rarely observed.
- (iv) The assessment of the facts with reference to the legal grounds for qualification for subsidiary protection status was very brief.⁷⁴ Most strikingly, the German provision transposing Article 15 (c) QD⁷⁵ was hardly ever mentioned in the audited decisions and reviewed only very exceptionally.⁷⁶ This was evident even in cases where the country of origin was experiencing armed conflict.⁷⁷

In the UK, the negative decisions audited usually related the acts feared by the applicant and the reasons for fearing persecution or serious harm, and if the case failed on grounds of credibility alone, this was stated. Formal refusal paragraphs were used in, for example, “non-compliance” cases. It was apparent from the audit that in general, each case had been examined individually and the reasons given in the decision were specific to the applicant. Applications that were rejected stated why they had not been accepted and provided reasons. The exception to this was where an application was considered inadmissible, for example on safe third country grounds. Decisions included standard paragraphs but in most cases these did not appear to be used inappropriately.

70 Only the template with regard to one of the national forms of protection (Section 60 (5) Residence Act) contains the remark “conferrable” after reference has been made to the jurisprudence of the Higher Administrative Court. However, the reason for this conclusion is not given.

71 For example 1977, 1980, 1985, 1989, 1990, 1994.

72 For example, the standard paragraph on the requirements for 1951 Convention refugee status stipulates that “initially, it has to be determined” whether the person concerned faces “political persecution”, thus, explicitly referring to the term used in German Basic Law instead of directly applying the relevant legal provision for Convention refugee status. Only the following statements refer to the differences of the two forms of protection.

73 See For example, 00ERT05; 00NIG04; 01LKA05; 01SOM07; 00PAK01; 00RUS09; 01IRQ05; 00IRN01.

74 Positive decisions on subsidiary protection sometimes clearly differentiate between reasons for subsidiary protection under the EC QD and national reasons (For example 00ERT05) and sometimes do not differentiate in this way. For example, see 01IRQ05; 01LKA05; 00TUR04, where protection under 60 (5) Residence Act is granted for reasons of a potential violation of the ECHR in the case of deportation whereas Section 60 (2) Residence Act (transposing the QD) is not reviewed.

75 Section 60 (7) 2 Residence Act.

76 See 01SOM07.

77 Regarding Somalia, see 00SOM08 and 00SOM10; on Sri Lanka, see For example 01LKA05; Afghanistan, 00AFGo5; 00AFGo6; 00AFGo8; 00AFGo9; Iraq, see For example 00IRQ02; 01IRQ04; 00IRQ08. According to information provided by the BAMF, the instructions on particular countries of origin were amended following the ECJ judgment (*Elgafaji*) and subsequent jurisprudence of the Federal Administrative Court, and specific parts of certain countries are now designated as zones of armed conflict with a level of violence justifying the application of Article 15 (c) QD to any person residing in that zone. With regard to other countries, the existence of an armed conflict is denied (which bars the application of Article 15 (c) QD) or an individual assessment of the situation is called for to determine the existence of a risk particularly affecting the individual applicant.

A negative decision on an application for international protection has a significant impact on the rights of the person affected. Full reasons in fact and law should, therefore, be given. From the research undertaken it is clear that there are problems with the content of asylum decisions in most of the Member States surveyed, and a systematic failure to properly set out the individual facts and evidence on which the decision is based, or to set out and apply legal reasoning. Decisions in several states surveyed included little more than references to generic sections of asylum legislation upon which the decision was based.

Recommendations

Given the findings of this study, which indicate the systematic failure of decisions in some Member States to provide individualized reasoning relating to law or fact, UNHCR recommends that initiatives be developed to further identify problems in particular states, and to provide appropriate remedial training. This should be taken forward as part of improved quality monitoring in all Member States. UNHCR recommends that objective, EU-wide standards for measuring the quality of asylum decisions should be established.

The decision should permit the applicant to know on what specific grounds the decision has been taken. Therefore, the decision should state the material facts of the application and sufficient details to permit the applicant to know the following:

- The evidence which was taken into consideration during the examination of the application and decision-making, including both evidence gathered by the determining authority and oral and documentary evidence provided by the applicant;
- Which aspects of the evidence were accepted, and which were considered to be insufficient or not accepted, and why the evidence was rejected; and
- The reason why the accepted evidence does not render the applicant eligible for refugee status or subsidiary protection status in accordance with the criteria set out in the Qualification Directive.

Decision-makers should be allocated sufficient time to draft well-reasoned decisions.

Content of reasoning in notified decisions

As stated above, UNHCR considers that one criterion for assessing the quality of a decision is whether the decision states clearly which aspects of the evidence were accepted, and which were not, and why. As relevant, the decision should also demonstrate a correct understanding of all relevant legal concepts in accordance with the Qualification Directive, and apply these correctly to the accepted facts.

Another criterion is whether the decision refers to sourced, objective, relevant and up-to-date country information, and applies that information appropriately to support the conclusions reached.

A further criterion is whether the decision specifies the standard of proof which has been applied.

During its audit of decisions, UNHCR therefore focused specifically on these issues. It should be reiterated that the relatively small sample of files audited renders any findings indicative only. However, some common trends were observed, relating to both good and bad practice, which warrant further attention as part of efforts to improve the quality of asylum decisions.

Application of the criteria under the Qualification Directive to the facts

A common trend identified through the audit of decisions in several states (Belgium,⁷⁸ France, Germany, the Netherlands and the UK) was that negative decisions were often made on credibility grounds and did not apply the criteria of the Qualification Directive to facts.

For example, in France, the great majority of negative decisions audited⁷⁹ were cases where the application was rejected on credibility grounds (“*faits non établis*”). However, in these instances, it was not possible from the written decision itself to understand what aspects of the facts were not established, and what aspects of the refugee definition or criteria for subsidiary protection status were considered to be fulfilled or not fulfilled.⁸⁰ Moreover, negative decisions were generally poorly reasoned with regard to the actors of persecution, the actors of protection, the internal flight alternative,⁸¹ or persecution or harm feared on return.

Likewise, refusal in the Netherlands was often based on the so-called ‘positively convincing’ test (the POK-test) of credibility.⁸² In such decisions, it was simply stated that the applicant had not made a plausible case that his/her application was based on circumstances constituting a legal ground for protection.⁸³

In the UK, several decisions referred to credibility being undermined as a result of the behaviour of the applicant which, under Section 8 of the Asylum and Immigration (Treatment of Claimants Etc) Act 2004, was considered to damage credibility, such as producing false documents⁸⁴ or failing to apply earlier.⁸⁵ In some cases, statements deemed to be incorrect resulted in dismissal of the credibility of the entire claim.⁸⁶ The written decisions audited did not generally, in any systematic manner, refer to Qualification Directive criteria.

In Germany, in about 75% of the cases where refugee protection was denied, decisions were based on the assessment that the applicant’s presentation of facts was not credible.⁸⁷ In those cases, the adjudicator explained why the presentations were not credible overall or why certain facts were not believed.⁸⁸ However, in about one in six decisions, the rejection was based on the assessment that there was no risk of persecution, i.e. the standard of risk was not satisfied.⁸⁹ Even in those cases, the adjudicators frequently stated in their assessment that “*a danger of persecution has not been made credible.*” Despite this terminology, the relevant decisions in fact often found

78 38 of the 56 negative decisions audited in Belgium were based on credibility grounds. Nine applications were rejected because the facts did not qualify the applicant for refugee or subsidiary protection status. Eight were ‘technical refusals’. The reason for the negative decision in one case was unknown. Information from audit of case files (10 February – 6 March 2009).

79 33 decisions out of 45 negative decisions. None of the written rejections sampled were explicitly grounded on the exclusion clauses or on the application of the internal flight alternative.

80 However, in the case file 46R (AFG), the decision refers to the absence of reasons for persecution and thus to the absence of fear of persecution from the Afghan authorities. In the case file 41 R (BOS), the decision refers to the absence of personal fear of persecution. In the case file 31 R (GEO), the decision refers to the absence of reasons for persecution and to the ability of the authorities to protect.

81 The terminology used in Article 8 of the Asylum Procedure Directive is ‘internal protection’.

82 The audit revealed that six out of 19 substantive negative decisions were refused on the basis of POK, namely numbers 43, 51, 52, 66, 88 and 90.

83 Such cases will be rejected according to Article 31 Aliens Act. However, decisions in the Netherlands generally are not very detailed and lack specific reference to the refugee definition. It is not the negative decision as such that refers to inconsistencies or contradictions. This kind of information is mainly to be found in the so-called Minute (now an internal IND document).

84 DAF 31, DAF22, DAF35.

85 DAF31.

86 DAF27, DAF40, DAF32, DAF36, DAF42.

87 In a sample of 42 negative decisions (rejection both of constitutional asylum and refugee status according to Section 60 (1) Residence Act), 32 of the rejections were based on the lack of credibility of the applicants’ statements (76.2 %).

88 This statement refers to the formal fact that an explanation had been given, but does not respond to the question whether the project evaluator has found the given explanation convincing.

89 This pertains to 7 of the 42 cases sampled (16.7 %).

the standard of risk was not satisfied, based on the assessment of objective facts.⁹⁰ In the remaining cases (about 7 %), the reason for rejection was based on non-fulfilment of one of the other legal criteria for qualification for international protection.⁹¹ Moreover, in some cases, the rejection was based cumulatively on different grounds. For instance, rejections based on credibility of (some of) the applicant's statements were sometimes additionally based on insufficient risk,⁹² or on a failure to fulfil other legal criteria,⁹³ even if the facts as presented by the applicant were presumed to be correct.⁹⁴

UNHCR is particularly concerned that in Greece and Spain, there was no clear application of the criteria for qualification for refugee status and subsidiary protection status to the applicant's individual circumstances and facts in any of the decisions audited. This was also the case for most of the decisions audited in Italy.

Application of the standard of proof

The purpose of UNHCR's research in this project was not to assess the standard of proof applied by the Member States of focus and its compliance with international standards. Instead, the purpose was to examine whether the decision informs the applicant and his/her legal representative, if any, of the standard of proof applied, and whether the evidence submitted and gathered in the course of the procedure satisfied this standard. Where the evidence does not meet the standard, UNHCR considers that the decision should state clearly why.

In only two of the Member States surveyed, the audit of decisions revealed that decisions did refer explicitly to the standard of proof applied.

In Bulgaria, some audited decisions referred to Article 75 (2) of the LAR which states that *"When the applicant's statements are not supported by evidence, they shall be deemed reliable if the individual has made an effort to justify the application and has given a satisfactory explanation of the lack of evidence."* These decisions, which concerned Iraqi nationals, stated that the facts as claimed by the applicant were deemed to be established in accordance with Article 75 (2) LAR and humanitarian status was granted.

In Germany, the audited decisions stated, as provided by a template: *"In so far as events outside the country of asylum are stated [by the applicant] for supporting the claim as evidence for the objective existence of a risk, generally the mere furnishing of prima facie evidence is considered sufficient. This is due to the difficulties regarding proof typical for the asylum procedure."*⁹⁵ In some cases, the decisions⁹⁶ additionally contained the more comprehensive

⁹⁰ See for example, ooLRQ04; o1NIGo8 (according to the decision, the applicant "could not make credible" that there was a danger of genital mutilation. However, the adjudicator bases this assessment on the general finding that such mutilation is only carried out on children until an age of three years.); ooLKAo8.

⁹¹ This pertains to 3 of the 42 cases sampled, ooNIGo4 (danger of criminal prosecution does not constitute an act of persecution; danger emanating from non-state entities does not constitute persecution [sic]); o1NIG1o (being searched for by the police as a witness to a crime does not constitute persecution); ooERTo5 (criminal prosecution for non-compliance with the obligation to serve in the army does not constitute persecution).

⁹² See for example, ooIRNo1; ooIRNo3; o1SOMo7; o1TURo2.

⁹³ See for example, ooSOMo8.

⁹⁴ o1RUSo3 the standard of risk is not fulfilled and the rejection is based additionally on the existence of an internal flight alternative.

⁹⁵ The handbook determines that the template concerning the definition of "to furnish *prima facie* evidence" has to be cited at the beginning of the facts. Furthermore, the following explanations are given: "The assertions must include a detailed and comprehensive demonstration of the grounds for persecution; i.e. they must not contain contradictions, and allow for the grant of political asylum if they were conceded as true. The applicants shall present those events, concerning the persecution and the respective escape they have experienced themselves, in a coherent manner, specifying precise details. If necessary, they must also to link these experiences with the general political situation and occurrences in their country of origin." (Handbook for Adjudicators "Decision", 2.4.3 page 16).

⁹⁶ See for example most of the decisions taken within the airport procedure: ooAPo1; o1APo2; ooAPo3; ooAPo4; ooAPo6; ooAPo7; ooAPo9; ooAP1o; not contained in: ooAPo5 and ooAPo8.

template which comprises, *inter alia*, the following requirements set by the Federal Administrative Court: “*Considering the difficulties for refugees to prove persecution, the personal assertions of the applicant and their analysis are particularly important. The applicant’s mere assertions of the facts can lead to the grant of asylum provided that – considering all other circumstances – they are credible in the sense that they lead to the full conviction of the truth – and not just the probability – of the individual circumstances causing the fear of political persecution.*”⁹⁷ Although the decisions superficially stated when the standard of proof was met, it was often not clear from the decision how this standard was applied to the evidence gathered; which evidence was considered to have satisfied this standard and which did not, or whether there was an absence of relevant evidence.⁹⁸ According to the appraisal of interviewed stakeholders,⁹⁹ the application of the standard of proof was seen as being very subjective and arbitrary,¹⁰⁰ or as setting very high standards or even requirements that could not be satisfied.¹⁰¹

On the other hand, UNHCR’s audit of decisions in the other Member States of focus revealed that most decisions did not explicitly state the applicable standard of proof. In some Member States, however, it could be deduced from the decision that a high standard of proof had been applied.

In Belgium, the audit of the case files, as well as the roundtables UNHCR held with NGOs and lawyers, suggested that some applicants are expected to obtain and submit documentary evidence, such as birth certificates, death certificates and marriage licences, which are likely to be impossible to obtain within the five-day time limit under national legislation for submitting further evidence. In the absence of relevant documentary evidence, it was clear from the case files that applicants must be able to answer correctly questions designed to test their credibility. For example, one case file revealed that the applicant claimed to be a Banjuni from one of the islands south of the coast of Somalia. The decision stated that the applicant was not credible because s/he failed to answer certain questions correctly and did not speak Somali. However, information in the case file showed that the applicant had answered a number of the questions correctly. It was not clear from the decision or the nature of the questions why more weight had been given to the questions answered incorrectly.¹⁰² By contrast, another case file also concerned an applicant who claimed to be a Banjuni from an island south of the coast of Somalia. This applicant also failed to answer some of the questions correctly and did not speak Somali, but s/he was granted refugee status.¹⁰³

In the Netherlands, UNHCR’s audit revealed that six out of the 19 substantive negative decisions were rejected on the ground that the application failed the ‘positively convincing test’ (the POK-test).¹⁰⁴ The test requires the applicant to make a plausible case that his/her application sets out circumstances which fulfil the criteria for the issue of a permit.¹⁰⁵ According to the Aliens Regulations, the applicant should be entitled, in principle, to the benefit of doubt where: s/he has submitted all elements at his/her disposal; provides a satisfactory explanation for the absence of elements; has applied at the earliest possible time; where his or her evidence is coherent and plausible, and not contrary to country of origin information; and the credibility of the applicant has been established.¹⁰⁶ However, UNHCR’s audit of case files and an interview with a legal adviser revealed that, in practice, if

⁹⁷ As stated in the judgments of the Federal Administrative Court of 16.04.1985 (BVerwGE 71, 180) and 21.07.1989 (NVwZ 1990, 171).

⁹⁸ See for example, 00ERT05; 00NIG04; 01LKA05; 01SOM07; 00PAK01;00RUS09; 01IRQ05; 00IRN01.

⁹⁹ This concerns lawyers with many years of experience with asylum law cases.

¹⁰⁰ X1.

¹⁰¹ X2, X3.

¹⁰² Case files 79 and 80.

¹⁰³ Case file 31.

¹⁰⁴ Case files 43, 51, 52, 66, 88 and 90.

¹⁰⁵ Article 31 (1) Aliens Act.

¹⁰⁶ Article 3.35 Aliens Regulations.

the applicant is undocumented and unable to submit documentary evidence relating to an element, such as the travel route taken, a higher standard of proof applies. Any doubt is deemed reason to reject the application.

In Slovenia, interpretation of the standard of proof is an evolving issue, including through rulings by the Constitutional Court¹⁰⁷ establishing a requirement to apply the ‘benefit of the doubt’. In May 2009, the Ministry of the Interior issued Guidelines on implementation of the IPA. However, the audit of first instance decisions suggested that in practice the ‘benefit of the doubt’ is rarely applied, and the standard of proof is higher than the ‘balance of probability’. Indeed, on the basis of reviewed decisions it appears that in practice the so-called ‘*intime conviction*’ standard is applied (the decision maker must come to a deep conviction that the allegations are truthful).

Generally, in most states surveyed, the audit of case files and decisions did not indicate what standard of proof was applied by decision-makers, let alone whether this had been applied appropriately or consistently. In some respects, the absence of a clear standard of proof was the most striking finding identified on this issue. This was the case in Bulgaria,¹⁰⁸ the Czech Republic, Finland,¹⁰⁹ France,¹¹⁰ Greece, Italy,¹¹¹ Spain and the UK.¹¹²

Use of Country of Origin Information (COI)

It is of serious concern to UNHCR that the determining authorities in two of the Member States of focus in this research, Greece and Spain, systematically fail to refer at all to any COI used in decisions to refuse protection status. With regard to Spain, reference to COI can be found in the case reports of applications examined in the regular procedure. This is infrequently the case when a decision is taken on the application in the admissibility procedure.¹¹³ The determining authorities in a further two Member States, France¹¹⁴ and Italy,¹¹⁵ appeared explicitly to refer to the use of COI in only a minimal number of decisions. In both countries, however, reference to COI was sometimes apparent from the case file although not included in the decision notified.¹¹⁶

¹⁰⁷ In case Up-1525/06, 21 June 2007 and Up-1458/06, 19 October 2006, the Constitutional Court for the first time said that benefit of the doubt has to be applied in asylum cases: “... *in the concrete case, asylum application of asylum seekers has been rejected in the accelerated procedure. In this procedure the MOI can reject the application without even verifying the existence of reasons for protection. Namely, the authority has to verify only existence of circumstances defined in the Asylum Act, proving that the application is manifestly unfounded. Nevertheless, also in the accelerated procedure, the authority must fully ascertain the actual situation. For reasons due to the nature of the asylum procedure and possible consequences for asylum seeker in case of rejected applications, the benefit of the doubt has to be applied.*”

¹⁰⁸ Except in decisions granting humanitarian status when no documentary evidence has been presented by the applicant.

¹⁰⁹ Finnish legislation does not make any reference to the standard of proof to be used in the asylum procedure. In individual cases, some references can be found, but there is no general standard that can be identified within the limits of the current study.

¹¹⁰ In France most of the audited decisions did not state the standard of proof applied and negative decisions stated simply that the “*facts are not established.*” However, two positive decisions explicitly applied the ‘benefit of the doubt’: case file 29 A (AFG) and 30A (AFG).

¹¹¹ In Italy none of the audited decisions referred to the standard of proof used.

¹¹² Although in the UK the standard of proof is outlined in the Asylum Process Guidance ‘Considering the Asylum Claim’ (downloaded 20 April 2009), it was not referred to specifically in many cases audited, and it was not clear whether the test stated in the guidance formed part of the decision-maker’s assessment.

¹¹³ Note that at the time of UNHCR’s research, an examination of the merits of an application was conducted in the ‘admissibility’ procedure, which allows that applications can be rejected on their merits, on grounds extending beyond admissibility grounds in the APD. See also section 9 on prioritized and accelerated examination of applications.

¹¹⁴ In France, only 5 of the 60 case files audited contained explicit reference to COI used. All 60 applications were decided on the merits.

¹¹⁵ In Italy, only four decisions audited referred specifically to COI sources: In the decision D/25/M/AFG/S and D/32/M/IRN/S, UNHCR guidelines were briefly quoted; in decision D/49/F//KIR/U, a US State Department report was briefly quoted; and in decision D/49/M/ETI/N an Amnesty International report was briefly quoted.

¹¹⁶ In France in particular it was observed that the contents and details of questions asked during interviews generally showed a relatively good knowledge by decision-makers of the situation in the country of origin. However, this was not substantiated by references to COI in the file and/or in the decision. In case file 6R (GEO) and case file 44R (GEO), the decision itself refers to precise and up-to-date country information, and the file contains several COI documents. In case file 16 R (SLK) some precise COI sources are mentioned in the file and used in the credibility assessment, but do not appear in the decision itself. In case file 46R (AFG) one article is included in the file but is not mentioned in the decision itself. In case file 7A (GEO) and case file 25 A (TR) one article is included in each file (positive decisions). In case file 17A (SLK) references are made in the case file to “information possessed by the OFPRA” but this information is not included

Similarly, in Belgium, the decisions audited did not state the information relied on nor refer directly to sources. The decisions simply stated that “*the information known to the CGRA of which a copy has been added to the administrative case file.*” As such, this information can only be obtained by the applicant requesting the administrative case file. While this reveals what COI has been used, there is no proper analysis of its bearing on various elements of the applicant’s claim. The decisions in other states surveyed (Finland and the Czech Republic) typically only made generalised references to COI, rendering it hard to assess whether COI had been used appropriately with regard to the facts of the individual case under examination.

In the Czech Republic, COI was frequently referred to in general terms (“*according to the information available in the case-file...*”), but without specific reference to the individual reports. This was the case in 16 decisions audited.¹¹⁷ There were also instances observed of COI referred to in the decision, but not included in the case file.¹¹⁸ In 19 decisions COI was cited specifically, with reference to the reports in the case file.

While in Finland a trend has been observed towards increasingly detailed references to COI in decisions,¹¹⁹ practice remains inconsistent. In some audited decisions, standard phrases such as “*according to sources available to the determining authority*” or “*in accordance with information obtained by the determining authority*”, rendered it impossible to know whether first or second hand sources were used, which sources were used or how many sources were used. In other decisions, both sources of COI and their contents were quoted directly in the text, making it easier to understand the argumentation.¹²⁰

In general terms, the following can be said about the use of COI in the audited German decisions rejecting applications:

- Negative decisions did not always reference COI.¹²¹
- If COI was mentioned, this was predominantly done in the form of standard paragraphs which stated the source of information.¹²²
- Reports of the German MFA¹²³ were the main source of information, although others were also cited. This included, *inter alia*, German court decisions¹²⁴ and newspaper articles,¹²⁵ but also reports from NGOs.¹²⁶

in the case file. In these rare cases, the information and/or references appear to suggest a careful assessment of relevance to the case in question. However, the cases of explicit use of COI are so limited in the sample (only 5 case files out of 60, i.e. less than 10 %) that it is difficult to say that more than one source of country of origin information was used in order to justify the decision to refuse protection status.

117 X001, X002, X005, X011, X013, X024, X027, X030, X033, X034, X035, X043, X044, X063, X065, X067.

118 X003, X007, X063.

119 For example, training on COI is increasingly given in certain divisions of the determining authority.

120 Case 115.

121 Audited decisions without stating COI, for example: 00GHA03; 01GHA05; 01GHA0700GHA10, 01ERT04; 01NIG01; 00NIG03; 00NIG04; 00SOM08; 00SOM10; 00RUS04.

122 The length of COI mentioned in the decisions varies widely. COI is contained in the handbooks on specific countries of origin which are issued by the BAMF’s IZAM (*Informationszentrum Asyl- und Migration*). The IZAM is assigned to collect comprehensive and up-to-date information on the situation in the countries of origin. For this purpose, publicly-available information, as well as that from restricted sources, is gathered and saved in the information system MILO. IZAM’s advisory expert forum, *inter alia*, is composed of judges, lawyers, UNHCR and representatives from non-governmental organizations. Additionally, each adjudicator has internet access and the possibility to address questions to the IZAM, which decides whether it can answer the question alone, or whether external services must be used.

123 Concrete examples: In one of the samples comprising 16 decisions stating COI in the form of templates, only one decision did not explicitly refer to the MFA report, and referred only to court decisions: 00NIG08. Two of the decisions stated as sole source the MFA report (01IRN05; 01IRQ09). In 11 decisions several court decisions were additionally cited; and 9 decisions stated more than three different kinds of sources, even up to 11(00AFG05; 00AFG06) or 13 different sources (00LKA08). Even though the MFA reports are for official use only, legal representatives can have access to these reports in individual cases (Information submitted by the BAMF).

124 These were cited frequently in decisions.

125 For example, “*Sueddeutsche Zeitung*”; “*Nuemberger Nachrichten*”; “*Das Parlament*”; “*Die Welt*”; “*FAZ*”.

126 For example, Annual Report from Amnesty International; Swiss Refugee Council.

Moreover, information provided by the MFA to courts in individual cases, internet pages,¹²⁷ reports from international organizations, European institutions,¹²⁸ and other sources were cited.¹²⁹

- Some decisions audited referred to COI without citing the source of the information; this also related to information which was decisive for the determination of refugee status.¹³⁰ This might be explained by the fact that information contained in the so-called COI- guidelines (“*HKL-Leitsaetze*”) may not be quoted in the decisions.¹³¹

In some states surveyed (Bulgaria, the Netherlands and the UK), there were indications to suggest reliance by decision-makers on a limited number of primarily state-sponsored sources. In Bulgaria, the audited decisions cited SAR COI Reports, but these Reports do not contain references to the primary sources, which were also not cited in the decision.¹³² In the Netherlands, from the audit of case files, it appeared that in the large majority of cases, the decision only contained a reference to country reports of the Ministry of Foreign Affairs and country-specific policy in the Aliens Circular. Only occasionally were audited decisions observed to refer to other sources, often where these had been raised by the applicant’s legal representative.¹³³ The exception to this relates to country information from the UK Home Office or the US State Department. In the UK, many decisions referred only to UK official Country of Origin Information reports, Operational Guidance Notes or Country Guidance cases, although there were other cases where decision makers referred to news reports or websites.

Use of templates and guidelines

The majority of determining authorities under focus in this research make at least some use of templates and/or guidelines to assist decision-makers in structuring their decisions. Templates are used by decision-makers in Belgium,¹³⁴ Bulgaria, the Czech Republic, Germany,¹³⁵ the Netherlands,¹³⁶ and the United Kingdom. Guidelines are additionally available in the UK and the Netherlands.

In Bulgaria, the templates used are not very detailed or prescriptive, and leave substantial discretion to decision-makers concerning the content, structure and style of decisions.

Other states (Belgium, the Czech Republic, Germany, the Netherlands and the UK) employ more detailed templates. In the UK, decision makers have a ‘stock letters template’. Standard wordings are also available. Three formal refusal paragraphs are frequently used for the refusal of humanitarian protection, where refusal includes non-compliance with procedural requirements and formal rejection of human rights-based claims.¹³⁷ In the Czech Republic templates are available for all types of decisions (including positive, negative, manifestly unfounded, and inadmissibility decisions). These templates are periodically revised in order to mirror current legislation.

¹²⁷ For example, www.defenselink.mil; <http://web.krg.org>.

¹²⁸ For example, UNHCR, UNAMA; EU Commission’s Status Report.

¹²⁹ For example, foreign news sources: BBC News, Sunday Observer; specialized institutes: “*Deutsches Orient-Institut*”, “*Institut fuer Nahost-studien*”; expert’s reports on specific matters provided to courts; COI report of the UK Home Office.

¹³⁰ See, for example, the following decisions in which the below mentioned facts are stated in the decision without any source: oolRQo2 (violence in Baghdad has declined, in particular, between Sunni and Shiite groups); o1SOMo7 (information on the political situation; situation of women in the society; clan affiliation), o1ERTo5 (information on military service in Eritrea).

¹³¹ Handbook for Adjudicators, “Decision”, 2.4.8, p. 22. Like other COI relied upon, the *HKL-Leitsaetze* also are not contained in the case file, and are not accessible for the legal representative.

¹³² Some decisions referred to Statements of the Ministry of Foreign Affairs (two such Statements on Iraq).

¹³³ This explicit reference to other sources was the case in only three out of the 90 audited case files, namely numbers 22, 47 and 71.

¹³⁴ Interview with operational coordinator of the CGRA, 25 February 2009.

¹³⁵ The case file audit revealed that the templates are always used to structure decisions.

¹³⁶ The case file audit revealed that the template is always used to structure decisions.

¹³⁷ Asylum Process Guidance “Reasons for Refusal letter”, downloaded 20 April 2009.

The templates dictate the structure of decisions, i.e. what to state first: content of the application; content of interviews; legal assessment of asylum and subsidiary protection; plus date, names of parties, and the decision. In Germany, as mentioned above, 80% of a decision is composed of standard country- or legally- specific paragraphs. Decision-makers are bound to employ the legally-specific paragraphs in their decisions.

Although forms are used in Italy, they do not ostensibly regulate the structure or content of decisions nor, for example, make any prescribed reference to the inclusion of facts or COI. In Finland, no templates are used, but decision-makers are given examples of earlier decisions. In France, there are no clear guidelines on the structure of decisions or explanation of the facts, or on how to set out the application of relevant legal criteria to the facts and support findings with clear reasons and references to country of origin information.

UNHCR believes that a decision check-list is a useful tool to aid decision-makers in drafting decisions. The check-list should require decision-makers to clearly establish the facts of the claim for international protection before applying to those facts the relevant refugee and, if rejected, subsidiary protection criteria, as well as other relevant legal principles. The check-list can also assist decision-makers to work through each legal criterion, and require them to support their findings with clear reasons, including reference to relevant country information.

Some templates and ready-made standard paragraphs may be useful as time-saving devices that help to ensure the consistency and comparability of decisions. However, their use should not take the place of individualised assessment and reasoning. Where used, they should always be applied appropriately to the facts of the case.

Recommendations

UNHCR recommends that:

An EU-wide decision check-list is developed to guide the structure and content of decisions. UNHCR is willing to assist with the development of such a check-list.

Drafting individual decisions, based on the check-list, should be a compulsory component of any initial training programme for decision-makers.

Determining authorities should not rely unduly on standard paragraphs and templates in drafting decisions.

Sequence of decision and provision of reasons, when refugee status is refused but subsidiary protection granted

Under the Qualification Directive, Member States are obliged first to assess whether an applicant qualifies for refugee status before proceeding to examine eligibility for subsidiary protection status.¹³⁸ Under Article 9 (2) APD, it is implicit that Member States are required to set out reasons for the refusal of refugee status, even where subsidiary protection status is granted, unless the latter confers the same rights and benefits under national and Community law as those attached to refugee status. In such cases, decisions need only be recorded on the applicants' files and made available on request.¹³⁹

¹³⁸ Article 2 states that “‘Person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee ...”

¹³⁹ Article 9 (2) APD states that “Member States need not state the reasons for not granting refugee status in a decision where the applicant is granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC. In these cases, Member States shall ensure that the reasons for not granting refugee status are stated in the applicant’s file and that the applicant has, upon request, access to his/her file.”

UNHCR's audit of decisions revealed that the structure of decisions in the majority of states surveyed addressed the decision on refugee status before subsidiary protection status: Belgium,¹⁴⁰ Bulgaria,¹⁴¹ the Czech Republic, Finland, France,¹⁴² Germany,¹⁴³ and the UK. This was also the case for decisions taken in the regular procedure in Slovenia, although some decisions observed in the audit were not sufficiently grounded. However, in Slovenia, most decisions are rejected in the accelerated procedure, which means that no in-merit assessment is conducted, and alleged reasons for applying for international protection are not examined or reflected in the decision. The decision only states whether there are reasons to reject the application as manifestly unfounded.¹⁴⁴

In Italy, the audited decisions generally contained two paragraphs, first addressing qualification for refugee status, and then qualification for subsidiary protection status. However, when subsidiary protection status was granted, there were cases where the reasons for the denial of refugee status were contained one sentence simply stating, for example, *“the circumstances reported by the applicant cannot be considered appropriate to support and justify a fear of persecution under Article 1A of the Geneva Convention of 1951.”*¹⁴⁵

Similarly, in Spain, it was observed that eligibility for refugee status was addressed first, followed by subsidiary protection status. However, the decisions relied almost exclusively on standard paragraphs. For refusal of complementary protection, no reasoning was provided, and the following standard paragraph was included in each audited decision: *“Moreover, no humanitarian reasons and no reasons of public interest apply in order to allow stay in Spain under Article 17 (2) of the Asylum Law.”*

The lack of reasoning systematic in the audited Greek decisions prevented an evaluation of the sequencing or basis of any assessment of eligibility for either status.

Where subsidiary protection status is granted (which does not offer the same rights and benefits as refugee status), the reasons for not granting refugee status were stated in decisions audited in Belgium,¹⁴⁶ the Czech

¹⁴⁰ For example, case file numbers 35, 41 and 96.

¹⁴¹ Explicitly required in national legislation: Article 73 LAR (amended and supplemented, SG No. 31/2005, amended, SG No. 52/2007): Status applications shall be reviewed by the State Agency for Refugees and reasons for granting refugee status shall be examined first. If refugee status is not granted, the need for humanitarian status to be granted shall be considered.

¹⁴² This was evident from the information contained in the case files. There was only one case of subsidiary protection being granted (case file 3A (IRQ)) among the 15 positive decisions sampled. The reasoning in the case file is sequential: 1) criteria of the Geneva Convention are not fulfilled; 2) criteria of subsidiary protection (generalized violence) are fulfilled. Nevertheless, the written decision states first that subsidiary protection is granted, and then it states that refugee status is rejected (with a short motivation: *“the applicant does not establish that she has personal fears for persecution in the meaning of Article 1A of the Geneva Convention”*).

¹⁴³ As required by the Handbook for Adjudicators, especially 2.4.5 “Structure of the decision”.

¹⁴⁴ See above.

¹⁴⁵ D/08/M/NIG/S, D/12/M/AFG/S, D/20/M/SOM/S, D/22/M/SOM/S: state only that there is no persecution; D/36/M/IRQ/S: no reason stated with regard to denial of refugee status; D/79/M/TUR/S, D/80/M/TUR/S, D/81/F/ERI/S, D/82/F/ERI/S, D/83/F/ERI/S, D/84/M/SOM/S, D/86/M/SOM/S, D/87/M/SOM/S: only states that alleged elements “are not suitable for” the recognition of refugee status.

¹⁴⁶ In case file number 35, 41 & 96 the applicants were granted subsidiary protection status after the assessment for qualification for refugee status. Moreover, in case files concerning applicants from countries where there could possibly be an armed conflict within the meaning of Article 15 (c) of the Qualification Directive, such as Iraq, Afghanistan, Somalia, Turkey & Chechnya, the decisions showed first the assessment for qualification for refugee status and second the assessment of qualification for subsidiary protection status. The assessment of qualification for subsidiary protection status would usually refer back to the lack of credibility of the applicant established during the assessment for the qualification for refugee status and/or otherwise establish that there was no armed conflict in the country or region of origin of the applicant.

Republic,¹⁴⁷ France,¹⁴⁸ and Germany.¹⁴⁹ However, in some states which formally fulfilled this requirement, the reasoning provided was inadequate. For example, in Bulgaria and Italy, where subsidiary protection status was granted following a rejection of refugee status, UNHCR audited decisions in which only generic reasons for the refusal of refugee status were provided.

The current research identified that this issue is especially significant in the context of the asylum procedure in the Netherlands, which provides for a single uniform status, with the same material rights and benefits for all those granted any form of protection.¹⁵⁰ As such, in the Netherlands, the exception under Article 9 (2) APD is applied. If subsidiary protection status is granted,¹⁵¹ the written decision does not provide reasons in fact or law for not granting refugee status. At the time of UNHCR's research, the reasons in fact and law for denial of other protection statuses were only reflected in an internal document, the Minute.¹⁵² This could be requested by the applicant or his legal counsellor, but was not supplied automatically with the decision. Since 14 July 2009, the IND instead produces a 'professional summary' which should, in principle, be available to the legal representative upon request once the decision has been notified. If the legal representative does not request the 'professional summary', the grounds for the rejection of the other statuses will only be made available if and when protection is withdrawn.

In UNHCR's view, the applicant should be given the opportunity to respond immediately to a decision not to grant refugee status or subsidiary protection. If informed about rejection grounds only years after the application, this reduces the possibility for rebuttal of the decision, and weakens the applicant's legal position. UNHCR considers that the grounds for refusal of refugee and/or subsidiary protection status should thus be notified automatically and in full to the applicant, regardless of whether a form of status is conferred bringing equivalent rights and benefits.

In the Czech Republic, although humanitarian asylum (Section 14 ASA) and asylum for the purpose of family reunification (Section 13 ASA) both confer the same rights and benefits as refugee status, negative decisions on refugee status set out reasons.¹⁵³ Similarly, in Finland, subsidiary protection status accords the same rights and benefits as refugee status, yet the denial of refugee status is usually reasoned in the decision. However, it is worth noting that some of the decisions audited in Finland revealed extremely limited or no reasons in fact and in law for the rejection of refugee status, but considerably more reasoning with regard to qualification for subsidiary protection status.¹⁵⁴ One decision which concerned an applicant from Somalia contained no reasoning for the decision not to grant refugee status, and simply stated in conclusion that the circumstances did not amount to persecution. The applicant was granted subsidiary protection status.

¹⁴⁷ This was observed for example in cases audited: Xo11 and Xo43. Section 28 (1) ASA states that "(1) International protection shall be granted in the form of asylum or subsidiary protection. If the Ministry establishes, while making its decision, that the reasons for granting asylum have been fulfilled... it shall grant asylum preferentially." This is interpreted as a requirement to state the reasons for not granting asylum when subsidiary protection is granted.

¹⁴⁸ Along with a decision outlining reasons for rejection of refugee status, the applicant generally receives an accompanying letter informing him/her that s/he is granted subsidiary protection, that s/he should go to the *prefecture* to receive a residence permit, that s/he is not granted refugee status according to the 1951 Convention, and that this negative decision can be challenged.

¹⁴⁹ Some cases have been identified (for example ooIRNo3, ooIRNo4, o1NIGo1, ooNIGo3) in which the explanation for the rejection of subsidiary protection only consists of a referral to the assessment of the need for refugee protection, and its denial. This suggests that the different grounds for protection were not adequately taken into account.

¹⁵⁰ A residence permit will be granted on different grounds, as enumerated in Article 29 a, b, c, d, e, and f Aliens Act. If for example a residence permit is granted under Article 29b Aliens Act, this implies a rejection of a permit under Article 29a Aliens Act.

¹⁵¹ Article 29 (1) (b) Aliens Act.

¹⁵² See below – sub-section on positive decisions. Note that the Minute is, since 14 July 2009, replaced by a 'professional summary'.

¹⁵³ Though the audit revealed that the reasoning was not always clear or complete.

¹⁵⁴ For example, decision 3 concerning Somalia and decision 62 concerning Iraq.

Recommendations

Member States should ensure that where refugee status is refused, the reasons in fact and in law for the refusal are stated in the decision. This should be regardless of whether another form of protection status is conferred that accords equivalent rights and benefits.

Member States should ensure that where an application for international protection is rejected with regard to both refugee status and subsidiary protection, the reasons in fact and in law for the rejection of each status are stated clearly and sequentially in the decision.¹⁵⁵

Motivation of positive decisions

Motivation of positive decisions to grant refugee status or subsidiary protection status is not required under Article 9 (2) APD, and of the Member States surveyed by UNHCR, is provided only in Finland,¹⁵⁶ Slovenia¹⁵⁷ and Bulgaria.¹⁵⁸

While Belgian legislation requires that decisions of the CGRA are motivated, positive decisions are not motivated in practice.¹⁵⁹ The case manager does motivate the decision, but this legal reasoning is contained in an *evaluation fiche* in the administrative case files, which is considered a preparatory document and, therefore, not a public document which can be accessed by the applicant.¹⁶⁰ UNHCR audited the *evaluation fiches* of the positive decisions sampled and found that they were clear with regard to which aspects of evidence were accepted and which were not, as well as issues of doubt. The reasons for finding the evidence credible or giving the applicant the benefit of doubt were stated. However, the legal analysis with regard to qualification for refugee status was limited, and did not apply all the relevant criteria of the Qualification Directive to the facts.

As mentioned above, the current research identified that this issue is especially significant in the context of the asylum procedure in the Netherlands which provides for a single uniform status, with the same material rights for all those granted any form of protection.¹⁶¹ A positive decision states the legal ground on which the permit is granted, but it is not motivated with regard to the reasons in fact and law, and the decision does not include reasons for the rejection of other grounds for protection. Since 14 July 2009, according to a policy instruction, reasons for the grant of the permit should in principle be stated in a ‘professional summary’ which should be available to the legal representative upon request once the decision has been notified.¹⁶² However, at the time of writing, the practice could not yet be verified.

¹⁵⁵ A proposal to amend the APD to this effect has been put forward by the EC. See proposed recast Article 10 (2): APD Recast Proposal 2009.

¹⁵⁶ The *Hallintolaki* (Act on Administrative Conduct), sections 43 to 44, requires all decisions to be given in writing, and for the decisions to include also their reasons. These norms apply to all decisions, irrespective of their nature, and are followed in practice. Hence, also positive decisions are given in writing and are reasoned. Reasons are given both in fact, with reference to the individual case at hand, and in law. As with other decisions, the quality of reasoning, length and style of the decision may vary among decision-makers.

¹⁵⁷ This is an obligation under Article 214 of the AGAP.

¹⁵⁸ Article 59 (1) of the Administrative Procedures Code requires that all administrative acts issued in writing set out the grounds in fact and law on which the decision is based. The audited decisions for granting refugee status formally contained reference to the reasons in fact and in law. They followed the standard structure of decisions, but were very brief. The audited decisions for granting refugee status were half a page to a little more than a page. Three of four audited case files on decisions for granting refugee status did not enclose COI Reports and the decisions made no reference to such.

¹⁵⁹ Article 57/6, § 2, of the Aliens Act.

¹⁶⁰ Interview with Commissioner-General, 27 April 2009.

¹⁶¹ A residence permit will be granted on different grounds, as enumerated in Article 29 a, b, c, d, e, and f Aliens Act. If for example a residence permit is granted under Article 29b Aliens Act, this implies a rejection of a permit under Article 29a Aliens Act.

¹⁶² IND-Work instruction nr. 2009/11 of 14 July 2009.

In Spain, the reasons for granting status are contained in the case report which is contained in the case file, and is accessible to the applicant once the decision has been adopted. However, as mentioned above, UNHCR has found shortcomings in the reasoning in these case reports.

From the UK case file audit, it was observed that where refugee status or humanitarian protection was granted, there was a file note which also gave reasons for this decision. However, these reasons were not issued to the applicant.

Likewise in Germany, while positive decisions on refugee protection are not motivated, the reasons in fact and law are given in brief in an internal note in the applicant's file.¹⁶³ This internal note is not automatically accessible to the applicant, but on request by his/her legal representative. According to the internal guidelines, the note shall comprise the statement of facts relevant for the decision as well as the decisive grounds underlying it.¹⁶⁴ The length,¹⁶⁵ composition and content of the internal notes vary,¹⁶⁶ but in all cases reviewed, contained the factual ground(s) on which the recognition was based.¹⁶⁷

Although states are not legally required to give reasons for positive decisions under the APD, UNHCR considers that this would represent good practice, particularly where this information is in any case retained in a different format on the file. This would contribute towards the transparency of decision-making and efforts to monitor and improve quality and consistency. It would also assist with possible decision-making at a later stage concerning any application to renew the validity of a residence permit, or any potential application of the cessation clauses.

Recommendations

As a matter of good practice, UNHCR encourages Member States to state in writing the reasons for a grant of either refugee status or subsidiary protection status, and to make these available to the applicant at the time of the decision.

Monitoring of the quality of decisions

Quality monitoring or auditing is an important way of supervising and evaluating the quality and consistency of decision-making. Regular review of a meaningful sample of decisions allows for an assessment of whether standards are being met by decision-makers throughout the determining authority, regardless of whether the procedure is centralised or de-centralised. Such monitoring also assists in identifying training and operational policy guidance needs. Objective oversight is also important to ensure that the system of quality control functions appropriately, and to verify adherence to quality standards.

¹⁶³ Different rules apply with regard to subsidiary protection.

¹⁶⁴ Internal Guidelines for the Asylum Procedure, 1.1 b), page (3/5), cf. also Handbook for Adjudicators "Decision", 2.1.2 page 7.

¹⁶⁵ In most audited cases, the internal note is 1/4-3/4 of a page long, and longer only in exceptional cases.

¹⁶⁶ The reasoning for a positive decision on a particular ground for subsidiary protection is usually limited to a statement that the specific situation of the applicant prompts the application of a certain ground of protection, but this has been sufficient for understanding the reason for granting protection, for example ooERT05; o1RQ05; ooNIG04; ooRUS09; ooTUR04.

¹⁶⁷ One very good example concerns a case (11NIG02) in which the adjudicator in the internal note comprehensively dealt with all issues that led to the decision. Over two pages, the statement of facts was portrayed, and the following four pages were dedicated to the legal and factual considerations of the particular case, including: the grounds for persecution, agents of persecution (non-state agents), availability of protection, the standard of risk, the specific standard of proof and how it was met. For each piece of COI, the various sources were clearly given. In three cases reviewed, a positive decision was based on factual grounds other than those presented in the interview (11ERT01, 11ERT03, 10ERT10). Nevertheless, the results in these decisions seem to be correct since considerable reasons for a well-founded fear were presented. The reasons brought forward by the applicant were not however those reflected in the internal note.

UNHCR notes that only two of those states surveyed (Germany and the UK) have a dedicated quality audit function as part of their asylum system. Most of the Member States of focus in this research have some form of supervision system in place to monitor the quality of first instance decisions. However, these are often of a relatively informal nature, and UNHCR considers it questionable whether decisions are being subjected to adequate scrutiny in all Member States.

In several states, at the time of UNHCR's research, (the Czech Republic, France, Finland, Greece, the Netherlands, Slovenia¹⁶⁸ and Spain) decisions were simply reviewed and checked internally by one other person, either a colleague or supervisor.

Thus in the Czech Republic every decision is read by the Head of the Asylum Procedure Unit.¹⁶⁹ Similarly in France, there is no external mechanism of quality control of written decisions but at an internal level, the protection officer who interviews the applicant and assesses the case writes a proposal for a decision which is referred to his/her superior, who signs the decision after possible amendments and further checks. The decision can also be referred to a higher level if necessary, and the Secretary General of the OFPRA may also conduct random checks. The improvement of decision-making is a stated priority of OFPRA.¹⁷⁰ A similar practice exists in Finland, where decisions taken by the decision-maker are reviewed and signed by the Department Manager, but there are no formal quality control mechanisms as such.

In Greece, according to ADGPH, the Director of Aliens' Directorate of the Greek Police Headquarters and the Head of the Asylum and Refugees Department are responsible for 'quality control', since they receive the case file, view the interview record form and sign all decisions.¹⁷¹ There exists the possibility of an element of independent oversight by the Greek Ombudsman, who has the authority to intervene in cases involving public bodies and to investigate individual administrative actions, and can make recommendations and proposals to the public administration.¹⁷²

In Italy, there is no official external mechanism of quality control of written decisions. Internally, however, all cases are assessed and decided by a panel of four members, including a UNHCR representative. Moreover, the Territorial Commissions which are located in ten cities in Italy are coordinated by a National Commission that has responsibility by law to monitor trends of the Territorial Commissions. It should also ensure coordination, including through visits to the Territorial Commissions and centralized coordination meetings.

In Slovenia, every decision is read by the Head of the International Protection Status Section, and then signed by the Head of the International Protection Division. Occasionally another decision maker may be consulted to help resolve a complex issue.¹⁷³

¹⁶⁸ At the time of this research, a joint UNHCR Quality Initiative Project, sponsored by the EU, was being implemented with the aim to embed an internal quality control system within the Ministry of Interior.

¹⁶⁹ Interview with the Head of the Asylum Procedure Unit, 7 April 2009 in Prague.

¹⁷⁰ Interview with the Head of Legal Department of the OFPRA and Interview with the Secretary General of the OFPRA. One of the qualitative objectives of the three year "Contract of objectives and means" (*Contrat d'objectifs et de moyens*) which has recently been signed is to monitor and analyze specific country case-loads in order to take necessary coping measures.

¹⁷¹ Interview with the Head of ARD in ADGPH.

¹⁷² The Greek Ombudsman has made several recommendations regarding the asylum procedure. In the most recent and relevant for asylum decisions, the Greek Ombudsman recommends precise and personalised reasoning and advises that an explanatory note in applicant's language should be attached to decisions (See Greek Ombudsman. 2008. *"Epidosis aporiptikon apofaseon ke askisi prosfygis"* [The service of negative decision and the submission of appeal]. Athens: Greek Ombudsman).

¹⁷³ The Head of the International Protection Status Section emphasised Slovenia's participation in the ERF-funded joint UNHCR Quality Initiative Project, currently being implemented with the aim of establishing internal quality control system within the Ministry of Interior.

In Spain, there is no systematic quality control of decisions. Decisions are drafted by eligibility officials and signed by the General Director for Asylum with whom final responsibility lies. Cases which raise complex issues, or where there are differences of opinion with UNHCR, will be discussed with the Head of the Unit or even with the General Sub-Director for Asylum (OAR Director).¹⁷⁴

In the Netherlands, at present, the only form of quality control¹⁷⁵ is a collegiate check. This means that every decision is checked by another official.¹⁷⁶

Although still only having an internalised supervisory system, Belgium and Bulgaria can be distinguished from the states above due to the nature of their supervisory systems, which are relatively more formalised and comprehensive in scope.

In Belgium, to ensure quality and efficiency, certain structures have been developed within the CGRA. The case managers at the CGRA are assigned to a geographical section which has a head of section as well as designated supervisors. Every supervisor oversees approximately four case managers on average. After the personal interview and the examination/analysis of the case file, a draft decision or *evaluation fiche* is prepared by the case manager in charge of the examination of the application. The draft decision or *evaluation fiche*, as well as the entire case file, are then sent to the supervisor who has responsibility to monitor quality and quantity of the work of each individual case manager.¹⁷⁷ After the draft decision has been corrected and approved by the supervisor, the decision is sent to the Commissioner-General or one of the deputy commissioners to sign. The Commissioner-General and deputies additionally undertake quality checks. Case files involving unusual or particular problems are sent to the Commissioner and the deputies with an explanatory note. In addition, the Commissioner-General and the deputies organise meetings with each geographical section every four months to review reports on the results of the section, operational issues, cooperation with other services (e.g. CEDOCA) and the results of individual case managers.

In Bulgaria, with regard to decisions taken in the regular procedure, SAR has in principle implemented a very strict and thorough supervisory system. According to regulations, the opinion of the interviewer is coordinated with his/her direct supervisor (the Head of the Proceedings and Accommodation Department) and the Director of the RRC.¹⁷⁸ The approved opinion is transferred to the Central Administration where it is allocated to a legal adviser from the Directorate of Methodology of Proceedings and Procedural Representation (Methodology Directorate). The legal adviser may require further examination of specific aspects of the case if necessary. If no changes are required, then the legal adviser drafts the text of a decision. In the case of disputes between the interviewer and the legal adviser, the personal file of the applicant is transferred to the field Deputy Chairperson who rules on the matter and gives explicit instructions.¹⁷⁹ After the decision is drafted, it shall be approved by the Director of the Methodology Directorate, and thereafter the field Deputy Chairperson of SAR. Either may require amendments to the decision.¹⁸⁰ After the decision has been approved, it is to be signed by the Chairperson of SAR and is given to the applicant together with his/her personal file. UNHCR considers this system to constitute a good practice for

¹⁷⁴ Note that UNHCR has an advisory role prior to the adoption of the decision by the determining authority.

¹⁷⁵ However, according to the Project manager pilot 'quality of services, asylum', another quality mechanism will be introduced, namely a system called Kondor, taken over from the SVB (social insurance bank).

¹⁷⁶ According to the IND, it may be not the strongest instrument of control since the mutual relationship between colleagues plays an important role.

¹⁷⁷ Interviews with case managers 19 & 20, March 2009 and interview with operational coordinator of the CGRA, 25 February 2009.

¹⁷⁸ Article 93 (3) of IRR.

¹⁷⁹ Article 97 of IRR.

¹⁸⁰ Article 98 of IRR.

decisions taken in the regular procedure. However, in Bulgaria in 2008 approximately 35% of negative decisions were taken in the accelerated procedure.¹⁸¹ These decisions are taken by the interviewers at SAR who are only given the possibility to consult on their decisions with legal advisers of the respective RRC, or with their direct supervisors.¹⁸² Taking into consideration the short time frame for decision (three days), the opportunity for quality control in accelerated procedures is therefore limited in practice.¹⁸³

The UK and Germany differ from the other states surveyed, in that they have, in addition to internal legal and administrative supervision, dedicated and specialist quality control functions.

In the UK there is a Quality Audit and Development Team (QADT) which undertakes audits of case files. Fifteen auditors work in the QADT, plus a small administrative support unit. The Quality Audit and Development Team aims to ensure consistency and has developed quality assessment tools.¹⁸⁴ Periodic reports are produced.¹⁸⁵

The German determining authority (BAMF) described to UNHCR the internal quality control as follows. According to the BAMF, there is a system of internal legal and technical supervision. To further facilitate a high standard of quality, internal “quality promoters” (i.e. a member of staff in the branch offices) carry out random examinations of decisions. They act as advisors for the adjudicators, inspect interviews and decisions and serve as a link between the branch offices and headquarters of the BAMF in Nuremberg. Moreover, a special unit for quality control was established at BAMF headquarters in 2004. Its task is to assure and manage a high standard of quality by means of:

- Analysis of decisions
- Development and documentation of procedural standards
- Review and evaluation of asylum proceedings concerning compliance with instructions
- Detection, evaluation and analysis of deficiencies
- Further development of quality assurance mechanisms and quality management (e.g. visits to the branch offices)
- Participation in international projects concerning quality of procedures (e.g. ASQAEM,¹⁸⁶ EAC).

According to the BAMF, the main instruments of quality assurance are internal instructions and guidelines (also with regard to COI). Handbooks for adjudicators contain quality requirements concerning issuing of a decision in relation to legal as well as formal and stylistic aspects. Information on the case law of the higher courts is provided regularly and workshops¹⁸⁷ are held, especially concerning new legal developments, countries of origin

¹⁸¹ *Report on the Activities of the State Agency for Refugees within the Council of Ministers for 2008* (not public). Note that applications from Iraqi nationals are not included in this figure.

¹⁸² Article 77 (2) of the IRR.

¹⁸³ However, a recommendation to introduce a control mechanism in the accelerated procedure, made under the ERF-funded joint UNHCR Asylum Quality Assessment and Evaluation Mechanism Project, was accepted in principle.

¹⁸⁴ The National Audit Office report HC 124 paragraph 2.11.

¹⁸⁵ For example, the National Audit Office report at 2.12 states that the audit for April 2008 found consistent themes, such as: “*over 20 per cent of case owners fail to identify in the decision letter the asylum applicant’s future fear as part of the basis of claim*”: The Controller and Auditor General, the Home Office, Management of Asylum Applications by the UK Border Agency, the National Audit Office; HC 124 Session 2008-2009, 23 January 2009, www.nao.org.uk.

¹⁸⁶ In Germany, the ERF-funded joint UNHCR Asylum Systems Quality Assurance and Evaluation Mechanism (ASQAEM) Project focuses thematically on the asylum procedures concerning unaccompanied minors and separated children. The project conducts, *inter alia*, an independent and objective gaps analysis and evaluation of the asylum interviews and the decision-making process (incl. appeals before the courts) of applications for international protection of the above mentioned group of persons.

¹⁸⁷ For example from 26-28 October 2009, for the first time a conference for all adjudicators was held in the BAMF headquarters in Nuremberg.

and specific groups of persons (e.g. unaccompanied children, traumatized applicants, victims of gender-specific persecution). Abstracts of decisions must be presented to the head of division or the quality promoter, before the decision is forwarded to the applicant.¹⁸⁸ Thereby, it can be assessed if the quality standards as well as the guidelines have been complied with. Moreover, at six monthly intervals, the decision-making practice of the BAMF as well as that of the administrative courts is systematically evaluated with a view to achieving a greater degree of consistency. Finally, communication with UNHCR, administrative courts and other organizations constitute a means of indirect quality control.¹⁸⁹

Recommendations

UNHCR recommends that Member States which do not have asylum decision quality evaluation or monitoring systems should consider developing these, drawing on the models developed and applied with positive outcomes in other countries. The ongoing exchange of experiences among Member States, including in the context of UNHCR's Quality Initiative projects, should be expanded.

UNHCR will encourage the EASO, in collaboration with Member States and other stakeholders, to examine closely the scope, potential benefits and possible approaches to quality mechanisms and exchange of good practice among Member States. UNHCR is ready to contribute to that process.

Quality assessment, at all levels, should focus on identifying areas where practical steps can be taken to fill gaps in knowledge, skills or capacity. This can include training, development of guidelines, templates and other tools which could assist the preparation of structured, well-reasoned and legally sound written decisions.

Provision of decision for dependants

Article 9 (3) APD provides that *“For the purposes of Article 6 (3), and whenever the application is based on the same grounds, Member States may take one single decision, covering all dependants.”*

Member States are not obliged to issue one single decision covering all dependants, and a number of Member States surveyed have opted not to transpose Article 9 (3) APD where their existing practice is to issue an individual decision for all adult dependants. This is the case in Belgium, France,¹⁹⁰ Germany, Italy, the Netherlands,¹⁹¹ and the UK.¹⁹² Other Member States have only transposed and implemented Article 9 (3) APD partially, by allowing a

¹⁸⁸ The internal guidelines furthermore state the duty to present decisions for review before delivery to the applicants, *inter alia*, in sensitive cases (for example gender-related persecution, unaccompanied children, torture, danger of suicide etc.) and in cases in which a positive decision is intended by the adjudicator. The guidelines also explicitly mention that adjudicators are bound by instructions. Cf. also Internal Guidelines for the Asylum Procedure, under: “Duty of presentation” (1/2), (2/2) and under “Decision”, 1.3 “Duty of presentation” (4/5); Handbook for Adjudicators “Decision”, 2.6 “Duty of presentation before submission”, page 25.

¹⁸⁹ The forum of experts which meets at the BAMF warrants particular mention. It supports quality management concerning the practices of the “IZAM” (“*Informationszentrum Asyl- und Migration*”) – a part of the BAMF which gathers information on refugee law and policy, in particular by collecting country information.

¹⁹⁰ French law does not provide for an application to be made by an applicant on behalf of dependant adults (and has not transposed Article 6 (3) APD). Each adult must make an application on his/her own behalf.

As far as accompanying minors are concerned (i.e. children below 18 years who accompany one parent who applies for asylum), regardless if the child arrived in France with his/her parent(s) or afterwards, the child does not lodge an individual application, s/he is registered in his/her parent(s)'s file and his/her case is indissociable from the case of his/her parent(s). In case his/her parent(s) is/are recognized as refugee(s), when the child is 18 years old (or between 16 and 18 years old if s/he wants to work), s/he has to lodge an individual application if s/he wants to continue to be protected by the OFPRA. The protection will be automatically renewed without any interview.

¹⁹¹ In the Netherlands a decision is taken on each individual application, including when the application is based on the same grounds.

¹⁹² The transposition note states that no action is required in relation to Article 9 (3) APD.

single decision to be made concerning dependent minors. This is the case in Bulgaria,¹⁹³ the Czech Republic,¹⁹⁴ and Slovenia.¹⁹⁵ Only Greece¹⁹⁶ and Spain¹⁹⁷ of the Member States surveyed have fully transposed Article 9 (3) APD.

Recommendation

UNHCR considers as good practice the issuance of individual decisions for each applicant, including for each dependant. This is particularly important in the case of dependant minors.

Notification of written decision

The basic guarantees regarding notification of written decisions are set out in Article 10 (1) (d) and (e) APD:

“10 (1) With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

[...]

(d) they shall be given notice in reasonable time of the decision by the determining authority on their application for asylum. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant for asylum;

(e) they shall be informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counselor, and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 9 (2).”

UNHCR’s research has found that there are a number of divergences between Member States in both legislation and practice as to how these guarantees are affected. It recorded some instances where national provisions fall short of requirements under the Directive, as well as cases of good practice and standards higher than those contained in the Directive. It should be stressed that the manner of decision notification, the provision and quality of language support and information on how to appeal, all play a significant role in determining whether, following receipt of a refusal decision, an applicant is able to understand the decision and is able, in reality, to instigate an effective legal remedy.

¹⁹³ LAR includes no special provision for the transposition of Article 9 (3). The only implementation of Article 6 (3) of the APD in the procedures in Bulgaria is for dependent minors (children up to 14 years of age). An application may be made only on behalf of a minor child by the parent who accompanies him/her. This rule is further developed in the IRR, Chapter 6. A single decision will be issued if the applications are submitted together. After the audit of case files for this research was completed, UNHCR encountered one decision on an application by an accompanied minor which was separate from the decision of the parent applying on his behalf. UNHCR was informed that this was the current practice, but as it was an isolated case, it would require further analysis.

¹⁹⁴ Article 9 (3) is only partially transposed to the extent that minors must be represented by their statutory representatives (parents) as provided by Section 34 (1) CAP, but it does not follow that a single decision should be issued although in practice this is the case.

¹⁹⁵ Article 9 (3) APD is transposed by virtue of the subsidiary application of the Article 130 (1) of the AGAP (joined cases). Under Article 130 (2) the parties have the right to object to this.

¹⁹⁶ Article 7 (4) of PD 90/2008: *“Whenever the application is lodged also on behalf of the dependant members of the applicant who claim the same grounds for protection, the determining authority may take one single decision, covering all dependants.”*

¹⁹⁷ Article 27 (3) ALR regulates the adoption of one single decision covering all family members, spouse included.

Time frames for notification of a decision

The first sentence of Article 10 (1) (d) APD requires that all applicants “*shall be given notice in reasonable time of the decision by the determining authority on their application for asylum*”.

The Directive does not define what constitutes a “*reasonable time*” between the taking and notification of a decision.

UNHCR understands that the time taken to notify an applicant and/or the legal representative will be affected by a number of factors, including whether the determining authority or another authority is responsible for notification. The time frame for notification of the decision will also be affected by the mode of notification and the place of residence of the applicant. For example, some Member States notify the applicant in person and, therefore, a meeting is scheduled which brings together an official of the determining authority, the applicant, an interpreter (if necessary) and possibly also a legal representative. This has many advantages in terms of ensuring that the decision, the reasons for the decision and the consequences of the decision are explained to the applicant in a language s/he understands. It may however require more time to organise than in those Member States which simply notify the applicant of the decision by post.

Few of the Member States surveyed have transposed this provision or regulate time limits under national legislation.

This requirement has been transposed into German asylum law by inserting the word for “*without delay*” (*unverzüglich*) into the provision requiring notification.¹⁹⁸ In Greece, legislative provisions require that the decision on the asylum application shall be taken and served to the applicant “*as soon as possible*.”¹⁹⁹ In Italy there is a requirement that the applicant be informed of the decision in “*a short time frame*”²⁰⁰ and the UK has replicated the term “*in reasonable time*” in its legislation.²⁰¹

Two Member States have defined time limits. In Spain, the general time limit established in the common administrative procedure for notification is ten (working) days from the date the decision was adopted.²⁰² Within the admissibility procedure, failure to notify the decision within the time frame will result in the application being transferred to the regular procedure. In Bulgaria, by law, the decision should be served in person within 14 days of the issue of the decision; and if not, the notice should be sent.²⁰³

Other states surveyed have no express time frames in legislation, but average durations have been noted in practice where these were recorded in case files or otherwise on the basis of information gathered from interviewees. It is worth noting here that, as a matter of good practice, Member States should record the date when a decision is taken and the date of notification of the decision, and this should be contained in case files.

Belgian legislation does not specify the time frame for the notification of the decision, but UNHCR’s audit of case files showed that in practice, notification of the decision was usually sent to the applicant within one to four days

¹⁹⁸ Section 31 (1) Sentence 2 APA. Note however that this word is missing from the English translation made available by the MOI on its website.

¹⁹⁹ Article 8 (1) (d) of PD 90/2008.

²⁰⁰ Article 10 (4) of the d.lgs. 25/2008.

²⁰¹ Paragraph 333 of the Immigration Rules HC 395.

²⁰² Article 58 (2)APL.

²⁰³ Article 76 (3) LAR.

of the decision being taken. The practice in Bulgaria varies between one and three days for service in person to applicants accommodated in reception centres, to approximately two weeks for those notified by post.

In the Czech Republic, decisions are delivered in person by the determining authority at a scheduled meeting in the presence of an interpreter if necessary. From the audit of case files, the average time frame for notification was observed to be about 13 days, ranging from one day in four cases to 150 days in two cases, the latter extreme delays caused by organizational difficulties with finding a Somali interpreter. In Finland, the time frame for the service of decisions can vary between one week and two months in practice.

The BAMF in Germany informed UNHCR that their software system initiates the automatic printout of a decision and cover letter once the decision has been taken. As a result, written decisions are issued on the day the decision is taken (or at the latest the following day) and delivered by mail to the legal representative (or applicant) two days later. In the airport procedure, the decision is delivered to the applicant on the same day the decision is taken.

In Italy, it is not the determining authority but the local *Questura* (police department) that delivers the decision in person. Stakeholders interviewed have observed time periods varying from a few days to two months in the notification of decisions.²⁰⁴

In the UK, the time frame for delivery of the decision depends on the procedure within which the application is examined. For example, in the accelerated detained procedures, the decision is usually delivered in person within one or two days of being taken, and in the regular New Asylum Model (NAM) procedure, the decision is usually notified within one to four weeks.²⁰⁵ In some UK regions, decisions taken in the regular NAM procedure are served at a meeting specifically arranged for that purpose.

In the Netherlands, applicants should be notified of the decision within 48 procedural hours in the accelerated procedure, or the application is transferred into the regular procedure; there are no provisions regulating time frames between the taking and notification of decisions in the regular procedure, and no records are kept as to how long this takes in practice. Similarly, the MOI in Slovenia does not record the period between the decision being taken and notified, so it was not possible to assess compliance with the APD.

From the above, it would not appear that there are widespread problems concerning delays between the taking and the service of refusal decisions, although in some Member States delays of up to two months were reported. Clearly, decisions should be communicated promptly. Therefore, it would be preferable for some Member States to better regulate the timing between taking and service of a decision, and to monitor and ensure good administrative practice in this regard.

Moreover, UNHCR considers it particularly important that States ensure that a decision be served a sufficient time before corresponding removal action is taken, in order to guarantee that the applicant has adequate advance notice and is able effectively to exercise any right of appeal. UNHCR was concerned to note that interviewees in Finland referred to instances where service of the decision was only affected after the applicant had been transferred from the detention centre to the airport for deportation.

²⁰⁴It should be noted that the determining authority has to send the decision to the *Questura* and then the *Questura* has to summon the applicant in order to deliver the decision in person.

²⁰⁵Asylum Process Guidance “Implementing Substantive Decisions”.

Recommendation

UNHCR recommends that Member States define reasonable time limits to govern the period between the taking of a decision and the service of a decision on an applicant. Such limits should be exceeded only in exceptional and well-justified circumstances. Administrative case files should record compliance with these requirements.

Where imminent removal action is intended following a negative decision, it is imperative that the timing of service of the decision takes account of the circumstances of the applicant, and provides reasonable notice for the applicant to ascertain and safeguard any appeal or other rights.

Member States should establish administrative practices which ensure that the time frame between the taking of the decision and notification of the decision can be monitored.

Manner of notification

The APD does not prescribe the manner of notification of the decision. UNHCR's review of state practice found that Member States may employ different methods, depending on the procedure; and/or depending on the place of residence of the applicant; and/or depending on whether the decision is to be notified to the applicant and/or legal representative. Some Member States deliver the decision in person to the applicant in a scheduled meeting at the premises of the determining authority or reception centre; some deliver it to the applicant in person at his/her address and some send the decision by post to the applicant and/or the legal representative.

Article 10 (1) (d) APD provides Member States with discretion whereby *“if a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant for asylum.”*

Some of the Member States of focus in this research have legislation in place which permits notification to the legal representative instead of the applicant in prescribed circumstances (Germany, Greece, the Netherlands, Slovenia and the UK).²⁰⁶ However, in practice, of the Member States surveyed, this option is generally only exercised by the determining authorities in Germany²⁰⁷ and the Netherlands (with regard to the regular procedure only).

Most of the Member States surveyed notify the applicant. A number of those have adopted good practice by serving the decision both on the applicant and his/her legal representative, if any (Belgium, Bulgaria,²⁰⁸ the Czech Republic,²⁰⁹ the Netherlands in the accelerated procedure, and Slovenia).²¹⁰ In the UK, the manner of notification depends on the procedure used to examine the application, and practice can also vary by region. The decision may be sent to the legal representative and also given to the applicant at a specially arranged meeting,²¹¹ or may be sent to the applicant's last known address²¹² or, in the absence of an address, to the representative.²¹³

²⁰⁶ Immigration Rules HC 395, Paragraph 333.

²⁰⁷ The cases in which a legal representative has been appointed (in writing) follow in this regard the rules set by general administrative law.

²⁰⁸ In the rare cases that the applicant is legally represented, the legal representative may be sent a notification as well.

²⁰⁹ Although Section 20(2) ASA state: *“(...) A power of attorney may not be granted to receive a decision made by the Ministry in the matter of international protection”*, this is only applicable to an *ad hoc* power of attorney to receive the decision, and not to the power of attorney given by the applicant to the legal representative for the whole procedure according to the Supreme Administrative Court (SAC) in its decision of 29 April 09, 7 AZs 21/2009. The SAC held that the determining authority is obliged to respect a fundamental principle arising from the institution of legal representation regarding delivery and is obliged to notify not only the applicant but also his/her legal representative of the decision.

²¹⁰ Constitutional Court held that *“it is very important that decisions of the authorities are in time issued to both – asylum seeker and his counselor”*, Up-338/2005, 26 May 2005.

²¹¹ Asylum Process Guidance *“Implementing Substantive Decisions”* downloaded 20 April 2009.

²¹² In the Case Resolution Directorate, according to Asylum Process Guidance *“Implementing Substantive Decisions”* downloaded 20 April 2009.

²¹³ Asylum Process Guidance *“Implementing Substantive Decisions”* downloaded 20 April 2009.

Legal provisions and practice vary between Member States, as can be seen in the following table.

	Notified to applicant	Notified to lawyer
Belgium	√	√ ²¹⁴
Bulgaria	√	√ ²¹⁵
Czech Republic	√	√
Finland	√ ²¹⁶	
France	√	
Germany	√ ²¹⁷	√ ²¹⁸
Greece	√ ²¹⁹	
Italy	√	
Netherlands	√ ²²⁰	√
Slovenia	√ ²²¹	√
Spain	√ ²²²	
United Kingdom	√	√ ²²³

214 Article 7 in conjunction with Article 24 of the Royal Decree of 11 July 2003 concerning the CGRA requires that notification of the decision is given to the appointed legal adviser.

215 There is no obligation for SAR to simultaneously provide the legal representative with a copy although this usually happens in practice in the rare cases in which the applicant is represented: information obtained in interviews with stakeholders.

216 In exceptional cases, where the applicant has left Finland before the decision is made, for example, in cases of withdrawal, the decision may be given to the legal representative.

217 The applicant receives the decision if there is no appointed legal representative in which case Section 31 (1) Sentence 3 (1st part) APA states *“If no representative has been appointed for the procedure, a translation of the decision and the information on legal remedy in a language the foreigner can reasonably be assumed to understand shall be enclosed.”*

The word “decision” in the aforementioned sentence of the English translation of the provision provided by the MOI on its website is not correct in so far as the German version speaks of the *“Entscheidungsformel”*, meaning “decision formula” / “Tenor” / “operative provisions”, i.e. those sentences at the beginning of the written decision informing the applicant which form of protection has been granted and/or has not been granted; and in case none of the different forms of protection has been granted, also the notification announcing deportation in case the foreigner does not leave the country voluntarily.

The applicant may also receive the decision according to Section 31 (1) Sentence 4 APA: *“If the asylum application is rejected only pursuant to Section 26 a [referring to constitutional asylum] or Section 27a [referring to Dublin-cases], the decision together with the deportation order under Section 34a shall be delivered to the foreigner himself.”* In this case, an authorized legal representative should also receive a copy of the decision in accordance with Section 31 (1) Sentence 6 APA, however, in practice, according to a legal representative (X2), the legal representative frequently receives the copy after deportation has taken place, so that the person concerned cannot be legally assisted. However, as those cases refer either to constitutional asylum or Dublin-cases, they are not directly covered by the APD.

218 As authorization usually is given in writing, Section 8 (1) Sentence 2 Law on Service in Administrative Procedure applies and accordingly, the decision is only given to the legal representative. That this is actually also done in practice has been confirmed by the BAMF in its response to UNHCR.

219 Article 8 (1) (d) PD 90/2008 states that the *“decision may also be served to the applicant’s attorney or legal representative instead of the applicant.”* However, in practice, according to four interviewees, the decision is given to the applicant. The legal representatives have the right to receive the decision in the applicant’s absence but only if they have power of attorney.

220 In the regular procedure the decision is only given to the applicant’s legal representative unless the legal representative is unknown. In accelerated procedures it is served on both adviser and applicant.

221 Although Article 49 of the IPA (service of documents) only requires service on the legal representative, in practice it is always additionally served on the applicant. UP-338/2005, 26 May 2005, Official Gazette No. 56/2005, CC stated that *“the asylum seeker is in a foreign country, where he is not acquainted with the legal system, does not speak the language of this country, which can render it impossible to enforce his right to asylum. According to Article 9 of the Asylum Act, the asylum seeker has the right to a refugee counselor which enables him to effectively protect his rights in the asylum procedure. Thus, it is very important that decisions of the authorities are in time issued to both – asylum seeker and his counselor.”*

222 By law, the decision can be sent to the legal representative or NGO that provided advice, according to Article 28 ALR and Article 59 APL, but in practice it is served on the applicant in person only, according to interviewed stakeholders. UNHCR’s audit of case files confirmed this, as a copy of the decision signed by the applicant upon receipt in person was witnessed in case files. Article 28 of the New Asylum Law introduces the possibility of notification through publication in the Citizens’ website and in the OAR’s website if personal notification has failed, and provided that the principle of confidentiality set out in Article 16 (4) of the New Asylum Law is respected..

223 Paragraph 333 of the Immigration Rules HC 395 states that notice may instead be given to the representative. For cases within the Case Resolution Directorate, decisions are sent to the last known address. In the absence of an address the notice can be sent to a representative.

Several Member States require service in person and strict recording that this has been affected in practice. In Bulgaria, all decisions are served on the applicant in person and this is certified by both the applicant and the interpreter.²²⁴ The whole text of the decision is read to the applicant (including the reasoning and how to appeal) with the assistance of an interpreter if necessary. Similarly, in the Czech Republic, the applicant is invited at a determined date and time to receive the decision in person, in the presence of and with assistance of an interpreter if necessary.²²⁵

In Spain, at the time of UNHCR's research, for the in-country admissibility procedure and the regular procedure, decisions were usually served in person when the applicant reported to the competent authority.²²⁶ In the border admissibility procedure, notification was always carried out in person. In the UK, the manner of notification depends on the procedure in which the application was examined. In some UK regions, applicants whose applications were examined in the regular NAM procedure are notified of the decision and how to appeal at a dedicated meeting with the case manager, and at which an interpreter is present and relevant information provided. This meeting does not take place in all cases, however, and this study did not observe any such meetings.

In France, the decision is served by registered letter with acknowledgement of receipt. If the applicant is held in an administrative retention centre, the decision is served upon the applicant in a closed envelope by the manager of the centre.²²⁷

As mentioned above, Germany and the Netherlands regularly notify the legal representative only in prescribed circumstances. In the Netherlands, during the regular procedure, the decision is only given to the applicant's legal representative unless the legal representative is unknown. In that case, the decision is given to the Aliens Police.²²⁸ In the accelerated procedure, the decision is simultaneously given to the applicant and his/her legal representative.²²⁹ In Germany, in cases of persons having a legal representative,²³⁰ the written decision is issued in German only and sent to the legal representative.²³¹ In cases of applicants who are not represented by a lawyer, the decision is sent to the applicant,²³² also containing a translation of the operative provisions ("*Tenor*") of the decision as well as a translation of the information on legal remedies. However, the reasons for the decision are not translated.

²²⁴ Section 76 (2) LAR.

²²⁵ Section 24a ASA, which states: "(1) *An exact copy of the written decision shall be delivered to the participant in the proceedings at the place and time determined in the written invitation to receive the decision. The signature of an authorized person on the exact copy of the decision may be replaced with the clause "Signed in person" or with the abbreviation thereof, i.e. "v. r.", and the clause "Person responsible for correctness of the copy" with specification of the name(s), surname and signature of the person responsible for preparation of the written decision.* (2) *Should the applicant for international protection fail to appear to receive the decision on the day specified in the invitation, in spite of having been delivered the invitation, the day specified in the invitation for receipt of the decision shall be deemed to be the day of delivery of the decision to the applicant for international protection.*"

²²⁶ Article 59 APL requires that notification must be done in any means that allows recording of its receipt by the applicant or his/her legal representative.

²²⁷ Article R. 723-2 *Ceseda* ("*Notification par voie administrative*").

²²⁸ IND-Brochure about the asylum procedure.

²²⁹ Aliens Circular C18/3.

²³⁰ Who has been authorized in writing, which usually is the case.

²³¹ In these cases the common rules with regard to the issuance of such kind of decisions apply, especially Section 8 (1) Sentence 2 Law on Service in Administrative Procedure: "*It [the decision] shall be addressed to him/her [the representative] in case of written authorization.*" Such a decision is issued in German only.

²³² Section 31 (1) Sentence 3 (1st part) APA: "*If no representative has been appointed for the procedure, a translation of the decision and the information on legal remedy in a language the foreigner can reasonably be assumed to understand shall be enclosed [...].*" The word "decision" in the aforementioned sentence of the English translation of the provision provided by the BMI on its website is not correct in so far as the German version speaks of the "*Entscheidungsformel*", meaning "decision formula" / "*Tenor*" ['operative provisions'], i.e. those sentences at the beginning of the written decision informing the applicant which form of protection has been granted and/or has not been granted and in case none of the different forms of protection has been granted also the notification announcing deportation in case the foreigner does not leave the country voluntarily.

UNHCR welcomes the fact that some of the Member States surveyed serve notice of refusal decisions on both the applicant and his/her lawyer where represented.

To avoid any prejudice to the applicant or risk of appeal deadlines being missed, service of the decision should be undertaken in a manner permitting this to be objectively recorded and verified (i.e. either in person or through recorded delivery). Moreover, UNHCR notes with approval good practice, for example, in Bulgaria, the Czech Republic and under the United Kingdom's New Asylum Model (NAM) procedure in some regions, whereby an interview is arranged by the case manager to notify the applicant of the decision, and with the assistance of an interpreter, to explain the reasons and provide information on how to appeal in the event of a negative decision.

Recommendation

UNHCR recommends that service of negative decisions should be objectively verifiable, either through service in person or by recorded delivery signed for by the applicant or legal representative.

As a matter of good practice, and in support of an efficient and fair procedure, a meeting may be scheduled with the applicant following a decision on his/her asylum application, so that the reasons for refusal and information on how to appeal can be conveyed orally in the presence of an interpreter.

Notification of the decision in a language understood by the applicant

Article 10 (1) (e) APD requires Member States to inform asylum applicants of the “*result*” of the decision on their application in a language that “*they may reasonably be supposed to understand.*” This applies unless they are represented by a legal adviser or free legal assistance is available, in which case this requirement can be waived.

UNHCR has already expressed its reservations with regard to the wording of this provision and urged Member States to ensure that applicants are informed of the decision, including the reasons for the decision, in a language they understand, not in a language which they may reasonably be supposed to understand.²³³ Furthermore, with regard to the waiver, it obviously cannot and should not be assumed that a legal adviser or any organisation providing free legal assistance can communicate with the applicant in a language s/he understands. Therefore, Article 10 (1) (b) APD, regarding the right to receive the services of an interpreter, should apply whenever the State relies upon a legal adviser or an organisation providing free legal assistance to inform the applicant of the decision, and where appropriate communication cannot be ensured without such services.

Almost all Member States of focus in this research have transposed or reflected the minimum requirement of the APD in national legislation, regulations or administrative provisions, namely: Bulgaria,²³⁴ Finland,²³⁵ France,²³⁶

²³³ UNHCR: *Annotated Comments On The Amended Proposal For A Council Directive On Minimum Standards On Procedures In Member States For Granting And Withdrawing Refugee Status*, 2005: <http://www.unhcr.org/43661ea42.html>.

²³⁴ Article 76 (1) of LAR: “A copy of the decision of the Chairperson of the State Agency for Refugees shall be served on the alien seeking protection. The contents of the decision, as well as the rights and obligations arising from it, shall be announced to the alien in a language s/he understands.”

²³⁵ Section 203 of the Aliens' Act 301/2004 states that “The person concerned has the right to be notified of a decision concerning him or her in his or her mother tongue or in a language which, on reasonable grounds, he or she can be expected to understand. A decision is notified through interpretation or translation.” Official translation available at www.migri.fi.

²³⁶ Article R. 213-3 *Ceseda* states that “the foreigner is informed about the negative or positive outcome of this decision in a language which s/he can reasonably be expected to understand.”

Germany,²³⁷ Greece,²³⁸ Slovenia,²³⁹ and the UK.²⁴⁰ In the Czech Republic, Article 10 (1) (e) APD is transposed by the general provision requiring interpretation throughout proceedings,²⁴¹ and in practice every applicant is informed of the decision through the presence of an interpreter.²⁴²

Belgium,²⁴³ Spain and the Netherlands²⁴⁴ have not directly transposed Article 10 (1) (e) APD in national legislation, but have opted to notify the applicant's legal representative of the decision or to rely on free legal assistance which is available to the applicant.

Italy has not properly transposed the APD minimum requirement. The relevant provision in Italian legislation states that *"all communications concerning the procedure for the recognition of international protection are given to the applicant in the first language chosen by him/her or, if this is not possible, in English, French, Spanish or Arabic, depending on the applicant's preference."*²⁴⁵ UNHCR does not consider that this subordinate option to choose between four languages is sufficient, as there is no reason to assume that the applicant necessarily understands any one of them. Moreover, according to the same paragraph in the Italian law, the assistance of an interpreter speaking the language of the applicant or another language s/he understands is assured only *"in all steps of the procedure concerning the filing and the examination of the application"* – and not for a possible translation of all the official documents communicated.

In most Member States surveyed, UNHCR found that it is usual that the decision is provided only in the host states' language, and interpretation is either provided orally when serving the decision in person or through a legal adviser. Some states provide a written translation of a summary of the decision and others provide accompanying generic information leaflets in a variety of languages.

UNHCR notes positively that Bulgaria has in place a higher standard than the minimum required under the Directive, in that the text of the decision is read to the applicant, and further explanations on the rights and obligations

²³⁷ Explicitly transposed in the framework of the 2007 Transposition Act (Bundestag printed papers, 16/5065, re Section 31, page 217) by the insertion of Section 31 (1) Sentence 3 (1st part) APA: *"If no representative has been appointed for the procedure, a translation of the decision and the information on legal remedy in a language the foreigner can reasonably be assumed to understand shall be enclosed."*

²³⁸ Article 8 (1) (e) of PD 90/2008: *"They shall be informed of the result of the decision on the asylum application in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision."*

²³⁹ Article 8 (basic procedural guarantee), indent 4 of the IPA: *"s/he shall receive a decision in writing ... in a language s/he understands."* Article 10 (3) of the IPA states *"The applicant shall be informed of the content of the written decision in a language s/he can understand. The only papers to be translated into the language the asylum applicant can understand shall be the operative part of the decision and a brief summary of the explanation of the grounds that contain essential elements on which the decision is based, and legal instructions."*

²⁴⁰ Paragraph 333 of the Immigration Rules HC395: *"Where the applicant has no legal representative and free legal assistance is not available, he shall be informed of the decision on the application for asylum and, if the application is rejected, how to challenge the decision, in a language that he may reasonably be supposed to understand."*

²⁴¹ ASA Section 22 (1): *"A participant in the proceedings is entitled to use his/her mother tongue or a language in which s/he is able to communicate during the course of the proceedings. For this purpose, the Ministry shall provide the participant, at no charge, with an interpreter for the entire course of the proceedings."*

²⁴² However, some instances have been observed which call into question whether the full reasons for the decision are always interpreted to the applicant.

²⁴³ In accordance with Article 51/4 Aliens Act, the language of the decision and the language of the notification is the same language as the language of the examination i.e. either Dutch or French. According to Article 7 in conjunction with Article 24 of the Royal Decree of 11 July 2003 concerning the CGRA, notification of the decision is also sent to the appointed lawyer. Article 90 Aliens Act referring to Article 668 of the Judicial Code guaranteeing free legal aid to asylum seekers is also relevant.

²⁴⁴ Applicants in the Netherlands enjoy free legal aid and the assistance of an interpreter throughout the procedure. See the Act with regard to free legal aid of 23 December 1993 (*"Wet houdende regelen omtrent de door de overheid gefinancierde rechtsbijstand"*).

²⁴⁵ Article 10 (4) of the d.lgs. 25/2008.

arising from it, are provided via an interpreter in a language the applicant understands, and is not only reasonably expected to understand.²⁴⁶

Slovenia has similarly retained higher legislative standards requiring that the applicant shall receive the decision *“in a language s/he understands.”*²⁴⁷ In practice, the applicant is given the decision in Slovene together with a written translation of the operative part of the decision – a brief summary of the explanation of the grounds that contain essential elements on which the decision is based, and legal instructions.²⁴⁸ If a written translation of the decision cannot be made, according to Ministry of Interior, the applicant is informed orally, with the assistance of an interpreter, and in a language which the applicant understands, of the result of the decision and how to challenge a negative decision.²⁴⁹ The decision in Slovene is also given to the legal representative.

A number of Member States provide the services of an interpreter to communicate the decision to the applicant. In both Bulgaria and Finland, the decision is usually translated orally rather than in writing and free of charge to the applicant. Occasionally problems have been caused by a lack of specialist interpreters for rarer languages (or in more remote parts of the country) which has resulted in the introduction of video-link or telephone interpretation.

In the Netherlands, the applicant is informed of the decision by the legal adviser with the assistance of an interpreter via the telephone.²⁵⁰

UNHCR is very concerned with regard to Greek practice. Respondents from the determining authority²⁵¹ claimed in interviews that police officers responsible for delivering decisions to applicants do so with interpreter’s assistance, in order to inform the applicants orally and free of charge. However, there were indications that this was usually not the case in practice.²⁵² Another interviewee not associated with the authorities maintained that most of the time, *“when applicants receive the decision, they come to the Greek Council for Refugees (GCR) or another NGO because they do not know what the paper they have been given is about. Almost all of our cases allege that police officers do not inform them and just tell them in English ‘go to GCR.’”*²⁵³ This is problematic, given that applicants are not guaranteed access to free legal assistance in Greece and refugee-assisting organizations are extremely under-resourced.

In Italy, there should, in principle, be an interpreter available at the local *Questura* (police department) where the applicant receives the decision, but in practice this is not assured.

²⁴⁶ Article 76 (1) of LAR: *“The contents of the decision, as well as the rights and obligations arising from it, shall be announced to the alien in a language s/he understands.”* Article 108 (2) IRR regarding general procedures states also *“Where the alien has no command of Bulgarian, the decision shall be served in the presence of an interpreter. The interpreter shall read the decision to the alien and shall attest the translation by signing.”*

²⁴⁷ Article 10 of the IPA.

²⁴⁸ Written translations can be provided in Albanian, Serbo-Croatian (sic), Bosnian, Turkish, Kurdish, Russian, Arabian, Farsi, Urdu, Hindu, Punjabi, Romanian, Moldavian, Chinese, Mongolian, Tamil, Lingala, Telegu, Kannada, English, French and all other EU languages.

²⁴⁹ In the course of this research, UNHCR did not observe an oral notification.

²⁵⁰ L. Slingenbergh 2006, p.40. According to the Aliens Circular C15/2.2 and asylum applicant should be given additional time to comment on an intended negative decision if an interpreter is not available at the time of notification.

²⁵¹ Interviews with S1, S3 and S4.

²⁵² However, good practice has been observed at the Asylum Office of the Security Department of Athens Airport where the applicant is properly informed of the decision and receives a list of NGOs that offer legal assistance. This can be distinguished from practice at other locations (Source: Interview with S6).

²⁵³ Interview with S8.

UNHCR has observed that in Spain there is a reliance on lawyers and organisations providing free legal assistance to explain the decision to the applicant. There is no provision in Spanish law regarding the possibility of notification in any language other than Spanish. However, in practice, an interpreter is always provided for notification of decisions at the border, and sometimes also at OAR in Madrid as well as some Aliens Offices and police stations elsewhere (if they are available). Nevertheless, the common practice is to recommend that the applicant, upon receipt of the decision, contact a lawyer or a specialized NGO in order to be informed of the decision and its reasons.²⁵⁴ In Spain there is by law free legal assistance available throughout the asylum procedure, thus constituting an exception to the requirement under Article 10 (1) (e) APD. Some NGOs have their own interpretation services, which are normally funded by the State, or they may request the free interpretation services from specialized NGOs which are normally also state-funded.

UNHCR is concerned about the situation in some states where, notwithstanding transposition of Article 10 (1) (e) APD, in practice the decision is not necessarily fully or adequately translated to applicants. This often occurs where there is an accompanying absence of free legal assistance.

Interviewed stakeholders in Germany emphasised that those applicants who do not have a legal representative, and therefore only receive the operative provisions and information on legal remedies in a language they understand, have problems understanding why a particular decision has been taken.²⁵⁵ Most fundamentally, given the wording of the decision which contains very technical references to the law, it is often impossible for an applicant to understand what he or she was granted or refused by the decision.²⁵⁶

As mentioned above, in Germany, if a legal representative has been appointed, the decision is issued in German only. Applicants who are not represented by a lawyer receive the decision in German together with a translation of the operative provisions of the decision as well as a translation of the information on legal remedies. According to the BAMF, the translation is provided in “*a language the applicant understands*.”²⁵⁷ Further assistance to inform the applicant of the reasons for the decision, oral translation or another kind of support for illiterate applicants is not foreseen in the German asylum system and also not provided in practice by the BAMF. Applicants have to arrange for the translation of the decision themselves, and relatives, friends or social workers are requested for help.²⁵⁸ NGOs with particular counseling services for refugees and asylum seekers may help.²⁵⁹ In cases of applicants who are represented by a legal representative, the latter has to procure translation/ interpretation services.

Similarly, although France has recently introduced colour-coded model letters with translated statements in 18 languages setting out whether the applicant has been rejected (yellow), granted refugee status (pink) or subsidiary protection status (green), the information translated is extremely brief and minimal stating only, in case of refusal: “*Your application for asylum has been rejected. You have the possibility to lodge an appeal against that decision with the National Court of the Right of Asylum within a month from this notification.*” As such, an applicant who does not read French will have no understanding of the reasons for the negative decision.²⁶⁰

The research undertaken would suggest that where a decision is served by post rather than in person (with an interpreter,) and/or where there are doubts as to whether legal representation is available in practice, it becomes

²⁵⁴ Information obtained from interviews with stakeholders (OAR, lawyers and NGOs).

²⁵⁵ X1, X2.

²⁵⁶ X2.

²⁵⁷ Note Section 31 (1) Sentence 3 APA speaks of “*a language the foreigner can reasonably be assumed to understand.*”

²⁵⁸ Answer submitted by a refugee lawyer (X1).

²⁵⁹ X2.

²⁶⁰ Note that the applicant may not have access to an NGO providing legal and social assistance.

questionable, or at least harder to verify, that the requirements of Article 10 (1) (e) APD are met in practice. UNHCR therefore supports good practice whereby in addition to the provision of translated written reasons, the applicant is notified orally of the reasons for the decision in the presence of an interpreter. This should be complemented by the provision of free legal assistance at all stages of the procedure. UNHCR also welcomes good practice (whereby in addition to a full oral translation and/or explanation through a legal adviser), at least a written translation of the decision is provided to the applicant in his/her own language, as is the current practice in Slovenia for example.

Finally, UNHCR reiterates its position that information should be conveyed in a language that the applicant “*understands*” and not merely “*is reasonably supposed to understand*”. UNHCR notes with regret that only two of the twelve states surveyed apply this higher standard.

Recommendation

UNHCR recommends that Member States provide a complete written translation of the decision, and/or the provision of a written translation of the summary of the decision, along with oral interpretation of the decision in its entirety.

All information must be provided to the applicant in a language s/he demonstrably does understand, and not merely one s/he is reasonably supposed to understand.

Article 10 (1) (b) APD should be amended to provide that all applicants receive the services of an interpreter as necessary when informed of the decision on the application.

Provision of information on how to appeal²⁶¹

Article 9 (2) APD requires all Member States to ensure that where an application is rejected, “*information on how to challenge a negative decision is given in writing.*” Moreover, Article 10 (1) (e) APD imposes a strict requirement that, together with the decision, applicants are given “*information on how to challenge a negative decision in accordance with the provisions of Article 9(2)*”, in a language which they may reasonably be supposed to understand. However, the third paragraph of Article 9 (2) APD sets out an exception, stating “*Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant.*”²⁶²

The aim of these provisions is to guarantee that when the applicant receives a negative decision, s/he also knows, at that point in time and in practical terms, how to appeal the decision, to which specific appellate body and within what applicable time frame. Information which simply states the right to appeal or provides generic information rather than practical instructions on how to challenge the decision does not fulfil this requirement. These practical instructions must be specific to the applicant, and must be communicated, according to the APD, in a language that the applicant may reasonably be supposed to understand. As mentioned above, UNHCR urges Member States to provide this information in a language which the applicant actually understands. Moreover, Article 15 (2) and (3) APD requires that Member States ensure free legal assistance to applicants, upon request and

²⁶¹ See also section 16 on right to an effective remedy.

²⁶² In accordance with Article 10 (1) (a) APD, this information should also have been provided, at least, in a language which the applicant may reasonably be supposed to understand.

potentially subject to conditions, in the event of a negative decision. Good practice would require that information on the right to free legal assistance and relevant contact details is also delivered with the decision and in a language which the applicant understands.

UNHCR's research found that a majority of Member States surveyed have transposed the requirement of Article 9 (2) APD in national legislation, regulations or administrative provisions. These are: Belgium,²⁶³ Bulgaria,²⁶⁴ Finland,²⁶⁵ France,²⁶⁶ Germany,²⁶⁷ Greece,²⁶⁸ Italy,²⁶⁹ the Netherlands,²⁷⁰ Slovenia,²⁷¹ Spain²⁷² and the United Kingdom.²⁷³ In the Czech Republic there are provisions requiring communication of information on appeal rights under the general law regulating the procedures of all administrative bodies,²⁷⁴ but as these do not refer to appeals before a court (where asylum appeals are heard), there is, therefore, legislative reliance on the third paragraph of Article 9 (2) APD by which information on how to appeal is provided at an earlier stage. Nevertheless, in practice, written decisions do contain a very brief statement in Czech on the right to appeal.²⁷⁵ As observed by UNHCR, when decisions are served on applicants (in the presence of an interpreter), they are informed of the address of the competent court and notified that the appeal should be filed in duplicate and within a prescribed time limit.²⁷⁶

²⁶³ In accordance with Article 2 § 4 of the Law of 11 April 1994 concerning the transparency of administration, every document containing notification of an administrative decision or administrative act provides information on how to challenge the decision or act. The document should name the institution to which to appeal and the applicable time frames. Information on how to challenge asylum decisions specifically can be found in the information brochures provided for by the AO in accordance with Article 2 of the Royal Decree of 11 July 2003 concerning the AO and on the website of the CGRA. The notification of the decision of the CGRA provides information on how to appeal the decision.

²⁶⁴ The general provision of Article 59 Administrative Procedures Code applies.

²⁶⁵ Section 43 of the Act on Administrative Conduct 434/2003 states that "*An oral decision must immediately also be given in writing, together with guidelines for corrections and appeal.*"

²⁶⁶ Article L.723-3-1 *Ceseda* states that "*Negative decisions should be reasoned in fact and in law and state all available remedies and respective deadlines.*"

²⁶⁷ Section 31 (1) Sentence 2 APA: "*It [the decision] shall contain a justification in writing and be delivered to those concerned, along with information on legal remedies.*"

²⁶⁸ Article 8 (1) (e) of PD 90/2008: "*They shall be informed of the result of the decision on the asylum application in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counselor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision.*"

²⁶⁹ Article 9 of the d.lgs. 25/2008 provides that "*the decisions on applications for international protection are given in writing. The decision which rejects an application contains the reasons in facts and in law and information on how to appeal a negative decision.*"

²⁷⁰ Article C18/3 Aliens Circular states that the negative decision should provide information on how to challenge the negative decision. All audited decisions contained a standard paragraph on how to challenge the decision and this information is also provided earlier in the information brochure which should be given to the applicant by the Aliens Police.

²⁷¹ Article 210 (3) of the AGAP states that every decision shall contain information on how to challenge a decision.

²⁷² Article 89 (3) APL states that "*The resolution shall include the decision adopted, stating the reasons in fact and law in the cases foreseen in Article 54. They will also indicate the appeals that may be lodged against it, the administrative or judicial body to which the appeal has to be lodged and the time frame to do it, without prejudice to any other appeal which the individual deems necessary to be eventually lodged.*" Moreover, Article 58 (2) APL states that "*It will include the complete text of the decision, indicating if it is a final act in the administrative procedure and the appeals that may be lodged against it, the administrative or judicial body to which the appeal has to be lodged and the time frame to do it, without prejudice to any other appeal which the individual deems necessary to be eventually lodged.*"

²⁷³ Paragraph 333 of the Immigration Rules HC395. "*Where the applicant has no legal representative and free legal assistance is not available, he shall be informed of the decision on the application for asylum and, if the application is rejected, how to challenge the decision, in a language that he may reasonably be supposed to understand.*" Paragraph 336 states "*Where an application for asylum is refused, the reasons in fact and law shall be stated in the decision and information provided in writing on how to challenge the decision.*"

²⁷⁴ Section 68 (5) & (6) CAP.

²⁷⁵ Although provisions under ASA or CAP do not impose this obligation expressly, the information on appeal is given to applicants on certain occasions in practice, and it is an integral part of every decision, which contains the following standard text concerning the appeal: "*Information on appeal: Action against this decision may be filed within 7/15 days from the date of delivery to the RC in the jurisdiction in which you have your registered address on the day of filing the action. The filing of the action has /has no suspensive effect in line with Section 32 ASA.*"

²⁷⁶ Delivery of decisions was observed in 4 out of 8 centres, specifically: three times in Zastávka u Brna, twice in Pořtová detention centre, once at Prague airport, once in Kostelec n. Orlicí. In all the cases observed the requirement to provide information was complied with in practice.

However, question marks remain about implementation and enjoyment of this right in practice in some Member States.

For example, in France, the written decision, which is posted to the applicant, is in French. Although France recently introduced standard-wording refusal letters translated into 18 languages, the information provided in the foreign language is very brief and inadequate. A negative decision simply states “*Your application for asylum has been rejected. You have the possibility to lodge an appeal against that decision with the National Court of the Right of Asylum within a month from this notification.*”²⁷⁷ Information given about how to challenge a negative decision with reference to the *Ceseda* and essential practical information such as the address of the appellate authority (CNDA), while systematically printed at the back of each negative decision, is only provided in French. No information on the right to free legal assistance is provided at this stage either. No official oral translation free of cost is made available.²⁷⁸ Furthermore, there is no specific assistance available for illiterate applicants. UNHCR considers that this does not fulfil the requirements of Article 10 (1) (e) APD.²⁷⁹

While Italian legislation requires information to be given on how to appeal a negative decision, in practice the applicant is only given formalistic information rather than precisely specifying the court in question or how or where to actually lodge the appeal.²⁸⁰ The audited decisions stated only: “*The decisions of the Territorial Commissions can be appealed before the court territorially competent under Article 35 of the d.lgs. 25/2008.*” Furthermore, in several audited decisions, refusal notices did not specify time limits for appeal.²⁸¹ UNHCR considers that these practices do not fulfil the requirements of Article 9 (2) APD.

Although Greece has transposed guarantees concerning notification of the decision and information on how to challenge a negative decision, UNHCR is concerned that these are not ensured in practice.²⁸² The written decisions audited did not provide information “*on how to challenge a negative decision*” as required by the APD. Instead, they merely stated the applicant’s right to appeal and the deadline for exercising the right. The last four lines of the audited written decisions stated, in Greek, “*Against this decision, the applicant has the right to appeal before the AB within thirty (30)²⁸³ days after the day of serving the decision. In case no appeal is made within the above time frame, the decision shall be final.*” This does not fulfil the requirement of Article 9 (2) APD. Moreover, as mentioned above, problems in practice mean that notification of decisions is provided without interpretation, leaving applicants essentially reliant on under-resourced NGOs to try to advise them on how to exercise appeal rights.²⁸⁴ Such practice does not comply with Article 10 (1) (e) APD.

²⁷⁷In the case of a decision granting subsidiary protection status, the OFPRA sends a letter stating “*You have been granted the benefit of subsidiary protection pursuant to Article L.712-1 of the Code of Entry and Residence of Foreigners and Right Of Asylum. However, you were not granted the refugee status provided for in the Geneva Convention of 28 July 1951. You have the possibility to lodge an appeal against that decision with the National Court of the Right of Asylum within a month from its notification.*”

²⁷⁸There is a similar problem at appeal level.

²⁷⁹Applicants may not have access to an NGO providing legal and social assistance, and NGOs may not have the resources to provide this service. Information on how to appeal is contained in the written guide which is supposed to be distributed by *Prefectures* to applicants at the outset of the procedure, but this was not yet available in languages other than French at the time of UNHCR’s research. Information on how to appeal is given orally at the end of the personal interview (if any) but only briefly.

²⁸⁰Refusal notices simply state literally and generically the provisions of Article 35 (1) of the d.lgs 25/2008.

²⁸¹The audit of case files revealed that time limits were not expressly mentioned in a number of the decisions examined: D/52/M/AFG/N, D/53/M/AFG/A, D/54/M/NIG/A, D/55/F/ERI/N, D/59/ M/TUR/S, D/60/ F/ETI/S, D/63/ M/PAK/N, D/64/ M/PAK/N, D/65/ M/GUI/N).

²⁸²As a result of these concerns a joint working group of UNHCR and the Ministry of Interior have proposed that an explanatory note in the applicant’s language should be attached to negative decisions in order to assist the applicant to understand the decision and his/her appeal rights; “*Pros mia dikei ke apotelesmatiki diadikasia anagnorisis tou prosfeyikou kathestotos stin Ellada*” [Towards a Fair and Efficient Refugee Status Determination in Greece]; Report of Ministry of the Interior and UNHCR joint working group, October 2008.

²⁸³Or ten (10) days, depends on the procedure.

²⁸⁴See previous sub-section on “Notification of the decision in a language understood by the applicant”, notably as described in text referred to at footnotes 249-251.

UNHCR therefore questions whether Articles 9 (2) and 10 (1) (e) APD are effectively complied with in practice in several states.

There is nevertheless good practice in a number of Member States, whereby decisions refusing refugee status and/or subsidiary protection are accompanied by a separate notice which informs applicants of how to appeal. For example, in Germany, a separate page is attached to the decision²⁸⁵ which states the relevant administrative court responsible and sets out the time limit within which the appeal should be filed, its form and content, the time limit for submitting the facts and evidence on which the appeal is based, the consequences of failing to observe the time limit, whether the appeal has suspensive effect and, if not, whether it is possible to suspend deportation. The page is in German when the decision is delivered to the appointed legal representative but, according to the BAMF, is translated into a language the applicant understands when there is no appointed legal representative and the decision is delivered to the applicant only. In the UK, a separate notice in English is attached to the decision which informs applicants how to appeal. Information sheets accompanying refusal decisions are available in 24 languages.²⁸⁶ In some regions of the UK, where applications are examined in the regular NAM procedure, the decision and notice on how to appeal are given to applicants at a meeting which is booked specifically for this purpose with the presence of an interpreter if required. The purpose of the meeting is to explain to the applicant how to appeal. These meetings do not take place in all NAM cases, or in all UK regions, and this survey could not assess the extent to which they occurred in practice.

In Finland, all refusal decisions are served alongside guidelines on how to appeal, translated into ten languages. Contact details are also provided for NGOs able to provide further advice.²⁸⁷

In Bulgaria, as well as being provided with the negative decision,²⁸⁸ information is also provided when the applicant lodges his/her application for international protection, in the form of instructions on the procedure to follow.²⁸⁹ Copies of this document are available in 13-14 languages.²⁹⁰ The instructions include information on all relevant appeal possibilities. There is a standard question at the outset of the interview to confirm that the applicant has received and understands the instructions. In Slovenia, if the written decision is not in a language the applicant understands, the applicant is informed of the result of the decision and how to challenge a negative decision in a language which he understands orally. A record is made of this. Oral and written translations are always free of cost for applicants.²⁹¹

285 UNHCR's audit of decisions noted that the last sentence of the decision reads: "*The attached information on legal remedies is a component part of this decision.*"

286 Amharic, Arabic, Albanian, Chinese, Dari, Farsi, French, Kinyarwanda, Kurmanji, Lingala, Ndebele, Portuguese, Punjabi, Pashto, Romanian, Russian, Spanish, Shona, Swahili, Somali, Tamil, Turkish, Urdu and Vietnamese.

287 In this regard it should be noted that appeal forms must be completed in Finnish or Swedish and therefore legal assistance is essential. Although generally available, this can cause problems in remote areas, particularly for cases under the accelerated procedure where appeal deadlines are shorter.

288 The relevant court of appeal and the time limit within which to lodge the appeal, and on rare occasions, the right to a lawyer in principle are a part of the decision and are interpreted to the applicant. It was observed that the official who performs the serving of the decision also explains the procedure to the applicant.

289 SAR, *Instructions on the rules for submitting an application for status, the proceedings to be followed, and the rights and obligations of the aliens who have submitted an application for status in the Republic of Bulgaria*. NGOs providing free legal assistance are enumerated in an attached list.

290 Interviews with stakeholders, Head of Proceedings and Accommodation Department of RRC – Sofia.

291 Article 10 of the IPA (right to an interpreter): "(1) *If the applicant does not understand the official language of the procedure, s/he shall be allowed to follow the procedure and participate in it in a language s/he can understand. The competent authority shall thus ensure the applicant follows the procedure through an interpreter.*"

(2) *The applicant shall be provided with the interpreter upon receipt of the application, at a personal interview, in other justified cases, and by the decision of the competent authority when this would be required for understanding of the procedure by the applicant.*

(3) *The applicant shall be informed of the content of the written decision in a language s/he can understand.*"

Article 9 (2) APD permits states to derogate from the obligation to provide information on how to appeal in conjunction with notification of the decision where *“the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant.”* However, UNHCR was pleased to note that none of the Member States surveyed in this research appear to make exclusive reliance on this derogation.

UNHCR welcomes the fact that the majority of Member States of focus in this research have transposed the provisions requiring the delivery of information on how to appeal against a negative decision. However, the failure of some states to implement this in such a way that the applicant understands what s/he needs to do to exercise the right of appeal, reinforces the fact that there is still room for improvement in this regard. UNHCR endorses good practice observed in Bulgaria where information on how to appeal is given at the start of the procedure, confirmed at the interview stage and then provided again along with the refusal decision.

Recommendations

UNHCR recommends that the written information on how to appeal, which accompanies the decision, should be practical and not legalistic, stating clearly the relevant deadlines, the specific body to which the applicant should apply, the steps that need to be taken to do this, and whom to contact with regard to free legal assistance. It should explain whether an appeal has automatic suspensive effect, and if not, provide information on the requirements for requesting suspension of a removal order. Such information should also refer to the rules governing submission of subsequent (repeat) applications. This should be provided in a language that the applicant understands.

In order to ensure that an applicant is fully aware of relevant appeal rights, general information on the right to appeal, how to appeal and how to obtain free legal assistance should be provided at the start of the procedure in a language which the applicant understands.

Paragraph three of Article 9 (2) APD, permitting derogation on the basis of earlier provision of information in writing or by electronic means accessible to the applicant, should be deleted, or should not be applied by Member States.

Annex 1

Audited decision issued following examination in the accelerated procedure in Slovenia

An example, from the decisions audited, of a typical decision rejecting an application as manifestly unfounded. Underlining indicates those provisions which are considered relevant for the applicant.

Case No. 6-2008:

“Article 55 of the International Protection Act defines that the determining authority shall reject application as manifestly unfounded if the applicant entered the Republic of Slovenia exclusively for economic reasons (indent 1), the applicant, in submitting his/her application and presenting the facts, has only raised issues that are insufficient, insignificant, or of minimal relevance to the examination of whether s/he qualifies for international protection under this Act (indent 2), the applicant clearly does not qualify for international protection, as stipulated in Articles 26 and 28 of this Act (indent 3), the applicant presents false reasons to which s/he refers, in particular when the statements of the applicant are inconsistent, contradictory, improbable or contradict the information on the country of origin referred to in the eighth indent of Article 23 of this Act (indent 4), the applicant has failed without reasonable cause to make his/her application earlier, having had the opportunity to do so (indent 5), the applicant has made an application merely in order to delay or frustrate his/her removal (indent 6), the applicant refuses to have his/her fingerprints and photograph taken (indent 7), the applicant has founded his/her application on a false identity or forged documents, or has withheld relevant information or documents with respect to his/her identity and/or nationality (indent 8), the applicant has deliberately destroyed or disposed of the passport, any other official paper with a photograph that shows his/her identity or nationality, or another document with a photograph which may help establish his/her identity or nationality (indent 9), the applicant has deliberately destroyed or disposed of other documents (official papers, tickets, certificates) which might potentially be relevant for establishing his/her identity, nationality, or entitlement to international protection (indent 10), if the application has not, despite his/her assurance, submitted within a specified period the documentation and data referred to in the fourth indent of Article 23 of this Act (indent 11), the applicant has filed another application stating other personal data (indent 12), the applicant is from a safe country of origin as referred to in Article 65 of this Act (indent 13), the applicant’s criminal offence may jeopardize national security or public order of the country, and s/he has been, due to the stated reasons, issued an instrument permitting enforcement to leave the country as an additional sentence, or the instrument permitting enforcement of leaving the country has already been enforced, and the time limit for prohibition of entry to the European Union has not yet expired (indent 14), the applicant conceals the fact that s/he filed a previous application in another country, in particular if s/he uses a false identity (indent 15), the applicant tried, prior to a decision taken by the competent authority, to enter illegally the territory of another country and was caught by the police, or already entered the territory of another country and was returned to the Republic of Slovenia (indent 16).

Article 23 of the International Protection Act defines that when establishing conditions for international protection, the determining authority shall take into consideration, in particular: data and statements from the application; information acquired during the personal interview; evidence submitted by the applicant; documentation submitted by the applicant, in particular regarding the applicant's age, background, including that of relevant relatives, identity, nationality, places where the applicant previously stayed, and the place of previous residence, previous asylum applications, travel routes, identity and travel documents, and the reasons for applying for international protection; evidence obtained by the competent authority; official data available to the competent authority;

documentation obtained prior to submitting the application; general information on the country of origin, in particular on the social political situation and the adopted legislation; specific information on the country of origin which is detailed, in-depth, and exclusively associated with the concrete case, which, however, may include also the manner of implementing acts and other regulations of the country of origin, the fact that the applicant has already been subject to persecution referred to in Article 26 of this Act, or serious harm referred to in Article 28 of this Act, or to direct threats of such persecution or such harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, or threats realized.

The determining authority may decide the application by accelerated procedure, if the actual state of affairs can be wholly determined on the basis of the facts and circumstances referred to in the first to eighth indents of Article 23 of this Act, until these are given.”

SECTION IV: OPPORTUNITY FOR A PERSONAL INTERVIEW

Introduction

Need for a personal interview

Status of transposition

Who conducts the personal interview?

Opportunity for adult dependants to have a personal interview

Opportunity for children to have a personal interview

Focus of the interview with dependants

Opportunity for an additional personal interview

Omission of personal interviews under Article 12 (2) APD

National legislation relating to the omission of interviews

Compatibility of national legislation with Article 12 (2) APD

Good practice with regard to national legislation

State practice relating to the omission of interviews

Failure to appear for a personal interview

Introduction

Article 12 APD sets out the general requirement that applicants for asylum, subject to some exceptions, must be given the opportunity of a personal interview on their application for asylum with a person competent under national law.

‘Personal interview’ is not defined in Article 12 or in Article 2 of the Directive which sets out definitions. In reality, applicants for international protection in EU Member States may be interviewed by different authorities, at different stages, for different purposes and in the framework of a myriad of different procedures. The APD is not explicit as to which of these interviews may be held to constitute a ‘personal interview’ in the terms of Article 12. However, it appears implicit in Article 13 (3) APD that the personal interview should be one which allows the applicant to present the grounds for his/her application in a comprehensive manner.¹

UNHCR’s review of the procedures in the Member States of focus in this research found that, in practice, Member States may conduct the personal interview in the context of an admissibility procedure, an accelerated procedure, a regular procedure or a border procedure.²

Some Member States conduct a preliminary interview.³ The principal purpose of this is generally the registration of the application for international protection and the gathering of information and evidence relating to the profile of the applicant, i.e. his/her identity, age, family relationships, nationality, place(s) of previous residence, previous applications for international protection, travel route details, and travel documents. In some of these Member States, this preliminary interview is conducted by the determining authority.⁴ But in other Member States, it is conducted by an authority other than the determining authority.⁵ Such interviews may request, in brief, the reasons for applying for international protection, but the main purpose is the gathering of basic bio-data, fingerprints, photographs, x-rays, travel route details and the registration of the application. This preliminary interview does not allow the applicant to present the grounds for the application in a comprehensive manner, and as such it cannot be considered to constitute a ‘personal interview’ in the terms of Article 12 (1) APD. In these Member States, unless omitted, a second interview, which constitutes the ‘personal interview’, is scheduled. The personal interview may repeat questions and review information gathered relating to the bio-data of the applicant and his/her travel route etc, but one of the principal purposes of the interview is to gather and explore in greater depth the reasons for the application for international protection and the credibility of the applicant’s evidence.

¹ Article 13 (3) states that “Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner.”

² In accordance with Article 12 (2) (b) APD, this may take the form of a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4 (2) of the Qualification Directive.

³ Belgium, Bulgaria, the Czech Republic, Finland, Italy, the Netherlands and the UK.

⁴ In Bulgaria, the Czech Republic, the Netherlands and the UK, the determining authority conducts the preliminary interview. In the Netherlands and the UK, the preliminary interview is conducted by the IND and the UK Border Agency respectively. In Bulgaria, the preliminary interview is conducted by the registration officer of the Registration and Reception Centre (RRC) which is the territorial unit of the determining authority (SAR). Note, however, that details on the travel route are gathered in the separate Dublin II procedure by the determining authority. In the Czech Republic, the preliminary interview is conducted by an officer of the DAMP.

⁵ Belgium: the Aliens Office/border police; Finland: the border guards/police; and Italy: the police.

In practice, preliminary interviews can have an important bearing on the examination of the application for international protection and any eventual preparation and conduct of the personal interview. Data from the preliminary interview may provide the determining authority with background information and a basis upon which to prepare the personal interview. Moreover, decisions on whether to channel an application into an accelerated or regular procedure – where both procedures exist – may be taken on the basis of the information gathered in this preliminary interview.⁶ Furthermore, perceived contradictions or inconsistencies between the information provided in the preliminary interview and the personal interview must be assessed by the determining authority. Given the purpose and significance of the preliminary interview, UNHCR believes that such preliminary interviews should be subject to the guarantees set out in Articles 13 and 14 APD.⁷

In France, there is no in-country preliminary interview; rather, the applicant's bio-data is gathered as a written submission. Firstly, applicants for international protection must apply in writing to the prefecture of their place of residence for a temporary residence permit.⁸ The applicant must complete, on his/her own, an application form providing information on identity, civil status, family, travel route and possible links with France. However, no information on the reasons for applying for international protection is requested in this form. The applicant must submit the completed form together with four identity photographs, proof of residence, any other available identity and travel documents, and fingerprints are taken. The prefecture staff may check that the form is completed correctly but this does not constitute a meeting in the context of Article 12 (2) (b) APD as no information on the reasons for applying for international protection is gathered.⁹ However, the decision on whether the application for international protection is examined in the accelerated or regular procedure will be taken on the basis of this information. Once a decision is taken by the prefecture on whether to grant a temporary residence permit, the prefecture gives the applicant an asylum application form to complete in writing in French, on his/her own. This also does not constitute a meeting in terms of Article 12 (2) (b) APD as the prefecture does not assist the applicant with the completion of the form and the submission of essential information. The completed asylum application form is submitted to the determining authority – OFPRA – for a decision on qualification for international protection. A personal interview with OFPRA may take place in the context of the regular or accelerated procedure.¹⁰

In Germany¹¹ and Greece, the gathering of data relating to the profile of the applicant i.e. his/her identity, age, family, nationality, place(s) of previous residence, previous applications for international protection, travel routes, and travel documents and the gathering of information with regards to the reasons for applying for international protection take place in one personal interview.

6 For example, in Finland, the Netherlands and the UK.

7 See section 5 on the requirements of a personal interview for further information.

8 This procedure was described by the Prefecture of Rhône (Lyon) to UNHCR during UNHCR's research. The divergent practices of all the prefectures are reviewed in detail in a report published by the NGO Cimade ("*Main basse sur l'asile. Le droit d'asile (mal) traité par les Préfets*", June 2007).

9 Article 12 (2) (b) APD states that the personal interview may be omitted where "*the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4 (2)*" of the Qualification Directive.

10 It should be noted that OFPRA may decide to omit a personal interview on grounds stipulated in national law. In such a circumstance, an applicant may not have a personal interview at all. See below for further details.

11 An exception applies with regard to the airport procedure. In the regular procedure, the personal interview begins with the answering of a questionnaire containing over 20 questions with regard to personal data, family, places of residence, education, travel route, etc.. Fingerprints are taken at an earlier stage of the procedure.

However, in Germany within the framework of the airport procedure, the Federal Border Police conducts preliminary checks which include, *inter alia*, questions with regard to the travel route and the reasons for leaving the country of origin.¹² The applicant is given the opportunity of a personal interview conducted by the determining authority (BAMF). However, discrepancies between the information gathered by the Border Police and statements made during the BAMF interview are sometimes used to cast doubt on the applicant's credibility.

It should be noted that, during the period of UNHCR's research, the Presidential Decree 90/2008 was in force in Greece. In accordance with this legislation, police officers conducted an interview which was intended to gather the bio-data of the applicant, information on the travel route and the reasons for the application for international protection. This interview was called a "personal interview" in Article 10 of PD 90/2008 and constituted the personal interview for the purposes of this research.¹³

Two of the Member States surveyed by UNHCR, Bulgaria¹⁴ and Spain, operate a 'filter' procedure through which all applications for international protection are channelled and examined before a decision is taken whether to admit the application to the regular procedure or to reject the application. In the context of this filter procedure, the applicant is given the opportunity for a personal interview with the competent authority. If the application is then admitted to the regular procedure, the applicant may have the opportunity of a further personal interview. Both of these interviews are considered to constitute a 'personal interview' for the purpose of this research.

At the time of UNHCR's research, Spain operated an admissibility procedure for all applications for international protection.¹⁵ The applicant was interviewed in the context of this admissibility procedure. The purpose of the interview was formally to complete and submit the application, and thereby to gather all the relevant bio-data relating to the applicant, relevant information regarding the travel route and to establish the reasons for the application for international protection so that a decision could be taken as to whether Spain was responsible to examine the application in accordance with the Dublin II Regulation, whether the application should be rejected on nationally-stipulated grounds of inadmissibility, or whether the application should be examined in the regular procedure. At the time of this research, the grounds for inadmissibility in national legislation went beyond the scope permitted by Article 25 APD and permitted a negative decision on the merits of the application. As such, the interview which took place in the context of the admissibility procedure would be the only interview with the applicant if the application was rejected in the admissibility procedure.¹⁶ Moreover, if an application was admitted to the regular procedure, it was at the discretion of the eligibility official whether to conduct a personal interview in the context of the regular procedure. In UNHCR's audit of case files in Spain, of the 32 applications that were admitted to the regular procedure, only in one case did a personal interview take place in the context

¹² According to the law, the safe third country concept could, in principle, be applied at the border and justify a denial of entry to Germany by the border police (Section 18 (2) No. 1 APA). However, according to information provided by the Federal Border Police, there are no cases in which entry could be denied on the basis of this provision in practice. In the absence of border control posts, there is practically no situation in which persons would seek asylum before having entered the territory. If the Federal Border Police apprehends a person without permission to stay in Germany close to the border, and this person seeks asylum, the request would be forwarded to the BAMF with a view to examining the applicability of the Dublin II criteria (Information provided to UNHCR in a phone conversation with the Federal Border Police in Koblenz on 10 November 2009).

¹³ New legislation PD 81/2009 has now entered into force and Article 2 foresees a personal interview before an advisory Refugee Committee. At the time of UNHCR's research, personal interviews were conducted by the Greek Police of the Aliens Directorates and Security Departments.

¹⁴ This is a three day accelerated procedure.

¹⁵ This operated up until 21 November 2009 when the New Asylum Law came into force. In the new border procedure, a personal interview takes place.

¹⁶ An analysis of the application form shows that it covers all the so-called 'essential information' as described in Article 4 (2) of the Qualification Directive and contains one open question on the 'grounds on which the application is based', leaving it to the interviewer to determine what questioning is required.

of the regular procedure. The interview in the admissibility procedure was, therefore, considered to constitute a personal interview. At the time of UNHCR's research in Spain, there was no national legislation in force regarding the right to be offered a personal interview, but the New Asylum Law, which entered into force in November 2009, now states that the formalization of the application (in the admissibility procedure) will be done by means of a personal and individual interview.¹⁷

In Slovenia, the determining authority conducts a preliminary procedure in which the application for international protection is formally submitted. An interview takes place in the context of this procedure. The purpose of the interview is to gather all the relevant bio-data relating to the applicant, relevant information regarding the travel route and to establish the reasons for the application for international protection so that a decision can be taken as to whether the application should be further examined in the Dublin procedure, in the accelerated procedure or in the regular procedure.¹⁸ A 'personal interview' takes place in the context of the regular procedure. However, given that, in accordance with Slovenian national legislation, the personal interview may be (and usually is) omitted in the accelerated procedure,¹⁹ the interview which takes place in the context of the preliminary procedure is considered to constitute a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application under Article 4 (2) of the Qualification Directive.²⁰ In other words, it is considered to constitute a meeting in terms of Article 12 (2) (b) APD²¹ and the provisions in the APD relating to 'personal interviews' apply.

In accordance with recital (29) APD, the APD "*does not deal with procedures governed by Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*" [Dublin II Regulation]. However, the Dublin II Regulation is silent with regard to the right of the applicant to be given the opportunity of an interview during the determination of the Member State responsible to examine the application. At the time of writing, the European Commission's Proposal for a recast of the Dublin II Regulation proposes an explicit article requiring Member States, in carrying out the process of determining the Member State responsible under the Regulation, to give applicants the opportunity of a personal interview with a qualified person under national law to conduct such an interview.²² It is proposed that the personal interview be used for the purpose of facilitating the process of determining the Member State responsible, in particular for allowing the applicant to submit relevant information necessary for the correct identification of the responsible Member

¹⁷ Article 17 (4) of the New Asylum Law.

¹⁸ Note that a preliminary interview will have been conducted by the police to gather personal identification data and information on travel route etc., and the applicant will have been asked to write in his/her own words a statement on why s/he wishes to apply for international protection. However, the subsequent application interview re-visits all these issues.

¹⁹ Article 46 (1), indent 1 of the IPA: "The personal interview may be omitted when *the competent authority* may decide in an accelerated procedure ..." 79% of the applications reviewed in UNHCR's research were examined in the accelerated procedure.

²⁰ Administrative Court decisions (U 129/2008, 6 February 2008, and U 728/2008, 9 April 2008). The Court concluded that the interview to submit the application is to be considered a personal interview where it is conducted in accordance with Article 45 and 47 of the IPA, which means that the determining authority (inspector) has to raise concrete and detailed questions in order to clarify facts and circumstances of the application in order to assess whether grounds for international protection exist or not.

²¹ "*The competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4 (2) of Directive 2004/83/EC ..*"

²² Article 5, European Commission, *Proposal for a Regulation of the European Parliament and of the Council 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 stateless person (Recast) (COM (2008) 820, 3 December 2008.*

State, and for the purpose of informing the applicant orally about the application of the Regulation. UNHCR has welcomed this proposed legal provision which it considers to be in the interests of Member States as well as applicants.²³ Given that it is proposed that the recast Dublin II Regulation addresses the issue of personal interviews in the context of Dublin II procedures, and the fact that the scope of UNHCR's research did not extend to Dublin II procedures, this section of this report does not make any specific recommendations in this regard. However, this section does refer to the opportunity of a personal interview in relation to the application of the safe third country concept as this is expressly referred to in the APD.

With regard to subsequent applications, some Member States conduct an interview with the applicant in the framework of a preliminary examination.²⁴ The purpose of this interview is to examine whether there are new elements or findings which relate to the applicant's qualification for refugee status or subsidiary protection status. Given the significance of the preliminary examination, UNHCR suggests that the guarantees set out in Articles 13 and 14 APD should apply to any such interview.²⁵

Recommendation

Any interview in which the applicant is given the opportunity to present his/her reasons for applying for international protection should be accorded the safeguards foreseen in the APD for interviews. This should be the case regardless of whether the interview is held in the context of an admissibility, accelerated or preliminary procedure. All such interviews on substance should be conducted by representatives of the determining authority.²⁶

Need for a personal interview

Within the framework of the basic principles and guarantees set out in Chapter II of the Directive, Article 12 concerns the right of the applicant to be given the opportunity of a personal interview on his/her application with a competent person under national law. The personal interview is crucial as it provides the applicant with an opportunity to explain comprehensively and directly to the authorities the reasons for the application; and it gives the determining authority the opportunity to establish, as far as possible, all the relevant facts and to assess the credibility of the oral evidence. As such, UNHCR considers that the personal interview should be an essential component of the asylum procedure.²⁷

²³ UNHCR comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council, 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, 18 March 2009. The proposal also sets out some requirements for the personal interview. UNHCR considers that the effectiveness of the interview for all parties would be improved by ensuring that the interview is conducted in a language that the applicant understands rather than "in a language that the applicant is reasonably supposed to understand" as proposed.

²⁴ The preliminary examination is to determine whether the subsequent application raises new elements or findings. UNHCR observed three interviews relating to subsequent applications which take place in the accelerated procedure in Bulgaria. See section 14 of this report on subsequent applications.

²⁵ See sections 5 and 6 of this report on Articles 13 and 14 respectively for further information.

²⁶ It is noted that the EC has proposed a change to the APD in this respect: see proposed recast article 13 (1), European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)*, 21 October 2009, COM (2009) 554 final; 2009/0165 (COD) (APD Recast Proposal 2009).

²⁷ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, September 2005, Chapter 4.3.1 provides that "[a]ll principal applicants must have the opportunity to present their claims in person in an RSD interview with a qualified Eligibility Officer. Under no circumstances should a refugee claim be determined in the first instance on the basis of a paper review alone."

Therefore, UNHCR is concerned that Article 12 (2) of the APD foresees extended possibilities for the determining authority of Member States to omit the personal interview.²⁸ Implementation of the optional Article 12 (2) (c) APD may significantly undermine the fairness of the procedure and the accuracy of the decision.

It is UNHCR's view that the right to be offered a personal interview in a language which the applicant understands and where the merits of the application are considered should be granted to all adult principal applicants unless the applicant is unfit or unable to attend the interview owing to enduring circumstances beyond his/her control.²⁹ UNHCR believes that all reasonable measures should be undertaken to conduct an interview. Where an earlier meeting has taken place for the purpose of filing an application, according to Article 12 (2) (b) APD, applicants should in particular be permitted to refute gaps or contradictions.

UNHCR's research examined the status of national transposition of Article 12 APD and the implementation, in particular, of Article 12 (1) and (2) in the Member States of focus.

Status of transposition

Article 12 APD only contains one provision which requires transposition in national legislation, regulations and administrative provisions. All the other provisions of Article 12 APD are optional.³⁰ This mandatory provision is set out in the first sentence of Article 12 (1) APD. The first sentence of Article 12 (1) requires that:

"[b]efore a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview".³¹

²⁸ For example, when the competent authority already has had a meeting with the applicant to assist him/her complete the application and submit the essential information regarding the application, and when the determining authority, on the base of a complete analysis of information provided by the applicant, considers the application to be unfounded in cases where Article 23 (a) (c) (g) (h) and (i) apply. Article 23 (2) (a): *"the applicant, in submitting his/her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he or she qualifies as a refugee by virtue of Directive 2004/83/EC"*; Article 23 (2) (c): *"the application for asylum is considered to be unfounded:*

(i) because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31, or (ii) because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28 (1)"; Article 23 (2) (g): *"the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her*

having been the object of persecution referred to in Directive 2004/83/EC"; Article 23 (2) (h): *"the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin"*; Article 23 (2) (i): *"the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal"*.

²⁹ See Resolution 1471 (2005) of the Parliamentary Assembly of the Council of Europe on Accelerated Procedures in CoE Member States (paragraph 8.10.2) available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/eres1471.htm>, and "Guidelines on human rights protection in the context of accelerated asylum procedures" of the Council of Europe (adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies) paragraph IV (1) (d) available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec%282009%291062/4.5&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

³⁰ Although note that some further requirements flow from transposition or implementation of the optional provisions.

³¹ However, it should be pointed out at this point that Article 12 (2) and (3) permit a number of exceptions to this general requirement. See below. It should also be noted here that Article 20 (1) (a) APD permits Member States to reject an application for asylum on the basis that the applicant has not established an entitlement to refugee status when there is reasonable cause to consider that the applicant has implicitly withdrawn or abandoned his/her application for asylum, in particular when, s/he has not appeared for a personal interview and has not demonstrated within a reasonable time that the failure to appear for the personal interview was due to circumstances beyond his/her control.

Of the 12 Member States of focus in this research, all have transposed or reflected Article 12 (1) APD in national legislation, regulations and/or administrative provisions. These are Belgium,³² Bulgaria,³³ the Czech Republic,³⁴ Finland,³⁵ France,³⁶ Germany,³⁷ Greece,³⁸ Italy,³⁹ the Netherlands,⁴⁰ Slovenia,⁴¹ Spain⁴² and the UK.⁴³

In Spain, at the time of UNHCR's research, the first sentence of Article 12 (1) APD had not yet been transposed. Neither the Asylum Law nor its Regulation required that the applicant for asylum be given the opportunity for a personal interview. Article 8 ALR foresees that an application for asylum is formalized when the applicant fills in and signs the application form. In practice, the applicant does this in the presence of and with the assistance of the competent authority. As such, this was considered to constitute "*a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4 (2) of Directive 2004/83/EC*" which is one of the grounds upon which a personal interview may be omitted in accordance with Article 12 (2) (b) APD. However, Article 17 (4) of the New Asylum Law now clarifies that the formalization of the application will be done by means of a personal and individual interview.

Recommendation

A personal interview, in a language which the applicant understands and where the merits of the application are considered, should be granted to all adult principal applicants unless the applicant is unfit or unable to attend the interview owing to enduring circumstances beyond his/her control. Article 12 (2) APD should be amended to reduce the extensive catalogue of situations in which a personal interview can be omitted.⁴⁴

32 Article 6 of the Royal Decree of 11 July 2003 concerning the CGRA. Although some provisions of this Royal Decree are considered obsolete due to major changes in the legislation and a draft amended Royal Decree is being debated at the time of writing, Article 6 is still applied by the CGRA.

33 Article 63a (3) LAR states that an interview shall be conducted with the alien. However, note that there is no explicit requirement as to the person's competence under national law to conduct such an interview. Articles 22 and 23 of the Statute of SAR and Articles 75 and 89 of the IRR clarify that personal interviews are conducted by an 'interviewing body'.

34 Section 23 ASA (1) states that an authorized employee of the Ministry of Interior shall conduct an interview with the applicant for international protection in order to establish the data necessary to make a decision.

35 Section 97 (2) Aliens Act 301/2004 states that the Immigration Services shall conduct asylum interviews in order to establish the grounds for the application. It further states that the police can be assigned the task of interviewing if the number of applications increases dramatically or for other special reasons.

36 Article L723-3 *Ceseda* states that "*the OFPRA invites the applicant to an interview.*"

37 Section 24 (1) sentence 3 APA states that it [the Federal Office] shall interview the foreigner in person.

38 Article 3 PD 81/09 states that the authorities competent to receive and examine an application shall provide the applicant with an official note which shall ... refer him/her to the Refugee Committee in order to conduct a personal interview.

39 Article 12 (1) d.lgs. 25/2008 which states that the National Commission and the Territorial Commissions order the personal interview of the applicant through a communication made by the territorially competent Questura.

40 Article 4:7, General Administrative Law Act in conjunction with Article 37 Aliens Act 2000, in conjunction with Article 3.110 and 3.111 Aliens Decree 2000.

41 Article 45 (1) IPA states that before a decision is taken by the competent authority, the applicant shall be given the opportunity of an individual personal interview. Article 7 (2) IPA stipulates that the procedure under this Act should be conducted only by officials with adequate knowledge in the field of asylum law.

42 Article 17 (4), New Asylum Law.

43 Paragraph 339NA of HC 395 (Immigration Rules) states that before a decision is taken on the application for asylum, the applicant shall be given the opportunity of a personal interview on his application for asylum with a representative of the Secretary of State who is legally competent to conduct such an interview.

44 A change to the APD is suggested in the proposal for recast Article 13(2): APD Recast Proposal 2009.

Who conducts the personal interview?

In the majority of Member States of focus in this research, the personal interview is conducted by an individual employee of the determining authority. This is the case in Belgium,⁴⁵ Bulgaria,⁴⁶ the Czech Republic,⁴⁷ Finland,⁴⁸ France,⁴⁹ Germany,⁵⁰ Greece,⁵¹ the Netherlands,⁵² Slovenia⁵³ and the UK.⁵⁴ In a number of these Member States, this employee is responsible for the examination of the application, including not only the conduct of the personal interview, but also obtaining relevant country of origin information (COI) and other evidence, the assessment of relevant COI and all other relevant evidence, and the drafting of the decision subject to approval. This is the case in Belgium, Finland, France, Germany,⁵⁵ the Netherlands, the UK, and with regard to some cases in the Czech Republic.

Exceptionally, at the time of this research, one Member State provided for interviews to be conducted, not by an individual employee, but by a panel of nominated members. In Italy, personal interviews should, by law, be conducted by a panel of four members of the Territorial Commissions (the determining authority) composed of:⁵⁶

- an official of the prefecture acting as President;
- a senior official of the state police;
- a representative of the state towns and local autonomies conference; and
- a representative of UNHCR.

This panel is responsible for the examination of the application, including the conduct of the personal interview, but also obtaining relevant COI and other evidence and the issue of the decision.⁵⁷ Due to a significant increase in the number of applications for international protection at the beginning of 2008 and an insufficient number of Territorial Commissions to examine the increased number of applications, during the time of this research all the personal interviews observed were conducted by one member alone or two members together, in order to facili-

⁴⁵ Case managers of the CGRA in accordance with Article 57/6 of the Aliens Act.

⁴⁶ 11 interviewers of the SAR up until December 2009.

⁴⁷ Interviewers of the DAMP

⁴⁸ According to Section 97 (2) Aliens' Act 301/2004, the Immigration Service which is the determining authority conducts personal interviews. Note that, exceptionally, the police may conduct part of the personal interview under Section 97 of the Act. The last time this occurred was during the summer 2008 when some Roma applicants from Eastern Europe (outside the EU) were interviewed by the police. The reason for interviews being transferred to the police during that time was the significant rise in applicants and long waiting list for scheduled interviews at the determining authority. The interviews are conducted by the Aliens' Police who have received special training on immigration and asylum issues. The interviews are not conducted in the framework of any border procedure.

⁴⁹ Protection Officers of OFPRA.

⁵⁰ Staff of the determining authority BAMF.

⁵¹ At the time of our research, personal interviews were conducted by police officers. However, see below with regard to recent legislative changes.

⁵² An interviewer of IND.

⁵³ Personal interviews conducted in the context of a meeting to complete the application are conducted by inspectors of the determining authority employed within the Operational Desk at the Asylum Home under the International Protection Division whereas personal interviews, if any, in the accelerated or regular procedures, are conducted by decision-makers employed in the International Protection Status Section.

⁵⁴ Case managers of the determining authority.

⁵⁵ The determining authority tries to ensure that the same person conducting the interview also takes the decision. This is not always possible. However, remarks on reactions considered relevant in the framework of the credibility assessment (for instance, extreme excitement) shall be noted down in the hearing reports, in order to give a better impression also to the decision-maker who has not been present during the interview (see Handbook for Adjudicators "Interview" 2.5.3, p.13). In sensitive cases (for instance gender-related persecution, unaccompanied children, torture, danger of suicide etc.), and in cases in which a positive decision is intended by the adjudicator the internal guidelines determine the duty to present the decision to a superior.

⁵⁶ Article 4 (3) of the d.lgs. 25/2008.

⁵⁷ If there is no consensus on the decision, there is a vote. If the vote does not produce a majority decision, the vote of the President prevails.

tate the simultaneous conduct of interviews and thereby increase the number of interviews conducted.⁵⁸ There is no specialised training for members on recruitment to the Commissions⁵⁹ and the competence of the members to conduct interviews varies greatly depending on their professional background, preparation for their task and personal attitudes. This means that the conduct of an interview by only one or two members of the Commission, rather than the full composition of four members, significantly impacts the quality of the personal interview and the outcome of the procedure in terms of the decision. In the context of the current legislative provisions for Territorial Commissions, UNHCR considers it crucial that interviews are conducted by the full composition of members sitting as a panel, and that decisions are taken in plenary.

In Greece, at the time of UNHCR's research, personal interviews were conducted by police officers. Recent legislative changes in Greece⁶⁰ provide that personal interviews would in future be conducted by an Advisory Refugee Committee composed of four members:

- a high-ranking police officer of the Greek Police as Chairperson;
- an officer or warrant officer of the Greek Police;
- an official of the Aliens and Immigration Directorate of the respective Region; and
- a representative of UNHCR.⁶¹

This would imply the establishment of 52 Committees in the 52 Police Directorates of Greece. UNHCR Greece has rejected the invitation to participate in the Advisory Refugee Committee. The Committee has only consultative status and its recommendation for a decision is non-binding. The Director of the respective Police Directorate has the competence to take the decision. Moreover, the Advisory Committee will be composed of two police officers of the same Police Directorate, one of which is the Chairperson, and an official of the Aliens and Immigration Directorate of the respective region. As such, the Committees will be dominated by the members of the Police Directorates.

Of the 12 Member States of focus in this research, Spain was the only one in which some personal interviews are conducted by an authority other than the determining authority. In Spain, the authority competent to conduct the personal interview, i.e. the application interview which is a meeting with the applicant to complete the application, depends on where the application is lodged and in which procedure the interview takes place. Employees of OAR, the determining authority, conduct interviews in Madrid and at Madrid (Barajas) airport. However, outside Madrid, the application interview is not conducted by employees of the determining authority and is instead conducted by other designated competent authorities.⁶²

It is UNHCR's view that all personal interviews should be conducted by qualified and trained personnel of the determining authority.

⁵⁸ Of the 20 interviews observed, 15 were conducted by one member and 5 were conducted by two members (1/02/M/GAM, 1/03/M/NIG, 1/04/F/NIG, 1/13/F/CAM, 1/15/M/NIG).

⁵⁹ See below for further information.

⁶⁰ On 30 June 2009, a new Presidential Decree (PD 81/2009) was published.

⁶¹ UNHCR Greece responded negatively to MOI's invitation for participation in the Advisory Refugee Committees. As UNHCR noted, participation in such Committees is not feasible since "the (recently) introduced changes to the asylum procedure (PD 81/2009) do not sufficiently guarantee either the efficiency or fairness of the refugee status determination procedure... (and) are moving in an entirely different direction from the proposal included in the joint report elaborated by UNHCR and MOI in October 2008, entitled *'Towards a Fair and Efficient Refugee Status Determination in Greece'*." (See Letter to the Head of Security and Order Department of Greek Police Headquarters in Ministry of Interior [UNHCR, 2009d]).

⁶² Outside Madrid, the personal interview (meeting to complete the application) is conducted by officials of Aliens' Offices, National Police Corps officials or border police depending on where the application is lodged.

UNHCR does not consider the police an appropriate authority to conduct the personal interview and examine applications for international protection. UNHCR has serious concerns regarding both the designation of police authorities as the determining authority, and the designation of police to conduct personal interviews. UNHCR considers that this raises issues of a potential conflict of professional interests. Moreover, it undermines the perception of confidentiality and impartiality which is so crucial in creating the conditions conducive to the complete disclosure of facts by applicants during the personal interview. Applicants may fear and/or mistrust the police as a result of their experiences in their country of origin. Furthermore, an interview conducted by the police may trigger or exacerbate post-traumatic stress disorder in applicants who have suffered persecution or serious harm at the hands of the police, military or militarized groups in their countries of origin. UNHCR recommends that another state or independent authority is assigned this responsibility and role.

UNHCR recognises that the conduct of a personal interview by a committee or panel may strengthen the impartiality and objectivity of the interview as well as the consequent decision-making. It may also constitute a useful monitoring and quality control tool. However, UNHCR is also aware that a panel of interviewers may be viewed as intimidating and counter to creating an environment which builds trust and is conducive to open disclosure. It is also more difficult to achieve gender-appropriate interviews. Furthermore, it may be more difficult to ensure a coherent line of questioning. In those Member States that conduct personal interviews by committee, measures are needed to ensure appropriate training and flexibility to ensure that the atmosphere is conducive to open disclosure in all circumstances.

Recommendations

UNHCR recommends that all personal interviews be conducted by qualified and trained personnel of the determining authority.

The police should not be designated as the determining authority and should not be involved in the conduct of personal interviews.

UNHCR recommends that the determining authority consider assigning case ownership to a designated staff member/committee, who is then responsible for conducting the personal interview, assessing the evidence gathered and any relevant country of origin information, and preparing the decision under supervision.

Where personal interviews are conducted by committee, it is essential that all members possess the requisite knowledge and training, and are also able to recognise when it would be more appropriate that the personal interview is conducted by one member only.

Opportunity for adult dependants to have a personal interview

UNHCR considers that it is crucial to ensure that dependant adults understand:⁶³

- the grounds for qualification for refugee and subsidiary protection status;
- the criteria for a derivative status;
- their right to make an independent application for international protection if they believe that they have independent grounds for qualification;

⁶³ Paragraph 3.2.6 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

- the confidentiality of the asylum procedure; and
- their right to request that any interviews are conducted by an interviewer, assisted by an interpreter when necessary, of the sex preferred by the applicant and without the presence of other family members.⁶⁴

As such, the determining authority should ensure that it meets with each dependant adult individually, in private and without the presence of other family members, to ensure they understand the above-mentioned grounds and procedures for qualification for international protection and to offer each dependant adult the opportunity of a personal interview without the presence of family members. In particular, personnel of the determining authority should be aware that in certain cultures or family units, women who have grounds to apply for international protection may be reluctant to make an independent application or request a personal interview, or may be discouraged from doing so. Therefore, communication that is gender appropriate and culturally sensitive is required.⁶⁵ It is also UNHCR's position that if, at any stage of the asylum procedure, any information provided by either the principal applicant or the dependant adult, or gathered independently by the determining authority, indicates that the dependant adult may have independent reasons for international protection, this should be further examined in a separate personal interview with the dependant adult.

The second sentence of Article 12 (1) APD states that:

“Member States may also give the opportunity of a personal interview to each dependant adult referred to in Article 6 (3)” APD.⁶⁶

This is a permissive clause and, therefore, under the APD, dependant adults have no right to be given the opportunity for a personal interview unless provided by national legislation, regulations or administrative provisions.

UNHCR's research shows that, in law, there is an opportunity for adult dependants to have a personal interview in 10 of the 12 Member States of focus.⁶⁷ In the UK, legal provisions grant the interviewing officer discretion as to whether to interview a dependant adult and, in Spain, there is no explicit legislation regarding the circumstances in which a dependant adult is offered the opportunity of a personal interview.

Six of the Member States of focus in this research do not permit an application to be made on behalf of a dependant adult and, therefore, each adult is an applicant and is given the opportunity of a personal interview subject to any general exceptions which may be applicable. This is the case in Bulgaria, Czech Republic, France, Germany,⁶⁸ Italy, and the Netherlands.

⁶⁴ Some individuals who have experienced persecution or serious harm may not have disclosed the details of the harm to family members and may be reluctant to initiate an independent application or have a personal interview out of concern that the information they provide will be heard by or shared with their family members. This may be particularly relevant for individuals who have experienced gender-related persecution or sexual violence: Paragraph 3.2.6 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

⁶⁵ Paragraph 3.2.6 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

⁶⁶ Article 6 (3) APD states that Member States may allow for an application to be made by an applicant on behalf of his/her dependants provided any adult dependant consents.

⁶⁷ Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, and Slovenia.

⁶⁸ However, in case family asylum or refugee protection for families is granted according to Section 26 (1), (4) Asylum Procedure Act, the dependant adult will be recognized without being interviewed by the BAMF in person. It should be emphasized in this regard that the law provides that the application is filed by the dependant adults themselves. Under Section 26 (1) APA: *“The spouse of a person entitled to asylum shall be recognized as entitled to asylum if:*

- 1. the recognition of the foreigner as a person entitled to asylum is incontestable,*
- 2. the couple was already married in the country where the person entitled to asylum is politically persecuted,*
- 3. the spouse filed an asylum application before or at the same time as the person entitled to asylum or immediately after entry, and*
- 4. there is no reason to repeal or withdraw the recognition of the person entitled to asylum.”*

Section 26 (4) APA: *“(1) through (3) shall be applied mutatis mutandis to spouses and children of foreigners granted refugee status. Refugee status shall take the place of entitlement to asylum.”*

In only one Member State, where an application may be made by an applicant on behalf of a dependant adult, is there an explicit legislative provision which gives the opportunity of a personal interview to each dependant adult. This is the case in Greece, where Article 3 of PD 81/2009 explicitly states that a separate personal interview shall be conducted for each dependant adult.⁶⁹

In three Member States where an application may be made by an applicant on behalf of a dependant adult, there is no explicit legislative provision regarding the opportunity of a personal interview for the dependant adult, but legislation requiring a personal interview is interpreted as applying to dependant adults.⁷⁰ In Belgium, Article 6 of the Royal Decree of 11 July 2003, which requires the CGRA to summon the asylum applicant for an interview at least once, is interpreted as applying to dependant adults.⁷¹ In Finland, Section 97 (2) of the Aliens Act 301/2004, which requires the Immigration Services to conduct asylum interviews, is interpreted as giving all applicants the right to a personal interview, including dependant adults. Furthermore, the Administrative Asylum Guidelines 109/032/2008 specifically state that spouses must be heard separately and individually.⁷² In Slovenia, the personal interview may be omitted where the applicant does not have the capacity to participate independently in the procedure.⁷³ Therefore, any adult with procedural capacity is given the opportunity of a personal interview (subject to the general exceptions) and according to UNHCR's interview with a representative of the MOI, it is very rare in practice that a dependant adult would not be interviewed because of his/her dependency.⁷⁴

In the UK, a dependant may be interviewed.⁷⁵ In practice, a case manager may offer a dependant the opportunity of an interview as part of the process of gathering evidence in support of the statements made by the principal applicant. Administrative provisions state that “[i]nterviewing officers reserve the right to interview dependants if relevant to the account of the main applicant. The interviewing officer might need to conduct such an interview in order to test ethnicity where the main applicant relies on their spouse's or civil partner's ethnicity to seek asylum.”⁷⁶

In Spain, as stated above, there is no explicit legislative provision regarding the right of the applicant to be given the opportunity for a personal interview, and the New Asylum Law contains no explicit provision regarding the opportunity for a personal interview for each dependant adult.⁷⁷ UNHCR's interviews⁷⁸ with admissibility officials, interviewers and NGOs providing legal assistance revealed that, in the absence of explicit legislation, the practice in Spain varies depending on the procedure in which the application is examined, the place where the application is lodged and the circumstances of the case. In the admissibility procedure, in the case of applications lodged at the determining authority (OAR) in Madrid, Valencia and Melilla, a personal interview with each dependant adult is considered mandatory. But in Barcelona, dependant adults are only interviewed if the facts presented by the main applicant are considered to require clarification or if the dependant adult appears to have suffered specific acts of persecution. At Barajas Airport in Madrid, it is left to the discretion of the admissibility official whether or not family members are interviewed.⁷⁹

69 This was also explicitly provided by Article 10 PD 90/2008 which was in force during the period of our national research and was replaced by Article 3 PD 81/2009 which entered into force on 20 July 2009.

70 Belgium, Finland and Slovenia.

71 This was verified through UNHCR's audit of case files. For example, case file nos. 35, 50, and 115.

72 This was verified in audited interviews 3 and 4 which both related to applications where spouses applied together for asylum.

73 Article 46 IPA.

74 Interview of 9 April 2009.

75 Immigration Rules HC 395, paragraph. 349.

76 The Asylum Instruction ‘*Conducting the Asylum Interview*’, under the heading ‘interviewing’ (no page numbers).

77 It only states that, exceptionally, if it is considered essential for the adequate formalization of the application, another family member may be present.

78 Held between 13 and 30 April 2009.

79 It should be noted that each adult applicant, even if a dependant, has his/her own case file and number.

Recommendations

Member States should ensure that not only principal applicants but also dependant adults understand the grounds for qualification for refugee and subsidiary protection status. States should give the opportunity of a personal interview to each dependant adult and ensure that they have the opportunity to raise any protection needs they may have in their own right. The offer of a personal interview should be made to each dependant adult in private. The APD should be amended accordingly, in line with the practice prevailing in many Member States.⁸⁰

If, at any stage of the asylum procedure, information provided by either the principal applicant or the dependant adult, or independently gathered by the determining authority, indicates that the dependant adult may have his/her own reasons for international protection, this should be further examined in a separate interview with the dependant adult.

This personal interview of dependant adults should take place without the presence of family members.

Opportunity for children to have a personal interview

It is UNHCR's view that unaccompanied and separated child applicants should be given the opportunity of a personal interview when this is considered to be in the best interests of the child, in light of all relevant circumstances; and where the personal interview can be conducted by qualified personnel with specialist training and knowledge regarding the psychological, emotional and physical development and behaviour of children and in the presence of a designated representative.⁸¹

The third sentence of Article 12 (1) APD states that:

“Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview”.

Article 2 of the APD on definitions does not define a ‘minor’ as such but Article 2 (h) APD defines an ‘unaccompanied minor’ as a person below the age of 18.⁸² Moreover, as Article 12 (1) APD refers simply to ‘a minor’, the term is assumed to apply to all children below the age of 18 regardless of whether they are accompanied, unaccompanied or separated.⁸³ Although Article 17 APD sets out specific guarantees for unaccompanied minors, it does not stipulate the circumstances in which an unaccompanied minor is given the opportunity for a personal interview.⁸⁴

⁸⁰ This is proposed in recast Article 13 (1): APD Recast Proposal 2009.

⁸¹ See paragraph 8.2, UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997 and paragraphs 3.4.5 and 4.3.7 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

⁸² Moreover, Article 1 of the UN Convention on the Rights of the Child describes a child as “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”. Note that only persons under the age of 14 are considered minors according to the Bulgarian Law on Persons and Family 1949, last amended, SG No. 120/29.12.2002. Juveniles are persons aged 14-18. So interviews with applicants aged 14 or above are mandatory. However, UNHCR's audit of case files revealed one case where a juvenile aged 14 was not given a personal interview (Decision 29). In accordance with Article 25 (1) LAR, a tutor or guardian shall be appointed to unaccompanied minors and juveniles.

⁸³ See Inter-Agency Guiding Principles on Unaccompanied and Separated Children, January 2004 for definitions of ‘unaccompanied’ and ‘separated’ children. UNHCR recommends use of the terms ‘child/children’ and the definitions set out in the Inter-Agency Guidelines, to ensure greater accuracy and specificity of references to children in relevant circumstances. However, in this report, the term ‘minor’ and ‘unaccompanied minor’ are used to reflect the language of the APD.

⁸⁴ Article 17 (1) (b) states that the unaccompanied minor's representative should be given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare him/herself for the personal interview.

The third sentence of Article 12 (1) APD is permissive. Notwithstanding the fact that the APD does not provide any direction on the circumstances in which a child should be given the opportunity of a personal interview, Member States' approach to this issue must be underpinned and guided by their obligations under other relevant international laws.

All the Member States surveyed in this research are party to the UN Convention on the Rights of the Child (CRC) and as such are bound by its provisions. States which are party to the CRC have to ensure that the provisions and principles of that Convention are fully reflected and given legal effect in relevant domestic legislation. In this regard, the national legislation of Member States must ensure that the best interests of the child are a primary consideration.⁸⁵ This is also stated in the Charter of Fundamental Rights of the European Union,⁸⁶ and has been repeatedly endorsed and reiterated by UNHCR.⁸⁷ Whether a personal interview is in the best interests of a child must be determined with reference to the individual circumstances of the child such as age, the level of maturity of the child, the presence or absence of parents and family, the child's experiences, the child's physical and psychological well-being etc.⁸⁸

Moreover, in accordance with the CRC, state parties must assure that a child who is capable of forming his/her own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.⁸⁹ The Convention goes on to stipulate that for this purpose, *"the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*⁹⁰ The Charter of Fundamental Rights of the European Union also provides that children *"may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity."*⁹¹

Specifically with regard to the treatment of unaccompanied and separated children, the Committee on the Rights of the Child has expressed the view that *"where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made."*⁹²

The above-mentioned international legal provisions should be given binding effect in relevant domestic legislation.⁹³ However, UNHCR's research has found that in the absence of a specific requirement in the APD, national legislation on the circumstances in which a child shall be given the opportunity of a personal interview in the asylum procedure is divergent, and occasionally limited or non-existent. For example, there is no explicit national

85 Article 3 which states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

86 Article 24 (2).

87 See, for example, UNHCR Executive Committee, Conclusion on Children at Risk, Conclusion No. 107 (LVIII), 5 October 2007.

88 See UNHCR Guidelines on Determining the Best Interests of the Child, May 2008. Although these guidelines are primarily directed to UNHCR Offices and partners in the field, they are also potentially of use to Member States.

89 Article 12 (1) UN Convention on the Rights of the Child, 20 November 1989.

90 Article 12 (2). Article 22 of the same Convention also states that States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his/her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said states are Parties.

91 Article 24 (1).

92 Paragraph 71., General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, 1 September 2005. This is also the view of UNHCR expressed at paragraph 8.2, UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997.

93 In the course of this research, UNHCR did not review the surveyed Member States' general legislation on children.

legislation on the circumstances in which a child shall be given the opportunity of a personal interview in Belgium, France, Germany⁹⁴ and Spain (see below).

The following provides a brief country by country overview:

Belgium: Article 6 of the Royal Decree of 11 July 2003 concerning the CGRA is considered to govern applications by unaccompanied children and, therefore, they are offered the opportunity for a personal interview regardless of their age or developmental capacity. The applications of unaccompanied children are examined with priority and in the accelerated procedure.⁹⁵ However, Article 6 of the Royal Decree is not considered to apply to children who are accompanied, i.e. dependant children.⁹⁶

Bulgaria: Bulgarian legislation distinguishes between accompanied and unaccompanied children.⁹⁷ Accompanied children between the ages of 10 and 14 shall be interviewed except where this would be to the detriment of the child's interests.⁹⁸ But such interviews are rare in practice.⁹⁹ An accompanied child under the age of 10 may be interviewed if there is a need to further clarify facts and circumstances, depending on his/her developmental level.¹⁰⁰ Such interviews are exceptional and have been conducted in case of doubts concerning family relations.¹⁰¹ Article 119 (1) of the IRR is not explicit with regard to the circumstances in which an unaccompanied child shall be interviewed, but based on its provisions, unaccompanied children are always given in principle the opportunity for a personal interview.¹⁰²

The Czech Republic: There is explicit legislative provision in Section 29 (4) CAP which provides that the administrative body should provide the opportunity for a child to be heard, either directly or through his/her representative, where the child is capable of formulating his/her views. These views shall be taken into account considering the age and mental maturity of the child.

Finland: Article 6 (b) of the Aliens Act 301/2004 explicitly states that children aged 12 or above shall be heard unless such a hearing is manifestly unnecessary. A child under the age of 12 may be heard if s/he is sufficiently mature. The child's views shall be taken into account in accordance with the child's age and level of development. Note that the right to be heard does not always entail a full personal interview.

France: There is no legislative provision on the circumstances in which a dependant child is offered the opportunity of a personal interview. In practice, dependant children aged less than 18 who are accompanied by at least one parent cannot submit an application in their own right and, in principle, will not be given the opportunity for a personal interview.¹⁰³ They may be interviewed in specific cases where their oral evidence is considered pivotal for the examination of the application of the main applicant. There is no specific provision in law regarding the circumstances in which an unaccompanied child is interviewed. In practice, however, UNHCR is informed that unaccompanied children are interviewed in the presence of the 'ad hoc administrator' who is appointed to assist them.

⁹⁴ With the exception of legislation regarding those aged 16 or more, and legislation regarding minors born in Germany aged less than 6.

⁹⁵ Information confirmed by personnel of the determining authority and the Commissioner-General for Refugee and Stateless Persons.

⁹⁶ *Idem*.

⁹⁷ According to the Bulgarian Law on Persons and Family of 1949, last amended, SG No. 120/29.12.2002, a minor is a person under the age of 14. Those aged between 14 and 18 are juveniles who are able to take legal action with the consent of their parents/custodians.

⁹⁸ Section III, Article 100 (3) of the IRR.

⁹⁹ Interviews with stakeholders,, Proceedings and Accommodation Department.

¹⁰⁰ Section III, Article 100 (4) of the IRR.

¹⁰¹ Interviews with stakeholders,, Proceedings and Accommodation Department.

¹⁰² Confirmed in an interview with the determining authority.

¹⁰³ This information was provided to UNHCR in an interview with the determining authority OFPRA.

Germany: Section 12 APA states that a person who is at least 16 years of age is capable of performing procedural acts during the asylum procedure.¹⁰⁴ This also includes the personal interview.¹⁰⁵ However, there are no explicit legal provisions concerning children aged less than 16 with regard to the conduct of a personal interview. Section 24 (1) Sentence 4 APA nonetheless states that the interview will be omitted with regard to children born in Germany who are under the age of six. In the absence of other relevant explicit legal provisions omitting the right of child applicants to be heard, it has been argued in the asylum literature that a personal interview of children under the age of 16 should be seen as mandatory.¹⁰⁶ With regard to its practice concerning accompanied children, UNHCR has been informed by the determining authority (BAMF) that in cases of children aged between 14 and 16, in principle, a personal interview is conducted in the presence of the parent(s),¹⁰⁷ while accompanied children aged less than 14 are not normally interviewed in person.¹⁰⁸ There is no explicit legislation with regard to the personal interview of unaccompanied children.¹⁰⁹ In case family asylum or refugee protection for families is granted according to Section 26 (2) and (4) Asylum Procedure Act,¹¹⁰ an unmarried child will be recognized without being interviewed in person by the BAMF. This provision also applies to children aged 16 to 18 as their personal status shall be governed by the law of the host country (Article 12 of the 1951 Convention).¹¹¹

Greece: Article 3 of PD 81/09 states, with regard to children, that the personal interview shall be conducted taking into consideration their maturity and psychological consequences of any traumatic experience.¹¹²

Italy: There is explicit legislation with regard to children who submit an asylum application in their own right. They have the right to a personal interview if accompanied (Article 13 (3) of the d.lgs. 25/2008) or unaccompanied (Articles 13 (3) and 19 (4) of the d.lgs. 25/2008).

The Netherlands: Dutch legislation distinguishes between accompanied and unaccompanied children. The Aliens Circular provides that the interview of unaccompanied children is mandatory but may be omitted if the child is under the age of 12, and a pedagogic or psychological examination suggests that the child may face difficulties which would hinder the interview.¹¹³ According to the determining authority (IND), the interview of dependant children under the age of 15 is discretionary and an interview will only be conducted if explicitly requested by the parents, lawyer or child him/herself.¹¹⁴

¹⁰⁴ Section 12 (1) 1st half of the 1st Sentence APA: “A foreigner who is at least 16 years of age shall be capable of performing procedural acts in accordance with this Act, [...]”.

¹⁰⁵ According to written information submitted by the BAMF, every applicant capable of performing procedural acts (thus from 16 years of age) is interviewed separately on the reasons for the application.

¹⁰⁶ G. Renner, Commentary on Foreigner’s Law, 8th edition (2005), Section 14a, paragraph 7 and Section 24 paragraph 8; Hailbronner, Commentary on Foreigner’s Law, Section 14a, paragraph 6 (June 2009), and Section 24 paragraph 53 (June 2008).

¹⁰⁷ Unless the minor does not consent to the presence of the parent(s).

¹⁰⁸ Information provided by the Head of the BAMF-Unit for Quality Control in Nuremberg on 16 November 2009 to UNHCR.

¹⁰⁹ This is notwithstanding the fact that the practice of the BAMF described for the cases of accompanied minors cannot be transferred to cases of unaccompanied minors, because information regarding the well-founded fear of being persecuted cannot be obtained from parents.

¹¹⁰ Section 26 (2) APA: “A child of the foreigner who was a minor and unmarried at the time the asylum application was filed shall be recognized as entitled to asylum if the foreigner’s entitlement to asylum is incontestable and there is no reason to repeal or withdraw the recognition of entitlement to asylum.”

Section 26 (4) APA: “(1) through (3) shall be applied mutatis mutandis to spouses and children of foreigners granted refugee status. Refugee status shall take the place of entitlement to asylum.”

¹¹¹ G. Renner, Commentary on Foreigner’s Law, 8th edition (2005), Section 26 paragraph 16; R. Marx, Commentary on the Asylum Procedure Act, 7th edition (2009), Section 26, paragraph 60.

¹¹² The same provision was contained in Article 10 (1) PD 90/2008 which was in force during the period of UNHCR’s national research. Article 10 (1) PD 90/2008 has been replaced by Article 3 of PD 81/09 on 20/7/2009 (PD 81/09 was published on 30/6/2009 and entered into force 20 days later).

¹¹³ C3/3.2, Aliens Circular.

¹¹⁴ According to the recently published report (June 2009) ‘Kind in het Centrum’, by K. Kloosterboer the participation of children needs to be facilitated in the asylum procedure with respect to their age. See recommendations 53-56 of the report.

Slovenia: With regard to unaccompanied children, national legislation provides that the unaccompanied child, together with his/her legal representative, shall be present during all acts of the procedure which would include any interviews.¹¹⁵ In practice, according to the MOI, unaccompanied children are always present when the application is lodged and during the personal interview. With regards to dependant children, the interview is optional and dependent on an assessment of the child's procedural capacity taking into account his/her age, mental maturity and ability to understand the meaning of the procedure.¹¹⁶

Spain: There are no specific legal provisions regarding the circumstances in which an unaccompanied or separated child shall be given the opportunity of a personal interview. This decision is left to the discretion of the interviewer, based on what is considered to be in the best interest of the child by the legal guardian who represents him/her throughout the asylum procedure, and who in practice would be present in any interview. Under the New Asylum Law, no specific provisions are included regarding unaccompanied or separated children, although Article 46 (1)-(2) foresees that the specific situation of vulnerable applicants, or beneficiaries of International protection such as minors, will be taken into consideration; owing to their vulnerability, the necessary measures will be adopted to afford a differentiated treatment to their applications for international protection.

UK: It is the determining authority's policy not to interview children under the age of 12. Unaccompanied children over the age of 12 who have applied for international protection in their own right shall be interviewed about the substance of the application unless they are unfit or unable to be interviewed. Other children over the age of 12 can be interviewed, but are not interviewed unless they apply for asylum in their own right.¹¹⁷

Recommendations

In accordance with the 1989 UN Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union, the APD should recall that the "best interests of the child" shall be a primary consideration in all actions concerning the child, including the determination of the circumstances in which a child shall be given the opportunity of a personal interview.¹¹⁸

In this connection, and in order to address the absence of national legislation and administrative instructions in some Member States, the APD should require Member States to determine in law the circumstances in which children shall be given the opportunity of a personal interview and/or the right to be heard. To this effect, in the last paragraph of APD Article 12 (1), the word "may" should be changed to "shall".

Focus of the interview with dependants

UNHCR's audit of case files and observation of interviews included only a very small number involving family members. Given the size of the sample, findings are not conclusive but may, nevertheless, be indicative. UNHCR found some evidence to indicate that interviews of dependants may focus solely on the issues raised by the main applicant without adequately seeking to identify or check whether there are any particular relevant circumstances relating to the dependants.¹¹⁹

¹¹⁵ Article 16 (6), IPA.

¹¹⁶ Article 46 (3) AGAP and Article 42 (2) and (3) IPA.

¹¹⁷ Paragraph 352 Immigration Rules HC 395.

¹¹⁸ Recital (14) of the APD at present refers to the best interests of the child as a primary consideration but only with regard to unaccompanied minors. However, a new and specific recital providing that the best interests of the child should be a primary consideration: see proposed recast Recital 23, APD Recast Proposal 2009

¹¹⁹ For example: case file 115 in Belgium and case file to Decision 16 in Bulgaria.

For example, in Belgium, the audit of case files, the interviews attended as well as interviews with stakeholders indicated that the personal interview of the dependant applicant may not sufficiently enquire into whether the dependant has reasons for an application in their own right.¹²⁰ After addressing issues relating to the personal data of the dependant applicant, documents and travel route, the dependant applicant was asked whether his/her reasons for fleeing are completely linked to that of the main applicant. When the dependant applicant's response was affirmative, the interview of the dependant applicant focused solely on the issues raised by the main applicant.¹²¹ At the end of the interview, the dependant applicant was asked whether s/he had ever been arrested or convicted. It might not be clear to the dependant applicant that the arrest or the conviction does not have to be related to the issues raised by the main applicant. The possible importance of his/her own reasons for fleeing were not explained to the applicant and no other questions were asked during the interview to check whether the dependant applicant did have his/her own reasons for an application for international protection. In one case,¹²² for example, the dependant applicant was not asked about her job, her daily activities, if she had ever been politically active herself or if she had ever experienced any problems herself (not related to the problems of her husband), even though she, for example, had studied at university and obtained a degree in educational studies. In one case file included in the audit, the dependant applicant requested that her file be separated from that of her husband because she claimed to have her own reasons for fleeing her country of origin. The issues raised by the dependant applicant were only discussed very briefly (one or two questions) during the interview, and the decision simply stated there were no reasons to separate the applicant's file from that of her husband. The dependant applicant did not receive protection, based on the rejection of the application of her husband.¹²³

One case file audited in the Netherlands highlighted the need for the determining authority to ensure that it checks whether the dependant may have reasons in his/her own right to request international protection. At the end of the interview, the dependant recounted problems that s/he had faced him/herself. The interviewer asked why s/he had not mentioned these issues before, and s/he answered that s/he had not been asked before.¹²⁴

From the interviews that UNHCR observed in Greece,¹²⁵ interviewers did not seek to identify any particular issues relating to the dependants. As three police officers¹²⁶ confirmed, the interview focuses mainly on the issues raised by the main applicant and dependants are asked questions only for reasons of clarification and confirmation.¹²⁷

With regard to the other Member States surveyed, UNHCR's sample of case files did not include a sufficient number relating to applicants with adult dependants or adult family members, to provide evidence of the general approach taken in those States on this issue. However, there was some evidence of good practice in specific cases in Germany,¹²⁸ the Netherlands, and Slovenia.¹²⁹

120 Interview with NGOs, 25 March 2009 and interview with lawyers, 26 March 2009.

121 Case file no. 35, 50 and 115.

122 Case file number 115.

123 Case file number 50.

124 Case file 7.

125 IO481IRQ1, IO41AFG1.

126 Personnel responsible for interviewing in ADA and SDS.

127 Interviews with S3 and S4.

128 Only one audited protocol ooAFGo9 concerned two adult family members who were interviewed separately and both applicants were given the opportunity to raise issues particular to their respective applications. In the 5 audited protocols concerning a parent and his/her child/children, the parent was given the opportunity to raise issues particular to the child/children: 11SOMo6, 11NIGo2, 10AFGo4, 11AFGo7, 11AFGo10.

129 Two interviews involving spouses were observed and they were all given the opportunity to present relevant circumstances.

Some cases indicated that interviewers may use the interview of family members as a means to establish contradictions and inconsistencies. For example, in one case, interview questions appeared to be aimed at establishing contradictions.¹³⁰ The application for refugee status was rejected on the ground that the determining authority did not believe the family had stayed in Baghdad recently because of contradictions between family members relating to, for example, how many times the family members visited the grave of their murdered daughter, when and where the children went to school, and the time the family had spent at a cousin's house (even though this was only discussed with one daughter). Some important issues were not addressed at all. For example, the father was never clearly asked about threats he claimed to have received.¹³¹

In Spain, case reports drafted by admissibility/eligibility officers setting out the reasoning for the proposed decision,¹³² indicated that in the case of applications involving large family groups from Colombia, separate interviews with family members are often used to establish contradictions which are difficult for the applicant to rebut in the re-examination procedure, because of the limited or lack of written reasoning given for the initial inadmissibility decision. In Melilla, UNHCR was explicitly informed that interviews of family members are used to establish contradictions.¹³³ Furthermore, UNHCR's audit of case files revealed indications that applicants are not always given the opportunity to explain apparent contradictions between members of the same family.¹³⁴

In Germany, the handbook for adjudicators instructs them not to attach too much importance to minor discrepancies in the facts claimed by applicants and dependants. Only major contradictions should be regarded as relevant, and the applicant must be given the opportunity to clarify such contradictions.¹³⁵ According to information provided by a lawyer,¹³⁶ the extent to which this instruction is applied in practice depends on the adjudicator. Some adjudicators are reportedly determined to conduct the interview in a way that contradictory statements are produced by the applicants, while other adjudicators completely abstain from such a practice. UNHCR observed four interviews concerning family members.¹³⁷ There was no indication that the adjudicator in any way focused on contradictions. However, given the fact that these were the only observed cases involving family members, no general conclusion in this regard can be drawn from the audit of personal interviews. Only one of the audited case files concerned spouses who had been interviewed separately.¹³⁸ The interviews did not focus on establishing contradictions. Given that only one case could be identified, no general conclusion can be drawn from this observation.

It is UNHCR's view that if new evidence or inconsistencies arise during an interview with family members or dependants that are material to the determination of the principal applicant's application, the principal applicant should generally be given the opportunity to clarify these aspects of the evidence in a second interview. However, the determining authority should use the utmost discretion and sensitivity in assessing the reliability of the

¹³⁰ Case file 35 in Belgium concerning an Iraqi family of five: father, mother, daughter and two sons (one of the sons being under 18). Three daughters and one son were still in Iraq and one daughter was killed in a shooting in Baghdad in 2004. All family members based their application on the application of the father (main applicant) who claimed to be a low-ranking case manager with the Iraqi Special Republican Guard and, therefore, a member of the Baath party.

¹³¹ Subsidiary protection status was granted.

¹³² These are held in the case files but are not accessible to applicants until a decision has been adopted.

¹³³ As informed by police official in charge of interviews.

¹³⁴ For example, case file 20R (RUS) in France and case files 0106044, 0206117, 0606116, 0306045, 1006062, 0906052, 0405046 in Spain.

¹³⁵ Handbook for Adjudicators "Interview", 2.5.4, page 13.

¹³⁶ X1.

¹³⁷ HR 8, HR 9, HR 10, HR 11 (father and son // mother and son).

¹³⁸ 00AFGo9.

evidence, and testing the credibility of the principal applicant, and should respect the obligation to preserve the confidentiality of the interview with the family member or dependant.¹³⁹

Recommendations

Where an application may be made on behalf of adult dependants, and the personal interview with the dependant adult is conducted, the Member State shall inquire whether the dependant adult has his/her own reasons to request international protection, and ensure s/he is aware of his/her right to make a separate application for international protection.

Personal interviews of dependants should not be conducted with the aim of establishing contradictions and inconsistencies. If any inconsistencies that are material to the determination of the principal applicant's claim arise during an interview with family members or dependants, the principal applicant should generally be given the opportunity to clarify these in a second interview.

EU guidelines with regard to the personal interview of dependants and family members should be developed, which could be provided to all adjudicators.

Opportunity for an additional personal interview

A second or follow-up personal interview may be needed to gather additional information. Where real or perceived inconsistencies, contradictions and improbabilities arise in the context of an applicant's personal interview, or in the personal interviews of family members or other dependants, or following the gathering of COI or other evidence, in the interests of an adequate and complete examination, it may be necessary to arrange a second interview to address these apparent contradictions and inconsistencies.

Of the 12 Member States of focus in this research, three have legislation or administrative provisions which explicitly foresee the possibility of a second personal interview: Bulgaria,¹⁴⁰ Slovenia¹⁴¹ and Spain.¹⁴²

None of the Member States of focus in this research have any legislation or administrative provisions preventing the conduct of an additional personal interview. Although UNHCR's research shows that there is generally no legislative limit on the number of interviews that can be held, in practice, it appeared rare for an applicant to be summoned for an additional interview in some Member States.¹⁴³ Belgium, Bulgaria and the Czech Republic

¹³⁹ UNHCR, Procedural Standards for Refugee Status Determination, under UNHCR's Mandate, September 2005, Chapter 4.3.13.

¹⁴⁰ Article 63a (3) of LAR which states "As needed by the relevant procedure, the interviewing body shall perform further interviews" and Article 91 (4), IRR Chapter six on the general procedure states that "the interviewing body may, at its discretion, conduct a second interview.."

¹⁴¹ Article 41 (1) of the IPA states that "The official may call more personal interviews in an individual case if this is necessary in order to fully establish the actual situation."

¹⁴² Article 17 (8) of the New Asylum Law states that a second interview may take place in accordance with conditions to be set out in the implementing regulation (which had not been drafted at the time of writing).

¹⁴³ Finland, none of the audited case files involved a second interview; France; Germany, none of the audited protocols involved a second interview and according to a lawyer (X1) a second interview had never taken place in any of his/her cases but nor had one been requested. One observed interview – HR5 – was a "supplementary interview" arranged because a social worker criticized the tone and atmosphere of the first interview; Italy, none of the audited case files involved a second interview; the Netherlands, in the accelerated procedure the opportunity for a second interview is limited by the time scales and only one of the case files audited had conducted a second interview; Slovenia, a refugee counsellor stated that second interviews were rare. This was confirmed directly by UNHCR's research, in which only one second interview was observed due to problems with interpretation of first interview; in Spain, a second interview rarely takes place in the admissibility procedure unless there have been procedural flaws in the first interview (in only one of the audited cases in the regular procedure did an additional interview take place); and the UK, no second interviews were observed, although the Asylum Process Guidance does refer to opportunities to provide further information.

represented exceptions. Out of the 90 case files audited and the 11 interviews observed in Belgium, 17 applicants were interviewed twice. In Bulgaria, second interviews were conducted in seven out of the 62 cases audited¹⁴⁴ and in the Czech Republic, out of 73 case files audited, two interviews had been or were to be conducted in 15 cases. However, UNHCR's research did not gather data on the reasons prompting the conduct of an additional interview.

Recommendation

States are encouraged to establish a practice of offering second interviews in cases where it may be warranted, for example, because of inconsistencies, lack of clarity or gaps arising from first interviews.

Omission of personal interviews under Article 12 (2) APD

UNHCR regrets that Article 12 (2) APD sets out circumstances in which a personal interview may be omitted. It must be stressed that this is an optional provision and Member States are not required to omit the personal interview in the circumstances listed.

UNHCR is of the opinion that the exceptions permitted by the APD to the right to a personal interview significantly undermine the fairness of procedures and the accuracy of decisions. In line with UNHCR Executive Committee Conclusions No. 8 (XXVIII) of 1977 and 30 (XXXIV) of 1983, UNHCR strongly recommends that all applicants should, in principle, be granted the opportunity for a personal interview, unless the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his/her control.¹⁴⁵

In general terms, Article 23 (2) APD requires an adequate and complete examination of applications. UNHCR believes that this cannot be achieved without the determining authority conducting a personal interview with the applicant as the personal interview is an essential part of the asylum procedure.

Article 12 (2) APD permits the omission of a personal interview in eight circumstances:

- the determining authority is able to take a positive decision on the basis of evidence available (Article 12 (2) (a));
- the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4 (2) of Directive 2004/83/EC (Article 12 (2) (b));
- the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application unfounded (Article 12 (2) (c)) where:
- Irrelevant issues or issues of minimal relevance are raised by the applicant;

¹⁴⁴ Decisions 1, 15, 36, 42, 50, 52 and 59.

¹⁴⁵ Article 12 (3) APD does provide that "the personal interview may also be omitted where it is reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control."

- The applicant is considered to be from a safe country of origin;
- There is a country which is considered to be a safe third country for the applicant;¹⁴⁶
- The applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution as defined in the Qualification Directive;
- The applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin;¹⁴⁷ and
- The applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal.

UNHCR considers that Article 12 (2) (c) APD is highly problematic and much of it lacks an element of logic.

Article 12 (2) (c) APD requires that any decision to omit a personal interview is taken by the determining authority “on the basis of a complete examination of information provided by the applicant”. In practice, such a decision to omit the personal interview would have to be taken on the basis of limited initial information provided by the applicant in a preliminary or screening interview or based on a written submission. At this point, the applicant has not necessarily provided, or received an opportunity to provide full information on the reasons for the application for international protection. As mentioned above, preliminary interviews are sometimes conducted by an authority other than the determining authority who may not be competent with regard to issues of international protection, and who may ask brief predetermined questions sometimes without applying guarantees which should be present in the personal interview. For example, the applicant may not have been informed yet of the procedure to be followed or his/her rights and obligations, and the consequences of non-compliance; they may not have received the services of an interpreter able to ensure appropriate communication; the interviewer may not have acted in a gender-appropriate fashion; and the interview may not have taken place in confidential conditions. Often these preliminary interviews are conducted soon after arrival when the applicant may be exhausted and disoriented. Moreover, the applicant is normally not asked to provide comprehensive reasons for the application for international protection. In short, information obtained in this context is limited and not reliable, and should not be relied upon to form a view regarding whether the application is founded or unfounded. Similarly, it should not be used to reach a decision to omit the personal interview.

Article 12 (2) (c) APD permits the omission of a personal interview on grounds that the determining authority considers the application to be unfounded because it states irrelevant or minimally relevant issues; the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing; or the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal. Yet, the personal interview serves to determine the relevance of facts raised by the applicant. It serves to provide the applicant with an opportunity to clarify any apparent or perceived inconsistencies, contradictions or improbable statements, and to add to representations

¹⁴⁶ Note that this can be an inadmissibility ground under Article 25 (2) (c) APD. However, in accordance with Article 27 (2) (c) APD, the safe third country concept should not be applied without giving the applicant the opportunity to challenge the application of the concept. As such, the decision to omit the personal interview should not be taken unless the applicant has been given this opportunity.

¹⁴⁷ Note that this may also be an inadmissibility ground under Article 25 (2) (f) APD. However, Article 32 (3) APD requires Member States to, at least, conduct a preliminary examination to determine whether there are new elements or findings. The decision to omit a personal interview cannot be taken unless this preliminary examination has been conducted. However, Article 34 (2) (c) permits the preliminary examination of a subsequent application to be conducted on the sole basis of written submissions without a personal interview. It must be stressed that this latter provision is optional.

which may be considered insufficient. Moreover, it can serve to determine whether the applicant has submitted an application for international protection *merely* or *only* to delay removal.

Article 12 (2) (c) APD also permits the determining authority, on the basis of a complete examination of information provided by the applicant, to omit the personal interview in cases where the applicant is considered to be from a safe country of origin within the meaning of Articles 29, 30 and 31 APD.¹⁴⁸ However, Article 31 APD implies that applicants must be given the opportunity to submit grounds for considering that the country is not a safe country of origin in his/her particular circumstances and in terms of the Qualification Directive.¹⁴⁹ A personal interview provides the applicant with the best opportunity to do this.

UNHCR considers that the APD is flawed in permitting the omission of the personal interview on the above-mentioned grounds.¹⁵⁰

Furthermore, Article 12 (2) (c) APD permits Member States to omit the personal interview on the ground that the determining authority considers that there is a safe third country for the applicant. In accordance with Article 27 (2) (c) APD and international law, Member States must conduct an individual examination and ascertain whether any proposed safe third country is actually safe for the particular applicant. Moreover, the applicant must be given the opportunity to at least challenge the application of the safe third country concept on the grounds that s/he would be subjected to torture, cruel, inhuman or degrading treatment or punishment. A decision to omit the personal interview, therefore, cannot be taken unless the applicant has been given the effective opportunity to rebut the presumption of safety. An interview of the applicant would provide the applicant with the opportunity to raise grounds, if any, to challenge the application of the concept and enable the determining authority to ascertain whether any proposed safe third country is actually safe for the particular applicant.

Article 12 (2) (c) also permits Member States to omit the personal interview on the ground that the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin. However, Article 32 (3) APD requires Member States to conduct, at least, a preliminary examination of the subsequent application to determine whether or not there are new elements or findings. The decision to omit a personal interview cannot be taken unless this preliminary examination has been conducted. However, Article 34 (2) (c) permits the examination of a subsequent application to be conducted on the sole basis of written submissions without an interview. It must be stressed that this latter provision is optional and an interview would provide the opportunity to ascertain whether there are any new elements or findings.

The following subsections of this report distinguish between national legislation and practice relating to the omission of the personal interview. As will be seen, in practice, most of the Member States surveyed offer the opportunity of a personal interview to first-time applicants.

¹⁴⁸ Of the 12 Member States surveyed for this research, Belgium and Italy do not have legislation permitting the designation of third countries as safe countries of origin. See section 14 of this report for further information.

¹⁴⁹ Article 31 (1) APD states that a country may only be considered as a safe country of origin for a particular applicant if ... “*he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee*”.

¹⁵⁰ Articles 23 (4) (a) APD, 23 (4) (c) APD with regard to safe country of origin, 23 (4) (g) APD, and 23 (4) (j).

National legislation relating to the omission of interviews

The grounds upon which Member States' national legislation, regulations or administrative provisions permit the omission of the personal interview cannot be easily and clearly set out in a comparative format.

This is due, in part, to the fact that national legislation may express the grounds for omission in broader terms than the APD, and whether a specific ground stipulated in the APD is considered to be reflected in national legislation may be a question of interpretation. For example, in France, one of the grounds upon which the personal interview may be omitted is that *“the elements which substantiate the claim are manifestly unfounded.”*¹⁵¹ French legislation does not define ‘manifestly unfounded’ and there are no public guidelines setting out the criteria to be applied. Other information provided by authorities regarding practice has, therefore, been drawn upon indicatively for the table below.¹⁵²

Care should also be taken in comparing national legislation because in some Member States the omission of the personal interview may mean that the applicant has no interview at all with the determining authority on the merits of the application. In some Member States, by contrast, national legislation may provide for a personal interview in an initial phase of the first instance procedure, but provide grounds for omission of the personal interview in a following phase. Therefore, notwithstanding legislative grounds for the omission of the personal interview, all applicants nevertheless have an interview with the determining authority. For example, in Slovenia and Spain, all applicants are given the opportunity for an interview as part of the procedure to formalize the registration of the application. However, following this phase, in Slovenia, the application is channelled into either the accelerated or the regular procedure; and the personal interview may be omitted, and usually is in practice, omitted in the accelerated procedure on numerous grounds stipulated in national legislation. In Spain, following the admissibility phase in which the applicant is interviewed, if the application is channelled into the regular procedure, the personal interview may be omitted at the discretion of the determining authority. No specific grounds are stipulated in national legislation.¹⁵³

Bearing these caveats in mind, UNHCR's research shows that national legislation, regulations or administrative provisions provide for the omission of the personal interview in the following circumstances:¹⁵⁴

¹⁵¹ Article L.723-3 *Ceseda*.

¹⁵² See footnote 155 below for more detail.

¹⁵³ Article 17.8 provides that secondary legislation will determine the conditions under which a new “personal hearing” on the asylum application can be held. The need to hold such hearing/s must be motivated.

¹⁵⁴ Note that this refers to legislation and not practice which is often different.

Key to table: √ indicates that the personal interview may be omitted on this ground. ‘X’ indicates that the personal interview may not be omitted on this ground.

	Be	Bg	Cz	De	Es ¹⁵⁵	Fi	Fr ¹⁵⁶	Gr	It	Nl	Si ¹⁵⁷	UK
Art. 12 (2) grounds:												
Positive decision can be taken on basis of evidence available	X	X ¹⁵⁸	X	X ¹⁵⁹		X	√	√	√	X	X	√
Meeting with competent authority already held	X	X	X	X		X	X	√	X	X	X	√
Irrelevant issues raised by applicant	X	X	X	X		X	√ ¹⁶⁰	√	X	X	√ ¹⁶¹	√
Safe country of origin	X	X	X	X		X	√ ¹⁶²	√	X	X	√	X
Safe third country	X	X	X	X ¹⁶³		X ¹⁶⁴	X	√	X	X	√	√ ¹⁶⁵

155 The New Asylum Law establishes that the personal interview serves to formalize the application (Article 17 (4)). As such, it is not possible to omit the interview as without it an application is not registered and no procedure ensues. Current Spanish asylum legislation does not establish a right to a personal interview nor legislate on the circumstances in which a personal interview will be offered in the regular procedure. In the regular procedure, the decision to conduct a personal interview is wholly at the discretion of the eligibility official.

156 In France, there are four grounds in legislation for the omission of the personal interview according to Article L.723-3 *Ceseda*: a) the OFPRA is able to take a positive decision on the basis of elements available; b) the asylum seeker is a national of a country to which article 1C5 of the 1951 Refugee Convention is applied; c) the elements which substantiate the claim are manifestly unfounded; d) medical reasons prevent the conduct of the interview. The term ‘manifestly unfounded’ has been interpreted in this table based on internal guidelines, and the criteria contained in the London Resolution of the Council of Ministers on Manifestly Unfounded Applications for Asylum of 1992 which, according to OFPRA inspires their practice (although not binding); and the practice whereby it appears that a significant number of applicants of subsequent applications are not offered the opportunity of a personal interview (see section 15 of this report).

157 All applicants are interviewed as part of an initial procedure to formalize the registration of the application. This is considered to constitute a meeting in terms of Article 12 (2) (b) APD. The data in this table relates to some of the grounds upon which the personal interview may be omitted in the accelerated procedure. Article 46 (1), indent 1 of the IPA provides that “*the personal interview may be omitted when the competent authority may decide [on the application] in an accelerated procedure on the basis of the facts and circumstances referred to in the first, third, fourth, fifth, sixth, seventh, or eighth indents of Article 23 of this Act [the latter sets out the evidence which may be taken into consideration e.g. oral and documentary evidence submitted by applicant and evidence obtained by competent authority]*”. There are 16 grounds upon which the competent authority may decide on an application in the accelerated procedure in accordance with Article 55 IPA.

158 Children born in Bulgaria to parents who have had protection granted in Bulgaria are not interviewed. See Decision 24 where a minor born in Bulgaria to parents who were beneficiaries of humanitarian status was granted humanitarian status.

159 Section 24 (1) Sentence 4, 1st Alternative APA states that the interview may be dispensed with if the Federal Office intends to recognize the foreigner’s entitlement to asylum. The wording only refers to constitutional asylum (Article 16a Basic Law). This is confirmed by G. Renner, *Commentary on Foreigner’s Law*, 8th edition (2005), section 24, paragraph 9 which states that the provision does not apply in cases of Section 60 (1) Residence Act. Thus it does not fall within the scope of the Directive. Moreover, there are indications in the literature (R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 24, paragraph 58) that this provision is not applied in practice any more.

160 Not an explicit legal ground. However, note that by law the personal interview may be omitted on the ground that the elements which substantiate the claim are manifestly unfounded.

161 An application may be decided in the accelerated procedure, and therefore the personal interview may be omitted where “*the applicant entered the Republic of Slovenia exclusively for economic reasons*” and also when “*the applicant, in submitting his/her application and presenting the facts, has only raised issues that are insufficient, insignificant or of minimal relevance to the examination of whether s/he qualifies for international protection*” according to Article 55 IPA in conjunction with Article 46 (1) IPA.

162 Not an explicit legal ground. However, note that by law the personal interview may be omitted on the ground that the elements which substantiate the claim are manifestly unfounded.

163 Section 24 (1) Sentence 4, 2nd alternative APA states that the interview may be dispensed with if the foreigner claims to have entered Germany from a safe third country (Section 26a). But the safe third country concept only applies to cases of constitutional asylum (Article 16a Basic Law). With regard to the examination of refugee status, entering Germany from a purported safe third country will lead to the application of the Dublin II Regulation.

164 Section 103 (1) of the Aliens’ Act 301/2004 allows for applications to be dismissed on the ground of a safe country of asylum. This includes the concept of safe third countries and implies that applications may be dismissed without a personal interview. However, according to the determining authority, this is interpreted as applying only when there is deemed to be a first country of asylum and not a safe third country.

165 Applications raising the issue of a safe third country do not have to be examined substantively and are treated in accordance with UK third country procedure, see Asylum Instruction ‘*Third Country Cases: Referring and Handling*’; in this regard there will be no personal interview of the asylum application.

	Be	Bg	Cz	De	Es ¹⁵⁵	Fi	Fr ¹⁵⁶	Gr	It	Nl	Si ¹⁵⁷	UK
Applicant has made inconsistent, contradictory, improbable or insufficient representations so claim unconvincing	X	X	X	X		X	√ ¹⁶⁶	√	X	X	√	√
Subsequent application raising no new elements	X	X	√ ¹⁶⁷	√		√	√ ¹⁶⁸	√	√ ¹⁶⁹	X	√	√
Application made merely to delay removal	X	X	X	X		X	√ ¹⁷⁰	√	X	X	√	√
Art. 12 (3) grounds:												
Unfit or unable on health grounds	X	√	X	X	X	X	√	√	√ ¹⁷¹	√	√	√
Other grounds found in national legislation:												
No interpreter available	√			X								
Application considered manifestly unfounded (potentially broader than Art. 12 (2))				X			√					
Application examined in accelerated procedure (potentially broader than Art. 12(2) APD)				X							√	
National of a country to which Art. 1 C 5 of 1951 Convention applicable				X ¹⁷²			√					
National of the EU			√	X								
First country of asylum			√	√ ¹⁷³		√			√ ¹⁷⁴			√ ¹⁷⁵

166 Not an explicit legal ground. However, note that by law the personal interview may be omitted on the ground that the elements which substantiate the claim are manifestly unfounded.

167 Interviews are omitted not on the grounds of Article 12 APD but on the grounds of inadmissibility.

168 Not an explicit legal ground. However, note that by law the personal interview may be omitted on the ground that the elements which substantiate the claim are manifestly unfounded.

169 Interviews are omitted not on the grounds of Article 12 APD but on the grounds of inadmissibility.

170 Not an explicit legal ground. However, note that by law the personal interview may be omitted on the ground that the elements which substantiate the claim are manifestly unfounded.

171 For a positive decision, (recognition of 1951 Convention status only).

172 With regard to eligibility procedures. Different rules apply with a view to revocation procedures based on an application of the German cessation provisions.

173 According to Section 29 APA, an application can be rejected as “irrelevant” if the asylum seeker was obviously safe from persecution in a third country and can be returned to that country. The rejection as “irrelevant” implies that a hearing is not carried out. However, in practice, the provision is hardly ever applied. In 2008, only three decisions were based on Section 29 APA according to information provided by the BAMF. They all concerned a Bosnian family which had applied for protection after having lived for seven years in the USA and held a 15-year residence title for that country. Since the application of the Dublin II Regulation, the possibility to reject an application as irrelevant would only apply to persons who enter Germany by air or sea and do not come directly from the state of persecution. Moreover, the criterion regarding return and the evidence test further reduce the scope of application for this provision.

174 Article 29 (1) (a) of d.lgs. 25/2008 provides that applications are declared inadmissible and the personal interview may therefore be omitted when “the applicant has been recognized as a refugee by a State that has signed the Geneva Convention and is still able to avail him/herself of such protection”.

175 Applications raising the issues of a ‘first country of asylum’ are not considered substantively and are treated in accordance with UK third country procedure.

Compatibility of national legislation with Article 12 (2) APD

For the most part, the national legislation of the Member States of focus in this research is considered to be compatible with Article 12 (2) APD, with two possible exceptions.

In France, as mentioned above, there is a general provision permitting the omission of an interview if the application is considered to be manifestly unfounded.¹⁷⁶ The compatibility of this provision with Article 12 (2) (c) APD depends on whether the decision that an application is manifestly unfounded is taken on the basis of complete examination of information provided by the applicant, and whether the interpretation given to the term ‘manifestly unfounded’ is limited to the terms of Article 12 (2) (c) APD. As stated above, French legislation does not define ‘manifestly unfounded’ and there are no public guidelines setting out the criteria to be applied, rendering it difficult to assess compatibility with Article 12 (2) (c) APD. The criteria for determining whether an application is manifestly unfounded is apparently based on the definition contained in the London Resolution of the Council of Ministers on Manifestly Unfounded Applications for Asylum of 1992 (which is not legally binding), and inspired by OFPRA’s own experience and practice (internal guidelines). Each protection officer, therefore, has a wide margin of appreciation in deciding whether to omit a personal interview on the ground that the application is manifestly unfounded, and interpretation may vary from one Geographic Division of the OFPRA to another.¹⁷⁷ OFPRA might consider an asylum application to be ‘manifestly unfounded’ on the following grounds: the grounds on which the claim is based are outside the scope of refugee status or subsidiary protection criteria; the application is based on deliberate fraud, for instance false declarations about nationality/identity; the applicant’s statements are devoid of any substance, i.e. do not contain sufficient details and/or personal details; the application relies on the general situation; the applicant’s statements are devoid of any credibility, i.e. are based on manifestly false documents, are fundamentally inconsistent or improbable or contain major contradictions. Moreover, on this basis, Article L.723-3 paragraph c) *Ceseda* also applies to subsequent applications. Member States had the opportunity to include Article 23 (4) (d) APD relating to the presentation of false information or documents or withholding information with respect to identity and nationality, but this is not included within the terms of Article 12 (2) (c) APD. Therefore, the interpretation of ‘manifestly unfounded’ by the French authorities may go beyond the scope of the APD.

It should be noted that the only ground upon which an interview can be omitted in Belgium is that there is no available interpreter. If the CGRA does not have an interpreter available who speaks the language of the applicant, the asylum applicant can be requested to bring his/her own interpreter. If the applicant fails to bring an interpreter, the CGRA *can* decide on the asylum application without hearing the asylum applicant.¹⁷⁸ The asylum applicant should be allowed to write down his statements. If the asylum applicant does not want to or cannot write down his/her statements, the CGRA is allowed to decide on the asylum application based on the elements made available to it. Article 20 of the Royal Decree of 11 July 2003 concerning the CGRA is based on the case law of the Council of State which states that the CGRA is not legally obligated to provide an interpreter.¹⁷⁹

UNHCR was informed by the determining authority that this legal provision is very rarely implemented. Nevertheless, given modern tele- and video communications, the absence of an interpreter should not be a ground for

¹⁷⁶ Article L.723-3 *Ceseda* states that OFPRA may omit the interview where “(c) the elements which substantiate the claim are manifestly unfounded”.

¹⁷⁷ In UNHCR’s audit of case files only applications concerning Pakistani nationals were determined to be manifestly unfounded: case files 11R(PK); 12R(PK) and 55R(PK). Six case files concerning Pakistani nationals were audited in total.

¹⁷⁸ Article 20 § 3, of the Royal Decree of 11 July 2003, concerning the CGRA.

¹⁷⁹ *RvS* 8 May 1998, nr. 73.569 & *RvS* 18 August 1998, nr. 73.599 & *RvS* 31 January 2006, nr. 154.366.

omission of the interview under Article 12 (3) APD.¹⁸⁰ Moreover, this is not in accordance with Article 10 (1) (b) and Article 13 (3) (b) APD. Article 10 (1) (b) APD requires Member States to provide applicants with the services of an interpreter for the personal interview, and Article 13 (3) (b) requires Member States to select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview.

It should also be noted that in Slovenia, Article 46 (1) indent 1 IPA permits the omission of the personal interview in the accelerated procedure. An application may be referred to the accelerated procedure on any one of 16 grounds, which are broader than Article 12 (2) (c).¹⁸¹ Therefore, the omission of the personal interview on this ground cannot be considered compatible with Article 12 (2) (c) APD. However, because the applicant has a meeting with the determining authority for the purpose of submitting the application before the accelerated procedure, this meeting is considered to constitute a personal interview for the purposes of the APD on the basis of Article 12 (2) (b).¹⁸²

Good practice with regard to national legislation

A number of Member States surveyed have recognized that it is not possible to ascertain whether any initial reasons given by the applicant for applying for international protection are irrelevant, inconsistent, contradictory, improbable and insufficient, or merely to delay or frustrate removal without first conducting a personal interview of the applicant. These Member States, therefore, do not have national legislation, regulations or administrative provisions which permit the omission of the personal interview on these grounds. These Member States are Belgium, Bulgaria, the Czech Republic, Finland, Germany, Italy, the Netherlands and Spain. Indeed, the determining authority in Germany (BAMF) has explicitly stated that the personal interview is seen as indispensable for the assessment of the reasons for the application and their relevance.

Similarly, in spite of Article 12 (2) (c) APD, a number of Member States have recognized that even if national legislation provides for the designation of third countries as safe countries of origin, in order to determine whether a particular country may be considered a safe country of origin for a particular applicant, an interview is essential to provide the applicant with an opportunity to rebut the presumption of safety.¹⁸³ These Member States, therefore, do not have national legislation, regulations or administrative provisions which permit the omission of the personal interview on the ground of a safe country of origin. These Member States are Belgium, Bulgaria,¹⁸⁴ the Czech Republic,¹⁸⁵ Finland, Germany,¹⁸⁶ Italy, the Netherlands,¹⁸⁷ Spain¹⁸⁸ and the UK.

¹⁸⁰ Article 12 (3) permits the omission of the personal interview when, “it is not reasonably practicable”.

¹⁸¹ See chapter on accelerated procedures for further details.

¹⁸² Administrative Court decisions (U 129/2008, 6 February 2008; U 728/2008, 9 April 2008). The Court said that the interview to submit the application is to be considered a personal interview where it is conducted in accordance with Articles 45 and 47 of the IPA, which means that the determining authority (inspector) has to raise concrete and detailed questions in order to clarify facts and circumstances of the application in order to assess whether grounds for international protection exist or not.

¹⁸³ Note that of the Member States surveyed, Belgium and Italy do not have legislation which permits the national designation of third countries as safe countries of origin.

¹⁸⁴ In practice, there is no current national list of designated safe countries of origin.

¹⁸⁵ The Czech Republic does not have legislation allowing for the designation of safe countries of origin but such national designation does exist (not adopted pursuant to a legislative provision) and this is a ground to determine an application as manifestly unfounded according to Section 16 ASA.

¹⁸⁶ Within the framework of the safe country of origin concept it is assumed that no persecution takes place in these countries, however, the applicant can rebut this assumption (Section 29a APA). A personal interview which provides for the opportunity of such a rebuttal is also conducted in these cases. The Member States of the European Union as well as Ghana and Senegal have been designated as safe countries of origin (Section 29a (2) APA).

¹⁸⁷ Note that the Netherlands does not have a national list of designated safe countries of origin in accordance with the APD. Instead, it may apply on a country-by-country basis an assumption of safety which the applicant must rebut. However, in practice, it is reported that the concept is rarely applied. See section 14 of this report for further information.

¹⁸⁸ According to Article 17 (4) New Asylum Law, the application for international protection is formalized in a personal interview. As such, all applicants are interviewed and there is no ground for omission of this interview.

State practice relating to the omission of interviews

UNHCR research shows that, in practice, regardless of national legislative provisions, a number of Member States offer a personal interview to all first-time adult applicants: Belgium,¹⁸⁹ Bulgaria,¹⁹⁰ the Czech Republic,¹⁹¹ France,¹⁹² Germany,¹⁹³ Italy,¹⁹⁴ the Netherlands,¹⁹⁵ and Spain. In Slovenia, every applicant has a meeting with the competent authority for the purpose of assisting him/her to complete his/her application and submit essential information.

In the UK, although Immigration Rule 339 NA permits an interview to be omitted in a wide range of situations, policy instructions set a higher standard.¹⁹⁶ The API on *Interviewing* states that the determining authority normally interviews applicants before refusing an asylum claim substantively.¹⁹⁷ In the 60 cases audited for this UNHCR research, personal interviews were omitted in four cases involving application of the Dublin II Regulation.¹⁹⁸

In Finland, personal interviews were conducted in 90 of the 115 case files audited. The cases in which personal interviews were not conducted were cases where the application was either implicitly or explicitly withdrawn, or were subsequent applications without new elements, Dublin cases or cases raising the issue of first country of asylum.

In Greece, in theory, the personal interview constitutes both the formalization of the application as well as the opportunity to gather evidence regarding the reasons for the application for international protection. In practice, the ‘omission of the personal interview’ means the omission of the question asked regarding the applicant’s reasons for leaving the country of origin.¹⁹⁹ The Head of the ARD in ADGPH informed that in ADA, where the overwhelming majority of applications are lodged, there is an oral guideline to ‘omit the interview’ in cases where the applicant claims to have left the country of origin exclusively on economic grounds and the country of origin does not have ‘disorderly’ conditions and/or is not among those countries that create refugees. Of the 52 cases that UNHCR ob-

¹⁸⁹ Unless there is no interpreter available.

¹⁹⁰ In 61 of the 62 case files audited, a personal interview was conducted. The exception was a case concerning a minor born in Bulgaria whose parents were beneficiaries of humanitarian status. The minor was granted humanitarian status.

¹⁹¹ Unless the applicant is an EU citizen or has already received international protection in another country or another EU Member State is responsible for the examination under the Dublin II Regulation.

¹⁹² According to the 2008 OFPRA activity report, 100% of first applicants were invited to a personal interview and there is now a policy of offering a personal interview to all new applicants. But the UNHCR audit of case files found that personal interviews were omitted where applications were considered to be manifestly unfounded (and in the case of subsequent applications).

¹⁹³ Exceptions apply in cases of first-time applicants under the following circumstances: applicants failing to appear at the interview without an adequate excuse (Section 25 (4) Sentence 4 APA / Section 25 (5) APA); application for a child under age 6 born in the Federal territory and the facts of the case have been sufficiently clarified (Section 24 (1) Sentence 4 APA); in case family asylum or refugee protection for families is granted to unmarried minors or spouses according to Section 26 (2), (4) APA; in practice in most cases of accompanied minors who are under 14 years old.

¹⁹⁴ Except if the applicant is already a recognized refugee and is able to avail him/herself of protection.

¹⁹⁵ An interview was conducted in all the case files audited for this research, but there are concerns about the quality of the interview in the 48 hour accelerated procedure.

¹⁹⁶ The API on *Interviewing*.

¹⁹⁷ API *Interviewing* November 2006 (rebranded December 2008).

¹⁹⁸ In 2008, 1,715 applications were rejected on safe third country grounds according to the provisional figures of the Home Office *Control of Immigration: Quarterly Statistical Summary*, United Kingdom October-December 2008. In our audit of case files, personal interviews did not take place in seven cases. This included four safe third country cases: DAF58, DAF 59, DAF 60, DAF 61. These were all “Dublin” cases. We were provided with four “dummy” files by the Third Country Unit; and three cases where the applicant did not turn up for interview and the application was therefore refused on non-compliance grounds: DAF 48, DAF50, DAF 51. It is the determining authority’s policy not to interview child asylum applicants under the age of 12. Stakeholders have confirmed that in cases involving children over the age of 12, interviews are often omitted.

¹⁹⁹ Note that UNHCR has very serious concerns regarding the quality of personal interviews in Greece. See section 6 of this report on the requirements of the personal interview.

served in Greece, in ten the ‘interview was omitted’ because the applicants, all Pakistani nationals, were deemed to have arrived in Greece for economic reasons.²⁰⁰

The fundamental problem with Article 12 (2) (c) APD, if applied, is perhaps highlighted by the following finding. UNHCR audited three case files in France which concerned applicants originating from Pakistan.²⁰¹ Their applications did not appear particularly short or less detailed, or less relevant or more stereotyped than other applications that were sampled. However, in each case the personal interview was omitted. This decision to omit the personal interview was taken on the basis of the information in the application form completed by each applicant in French and without the assistance of the determining authority. The case file contained a ‘*Proposal for a negative decision*’ which consisted of one or two pages. The application for international protection was rejected in all three cases on the grounds of a lack of personal and detailed written declarations by the applicants. Clearly, the omission of the personal interview denied the applicants the opportunity to provide detailed or further evidence to support their claims.

UNHCR’s audit of 60 case files in France revealed eight case files concerning subsequent applications.²⁰² All the subsequent applications in the sample were examined under the accelerated procedure and none of the applicants were invited to an interview. The ground for the omission of the interview was not mentioned in any of the case files. Moreover, three of the eight applicants had not been interviewed by OFPRA in the framework of the procedure to examine their first application for international protection, on the ground that their application was considered to be manifestly unfounded.²⁰³ This decision was taken on the basis of the application form completed by each applicant in French and without the assistance of the determining authority. As a result, these three applicants were never given the opportunity of a personal interview with the determining authority OFPRA. It should be noted that, according to OFPRA, it now seeks to give the opportunity of a personal interview to all first-time applicants.²⁰⁴

Recommendations²⁰⁵

Article 12 (2) (c) APD should be amended and the references to Articles 23 (4) (a) (irrelevant issues), 23 (4) (c) (safe country of origin), 23 (4) (g) (inconsistent, contradictory, improbable and insufficient representations) and 23 (4) (j) (merely to delay or frustrate removal) should be deleted.²⁰⁶

Those Member States which have national legislation permitting the omission of the personal interview on the grounds that the issues raised are irrelevant, inconsistent, contradictory, improbable, insufficient or merely to delay or frustrate removal, should delete this legislative provision.

²⁰⁰ IO1PAK1, IO2PAK2, IO3PAK3, IO6PAK5, IO15PAK6, IO16PAK7, IO21PAK8, IO32PAK10, IO35PAK11 and IO36PAK12.

²⁰¹ Case-File 11R (PK); Case-File 12R (PK); and Case-File 55 R (PK).

²⁰² Case-File 52R (AFG); Case-File 58R (DRC); Case-File 59R (SLK); Case-File 49R (SLK); Case-File 50R (PAK); Case-File 51R (RUS); Case-File 57R (TR); and Case-File 48R (TR).

²⁰³ Case-File 58R (DRC); Case-File 50R (PK); and Case-File 48R (TR).

²⁰⁴ Note OFPRA’s claim in the 2008 Activity Report that all first-time applicants are now invited to an interview.

²⁰⁵ This research project does not encompass the implementation of the Dublin II Regulation and therefore no recommendations are made here relating to the opportunity of a personal interview in the course of Dublin procedures. However, a recommendation is made with regard to the application of the safe third country concept and it is recognized that this may be applied in the context of Dublin procedures.

²⁰⁶ This is proposed in recast Article 13(2): APD Recast Proposal 2009.

In Member States which operate a separate procedure in which the applicability of the safe third country concept is assessed, the determining authority should ensure the applicant is given the opportunity of an interview in which s/he has the opportunity to rebut any presumption that a safe third country is safe in his/her particular circumstances. Where Member States assess the applicability of the safe third country concept in the course of the normal procedure, when it is considered that there is a safe third country, the applicant should be given the opportunity to rebut any presumption that a safe third country is safe in his/her particular circumstances in an interview with the determining authority.

During the preliminary examination of subsequent (repeat) applications, UNHCR considers it good practice for Member States to give applicants the opportunity for an interview, so that applicants can explain the facts and substantiate the evidence which is claimed to justify a new procedure.

Failure to appear for a personal interview

Article 12 (6) APD states that, irrespective of Article 20 (1) APD (on the implicit withdrawal or abandonment of an application), “Member States when deciding on the application for asylum, may take into account the fact that the applicant failed to appear for the personal interview, unless s/he had good reasons for the failure to appear”.

The consequences of a failure to appear for a personal interview, in terms of the procedural steps taken by the competent authorities and the type of decision which might ultimately be taken, are dealt with in section 7 of this report on the withdrawal or abandonment of applications.

With regard to Article 12 (6) APD, UNHCR’s research revealed some evidence indicating that a failure to appear, without good reason, will undermine the credibility of the applicant should the applicant reappear for a re-scheduled interview or contact the competent authorities.²⁰⁷ In Belgium, technical refusal decisions on the ground of a failure to appear for interview state that the behaviour of the applicant:

“shows a lack of cooperation /disinterest in the asylum procedure, which is incompatible with the existence, in your circumstances, of a real risk of persecution as defined in the Geneva Convention or a real risk of serious harm warranting subsidiary protection, and the duty of the asylum applicant to cooperate with the determining authority”.

In Bulgaria, two of the four interviewers interviewed for this research did not consider that a failure to appear for an interview should be a significant factor to be taken into account, whilst the other two interviewers considered that a failure to appear, without good reason, undermined the credibility of the applicant. In Finland, according to the determining authority, a failure to appear for an interview without good reason clearly affects the credibility of the applicant.²⁰⁸ In Germany, legislation explicitly states that the determining authority will make a decision “taking into account the foreigner’s failure to cooperate”.²⁰⁹ In Greece, according to the Head of ARD in ADGPH, a failure to appear for an interview weakens the asylum application. In Italy, some decisions state “the fact that the applicant has not attended the personal interview can also be interpreted as a lack of interest in recognition” (D/55/TP/F/ERI/N). In the Netherlands, legislation states that a failure to appear for an interview is a counter-indication for a positive decision (Article 31 (2) (b) Aliens Act).

²⁰⁷For example, stated in reports on Belgium, Finland, Greece, and the Netherlands.

²⁰⁸Interview conducted 24 February 2009.

²⁰⁹Section 25 (4) Sentence 4 APA with regard to applicants who are required to reside in a reception centre and Section 25 (5) APA with regard to applicants who are not required to reside in a reception centre.

UNHCR wishes to recall that a failure to appear for the personal interview does not necessarily indicate that an applicant does not qualify for refugee or subsidiary protection status. A person with protection needs may not appear for the personal interview for a variety of reasons unrelated to the merits of his/her application.²¹⁰

Recommendation

The assessment as to whether the applicant has a good reason for his/her non-appearance at the personal interview should take into consideration the subjective circumstances of the applicant, including, *inter alia*, his/her psychological state. It should not be treated as an indication, of itself, that an applicant does not qualify for refugee or subsidiary protection status.

²¹⁰ See section 7 of this report on the withdrawal or abandonment of applications for further information.

SECTION V: REQUIREMENTS FOR A PERSONAL INTERVIEW

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Introduction

The personal interview is an essential and crucial component of the procedure to determine whether a person is a refugee or qualifies for subsidiary protection status. It is UNHCR's position that all principal adult applicants must have the opportunity to present their application for international protection in a comprehensive manner in a personal interview with a qualified interviewer and, where necessary, a qualified interpreter.¹ In order to be effective, the personal interview must be conducted in a manner and in conditions which are conducive to and facilitate the most complete and accurate disclosure by the applicant of the reasons for the application for international protection.

Article 13 APD sets out the requirements for a personal interview.² In accordance with Article 13 (5) APD, these requirements also apply to any meeting conducted by a competent authority with the applicant, to assist him/her complete and submit his/her application with all essential information.³

As such, in Spain, at the time of UNHCR's research, the interview conducted in the context of the 'admissibility' procedure, where all applications for international protection were formally registered and examined, and after which a negative decision on the merits of the application could be taken, was considered to constitute such a meeting under the APD and in accordance with the requirements of Article 13 APD. Since then, the New Asylum Law entered into force in November 2009, which confirms that the formal registration of the application in the admissibility procedure will be done by means of a personal and individual interview.⁴ Similarly, in Slovenia, the application interview conducted by an inspector of the determining authority is also considered to constitute such a meeting, as consequent to this interview the application may be submitted to an accelerated procedure and the personal interview may be omitted.⁵

Some Member States conduct a preliminary or screening interview.⁶ The principal purpose of this is the registration of the application for international protection and the gathering of information and evidence relating to the profile of the applicant, i.e. his/her identity, age, family relationships, nationality, place(s) of previous residence, any previous applications for international protection, travel route details, and travel documents. In practice, preliminary interviews can have an important bearing on the examination of the application for international protection and any eventual preparation and conduct of the personal interview. Data from the preliminary interview may provide the determining authority with background information and a basis on which to prepare the personal interview. It may also provide an opportunity to identify applicants with special needs, enabling informed decisions relating to the scheduling of the personal interview, and the assignment of the case to an appropriately qualified and trained interviewer. Moreover, decisions on whether to channel an application into an accelerated

1 Executive Committee Conclusions No. 8 (XXVIII) of 1977 and 30 (XXXIV) of 1983. See also UNHCR Procedural Standards for Refugee Status Determination (RSD) under UNHCR's Mandate, 1 September 2005. See section of this report on the right to the opportunity of a personal interview for dependants and unaccompanied and separated children.

2 Council Directive 2005/85/EC of 1 December 2005.

3 Article 13 (5) APD states that "[T]his Article is also applicable to the meeting referred to in Article 12 (2) (b)." Article 12 (2) (b) APD stipulates that the personal interview may be omitted where "the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4 (2) of Directive 2004/83/EC" [the Qualification Directive]. Article 4 of the Qualification Directive relates to the assessment of facts and circumstances.

4 Article 17 (4) of Law 12/2009 regulating the Right to Asylum and to Subsidiary Protection – henceforth referred to as the 'New Asylum Law' – entered into force on 20 November 2009.

5 The Administrative Court of Slovenia has stated that the application interview is to be considered as a personal interview as long as the determining authority (inspector) raises concrete and detailed questions relating to the reasons for the application (U 129/2008, 6 February 2008, U 728/2008, 9 April 2008).

6 Belgium, Bulgaria, the Czech Republic, Finland, Italy, the Netherlands and the UK.

or regular procedure – where both procedures exist – may be taken on the basis of the information gathered in this preliminary interview.⁷ Furthermore, perceived contradictions, discrepancies or inconsistencies between the information provided in the preliminary interview and the personal interview must be addressed and assessed by the determining authority.

It is UNHCR’s opinion that all basic requirements should also apply to screening or preliminary interviews. For example, guarantees relating to the competence and qualification of the interviewer, the selection and provision of qualified interpreters, conditions of confidentiality and the non-presence of family members should apply to screening or preliminary interviews. Given the purpose and significance of the preliminary interview, UNHCR believes that such preliminary interviews should be subject to all of the guarantees set out in Article 13 APD.

With regard to subsequent applications, some Member States conduct an interview or hearing with the applicant in the framework of a preliminary examination of the application.⁸ The purpose of this interview or hearing is to examine whether the subsequent application raises new elements or findings which relate to the applicant’s qualification for refugee status or subsidiary protection status. Given the significance of the preliminary examination, UNHCR suggests that the guarantees set out in Article 13 APD should apply to any such interview or hearing.

Recommendation

Preliminary interviews, the principal purpose of which is the registration of the application for international protection and the gathering of information and evidence relating to the profile of the applicant, should also be subject to the guarantees set out in Article 13 APD. Similarly, interviews or hearings which are conducted in the framework of a preliminary examination of a subsequent (repeat) application should also be subject to all the guarantees of Article 13 APD. This should be clarified in the APD.

The presence of family members during the personal interview

It is UNHCR’s view that any preliminary interview and the personal interview with the principal applicant should not be conducted in the presence of family members unless there are compelling reasons to indicate otherwise.⁹ Similarly, it is UNHCR’s position that any interview of adult family members/dependants should be conducted separately and confidentially.¹⁰

Article 13 (1) APD provides that “*a personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present*”.

⁷ For example, in Finland, the Netherlands and the UK.

⁸ UNHCR observed three interviews relating to subsequent applications which take place in the accelerated procedure in Bulgaria. See section 15 of this report on subsequent applications for further information.

⁹ See Paragraph 4.3.13 of UNHCR Procedural Standards for RSD under UNHCR’s Mandate, 1 September 2005.

¹⁰ Paragraph 3.2.6 of UNHCR Procedural Standards for RSD under UNHCR’s Mandate, 1 September 2005. Some individuals who have experienced persecution or serious harm may not have disclosed the details of the harm to family members, and may be reluctant to initiate an independent application or have a personal interview out of concern that the information they provide will be heard by or shared with their family members. This may be particularly relevant for individuals who have experienced gender-related persecution or sexual violence

Only five Member States focused on in this research have fully and explicitly transposed or reflected Article 13 (1) APD in national legislation, regulations or administrative provisions. These are Germany,¹¹ Greece,¹² Italy,¹³ Spain¹⁴ and the UK.¹⁵ In two Member States, Article 13 (1) APD is not explicitly transposed or reflected, but there is an absence of legislation permitting the presence of adult family members during the personal interview. These are Bulgaria¹⁶ and the Czech Republic.¹⁷ However, in both these Member States, the norm that personal interviews are usually conducted without family members being present is not reflected in the case of accompanied children.¹⁸ In the case of accompanied children, the emphasis is reversed in national legislation, i.e. the interview is conducted with the presence of the parent(s) unless this is not considered to be in the best interests of the child. In Germany, this is the practice with regard to accompanied children.¹⁹ Similarly, in the UK, the rules regarding the presence of third parties during the personal interview differ for children. A parent, guardian, representative or other responsible adult who is independent of the Secretary of State must be present.²⁰

Notably, six Member States have not transposed Article 13 (1) APD. These are: Belgium, Finland, France, the Netherlands, and Slovenia.²¹ However, at the time of writing, both Belgium²² and Finland²³ were debating draft legislation which would transpose Article 13 (1) APD. The Netherlands has claimed, in its table of national legislation corresponding to the APD, that Article 13 (1) APD is transposed by Article 3:2 General Administrative Law Act, but the latter does not mention the presence of family members at interviews and UNHCR questions whether Article 13 (1) APD can be considered to be transposed by this particular piece of legislation.²⁴

Due to the time constraints on UNHCR's field research, and the more limited number of applications made involving family members, UNHCR was not able to specifically include the observation of personal interviews with family members in this research. Nevertheless, in Greece, in spite of the fact that the national law states that adult

11 Section 25 (6) APA: *"The interview shall not be open to the public. It may be attended by persons who show proof of their identity as representatives of the Federation, of a Land, the United Nations High Commissioner for Refugees or the Special Commissioner for Refugee Matters at the Council of Europe. The head of the Federal Office or his deputy may allow other persons to attend."* The Handbook *"Interview"* (one of the so-called "Quality Handbooks") explicitly advises that, as a rule, spouses should be interviewed separately (2.5.4 "Separate interviews of spouses", page 13). According to the BAMF, this rule is also followed in practice, unless otherwise explicitly requested by the applicant.

12 Article 10 (6) PD 90/2008.

13 Article 13 (1) d.lgs. 25/2008.

14 Article 17.4 of the New Asylum Law states: *"The application will be formalised by way of a personal interview which will always be individual. Exceptionally the presence of other family members may be required if this is considered absolutely necessary for the adequate formalisation of the application."*

15 Immigration Rule 339NB.

16 Article 63a of LAR does not provide for the presence of family members.

17 Article 9 ASA provides for exemption from general provisions regarding the oral hearing in the CAP. The Act on Asylum does not however regulate who may be present at the oral hearing.

18 Section 29 (4) CAP in the Czech Republic and Section III, Article 101 of the IRR in Bulgaria which foresees the presence of the parent of an accompanied minor and "guardian/custodian or another close person" except where this would be to the detriment of his/her interests.

19 According to information by the determining authority. However, it needs to be kept in mind that according to Section 12 APA, a person *"who is at least 16 years of age shall be capable of performing procedural acts in accordance with [the APA]"*. This also pertains to the personal interview. Therefore, in cases of minors who are 16 or 17 years of age, the parent(s) are permitted to be present during the interview, if requested by the minor (Information provided by the determining authority to UNHCR).

20 Immigration Rule 352.

21 The IPA does not legislate on the presence of family members during the personal interview. Article 181 of the AGAP provides that the authority may call persons to an interview besides the applicant who need to be heard.

22 At the time of writing, proposals for amendments to the Royal Decree of 11 July 2003 concerning the CGRA proposed that during the interview only the following persons should be present: the case manager, the applicant, if required the interpreter, the lawyer and one person of trust. The proposal also stipulates that in case the CGRA considers it necessary for an appropriate examination of the application, the presence of family members during the personal interview will be accepted.

23 Section 97 of Government Bill 86/2008.

24 According to the table of correspondence, Article 13 (1) APD is transposed in Article 3:2 General Administrative Law Act which states that when preparing a decision the administrative authority should gather the necessary information concerning the relevant facts and the interests to be weighed.

dependants should be interviewed separately,²⁵ UNHCR observed two personal interviews where family members were interviewed together.²⁶ In order to ensure compliance with Article 13 (1) APD, Member States should ensure that, whenever family members are interviewed together, this is necessary for an appropriate examination, and the reasons why it was considered necessary are recorded in the applicant's case-file.

Recommendations

Member States should ensure that the personal interview takes place without the presence of family members, unless the determining authority considers their presence necessary for an appropriate examination.

In cases where children (accompanied or separated) are interviewed, based on the Convention on the Rights of the Child, the child's best interests should be a primary consideration in deciding on the presence of family members, as well as guardians and/or legal representatives. The views of the child on this should be taken into account, in accordance with age and maturity.

Conditions of confidentiality

The confidentiality of the personal interview, including all procedures, is essential to creating an environment of security and trust for applicants.²⁷ Article 13 (2) APD requires that personal interviews “*take place under conditions which ensure appropriate confidentiality*”. This should be interpreted as applying both to the physical conditions in which personal interviews take place as well as to those persons who participate in or are present during the personal interview.²⁸ In other words, all persons who participate in or are present during the personal interview should be under a duty of confidentiality regarding any information learnt or obtained about the applicant and the application. Moreover, the personal interview should be conducted in physical conditions which ensure that persons who are extraneous to the personal interview do not acquire any information – audible, visible or material – concerning the applicant or the application.

Three Member States of focus in this research have transposed Article 13 (2) APD in national legislation, regulations or administrative provisions. These are Greece,²⁹ Italy³⁰ and the UK.³¹

Seven Member States of focus in this research have national legislation, regulations or administrative provisions on data protection and non-disclosure of information gathered in the course of the procedure. However, the leg-

25 Article 10 (1) PD 90/2008 “A separate personal interview shall be conducted for each dependant adult.” This has now been replaced by Article 3 PD 81/09 which states that “a separate personal interview shall be conducted for each dependant adult.”

26 Interview observation of a family from Iraq (IO48IRQ7), and interview observation of a family from Afghanistan (IO41AFG8).

27 See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1991, paragraph 200: “*it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed.*”

28 Note that Article 41 of the APD on confidentiality states that “*Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work.*” See section 8 of this report for further information regarding confidentiality in asylum procedures.

29 Article 10 (7) PD 90/2008, which states that the personal interview shall take place under conditions which ensure appropriate confidentiality.

30 Article 13 (1) d.lgs 25/2008 requires that the personal interview takes place in a closed session. This is interpreted as transposing Article 13 (2) APD. Article 14 (3) of the d.P.R. 303/2004 states that the determining authority must adopt appropriate measures to grant confidentiality of the data concerning the identity and the declaration of applicants. Article 37 d.lgs. 25/2008 states that “all persons involved in the procedures regulated by this decree have a duty of confidentiality concerning all information gathered during the procedures”.

31 Immigration Rule 339NB, which states that the interview must take place under conditions which ensure appropriate confidentiality.

isolation does not explicitly relate to the physical conditions in which personal interviews take place. These are: Bulgaria,³² the Czech Republic,³³ Finland,³⁴ Germany,³⁵ the Netherlands,³⁶ Slovenia³⁷ and Spain.³⁸

At the time of writing, three Member States had not transposed Article 13 (2) APD in national legislation, regulations or administrative provisions. These are: Belgium, France and Spain. However, in Belgium, at the time of writing, a draft regulation was being debated which would transpose Article 13 (2) APD.³⁹

UNHCR believes that applicants should be informed, at the earliest possible stage of the procedure, and in a language they understand, of the confidentiality of the asylum procedure, including the personal interview. Before initiating the personal interview, the interviewer should assure the applicant that all the information disclosed in the course of the interview will be treated as confidential by the competent authorities and all those present during the interview.⁴⁰ On the basis of UNHCR's observation of personal interviews and audit of the written records of personal interviews, in seven Member States of focus in this research, the interviewer routinely informed the applicant of the confidentiality of proceedings at the outset of the interview: the Czech Republic,⁴¹ Finland,⁴²

³² Article 65 LAR (Amended, SG No. 52/2007) requiring that information provided by the applicant during procedures is treated in compliance with the Law on Personal Data Protection; and Article 29 of the Statute of SAR prohibiting the determining authority' employees from disclosing official information or data concerning applicants for international protection.

³³ Section 19 ASA which refers to the protection of data gathered by the determining authority and Section 15 (3) CAP regarding the obligation of authorized officials to observe the duty of non-disclosure of facts learnt in the procedures. According to the Head of Asylum Procedure Unit, all employees of the determining authority must have security clearance; interview on 7 April 2009.

³⁴ Section 24 (24) in the *Laki viranomaisten toiminnan julkisuudesta* (Act on the Openness of Government Activities 621/1999, as in force 10.6.2009) states that all documents and information about refugees or asylum seekers are classified. Tapes of interviews are filed together with case files and marked with the date of disposal 5 years from the date of the interview. This was observed by UNHCR in the audited case files. The Act on Administrative Conduct 434/2003 provides that the legal adviser cannot without consent from the applicant reveal classified information that the applicant has entrusted to him/her or that s/he has obtained from other authorities. This also applies to interpreters and translators.

³⁵ The determining authority (BAMF) has a Commissioner for Data Protection (cf. Section 4f of the Federal Data Protection Act), for ensuring compliance with the Federal Data Protection Act and other provisions on data protection (for example Sections 7 and 8 APA; Sections 86 to 91e Residence Act).

³⁶ Article 2:5 General Administrative Law Act provides that anyone who is involved in the performance of duties of an administrative authority, who in the process gains access to information which s/he knows, or should reasonably infer, to be of a confidential nature, and who is not already subject to a duty of confidentiality by virtue of his office or profession or any statutory regulation, shall not disclose such information unless s/he is by statutory regulation obliged to do so or disclosure is necessary in consequence of his/her duties. This applies to institutions and persons belonging to these or working for these, involved by an administrative authority in the performance of its duties, and to institutions and persons belonging to these or working for these and performing a duty assigned to these by, or pursuant to an Act of Parliament. Also, C11/3.1 Aliens Circular states that the information provided by the applicant should be treated confidentially and no information should be given to third parties. The Data Protection Act (*Wet bescherming persoonsgegevens* (Wbp)) is also applicable.

³⁷ Article 47 (5) IPA states that "Prior to opening the personal interview, all those present shall be warned of the confidentiality of the procedure under this Act, and of the provisions of the act governing the protection of personal data." Also, Article 128 IPA and 130 IPA on data protection are relevant.

³⁸ Law 15/1999 for the Protection of Personal Data and Article 16.4 of the New Asylum Law states that "all information regarding the procedure, including the application itself will be confidential".

³⁹ The proposed amendments to the Royal Decree of 11 July 2003 concerning the CGRA stipulate that the personal interview shall take place under conditions which ensure appropriate confidentiality.

⁴⁰ The applicant should be assured that information will not be shared with the authorities of the country of origin or any other third parties without the applicant's express direction and consent. The scope and conditions of any disclosure of information to third parties should be explained.

⁴¹ This is a legal requirement under Section 19 (2) ASA whereby the determining authority must inform the applicant about its obligation to protect personal data. Interpreters are obliged to observe confidentiality under Act No. 36/1967 Coll. on experts and interpreters, and those who are appointed on an *ad hoc* basis are also reminded of their duty by signing a promise at the interview. UNHCR observed in some cases that the interpreter was reminded by the interviewer of the duty of confidentiality (Y002 and Y003).

⁴² This was carried out in all audited interviews, and prior to the interview, the interviewer requested all participants to confirm that they had understood their obligations in this respect.

France, Italy, the Netherlands, Slovenia⁴³ and the UK. This occurred only occasionally in the other Member States.⁴⁴ Notably, this did not occur in any of the interviews UNHCR observed in Germany,⁴⁵ nor at the ADA in Athens, Greece.⁴⁶

Member States should take all feasible steps to ensure that waiting areas and interview rooms preserve the right of applicants to confidentiality. In waiting areas, staff should avoid calling the names of applicants in the presence of other applicants and instead alternative methods should be used in these areas.⁴⁷ The interview room should be completely private so that the interview proceedings are not audible or visible to persons who are not involved in the interview. Interview rooms should have adequate partitioning walls, doors and windows. The doors should be shut, windows obscured as necessary and a notice prohibiting entry and disturbance should be placed on the door when the interview room is in use. Only those persons involved in the personal interview as permitted by law should be present. Similarly, where a video or telephone link is used during the personal interview, all necessary steps should be taken to preserve confidentiality.

On the basis of UNHCR's observation of interviews, UNHCR noted positively that six Member States ensured, in practice, that personal interviews were conducted under physical conditions which ensured confidentiality: the Czech Republic, Finland, France, Germany,⁴⁸ the Netherlands, and Slovenia. In these Member States, the personal interviews that UNHCR observed took place in private rooms with the door closed and no windows through which proceedings and those present could be observed. Furthermore, only those persons involved in the personal interview were present.

In Belgium, although the personal interviews UNHCR observed were held in private hearing rooms, some of the case managers left the doors of the hearing room open. The door was only closed when there was too much noise in the hall ways. Clearly, all interviewers should ensure that personal interviews take place in closed rooms.

In the UK, the personal interviews observed also took place in private closed rooms. However, two personal interviews were observed which took place in a room connected by an open door to an adjoining room where crèche workers looked after the applicant's children. The children came and went between the two rooms during the interviews, and it was possible for the crèche workers to hear the content of the interview.⁴⁹ Where childcare is provided, confidentiality issues need to be carefully considered.

UNHCR's main concerns with regards to the confidentiality of the conditions in which personal interviews take place, relate to the conduct of personal interviews in ADA in Greece, Spain and some of the Territorial Commis-

⁴³ This is a legal requirement. Article 47(5) IPA states that "*Prior to opening the personal interview, all those present shall be warned of the confidentiality of the procedure under this Act, and of the provisions of the act governing the protection of personal data.*" Also, this was observed in all interviews that UNHCR attended.

⁴⁴ In Belgium, some case managers did not do this in the interviews that UNHCR observed. In Bulgaria, this was observed in only some of the interview records audited in the case files but was not done in the interviews that UNHCR observed. In Spain, this was done in the interviews UNHCR observed, but note that this information was not always given before the conduct of the personal interview: case files no. 1101140, 1101141, and 1101142.

⁴⁵ Information on the confidentiality of the proceedings is not mentioned in the BAMF-leaflet for applicants "*Important Information*". Furthermore, according to information provided by the BAMF in a phone conversation on 16 November 2009, information on the confidentiality of the proceedings forms neither part of the standardized oral instructions given to the applicant at the outset of the personal interview nor is it contained in the so-called "control-sheet", which is signed by the applicant after the personal interview.

⁴⁶ This is where the majority of interviews in Greece are conducted, and UNHCR observed 49 interviews. However, it did occur at the 3 personal interviews UNHCR observed at SDAA and SDS.

⁴⁷ See paragraph 3.1.5 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

⁴⁸ Note that in the framework of this study, all interviews were observed in the BAMF branch office in Berlin.

⁴⁹ GLA int4.3.09; GLA int18.3.09.

sions (CTRPIs) in Italy. In these Member States, UNHCR observed interviews which took place in conditions which breached Article 13 (2) APD.

UNHCR observed 49 personal interviews at the ADA in Athens, Greece. It was clear that no steps were taken to ensure the confidential conditions of interviews. Three to four interviews were conducted simultaneously in one large noisy room measuring approximately 20 x 10 metres. The room contained the four desks of the interviewers and about 13 more desks belonging to other police officers responsible for fingerprinting, and interpreters of the Department. There were approximately 30 persons present in the room whilst interviews were being conducted.⁵⁰ People were moving around for fingerprinting and other procedural matters. On occasions, the noise was so loud that communication between the applicant and the interpreter or the interpreter and the interviewing police officer was difficult.

In two of the CTRPIs visited in Italy, UNHCR also witnessed the simultaneous conduct of three separate personal interviews in one large room.

In Spain, at the OAR in Madrid, application interviews are held in the Public Information Unit. They take place in what are called “cabins” which are open cubicles separated by panels which do not reach the ceiling and have no door. In the five interviews UNHCR observed, there was constant noise from outside the cabins and the interviews occurring in other cabins could be heard.⁵¹ At times, the noise levels were such that it was not possible to understand what the applicant or the interpreter was saying. Disruptions were also frequent in the form of telephone calls which were answered by the interviewers, and other persons constantly entered the cabin to ask the interviewer questions or to take something from the cabin. In Barcelona, the interviews observed were held in a through-room where a photocopying machine was located.⁵² The photocopying machine was constantly used by persons unrelated to the interview and people continually passed through the room. In Melilla, UNHCR observed a personal interview which was held in a room where – in addition to the persons involved in the interview (applicant, interviewer, interpreter and lawyer) – five other people were present dealing with other issues. The applicant had a cold and was aphonic (voice hindered by damage to vocal tract), and the interviewer had to ask the rest of the people in the room to be quiet because he could not hear the applicant.⁵³

Recommendations

Member States must ensure that all personal interviews are conducted in physical conditions that ensure confidentiality i.e. in private rooms, and in the presence of only those persons who are permitted by law to attend. The interview proceedings should not be audible or visible to persons who are not involved in the interview.

UNHCR recommends that Article 13 (2) APD be interpreted as applying to initial or screening interviews. Such interviews should also be conducted in conditions which ensure confidentiality.

UNHCR recommends that Article 13 (2) APD be interpreted as applying to any interview which is held in the context of a preliminary examination of a subsequent (repeat) application. Such interviews should also be conducted in conditions which ensure confidentiality.

⁵⁰ These were interviewing police officers, interpreters, interviewees and other police officers who were fingerprinting applicants following their interview.

⁵¹ Cases No. 0501001, 0401009, 0501010, 1001020 and 0201037.

⁵² Cases No. 0601142 and 0101143.

⁵³ Case No. 1101140.

Member States must ensure that all necessary steps are taken to ensure the confidentiality of proceedings, when a video or telephone link is used for the purpose of conducting the personal interview.

At the outset of the personal interview, the applicant should be assured of the confidentiality of the interview and all persons present should be reminded of the obligation to adhere to the principle of confidentiality.

Conditions conducive to an effective personal interview

Article 13 (3) APD requires Member States to take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner.⁵⁴ There are a number of steps which should be taken by Member States in order to ensure compliance with Article 13 (3) APD. This section begins with the two specific steps explicitly stated in Articles 13 (3) (a) and (b) APD, regarding the competence of the interviewer and the competence of interpreters.

Competence of interviewers

The personal interview is an essential part of the examination of the application for international protection. The task of the interviewer is hugely challenging and complicated, and s/he bears a heavy burden of responsibility. S/he has to conduct a personal interview which establishes, as far as possible, all the facts relevant to determining whether a person is a refugee or qualifies for subsidiary protection status according to law. This requires interviewers to have both specific knowledge and specific skills. This also requires an understanding of applicants' particular circumstances and any special needs.⁵⁵

Article 13 (3) (a) APD requires Member States to “ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so”. In this regard, Article 8 (2) (c) APD is also relevant as it requires that the personnel examining applications has the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

UNHCR is of the view that the above two mentioned provisions of the APD mean that, at a minimum, Member States should ensure that interviewers:⁵⁶

- have knowledge and understanding of the applicable national and international refugee and human rights law, and are able to apply these laws and legal principles to elicit and establish the relevant facts;
- have knowledge and understanding of any relevant administrative provisions and guidelines;
- have knowledge of and are able to use appropriate interviewing and questioning techniques to ascertain the facts relevant for the application of the law;
- are competent to recognize and take account of factors such as the applicant's age, gender, culture, education and any other vulnerabilities for the purposes of the interview;

⁵⁴ Article 13 (3) states that “Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner.”

⁵⁵ See paragraph 190 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1991.

⁵⁶ See paragraph 4.2.1 UNHCR Procedural Standards for RSD under UNHCR's Mandate, September 2005.

- are competent to research (if there are no specialised staff to do this), evaluate and apply objective country of origin information, and other information in order to elicit and establish the facts;
- are able to conduct interviews working effectively through interpreters and are able to manage the conduct of interpreters;
- have strong interpersonal skills and are able to establish conditions and conduct themselves in a way that is conducive to effective communication;
- are impartial and objective; and
- possess good written communication skills and are able to ensure a complete record of the personal interview.

Transposition of Article 13 (3) (a) APD

Four Member States of focus in this research have transposed or reflected Article 13 (3) (a) APD in their national legislation, regulations or administrative provisions. These are Belgium,⁵⁷ Greece⁵⁸ and Slovenia.⁵⁹ In Spain, Article 13 (3) (a) APD is reflected insofar as recent national legislation requires that the person who conducts the personal interview has received training and has acquired the necessary capacities to perform his/her duties.⁶⁰

In the Czech Republic, this provision is partially reflected to the extent that legislation requires that the interview is conducted by a qualified person.⁶¹ In Italy, Article 13 (3) (a) APD is also partially transposed to the extent that the law requires that one member of the interview panel is a UNHCR representative. And in the UK, Article 13 (3) (a) APD is partially transposed insofar as it requires interviewers to be knowledgeable about asylum and refugee law, but it does not require them to be competent regarding personal and cultural circumstances.⁶²

⁵⁷ Article 2 of the Royal Decree of 11 July 2003 concerning the CGRA states that the case managers should at least hold a degree that gives them access to functions with the state authorities at level 1 (university degree) and Article 3 of the Royal Decree of 11 July 2003 concerning the CGRA states that the case managers receive basic training as well as advanced training on the 1951 Convention, Human Rights Conventions and national legislation with regard to international protection. The case managers also receive training in interviewing asylum applicants, intercultural communication and basic needs of vulnerable asylum applicants. The proposal for amendments to the Royal Decree of 11 July 2003 concerning the CGRA states that the case managers at the Office of the CGRA should at least hold a degree that gives them access to functions with the state authorities at level A (university degree) and should have appropriate knowledge of the applicable standard regarding asylum cases and refugee law. The case manager in charge of the personal interview of the unaccompanied minor should have the necessary knowledge of the special needs of (unaccompanied) minor applicants.

⁵⁸ Article 10 (8) (a) PD 90/2008 states that “persons who conduct the interview must be sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability. It is particularly necessary that the above mentioned officials be trained concerning the special needs of women, children and victims of violence and torture.”

⁵⁹ Article 47 (6) of the IPA in connection with Article 7(2) of the IPA (basic principles): “(6) The official shall conduct the personal interview under conditions which allow the applicant to present the grounds for his/her applications in a comprehensive manner. The manner of conducting the personal interview shall be adapted to the applicant’s personality, and shall be such as to take account of personal and general circumstances, including the applicant’s cultural origin and eventual membership of vulnerable groups. (2) The procedure under this Act can be conducted only by officials with adequate knowledge in the field of asylum law.”

⁶⁰ The New Asylum Law foresees in its third additional provision that “the State Administration will seek that all public officers and other persons with responsibilities towards international protection applicants, refugees and subsidiary protection beneficiaries, have the adequate training. To this effect, training programmes will be developed to allow the public officers to acquire the necessary capacities to carry out their duties”.

⁶¹ Section 23 (4) ASA provides that “the interview with an applicant for granting international protection shall be conducted by a qualified person.”

⁶² Immigration Rule 339HA.

Five Member States of focus in this research have not transposed or reflected Article 13 (3) (a) APD in their national legislation, regulations or administrative provisions. These are Bulgaria, Finland,⁶³ France, Germany⁶⁴ and the Netherlands.⁶⁵

Recommendation

Member States must ensure that national legislation, regulations or administrative provisions require that interviews are conducted by qualified interviewers, who have knowledge of the relevant international and national laws, and have been trained to conduct interviews in the context of asylum procedures, and are competent to take into account the personal and general circumstances surrounding the application.

Qualifications and training of interviewers

In UNHCR's view, the recruitment and retention of highly qualified and skilled interviewers and decision-makers is essential for an effective procedure and sustainable first instance decisions.

UNHCR recommends that a university degree in a related field is the desirable minimum educational qualification for the recruitment of interviewers and decision-makers.⁶⁶ UNHCR also believes that **before carrying out personal interviews**, interviewers should receive comprehensive and specialist training which includes, as a minimum:

- International refugee and human rights law, and the applicable national laws, regulations and administrative provisions;
- Research on country of origin information (COI) (if there are no specialized staff to do this), evaluation and application of COI and other evidence;
- Identification of applicants with special needs;
- Interviewing and questioning techniques, including age, gender, cultural, educational and trauma sensitivity;
- Working effectively with and managing interpreters;
- Issues of confidentiality, impartiality, and objectivity;
- Creating conditions conducive to communication and appropriate conduct;
- Structuring the personal interview, establishing the relevant facts and the assessment of credibility.

UNHCR researchers asked the determining authorities in the Member States of focus whether any specific qualifications are required for recruitment to the role of interviewer and what initial training is planned for and provided

⁶³ The determining authority applies its own internal policy.

⁶⁴ The Asylum law does not contain rules in this regard. The determining authority has internal rules.

⁶⁵ According to the Government table of correspondence, Article 13 (3) APD is transposed in Article 3:2 General Administrative Law Act. However, this does not set out any requirement concerning the competence of the interviewer and simply states that when preparing a decision an administrative authority should gather the necessary information concerning the relevant facts and the interests to be weighed.

⁶⁶ Paragraph 4.2.1 UNHCR Procedural Standards for RSD under UNHCR's Mandate, September 2005.

to new recruits prior to them becoming operational and conducting personal interviews. The following table provides a summary of the information obtained:

	Qualifications required	Formal & compulsory specialist training curriculum	Duration of specialist training	Formal on-the-job mentoring	Other comments
Belgium	University degree ⁶⁷	√	3-4 weeks	5 months	Personnel are expected to work independently under supervision after 6 months.
Bulgaria	University degree	No	N/A	2 months in practice ⁶⁸	A recommendation has been made by the ASQAEM Project and accepted in principle to regulate training by legislation and provide for initial and regular training programmes.
Czech Republic	University degree	No	N/A	10 working days	After 10 days mentoring and observation, interviewer works independently under supervision.
Finland	University degree ⁶⁹	√	14 days	Information unavailable	<i>Ad hoc</i> training sessions are offered after the initial training phase.
France	University degree ⁷⁰	√	14 days	4-6 months	Duration of mentoring period is not pre-determined
Germany	University degree or degree in administrative matters of a university of applied science (“ <i>Fachhochschule</i> ”)	No	N/A ⁷¹	At least 3 months	Prerequisites for working as interviewer are firstly, the observation of interviews of more experienced staff, followed by the conduct of interviews under supervision and the confirmation by a supervisor that the person concerned has gained the relevant knowledge and capability.
Greece	Police officer grade	No	N/A	No	There is a period of 1-2 months during which new recruits observe more experienced officers. ⁷² <i>Ad hoc</i> courses are offered by external organisations.

⁶⁷ Refer to footnote 57.

⁶⁸ This is not a formal requirement.

⁶⁹ In practice, decision-makers are required to have a degree. Decision-makers conduct interviews. Decision-makers are also required to have a command of Finnish, Swedish and English and an ability to communicate in writing and orally. This information is based on an interview with the Immigration Services.

⁷⁰ Protection officers have also passed a competitive examination, “*concours*”.

⁷¹ There is special training for staff dealing with cases of: unaccompanied minors, victims of gender-specific persecution, trauma or torture (“*Sonderbeauftragte*”).

⁷² Interviews with S1, S3, S4 and S14.

	Qualifications required	Formal & compulsory specialist training curriculum	Duration of specialist training	Formal on-the-job mentoring	Other comments
Italy	Depends on interviewer ⁷³	No	N/A	No	Regular training courses are organised by the CNDA (IT) with input from UNHCR. New appointees to the Territorial Commissions are mentored by other members, including UNHCR.
Netherlands	Higher vocational education	√	70 days ⁷⁴	√	The training programme incorporates experience in the workplace. Personnel are expected to work independently after 2 years.
Slovenia	Higher vocational education	No	N/A	10 months ⁷⁵	Traineeship period.
Spain	Depends on interviewer ⁷⁶	No	N/A	√ ⁷⁷	Mentoring at OAR is basically the observation of experienced interviewers for a short period of time. Although there is no fixed time, personnel are expected to be operationally independent after 3 months.
UK	Depends on interviewer ⁷⁸	√	25 days ⁷⁹	1 month	After the training course and the one month on-the-job mentoring and supervision, personnel are expected to be operationally independent.

Most Member States of focus in this research do not require interviewers to hold a specific qualification in refugee and/or human rights law or to have relevant experience upon recruitment.⁸⁰ The minimum educational qualifica-

⁷³ The interviewing panel is composed of two senior officials of the Ministry of Interior and a representative of UNHCR who have a university degree, however, there is no specific academic qualification required of the other panel member who is a representative of the local administration.

⁷⁴ This relates to the KLC (national knowledge and learning centre) training programme in Utrecht and the figure is an estimate as the course is tailored to individual needs. Ter Apel and Zevenaar are also developing training programmes, mainly to encourage the self-learning capacity of personnel. In Zevenaar, the initial training period is one year.

⁷⁵ Trainee has to study the relevant national and international legislation and case law themselves during this period.

⁷⁶ Those at OAR doing the personal interview (meeting) to complete the application require a school diploma or equivalent vocational diploma. Admissibility and eligibility officials who conduct interviews at Madrid (Barajas) airport and in the regular procedure have a university degree. Outside Madrid, requirements relating to qualifications vary for other competent authorities who conduct interviews.

⁷⁷ At the OAR in Madrid, new personnel spend a short period observing more experienced colleagues. The staffs of aliens offices and border police who conduct interviews (meeting to assist applicant with completion of application) do not undertake any specific training prior to conducting interviews.

⁷⁸ There is a commitment to Higher Executive Officers (HEO) having a university degree or long service. In practice, Executive Officers (EO) can conduct interviews and make decisions under the general supervision of HEOs. Recruitment at EO level is dependent on personal experience and there are no minimum education requirements.

⁷⁹ It was 55 days during 2008 and this included a substantial element of self-study which has now been removed from the training period.

⁸⁰ Although in France, according to OFPRA, in practice most protection officers do possess this knowledge on recruitment.

tion required varies from a university degree of any discipline in some Member States to no minimum educational requirement.

In this context, given the role of the interviewer and the legal requirement that interviewers are knowledgeable with regard to a highly specialized area of law, and are competent to conduct interviews taking into account a number of factors, UNHCR is extremely concerned to note that three Member States provide no formal and compulsory specialist training for all interviewers and decision-makers upon recruitment. In Greece, Italy, and Spain,⁸¹ it was reported that there is no initial formal and compulsory training programme for new interviewers and decision-makers upon recruitment.

In Greece, in spite of national legislation implementing the APD, the necessary steps have not been taken to implement the law fully in practice. The police officers who were conducting the personal interviews during the period of this research were not required to have any knowledge of asylum and refugee law and the other relevant personal and general circumstances pertaining to the interview upon recruitment to the role of interviewer; and they did not acquire this knowledge and relevant skills through planned training upon recruitment and *prior* to conducting interviews. In order to ensure compliance with Article 13 (3) (a) and Article 8 (2) (c) APD, urgent steps must be taken to ensure that all interviewers are trained and acquire such knowledge and skills upon recruitment and *prior* to conducting interviews

In Italy, neither national law nor administrative provisions require the members of the CTRPIs, i.e. the interviewers, to have the requisite knowledge and skills to fulfil the requirements of the APD, although it is required that one member of the interviewing panel, which also assesses each individual case, is a representative of UNHCR who does have the requisite knowledge and skills to fulfil the requirements of the APD.⁸² The CNDA (IT), in cooperation with UNHCR, has organized training courses for interviewers over the last 18 months.⁸³ This has included one three-day training course for the members of the more recently-established CTRPIs. However, the provision of training would be immeasurably improved by the provision of a compulsory and extended training programme for all new members of the CTRPIs upon recruitment and prior to conducting personal interviews. It is essential that adequate steps are taken to ensure that all members of the CTRPIs acquire such knowledge and skills upon recruitment and *prior* to conducting interviews in order to ensure compliance with the APD.

In Spain, national law does not reflect the requirements of the APD in this regard and the personnel of the competent authorities conducting personal interviews outside Madrid are not required to have the relevant knowledge and skills. No steps have been taken to ensure that they acquire such knowledge and skills through planned training upon recruitment and *prior* to conducting interviews. It is essential that training is extended to all interviewers throughout Spain.

Only five Member States provide compulsory and formal training for newly recruited interviewers and decision-makers (Belgium, Finland, France, the Netherlands and the UK). In these Member States, newly recruited interviewers and decision-makers only become independently operational after a period of initial formal training followed

⁸¹ With regard to personnel conducting application interviews outside Madrid.

⁸² It should be noted that, as an organization which nominates a representative to be a member of the CTRPIs, UNHCR ensures that in fact all its representatives have the requisite knowledge and skills to conduct personal interviews and, in practice, its representatives seek to provide mentoring and guidance to other members of the CTRPIs.

⁸³ A two-day training course in February 2008; a three-day training course for new members in June 2008; a three-day training course for all members in March 2009, and a two-day training course on inclusion at one of the CTRPIs. It is our understanding that the feedback from these courses based on the evaluation by participants was positive.

by a period of mentoring. However, the duration of the formal training period varies from 14 days in one Member State to 70 days in another, and the duration of the period of mentoring varies widely too.

The remit of this research did not permit UNHCR to look in detail at the training programmes of these Member States nor the methodology applied. Only the determining authorities in France,⁸⁴ the Netherlands⁸⁵ and the UK were able to provide UNHCR with the outlines of their training programmes. The determining authorities in Belgium and Finland did not have an established uniform training programme for all interviewers which they could share with UNHCR.

In contrast, a number of determining authorities have not established bespoke formal training programmes for newly recruited interviewers and instead organize ‘training’ on a more *ad hoc* basis, often relying solely on mentoring by supervisors and on the job observation (Bulgaria, the Czech Republic,⁸⁶ Germany,⁸⁷ Slovenia and Spain).⁸⁸ The content and quality of such training will clearly vary, depending on the competence of the staff member who is mentoring.

UNHCR is concerned that there are serious shortcomings in the provision and quality of training in some Member States. The lack of training or the limited initial training provided in some Member States is insufficient to ensure that interviewers acquire the necessary skills and knowledge to fulfil this hugely challenging and complicated role, and must be improved. Good quality initial and continuous training is crucial to enhancing the quality of procedures and raising the quality of decisions across the EU.

Recommendations

UNHCR recommends that all Member States develop and deliver a compulsory specialized training programme for every newly recruited interviewer upon recruitment and prior to conducting personal interviews, in order to ensure compliance with Article 13 (3) (a) and Article 8 (2) (c) APD.

Interviewers should receive initial training which includes, as a minimum:

- International refugee and human rights law, and the applicable national laws, regulations and administrative provisions;
- Access to/research into country of origin information (COI), evaluation and application of COI and other evidence;
- Identification of applicants with special needs;
- Interviewing and questioning techniques, including age, gender, cultural, educational and trauma sensitivity;
- Working effectively with and managing interpreters;
- Issues of confidentiality, impartiality, and objectivity;
- Creating conditions conducive to communication and appropriate conduct;
- Structuring the personal interview, establishing the relevant facts and the assessment of credibility.

⁸⁴ According to a copy of the ‘model training programme for new recruits’ which was given to UNHCR, the subject matters cover: 1) the OFPRA and the asylum procedure; 2) Nationality case loads and activities of the Geographic Divisions of the OFPRA; 3) Support services such as the legal department, the information and documentation department, the human resources department, the interpretation department of OFPRA; 4) the CNDA.

⁸⁵ The training provided in the Netherlands is extensive, but uniformity of the training provision has not been achieved because there are a few training programmes.

⁸⁶ Interview with Head of Asylum Procedure Unit, the Czech Republic, 7 April 2009.

⁸⁷ The on-the-job training of at least three-months is compulsory and carried out under supervision of an experienced staff member.

⁸⁸ Only with regards to employees at OAR.

There should also be some form of external quality assurance for the training.

UNHCR recommends that there should be greater uniformity of the content of training delivered across the Member States. To this end, UNHCR suggests that the EU develop and adopt guidelines as regards training and qualification of interviewers. The European Asylum Curriculum, once finalized and translated, may provide a basis for the content and delivery of training.

UNHCR recommends that initial training programmes conclude with an objective assessment of competency and that only those persons who are assessed to be competent proceed to work as interviewers.

The initial training programme should be regularly reviewed and updated to take account of legal and policy developments.

UNHCR recommends that all determining authorities establish a programme of continuing training for interviewers in order to refresh skills and knowledge, and provide updates on recent developments.

Interviewers need to be updated on relevant international and national legislation and case-law and country of origin information. The determining authorities must ensure that they have systems in place to disseminate such information systematically and promptly to all interviewers.

Quality control and monitoring should be used as a means of identifying individual and collective training needs, and informing the ongoing training programme.

Mentoring and supervision are an integral part of training. All new interviewers should be subject to an established programme conducted by trained mentors.

Training for interviewing children

Personal interviews of children, as with all aspects of the asylum procedure, should be conducted in an age-appropriate manner taking into account the maturity and emotional development of the child and any other special needs. It is UNHCR's position that personal interviews of children – whether they are accompanied, unaccompanied or separated⁸⁹ – should, therefore, be carried out by an interviewer who has special training and knowledge regarding the psychological and emotional development and behaviour of children.⁹⁰

Article 17 (4) (a) APD provides that “*Member States shall ensure that if an **unaccompanied minor** has a personal interview on his/her application for asylum ... that interview is conducted by a person who has the necessary knowledge of the special needs of minors.*” Moreover, Article 13 (3) (a) APD requires that Member States shall ensure that the person who conducts the interview is sufficiently competent to take account of the “*personal ... circumstances surrounding the application, including the applicant’s ... vulnerability.*” Vulnerable applicants include children.

Member States, therefore, must ensure that the determining authorities conducting personal interviews have this specialized staffing capacity. Appropriate training, education and information should be provided to the person-

⁸⁹ Separated children are those separated from both parents, or from their previous legal or customary primary care giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members. Unaccompanied children are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

⁹⁰ Paragraph 4.3.7, UNHCR Procedural Standards for RSD under UNHCR's Mandate, September 2005 and UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997.

nel of the determining authority charged with conducting the personal interview of children. The training should include:⁹¹

- Relevant human rights norms, standards and principles, including the rights of the child;
- Understanding of the impact and consequences of persecution, serious harm and trauma on children;
- Understanding of the effect of the child's age and stage of development both at the time of the relevant facts and at the time of the personal interview on the child's recall of events and knowledge of conditions in the country of origin;
- Appropriate adult-child communication skills;
- Interview techniques that minimize trauma to the child while maximizing the quality of information received from the child;
- Skills to deal with children in a sensitive, understanding, constructive and reassuring manner; and
- Cross-cultural and age-related linguistic, religious, social and gender issues.

Only some determining authorities reported that they ensure that the personal interview of children is conducted by specially trained interviewers (Belgium,⁹² the Czech Republic,⁹³ Finland, Germany,⁹⁴ Netherlands⁹⁵ and the UK).⁹⁶ In both Finland and the Netherlands, there is a specialized unit of personnel who have been specifically trained to deal with applications by unaccompanied children.⁹⁷ In Germany also, specialized staff who are specially trained to interview unaccompanied minors work in different branch offices.⁹⁸ There are also specific guidelines for the interview of children in Finland,⁹⁹ Germany,¹⁰⁰ the Netherlands,¹⁰¹ and the UK.¹⁰² Moreover, in the UK, training has been under review and a centrally managed asylum team has been preparing specialized training on children for interviewers and decision makers. The module has been delivered in some regions as of October 2009.

It is of concern that in the other Member States of focus in this research, UNHCR was informed that interviewers are not specially trained to interview children, although some of the interviewers in some Member States may have received some limited training.¹⁰³ In order to ensure compliance with Article 13 (3) (a) and Article 17 (4)

⁹¹ Based on the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime adopted by the UN Economic and Social Council in 2005 (Res. 2005/20) which can also be applied to processes in the field of immigration and refugee law in accordance with paragraph 6.

⁹² There is a special coordinator in CGRA.

⁹³ According to information by the Head of Asylum Procedure Unit, interview of 7 April 2009 and e-mail response of 1 June 2009. UNHCR was not able to verify this information in the remit of this research.

⁹⁴ The so-called "*Sonderbeauftragte*" are explicitly trained to interview unaccompanied minors.

⁹⁵ C13/3.2 Aliens Circular stipulates that the interview of minors under the age of 12 should be conducted by a person who has received specialist training. However, note that the Netherlands has not transposed Article 17 (4) with regard to unaccompanied minors aged 13-18 as its administrative provisions only relate to unaccompanied minors under the age of 12.

⁹⁶ Immigration Rule 350, 351, 352, 352ZA and 352ZB.

⁹⁷ In the Netherlands, this is the AMA-unit based in Den Bosch. Personnel in this unit have received specialized one week training on top of the regular training programme.

⁹⁸ According to the Internal Guidelines for the Asylum Procedure, all interviews of unaccompanied minors shall be conducted by specialized staff ("*Sonderbeauftragte*"), irrespective of being under or over 16 years of age, as all these persons by law are minors, even though the latter group is able to perform procedural acts in the framework of the asylum procedure (Section 12 APA). (Internal Guidelines for the Asylum Procedure, under: Adjudicators with special tasks, "2. Additional remark for '*Sonderbeauftragte*', (2/3)). With regard to the practice concerning issues of unaccompanied minors, please refer to the findings of the ASQAEM Project (implemented in Germany mainly in 2009) which had a special focus on the asylum procedures for unaccompanied minors and separated children.

⁹⁹ Yksintulleiden alaikäisten turvapaikkahakijoiden haastatteluohjeistus, Ulkomaalaisvirasto 2001.

¹⁰⁰ According to information provided by the determining authority, special guidance is given with regard to the conduct of interviews of children, however, no specific guidelines were submitted to UNHCR for this research.

¹⁰¹ Protocol entitled '*Interviewing unaccompanied minors under the age of 12*'.

¹⁰² API on Processing Claims for Children, 7.3.2007 updated 22.5.2009.

¹⁰³ For example, in Bulgaria, stakeholders informed that some of the more experienced interviewers have received training on interviewing children. In France, the Africa division has had specific training. In Italy, a three-day training course for new members of the CTRPIs included a unit on vulnerable groups.

(a) APD, the determining authority must ensure that all interviews of children are conducted by personnel with specialist knowledge and training.

Recommendations

All determining authorities should ensure that there is specific training on interviewing children and that sufficient numbers of interviewers are available, of both genders, who are specially trained to conduct interviews of children.

Determining authorities must ensure that all interviews of children are conducted by interviewers who have been specially trained and have the necessary knowledge regarding the psychological and emotional development and behaviour of children.

The APD should be explicit in providing that all interviews of children – not just unaccompanied children – are conducted by a person who has the necessary knowledge of the special needs of children.

Training for interviewing persons with special needs

Member States should ensure that they have mechanisms in place to identify and assist, at the earliest possible stage of the asylum procedure, applicants who are vulnerable or have special needs. With regard to the personal interview, this is essential to ensure that any necessary referrals and assessments are carried out promptly in order to determine whether applicants are physically and mentally fit for the personal interview and to inform any decision regarding the scheduling of the personal interview. Moreover, early identification of applicants with special needs is crucial in order to assign responsibility for the conduct of the personal interview to an appropriate interviewer who has the requisite specialized knowledge, training and experience. As such, it is important that the personnel of the competent authorities that conduct registration procedures or preliminary/screening interviews are trained to identify and refer as necessary applicants who may have special needs; and that there are sufficient trained personnel who are designated and qualified to conduct the preliminary or screening interviews of applicants with special needs.

However, it should be acknowledged that for a number of reasons, including shame or lack of trust, applicants may be hesitant to disclose certain experiences immediately. This may be the case, amongst others, for persons who have suffered torture, rape or other forms of psychological, physical or sexual violence. Special needs resulting from such experiences may therefore go undiscovered at the early stage of the procedure. Later disclosure of such experiences should not be held against applicants, nor inhibit their access to any special support measures or necessary treatment.

Occasionally an applicant's special needs may not become apparent until the personal interview. Therefore, it is important to ensure that all personnel who conduct personal interviews are able to identify applicants who have special needs, and are able to take appropriate measures as necessary. Moreover, the determining authority should have designated interviewers who have the requisite specialized knowledge, training and experience to conduct the interview of applicants with special needs.

Article 13 (3) (a) APD requires Member States to ensure that the person who conducts the personal interview is sufficiently competent to take account of the applicant's vulnerability. This provision states that "*Member States shall ensure that the person who conducts the interview is sufficiently competent to take account of the personal or*

general circumstances surrounding the application, including the applicant's ... vulnerability, insofar as it is possible to do so". It is UNHCR's view that applicants who may be vulnerable include:¹⁰⁴

- Victims of torture, sexual violence and persons suffering post-traumatic stress disorder;
- Women with special needs;
- Children under the age of 18;¹⁰⁵
- Elderly applicants;
- Applicants with a disability; and
- Applicants with mental or physical health problems.

Member States must ensure that the competent authorities designate and train sufficient staff to conduct the interviews of vulnerable applicants and ensure that the interview of an applicant with special needs is conducted by a trained and qualified interviewer.

UNHCR was informed by the determining authorities in Belgium,¹⁰⁶ the Czech Republic,¹⁰⁷ Finland,¹⁰⁸ Italy,¹⁰⁹ Germany,¹¹⁰ the Netherlands¹¹¹ and the UK¹¹² that they provide specific training for interviewers. By contrast, UNHCR was informed that there is no compulsory specialist training on applicants with special needs provided in Bulgaria,¹¹³ France, Greece,¹¹⁴ Slovenia and Spain.¹¹⁵

Recommendations

In order to ensure compliance with Article 13 (3) (a) APD, Member States must ensure that training on the identification of applicants who may be vulnerable or who have special needs is included as part of a compulsory initial training programme for all interviewers and that existing interviewers receive appropriate training.

Member States must also ensure that a sufficient number of interviewers are specifically trained to conduct the interview of applicants with special needs.

¹⁰⁴ Paragraph 3.4.1 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

¹⁰⁵ See above.

¹⁰⁶ In Belgium, Article 4 of the Royal Decree of 11 July 2003 concerning the CGRA provides that the case manager should take into account the specific circumstances of the case.

¹⁰⁷ According to Head of Asylum Procedure Unit, interview of 7 April 2009. Although, it was noted that at the time of the UNHCR research, there was no specialized staff to deal with vulnerable applicants at the inland reception centre (Vys'ní Lhoty).

¹⁰⁸ Training on special needs is offered on a regular basis and on request by decision-makers/interviewers.

¹⁰⁹ The training courses organized by the National Commission each year since 2005 have included a session on the consequences of trauma and a specific training event on interviewing victims of torture and violence took place in spring 2009 with the participation of medical experts as trainers. Moreover, the National Commission has promoted and funded a project that provides for the creation and training of a network of experts in the public sector for the identification and certification of victims of trauma.

¹¹⁰ In addition to the specialized staff for unaccompanied children, there is specially trained staff for interviewing persons persecuted on grounds of gender as well as victims of torture and traumatized asylum-seekers. On its website, the determining authority states that this staff requires considerable sensitivity as well as psychological skills and needs special personal support (www.BAMF.de).

¹¹¹ The KLC does offer an optional training module on trauma. Newly recruited IND civil servants receive initial materials on traumatized persons and sometimes an expert may be invited to give a lecture. Later, interviewers can opt to participate in a follow-up course.

¹¹² Although UNHCR is not aware of any specific training relating to issues of gender.

¹¹³ Note that training on applicants with special needs has been provided in the past.

¹¹⁴ This is not in compliance with national legislation. Article 10 (8) (a) of PD 90/2008 sets out a provision which demands that police officers who conduct the asylum interview be trained on special needs of women, children and victims of violence and torture.

¹¹⁵ *Ad hoc* training may have been undertaken by some interviewers in Bulgaria, France and Italy. And in the Netherlands, there is an optional module as part of the training programme but there are no staff specially trained to deal with sexual violence.

Specialist knowledge of countries of origin and cultural factors

Article 13 (3) (a) APD also requires Member States to ensure that the person who conducts the interview is sufficiently competent to take account of the applicant's cultural origin.¹¹⁶ This is important not merely to help the interviewer understand the context in which any alleged persecution or serious harm was perpetrated, but also for understanding the applicant's background, as well as his/her demeanour and communication in the personal interview.

UNHCR has been informed that in a few Member States, personnel of the determining authorities who are responsible for the examination of the application specialize in particular countries and regions of origin. In Belgium, Finland and France,¹¹⁷ personnel are assigned to specific geographic units. As such, they receive specific training on the relevant countries of origin, and gain an in-depth familiarity with the relevant country of origin information which is periodically updated.¹¹⁸

In the Netherlands, interviewers do not specialize in particular countries or regions of origin, but UNHCR was informed by the determining authority (IND) that the KLC organizes so-called "theme-specific" days for example on regions of origin.

In Germany, UNHCR was informed by the determining authority that in practice, every adjudicator has specialist knowledge with regard to those countries s/he constantly deals with.¹¹⁹ This may lead to a specialization in a group of countries (for instance Ethiopia, Eritrea, and Somalia). Interviews of applicants originating from countries from which only a relatively small number of applicants originate, are conducted by a few branch offices only, in order to ensure specialist knowledge of these countries of origin.¹²⁰

However, in the other Member States of focus, training with regard to specific countries of origin and cultural factors appears to be limited or non-existent at the time of writing.¹²¹

¹¹⁶ "Member States shall ensure that a person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin".

¹¹⁷ With the exception of personnel who conduct interviews at the border.

¹¹⁸ Eligibility and admissibility officials who conduct personal interviews in the regular procedure in Spain are also assigned specific countries of origin. However, this is not the case for officials who conduct the application interviews or for the eligibility and admissibility officials who conduct the application interviews at Madrid Barajas airport.

¹¹⁹ The determining authority stated that the high quantity of applications does not allow for the specialization of adjudicators in one particular country. According to the BAMF, all adjudicators have thorough knowledge of the main countries of origin and almost all adjudicators conduct interviews of applicants from these countries. The lawyers consulted by UNHCR in the framework of this study, confirmed knowledge of the adjudicators on the respective countries of origin, however, all criticized the lack of sensitivity for cultural factors (X1, X2, and X3).

¹²⁰ However, concerns have been raised with regard to those persons who have registered with a specialized NGO as torture victims and therefore their applications are not further distributed to another branch office, but stay in the city where they have requested asylum, in order to ensure their medical treatment there. Thus, these persons might not be interviewed by a staff member with special knowledge with regard to his/her country of origin, but by someone who needs to acquire that knowledge.

¹²¹ In Bulgaria, according to the determining authority specialization by countries of origin has been in existence in the past; cultural factors were also included as part of different trainings. The practice was terminated in order to avoid any possible corruption, and in the Czech Republic following a decrease in the number of applicants, the previous staff specialization in particular countries of origin and specialized COI workshops have been suspended. Interviews with Employee A (18 February 2009), C (28 January 2009), D (22 December 2008), and E (13 February 2009).

Recommendations

In order to ensure compliance with Article 13 (3) (a) APD, Member States should ensure that the relevance of cultural factors for communication, including issues relating to the status of women, customs and education, and the demeanour of the applicant during the personal interview be an integral part of a compulsory initial training programme for all interviewers upon recruitment.

Member States should also offer ongoing training on specific countries and regions of origin through, for example, workshops and meetings for interviewers.

Code of conduct for interviewers

UNHCR recommends that the training of interviewers should be reinforced by a code of conduct by which all interviewers abide.

UNHCR has learnt that three Member States have such a code of conduct for interviewers (Finland,¹²² the Netherlands¹²³ and the UK).¹²⁴ In addition, the determining authority in Belgium, the CGRA, has a charter of values which applies to all employees and a CGRA working group has produced an internal working document on the preparation and strategy of the personal interview which provides guidance on the conduct of interviewers.¹²⁵ In Germany, the Handbook for Adjudicators on the conduct of the interview as well as the Internal Guidelines on the Asylum Procedure, contain guidance with a view to appropriate behaviour, including consideration of the personality of the applicant.¹²⁶ Behavioural rules also form part of the on-the-job training.¹²⁷

However, the remaining seven Member States of focus in this research do not have such a code (Bulgaria,¹²⁸ the Czech Republic,¹²⁹ France, Greece, Italy, Slovenia and Spain).¹³⁰

Recommendation

It is recommended that the EU develop a code of conduct by which interviewers in all Member States should abide.

¹²² An extensive guide which includes the role and conduct of the interviewer was published following a joint ERF funded project of the Refugee Advice Centre and the Immigration Services.

¹²³ *Gedragcode tolken en vertalers IND*, September 2002.

¹²⁴ The Protocol Governing the Conduct of Substantive Interviews and the Role of the Interviewing Officers, Representatives and their Interpreters.

¹²⁵ CGRA has a charter of values which mentions respect, integrity, impartiality, training, decisiveness, empathy, coherence, professionalism, responsibility, loyalty, cooperation, openness and clarity. The working document covers issues such as the need for respect, tolerance, neutrality, patience and how to create an atmosphere in which the applicant can speak freely, the need to interview rather than interrogate, setting aside one's prejudices and background etc., according to information from the Office of the CGRA (email from operational coordinator of the CGRA, 15 April 2009).

¹²⁶ There is also advice given on interviewing skills and questioning techniques (For example, Handbook for Adjudicators "*Interview*", 2.6.1 to 2.6.4, p. 15).

¹²⁷ Information submitted by the determining authority to UNHCR.

¹²⁸ A Code of Conduct for Interpreters was developed in November 2009, and discussed during a training session, and is in the process of adoption at the time of writing this report.

¹²⁹ According to interviewers and the head of the Asylum Procedure Unit, there is no code of conduct (interview of 7 April 2009).

¹³⁰ At the OAR, all personnel doing interviews reported to have had access to the "*Handbook on Good Practices for the formalization of asylum applications*". In Barcelona, UNHCR was informed that personnel had obtained it at a seminar about asylum and refuge that had taken place in the Bar Association in Barcelona. In Valencia and Melilla the personnel reported to have no information about the guide.

Competence of interpreters

The quality of interpretation clearly has a significant bearing on the effectiveness of the personal interview and the reliability of the oral evidence gathered. All applicants for international protection should receive, as necessary, the services of trained and competent interpreters who have competent language and interpreting skills, and conduct themselves in a professional manner.

Article 10 (1) (b) APD requires Member States to provide the applicant with the services of an interpreter “*when the determining authority calls upon the applicant to be interviewed as referred to in Articles 12 and 13 and appropriate communication cannot be ensured without such services.*” Article 13 (3) (b) APD further requires Member States to “*select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate.*”

UNHCR supports the requirement in the APD that applicants receive the services of an interpreter, whenever necessary, during the personal interview.¹³¹ UNHCR also supports the requirement that the interpreter must be able “*to ensure appropriate communication between the applicant and the person who conducts the interview*”. UNHCR is of the opinion that the term ‘appropriate’ should be understood to require that the interpreter competently understands and speaks languages which the interviewer and applicant can understand, and in which they are able to communicate. UNHCR has already noted its concern that the APD refers to a language which the applicant ‘*may reasonably be supposed to understand*’ and reiterates that the language used must be language which the applicant understands. This is a pre-requisite for a fair procedure and when it is not fulfilled, any evidence gathered in the course of the personal interview may be unreliable.¹³²

Moreover, UNHCR understands the clause ‘*appropriate communication*’ to also require that the interpreter:

- possesses competent interpreting skills, for instance, interprets accurately without addition or omission, uses the same grammatical person as the speaker, takes notes, etc.;
- is neutral in his/her interpretation;
- is impartial;
- does not provide any kind of supplementary sociological, anthropological or historical information as a contribution to the case for which s/he is interpreting, and does not comment on the applicant’s testimony; and
- does not provide procedural or legal advice to the applicant.

In addition, Member States should ensure that interpreters are respectful to all parties, adhere to the duty of confidentiality, and do not take on tasks that are unrelated to their role as interpreters as this could undermine the impartiality of the interpreter or the perception of impartiality.

¹³¹ Note that UNHCR also encourages Member States to ensure that applicants receive the services of an interpreter for submitting their case to the competent authorities whenever necessary, including during preliminary interviews and/or the written completion of an application form; and submission of any appeal.

¹³² UNHCR APD comments 2005.

Transposition of Article 13 (3) (b) APD

Seven Member States of focus in this research have transposed or reflected Article 13 (3) (b) APD in their national legislation, regulations or administrative provisions. These are Bulgaria,¹³³ the Czech Republic,¹³⁴ Greece,¹³⁵ Germany,¹³⁶ Italy,¹³⁷ Slovenia¹³⁸ and the UK.¹³⁹

Belgium has only partially reflected Article 13 (3) (b) in its national legislation¹⁴⁰ insofar as Belgian national legislation does not guarantee the services of an interpreter whenever necessary during the personal interview. Indeed, Article 20 (3) of the Royal Decree of 11 July 2003 concerning the CGRA permits the CGRA to decide on an application without a personal interview of the applicant, when there is no interpreter available who speaks a language understood by the applicant. This is not in line with Article 10 (1) (b) APD.

¹³³ Bulgaria has transposed the second sentence of Article 13 (3) (b) APD, Article 63a (6) LAR (New, SG No.52/2007): The interview shall be conducted in a language requested by the alien. If this is impossible the interview shall be conducted in a language that the alien may be expected to have command of. Choosing an interpreter who is able to ensure appropriate communication (Article 13 (3) (b) first sentence, APD) is not explicitly provided for. According to the Statute of the SAR, the organization and coordination of interpretation and translation is dealt with on the level of the RRC (Article 23 (2), item 6).

¹³⁴ Section 22 ASA: “(1) A participant in the proceedings is entitled to use his/her mother tongue or a language in which s/he is able to communicate during the course of the proceedings. For this purpose, the Ministry shall provide the participant, at no charge, with an interpreter for the entire course of the proceedings. (2) A participant in the proceedings is entitled to engage an interpreter of his/her own choice at the participant’s own costs.” Section 4 of Act No. 36/1967 on experts and interpreters states that an interpreter may be appointed if “(b) s/he has necessary knowledge and experience from the field in which s/he is to function, especially one who has completed specialized training on the expert activities in case there is such training available for the field in which s/he is to function”.

¹³⁵ Article 10 (8) (b) PD 90/2008 states that “an interpreter shall be selected who is able to ensure appropriate communication **in a language understood by the applicant**”.

¹³⁶ Even though an interpreter has to be present during the interview it is questionable whether the respective provision sufficiently mirrors that “appropriate communication” has to be ensured. Section 17 (1) APA: “If the foreigner does not have sufficient command of the German language, an interpreter, translator or other language mediator shall be provided at the hearing as standard procedure in order to translate into the foreigner’s native language or another language which the foreigner can reasonably be supposed to understand and in which he can communicate orally.” (Translation provided on the website of the MOI: <http://www.en.bmi.bund.de>). The Higher Administrative court in Baden-Wuerttemberg referred to the last part of the provision when confirming its compatibility with Article 13 (3) (b) APD (A 9 S 666/09, decision of 25 March 2009.)

¹³⁷ Article 10 (4) of the d.lgs. 25/2008, which states that “during all steps of the procedure related to the presentation and the examination of the application, if necessary, the applicant is granted the assistance of an interpreter of his/her language or a language he/she knows”; the same principle is stated in Article 14 (2) of the d.P.R. 303/2004.

¹³⁸ Article 11(5) of the IPA (selection of interpreters) in connection with Article 10(1,2) of the IPA (right to an interpreter): “(5) Priority in selection shall be given to interpreters who: have a broad general education, in particular in the field of anthropology, culture, political science, and sociology, and also are familiar with the actual political situation and culture in the state of the language which is the subject of interpretation; know the corresponding translations of professional terms which are used in procedures for obtaining international protection.” “(1) If the applicant does not understand the official language of the procedure, he/she shall be allowed to follow the procedure and participate in it in a language he/she can understand. The competent authority shall thus ensure the applicant follows the procedure through an interpreter. (2) The applicant shall be provided with the interpreter upon receipt of the application, at a personal interview, in other justified cases, and by the decision of the competent authority when this would be required for the understanding of the procedure by the applicant.” This provision ensures the right to interpretation in a language the applicant understands, which exceeds the standard on requirements for a personal interview regarding language set in the APD.

¹³⁹ Immigration Rule 339ND.

¹⁴⁰ Articles 20 and 21 of the Royal Decree of 11 July 2003 concerning the CGRA. Furthermore, Article 15 of the Royal Decree requires the case manager to always verify whether the applicant and the interpreter understand each other. The proposal for amendments to the Royal Decree of 11 July 2003 concerning the CGRA provides for a new article with regard to the interpreter present at the personal interview. The proposal stipulates that if the interpreter establishes that there is a conflict of interest between him/her and the asylum applicant, the interpreter should inform the case manager. The case manager should examine whether there is indeed a conflict of interest and, if necessary, appoints a new interpreter at the Office of the CGRA who speaks the appropriate language. If a new interpreter cannot be appointed right away, a new date should be set for the personal interview.

Four Member States focused on in this research have not transposed, or reflected Article 13 (3) (b) APD in their national legislation, regulations or administrative provisions. These are Finland, France,¹⁴¹ the Netherlands¹⁴² and Spain.¹⁴³

Recommendations

Member States should have national legislation, regulations or administrative provisions which require that applicants receive the services of a qualified interpreter whenever the competent authority calls upon the applicant to communicate with the authority and appropriate communication cannot be ensured without such services. This should include any initial or screening interview and the personal interview. The APD should be amended to this effect.

Article 13 (3) (b) APD should be amended to require that communication take place in a language which the applicant understands and in which s/he is able to communicate.

Availability of interpreters

The competent authorities need to have access to a sufficient number of interpreters who cover the main languages spoken and understood by applicants for international protection.¹⁴⁴

In some Member States, the determining authority recruits its own interpreters on a freelance basis (Belgium, Bulgaria, Germany, the Netherlands and the UK). In Belgium, the database of the interpreter services of the determining authority (CGRA) contains 150 to 200 interpreters, representing about 80 different languages and dialects. About 80 to 100 interpreters work on a regular basis for the CGRA. The interpreters work for the CGRA on a self-employed basis and are paid for work undertaken, i.e. both interpreting and the translation of documents. This approach is also taken in Germany, where according to information submitted by the determining authority to UNHCR, approximately 400 languages and dialects are covered by a pool of self-employed interpreters. In the Netherlands, the determining authority (IND) has a register (called GAAS) of approximately 700 freelance interpreters covering about 130 languages and strives to use interpreters on the register whenever possible.¹⁴⁵ Similarly, in the UK the determining authority has a Central Interpreters Unit which has a register of freelance interpreters.

Some Member States use service-providers or agencies to provide interpreters and translation services, often following a tender procedure: the Czech Republic, Finland,¹⁴⁶ France, Italy and Slovenia. In the Czech Republic, the

¹⁴¹ Article R.723-1-1 al.1 *Ceseda* states that “*The third paragraph of Article R.213-2 [i.e. interpreter paid by the State] is applicable to the interview mentioned under the first paragraph of Article L.723-3 [i.e. personal interview by the OFPRA].*” However, there is no explicit legislation regarding the competence of the interpreter or the languages in which the interviews should be conducted.

¹⁴² In the table of correspondence, the Netherlands claims that Article 13 (3) APD has been transposed in Article 3:2 General Administrative Law Act but the latter does not contain any reference to the selection of interpreters or competence of interpreters. It states that when preparing a decision, the administrative authority should gather the necessary information concerning the relevant facts and interests to be weighed.

¹⁴³ Article 8 (4) ALR provides that “*applicants for asylum who are inside Spanish territory have the right to an interpreter and legal assistance during the formalization of their application and throughout the entire procedure*”. However, there is no legal provision with regard to the competence of the interpreter or the languages in which interviews can be conducted.

¹⁴⁴ Note that the competent authorities also need to take steps to identify both male and female interpreters so that, as far as possible, there is the capacity to conduct gender-sensitive interviews. See below for further information.

¹⁴⁵ According to the Dutch Interpreters and Translators Centre (*Tolken en Vertaalcentrum Nederland, TVcN*), the IND sometimes uses its services. All interpreters working for TVcN are registered in the quality register for interpreters. Legal Aid makes standard use of the services of TVcN.

¹⁴⁶ If the agencies are unable to provide an interpreter for a particular language, the determining authority will attempt to identify someone to undertake interpretation. This was the case in interview 9 which UNHCR observed, where the leader of a home for unaccompanied minors was used as an interpreter for Swahili as no other interpreter was available in southern Finland.

agency selected following a tender procedure provides interpretation and translation services in approximately 43 languages, and also in other languages in cooperation with other external agencies.¹⁴⁷ In France, according to the 2008 OFPRA Activity Report, 96 languages are offered and 450 professional interpreters are hired through 10 companies selected under the tender procedure; and in Italy, the Interpreter and Translators Consortium (ITC), which was also selected through a tender procedure, offers the services of 320 interpreters covering 88 languages.

Spain uses a mixed approach, employing a few interpreters which are supplemented by interpreters from a service provider.¹⁴⁸

In Greece, the ADA in Athens employs 16 interpreters who cover 11 languages.¹⁴⁹ But there is a severe shortage of interpreters in Police Directorates outside Athens.

A number of Member States face shortages of interpreters in particular languages or in particular regional locations. Some Member States have addressed this challenge by using interpreters via video conference. For example, in Finland, most interpreters are located in Helsinki. Access to interpreters in the two offices located near the Finnish border with Russia is very difficult.¹⁵⁰ Thus, many of the interviews conducted in these offices are interpreted via video link from Helsinki. Moreover, in the border procedure in France, all interviews between non-French speaking applicants and OFPRA Protection Officers are conducted with an interpreter on the telephone.

In Bulgaria, the determining authority is also faced with a shortage of interpreters in particular languages. At the time of UNHCR's research, the determining authority, SAR, had an agreement with the determining authority in the Netherlands (IND) to use their interpreting services for particular languages via a video-conference call. This required double-interpretation via English, i.e. the interpreter in the Netherlands spoke the applicant's language and English, and there was an interpreter in the RRC Sofia who spoke English and Bulgarian.¹⁵¹ This form of cooperation and interpretation has been successfully piloted in the Interpreters' Pool Project of the General Directors' Immigration Services Conference (GDISC) which involved 12 Member States, three of which donated the services of experienced and qualified interpreters, and nine of which were beneficiary states.¹⁵² The aim of the project was to support Member States facing a lack of interpreters by giving them access to a pool of interpreters in three donor Member States by using videoconferencing equipment. Although relay interpretation is time-consuming and the use of electronic devices and technology can cause anxiety for some applicants, it was considered by the project's participating states that the benefits, in terms of accessing the services of experienced and qualified interpreters, outweighed these concerns, and that the execution had been effective.¹⁵³

¹⁴⁷ Interview of 7 April 2009 with Head of Asylum Procedure Unit. Information was also provided to UNHCR Prague that the Czech Republic takes part in the Interpreters' Pool Project, the goal of which is to have a Europe-wide pool of interpreters which may be accessed on demand by European countries, when suitable interpreter cannot be found in-country.

¹⁴⁸ The determining authority, OAR, employs two interpreters. It is expected that a third interpreter will join the staff in the coming months. The Provincial Police Department in Melilla employs three interpreters and additionally OAR uses an agency hired by the Ministry of Interior to supplement its staff.

¹⁴⁹ According to ADA officials, the languages covered in the Department are the following: English, French, Urdu, Bangla, Russian, Georgian, Arabic, Farsi, Hindi, Punjabi and Kurdish.

¹⁵⁰ There are two offices in Lappeenranta and Kuhmo. At the time of UNHCR's research, two further offices were to be opened in Imatra and Oulu in May 2009.

¹⁵¹ This was only available at the RRC-Sofia in Bulgaria. UNHCR observed interview 4 conducted by video from Tamil to English to Bulgarian and *vice-versa*. At the time of writing, it was not clear if this arrangement could be continued due to a shortage of funding.

¹⁵² GDISC Interpreters' Pool Project was funded by ARGO in 2008. Its project implementation phase ended on 31 December 2008.

¹⁵³ GDISC Interpreters Pool – Final Evaluation Meeting, Sofia, 20-21 November 2008.

A particular challenge arises in Belgium. In accordance with Article 51/4 of the 1980 Aliens' Act, the examination of the asylum application is in either Dutch or French.¹⁵⁴ Due to logistical reasons, or due to the fact that for some languages, no interpreter is available who can translate into Dutch, personal interviews in the 'Dutch procedure' are conducted in the language of the applicant and either French or English. Although the interpreter translates into English or French, the case manager will have to write the report of the interview in Dutch. However, due to the translations (from one of the languages the applicant speaks, possibly not the preferred language, to English or French, and not the mother tongue of the case manager), important elements in the applicants' statements may be missed or lost. Moreover, not all lawyers speak French very well, which can make it difficult for a lawyer to fully understand what is said during the interview and check the report of the personal interview with his/her own notes. This might have an effect on the lawyers' ability to present and defend his/her clients' rights. Lawyers interviewed by UNHCR thought this to be especially problematic.

Recommendation

States should seek to ensure that they have sufficient qualified interpreters of both sexes for all the main languages of applicants. In the absence of a qualified and trained interpreter who speaks the language of the applicant, determining authorities should seek to establish agreements with other determining authorities whereby interpreters in other EU Member States are used via video link. The European Asylum Support Office could have a facilitative role to play in this regard.¹⁵⁵

Qualifications of interpreters

Within the scope of this research, UNHCR was not able to establish comparatively the qualifications required of interpreters by Member States, as some states use outside service providers, and the time constraints for this research did not allow UNHCR to interview these service providers. However, UNHCR notes that the Czech Republic¹⁵⁶ has national legislation which requires interpreters to have undertaken training whenever possible; and the Czech Republic and Slovenia¹⁵⁷ have national legislation requiring interpreters to have experience of interpreting. Whereas, in France, for example, the qualifications and skills required of interpreters are part of the contract with the service provider, and in the Netherlands, an agency under the responsibility of the Ministry of Justice is tasked with ensuring that interpreters on the register have the necessary skills.¹⁵⁸ However, in a number of Member

¹⁵⁴ Article 51/4 of the Aliens Act (*Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, M.B., 31 décembre 1980, p. 14584). «In accordance with Article 51/4 of the Alien's Act, the examination of the asylum applicant is either in Dutch or French.»

¹⁵⁵ The 6th GDISC conference on 28 October 2009 noted that the Interpreters' Pool Project should be transferred to the European Asylum Support Office.

¹⁵⁶ According to Section 4 of Act No. 36/1957 Coll. on Experts and Interpreters, an interpreter may be appointed if: "a) s/he is a Czech citizen, b) s/he has necessary knowledge and experience from the field (language) in which s/he is to function, especially one who has completed specialized training on the expert (interpreter) activities, in case there is such training available for the field (language) in which s/he is to function; c) has such personal abilities that allow for presumption that s/he can do the expert (interpreter) activities properly; d) agrees with his/her appointment." [Precondition a) can be pardoned].

¹⁵⁷ Art. 11(5) IPA. In Article 11 (3) IPA there is a list of requirements which interpreters must fulfil including evidence of a command of Slovene and the other language and evidence of previous experience of interpreting and knowledge of the corresponding translations of professional terms which are used in international protection procedures. Also, national legislation gives priority to interpreters who have a broad general education, in particular in the field of anthropology, culture, political science, and sociology, and is also familiar with the actual political situation and culture in the state of the language which is the subject of interpretation; and knows the corresponding translations of professional terms which are used in procedures for obtaining international protection.

¹⁵⁸ *Bureau beëdigde tolken en vertalers (BTV)*, www.bureaubtv.nl.

States, it was reported that no specific professional qualifications are required for interpreters (Belgium, Bulgaria, Finland,¹⁵⁹ Germany,¹⁶⁰ Greece and Italy).

It is worth noting that in some Member States, the determining authority reported that they do take steps to try to ensure the impartiality and neutrality of interpreters. For example, in Belgium, prospective interpreters are interviewed by the CGRA; and during the interview their background is checked, and a security check is carried out by the Belgian security services. Anyone who is found to have been politically active in their country of origin is rejected on the grounds that they may not be able to maintain neutrality and objectivity.¹⁶¹

However, UNHCR is concerned to note that there is no official procedure for the recruitment of interpreters in Greece, nor any job description setting out minimum qualifications. UNHCR was informed that in ADA, in Athens, prospective interpreters submit a *Curriculum Vitae* and are recruited without any interview to assess their suitability for the job.¹⁶² Moreover, the Asylum and Security Departments outside Athens confront severe shortages of interpreters and reportedly use any available interpreter who can understand applicant's language.¹⁶³

Recommendation

Competent authorities should, as a matter of good practice, aim to use professionally trained and qualified interpreters. Where this is not possible, the authorities should ensure that interpreters have at least adequate interpreting skills. These include:

- a competent command of the relevant languages;
- the ability to accurately and faithfully interpret what is said by the interviewer and applicant without omission, addition, comment, summarizing or embellishing;
- the need to use the same grammatical person as the speaker;
- note-taking skills; and
- gender, age and cultural sensitivity in interpretation.

Training for interpreters

Interpreters should receive appropriate training before interpreting personal interviews in the asylum procedure.¹⁶⁴ In order to perform their task effectively, professionally and ethically, interpreters must be aware of the purpose of their work in relation to the mandate of the determining authority, the international protection framework and the purpose of the personal interview specifically. Interpreting personal interviews requires knowledge of the terminology that is most frequently and commonly used in personal interviews.

¹⁵⁹ In practice, the determining authority in Finland strives to use only interpreters with official degrees in translation but this is not always possible with regard to the rarer languages.

¹⁶⁰ Asylum law does not contain any requirements in this regard. The determining authority informed UNHCR that in practice, it seeks to use interpreters with an official degree; however, this is not always possible, especially with regard to rarer languages. According to stakeholder X2, the low payment for translation services seems to be a problem in this regard. This was confirmed by an interpreter (INTX).

¹⁶¹ In Finland, Section 10 (2) of the *Ulkomaalaislaki* (Aliens' Act, 301/2004, as in force 24.4.2009) states that interpreters or translators used by the authorities may not be persons that have connections to the person or matter concerned in a manner that would jeopardize the reliability of the interpreter or translator or the safety of the person concerned. In Slovenia, Art. 11 (3) IPA requires that interpreters are not performing interpreting services for a diplomatic or consular mission.

¹⁶² Interview with interpreter in ADA (S5)

¹⁶³ Interview with S6 and S14.

¹⁶⁴ See '*Interpreting in a Refugee Context – Self-study Module 3*', UNHCR, 1 January 2009. This UNHCR self-study module is designed to familiarize interpreters with the principles and techniques of interpretation and assist UNHCR staff and partners in the field who frequently use the services of interpreters, in designing and conducting their own training sessions.

Moreover, interpreters should receive guidance on the need for impartiality and neutrality in their role, and the duty of confidentiality. Training should also cover all relevant aspects of professional conduct including the need to be respectful, refrain from providing advice on the case or procedures to the interviewer or applicant, and not take on tasks that are unrelated to the role of an interpreter.

Across the 12 Member States of focus in this research, the provision of training for interpreters is, at best limited, and in many cases non-existent.

In a significant number of the Member States of focus in this research, the determining authorities do not organize any training for interpreters.¹⁶⁵ In Finland, steps are being taken to address the deficit in training. Following a joint ERF funded project involving the Immigration Services and the NGO Refugee Advice Centre, an extensive guide which includes guidance on the role and conduct of interpreters has been published. Training for interpreters, on the basis of these guidelines, was planned to commence in autumn 2009.

Exceptionally, in Belgium, interpreters who interpret personal interviews with unaccompanied children receive the same training as case managers conducting the interviews with unaccompanied children; and for other interpreters, voluntary training sessions are offered by the CGRA. Moreover, the CGRA is currently working with its best interpreters on a list of essential refugee terms and accurate translations. In the Czech Republic, the service-provider provides interpreters with a dictionary of basic terms used in the asylum procedure.¹⁶⁶

Some initiatives have also been taken in Bulgaria¹⁶⁷ France, Italy and Spain. It should be noted that in France, the service providers do offer specific training sessions for interpreters, and the determining authority OFPRA has informed UNHCR that it plans to participate in some of the training sessions organized by these service providers in the future.¹⁶⁸ In Italy, the service provider, in cooperation with UNHCR and the CTRPIs, also recently organized training sessions for interpreters in 2008 and February 2009. 80 interpreters working in the different CTRPIs across Italy participated in the latter training session. Finally, in Spain in 2008, the Ministry of Interior, on the initiative of OAR's Interpreters Service, organized a one day training course for the interpreters of the service provider. More recently, UNHCR together with the Bulgarian Helsinki Committee held a training session for interpreters in Bulgaria.¹⁶⁹

Recommendations

UNHCR recommends that all Member States develop and deliver a training programme for interpreters engaged in the asylum procedure. Interpreters should receive specific training on interpreting personal interviews in the asylum procedure, and recruitment should be conditional upon completion of training. Training should cover a code of conduct for interpreters and include:

- the framework of international protection and the purpose of the personal interview;
- the importance of faithfully interpreting what is said by the interviewer and applicant;
- impartiality, neutrality, objectivity, and confidentiality;

¹⁶⁵ Bulgaria, the Czech Republic, Finland, Germany, Greece, the Netherlands, and Slovenia. No information for the UK. The determining authority in Germany reported that a new attempt will be undertaken to train interpreters, since more and more translating services are offered to the BAMF. According to the BAMF, former attempts to provide training have failed as the time allocated for the training meant unpaid working time for the interpreter.

¹⁶⁶ According to the Head of Asylum Procedures, interview of 7 April 2009.

¹⁶⁷ In Bulgaria, UNHCR organized training for interpreters in 2003 and 2006 covering the need for faithful interpretation, impartiality, gender, age and cultural sensitivity and obligations of confidentiality.

¹⁶⁸ Interview with the Head of Interpretation Service of OFPRA.

¹⁶⁹ 27 November 2009.

- the role and conduct of the interpreter in the personal interview; and
- gender, age and cultural sensitivity in interpretation.

With regard to the personal interview of children, Member States should engage to the extent possible interpreters who have specific training on interpreting for children.

Member States should produce a glossary of essential and frequently used terminology in the main languages of applicants for international protection.

EU guidelines should be developed, potentially under the auspices of the EASO, which set out the minimum desirable qualifications and minimum training required for interpreters in the asylum procedure.

Conduct of interpreters in practice

UNHCR's research revealed widespread misconduct involving interpreters in personal interviews, and serious shortcomings in the ability of interviewers to work effectively with or manage the conduct of interpreters. During the observation of interviews, UNHCR researchers witnessed the following malpractices by interpreters:

- The interpreter omitted to interpret some of the applicant's statements. For example, in Greece, in three interviews observed, the interpreter did not interpret some of the applicant's answers.¹⁷⁰
- The interpreter extensively modified the statements of the applicant by summarizing, paraphrasing or only interpreting the conclusions of the answers given by the applicant, instead of providing a faithful interpretation. For example, in Greece, in at least 12 interviews observed, there was no *verbatim* interpretation of the applicants' statements and replies. The interpreter simply gave the conclusion of the applicants' statements.¹⁷¹ This also occurred in some of the interviews observed in Italy,¹⁷² and in interviews observed in Bulgaria,¹⁷³ and Slovenia.
- The interpreter added his/her own comments or personal observations. For example, in an interview observed in the Czech Republic, the interpreter added comments such as: "*Should I ask him whether he is all right in the head?*" or "*This seems quite strange...*" or in translating he added the word "*allegedly...*" (*allegedly, he went to a feast...*).¹⁷⁴ Also, UNHCR observed an interpreter in Greece who made personal comments on the situation in Afghanistan and the problems between different ethnic groups.¹⁷⁵
- The interpreter did not use direct speech i.e. first person (I) and second person (you) but instead interpreted in the third person (s/he).¹⁷⁶
- The interpreter did not adopt a position of neutrality but was instead hostile towards the applicant.¹⁷⁷

¹⁷⁰ IO13IRQ2, IO12AFG2, and IO33IRAQ4. All these interviews were conducted at the ADA in Athens and involved two different interpreters.

¹⁷¹ IO4NIG1, IO7NIG2, IO8NIG3, IO9SOM1, IO26GHA1, IO27GHA2, IO28SOM2, IO29NIG4, IO34ETH1, IO46SLK2, IO47SLK2, and IO49GHA3 (interviews in English and French [IO8NIG3]). All these examples were in ADA and involved the same interpreter.

¹⁷² Witnessed in the personal interviews audited I/03/M/NIG, I/04/F/NIG, I/05/F/ERI, I/08/M/NIG, I/09/M/IND, I/10/M/GHA, I/11/M/CDA, I/12/M/NIG, I/13/F/CAM, I/18/F/ERI, I/19/M/ERI, and I/20/M/ERI.

¹⁷³ Interviews 3, 4 and 5.

¹⁷⁴ Note that the interviewer tried to stop the interpreter from making such comments and asked him to merely interpret, but the interpreter still then added a few more comments (Yoo1). Also, in Bulgaria, two interviews were observed in which the interpreter made inappropriate comments in Bulgarian: interviews 1 and 4. Furthermore, in Greece, UNHCR observed an interpreter make personal comments and adopt a sarcastic attitude towards the applicant because the latter was illiterate: IO39AFG9. In Germany, UNHCR attended an interview (HR 12) during which the interpreter commented on the statements made by the applicants, and was not stopped by the interviewer. In another interview, the interpreter's role was not limited to just translating what had been said (HR9).

¹⁷⁵ IO51AFG9.

¹⁷⁶ This was the case in most interviews observed in the RRC in Sofia, and occurred in some interviews observed in Germany.

¹⁷⁷ For example, in two interviews observed in Spain, the interpreter opposed the applicant instead of adopting a neutral attitude. This was the case in an interview observed in Melilla (Case No. 1101140) and in case No. 0501010.

- The interpreter took over the role of the interviewer and asked the applicant questions. For example, in the Czech Republic, UNHCR witnessed an interview where the interviewer only asked three questions, but extended communication took place between the interpreter and the applicant during which approximately 12 questions were asked by the interpreter and answered by the applicant (Yo10).¹⁷⁸ And in Italy and Spain, UNHCR observed interviews where the interpreter gathered all the initial bio-data from the applicant.¹⁷⁹
- The interpreter took over the role of the interviewer and explained aspects of the procedure¹⁸⁰ or answered questions posed by the applicant regarding the procedure without interpreting the questions for the interviewer to answer.¹⁸¹
- The interpreter took over the role of the applicant and answered the interviewer's question which was directed to the applicant.¹⁸²
- In ADA in Greece UNHCR observed that in several cases, without guidance from the interviewer, the interpreter advised applicants and instructed them as to how to complete the application form.¹⁸³ For example, UNHCR witnessed an interpreter instruct the applicant to write on the application form that she came to Greece "for a better life".¹⁸⁴
- The interviewer and the interpreter exchanged comments in an aside,¹⁸⁵ or the interpreter and the applicant exchanged comments that were not interpreted for the interviewer.¹⁸⁶
- The interpreter undertook or was asked to undertake tasks beyond their duties. For example, in Spain, UNHCR observed interviews in which the interpreter was asked to call the applicant in, or bring tissues or water.¹⁸⁷

All these malpractices would be in breach of any professional code of conduct for interpreters and are not in line with Article 13 (2) (b) APD insofar as these practices thwart appropriate communication between the applicant and the interviewer. UNHCR is also concerned by the inability of a significant number of interviewers to manage interpreters effectively.

The determining authorities of only four Member States of focus in this research have a code of conduct for interpreters involved in procedures for international protection. These are Belgium, Finland,¹⁸⁸ the Netherlands,¹⁸⁹ and the UK.¹⁹⁰ However, in Italy, the service provider has its own code of conduct, and in the Czech Republic, interpret-

¹⁷⁸ There were further examples of interpreters posing questions in Bulgaria (interviews 3 and 5), Finland (in all interviews observed) and the Czech Republic (Yo05 and Yo08).

¹⁷⁹ Cases of initial application interviews nr. 0501001 and 0501010.

¹⁸⁰ In some interviews in Germany (for example, HR 9 and HR 13) information on the interview given at its outset was solely given by the interpreter and not by the adjudicator. However, UNHCR has been informed by the determining authorities that this problem has been tackled by instructing the adjudicators to give the initial instructions and explanations themselves, in order not to cause any misunderstandings on the role of the interpreter.

¹⁸¹ In one interview observed in the Czech Republic, the applicant was informed by the interpreter, not by the interviewer, of the fact that no copies could be made from the case files (Yo07). Slovenia: Case No. 1-2009. In Bulgaria and France, at the end of the interview, interpreters were observed to informally provide information about the procedure and reception conditions to applicants.

¹⁸² The interpreter stated the date on which the applicant arrived in response to the question "On what date did you arrive in Greece?" (IO30PAK9). Germany: HR 8: The interpreter started to answer the questions instead of asking the applicant. However, the interviewer intervened and insisted on the translation.

¹⁸³ This observation is further confirmed by the GCR and UNHCR report on interviews during the first instance procedure (GCR & UNHCR; 2008).
¹⁸⁴ IO37RUS.

¹⁸⁵ Observed in interviews in Bulgaria and Germany, and in an interview in France.

¹⁸⁶ Observed in interviews in Finland. Such instances have also been reported by one of the consulted lawyers (X1) in Germany.

¹⁸⁷ In Spain, it was observed that interpreters often assume tasks outside the scope of their responsibilities either because they are asked to do so by the interviewer or because they assume these tasks on their own initiative (cases of initial application interviews No. 0501001 and 0501010).

¹⁸⁸ A recent guide published, following an ERF joint project of the Refugee Advice Centre and the Immigration Services which took place in 2008, covers the role and conduct of interpreters and will provide the basis for forthcoming training of interpreters.

¹⁸⁹ IND Code of Conduct: *Gedragcode tolken en vertalers IND*, September 2002.

¹⁹⁰ Home Office Interpreters' Code of Conduct. Although in its 4th Quality Initiative report the UNHCR noted an apparent lack of awareness amongst interviewers of this code and recommended that its standards and procedures be given greater prominence, UNHCR 4th QI report paragraph 2.3.79. In Bulgaria, UNHCR was requested to develop ethical rules for interpreters at an ASQAEM project conference in June 2009.

ers who are not ‘appointed interpreters’ by law, sign a ‘promise of expert/interpreter’ which does set out certain obligations of confidentiality, impartiality and the need for faithful interpretation. Similarly, in Germany, interpreters are bound by contract to provide precise translations and to keep information obtained confidential.¹⁹¹

It may not be a coincidence that most of the incidences of misconduct by interpreters which were witnessed by UNHCR occurred in those Member States where the determining authority had not yet developed a code of conduct for interpreters.

Example of code of conduct for interpreters (Belgium)

- The interpreter should translate completely (without any omissions, additions or modifications), faithfully and objectively;
- The interpreter should regularly update his knowledge and expertise;
- The interpreter should take notes;
- interpreters should use first (I) and second (you) personal singulars;
- interpreter should speak clearly and comprehensibly;
- interpreter may convey through intonation the emotions and intentions of the parties;
- interpreter should only accept assignments for which s/he has the required skills;
- The interpreter must adopt a position of objectivity, neutrality and independence;
- The interpreter must undergo a security check;
- The interpreter should present him/herself as neutral;
- The interpreter is bound by confidentiality;
- The interpreter should refrain from any comments;
- The interpreter should accept that the case manager is conducting the interview and that s/he should not try to interfere;
- The interpreter should never stay alone with the applicant;
- The interpreter should never try to prevent or solve any problems, frictions or conflicts between the applicant and lawyer/legal guardian;
- The interpreter should immediately inform the CGRA of any conflict of interest;
- The interpreter should inform the case manager if the applicant speaks another language or dialect than indicated by the applicant (even if the interpreter is able to interpret this language or dialect);
- The interpreter should switch off his/her mobile phone;
- The interpreter should have a neat appearance;
- The interpreter should, under no circumstances, avail him/herself of his/her position to receive gifts or compensation;
- The interpreter is acquainted with the rules and legal provisions governing his/her profession;
- The interpreter should present him/herself in due time and has a right to a break of 15 minutes after one hour and a half; and
- The interpreter receives the agreed compensation for his/her assignments.

Interpreters who do not abide by the CGRA’s professional code of conduct will not be called upon in the future.

¹⁹¹ Moreover, interpreters are obliged to refrain from deploying subcontractors who have not been explicitly authorized, and must declare that neither they themselves nor one of their family members are currently conducting an asylum procedure. They also have to confirm that their service for the BAMF does not contravene contractual agreements with other parties, that they observe secrecy with regard to their remuneration, that they do not have a criminal record and that no criminal proceedings with regard to their person are conducted (Information provided by the BAMF).

Recommendations

A code of conduct for interpreters involved in procedures on international protection would go some way to address some of the critical deficiencies evidenced. An EU code of conduct for interpreters would ensure greater uniformity of conduct across Member States.

Interviewers and applicants should be provided with a way to report the poor conduct of an interpreter so that remedial action can be taken.

Working effectively with and managing interpreters should be a compulsory part of the training programme for all interviewers.

Effective communication – the language skills of interpreters

Obviously, interpreters who are engaged to provide interpretation in personal interviews should have competent language skills. Before commencing the personal interview, the interviewer should confirm that the applicant and the interpreter understand each other, and that the applicant is comfortable with the interpretation arrangement. The applicant should be advised that s/he should raise any perceived problem with the interpretation during the personal interview if and when it arises.¹⁹²

UNHCR observed personal interviews where it noted with approval that, to the extent that UNHCR's researchers were able to assess, on the whole interpreters had at least an adequate command of the languages of the interview and were able to ensure an appropriate level of communication between the interviewer and the applicant.¹⁹³

However, UNHCR did observe a few interviews in which the interpreters did not possess an adequate command of the language of the Member State. For example, in two interviews observed in Spain, the interpreters had a poor command of Spanish¹⁹⁴ and in an interview observed in Slovenia, the interpreter had a poor command of Slovene.¹⁹⁵

UNHCR also observed interpreters who did not possess an adequate command of the language of the applicant. UNHCR's researchers noted the following:

“One interpreter’s command of English was so poor that he could not use the past tense and a number of inconsistencies arose during the course of the interview.”¹⁹⁶

¹⁹² UNHCR checklist for the opening of the RSD interview, UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

¹⁹³ Bulgaria, the Czech Republic, Finland, France, Germany, the Netherlands and the UK. However, it should be noted that UNHCR in Germany attended one interview where the command of the foreign language was so poor, that the legal representative had to intervene (HR 7). Moreover, it should not go unmentioned that one of the lawyers consulted by UNHCR explicitly raised concerns with regard to the poor language skills of interpreters, and the negative effects for the persons concerned. It was reported that interviews often have to be postponed because the interpreter did not have a sufficient command of one of the languages (X1). Lawyer X2 stated that while the interpreting skills of some of the interpreters were very good, they were insufficient with regard to others. In addition, it has been cast into doubt whether applicants without legal representation would dare to ask for another interpreter, or in fact be able to achieve a change of interpreter, even though applicants are explicitly asked in the framework of the interview whether they understand the interpreter (X1).

¹⁹⁴ No. 0602125 and 0601142.

¹⁹⁵ Case No. 2-2009

¹⁹⁶ In the Czech Republic, (Yoo6).

*“The interpreter’s poor command of the language chosen by the applicant was an issue in two interviews observed. In the first one, this weakness was compensated for by the applicant’s basic knowledge of Spanish but in the second interview, although the applicant tried to raise the issue during the interview, no measure was taken to resolve the problem.”*¹⁹⁷

During nine interviews observed in Greece, the interpreter was not able to ensure appropriate communication because of the interpreter’s poor language and interpreting skills.¹⁹⁸ In two cases of Nigerian applicants, the interpreter’s command of English was very poor and provoked several misunderstandings during the interview.¹⁹⁹ In five interviews, the applicants were Pashto speakers while the interpreter spoke Farsi and only poor Pashto.²⁰⁰ Similarly, there was poor interpretation and misunderstandings from French to Greek during the interview of an applicant who was Nigerian, and from Kurdish to Greek for an Iraqi applicant. In both two cases, the interpreter blamed the applicants by saying *“they speak a strange dialect”*.²⁰¹

Recommendations

UNHCR recommends guidelines for interviewers on working with interpreters. Such guidelines should require interviewers to confirm, before initiating the personal interview, that the applicant and the interpreter understand each other, and that the applicant is comfortable with the interpretation arrangement. Such guidelines should also make it clear that a personal interview should be stopped if it becomes apparent that there are problems of communication.

Interviewers and applicants should be provided with a way to report the poor language and interpreting skills of an interpreter so that remedial action can be taken.

The languages of the personal interview

Article 13 (3) (b) APD states that *“The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate.”*

It is UNHCR’s view that the personal interview must be conducted in a language which the applicant understands and in which s/he is able to communicate, recognizing that there is a difference between the basic ability to make oneself understood in a language and the ability to present a complex account which may include difficult or painful events in that language. Evidence which is gathered in the context of an interview conducted in a language which the applicant is only “reasonably supposed to understand” is unreliable and renders the procedure unfair.

UNHCR notes with approval that some Member States have set a more appropriate national legislative standard. For example, in Italy, Article 10 (4) of the d.lgs. 25/2008 states that:

¹⁹⁷ In Spain, Case No. 0502102 and Case No. 0501010. In an interview observed in Spain, the applicant was Nigerian and had a university degree. When he stated that he was having problems understanding the interpreter, the interviewer replied that that was not possible as the applicant should have a good level of English since he had a university degree. The applicant replied that he did have good proficiency in English. However, no action was taken in response and the interview continued with the same interpreter.

¹⁹⁸ 52 interviews were observed in total.

¹⁹⁹ IO7NIG2 and IO29NIG4.

²⁰⁰ IO11AFG1, IO11AFG2, IO17AFG3, IO19AFG4 and IO20AFG5.

²⁰¹ IO8NIG3 and IO43IRQ6.

*“during all steps of the procedure related to the presentation and examination of the application, if necessary, the applicant is granted the assistance of an interpreter of his/her language or a language s/he knows”.*²⁰²

Similarly, in Greece, Article 10 (8) (a) of PD 90/2008 stipulates that the selected interpreter for the interview should be able to communicate in a language understood by the applicant and in Belgium, national legislation requires that interpretation is in principle into a language spoken by the applicant.²⁰³ Article 15 of the Royal Decree of 11 July 2003 concerning the CGRA requires the case manager to verify whether the applicant and the interpreter understand each other.

Based on UNHCR’s observation of interviews and audit of interview records, UNHCR is pleased to note that most interviews were conducted in the mother-tongue of the applicant or in another language chosen by the applicant.²⁰⁴

However, UNHCR notes that personal interviews are sometimes conducted in a language which the determining authority supposes the applicant understands, and not the language requested by the applicant. This may not always be a language which the applicant actually understands. The problem appears to stem from a shortage of interpreters in particular languages in some Member States. For example, in France, Chechen applicants are interviewed in Russian, and Roma from the Balkans are very rarely interviewed in the Romany language.²⁰⁵

In 11 out of the 49 interviews observed by UNHCR in ADA in Athens, applicants were obliged to speak in a language that they did not request and/or hardly knew.²⁰⁶ For example, in a number of cases the applicant claimed to be from Afghanistan and to speak Pashto but the interview was conducted in Farsi.²⁰⁷ In one interview observed, more than 30 minutes were spent repeating questions and requesting clarifications because the applicant could not understand many of the questions and the interviewer could not understand many of the applicant’s responses.²⁰⁸

²⁰² The same principle is stated in Article 14 (2) of the d.P.R. 303/2004. The audit of case files confirmed that all the personal interviews were conducted in the language preferred by the applicant. In one case of an applicant from Nigeria, the language used by the interpreter was English, while the language in which the applicant spoke was Pidgin English: I/o8/M/NIG.

²⁰³ Article 20 (1) of the Royal Decree of 11 July 2003 concerning the CGRA.

²⁰⁴ For example, in the Czech Republic, all the interviews observed were in the language chosen by the applicant. In one interview, the interpreter was changed to find an interpreter who could speak the mother-tongue of the applicant. However, in one case, the determining authority sought to contact a recognized Somali refugee to interpret. In Finland, in 9 out of 10 interviews observed the language used was the mother tongue of the applicant. In the one interview where the language was different, the language was, nevertheless, chosen by the applicant. In Slovenia, UNHCR observed two interviews that were not conducted in the preferred mother-tongue language of the applicant. However, the interpreter used a technique called ‘double-check’ to check interpretation was correct. In Case No. 4-2009, the applicant’s mother-tongue was Kasem but the interview was conducted in English, and in Case No. 8-2009, the mother-tongue of the applicant was Pashto, but the interview was conducted in Farsi.

²⁰⁵ Case 10, the applicant’s mother-tongue was Romani but the Protection Officer considered that s/he should understand Serbo-Croatian and this was the language of the interview. In Germany, the interviews attended by UNHCR were conducted in the mother-tongue or the language chosen by the applicant. However, according to statements given by consulted lawyers, applicants may face the problem that the interpreter appointed by the BAMF is one who speaks the official language of the country of origin, but not the language/dialect the applicant actually speaks and understands best (X1, X2). This finding is confirmed insofar as in one of the interviews attended by UNHCR (HR6), the interpreter was told before the interview to interpret into Russian, even though the applicant was of Chechen origin. The interview, nevertheless, took place in Chechen and German, since the interpreter was also able to interpret into and from Chechen.

²⁰⁶ The Greek language was used in two interviews with a national from Sri Lanka [IO47SLK2] and Pakistan [IO50PAK13]. Neither applicant could speak Greek well.

²⁰⁷ IO11AFG1, IO11AFG2, IO17AFG3, IO19AFG4 and IO20AFG5.

²⁰⁸ IO50PAK13. Moreover, of the 202 case files reviewed by UNHCR researcher, in 19 cases the interview was held in a language other than applicants’ mother tongue.

Other appropriate steps which should be taken to ensure effective personal interviews

In addition to ensuring the competence of the interviewer and the interpreter, UNHCR considers that Article 13 (3) APD requires Member States to take further appropriate steps in order to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner.

Preparing for the personal interview

In accordance with Article 13 (3) APD, in order to establish the conditions which allow applicants to present the grounds for their applications in a comprehensive manner and to ensure that the interviewer is competent to conduct the interview, the interviewer should prepare the personal interview in advance. This requires the interviewer to be familiar with the content of the application, including the personal and general circumstances relating to the application, review the information provided in travel and other documents submitted, consult relevant objective country of origin information, including maps of the relevant region and information on the culture of the country, and identify preliminary issues that need to be addressed and any specific questions that might need to be asked, before initiating the personal interview.²⁰⁹ An interviewer will not be able to ask the right questions and ultimately make a fair assessment of the credibility of the applicant's statements unless s/he is well-prepared and familiar with the application and the relevant objective country information before s/he conducts the personal interview.

In some Member States, UNHCR has found that there are guidelines stressing the importance of the interviewer preparing well for the personal interview, and how to prepare for the interview so that it is effective (Belgium,²¹⁰ Finland²¹¹ and the UK²¹²). In the UK, the guidelines state:

“Interviewing officers should always prepare for their asylum interviews as thoroughly as time allows. They should identify the key issues specifically focusing on: the reason asylum is being claimed, alleged agents of persecution and any allegations of torture or ill treatment.

The interviewing officer should consider the likelihood of the applicant having scars. Where there are elements of the claim that require further examination, the interviewing officer should prepare a question plan to take into account these areas....The interviewing officer should be familiar with the country report or other country information relating to where the applicant fears persecution, where available.”²¹³

In order to prepare the interview, the interviewer will need to have some basic information regarding the profile of the applicant and his/her reasons for applying for international protection. For example, in Belgium, UNHCR has been informed that on registration of the application, the applicant is asked to complete a questionnaire which has been devised to provide background information for the preparation of the interview. In the Czech Republic, the application form is completed by the determining authority in the presence of the applicant and an interpreter whenever necessary. The completed form signed by all persons present is then forwarded to the appointed in-

²⁰⁹ See paragraph 4.3.2 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, September 2005.

²¹⁰ Internal working document on the preparation and strategy of the personal interview.

²¹¹ An extensive guide which includes planning and scheduling the interview was published following a joint ERF-funded project of the Refugee Advice Centre and the Immigration Services.

²¹² Interviewers have guidelines on how to structure and conduct an interview. These are contained in the Asylum Policy Instruction (API), *Interviewing* November 2006, rebranded December 2008.

²¹³ API *Interviewing*.

interviewer. Whereas, in the Netherlands and the UK, the determining authority conducts an initial interview which, *inter alia*, gathers background information.

However, in some Member States, UNHCR was informed that insufficient data is gathered prior to the personal interview to facilitate the preparation of the interview. For example, UNHCR was informed that in Spain²¹⁴ and Greece, the only data available to the interviewer is the identity, nationality, gender and family composition of the applicant. Similarly in Germany, the form²¹⁵ available before the interview for the interviewer, contains basic information regarding the profile of the applicant but does not provide information about the reasons for applying for international protection.²¹⁶ In some other Member States, the information available to the interviewer is also very limited.²¹⁷

It is evident that the interviewer will need to receive adequate information sufficiently in advance of the interview so that the interviewer can conduct a thorough review of the applicant's case file and consult relevant country of origin information.²¹⁸ Interviewers in a number of Member States reported to UNHCR that they receive the case files of applicants sufficiently in advance of the personal interview, and claimed to undertake preparatory research with regard to both personal and general factors, although UNHCR was not able to verify this in the context of this research.²¹⁹ By way of example, in Belgium, interviewers informed UNHCR that they receive applicants' case files on average two to three weeks before the personal interview and that preparation for the interview, including relevant COI and other research, may take from 30 minutes to a few days, depending on the case.²²⁰

In contrast, interviewers at ADA, Athens in Greece reported that they are informed of the interviews that they will conduct on the same day the interview is to be conducted. During UNHCR's period of observation, each interviewer received every day a list of approximately 20 interviews that s/he had to conduct during that day. As such, there was no time to prepare the interview. The interviewer opened a case file for the applicant at the interview.²²¹ It should be noted that whilst the overwhelming majority of applications for international protection are lodged at ADA in Athens,²²² a small percentage are lodged elsewhere.²²³

Due to the increase in the number of applications lodged in Italy in 2008, the members of the Territorial Commissions (CTRPis) were also experiencing time constraints on their preparation of interviews. During the period

²¹⁴ This relates to the interview in Spain, which is conducted in the course of the admissibility procedure in which all applications are examined, and is considered to constitute the personal interview in line with Article 12 (2) (b) and Article 13 (5) APD. Eligibility officials who conduct personal interviews in the course of the regular procedure do have sufficient data in advance of the interview.

²¹⁵ So-called "*Niederschrift zu einem Asylantrag (Teil 1)*", which was submitted to UNHCR for all cases in which UNHCR observed the interview.

²¹⁶ Even though the electronic file is available, information on the reasons for applying for asylum is only very exceptionally included, for example in cases where a written statement by a legal representative has been submitted before the interview takes place. Moreover, a medical opinion is not necessarily contained in the electronic file at this point in time according to information provided by the determining authority to UNHCR. Furthermore, neither the Handbook for Adjudicators on the conduct of the interview, nor the Internal Guidelines on the Asylum Procedure contain explicit advice or instructions on how to prepare for the interview in advance. Also in the information submitted by the determining authority to UNHCR, it is not mentioned that interviewers are instructed to do so and how.

²¹⁷ In Slovenia, prior to the application interview, the inspector receives a registration form completed by the police with a statement of the reasons for the application handwritten by the applicant. The *Modello C3* completed in Italy contains limited information for the members of the Territorial Commissions.

²¹⁸ Including the application, any statement, country of origin information, including maps of the region, identify preliminary issues, missing information etc.

²¹⁹ Belgium, Bulgaria, the Czech Republic, Finland, and France. However, given the time constraints of the border procedure in France, in practice, there is little time for preparation of the interview.

²²⁰ Information based on interview with case managers, 19 & 20 March 2009.

²²¹ Interview with S3 and S4.

²²² According to 2008 statistics of the Ministry of the Interior, 90.1% of applications are lodged in Athens.

²²³ Interviewers in SDAA and SDS have to conduct personal interviews per week; therefore, they have the opportunity to prepare their interviews.

of UNHCR's research, two CTRPIs in particular were conducting 15 – 20 personal interviews per day.²²⁴ Instead of interviews being conducted by the four members as a collective, interviews observed were conducted by one or two members together.²²⁵ UNHCR observed that on the morning of the scheduled interviews, each member had approximately 30 minutes to view the case files of all the applicants to be interviewed that day. Otherwise, the interviewers reviewed the case file of the applicant just before the interview. As a result, in practice, the interviewers rarely had the opportunity to conduct any specific research or to formulate specific questions prior to the personal interview.

In the Netherlands, in the application centres, UNHCR observed that interviewers receive the case file of the next applicant to be interviewed approximately 30 minutes before the detailed personal interview. This provided time for the interviewer to read the information obtained during the initial interview, but not to conduct research or formulate specific questions in preparation for the personal interview. To compensate, interviewers scheduled breaks during the course of the interview in order to conduct relevant research.

In the course of this research, UNHCR did not shadow interviewers in their work and as such did not observe interviewers preparation of interviews in all the Member States of focus. However, UNHCR observed 185 personal interviews and noted whether interviewers referred to COI or other information that had been previously collected, and which they had to hand; or whether questioning was indicative of a specific knowledge of the applicant or the region of origin.

UNHCR did witness instances indicative of prior familiarization with the application and prior research. For example, in all the interviews observed in Finland, the interviewers' questioning indicated that s/he had prepared the interview in advance and undertaken relevant research.²²⁶ In the UK, some interviewers had perused Operational Guidance Notes about countries of origin and had read submissions received from legal representatives.²²⁷ There was a mixed picture in some other Member States, with some indications that some interviewers had undertaken some preparation.²²⁸ In the Netherlands, UNHCR observed that the interviewers structured the interviews to include short breaks. During these breaks, when the applicant left to go to the waiting area, the interviewer researched relevant information.

²²⁴ According to internal UNHCR data, at the time of writing, the average number of personal interviews conducted is 6-8 per CTRPI each day, four days a week. In most CTRPIs, one day per week is dedicated to case discussion, COI research and the drafting of decisions.

²²⁵ Although, in principle, in accordance with Article 12 (1) of the d.lgs. 25/2008, the personal interview may be conducted by only one member of the Commission "on the basis of a motivated request of the applicant". Article 12 (1) also provides that, if possible, the interviewer should be "of the same sex as the applicant".

²²⁶ For example, interview 5, the interviewer had fully researched the family relationships prior to the interview.

²²⁷ LIV int9.3.09 and GLA int4.3.09.

²²⁸ During two interviews observed in the Czech Republic, the interviewers had a detailed map of the country of origin with which they were obviously familiar. This was also noted in France where in one case (Case 6), the protection officer had prepared questions in advance together with his/her head of section (this was a case which could possibly raise the issue of exclusion). In Case 7 and Case 8, the protection officer had a map at hand and some COI documents. In Case 11 and in Case 12, the protection officer had a map at hand. In Greece, in contrast to interviews observed in ADA, from interview observation in SDAA and SDS, it was clear that interviewers in these Departments were prepared for their interviews. They had access to the case file before the interview, they had undertaken some country of origin research in advance and they were equipped with a map that they were using during interview. However, other stakeholders suggested that the interviews that UNHCR observed at SDAA and SDS were not representative of the way interviews are normally conducted there. UNHCR was informed that the two interviews at the SDS had been specifically prepared for UNHCR's visit and that in many cases in SDAA, interviews are omitted without any examination of the case or last only a few minutes: interviews with S15 and S13. In Spain, eligibility officials appeared to have prepared the personal interviews observed in the regular procedure.

However, UNHCR is concerned to note that in most interviews observed, the interviewer did not refer to any information that had been previously gathered and questioning did not indicate any specific knowledge of the circumstances pertaining to the application.²²⁹

Moreover, UNHCR witnessed a couple of interviews where the interviewer ‘stood in’ for an absent colleague on the day of the interview and, therefore, did not have sufficient time to prepare the interview.²³⁰ In one interview, the interviewer had been sent questions by another decision-maker. When the applicant addressed some questions to the interviewer, s/he replied that s/he did not know why certain questions had been asked.²³¹

UNHCR is concerned that there is evidence that a significant number of personal interviews are either not prepared or poorly prepared, and there is a failure on the part of the interviewers in some determining authorities to ensure familiarisation with country of origin information (COI) prior to or in the context of interviews. Knowledge of the relevant objective COI on the part of the interviewer is a prerequisite if the personal interview is to be used effectively to assess the credibility of evidence. UNHCR believes that as a general principle, unless an applicant has had the opportunity to explain inconsistencies or evidence that are otherwise not believable, the interviewer should not make a negative credibility finding in assessing the facts. Therefore, if the determining authority assesses that there are inconsistencies or discrepancies between the applicant’s statements and COI or other information gathered following the personal interview, a second interview should be scheduled in order to give the applicant an opportunity to explain these inconsistencies.

Recommendations

Pre-interview preparation should be a specific and mandatory step in the interview process. Such preparation should include a thorough review of the applicant’s case file and relevant country of origin information.

Member States must ensure that interviewers receive adequate information relating to the application and any special needs of the applicant sufficiently in advance of the scheduled interview. Interviewers should be assured sufficient time to prepare the interview.

²²⁹ Bulgaria: the interviewer did not refer to the case file in any of the interviews observed, and in only one did the interviewer refer to a map of the country of origin. This was also the case in quite a high number of the interviews observed in France. In Germany, on the basis of the interviews observed by UNHCR for this research, it appeared that interviewers were not specifically prepared for the interview. This was evident in a case in which the adjudicator at the beginning of the interview noticed with surprise that the standard questions which are asked before the questions enquiring into the actual grounds for persecution, had already been dealt with at an earlier date (HR 13). However, a calendar (in interviews involving applicants from countries using a different calendar) was always at hand, and often the adjudicators seemed to know quite well the regions and towns mentioned by the applicant when describing where something happened or which route they had travelled. In ADA in Greece, during the 49 interviews observed, no interviewer asked any specific question which was indicative of prior knowledge of the relevant circumstances relating to the application, and country of origin maps were not referred to. In Slovenia, the inspectors who conduct the meeting to complete the application only asked the standard questions on the form and a few follow-up questions. No research was previously undertaken. In Spain, it appeared that no specific research is undertaken prior to the meeting to complete the application.

²³⁰ For example, LIVint13.3.09 in the UK.

²³¹ The Czech Republic, interviewer E.

Preparing the applicant for the personal interview

The personal interview will be more effective if the applicant understands the purpose and significance of the interview, the roles of those present, and his/her rights and obligations with regard to the conduct of the personal interview. In accordance with Article 10 (1) (a) APD, all applicants must be informed in a language which they understand of the procedure to be followed as well as their rights and obligations during the procedure. This should, therefore, encompass information regarding the purpose and conduct of the personal interview.

UNHCR has noted that all Member States have developed an information brochure for applicants, which includes information on the personal interview.²³²

It is evident that any such information brochure needs to be given to the applicant at the earliest possible opportunity, and in advance of the personal interview, if it is to serve its purpose. The determining authorities of some Member States informed UNHCR that this information brochure should be given to the applicant at the time s/he applies for international protection (Belgium,²³³ Bulgaria,²³⁴ the Czech Republic, Finland, France,²³⁵ Germany,²³⁶ Greece,²³⁷ Italy,²³⁸ the Netherlands²³⁹ and the UK);²⁴⁰ and/or is disseminated in the reception centres by partner NGOs or the personnel running the reception centre in advance of the personal interview (Belgium,²⁴¹ Finland and Slovenia). Within the remit of this research, UNHCR was unable to verify to what extent this occurs in practice in all these Member States.²⁴² However, some deficiencies were brought to UNHCR's attention. For example:

- In France, it was reported to UNHCR that the information brochure for applicants is not always given to applicants by the *Prefectures* and practice may vary from one *Prefecture* to another.²⁴³ An updated version of the information brochure should be available shortly and steps should be taken to ensure that all *Prefectures* systematically distribute these brochures to all applicants.
- During UNHCR's observation of 49 registrations and interviews²⁴⁴ at ADA in Athens, only seven applicants were given the information brochure and this occurred after the conclusion of the personal interview.²⁴⁵

²³² Belgium (two brochures provided by the AO and the CGRA), Bulgaria, the Czech Republic, Germany, Greece, Finland, France, Italy, the Netherlands (a number of brochures depending on the procedure), Slovenia, Spain, and the UK.

²³³ Article 3 of the Royal Decree of 11 July 2003 concerning the CGRA.

²³⁴ This constitutes a minimum of 14 days in advance of the personal interview in the accelerated procedure, but a minimum of 3 days if it is a subsequent application.

²³⁵ This is the role of *Prefectures* not the determining authority, OFPRA.

²³⁶ The applicants receive the leaflet "*Important Information*" which contains information about the duties of the applicant as well as the asylum procedure, including information concerning the conduct of the personal interview. The applicants confirm by signature that they have received the information. According to information from the determining authority, this is handed out to applicants either in person after they have filed their application or sent to them by mail, if the application has been made in writing (if possible in the respective case). No information on actual practice throughout the country could be gathered.

²³⁷ According to ADGPH's internal circular, the leaflet '*Basic information for asylum seekers*' should be disseminated by the Aliens Directorates and Security Departments at the start of the procedure.

²³⁸ Article 10 (1) and (2) of the d.lgs 25/2008 explicitly stipulates that an information brochure should be produced and that at the time of lodging the application, the applicant should be provided with information on the procedure and his/her rights and obligations.

²³⁹ Article 3.43a Aliens Regulations.

²⁴⁰ The '*Points Claim*' leaflet should be given to applicants at the screening interview.

²⁴¹ At the time of writing (21 July 2009), due to an acute shortage of capacity in the open reception centres which has necessitated the use of temporary emergency accommodation and the heavy workload on the staff of Fedasil who run the reception centres, social assistants have not been able to provide guidance to applicants or ensure the assignment of legal assistance. Therefore, the scheduling of personal interviews for new applicants had been temporarily suspended.

²⁴² In the Netherlands, at the time of writing, the IND was running a pilot to see if this happens in practice.

²⁴³ Information provided in interviews with NGOs.

²⁴⁴ Note that a 'full' interview including a question regarding the reasons for applying for international protection was omitted in 10 cases.

²⁴⁵ According to interviewees S8 and S9, applicants are not given the information brochure when they register their names and nationalities at ADA on Saturdays.

- In Greece, the information brochure was produced in 2005 and had not been updated to take into account more recent legislative changes.
- In Italy, at the time of this research, the updated information brochure for applicants reflecting recent legislative changes was only available online in Italian as translation and publication in other languages had not yet been finalized. As a consequence, some police officers reported that they were not supplying applicants with the out-dated information brochure any longer and were awaiting the new brochures. However, by the time of writing, in autumn 2009, the brochure had been translated into 10 languages and was posted on the website of the Ministry of Interior.
- In Spain, at OAR in Madrid, applicants are only given the information brochure (if available in a language which the applicant understands) while they wait in the waiting room before the interview. The most significant consequence of this is that the applicant is not informed of the right to have legal assistance until the beginning of the interview, which means that if s/he wants a lawyer to be present at the interview, the interview has to be postponed. In practice, applicants do not postpone the interview as this would result in them not being registered and documented as applicants for international protection; therefore, they do not receive legal advice prior to the interview to complete the application.²⁴⁶

There are clearly some inherent constraints with the use of written brochures to convey information about the personal interview. Firstly, the information brochures need to be made available in the multiple languages of applicants if they are to be independently accessible by applicants. UNHCR has noted that the Member States of focus have taken steps to produce their information brochures in between five and 19 foreign languages, depending on the Member State.²⁴⁷ Exceptionally, in Germany, the information leaflet of the determining authority is available in 58 languages.²⁴⁸ Moreover, the service of an interpreter is foreseen in case of need.²⁴⁹ Also in the Netherlands, the information brochure produced by the Dutch Refugee Council is published in 32 foreign languages. Clearly, given the extent of the languages spoken by applicants, in those Member States where the information is only available in five to nine foreign languages, this will not always satisfy demand.²⁵⁰

Furthermore, some applicants may be illiterate or may have limited literacy skills and/or education. It is critical that the style of language used in the information brochure is not too technical or legalistic; otherwise it may be inaccessible for some applicants.²⁵¹

In order to ensure, as far as possible, that applicants understand the purpose and significance of the personal interview, its conduct, and their rights and obligations during the interview, it is, therefore, essential that Member

²⁴⁶Note that this was not the practice in Barcelona, Valencia or Melilla where UNHCR were informed that applicants are referred to the legal services of specialized NGOs, to complete the application before the meeting.

²⁴⁷In Belgium, the recent CGRA information brochure is available in 8 languages. The AO brochure is available in 19 languages and the AO is preparing additional language versions. In Bulgaria, *The Instructions* are available in 17 languages. In Finland, the brochure is available in 9 languages. In France, the recently updated brochure will be available in 6 languages (including French). In Greece, the information leaflet is available in 6 languages (including Greek). In Italy, the new brochure will be available in 9 languages. In the Netherlands, the brochures are available in 11 foreign languages but the brochure of the Dutch Refugee Council is available in 32 foreign languages. In Slovenia, the brochure is available in 9 languages. In Spain, the brochure is available in 11 languages (including Spanish). In the UK the brochure is available in the 17 main asylum-seeker languages.

²⁴⁸Information provided by the determining authority.

²⁴⁹At the end of the leaflet the applicant states in which language the content has been translated by the interpreter and confirms that s/he has understood the content. The interpreter also signs the document. No reliable information could be gathered with regard to practice.

²⁵⁰For example, UNHCR observed two cases at Madrid Barajas airport where the information brochure was not given to two applicants because it was not available in Somali. In Greece, the information brochure is not available in a number of the more common languages of applicants. The Head of ARD informed UNHCR that the information brochure will be translated into more languages (interview with S1).

²⁵¹According to NGOs, although the information brochures provided in Belgium are of good quality and near exhaustive, the language used may be too technical for some applicants to understand fully.

States supplement any written brochures with the systematic provision of oral information at the earliest point in the procedure and, at least, before the personal interview.

In Italy, oral information and a written leaflet providing basic information was given to persons arriving in Lampedusa. This was an initiative of the Praesidium project, an EC-funded project coordinated by the Ministry of Interior and implemented by UNHCR, the International Organization for Migration (IOM), Save the Children and the Red Cross until May 2009.²⁵²

The determining authorities of some Member States informed UNHCR that information is orally provided to applicants in advance of the personal interview at reception or application centres.²⁵³ However, it is important to note that reception centres may not accommodate all applicants. For example, in France, applicants whose applications are processed in the accelerated procedure do not have access to the reception centres. Some *départements* have 'reception platforms' which offer an alternative source of information but state funding for a number of these 'platforms' was cut in 2007 and, therefore, they are not universal. Also, in Italy, the personnel of some reception centres informed UNHCR that there was a lack of human resources to ensure that all applicants are adequately informed, although specialized NGOs funded by the government are present in the reception centres to provide legal and psycho-social support and information. In this respect, the practice in Finland may serve as a possible model. There, a specialized NGO holds information meetings in the reception centre which are offered to all applicants and is funded by the Finnish Ministry of Interior. Also, in the Netherlands, the Dutch Refugee Council provides information in the TNVs and at the application centres.²⁵⁴

Before initiating the personal interview, the interviewer should again explain the purpose and significance of the interview, how it will proceed and the roles of those present with the applicant. UNHCR was informed by the determining authorities in some Member States that the interviewer, before initiating the interview, should inform the applicant of the purpose of the interview, or check that the applicant has understood the purpose of the interview based on information previously provided.²⁵⁵ This was done on a standard basis in all the interviews that UNHCR observed in Finland, Germany²⁵⁶ and Slovenia.²⁵⁷

However, based on UNHCR's observation of personal interviews and based on interviews with stakeholders, this was not always done or practice was varied, in interviews observed in other Member States.²⁵⁸ In Greece, of the 52 interviews observed, in only four was the applicant orally informed of the purpose of the interview.²⁵⁹ In Spain,

²⁵² This project continues at places of arrival in Sicily.

²⁵³ In Belgium and France, information is provided by staff at the reception centres.

²⁵⁴ It should be noted that these are volunteers who do not always have a legal background and may not always be available.

²⁵⁵ Belgium (in accordance with Article 15 of the Royal Decree of 11 July 2003 concerning the CGRA), Bulgaria, the Czech Republic, Finland, France, Germany, Greece (ADGPH internal circular), Italy (in Italy, just prior to the start of the interview, the applicant is provided with a document, read by the interpreter, which provides basic information on the interview), Slovenia, Spain, and the UK.

²⁵⁶ This was also noted down in a standardized form at the beginning of the hearing report. Applicants are also asked whether they received and understood the leaflet "*Important Information*".

²⁵⁷ However, in some interviews observed the information provided was very brief and in others very long and applicants were given irrelevant information such as how to apply for international protection from a consular or diplomatic representation, notwithstanding the fact that they were in-country and had already initiated the process of application. In two cases, the information provided was not tailored to take into account the applicant's age, education and cultural background (Cases No. 1-2009 and 7-2009). At the time UNHCR observed interviews, the so-called "information sessions" were provided by inspectors of the determining authority. This was due to the fact that an NGO-run project, funded by the ERF, to provide information to all applicants prior to the initiation of the procedure was not in operation at the time of UNHCR's field research, because of a gap in contract periods. These information sessions would provide information on the applicant's rights and obligations, and would prepare the applicant for the personal interview.

²⁵⁸ Interviews with case managers in Belgium on 19 & 20 March 2009, interview with NGOs, 25 March 2009, and interview with lawyers, 26 March 2009. The CGRA is aware of the fact that not all case managers provide the same information during the interview, and is working to address this. In France, officers usually informed the applicant briefly of the purpose and format of the interview, but not always.

²⁵⁹ One interview at the ADA in Athens, one interview at the SDAA and two interviews at the SDS.

in OAR in Madrid, UNHCR observed that the standard form providing information to the applicant is read either by the interviewer in Spanish or by the interpreter, without the presence of the interviewer, before the interview begins.²⁶⁰ But in Valencia and Barcelona, the form was read and signed at the end of the interview; and in Melilla, it was not read but given to the applicant to sign at the end of the interview.²⁶¹ No information was provided about the significance and purpose of the interview before the interview, as it appeared to be assumed that the assisting NGO had already done this.

Where appointed, lawyers may be able to provide information about the procedure, including the personal interview.²⁶² In the UK, applicants receive a letter inviting them to their personal interview. The letter sets out, in English, the purpose and significance of the interview. A copy is sent to the legal representative, if the applicant has one, asking them to ensure that the applicant understands the content of the letter.

Nonetheless, some constraints have been reported regarding the provision of legal assistance. In the Netherlands, the timetable of the procedure does not allocate time for the applicant to meet with a legal advisor before the initial interview is held. However, all applicants are appointed a legal counsellor who is on duty at the application centre. The legal counsellor has two hours to discuss with the applicant the initial interview after its completion, and to prepare for the detailed personal interview. In Belgium, the time schedule of the accelerated procedure in the closed reception centres reportedly does not allow for the applicant to be prepared for the personal interview by the lawyer.²⁶³ Lack of funding meant that the Bulgarian Helsinki Committee had to suspend its legal advice service based in the RRC-Sofia for the first six months of 2009. And in Finland, legal representatives rarely attend the personal interviews conducted in the offices on the Russian border.

In Belgium, the determining authority is working closely with the governmental agency for the reception of asylum seekers, Fedasil, to develop an audio-visual DVD in eight languages which can be shown to all applicants for international protection in the reception centres. The DVD will be distributed to the reception centres in 2010 with an information brochure.²⁶⁴ A similar initiative has been taken in Italy, where a DVD entitled “*Asking for international protection in Italy*” has been made by UNHCR and the Association of Legal Studies on Immigration and Asylum coordinated by SPRAR.²⁶⁵ The DVD is translated into nine languages.

However, UNHCR’s research, based on the observation of interviews, found that notwithstanding the arrangements in place in Member States to explain the personal interview and the procedure to applicants, applicants may not always be aware of the procedure and significance of the interview for the determination of their application. For example:

- During one interview observed in Bulgaria, at the end of the interview, the applicant was invited to ask any questions. S/he asked what had been the purpose of this conversation, demonstrating that s/he had not understood the significance of the interview.²⁶⁶
- In two interviews observed in Italy, the applicant was explicitly asked by the interviewer if s/he understood what it meant to apply for asylum. In both cases, the applicant replied in the negative.²⁶⁷

²⁶⁰ Case No. 0501001, 0401009, 0501010, 1001020, and 0201037.

²⁶¹ Case No. 1101140. The applicant did not understand Spanish.

²⁶² Belgium, Finland, and the Netherlands. In Finland, an extensive guide which covers the role of reception centres and legal representatives in preparing the applicant for the interview was published following a joint ERF-funded project of the Refugee Advice Centre and the Immigration Services in 2008.

²⁶³ Interview with lawyers, 26 March 2009.

²⁶⁴ Information from communication, information and press unit at the CGRA, 23 April 2009.

²⁶⁵ This was produced in the context of a project called *In/formazione* (training and information).

²⁶⁶ Interview 9.

²⁶⁷ I/11/M/CDA and I/12/M/NIG.

- In one case observed in the Czech Republic, the applicant was not informed at all about the interview and his rights and obligations, although it was still recorded in the case file that he had been informed. In one case, part of the information given by the interviewer was not translated by the interpreter, but it was recorded in the case file that this information had been given.
- In Germany, concerns were raised by consulted stakeholders that some applicants in fact do not fully understand the purpose and significance of the interview, despite the explanations and information given to them before and at the outset of the interview. Different reasons have been mentioned: excitement and level of education of the applicants, information is given in a formalized language and information is “rattled off”.²⁶⁸

Recommendations

Member States should ensure that all applicants are informed in a language they understand, and at the earliest possible point in the procedure, of the purpose and significance of the personal interview, the format of the interview and their rights and obligations during the personal interview. This information should be provided sufficiently in advance of the scheduled interview so that the applicant has time to prepare for the interview, taking into account any special needs. Article 10 (1) (a) APD should be amended to this effect.

UNHCR suggests that Member States review their procedures for the distribution of information brochures to applicants and ensure that this be done systematically at the earliest possible point in the procedure.

Any written information produced for this purpose should be available in the languages of the main countries and/or regions of origin of applicants, and written in a style which is accessible. UNHCR encourages determining authorities to explore other methods of imparting this information, such as the use of DVDs.

UNHCR recommends that the purpose, significance, and an outline of the structure of the interview, the roles of those present and the applicant’s rights and obligations during the interview should be explained orally to the applicant by the interviewer at the start of every interview. A standard text should be developed for this purpose to ensure uniformity in the provision of information.

Applicants should have an effective opportunity to consult a legal adviser prior to the personal interview.

Explaining the interview to children

Children who are to be interviewed also need to be informed in advance of the purpose, significance, timing, format and consequences of the personal interview but in a way which is appropriate for their age and level of maturity. The importance of being truthful and providing as much information as possible, should be explained in a way the child can understand.²⁶⁹

Article 17 (1) (b) APD states that Member States must ensure that the appointed representative of an unaccompanied child is given the opportunity to inform the unaccompanied child about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare him/herself for the personal interview.

²⁶⁸ Lawyers: X1, X2, X3, and interpreter: INTX.

²⁶⁹ Paragraph 4.3.7 UNHCR Procedural Standards for RSD under UNHCR’s Mandate, September 2005. See also UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997 and Refugee Children: Guidelines on Protection and Care, 1994.

The scope of this research meant that UNHCR did not assess the preconditions of Article 17 (1) (b) APD as such, but only dealt with matters of unaccompanied children when the issue came up in the framework of the research. However, some difficulties were highlighted by stakeholders, and are therefore mentioned below, although they do not represent a comprehensive picture of the situation in the surveyed Member States.

In a number of Member States, delays in the appointment of a representative may mean that there is not sufficient opportunity for the representative to explain the purpose and conduct of the interview to the child.²⁷⁰ In a couple of the case files audited in Italy, the application for international protection had been submitted without the assistance of an appointed representative, or the representative had confirmed the application just one day before the personal interview.²⁷¹ In four out of six case files audited in the Czech Republic concerning unaccompanied children, it was clear from the case files that the representative was appointed on the same day as the asylum application was lodged.²⁷² In addition, appointed representatives can sometimes reside a considerable distance from the child – for example, five hours' travelling distance – making it difficult for the representative to meet with the child before interview.²⁷³

Furthermore, the appointed representative may not always be appropriate for the role.²⁷⁴ For example, in Italy, the city councillor may be appointed as legal representative and may have very little time to spend preparing the child for the procedure, although in most cases the city councillor delegates to a social assistant.²⁷⁵ In Bulgaria, in theory the appointed representative (a social worker) should meet with the child to explain the personal interview in advance. In practice, however, this does not happen due to the workload of social workers and the fact that they lack the necessary knowledge due to constant changes in personnel.²⁷⁶

UNHCR was also informed of concerns that unaccompanied children may not always be identified as children and, therefore, would not benefit from any procedural guarantees in place for children.²⁷⁷ In one of the case files UNHCR audited in the UK, the legal representative complained about the conduct of the interview and about the determining authority's initial decision that the applicant was not a child. The applicant's interpreter was excluded from the interview, and a request for an interpreter of the applicant's sex was ignored. Translations subsequently appearing in the interview record of words used to describe family relationships were challenged by the legal

²⁷⁰The Czech Republic, Greece and Italy. In Italy, it can take up to three or four months to appoint a legal guardian instead of the two day time limit foreseen in law. In Greece, stakeholders informed that in practice the appointed representative rarely meets with the minor before the latter has the personal interview. Moreover, according to the determining authority in Germany, problems may arise, inter alia, with regard to the time span needed for the appointment of legal guardians, the actual time guardians have to fulfill their tasks (depending in particular on the amount of cases the guardian is responsible for) as well as the process of identification of children. However, since neither interviews nor case files of unaccompanied minors were evaluated, these issues were not reported in the framework of this research. With regard to the practice concerning issues of unaccompanied minors, please refer also to the findings of the ASQAEM Project (implemented in Germany mainly in 2009) which had a special focus on the asylum procedures of these applicants.

²⁷¹D/68/F/NIG/N and D/70/M/IRQ/S respectively.

²⁷²Xo14, Xo16, Xo24 and Xo40.

²⁷³The Czech Republic.

²⁷⁴See UNHCR's Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008) 815 final of 3 December 2008, March, 2009, pg.12, where UNHCR has recommended that a guardian should have the necessary expertise in the field of childcare so as to ensure that the interests of the child are safeguarded, and that the child's legal, social, health, psychological, material and educational needs are appropriately covered. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.

²⁷⁵It has been argued (Olivetti, 2008) that there may be a risk of a possible conflict of interests for the municipalities involved in unaccompanied minor's guardianship, as mayors cooperate with the administrative bodies in charge of repatriating unaccompanied minors and "may be influenced by the opportunity to favour their repatriation to their country of origin, instead of confirming the minors' applications for asylum in Italy, especially when considering that mayors are the authority responsible for the management of public funds needed for the accommodation and reception of the same unaccompanied minors".

²⁷⁶Information received from interviewers.

²⁷⁷Greece. Note that there is no mechanism for carrying out an age determination in Greece and the determining authority registers the age as claimed by the applicant: interview with S8.

representative. The authority's initial age assessment was also challenged: it had been made in spite of the applicant's passport and a Social Services' age assessment both indicating that the applicant was under age 18. Following these challenges, the age assessment was changed.²⁷⁸ Research carried out in 2007 revealed concerns about the extent to which the determining authority disputed the age of applicants, with the result that they did not benefit from policies provided for children.²⁷⁹ Since then, policies have been under review.²⁸⁰

Recommendation

Member States must ensure the timely appointment of an appropriate and qualified representative for every unaccompanied child. It should be a requirement that the personal interview of a child cannot proceed unless the representative has had the opportunity to inform the child of the purpose, significance, format and possible consequences of the personal interview.

Specific measures for children

The environment, tone, language and conduct of the personal interview with children should be age-appropriate and sensitive to their special needs. Special emphasis should be placed on putting the child at ease and developing a relationship of trust. Therefore, the environment and tone of the interview should be as informal as possible.²⁸¹

The personal interview should be conducted by specifically trained professionals.²⁸² It should be conducted in an informal child-friendly environment that accommodates the special needs of the child and in which s/he feels secure and comfortable, for instance an interview room designed for children. The personal interview should be scheduled at an appropriate time of day, taking into consideration the age and maturity of the child. Its duration should also be appropriate, with regular breaks taken. All interactions with children should take place in a language that the child uses and easily understands, and which is appropriate taking into account the child's age and intellectual maturity.²⁸³

Only a few of the Member States of focus in this research have specific guidelines on interviewing children: Belgium,²⁸⁴ Finland,²⁸⁵ the Netherlands²⁸⁶ and the UK.²⁸⁷ In these Member States, the determining authorities have taken specific steps to ensure that the interview of children takes place under conditions which are child-friendly. Practical steps to this end are also undertaken in Germany.²⁸⁸

²⁷⁸ DAF42.

²⁷⁹ Crawley H., *When is a Child not a Child? Asylum, age disputes and the process of age assessment* ILPA, May 2007.

²⁸⁰ In March 2009, the remit of the Refugee Council's Children's Panel was narrowed so that it no longer includes age dispute cases: letter from Chief Executive, British Refugee Council to stakeholders, 4 March 2009..

²⁸¹ Paragraph 4.3.7 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, September 2005.

²⁸² See above for further information on training of interviewers.

²⁸³ See paragraph 14 of UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, 2005 (Res. 2005/20).

²⁸⁴ Presentation of the examination of asylum applications by the CGRA (evaluation of the new asylum procedure before the Senate), March 2009.

²⁸⁵ *Yksintulleiden alaikäisten turvapaikanhakijan haastatteluohjeistus* (Guidelines on Interviews with Unaccompanied Minors), Ulkomaalaisvirasto 2001.

²⁸⁶ Protocol on interviewing unaccompanied minors under the age of 12.

²⁸⁷ API on *Processing Claims for Children* (07 March 2007, last updated 02 November 2009).

²⁸⁸ According to the determining authority, specific steps are taken for child-friendly interviews (in addition to the conduct by specially trained staff), for example by using a language appropriate to the child. With regard to the practice concerning issues of unaccompanied minors, please refer also to the findings of the ASQAEM Project.

For example, the determining authority in Belgium has developed a cartoon to explain the asylum procedure to children.²⁸⁹ Furthermore, in Belgium, the determining authority has six specially designed and furnished child-friendly interview rooms.²⁹⁰ In the Netherlands, the unit for unaccompanied children has a special hearing area with a separate television area where the legal representative can observe the interview. In the Czech Republic, the interview of children is reported to take place in the special accommodation centres for children.²⁹¹

UNHCR has been informed by the determining authorities that interviews are conducted by specially trained staff in Belgium, Finland, Germany, the Netherlands and the UK. However, due to the fact that the transposition and implementation of Article 17 APD on guarantees for unaccompanied minors did not fall within the scope of this research, UNHCR did not observe interviews involving unaccompanied children.

UNHCR was also informed that all interviews of unaccompanied children in the Netherlands are both audio and video recorded, and that specific question templates have been developed for children over 15 and children under 15 years of age in Finland.

With the exception of the presence of the appointed representative at the personal interview, UNHCR is concerned to note that in Bulgaria, France, Greece,²⁹² Italy, Slovenia and Spain, no specific measures are taken for the personal interview of children.

Recommendation

UNHCR recommends that EU-wide guidelines on the personal interview of children are adopted and implemented. UNHCR would be available to play an advisory role in the elaboration of such guidelines.

Specific measures to address special needs

Member States should have measures and procedures in place to identify, as early as possible in the procedure, and refer as appropriate, applicants who have special needs. An initial or screening interview and reception procedures may provide an opportunity to identify applicants who have special needs. However, an applicant's special needs may not become evident until during the personal interview.

Interviewers should be aware that the following are applicants who may be vulnerable or have special needs which need to be taken into account during the personal interview:

- Victims of torture, sexual violence and persons suffering post-traumatic stress disorder;
- Women with special needs;
- Children under the age of 18;²⁹³
- Elderly applicants;

²⁸⁹ Presentation of the examination of asylum applications by the CGRA (evaluation of the new asylum procedure before the Senate), March 2009.

²⁹⁰ Interview with operational coordinator of the CGRA on 25 February 2009.

²⁹¹ A social worker from the accommodation centre may accompany a child at the interview; interview with Head of Asylum Unit, 7 April 2009.

²⁹² In spite of exemplary legislation which provides that "*When minors are concerned, the personal interview shall be conducted taking into consideration their maturity and psychological consequences of any traumatic experience,*" No. specific measures are taken for the personal interviews of children in practice (Article 3 PD 81/09). Children are interviewed in the same rooms and in the same conditions as other applicants. Note, however, that the applications of children are not examined in the accelerated procedure.

²⁹³ See sub-section above for further information.

- Applicants who have a disability; and
- Applicants with mental or physical health problems.

Before initiating the personal interview, interviewers should ask whether the applicant feels physically and psychologically fit for the personal interview.²⁹⁴ If the applicant indicates that s/he does not feel well, the interviewer should ask follow-up questions to assess the nature of the problem. Similarly, if after initiating the personal interview, the interviewer has reasons to doubt whether the applicant is fit for the personal interview, the interview should be suspended. In both cases, the interviewer must assess whether or not it is appropriate to continue with the personal interview or whether other action is required, for instance, a referral to a medical expert and/or counselling and support services.²⁹⁵ This requires determining authorities to have appropriate referral processes in place. Women who have or may have experienced sexual or domestic violence may require referral as necessary, and steps should be taken to seek to ensure a gender-sensitive interview.²⁹⁶

The determining authorities of only a few Member States were reported to have guidance in place regarding the treatment of persons with special needs: Belgium, Finland²⁹⁷ and the UK.²⁹⁸ However, UNHCR, within the scope of this research, was not able to assess the quality of these guidelines or the extent to which they are implemented in practice.²⁹⁹

UNHCR was informed by the determining authority in Belgium that it has a ‘gender cell’, comprising a coordinator and a case manager in each geographic section. The coordinator ensures that the case managers have appropriate guidelines for the examination of applications by women and ensures that these are implemented and applied in practice. Moreover, s/he ensures that relevant international and national case law relevant to applications by women are distributed to case managers, and that the geographic sections inform the coordinator of their needs with regard to gender.³⁰⁰

In Germany, specially trained staff interview victims of sexual violence and torture, traumatized applicants, and unaccompanied minors.³⁰¹ Moreover, the determining authority informed UNHCR that all staff conducting interviews has been sensitized to identify indicators that an interviewee has special needs.³⁰²

In Italy, the National Commission has facilitated the creation of a network of experts in the public sector to whom the determining authority can refer, when applicants with special needs are identified prior to or during the personal interview.³⁰³

²⁹⁴ UNHCR was concerned to observe that at ADA in Athens, Greece, interviewers routinely stated in writing in the record of the interview that the applicant was in good health and physical condition without having asked the applicant about his/her health.

²⁹⁵ Paragraphs 205, 208 and 212 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1991.

²⁹⁶ See sub-section below for further information.

²⁹⁷ Administrative Asylum Guidelines and the guide produced following the ERF-funded joint project of the Immigration Services and Refugee Advice Centre both provide guidance on interviewing persons with special needs.

²⁹⁸ The API on Interviewing contains a section on ‘*Interviewees requiring particular care*’. There is a separate API on *Gender Issues in the Asylum Claim*, October 2006.

²⁹⁹ Concerns have been expressed in the UK that guidelines on gender are not followed in practice. See “Lip Service” or implementation? The Home Office Gender Guidance and women’s asylum claims in the UK March 2006: UNHCR 4th Quality Initiative Report.

³⁰⁰ Presentation of the examination of asylum applications by the CGRA (evaluation of the new asylum procedure before the Senate), March 2009.

³⁰¹ See Internal Guidelines for the Asylum Procedure, under “*Adjudicator with special tasks*” (1/3) – (3/3). It should also be noted that it is standard practice to ask applicants at the outset of the interview whether they feel fit for the interview.

³⁰² The determining authority also informed UNHCR that in case such indicators are identified, the adjudicator shall inform the applicant (again) that specially trained interviewers (so-called “*Sonderbeauftragte*”) are available. The conduct of the interview by one of these “*Sonderbeauftragte*” needs to be noted down in the hearing report.

³⁰³ NIRAST project.

In the course of this research, UNHCR did observe some interviews where applicants with special needs were treated with sensitivity.³⁰⁴ However, UNHCR also audited a record of a personal interview of a female child which revealed a lack of appropriate action. The interviewer was male and the child's father was present as her legal guardian. The applicant asked for her mother to be present instead of her father. She stated repeatedly that she was the daughter of her mother, not her father. The interview only took a few minutes and only four questions were asked. The transcript stated that the applicant was unable to respond to questions and that her father was unable to understand what she was saying. A decision on the application was taken on the basis of this short interview. The interview was not postponed for the applicant to be referred to a medical expert or to a counsellor for an assessment. And the interview was not re-scheduled to take place without the presence of her father.³⁰⁵

UNHCR was informed that there are no specific guidelines regarding the treatment of persons with special needs in the Czech Republic, France, Greece,³⁰⁶ Italy, the Netherlands, Slovenia, and Spain.

Recommendation

UNHCR recommends that EU-wide guidelines on the personal interview of persons with special needs are adopted and implemented in all Member States. UNHCR would be available to play an advisory role in the elaboration of such guidelines.

Gender-sensitive interviews

The gender of the applicant should be taken into account when assigning a case file to an interviewer and appointing an interpreter. A woman may be reluctant, or find it difficult, to talk about her experiences to a male interviewer and/or through a male interpreter. This may especially be the case where these experiences relate to, for example, sexual violence.

UNHCR's Procedural Standards and guidance on interviewing state that, if at all possible, female applicants should be interviewed by a female interviewer and female interpreter (where an interpreter is required).³⁰⁷ Gender-appropriate interviewing will enhance the fact-finding potential of the interview, but this becomes particularly important when the application indicates that gender issues may be raised in the personal interview.

UNHCR has been informed that in no Member State of focus in this research is the provision of a same-sex interviewer and interpreter mandatory. Moreover, the provision of a same-sex interviewer *and* interpreter is not mandatory or automatic, even for applications which raise the issue of sexual violence. Exceptionally, legislation in the Czech Republic does require the provision of an interviewer of the same gender "*for reasons that require*

³⁰⁴ An interview in Bulgaria where the applicant, who had mild mental health problems, was treated with sensitivity. Similarly, UNHCR observed two interviews in Slovenia where elderly applicants were treated with sensitivity: the interview room was warmed in advance, breaks were offered, a nurse was called to treat an eye complaint and questions were adapted to aid understanding; application No. 2-2009 and 3-2009.

³⁰⁵ Xoo8, the Czech Republic.

³⁰⁶ Article 10 (12) of the law (PD 90/2008) states that "*If, there are strong indications during the interview that the applicant has been submitted to torture, s/he shall be referred to a specialized medical centre, or a doctor or a psychologist of a public hospital, who shall make a report on the existence or not of injuries of maltreatment or of indications of torture.*" However, in practice, it was reported that there is no referral procedure and that the situation is worse since the suspension of operations of the independent and specialist Medical Centre for Rehabilitation of Victims of Torture.

³⁰⁷ Paragraphs 2.5.1 and 4.1.1 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005 and Interviewing Applicants for Refugee Status, 1995.

special consideration or upon explicit request of the applicant”, but provision of an interpreter of the same sex is conditional upon availability.³⁰⁸

UNHCR was informed that in some Member States, the competent authorities formally ask applicants at an initial or screening interview whether they have a preference with regard to the sex of the interviewer and interpreter at the personal interview: Belgium, the Netherlands³⁰⁹ and the UK.³¹⁰ The authorities stated that they seek to satisfy any such request as far as possible.³¹¹ Moreover, in accordance with Belgian law, if the case manager considers that the persecution alleged by the applicant may be related to his/her gender, at the beginning of the interview, the case manager should check whether the applicant has any objections to the interview being conducted by a person of the opposite sex.³¹² In the Netherlands, in the personal interviews that UNHCR observed, also at the end of the interview, the applicant was asked whether the sex of the interviewer and interpreter had prevented the applicant from giving a full account. From the templates of the detailed interview, provided by INDIAC, it is standard to raise these questions at the end of the interview.

In Germany, the information leaflet provided to applicants at the outset of the procedure informs female applicants of the possibility to request a female adjudicator and that in such cases the interview will also be carried out with the assistance of a female interpreter (if possible).³¹³

The determining authorities of the other Member States of focus in this research reported that, upon request by the applicant (or sometimes upon the request of the reception centre which accommodates the applicant),³¹⁴ the determining authorities would try to appoint an interviewer and interpreter of the same sex: Bulgaria,³¹⁵ the Czech

³⁰⁸Section 23 (3) ASA states that: “For reasons that require special consideration or upon an explicit request of the applicant for international protection, the Ministry shall arrange that the interview shall be conducted and, if feasible on the part of the Ministry, interpreting shall be provided by a person of the same gender.” See below – this may not always be implemented in practice.

³⁰⁹C3/3.1.1 Aliens Circular is applicable in the regular procedure and provides that a female applicant should be informed about the possibility to be interviewed by a female in the presence of a female interpreter. In observations of initial interviews, UNHCR observed that applicants are asked if they have a preference regarding the sex of the interviewer and interpreter for the detailed interview.

³¹⁰UNHCR 5th Quality Initiative Report paragraph 2.4.31 (March 2008).

³¹¹In the UK, the guidelines ‘API Conducting the Asylum Interview: Requests for a Same Sex Interviewing Officer’ states that this request should be accommodated as far as possible, especially if the request has been made in advance of the interview. If an applicant refuses to go ahead without a same-sex interpreter, the interview will only be postponed if a same-sex interpreter could be provided in future, and it is clear that failure to provide such an interpreter would adversely affect the applicant’s ability to advance a full and accurate account.

³¹²Article 15 of the Royal Decree of 11 July 2003 concerning the CGRA states that when there are reasons to assume that the persecution suffered by the applicant is related to his/her sex, the case manager should check whether the applicant has any objections to being interviewed by a person of a different sex. If so, the applicant is assured a hearing by a case manager of the same sex. Article 20 (2) of the Royal Decree also requires the CGRA to take the specific situation of the applicant into account when appointing an interpreter. Article 21 of the Royal Decree states that the applicant can request another interpreter at the beginning of the interview, as well as during the interview. If the applicant has a valid reason for requesting another interpreter, the interview will be stopped and will resume with another interpreter or will be rescheduled.

³¹³Information leaflet “Important Information”. A corresponding remark is also contained in the Internal Guidelines for the Asylum Procedure (“Female-specific persecution” (1/1)). The respective paragraph of the English information leaflet reads as follows: “**Notes for women and girls, as well as for the parents of daughters:** Insofar as may be required by you for personal reasons, the hearing can be carried out or continued by a[...]female decision-maker – as far as possible with the help of a female interpreter. The Federal Office has [...]female decision-makers specially trained in the field of sex-specific violations of human rights (for example rape, other types of sexual abuse, impending mutilation of the genitals). If you wish your hearing to be carried out by such a female person, please inform the Federal Office in good time before the hearing”. In both interviews attended by UNHCR in which gender and sexuality issues played a role (rape, homosexuality), the interviewer and the interpreter were of the same sex as the applicant. However, according to stakeholders, the request for an adjudicator of a certain sex is not always satisfied (X2, INTX).

³¹⁴In France.

³¹⁵In Bulgaria, Art. 63a (4) LAR

Republic,³¹⁶ Finland,³¹⁷ France, Greece,³¹⁸ Italy,³¹⁹ Slovenia³²⁰ and Spain.³²¹ However, UNHCR was not able to verify to what extent applicants are informed of the possibility to request an interviewer and interpreter of the same sex and in some of these States, a lack of female interviewers and interpreters may mean that such a request, even if made, is difficult to satisfy.³²²

UNHCR observed a significant number of personal interviews in which the interviewer and/or interpreter were not gender-appropriate. For example:

- In two interviews observed by the UNHCR researcher in the Czech Republic, the applicants and interviewers were female but the interpreters were male. Both female applicants claimed to have been subjected to sexual violence and were asked to detail this during the personal interview. They were not asked whether they would prefer a female interpreter and they did not request a female interpreter.³²³
- Three interviews were observed in Finland in which issues of sexual violence and forced abortions were raised, but neither the interviewer nor the interpreter was of the same sex as the applicant.³²⁴
- In the UK, UNHCR observed four personal interviews of female applicants where the interpreter was male, and either sexual violence and/or details of sexual activity were discussed.³²⁵ UNHCR considered that having a male interpreter hindered gender-appropriate interviewing, even where the interviewer was female.
- In Greece, UNHCR observed a total of seven interviews where the applicant was female. In all seven interviews, the interviewer was male.
- In Italy, UNHCR observed an interview in which the male interviewer used inappropriate questioning and an inappropriate tone with a female applicant who may have been a victim of sexual violence. The interpreter intervened and translated the questions more appropriately.

³¹⁶ Section 23(3) ASA: “For reasons that require **special consideration** or **upon an explicit request** of the applicant for international protection, the Ministry shall arrange that the interview **shall be conducted and, if feasible on the part of the Ministry, interpreting shall be provided by a person of the same sex.**” Confirmed by the Head of Asylum Procedure Unit, interview 7 April 2009. There was some evidence of this in case file Xo26, according to which a female applicant who alleged forced marriage requested to be interviewed by a female interviewer. Another interview took place with a female interviewer.

³¹⁷ It is the legal representatives who make the request normally as they meet with the applicant in advance of the interview. There was no evidence in the case files audited of such requests. According to legal representatives interviewed, such requests are informal and thus not registered in the case file.

³¹⁸ In Greece, Article 3 PD 81/09 states that “If the interview concerns a woman applicant who, due to her experiences or her cultural background, is having difficulties in presenting the reasons for her claim, special attention shall be taken so that the interview is conducted by a specialised woman interviewer in the presence of a woman interpreter.”

³¹⁹ In Italy, Article 12 (1) of the d.lgs. 25/2008 states that the CTRPI, “on the basis of a grounded request of the applicant, may decide to run the personal interview in the presence of only one of its members and, if possible, of the same sex of the applicant”.

³²⁰ In Slovenia, Article 18 of the IPA (female applicant for international protection) stipulates special provisions on processing female applications: “(1) Upon her request, a female asylum applicant shall be entitled to have a female person conduct the procedure. (2) The female applicant shall be provided an interpreter, if possible.”

³²¹ Article 17.5 of the New Asylum Law states that “The administration will adopt the necessary measures to give a different treatment during the interview, when necessary, on grounds of the applicant’s sex”.

³²² In Bulgaria, due to a severe shortage of interpreters, it may be difficult to satisfy such a request with regard to the interpreter. In most of the aliens departments in Greece, there is only one police officer responsible for conducting personal interviews and there is a severe shortage of interpreters. In Greece and Slovenia it was reported that applicants are not routinely informed that they can request an interviewer and interpreter of the same sex.

³²³ Y005 and Y009. It should be noted that in case Y005, a female interpreter who spoke French was initially appointed; but due to the fact that the applicant did not have a sufficient command of French, a male interpreter who spoke Lingala was then appointed. It is recognized that the determining authority may have experienced difficulty in finding a female interpreter of Lingala which is a rare language in the Czech Republic.

³²⁴ Interviews 3, 4 and 5.

³²⁵ Glaint2.3.09; glaint11.3.09; LIVint13.3.092; GLAJ202.

Recommendations

UNHCR recognizes that genuine operational constraints with respect to providing a same-sex interviewer and interpreter may currently exist in some Member States. Member States should seek to ensure their capacity to assign interviewers of the same sex upon request.

Member States should also seek to ensure the availability of sufficient numbers of qualified interpreters of both sexes. In particular, states should identify shortages of female interpreters. In the absence of a qualified interpreter of the same sex in the required location, determining authorities could seek to address this through the use of telephone or video-conferencing. The European Asylum Support Office could have a facilitative role to play in this regard.

EU guidelines should state that all applicants should be informed of their right to request an interviewer and interpreter of the same sex; and all applicants should be routinely asked, in advance of the personal interview, whether they wish to request an interviewer and interpreter of the same sex.

Same-sex interviewers and interpreters should be provided, subject to genuine operational constraints, when requested, and when the application raises gender issues. Where an interview has been arranged that is not gender-appropriate for whatever reason, a mechanism should be in place to allow for the postponement of the interview.

Time allocated for and duration of the personal interview

Sufficient time must be allocated for the personal interview so that applicants can present the grounds for their application in a comprehensive manner. What is sufficient will vary and will depend on a number of factors relating to the profile of the applicant and the reasons for the application. Many other factors will also affect the time required to interview an applicant, for example, the use of interpretation etc. As such, it is not possible to recommend an average duration of a personal interview. However, it is critical that interviews are scheduled in such a way as to allocate sufficient time. Scheduling should be based on a realistic assessment of interviewing capacity, and should give both the interviewer and applicant a reasonable amount of time to prepare for the interview.³²⁶

UNHCR's audit of interview records in case files and observation of interviews confirmed that the duration of personal interviews varies widely.

However, UNHCR has very serious concerns regarding the time allocated and taken for interviews in ADA in Athens, Greece.³²⁷ During the period of UNHCR's observation of interviews in ADA, interviews were conducted simultaneously by four police officers.³²⁸ According to interviewers at ADA, every day, each interviewer receives a list of approximately 20 interviews that s/he has to conduct during that same day.³²⁹ A total of 60 to 80 interviews were conducted each day by four police officers during the period of UNHCR's observation. UNHCR observed the per-

³²⁶ See paragraph 3.5.3 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, 1 September 2005.

³²⁷ The interviews conducted at the SDAA and SDS were of longer duration. The interview at SDS lasted 50 minutes and the two interviews at SDAA lasted 3 hours each.

³²⁸ The Head of ARD has stated that 10 police officers are appointed to conduct interviews in ADA, and the fact that only four police officers were conducting interviews at the time of UNHCR's observation was probably due to temporary administrative problems. A GCR and UNHCR *Report on the conduct of interviews during the first instance procedure for refugee recognition at ADA*, 2008, reported that during the period 13.09.07 and 16.05.08, interviews were conducted by four to six police officers.

³²⁹ Interview with S3 and S4.

sonal interview of 39 applicants at ADA.³³⁰ Twenty interviews lasted 5 minutes each;³³¹ ten interviews lasted 10 minutes each;³³² four lasted 15 minutes each;³³³ four lasted 25 minutes each;³³⁴ and one lasted 35 minutes.³³⁵

The following is an example of the complete personal interview of an applicant in ADA, Athens who claimed to be from Afghanistan. The questions and answers (as interpreted) were recorded word for word by UNHCR's researcher. The interview from start to finish lasted approximately five minutes. There was no introduction to the personal interview and no other questions were asked.

Police Officer: Can he tell us why he left Afghanistan?

Interpreter (interpreting the applicant's answer): There was a land problem. His family has enemies. These enemies wanted his land and killed a member of his family.

Police Officer: These enemies are neighbours?

Interpreter: Yes.

Police Officer: When he arrived in Greece?

Interpreter: Three months ago.

Police Officer: Is he working in Greece?

Interpreter: No.

Police Officer: What was his itinerary?

Interpreter: He went to Iran. From there he went to Turkey...

Police Officer: He came by boat?

Interpreter: Yes.

Police Officer: How much he paid?

Interpreter: 1000 dollars.

Police Officer: OK, tell him to go now for fingerprints.

This cannot be considered to constitute a personal interview, as it has not allowed the applicant to present the grounds for his/her application in a comprehensive manner, and the interviewer has not conducted the interview in a way that allows all the facts relevant to the criteria for international protection to emerge. In addition to issues such as the need for the specialist training of interviewers, which is dealt with earlier in this chapter, the determining authorities of Member States must ensure that they have sufficient staffing capacity for the conduct of personal interviews, that sufficient time is allocated for the interview so that all the relevant issues relating to the application can be addressed fully (see below), and the scheduling of interviews is realistic.

Interviews require concentration and can be stressful and tiring for all involved. Therefore, a personal interview should not be too prolonged, and a second interview should be scheduled if more time is needed to fully establish the grounds for the application or if the applicant suffers an onset of ill health or tiredness.

³³⁰A total of 49 cases were observed in total at ADA, but in ten of these the full personal interview was omitted.

³³¹On average.

³³²*Ibid.*

³³³*Ibid.*

³³⁴*Ibid.*

³³⁵*Ibid.*

As a matter of course, at the beginning of each interview, applicants should be informed that they may request a break during the interview³³⁶ and the interviewer should schedule breaks during the personal interview. This is important for all involved in the interview.

Based on UNHCR's observation of interviews, in some Member States, breaks were rarely offered by the interviewer, were ad hoc or when offered, it was a lunch break.³³⁷ One interview observed in the Czech Republic lasted four hours and no break was offered.³³⁸ And in another interview observed in Bulgaria, the interpreter – operating via video link – in the Netherlands took a break after 2 hours. The interviewer also left the room but the applicant was not informed that s/he could take a break.³³⁹ In contrast, breaks were regularly taken in interviews observed in the Netherlands.

It is not surprising, therefore, that either due to the duration of the interview or, in the case of interviewers and interpreters, due to the cumulative number of interviews conducted during the day, UNHCR observed interviewers, interpreters and applicants who appeared to be very tired. This is not conducive to the conduct of an effective interview.³⁴⁰

Recommendations

Scheduling should be based on a realistic assessment of interviewing capacity. It should give both the interviewer and applicant a reasonable amount of time to prepare for the interview.

The determining authority must ensure that the applicant has sufficient time to present all the reasons for the application for international protection. The duration of the personal interview should be whatever is required in order to establish all the relevant reasons for the application for international protection. However, the interview should not be excessively long and a second interview should be scheduled if more time is needed to establish fully the grounds for the application.

UNHCR recommends short breaks for every hour of interview, with more frequent breaks where special needs are present, for instance pregnant applicants, those accompanied by young dependants or suffering from ill-health. Applicants should also be informed that they can request a break at any point during the interview.

³³⁶ For example, at the beginning of the interviews observed in Bulgaria and France, the applicant was not informed that s/he could request a break.

³³⁷ Bulgaria, the Czech Republic, France [a break was taken after language problems], Italy and the Czech Republic. In Finland, breaks were offered for lunch and before the record of the interview was reviewed at the end of the interview. This was the case in all audited interviews. Additionally, for instance in interview 3, breaks were offered for the applicant to feed her baby who was with her husband outside. In Slovenia, applicants were never informed that they may request a break, but it was always given for lunch. In Germany, in 12 of the 16 interviews observed, no break was taken. While eight of these interviews were only about an hour long, there were another three which lasted for about two hours and one which was four hours long. In the other four interviews breaks were taken. In one of these which lasted six hours, two breaks were taken. Only sometimes, at the beginning of the interview, was the applicant informed that s/he could ask for a break. In all the cases the applicant requested a break, this was complied with. In case an interview takes place over lunch time, a lunch break is foreseen.

³³⁸ Yoo6.

³³⁹ Interview 4.

³⁴⁰ In one interview observed in the Czech Republic, both the interviewer and interpreter appeared tired during what was the third interview of the afternoon. Cumulatively the interviews had taken 4 hours and 29 minutes. In many of the CTRPIs visited in Italy, the interviewers appeared tired after 6-8 hours of back-to-back interviewing.

The environment in which personal interviews are conducted

The environment in which the personal interview takes place may have an impact on the effectiveness of the personal interview. A failure to establish an appropriate environment will inhibit disclosure on the part of the applicant.

As such, the personal interview should be free from external noise, other interruptions and distractions. However, during the period of this research, UNHCR witnessed numerous personal interviews that took place against a background of noise, interruptions and other distractions. The following circumstances are cited by way of example:

- Personal interviews were interrupted by phone calls to the interviewer and/or the interpreter who responded during the interview (Bulgaria, the Czech Republic, Italy, Germany,³⁴¹ Slovenia, Spain).
- Personal interviews were interrupted by colleagues of the interviewer or other persons entering, exiting, and/or asking questions (Bulgaria,³⁴² the Czech Republic,³⁴³ Italy, Germany³⁴⁴ and Spain).
- Personal interviews were affected by the level of noise in or around the room where the interview was being conducted (Greece,³⁴⁵ Italy, Germany³⁴⁶ and Spain).
- In the UK, UNHCR observed the interview of a female applicant whose young baby was present throughout. Rape emerged as an issue in the account and although the baby was too young to understand, UNHCR was concerned that its presence was inhibiting the woman from giving a full account, since she might not wish to exhibit her own distress, in case it upset the baby. Also, the rape account was not pursued at the time when the woman raised it, which meant that the topic had to be returned to later, which appeared to be unnecessarily distressing. The woman became very tired during the interview and although a break was taken, it was clear that the responsibility of caring for the child throughout the three hour interview was affecting her. UNHCR considered that some issues – such as personal circumstances on return – were not fully explored in this interview. UNHCR was also concerned to note that the presence of the child had not been recorded on the interview record.³⁴⁷ In the same interview, the interpreter's conduct was not properly controlled as she started to complete what appeared to be a timesheet during the interview. UNHCR concluded that these factors impacted on the effectiveness of the interview in this case.³⁴⁸

Recommendation

EU-wide guidelines should set out the conditions in which personal interviews should be conducted.

³⁴¹ For instance in interviews HR 5 and HR7 the phone of the interviewer rang and the call was taken.

³⁴² Interviews 1 and 4. In interview 4, the interview which was taking place by means of a video conference with an interpreter in the Netherlands was interrupted by a technician, who passed through the room at least three times for reasons unconnected to the conduct of the interview.

³⁴³ Y001 and Y003.

³⁴⁴ For instance HR 8.

³⁴⁵ ADA, Athens in Greece; some CTRPIs in Italy; OAR, Madrid, Spain

³⁴⁶ The noise of landing airplanes sometimes had a disruptive effect.

³⁴⁷ Stakeholder interviewee confirmed that it would not be normal practice to record the presence of family members unless they became distracting.

³⁴⁸ LIVint9.3.09.

Rapport between interviewer and applicant

There are a number of factors which contribute to creating an atmosphere of trust, such as the tone adopted by the interviewer (and, where present, the interpreter), body language and other forms of non-verbal communication.

The tone adopted by the interviewer and the interpreter should always remain neutral and professional throughout the personal interview. In particular, the interviewer should never use a threatening or harsh tone. Gestures that demonstrate disapproval, disbelief or a lack of interest should be avoided.

UNHCR observed that in some interviews, the conduct of the interviewer was not appropriate. The following behaviours are cited by way of example:

- aggressive questioning (Slovenia);
- body language demonstrating disbelief in the applicant's story (Slovenia and Spain);
- rare eye contact with applicant (Finland, Slovenia, and Spain);
- inappropriate comments (Spain: "This interview is not going very well for you"³⁴⁹ or "You did it very well",³⁵⁰ or comments on the workload; and Germany);³⁵¹
- loss of patience by the interviewer (Bulgaria and Spain);
- interviewer did some work on the computer while the interpreter and the applicant were still communicating (Germany);
- interpreter appeared to be filling in a timesheet during the interview (UK); and
- lack of respect shown by interviewer in use of language, for example using informal/familiar term for 'you' ("tu" instead of "le" in Italy).

Initial compulsory training for all interviewers should include a module which covers the conduct of interviewers and interpreters. An EU code of conduct for interviewers and interpreters should be adopted.

Interviews conducted by the interviewer via video

At the end of 2007, the French determining authority (OFPRA) introduced personal interviews by video link in the Lyon Administrative Retention Centre (CRA). The applicant remains in the detention centre in Lyon and the interviewer, and where necessary, the interpreter is located in premises in OFPRA in Paris. This technique was introduced as a means to reduce the costs of transporting applicants under police escort to Paris, where all personal interviews in France generally take place, and to save time, given the strict time limits for detention. Furthermore, in 2008, 25% of applicants who applied for international protection whilst in French overseas territories were also interviewed by video.³⁵² In the framework of this research, it was not possible for UNHCR to observe interviews conducted by video. However, this new technique was much criticized by NGOs when it was introduced. A Charter has since been drafted which aims at ensuring the same guarantees that are applicable to personal interviews conducted in the OFPRA premises.

³⁴⁹ Case No. 0501010.

³⁵⁰ Case No. 1001020.

³⁵¹ For instance, HR 1: "I think we should leave that out. You can't know that, since you had already left the country at that time." HR 2: "So, you do not yet know your husband well."

³⁵² For applicants in Guadeloupe, in Martinique and in Guyana, missions are organized from the office of the OFPRA based in Basse-Terre (Guadeloupe). For applicants in Mayotte and Réunion, missions are organized directly from the Headquarters in Paris, with the deployment of some protection officers for several weeks to conduct interviews. 75% of the case files in the French overseas territories were treated this way in 2008.

In the context of this research, it has not been possible for UNHCR to assess whether the use of video technology to replace a face-to-face interview for the interviewer and applicant may have any impact on the effectiveness of the personal interview. However, the fact that OFPRA itself, on the basis of its own assessment of whether an application may raise complex issues, selects some applications for face-to-face interview on mission rather than by video interview may be indicative of a recognition that video interview is not always appropriate or the most effective method. Some OFPRA officers informed UNHCR that they found it easier to be neutral, objective and impartial when there is no face-to-face interview. On the other hand, face-to-face interviews are certainly more conducive to creating a climate of confidence and to facilitating communication between the protection officer and the applicant. It must also be borne in mind that the use of such technology may be difficult for some applicants to grasp.³⁵³ More research on this issue may be required.

Establishing the facts in the personal interview

Questioning during the personal interview should facilitate the most complete and accurate disclosure of the facts that are relevant to the application for international protection.³⁵⁴

In UNHCR's experience, the most effective interviews are those that are well-structured and focused on assessing qualification for refugee status or subsidiary protection status. As such, the personal interview should establish all the facts that are relevant for the application of all the elements of the refugee definition and the application of the criteria for qualification for subsidiary protection status. An assessment of the credibility of the applicant's statements is an important part of the fact-finding process and the personal interview provides the interviewer with an opportunity to clarify any incomplete information and/or apparent inconsistencies, to resolve, if possible, any contradictions and to find an explanation for any misrepresentation or concealment of facts. However, the personal interview should not concentrate on establishing discrepancies, inconsistencies and contradictions. Neither should it be focused in the main on establishing the applicant's travel route, the facilitation and means of travel.

In this research, UNHCR observed personal interviews and audited the transcripts of interviews in order to assess whether the interviews were conducted in a way which allowed all the facts relevant to criteria for international protection – both refugee and subsidiary protection status – to emerge.³⁵⁵

The picture which emerged was mixed. In general terms, UNHCR found that the interviews observed in the Czech Republic,³⁵⁶ Finland, Germany,³⁵⁷ the Netherlands and the UK³⁵⁸ were structured and conducted in such a way that allowed facts relevant to the criteria for international protection to emerge. However, personal interviews observed elsewhere revealed notable shortcomings.

³⁵³ When asked about the use of interpretation via video, the representative of the determining authority in Lappeenranta in Finland, where interpretation via video is frequently used, states that for some applicants, it takes some time for them to become accustomed to the interpretation via video.

³⁵⁴ Paragraph 4.3.6 of UNHCR Procedural Standards for RSD, under UNHCR's Mandate, September 2005. This requires the use of both open-ended questions which permit the applicant to use his or her own words and describe events they consider relevant, and closed questions.

³⁵⁵ All the Member States of focus operate a single procedure for the determination of both refugee status and subsidiary protection status. Even though in Germany, the examination of subsidiary protection cannot be applied for, but is dealt with by the determining authority *ex-officio*, all forms of international protection are assessed in the same interview.

³⁵⁶ With the exception of issues related to internal protection and subsidiary protection status, which were not always fully examined.

³⁵⁷ However, it should not go unmentioned that adjudicators first ask (25) standard questions concerning personal data, family, travel route etc., and only subsequently, ask the applicants to state their reasons for applying for asylum.

³⁵⁸ Based on UNHCR's observation of personal interviews, interviewers did investigate whether the applicant's feared persecution was for a 1951 Convention reason; but in some cases not all relevant criteria of the Qualification Directive and the Convention were explored. For example, although the interviewer did ask about the position of a Somali woman as a minority clan member, the question of gender-based persecution was not pursued. Where the internal protection alternative was being considered, interviewers did not establish whether internal protection was relevant and reasonable, taking into account the general situation and the personal circumstances of women: LIVint9.3.09; GLAint4.3.09.

UNHCR has found that, in general terms, the personal interview was more effective in those Member States which conduct a separate interview to gather bio-data and information regarding the travel route. As a result, the personal interview focused principally on the reasons for applying for international protection and an assessment of credibility.

For example, in the Czech Republic, there is a separate process to gather the elements relating to the profile and travel of the applicant. Also, in Finland, the police or border guards conduct a separate investigation, including an oral hearing with the applicant, regarding the applicant's identity, travel route and entry to Finland. As such, the personal interview conducted by the determining authority is focused on the reasons for the application. In the Netherlands, the determining authority conducts an initial interview in which the identity of the applicant and the travel route taken are assessed. Similarly, in the UK, prior to the personal interview, a screening interview is conducted by the determining authority. The screening interview gathers bio-data and detailed information regarding the travel route, as well as brief reasons for applying for international protection.³⁵⁹ In these four Member States, the observed personal interviews, in general and comparative terms, established all the facts relevant to the application of the criteria for refugee status and subsidiary protection status.

However, in other Member States, the personal interview or application interview³⁶⁰ has multiple objectives:³⁶¹

- gathering of bio-data regarding the applicant;
- gathering of detailed information regarding the travel route;
- establishing the reasons for the application for international protection.

Moreover, in these Member States, the format of the interview means that it begins with the gathering of bio-data and/or information on the travel route taken by the applicant, and subsequently addresses the reasons for the application. The consequence of this approach is that it was observed that a limited amount of the interview time was dedicated to exploring the reasons for the application. For example, in the application interviews observed in Slovenia and Spain, approximately two-thirds of the interview time was dedicated to gathering bio-data and information on the travel route, and only one third of the interview time was dedicated to exploring the reasons for the application.³⁶² In this regard, UNHCR was also concerned to note that in some application interviews observed in Spain, questioning on the reasons for the application was omitted and replaced solely by a written statement by the applicant.³⁶³

UNHCR was also concerned to note that in some of the interviews observed in these Member States, questioning with regard to the reasons for the application tended to be superficial, formalistic or insufficient to elicit all the

³⁵⁹ Note that a report entitled '*The Management of Asylum Applications by the UK Border Agency*', by the UK's National Audit Office found that of the 49,834 asylum applicants over the period January 2007- August 2008, 13,684 (27.5 per cent) had not had a full screening interview within two days of their application. The Comptroller and Auditor General, *The Home Office, Management of Asylum Applications by the UK Border Agency*, Part two, paragraph 2.2-2.3, The National Audit Office; HC 124 Session 2008-2009, 23 January 2009, www.nao.org.uk.

³⁶⁰ In Slovenia and Spain.

³⁶¹ Bulgaria, France, Germany, Italy, Slovenia and Spain. Note that in Bulgaria, information on the travel route is gathered in a separate interview (Dublin II interview).

³⁶² The ratio was estimated to be 50/50 in the personal interviews observed in Bulgaria (with regard to bio-data and reasons for the application) and France. Also in Germany, the major part of the interview was used for gathering information on bio-data and the travel route, before the reasons for applying for asylum were investigated. This sometimes even meant that only one third of the time was dedicated to the reasons for the application (for example HR 4: only the last two hours of six were dedicated to the reasons for the application). Moreover, sometimes directly after the interview took place, applicants were asked by another BAMF officer (especially responsible for gathering information on the travel route), to report again in detail on the travel route. It should not go unmentioned that applicants apparently do not understand that the question posed at the end of the interview, whether the applicant has any other reasons which would form an obstacle for returning to the country of origin, relates to all forms of subsidiary protection. (Lawyer: X2, X3; similarly X1).

³⁶³ Four interviews observed outside Madrid.

facts which are relevant to qualification for international protection.³⁶⁴ There was little evidence of clarification being sought regarding salient issues. Questioning was often more extended and more probing with regard to the identity of and travel route taken by the applicant.

Some interviews observed were overly dominated by credibility assessment, and applicants appeared to be questioned or tested at length regarding their origin and/or travel route.³⁶⁵ Country information or maps were mainly used to test the applicant's knowledge of his/her claimed region of origin or travel route.³⁶⁶ UNHCR recognizes the importance of establishing the identity of the applicant and travel route, but points out that the credibility assessment may also be made in the framework of exploring the reasons for the application.

Furthermore, UNHCR noted with concern that, with regard to the reasons given for applying for international protection, interviewers did not refer to any country of origin information in the interviews observed in Bulgaria, France, Germany,³⁶⁷ Slovenia,³⁶⁸ Spain³⁶⁹ and the UK.

There was also some evidence to suggest that interviewers do not always give applicants the opportunity to clarify apparent or perceived contradictions or inconsistencies which emerge in the course of the interview.³⁷⁰ For example, the audit of case files in Bulgaria showed that inconsistencies are often used as a ground for finding the testimony of the applicant not credible.³⁷¹ The interview records in relation to the respective decisions, however, provided no evidence that the applicant had been alerted to these inconsistencies or given the opportunity to clarify these inconsistencies. In only one of the interviews observed in Bulgaria,³⁷² did the interviewer address the inconsistency which emerged, and the applicant provided an explanation which was accepted as satisfactory.

The shortcomings observed in the personal interviews conducted at ADA, Athens were so severe that it can only be concluded that the personal interviews were not fit for purpose. Of the 49 interviews observed, the overwhelming majority lasted only five to ten minutes. Inevitably, these applicants were thus not given the opportunity to present the grounds for their applications in a comprehensive manner. In the majority of interviews observed, when the applicant claimed to have left his/her country of origin for fear of persecution, no follow-up questions were asked.³⁷³ For example:

- In case IO34ETH1, the applicant claimed that her father had “problems with the army”. No related question followed.
- In case IO48IRQ7, the applicant claimed that he was facing problems because of his Kurdish origin. No further question regarding the alleged problems was asked.
- In case IO49GHA3, the applicant claimed fear of persecution for reasons of race. The interviewer did not ask any related questions to clarify the exact reasons.

³⁶⁴ Bulgaria, France, Italy, Slovenia and Spain with regard to OAR in Madrid.

³⁶⁵ Based on observation of interviews and interview records in Belgium, France (with regard to Sri Lankans), Slovenia, and Spain.

³⁶⁶ Observed in Belgium and France. The CGRA in Belgium is aware of this criticism and is taking steps to discuss and address this in working groups and documents.

³⁶⁷ During the attended interviews the interviewer did not explicitly inform the applicant which COI would be used by the interviewer in taking the decision. This finding is confirmed by the consulted lawyers, who all stated that the interviewers do not inform applicants of the relevant COI during the interview (X1, X2, X3).

³⁶⁸ With regard to the application interviews.

³⁶⁹ *Ibid.*

³⁷⁰ Witnessed in some interviews in Bulgaria and confirmed by interviewers; and observed in some interviews in Italy and the UK: LIVint9.3.09; LIVint13.3.09. Also observed in some interviews and the transcripts of interviews in case files in France.

³⁷¹ See for example Decision 50.

³⁷² Interview 2.

³⁷³ Of the 52 personal interviews observed in total, in only 6 interviews was a follow-up question asked when the applicant claimed to have left the country of origin for fear of persecution.

In contrast, applicants at ADA were questioned on:

- their travel route to Greece;³⁷⁴
- the economic conditions in the country of origin and the financial status of the applicant;³⁷⁵ and
- why Greece was chosen as the country of destination.³⁷⁶

By way of example, in interview IO40AFG7 the applicant was asked to answer only the following questions in this order:

1. *What were the reasons of your flight?*
2. *Do you work in Greece?*
3. *Do you have relatives in Afghanistan?*
4. *What was the exact itinerary that you followed on your way to Greece?*
5. *Have you gone to school?*
6. *When did you leave Afghanistan?*
7. *Do you have a passport?*
8. *What was your employment in Afghanistan?*
9. *How much money have you spent for your itinerary?*

Some determining authorities reported that interviewers have guidelines on how to structure the interview (Belgium, Finland,³⁷⁷ Germany,³⁷⁸ Greece,³⁷⁹ the Netherlands and the UK). However, in most Member States of focus in this research, the determining authorities informed UNHCR that interviewers use a template with standard questions (Bulgaria,³⁸⁰ Finland,³⁸¹ Germany,³⁸² Italy,³⁸³ the Netherlands, Slovenia, and Spain) or that such a template was being prepared (France). Within the remit of this research, UNHCR has not assessed the content of these guidelines or templates.

³⁷⁴ IO40AFG7, IO42IRQ5, IO43IRQ6, IO46SLK1, IO32PAK10, IO31GEO1, IO30PAK9, IO5PAK4, IO2PAK2, IO1PAK1, IO51AFG9, and IO52MAU1.

³⁷⁵ This was whether or not the applicant had claimed to have left the country of origin for economic reasons: IO5PAK4, IO46SLK1, IO31GEO1, IO30PAK9, IO11AFG1, and IO49GHA3.

³⁷⁶ IO42IRQ5, IO43IRQ6, IO46SLK1, IO32PAK10, IO31GEO1, IO38GEO2, IO48IRQ7, and IO49GHA3.

³⁷⁷ Finnish Immigration Service, Pakolaisneuvonta ry, ERF: *Suosituksset turvapaikkapuhuttelun kehittämisessä* 2008.

³⁷⁸ Adjudicators firstly use a catalogue of 25 standard questions concerning personal data, family, travel route etc. Subsequently, applicants are asked to state their reasons for applying for asylum. The catalogue was used in all the case files reviewed by UNHCR as well as in all the attended interviews. Adjudicators are instructed to use this catalogue and to ask also all necessary additional and follow-up questions. They can only deviate from it if it seems more appropriate during a particular interview (Handbook for Adjudicator “Interview”, in particular, p. 7; Internal Guidelines for the Asylum Procedure, in particular, under: “Record”; “Interview” (4/5)). Moreover, there is a checklist available concerning the requirements set by the determining authority.

³⁷⁹ Head of ARD in ADGPH informed UNHCR that interviewers have internal guidelines which are strictly for internal use, so UNHCR was not given permission to see or obtain a copy of the guidelines. At the time of UNHCR’s research, according to the Head of ARD in ADGPH, a general circular on the implementation of PD 90/2008 was in preparation which would cover issues related to personal interviews.

³⁸⁰ The template is not obligatory. Some interviewers do not follow it in the general procedure. The case files audit confirmed that the templates for the accelerated procedure and for interviews on subsequent applications are in all cases followed.

³⁸¹ Confirmed by observation of interviewers, although all interviewers asked additional and follow-up questions.

³⁸² The catalogue does not state questions related to the actual reasons for the asylum application. These are enquired following the general questions. The Handbook for Adjudicator “Interview”, does not provide a checklist or practical information on the criteria for qualification for refugee status or subsidiary protection, but contains advice regarding adequate conduct of the interview. The Internal Guidelines for the Asylum Procedure contain a table with explanations with a view to the criteria for qualification for refugee status or subsidiary protection; however this table does not refer to the structuring of the personal interview. Also the explanatory documents available for the adjudicators regarding the assessment of the criteria of Article 15 c QD (in certain countries of origin), do not explicitly relate to the conduct of the interview (Documents submitted by the determining authority to UNHCR).

³⁸³ Some Commissions of the determining authority have a template with some initial questions or general areas to be addressed during the interview. Further questions are developed in the course of the interview.

Recommendations

An *aide memoire* to interviewers should be developed to facilitate the structuring of the personal interview, ensuring that all the relevant key elements of the refugee definition and the criteria for qualification for subsidiary protection status are covered during the personal interview. UNHCR would wish to contribute to the development of such an *aide memoire*. The EASO may also be able to play a facilitating role in developing such a tool.

Establishing the facts relevant to qualification for international protection should be the principal aim and focus of the personal interview, and appropriate lines of questioning should be used to this end. The applicant should be given the opportunity to address any perceived inconsistencies, discrepancies or contradictions during the personal interview.

Sufficient time should be allocated for the personal interview, so that the applicant is able to present the grounds for the application in a comprehensive manner.

Recording of interview

In the overwhelming majority of interviews UNHCR observed in the course of this research, the interviewer made a written or typed record of the applicant’s statements.³⁸⁴ The fact that the interviewer requires time to record the applicant’s statements not only has an impact on the duration of the interview, but also has an impact on the ‘flow’ of communication. The extent of this impact will depend upon the ability of the interviewer to type proficiently or write quickly; and whether a verbatim record or summary notes are being made. UNHCR was informed that the determining authority (CGRA) in Belgium, at the time of this research, provided case managers with a course in touch-typing so that the case manager is able to maintain eye contact with the applicant and interpreter whilst recording statements made.³⁸⁵

	Audio taped	Video taped	Written or typed notes	Drafted by who?
Belgium			√	Interviewer
Bulgaria			√	Interviewer
Czech Republic			√	Interviewer
Finland	√ ³⁸⁶		√	Interviewer
France			√	Interviewer
Germany	√ ³⁸⁷		√ ³⁸⁸	Interviewer ³⁸⁹
Greece			√	Interviewer
Italy			√	Interviewer
Netherlands	√ (UAM u12s only)	√ (u12s only)	√	Interviewer
Slovenia ³⁹⁰			√	Interviewer or typist

³⁸⁴ See section on Article 14 for further information regarding the status of the report of a personal interview in the procedure.

³⁸⁵ Interview with operational coordinator of the CGRA, 25 February 2009.

³⁸⁶ This is a back-up to the *verbatim* record made of interview.

³⁸⁷ In the interviews attended by UNHCR, the adjudicators dictated into a dictaphone the information deemed to be “essential information”. Thus, the interview is divided into sections during which the applicant speaks and the interviewer takes notes, and parts during which the adjudicators dictate in direct speech the audio version of the interview record. (Many interpreters were already “checking” at this stage, whether the adjudicator dictated accurately based on what had been stated before). Therefore, the audio version is not an audio record of the interview itself.

³⁸⁸ During the interviews all adjudicators and most interpreters first made written notes, in order to use these for the audio version, of the interview with the help of the dictaphone. However, these written notes do not form part of the typed final version of the hearing report.

³⁸⁹ The dictation is made by the interviewer. Only the typing of the dictation is done by a typist.

³⁹⁰ The MOI has set audio-taping as a long term goal. It has been unable to introduce it so far due to financial constraints.

	Audio taped	Video taped	Written or typed notes	Drafted by who?
Spain	√ (RSD only)		√	Interviewer
UK	√ (on request & piloted cases) ³⁹¹		√	Interviewer

UNHCR encourages all Member States to audio-record personal interviews as a back-up to the written record of the interview.

Presence of third parties during personal interview

It is UNHCR’s view that, as a general rule, the participation of third parties during the personal interview should be limited to a legal representative or, in the case of a child applicant or applicant who is suffering from a mental illness or disability, the designated representative. Where the attendance of a third party other than a legal representative or a designated representative is specifically requested by an applicant, discretion should be exercised in determining whether to grant the request. In assessing, the appropriateness of the participation of a third party, consideration should be given to any special needs or vulnerabilities of the applicant, the nature of the relationship between the applicant and the third party, as well as any factors indicating that the attendance of the third party would be likely to promote or undermine the objectives of the personal interview.³⁹²

Article 13 (4) APD states that “Member States may provide for rules concerning the presence of third parties at a personal interview.” Most Member States do have some rules in place, but these may be supplemented in practice. Most determining authorities permit a legal representative to be present. The notable exception is OFPRA in France.

Practice regarding who may be present during the personal interview is stated below.

	Rules	Legal Rep/NGO/UNHCR	Friend or supporter or person of trust	Expert - medical	Appointed Guardian for minors	Parent or family
Belgium	√ ³⁹³	√	√ ³⁹⁴		√ mandatory	√ ³⁹⁵
Bulgaria	√ ³⁹⁶	√ ³⁹⁷		√ ³⁹⁸	√ mandatory	√ ³⁹⁹
Czech Republic		√	√	√	√ mandatory	√ ⁴⁰⁰
Finland	√ ⁴⁰¹	√ ⁴⁰²	Possible		√	√
France					√	

³⁹¹ UNHCR observed two interviews that were audio-taped – one at the request of the legal representative and the other as part of a pilot; GLAint4.3.09 and LIVint9.3.092.

³⁹² Paragraph 4.3.4 of UNHCR Procedural Standards for RSD under UNHCR’s Mandate, September 2005.

³⁹³ Article 19 of the Royal Decree of 11 July 2003.

³⁹⁴ With permission from the CGRA.

³⁹⁵ *Ibid.*

³⁹⁶ The only explicit legislative provision is Article 63a (9) of LAR concerning unaccompanied minors, otherwise there is an unofficial administrative list.

³⁹⁷ Only NGOs which are implementing partners of UNHCR.

³⁹⁸ In interviews with applicants who are minors.

³⁹⁹ Parents of accompanied children may be present as long as it is not to the detriment of the child’s interests.

⁴⁰⁰ Only when the interviewee is a minor and the parent is legal guardian. According to Section 29 (4) CAP, interviews of minors may be conducted without the presence of parents or any other persons responsible for raising the child, when this is required by the interest’s of the child.

⁴⁰¹ Administrative Asylum Guidelines state that legal representatives, minor’s appointed representative and family members may be present at the interview. In practice, even if it is rare, it may be possible to have a person of trust or an NGO present.

⁴⁰² A legal representative was present in 3 out of 10 interviews observed. In 2/3 of these cases, the representative came from the Refugee Advice Centre. However, note that legal representatives only rarely attend personal interviews held outside Helsinki due to distance.

	Rules	Legal Rep/NGO/UNHCR	Friend or supporter or person of trust	Expert - medical	Appointed Guardian for minors	Parent or family
Germany	√ ⁴⁰³	√ ⁴⁰⁴	√ ⁴⁰⁵	√ ⁴⁰⁶	√ ⁴⁰⁷	√ ⁴⁰⁸
Greece	√ ⁴⁰⁹	√ ⁴¹⁰			√ ⁴¹¹	
Italy	√ ⁴¹²	√		√	√	√
Netherlands	√ ⁴¹³	√ ⁴¹⁴			⁴¹⁵	
Slovenia	√ ⁴¹⁶	√	√		√	
Spain	√	√		Possible	√	
UK	√ ⁴¹⁷	√	√ ⁴¹⁸			√ ⁴¹⁹

⁴⁰³ Section 25 (6) APA: “The interview shall not be open to the public. It may be attended by persons who show proof of their identity as representatives of the Federation, of a Land, the United Nations High Commissioner for Refugees or the Special Commissioner for Refugee Matters at the Council of Europe. The head of the Federal Office or his/her deputy may allow other persons to attend.”

⁴⁰⁴ Legal representatives do not need a permission, as they are not considered to be “other persons” (Section 25 (6) APA). They are allowed to be present during the interview pursuant to the rules generally applying in administrative procedures (They can be excluded under certain circumstances according to the general administrative rules). The possibility of attendance by UNHCR staff is explicitly mentioned in Section 25 (6) APA (In practice, if UNHCR staff/interns (located in Berlin) want to attend interviews in the branch office in Berlin, prior approval of the head of the branch office is obtained). NGO staff may attend the interview; however, they need permission too.

⁴⁰⁵ According to Section 25 (6) APA possible with prior permission.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ The determining authority informed UNHCR that in the case of unaccompanied minors the appointed guardian has the right to be present during the interview; however, it stated at the same time that the filing of an asylum application as well as the conduct of the interview are only possible after a legal guardian has been appointed. Also working paper 26 speaks on the one hand of “permitting the attendance of legal guardians” while stating on the other hand that a legal guardian has to be appointed (Working Paper 26, “Unaccompanied Minors in Germany”, Research Study II/2008 (EMN), published 2009, p. 39). With regard to practice, UNHCR has been informed by the determining authority that in all cases of unaccompanied minors under the age of 16, the interview is conducted in the presence of the legal guardian. It has to be kept in mind, that according to Section 12 APA, a person “who is at least 16 years of age shall be capable of performing procedural acts in accordance with [the APA]”. Even though, according to Section 42 Code of Social Law (“SGB VIII”), a legal guardian has to be appointed for unaccompanied minors until they are 18 years old, these persons are capable of performing procedural acts. This also pertains to the personal interview. This is mirrored in the practice, experienced by lawyer X2, who stated that in cases of unaccompanied minors who are 16 years of age or older, only sometimes is a guardian present. With regard to the practice concerning issues of unaccompanied minors, please refer to the findings of the ASQAEM Project (implemented in Germany mainly in 2009) which had a special focus on the asylum procedures of unaccompanied minors and separated children.

⁴⁰⁸ According to the determining authority, interviews of children (under 16, see remark above) are conducted in the presence of the parent(s), and in cases of minors who are 16 or 17 years of age, the parent(s) are permitted to be present during the interview, if requested by the minor. Spouses are interviewed separately, unless otherwise explicitly wished by the applicants.

⁴⁰⁹ Article 11 (5) and 12 (1) of PD 90/2008.

⁴¹⁰ Of the 52 interviews observed, a legal representative was present during only one (IO51AFG9).

⁴¹¹ This is not mandatory according to Article 12 (1) of PD 90/2008.

⁴¹² Article 13 (1) of the d.lgs. 25/2008 and Article 8 of the d.lgs. 140/2005 permit the presence of family members.

⁴¹³ According to the table of correspondence, Article 13 (4) has not been transposed. However, according to Article C13/2 Aliens Circular, the applicant can be assisted by a legal counselor in the accelerated procedure. There are no specific rules regarding the presence of other persons but in practice the Dutch Council for Refugees and other NGOs are generally allowed if requested. Article C13/3.1.2 Aliens Circular states that a legal counselor and a social worker may be present in the regular procedure.

⁴¹⁴ In practice, legal counselors are only rarely present during the initial and detailed personal interviews due to budgetary and time limit constraints.

⁴¹⁵ According to the AMA-unit in Den Bosch, legal guardians can observe the interview via a television but they are not allowed to be physically present.

⁴¹⁶ Article 47 (1 -4) of the IPA.

⁴¹⁷ API on *Interviewing*.

⁴¹⁸ API on *Interviewing* states that friends or other companions may be present at the interview at the discretion of the interviewing officer, provided that they are there to provide medical or emotional support.

⁴¹⁹ A parent, guardian, representative or other independent responsible adult must be present. Where unaccompanied minors are interviewed, their representative shall have the right to be present, ask questions and make comments in the interview. As with accompanied children, it is mandatory that a responsible adult is present when unaccompanied children are interviewed, but it is not mandatory that the legal representative be present; Immigration Rules 352 and 352ZA. In the case file audit, UNHCR noted that the legal representative’s interpreter for an unaccompanied minor had been excluded from the interview on the ground that there may not be enough space in the room, but when the interview went ahead, the room would have been large enough: DAF 42.

Monitoring and quality control of personal interviews

It is essential that the determining authorities ensure that personal interviews are monitored, so as to check whether interviewers and interpreters meet the relevant standards of fairness and due process. Moreover, without monitoring, the training needs of interviewers and interpreters will remain unidentified.

In the UK the determining authority has established a Quality Assurance Team to randomly monitor interview records and a small number of ‘live’ interviews.⁴²⁰

According to some determining authorities, a supervisor will check case files and/or read interview records⁴²¹ or conduct random checks on interviews;⁴²² or audio-tapes will be checked if there is a complaint.⁴²³ In some Member States, in practice, however, there is no systematic monitoring of personal interviews.⁴²⁴

With regards to interpreters, UNHCR was informed that in Belgium, there is constant monitoring in the first three months of an interpreter’s recruitment, and thereafter an evaluation interview once a year.⁴²⁵ In the UK, in its 5th Quality Initiative report, UNHCR welcomed the fact that an interpreters’ monitoring form – aimed at identifying poor performance among interpreters – had been piloted, as it could help to ensure a higher standard of interpretation in practice. It is not clear how widely it is used.⁴²⁶

Recommendations

UNHCR recommends that EU Member States which do not have national quality evaluation or monitoring systems should consider developing them, to address interviews as well as other procedural elements. At EU level, the EASO should work towards the establishment of EU criteria and mechanisms for quality control and improvement among Member States and stakeholders, based on common objective standards. It is recommended to introduce in the APD the obligation for states to establish quality control and improvement mechanisms.

Determining authorities should ensure that they conduct random and regular monitoring of personal interviews and assess performance based on established criteria. Such monitoring should be conducted by personnel with the requisite training and experience.

There should be a formal link between quality control and monitoring, training and operational guidance. Where quality controls identify gaps in training, guidance or policy, there should be mechanisms in place to communicate these findings and ensure that appropriate changes are made.

⁴²⁰ National Audit Office Report HC124 2008-09 23 January 2009, paragraphs 2.11- 2.13, and stakeholder interview 16.3.09.

⁴²¹ Belgium; and the Czech Republic according to the Head of Asylum Unit, interview of 7 April 2009. In Belgium, only rarely will a supervisor monitor the conduct of an interview, according to an interview with case managers on 19 & 20 March 2009. In France, the Head of Section receives the proposal for a decision and the interview record. However, UNHCR does not have any evidence that the interview record is monitored.

⁴²² In Bulgaria, the Methodology Directorate and Head of Proceedings and Accommodation Department reported that they carry out random monitoring. Similarly, in Germany, the determining authority informed UNHCR that random checks on interviews are conducted by the quality unit and the quality promoter (i.e. one of the staff members in a branch office). Also in Greece, the Head of ARD in ADGPH informed that there is occasional monitoring of the interviews conducted in ADA, but no monitoring of interviews conducted in the provincial Asylum and Security Departments. However, ADGPH plans to send experienced officers to provincial Departments for interview monitoring; interview with the Head of ARD in ADGPH.

⁴²³ In Slovenia, according to the determining authority (MOI) there are plans that, at some point in the future, all procedures will be taped, but it is foreseen that the tapes will only be monitored if a complaint is lodged.

⁴²⁴ Finland, France, Italy, and Spain.

⁴²⁵ According to interview with persons responsible for the interpreter services of the CGRA, 24 April 2009.

⁴²⁶ UNHCR 5th QI Report paragraph 2.4.34 and 35.

Complaints

UNHCR's Procedural Standards for Refugee Status Determination stress the importance of a complaints procedure for applicants about services provided in any refugee status determination operation. Such procedures are an essential managerial tool that can permit early detection of problems.

Some determining authorities reported that they do have a specific complaints procedure. In some Member States, this is in the form of a designated mail box.⁴²⁷ In the Czech Republic, applicants are informed of the possibility to lodge a complaint, in case of partiality on the part of employees of the determining authority.⁴²⁸ In the Netherlands, applicants are informed of the complaints procedure during the interview. Other determining authorities noted that there is a general administrative complaints procedure or ombudsman.⁴²⁹ However, UNHCR has not been able to assess the extent to which applicants are informed that they may lodge a complaint.

On the other hand, it was reported that in a number of Member States there is no complaints procedure: Finland, France, Greece, and Italy.

Recommendation

All determining authorities should establish a procedure to receive and respond to complaints by applicants or other individuals about the services provided in the asylum procedure. Information regarding the basic rights of applicants and the procedures for reporting mistreatment or misconduct should be disseminated to applicants at the earliest stage of the procedure. It should be made clear that making a complaint will not in any way influence the examination of the application, and is distinct from appeal procedures. Determining authorities should emphasise the seriousness of the complaints procedure so that it is not used for improper, frivolous or malicious complaints. The complaints procedure should be used to report serious misconduct or procedural unfairness.

⁴²⁷ In Bulgaria, according to the Head of Proceedings and Accommodation Department, of RRC-Sofia, and in Slovenia.

⁴²⁸ An NGO stated that applicants are often afraid to make complaints, interview of 22 April 2009.

⁴²⁹ Belgium and Spain. In Germany, in addition to the general administrative complaints procedure, there is the possibility to directly address the head of the respective branch office (Information provided by the determining authority. No information could be gathered concerning the practice).

SECTION VI: STATUS OF THE REPORT OF A PERSONAL INTERVIEW IN THE PROCEDURE

Introduction

Written transcript of personal interview

Audio and video-recording of personal interviews

Requesting the applicant's approval of the contents of the report

Refusal to approve the content of the report

Access to the report of the personal interview

Introduction

In the examination of a claim for international protection, the oral testimony of the applicant is crucial. In many cases, an applicant will be unable to support his/her statements by documentary or other proof and, therefore, it is imperative that his/her oral testimony is recorded accurately and fully.¹ A failure to accurately and fully record the applicant's testimony may result in an erroneous decision and a failure to identify a person with protection needs. This is not in the interests of Member States as an inaccurate record of the content of the personal interview is liable to challenge upon appeal. For the applicant, such a procedural failure carries the risk of *refoulement* in breach of international law.

Article 14 APD sets out the minimum requirements with regard to the report of the personal interview.

Written transcript of personal interview

Article 14 (1) APD provides that:

“Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of Directive 2004/83/EC” (the Qualification Directive).

In accordance with Article 14 (4) APD, this also applies to meetings with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application.² At the time of UNHCR's field research, the determining authorities in both Slovenia and Spain conducted such a meeting and, therefore, this research also focused on the report of the application interview and its compliance with the APD.³

Eleven of the 12 Member States under focus in this research have transposed Article 14 (1) APD in national legislation, regulations or administrative provisions: Belgium,⁴ Bulgaria,⁵ the Czech Republic,⁶ Finland,⁷ France,⁸ Germany,⁹ Greece,¹⁰ Italy,¹¹ the Netherlands,¹² Slovenia¹³ and the UK.¹⁴

¹ See Paragraph 196, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention, and the 1967 Protocol relating to the Status of Refugees, revised 1992.

² Article 14 (4) APD states: *“This Article is also applicable to the meeting referred to in Article 12 (2) (b)”*. Article 12 (2) (b) refers to *“a meeting with the applicant for the purpose of assisting him/her with completing his/her application”*.

³ UNHCR also observed interviews in the regular procedure in Spain for the purposes of this research.

⁴ Article 16 (1) of the Royal Decree of 11 July 2003 concerning the CGRA. Article 16 (2) of the same Decree requires that an inventory is made of all documentary evidence submitted by the applicant. By law, a record should also be made of the initial interview with the AO (Articles 15-18 of the Royal Decree of 11 July 2003 concerning the AO).

⁵ Article 63a (3) of LAR (New, SG No. 52/2007) and Article 91 (5) IRR. There is also explicit legislation requiring a written report of the interviews of accompanied and unaccompanied minors (Articles 102, 119(3) IRR).

⁶ Section 23 (1) ASA.

⁷ Administrative Guidelines apply (Turvapaikkaohje SM 109/032/2008). However, according to the Government Bill 86/2008, Section 97 a (2) and (3) of the Aliens' Act (301/2004) will be amended to explicitly state that a record must be made of the personal interview and interviews may be audio or video recorded.

⁸ Decree of 15 July 2008 (Article R.723-1-1 *Ceseda*).

⁹ Section 25 (7) APA: *“A record of the interview containing the essential information produced by the foreigner shall be kept. A copy of this record shall be given to the foreigner or sent to him with the Federal Office's decision.”* The practice experienced in the framework of this study complied with this rule; a written record of the interview had been issued in each of the reviewed case files as well as in all the cases in which UNHCR observed the interviews. The adjudicators make use of a standardized template for the issuance of the written record.

¹⁰ Article 10 (9) of PD 90/2008.

¹¹ Article 14 d.lgs. 25/2008.

¹² Articles 3.110(3) and 3.111(2) Aliens Decree 2000 require a written record be made of both the initial and detailed personal interviews.

¹³ Article 48 IPA.

¹⁴ Paragraph 339NC Immigration Rules.

The only exception is Spain which, at the time of UNHCR's research, had not transposed Article 14 (1) APD in national legislation or administrative provisions, nor has it transposed Article 14 (1) APD in the New Asylum Law. In practice, UNHCR observed that the competent authorities produced a written completed application form following each application interview, and transcripts of interviews in the regular procedure were also made.

The Directive is explicit in requiring that a written report be made. The national legislation and regulations of most Member States reflect this and require that a written record be made of the personal interview.¹⁵ The national legislation of Finland is not explicit as to the form of the record, but, in practice, a written record is made.

Notwithstanding the fact that most of the Member States of focus have transposed Article 14 (1) APD and all produce a written record of the interview, practice amongst the Member States is nevertheless varied as some Member States produce a *verbatim* transcript of each personal interview and some Member States produce a summary report of each personal interview.

UNHCR notes that the APD does not explicitly require a *verbatim* transcript of the personal interview. The APD states that the written report should contain “*at least the essential information regarding the application*” in terms of Article 4 (2) of the Qualification Directive. UNHCR is of the opinion that this should be interpreted as requiring Member States to completely transcribe in detail all the questions and statements of the interviewer and applicant regarding the essential elements stated in Article 4 (2) of the Qualification Directive.¹⁶ This includes a complete and detailed transcript of the stated reasons for applying for international protection since this is considered ‘essential information’ in terms of Article 4 (2) of the Qualification Directive. It should be noted that, when an interpreter is used, the transcript of the applicant’s statements is in fact a transcript of the translation of the applicant’s statements. In order to ensure an accurate record of the applicant’s statements, UNHCR encourages Member States to make an audio-recording of personal interviews.¹⁷

UNHCR notes positively that according to law or administrative instruction, seven of the Member States of focus in this research require that the interviewer makes a *verbatim* written transcript of the personal interview, including everything said and not said by the applicant and interviewer.¹⁸ For example, UNHCR’s observation of interviews and audit of interview reports in the Czech Republic confirmed that a *verbatim* report is made and that some interviewers also described the non-verbal reactions of applicants, for example, “*the applicant is smiling*”, and “*the applicant cannot understand the question and it has to be re-formulated*.”¹⁹ Similarly, in Italy, some interviewers write a *verbatim* report and also describe the non-verbal reactions of applicants.²⁰

15 Belgium, Bulgaria, the Czech Republic (Section 18 CAP (1), which also states that a visual or audio recording may be taken in addition to the report), France, Germany, Greece, Italy, the Netherlands, Slovenia (Article 48 (4) IPA. Article 48 (7) IPA permits the audio and video recording of the personal interview) and the UK (Para 339NC (i)).

16 This would include all questions and answers regarding “*the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection*”.

17 See subsection below.

18 Belgium (Article 17 (1) of the Royal Decree of 11 July 2003, concerning the CGRA), Bulgaria (Article 63a (3) LAR), the Czech Republic (practice), Finland (practice), France (practice), Slovenia (Article 48 (4) IPA), and the UK (Asylum Process Guidance “Conducting the Asylum Interview”).

19 Y005, Y009, Y012, X008 and X013.

20 Information obtained from UNHCR Italy which participates in the determination procedure in Italy.

However, in a couple of Member States which, by law or administrative instruction, should produce *verbatim* transcripts, doubts were raised by stakeholders²¹ or by UNHCR's audit of interview reports²² as to whether full *verbatim* transcripts are actually written in practice. The Council of State in Belgium has stated in a decision that there were no guarantees that the notes taken by case managers during the personal interview were reliable. The Council of State reasoned that if the applicant disputes the content of the report of the personal interview in a precise and credible manner, the recorded statements which are disputed cannot be used against the applicant.²³ The determining authority in Belgium (CGRA) has since produced a working document which provides instructions for case managers on how to take notes during the personal interview.²⁴ UNHCR welcomes CGRA's acknowledgement of this problem and readiness to take steps to address it. UNHCR suggests that the accuracy of the written reports of personal interviews in all Member States is best achieved if a complete transcript is made.²⁵

UNHCR is concerned that some Member States have interpreted 'essential information' as giving the interviewer discretion to determine which parts of the applicant's statements are worthy of recording in the written report with the result that the written report is only a summary of the oral evidence given. This may result in relevant oral evidence not being recorded, and/or the meaning and accuracy of statements being unwittingly altered in the process of summarizing.

In five Member States, the interviewer is not required to make a full *verbatim* record of the personal interview.²⁶

German law only requires that the record contains the "essential information", but remains silent with regard to the form in which this information shall be given. According to the interpretation of the determining authority (BAMF), this term means as a rule, that a *verbatim* report is not required but rather a combination of a *verbatim* record and a summary of parts.²⁷ Questions and answers regarding the core events shall be noted down *verbatim*; and summaries shall be marked as such, for example, by use of reported speech.²⁸ The practice observed by UNHCR during the attended interviews²⁹ differed from these instructions. While questions and further enquiries by the adjudicator were noted down *verbatim*,³⁰ this was not always the case with regard to the information given by the applicant, notwithstanding the fact that they concerned the core events. Judging only from the hearing

21 In Belgium, the written report is supposed to be a "true account" of the personal interview, but some lawyers have criticized the interview records on the grounds that they are not always a true account and the case managers do not report everything but only what they consider to be relevant for the application – interview with lawyers on 26 March 2009. The lawyers reported that the failure to record a true account has been a successful ground of appeal. UNHCR was not able to verify the accuracy of interview reports in Belgium as UNHCR was not able to audit the written reports of the interviews it had observed.

22 In Bulgaria, UNHCR observed that the written reports do not include all the questions which are additional to the standard template questions, and do not include all the statements made by the applicant. Some statements of the applicant were also re-phrased.

23 *RvS*, 7 August 2007, nr. 173.899. The decision concerned an application dealt with within the asylum procedure before June 2007. In this case the Council of State compared the notes of the CGRA to the notes of the lawyer. The notes of the lawyer were more elaborate and clearer than the notes of the CGRA. Moreover, the notes of the lawyer stated that the case manager had said that "he was not there to note everything" and that he had asked the asylum applicant to be short and concise.

24 The report should be readable, it should be an accurate and literal account of everything that has been said by applicant and case manager, it should also state what is not being said (questions that are not being answered), the report should clearly state who said what, the report should be objective and only official abbreviations can be used.

25 See below also for recommendations regarding audio-recording.

26 Greece, Italy, the Netherlands and Spain (with regard to both the application interview and the personal interview in the regular procedure).

27 BAMF Handbook "Interview", 3.3 "Protocol", p.20.

28 BAMF Handbook "Interview", 3.3 "Protocol", p.20.

29 HR 1 to HR 16.

30 The hearing report of HR 1 does not contain the first 24 questions, however, these questions are those contained in the standard catalogue of questions asked in each interview and thus their wording can be identified.

reports, a conclusion could be reached that in practice, *verbatim* records are made and the information is clearly divided into questions and answers, and the answers are reported in direct speech (“I”, “we”, “our”). However, it depends very much on the adjudicator, the interpreter and their interplay, whether an answer is actually the one given by the applicant, or rather the version of the answer the adjudicator has dictated in direct speech into the dictaphone after having “filtered” the statement of the applicant for information seen as relevant. The aforementioned should not be misunderstood as implying that the adjudicators act in bad faith; the approach should be understood as an attempt to state the essential facts as clearly as possible. However, it should be mentioned when analyzing the actual practice of the conduct of the interviews, and the subsequent production of the hearing reports. Non verbal-reactions are also included in the hearing report³¹ as well as questions asked by other persons (e.g. by a lawyer).³²

In Italy, in practice, the level of detail recorded varies between the different Territorial Commissions and/or interviewers. As mentioned above, some write a full *verbatim* report, including recording non-verbal reactions, while others tend to summarize questions and answers.

In the Netherlands, there are empirical studies which have revealed discrepancies between the statements of applicants and the summary contained in the report.³³

In Spain, the report of the application interview in the admissibility procedure consists of a completed application form. UNHCR was informed that in certain offices, the applicant prepares and submits to the competent authority a written statement setting out the reasons for the application for international protection. UNHCR observed that, in these cases, the application form either contained a summary based on the written statement which was then attached to the form, or the interviewer recorded on the application form “*written statement attached*”. In two interviews observed by UNHCR, the interviewer had obviously received a written statement in advance of the application interview and had already filled in the application form so that the interview consisted of the applicant checking the details and confirming that the information was correct.³⁴

During UNHCR’s observation of personal interviews in ADA, Athens, UNHCR was gravely concerned to discover that the written summary report made of a personal interview did not reflect the oral evidence given by the applicant at all. UNHCR conducted a random check of a completed interview report of an applicant from Sri Lanka who had claimed in the personal interview which UNHCR observed that he had left his village in Sri Lanka because

31 According to the BAMF Handbook “Interview”, remarks with regard to reluctant/evasive answers, emotions or conspicuous behaviour might be informative with regard to the applicant’s credibility; especially in cases in which the decision is not taken by the same adjudicator who has conducted the interview (under: 2.5 “Additional Remarks in the Protocol”; 2.5.3 “Reluctant/evasive answers, emotions, conspicuous behaviour”, p.13)

32 HR 7, page 10.

33 U. Aron & F. Heide, *Bandopnamen van het nader gehoor*, Den Haag 1999, p. 37-39; T.P. Spijkerboer, *De asielzoeker, de contactambtenaar, de tolk en de bandrecorder*, *Rechtshulp* 2003-3, p. 28-32; N. Doornbos, *De papieren asielzoeker. Institutionele communicatie in de asielprocedure*, Nijmegen: Gerard Noodt Instituut 2003, p. 114, 119, 130, 136-141.

34 Cases Nr. 1101140 and 1201141.

of disorderly conditions. The completed interview form contained a dialogue which had not taken place in the personal interview:³⁵

Question (Q): Which were the crucial reasons that made you leave the country?

Answer (A): Economic reasons.

Q: Which other reasons made you leave?

A: None.

Q: Why did you choose Greece as your destination?

A: For a better life, because it's a secure country.

Q: Have you tried to move to another part of your country to find work?

A: No.

Q: Why you could not find a job in your country?

A: Because of grave unemployment.

Q: Have you tried to work outside your country?

A: No.

Q: Have you left your country because of family problems?

A: No.

Q: Have you faced any problems related with your job?

A: No, none.

Q: Your exclusive purpose was to come to Greece?

A: Yes.

Q: What other problems have you faced in your country that you will not face in Greece? A: Better conditions of living.

Q: Could you practice your occupation freely in your country?

A: Yes

UNHCR randomly sampled and audited 185 written reports of personal interviews conducted in Greece.³⁶ The interviews had been conducted by nine different police officers and the case files examined by six different examining officers (three police officers and three civil servants). UNHCR discovered that 171 reports contained the same questions with the same answers. The 171 reports related to applicants of different nationality, social status and gender and yet the reports recorded exactly the same questions posed and exactly the same responses given. Some of the applicants were members of ethnic groups which, in other States, have been found to have experienced persecution,³⁷ and other applicants claimed to have come from regions experiencing widespread violence and armed conflict.³⁸ UNHCR's audit of the case files revealed that in all cases, the police officer who conducted the interview proposed in standard phraseology that the application for international protection should be rejected because the application was deemed manifestly unfounded.³⁹

³⁵ IO46SLK1.

³⁶ UNHCR audited 202 case files in total but in 17 case files, an interview had not been conducted on the ground that the application had been implicitly withdrawn. All case files, with the exception of three, related to applications lodged at ADA in Athens.

³⁷ CF39AFG15, CF38AFG14, CF45AFG21 (Afghans belonging to the Hazara tribe) and CF84SLK2, CF83SLK1, CF85SLK3, and CF86SLK4 (nationals of Sri-Lanka of Tamil ethnic origin).

³⁸ Such as Paktia (CF27AFG3 and CF51AFG27), Uruzgan (CF39AFG15 and CF45AFG21), Logar (CF44AFG20 and CF42AFG18), Kapisa (CF29AFG5), Kabul (CF31AFG7), Ghazni (CF36AFG12 and CF38AFG14), Hirat (CF48AFG24), Kirkuk (CF80IRQ28) and Baghdad (CF77IRQ25, CF76IRQ24, CF53IRQ1, CF54IRQ2, CF55IRQ3, CF56IRQ4, CF57IRQ5, CF59IRQ7, CF60IRQ8, CF61IRQ9, CF62IRQ10, CF63IRQ11, CF64IRQ12, CF65IRQ13, CF67IRQ15, CF75IRQ23, CF78IRQ26, CF79IRQ27, and CF81IRQ29).

³⁹ Of the 202 case files randomly sampled and audited, in only one case file (CF13SSYR4) did the interviewer state that the application is unfounded and proposed rejection following an examination in the regular procedure. The Aliens Directorate of the Greek Police Headquarters (ADGPH) which received the proposal, and examined the interviewer's recommendation before a decision was taken, did not accept this proposal and recommended examination in the accelerated procedure without any recorded reasoning.

In the face of this evidence, UNHCR can only conclude that the 171 interview reports reviewed do not reflect the actual discourse of the personal interview. With regard to the other reports audited, there was either an extremely brief summary of stated reasons for applying for international protection which provided insufficient information upon which to take a decision or in some reports, the statements of the applicants with regard to the reasons for applying for international protection were not recorded at all.⁴⁰

The following citation is taken from the report of a personal interview of an applicant who was registered as from Pakistan (not one of the 171 reports referred to above):⁴¹

Question (Q): Which were the crucial reasons that made you leave the country?

Answer (A): I belong to ATI party, which is in conflict with SSP. I received threats by SSP and therefore I was forced to leave.

Q: Why did you choose Greece as your destination?

A: Because it's a secure country.

Q: Have you tried to move to any neighboring country of Pakistan?

A: No.

Q: Your exclusive purpose was to come to Greece?

A: Yes.

Q: What other problems have you faced in your country that you will not face in Greece? A: Better conditions of living.

No further questions or answers were recorded regarding the reasons for applying for international protection. The interviewer's proposal for a decision states that "*the applicant alleged that he had left his country of origin for political reasons*" and the interviewer recommends "*examination of the application within the accelerated procedure and rejection as manifestly unfounded*" without any further reasoning.

This evidence has led UNHCR to suspect that written reports of personal interviews may be copy-pasted standard templates which do not reflect the actual discourse of the personal interview, or are summarized to such an extent as to be generic and useless as evidence upon which a decision can be taken.⁴² These observations made by UNHCR cast grave doubts as to whether an individual, objective and impartial examination of applications is conducted in Greece, and suggests that in practice, the minimum standards of the Asylum Procedures Directive may be violated in practice.

⁴⁰ CF77IRQ25, CF27AFG3, CF29AFG5, CF31AFG7, CF40AFG16, CF14SYR5, CF147PAK35, CF25AFG1, CF13SYR4, CF16SYR7, CF11IRN1, and CF9IRN9.

⁴¹ CF147PAK35.

⁴² Note UNHCR concerns regarding the brevity and quality of personal interviews observed in ADA in Athens in Section on requirements of the personal interview.

Recommendations

Member States should ensure that the determining authority makes a complete and detailed transcript of every personal interview. Article 14 (1) APD should be amended accordingly.⁴³

Pending such amendment, the preparation of a written summary report of the personal interview should be permitted only if there is an audio recording of the entire personal interview, and audio recordings are admissible as evidence on appeal.

Member States are encouraged to consider the use of transcribers to assist interviewers in the task of producing a complete and detailed transcript of the personal interview.⁴⁴

Audio and video-recording of personal interviews

Some determining authorities have begun to use audio and/or video recording of the personal interview.⁴⁵ The determining authority in Finland supplements the written report with an audio-recording of all personal interviews.⁴⁶ A few other Member States use audio-recording to record some, but not all, personal interviews. For example, in Spain, since 2006, the determining authority (OAR) has audio-recorded personal interviews in the regular procedure, but not the application interviews.⁴⁷ In the UK, a legal precedent has established that applicants who are not entitled to publicly-funded legal representation at the personal interview and cannot afford to fund their legal representation may now request that their personal interview be audio-recorded.⁴⁸ If they do so, the interviewer is required to do this. However, in UNHCR's observation of personal interviews in the UK, it was noted that there were occasions when applicants who were entitled to publicly-funded legal representation requested and were granted an audio-recorded interview, although this was not granted in other interviews, due to the unavailability of an interview room with recording equipment. In the Netherlands, the personal interviews of all unaccompanied minors are audio and video-recorded.⁴⁹

The audio-recording of personal interviews is an effective means to ensure that an accurate record of the personal interview is made.⁵⁰ It does not employ the human resources of the interviewer during the interview; it helps to eliminate disputes regarding the accuracy of the written report; may also help to address allegations of inaccurate interpretation during the personal interview and provides a useful evidential resource to both the decision-maker and, in the case of any eventual appeal, the adjudicator. Clearly, rules of data protection and confidentiality apply to audio-recordings and must be taken into consideration.

Recommendation

UNHCR strongly encourages Member States to make an audio recording of the personal interview of each applicant.

43 It is noted that the Commission has proposed amendments to this effect, under which the relevant Article would state: "*Member States shall ensure that a transcript is made of every personal interview*" and "*Member States may make a written report of a personal interview, containing at least the essential information regarding the application, as presented by the applicant. In such cases, Member States shall ensure that the transcript of the personal interview is annexed to the report.*" APD Recast Proposal 2009.

44 The requirement that the interviewer make a detailed transcript of the interview hampers the interviewer's ability to establish a rapport with the applicant, slows the conduct of the interview and may have a negative impact on the flow of the interview.

45 UNHCR was informed, on 9 April 2009, by the determining authority in Slovenia that it plans to introduce the audio-recording of personal interviews but this had not been implemented yet at the time of writing.

46 The digital audio-tapes are filed for five years together with the other materials relating to the application. UNHCR observed both written reports and audio-tapes in all the case files audited.

47 In the course of this research, UNHCR listened to two audio-recordings of personal interviews in the regular procedure (Case No. 0602125 and 0702129).

48 *Dirshe. R (on the application of) v Secretary of State for the Home Department* [2005] EWCA Civ 421.

49 In Den Bosch. Some stakeholders have recommended that all interviews be audio-recorded e.g. ACVZ.

50 See UNHCR 3rd QI Report: recommendation 39 supported audio recording: 4th QI report at paragraphs 2.3.74 -2.3.75

Requesting the applicant's approval of the contents of the report

Article 14 (3) APD states that “*Member States may request the applicant's approval of the contents of the report of the personal interview.*” This is an optional provision and, therefore, it is not surprising that UNHCR found that practice is divergent amongst the Member States of focus. Moreover, the Directive does not contain the concomitant guarantee that the applicant can check the accuracy of the report and rectify the content, as necessary, before approving the contents of the report. Without this guarantee, written records may be inaccurate and distort the oral testimony of the applicant, making them unreliable as evidence in the first instance examination and liable to challenge on appeal.

UNHCR considers that the determining authority should seek the applicant's approval of the contents of the interview transcript. Verifying the content of the report of a personal interview is important not only to avoid misunderstandings but also to facilitate the clarification of any contradictions.⁵¹ Ultimately, the applicant's approval is imperative in order to seek to assure the accuracy of the evidence upon which a decision is based.

Article 8 of the Charter of Fundamental Rights of the European Union states a fundamental administrative legal principle that, with regard to personal data, “*such data must be processed fairly for specified purposes*” and “*everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*” UNHCR is very concerned that, to the contrary, in some Member States decisions are taken by determining authorities on the basis of written reports of personal interviews, the accuracy of which applicants have not been able to check and rectify.

UNHCR is particularly concerned that it has observed in some Member States, that applicants are required to approve the contents of the written report without being given the opportunity to check the content of the report; and in some Member States, approval of the content of the report is not sought and applicants are not given the opportunity to check the contents of the written report at all before a decision is taken by the determining authority.

UNHCR also observed good practice in some Member States whereby the applicant is informed, with the assistance of an interpreter if necessary, of the content of the report and is given the opportunity to rectify the report, as required.⁵² Indeed, in an interview observed in Finland, the applicant wished to waive the right to check the report of the interview, however, the interviewer insisted that the applicant check the content of the report.⁵³ Similarly in Germany, according to the Internal Guidelines for Adjudicators,⁵⁴ the adjudicators shall advise insistently those applicants who want to waive the retranslation⁵⁵ that the aim of the retranslation is to make corrections and to clarify any misunderstandings that might have arisen during the interview. UNHCR witnessed such advice being given to an applicant in practice.⁵⁶

⁵¹ UNHCR APD Comments 2005.

⁵² Bulgaria, Finland, Italy, the Netherlands and Slovenia. This was observed in only five out of 14 interviews observed in the Czech Republic.

⁵³ Interview 8.

⁵⁴ BAMF Internal Guidelines for Adjudicators, “Translation (of the hearing report)”, No. 3; Date: 07/02.

⁵⁵ The retranslation is normally done directly after the interview has taken place.

⁵⁶ HR 14. This has also been experienced during interviews attend by UNHCR *stagiaires*. The relevant part of the so-called “control sheet” template contains the standard paragraph for such cases, that the applicant has dispensed with the retranslation despite being informed that its purpose is the correction of eventual misunderstandings.

Nine of the Member States surveyed require the applicant to sign the report of the interview to indicate that s/he approves of the contents.⁵⁷ Sometimes, the applicant is required to sign each page of the report.⁵⁸ Clearly, if the applicant is requested to approve the contents of the report, then the content of the report must have been read by, or to, the applicant, in a language s/he understands, so that s/he can check its accuracy. For example, in Finland, Italy, Slovenia and occasionally in Bulgaria,⁵⁹ when the interviewer has typed the report during the personal interview, the document is printed out immediately and the interpreter reads back the report to the applicant before asking for his/her signature of approval.⁶⁰ In Bulgaria, often the interviewer has handwritten the report, so the interviewer schedules an appointment for the applicant to return and have the contents of the typed report read by the interpreter and signed.⁶¹ In these Member States, any amendments, additions or clarifications can be made to the report at that time.⁶² As a result, any amendments are made to the report before the determining authority assesses the evidence and takes a decision on the application. For example, in all the interviews observed in Finland, corrections were made to the written record during the final check of the report at the end of the interview. Occasionally, in Italy the applicant wished to add relevant information for the record or sometimes corrections were made to the details.⁶³ Even though in Germany asylum law does not contain a provision concerning the applicant's approval of the report, the determining authority (BAMF) informed UNHCR that in practice all applicants are asked to approve the report by providing their signature.⁶⁴ The BAMF handbook states that there is no obligation on applicants to approve the report by signature; however, in case an applicant refuses to sign, this has to be noted in the record.⁶⁵ Applicants are asked for approval on a so-called "control sheet"⁶⁶ after they have had the chance to check the accuracy of the content of the report⁶⁷ and were

57 Bulgaria: Article 63a (7) LAR; the Czech Republic; Finland; Germany (not a legal requirement but performed in practice); Greece, Italy, Slovenia, Spain (with regard to the application interview) and the UK (Immigration Rules HC395, paragraph 339NC (iii) and (iv)); and Asylum Process Guidance "Conducting the Asylum Interview", section on signature of approval of contents of interview record.

58 Bulgaria, the Czech Republic, Finland and Italy.

59 This was observed in 4 out of 12 interviews in the accelerated and in the general procedure in Bulgaria.

60 According to the Government Bill 86/2008, Section 97 a (2) and (3) of the Aliens' Act (301/2004) will be amended to explicitly state that "at the end of the interview the report of the interview is translated to the applicant and the applicant is informed about the possibilities to make amendments to the record. The applicant confirms the contents of the record by signing it."

61 Almost all of the audited reports of personal interviews conducted in the accelerated procedure were handwritten. Courts do not accept the handwritten reports of interviews conducted in the general procedure according to interviewers. At the end of interview 1 which UNHCR observed, the applicant was invited to hear a reading of the written report of the personal interview and sign the report 17 days after the date of the interview.

62 Article 63a (7) LAR requires that "the record shall be read to the alien and should be signed by him/her, by the translator or interpreter and by the interviewing authority."

63 Substantive corrections or amendments were rarely requested by applicants during the interviews observed in Italy.

64 This is done by the use of a "control sheet". This statement is confirmed by the consulted asylum lawyers (X1, X2). Illiterate applicants are asked to sign with a cipher (e.g. X) or a fingerprint.

65 Handbook for Adjudicators „Interview“, p. 20.

66 A line is foreseen for the signature of the applicant(s), the interpreter and the adjudicator.

67 This was witnessed by UNHCR during the interviews which were attended in the framework of this study. The accuracy of the report is checked either by means of the written report or in case the report cannot be produced electronically on the day of the interview, orally directly after the interview is completed. The content of the report, which exists in the latter case at this point as an audio-version in German (that has been dictated by the adjudicator into a Dictaphone during the interview), is retranslated by the interpreter to the applicant orally. Oral retranslation was the practice observed by UNHCR in the BAMF Branch office in Berlin. (Due to personnel constraints, it was not possible to produce the written report the same day the interview took place.) This process of oral retranslation creates a greater risk of oversight of discrepancies between what has actually been said and what has been understood. Moreover, an asylum lawyer (X1) reported that the direct retranslation may impact negatively on the attentiveness of the interpreter as well as the applicant and therefore, according to his/her experience, it is often better if the retranslation takes place on a day other than the day of the interview.

able to ask for amendments.⁶⁸ Whether corrections or amendments are requested by the applicants depend on the individual case.⁶⁹

In the Netherlands, a different approach is taken. The applicant receives a copy of the written report of the detailed personal interview at the end of the interview, or soon after. The applicant signs the report, not to indicate approval of the content but instead to indicate that s/he has received a copy of the report. The applicant is then given time to read the report together with his/her appointed legal representative, with the services of an interpreter, if required, and to make corrections, amendments or additions. The report itself should state the deadline by which the applicant can submit corrections.⁷⁰ In the regular procedure, a period of at least two days applies but in the accelerated procedure, the period is just three working hours.⁷¹ This process would be improved if two shortcomings were addressed. UNHCR has been informed that the time restrictions on legal aid in the accelerated procedure may mean that the legal representative is unable to discuss the full content of the report with the applicant.⁷² Furthermore, in the accelerated procedure, the report of the personal interview is often given to the applicant simultaneously with the 'intended decision' so that any corrections or additional information have not been taken into account when the determining authority took the intended decision. With reference to the regular procedure, the Council of State did not accept this practice.⁷³ However, with regard to the accelerated procedure, the Council of State considered this practice compliant with the requirement to deliver the report of the interview 'as soon as possible'.

UNHCR was very concerned to note during its observation of interviews that in some Member States, some interviewers requested the applicant to sign the report to indicate approval of the content without giving the applicant the opportunity to read the report or have the report read to him/her in a language s/he understood.⁷⁴

In the Czech Republic, at the bottom of each page of the written report, there is a sentence which reads "*I was informed of the content of this page of the protocol*" and, at the end of the report, there is a sentence which reads "*I was informed of the content of the report from the interview in the ... language, I agree with it and do not ask for any amendments to it.*" In the detention centres, UNHCR observed that applicants were asked to write this sentence in their language. On the basis of the reports UNHCR audited, it appeared that all the reports were read back to the applicants page by page and signed. However, this practice could not be confirmed by UNHCR's observation of personal interviews. In nine out of the 14 personal interviews observed, the report was not read back to the applicant. In some cases, this opportunity was offered with the words: "*If you would like to have the report read back, the interpreter can read it back to you*". However, in some cases an additional comment was made such as: "*If you do not trust that I have written it well, the interpreter can read it back to you.*" In one interview, the applicant nevertheless requested that the report be read back, but in the others, the applicants replied "*No, I trust you.*"⁷⁵

68 This was observed by UNHCR during the interviews which were attended in the framework of this study.

69 As stated by asylum lawyer X2, it is problematic in this regard, that the corrections are added at the end of the report introduced by the phrase "After the retranslation of the report the applicant states...", which suggests that the applicant wants to *correct* the original statement, while the person concerned only wants to clarify that s/he has been misunderstood. This can have a negative impact on the credibility.

It is also possible to make corrections by means of a written statement, submitted by the applicant after s/he receives the written report. Even though German asylum law contains a provision (Section 25 (3) APA) allowing under certain circumstances the exclusion of such statements, this provision is – as a rule – not applied in such cases. (This has been reported by asylum lawyers X1 and X2). However, such corrections may also have a negative impact on the credibility of the applicant. Section 25 (3) APA: "*If the foreigner produces such facts only at a later stage, they may be ignored if the decision of the Federal Office would otherwise be delayed. The foreigner shall be informed of this provision and of Section 36 (4) third sentence.*"

70 Article 3.111(3) Aliens Decree 2000.

71 Article 3.111(3) Aliens Decree 2000. C13/2 Aliens Circular also provides the right of the applicant to correct, amend or add information to the report of the initial interview. Similarly, the applicant has some time with the appointed legal representative to discuss the content of the report and propose any amendments as necessary.

72 Commissie Evaluatie Vreemdelingenwet 2000, WODC 2006, Evaluatie Vreemdelingenwet 2000, De asielprocedure – Deel 2, pg. 158.

73 Council of State, 22 June 2004, JV 2004/325.

74 The Czech Republic, Greece, Spain and UK.

75 Y005, Y008 and Y011.

In one interview observed, the report was not read back to the applicant and the applicant was not asked if s/he wanted the report read back.⁷⁶ Moreover, according to information from a local NGO, applicants are sometimes afraid not to sign the record for fear that it might have a negative impact on the outcome of their application.⁷⁷

Yet, on appeal in the Czech Republic, when appellants argued that the written report of the personal interview distorted their statements or that they had not understood the interpreter, their signature on the report was used by the courts to dismiss their appeal. For example, the decisions of the SAC No. 5 Azs 70/2008-55 of 11 February 2009 stated: *‘The appellant had the opportunity to provide his opinion on the information [COI] or propose his own evidence; however he made no use of such option and signed the reports from the interviews without objections’*,⁷⁸ or judgment of the SAC No. 2 Azs 91/2008 of 27 January 2009 *‘If the appellant was not content with the way his statements were being interpreted, he should have stated that in the course of the interviews, or should not have signed that he had been acknowledged with the content of the interview and agreed with it on each page of the report from the interview, but rather should have stated that parts of his statements were interpreted wrongly. He had a great opportunity to do so, since there were different interpreters present at every interview (...) The appellant thus had sufficient conditions to find out independently from the interpreters how his statements were recorded and could, in case he did not agree with that record, have pointed out exactly what parts of his statements were being interpreted wrongly.’*⁷⁹

In ADA in Athens, UNHCR observed that applicants were asked to sign the report without having read or listened to a re-reading of the contents of the report.⁸⁰ In all the 49 interviews that UNHCR observed in ADA, the report of the interview was printed whilst the applicant was taken to be fingerprinted and upon return the applicant was asked to sign the report. Also, in most of the interviews observed in Spain, the applicants were asked to sign the application form but they were not informed that they could read the form first, or have the contents of the form read to them by the interpreter.⁸¹

In the UK, in spite of published policy⁸² and the law⁸³ which states that the applicant should sign the end of the report to confirm approval of the contents of the report, UNHCR’s observation of interviews revealed that applicants were asked to sign to confirm receipt of a photocopy of the report. Applicants were not asked to confirm that they approved the contents of the report, and the interview record was not read back to any applicant. The Asylum Process Guidance⁸⁴ states:

“It is Home Office policy to not routinely read out the interview record after the conclusion of a substantive asylum interview. Read overs should only be given in very exceptional circumstances”.

The applicant may be given five days, or two days in the fast-track detained processes, after the interview to submit further information and from UNHCR’s audit of case files, information submitted during this time is referred to in the decision letter.⁸⁵ This period provides an opportunity to correct the transcript of the interview.⁸⁶

76 The interpreter said, *“Everything that you said in the interview is written here. For example, here is the information you received at the beginning. Please, sign the papers one by one.”* Yoo6.

77 Interview of 22 April 2009.

78 Available at www.nssoud.cz, unofficial translation.

79 Available at www.nssoud.cz, unofficial translation.

80 In the interviews observed in SDAA and SDS, the interviewers read the report to the applicants before asking for their signature.

81 In only two of the 11 interviews observed was the applicant informed s/he could read the contents of the application form.

82 Asylum Process Guidance *“Conducting the Asylum Interview”*, section on Signature of Approval of Contents of Interview Record, accessed 29th April 2009 which states *“The applicant is required to sign at the end of the interview record to confirm approval of the contents of the record. There is no need for the applicant to sign the photocopy that has been provided. The refusal of an applicant to approve the contents of the record shall not prevent the Interviewing Officer from making a decision”.*

83 Immigration Rules HC395, paragraph 339NC (iii) which state *“(iii) The Secretary of State shall request the applicant’s approval of the contents of the report of the personal interview.”*

84 Asylum Process Guidance, *“Conducting the Asylum Interview”*, section on Read Overs.

85 DAF 19.

86 DAF 42.

However, this opportunity is severely compromised by the fact that the determining authority does not provide the applicant with an interpreter so that s/he can read the transcript. In principle, with regard to applicants in receipt of legal aid, public funding may be available for a post-interview conference with the legal representative and interpreter. However, in practice, stakeholders indicate that, under the current fixed fee system for legal aid provision, there are often insufficient funds available to allow for this post-interview meeting to take place.

Finally, some Member States do not request the applicant's approval of the report of the personal interview and the applicant is not given the opportunity to read the report or have it read by an interpreter in order to check the accuracy of the content.⁸⁷ Without knowledge of the content of the report, the applicant does not have the opportunity to correct or amend the content of the report before a decision is taken by the determining authority.⁸⁸ As a result, decisions may be taken on the basis of inaccurate reports.

UNHCR considers that it is in both Member States' and applicants' interests that the applicant reads or is read, through an interpreter, the content of the report of the personal interview and the applicant has the opportunity to correct or add to the content of the report before a decision is taken by the determining authority on the application. From the perspective of the Member States, it is costly to conduct a procedure which fails to accurately record all the relevant grounds for the application for international protection, with potentially further costs resulting from a challenge on appeal; and from the perspective of the applicant the failure to do so may result in a risk of *refoulement*. In Finland, a full *verbatim* transcript of the personal interview is made; the report is read back to the applicant, with the assistance of an interpreter, at the interview so that corrections and amendments are made as necessary; and there is an audio-recording of the interview. UNHCR was informed that under this system, applicants do not generally challenge the accuracy of the report on appeal.⁸⁹

Recommendations

The content of the written transcript of the personal interview should, in all cases, be read by the applicant, or read back to the applicant with the assistance of an interpreter. The applicant should not be asked to approve the content of the transcript of the personal interview before the transcript has been read by him/her or read back to him/her, with the assistance of an interpreter if necessary.

Before the content of the written report is read by or read to the applicant, with the assistance of an interpreter as necessary, the applicant must be informed that s/he has the right to rectify, clarify or provide additional information for inclusion in the transcript. An effective opportunity to do so should be provided.⁹⁰

87 Belgium, France and Spain. In Belgium, the CGRA does not request approval of the report which is not read to the applicant and the applicant does not receive a copy according to the CGRA website http://www.cgvs.be/nl/Procedure_d_asile_en_pratique/Audition/. On the other hand, the initial interview report with the AO is read to the applicant and s/he is asked to sign the report to indicate approval of the contents. In France, the determining authority does not request the applicant's approval and the applicant is not given any practical opportunity to read or hear the content of the report. In Spain, the applicant is not given the opportunity to check the content of the written report of the interview in the regular procedure, although note that these interviews are audio-recorded.

88 In Belgium, the applicant can only request a copy of the report which may be received 4 days after notification of the decision by the determining authority. Article 17 (3) of the Royal Decree of 11 July 2003 concerning the CGRA allows the applicant or his/her legal representative to send additional information or documents by registered mail. But without knowing the content of the report, it will not always be clear what additional information may be required.

89 The audio-tapes are rarely referred to as evidence in court, but are widely used by the judges for information about the case. It should be noted here also that in Finland, the applicant's legal representative can submit in writing further evidence or corrections to the written report (cases 87 and 88).

90 The EC has proposed that recast Article 16 would contain the following new requirements: '*Member States shall request the applicant's approval on the contents of the transcript at the end of the personal interview. To that end, Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarifications with regard to any mistranslations or misconceptions appearing in the transcript*': APD Recast Proposal 2009.

The applicant should be clearly informed, in a language s/he understands, that his/her signature represents approval of the content of the transcript and informed of his/her right to refuse to approve the contents of the written transcript.

Refusal to approve the content of the report

With the exception of Spain (and Germany), in those Member States that require approval of the contents, if the applicant refuses to approve the contents of the report, the reasons for this refusal should be entered in the applicant's file in accordance with Article 14 (3) APD.⁹¹ UNHCR only observed such a note of refusal in some of the case-files audited in the Czech Republic.⁹²

In Germany, the asylum law does not contain such a provision and with regard to the administrative practice the BAMF Handbook only requires that a refusal is noted, but does not explicitly state that the reasons for the refusal should be noted.⁹³ According to information provided by an asylum lawyer,⁹⁴ applicants have to 'fight' to refuse to sign the report⁹⁵ and are mostly not allowed to have their own reasons recorded; the stated reason is: "Signature refused, because the protocol is allegedly wrong."

In Spain, if the applicant does not sign the application form, which constitutes the record of the application interview, then the application is not officially registered. This is problematic because the signature is considered to attest to the truth and accuracy of the content of the form,⁹⁶ yet, as stated above, applicants are not always given the opportunity to read the content of the report.⁹⁷ This problem could be overcome by requiring a signature, to officially register the application, and requesting a separate signature to approve the content of the application form after its content has been read by or read to the applicant with the assistance of an interpreter as necessary, and the content approved by the applicant.

Recommendation

The applicant should be given an opportunity, which can be exercised in practice, to refuse to approve the content of the interview report, and to have recorded for the attention of decision-makers his/her reasons for refusal.⁹⁸

⁹¹ Bulgaria: Article 63a (8) LAR; the Czech Republic: Article 18(3) CAP; Finland: Article 97a Aliens Act (301/2004) states that the applicant approves of the report by signing all pages of the report. The preparatory works, Government Bill 86/2008, at page 56 further clarify that if the applicant does not approve of the report, the reasons for this shall be written down in the report. Greece: Article 10 (11) PD 90/2008; Italy: Article 14 (2) d.lgs. 25/2008; Slovenia: Article 48 (6) IPA; and the UK: Asylum Process Guidance. In Belgium, this is the case with regard to the initial interview with the AO, but not the personal interview with the determining authority (CGRA).

⁹² For example, case file Xo13.

⁹³ Handbook for Adjudicators „Interview“, p. 20.

⁹⁴ X 2.

⁹⁵ Another asylum lawyer (X1) reported that s/he had never experienced an applicant refusing to sign and that s/he did not believe that – in practice – an applicant is able to refuse the approval.

⁹⁶ This is explicitly stated on the application forms used by authorities other than the determining authority OAR and at the border, but it is not explicitly stated in the application form used by OAR although in practice it is implicit.

⁹⁷ Whether or not the applicant is given the opportunity to check the content of the interview report depends on the interviewer. This opportunity is not always offered by the interviewer. If requested by the applicant, this opportunity would not be denied.

⁹⁸ The Commission has proposed that recast Article 16 should state: "Where an applicant refuses to approve the contents of the transcript, the reasons for this refusal shall be entered into the applicant's file. The refusal of an applicant to approve the contents of the transcript shall not prevent the determining authority from taking a decision on his/her application": APD Recast Proposal 2009.

Access to the report of the personal interview

Article 14 (2) APD states that:

“Member States shall ensure that applicants have timely access to the report of the personal interview. Where access is only granted after the decision of the determining authority, Member States shall ensure that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.”

UNHCR welcomed the APD’s requirement that applicants should have timely access to the report of the personal interview, and recommends that applicants should automatically receive a copy of the report of the personal interview before a decision is taken on the application. The practice in a number of Member States of focus demonstrates that this can be done.⁹⁹ For example, in Finland, Germany, Italy, the Netherlands and the UK, the applicant is given a copy of the report of the interview at the conclusion of the interview or soon after.¹⁰⁰ In the Netherlands, in the accelerated procedure, the report is given to the applicant as soon as possible after the interview. Sometimes it is given simultaneously with notification of the ‘intended decision’, but before the decision is finally taken and issued.¹⁰¹

In some Member States, the applicant may access the report of the personal interview upon request at any point in the procedure.¹⁰²

However, UNHCR regrets that in some Member States, the applicant is only granted access to the report after a decision has been taken by the determining authority.¹⁰³ This means that an applicant for international protection in Belgium, France and Greece does not have the content of the report of the personal interview read back to

⁹⁹ In Slovenia, this is done with regard to the personal interview in the regular procedure but not at the application interview.

¹⁰⁰ In Finland, at the time of writing, the Government Bill amending Section 97 a (2) and (3) of the Aliens’ Act will read that “the applicant is immediately or as soon as possible given a copy of the record.” The Administrative Guidelines state that the record should not be given immediately, but as soon as possible, if sensitive issues have arisen in the course of the interview with a spouse and the other spouse is present or waiting at the office of the determining authority (*Turvapaikkaohje SM 109/032/2008*, 30 – 31). In this case the report is sent by mail to either the applicant or his/her legal representative. In Germany, although Section 25 (7) 2nd Sentence APA allows for the submission of the report together with the decision (“*A copy of this record shall be given to the foreigner or sent to him with the Federal Office’s decision.*”), the BAMF has informed UNHCR that in practice the applicant receives the report directly after its production, i.e. either on the day of the interview or some time later by post (cf. also Handbook for Adjudicators „*Interview*“, p.20). Furthermore, the BAMF reported, that only in absolutely exceptional cases a copy of the report of the interview is submitted together with the decision and that it never occurs that the applicant receives the record only after the decision has been submitted. These statements are confirmed by an asylum lawyer (X2), who stated that applicants receive the report immediately or shortly after the interview (either by post or it can be picked up), and that cases in which the report had been submitted together with the decision have not been recently observed. Lawyer X1 reported that the time frame for the submission of the report is 1 to 4 weeks. It is interesting to note that the second sentence of Section 25 (7) APA is one of the rare examples of a modification of the law due to the APD. It has been introduced in order to fulfill the requirements set by Article 14 (2) APD (Explanatory Report, Bundestag printed papers 16/5065, re Number 17 (Section 25 APA), p. 217.). Furthermore Section 29 Administrative Procedure Act arranges for the right of the legal representative to access the applicant’s BAMF file at any time. The BAMF has reported that this right is realized with the submission of a print copy of the electronic file. In Italy, Article 14 (1) of the d.lgs. 25/2008 states that “*the foreign citizen is given a copy of the record*”. In practice, the applicant is given a copy of the report at the end of the personal interview. In the Netherlands, the copy of the report is also sent to the legal representative unless the applicant does not approve this action: C13/2 and C13/3.3 Aliens Circular 13/3.3. In the UK, this is provided for in Asylum Process Guidance “*Conducting the Asylum Interview*”, section on Photocopies of the Interview Transcript.

¹⁰¹ See above for further information.

¹⁰² The Czech Republic: Section 38 CAP; Slovenia (with regard to the application interview): Article 82 AGAP and Spain (with regard to the application interview but not in relation to the personal interview during the regular procedure): information provided by OAR and confirmed by other stakeholders.

¹⁰³ Belgium, Bulgaria, France, and Greece.

them in order to check its accuracy and does not receive a copy of the report before a decision is taken by the determining authority.¹⁰⁴

In Belgium, the applicant has to apply to get access to his/her case file by completing and sending a form to the determining authority (CGRA). Although the form can be submitted immediately after the personal interview, the applicant will only receive copies of the requested documents after the decision has been taken by the CGRA and normally within four days of notification of the decision.¹⁰⁵ The deadline for submission of an appeal is 15 days from notification of the decision for applicants who are detained and 30 days for other applicants.¹⁰⁶ Clearly, this practice further limits the time available to the applicant to prepare and lodge an appeal. This is particularly significant for applicants who are detained and whose right of appeal is curtailed by a shortened deadline.¹⁰⁷

In France, by contrast, a part of the overall written report, including the report of the personal interview, is systematically sent to the applicant together with the negative decision of the determining authority.¹⁰⁸ This does not include the parts of the report which contain the reasoning for the decision which is essential if the applicant has to consider whether s/he has grounds to appeal and to substantiate any eventual appeal. Applicants have to request access to the whole report if they wish to access these key parts of the report. In the remit of this research, UNHCR was not able to verify the time it takes to receive this part of the report in practice given that the applicant has one month within which to lodge an appeal.

According to personnel of the determining authority in Greece, applicants can request access to the report of the interview after the decision has been issued¹⁰⁹ and access is granted in time to permit the appeal to be prepared and lodged in due time.¹¹⁰ However, this is disputed by NGOs and legal advisers who state that access is not granted in time to prepare and lodge the appeal. One legal adviser stated: *“It takes more than 10 days for the authorities to provide the applicant or his/her representative with a copy of the decision. Access to the case file takes even longer. In most cases, the appeal against the decision is lodged without knowing what the police officer recorded in the interview”*.¹¹¹

In Bulgaria, access to the case file, including the report, is only allowed on the premises of the determining authority (SAR) as no copies can be made of the documentation.¹¹² Similarly, in the Czech Republic access to the case file is allowed on the premises of DAMP. Although the law states that the determining authority cannot make copies of the file or any part of it, the current case law of the SAC allows applicants to make copies at their own cost by using, for example, a digital camera. During UNHCR’s observation of procedures, it noted that applicants were being informed that copies could not be made of the case files, but did not witness applicants being informed of

¹⁰⁴ In Bulgaria, the content of the interview report is read back to the applicant before it is signed by them. It should be noted that in Belgium, the report of the preliminary interview with the AO is read to applicants and the report is signed. However, this is not the case with regard to the report of the personal interview with the determining authority (CGRA).

¹⁰⁵ http://www.cgvs.be/nl/binaries/CG%20-%20419b%20N%20-%20aanvraag%20kopie%C3%ABn%20administratieve%20stukken_tcm127-18459.pdf

¹⁰⁶ Law of 6 May 2009, regarding various provisions concerning asylum and migration (B.S., 19 May 2009).

¹⁰⁷ Article 14 (2) APD has not been transposed in Belgian legislation or administrative provisions, and at the time of writing, the proposal for amendments to the Royal Decree of 11 July 2003 concerning the CGRA did not foresee a transposition of Article 14 (2) APD.

¹⁰⁸ Parts 1 – VI of the interview form. Article R.723-1-1 *Ceseda* states that *“A copy of the report is transmitted to the applicant together with the decision of the General Director of the OFPRA when refugee status is refused”*.

¹⁰⁹ Interviews with S3, S4, and S9.

¹¹⁰ Interviews with S1, S3 and S4.

¹¹¹ Interview with S8. It should be noted that according to article 25 of PD 90/2008, the deadline for lodging an appeal is: 10 days for inadmissible applications, 8 days for applications examined through border procedure and 30 days for all other applications.

¹¹² Interviews with stakeholders at the Methodology Directorate.

their right to take photos of the case file. It was also unclear whether an interpreter would be available to assist the applicant with accessing the information contained in the case file.¹¹³

Recommendation

All applicants should receive a copy of the report of the personal interview before a decision is taken by the determining authority.¹¹⁴

¹¹³ Differing views were held by personnel within DAMP.

¹¹⁴ A proposed recast Article 16(5) would require that “*Member States shall ensure that applicants have timely access to the transcript and, where applicable, the report of the personal interview before the determining authority takes a decision*”: APD Recast Proposal 2009.

SECTION VII: THE WITHDRAWAL OR ABANDONMENT OF APPLICATIONS

Introduction

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Introduction

Insofar as Member States provide in national law that an applicant may withdraw his/her application for international protection, Article 19 of the APD sets out the options for the procedure for this withdrawal, which must be adopted by Member States. This is referred to as ‘explicit withdrawal’ in the APD. Article 20 of the APD, by contrast, sets out non-exhaustive grounds upon which Member States may assume that an applicant has abandoned his or her application and the options for the consequent procedure to be followed. This is referred to as ‘implicit withdrawal’ or abandonment of the application in the APD.

Due to the fact that an application for international protection may be explicitly or implicitly withdrawn or abandoned for a variety of reasons which are not necessarily related to an applicant’s lack of protection needs, UNHCR’s fundamental concern is that the APD and Member States’ national legislation and practice should ensure, as far as possible, that the provisions on implicit withdrawal and abandonment are not applied to applicants who have no intention of withdrawing or abandoning their applications. Moreover, following (explicit or implicit) withdrawal or abandonment of an application, if an applicant wishes to re-open the application and pursue the examination, s/he should have access to a fair and effective asylum procedure and the application should be subject to an appropriate and complete examination of its merits.¹ This is essential to ensure compliance with the international legal obligation of *non-refoulement* and the relevant provisions of the European Convention on Human Rights and the UN Convention against Torture.

Explicit withdrawal

The APD does not require Member States to make provision in national law for applicants to be able to withdraw their application for international protection. Nevertheless, most of the Member States surveyed for this research have national law in place which provides the possibility for the explicit withdrawal of an application for international protection. This is the case in Belgium,² Bulgaria,³ the Czech Republic,⁴ Germany,⁵ Greece,⁶ Italy,⁷ the Netherlands,⁸ Slovenia,⁹ Spain¹⁰ and the UK.¹¹ And, at the time of writing, it was provided for in pending draft law in Finland.¹²

- 1 Article 14 of the Universal Declaration of Human Rights, and Article 18 of the EU Charter on Fundamental Rights. See also UNHCR ExCom Conclusion No. 65 XLII, 1991, paragraph (o); ExCom Conclusion No. 82 (XLVIII) on safeguarding asylum, 1997, paragraph (d) (ii); ExCom Conclusion No. 85 (XLIX) on international protection, 1998, paragraph (q), which reiterates that asylum seekers should have access to fair and effective procedures for determining their status and protection needs.
- 2 Article 33 Royal Decree of 11 July 2003 concerning the procedure to be followed by the CGRA. Moreover, if a period of time has elapsed since the application was submitted, the CGRA can, by law, ask the applicant in writing whether s/he wants to continue to pursue the application or explicitly withdraw the application: Article 11 of the Royal Decree of 11 July 2003.
- 3 Article 15 (1), item 6, LAR.
- 4 Section 25 (a) ASA.
- 5 Section 32 APA with regard to the asylum application only and not subsidiary protection.
- 6 Article 14 (1) PD 90/2008.
- 7 Article 23 d/lgs 25/2008. Note that an application can only be explicitly withdrawn before the personal interview.
- 8 Article 3:47 Aliens Regulation and C11/3.5 of the Aliens Circular.
- 9 Article 50 (1) of the IPA.
- 10 Article 90 APL and Article 27 of the New Asylum Law.
- 11 Immigration Rule 333C.
- 12 The Government Bill 86/2008 implementing the APD lays down new legislation on the matter. Section 95 b will read: “*The applicant can withdraw his or her application by notice to the Immigration Service, the police or the border guards. The notice must be made in person and must be in writing, and it must without doubt convey the intention of the applicant to withdraw the application. The applicant shall in the notice give the date for the withdrawal. The notice must be signed.*”

In Germany, an asylum application is defined as an application for constitutional asylum and for recognition of refugee status only.¹³ It does not encompass the various forms of subsidiary protection status.¹⁴ However, following an examination of the asylum application, if the applicant is not deemed to qualify for constitutional asylum and is not recognized as a refugee, the determining authority *ex officio* examines qualification for subsidiary protection status. Before a decision is taken on any of these forms of protection, an applicant may explicitly withdraw the asylum application.¹⁵ This will halt the examination of the asylum application with regard to constitutional asylum and recognition of refugee status. However, by law, the determining authority will nevertheless be required to take a decision with regard to subsidiary protection.¹⁶

In Belgium and the UK, there is a specific form which needs to be completed and signed by the applicant to confirm that the applicant is voluntarily withdrawing the application and s/he is fully aware of the consequences of this action.¹⁷ A specific form also exists in the Netherlands, although only for those applicants who are in detention.¹⁸

In the other Member States surveyed, there is no standard form but the applicant is required to put the request for withdrawal of the application in writing. This is the case in Bulgaria,¹⁹ the Czech Republic, Finland, Greece,²⁰ Italy, the Netherlands²¹ and Spain.²² In Slovenia, “an applicant may make an oral or written statement in order to withdraw the application”.²³ However, where an applicant asks orally to withdraw the application, the determining authority is required to record the request in writing.²⁴

In Germany, the mode for requesting the explicit withdrawal of the asylum application is not stipulated in law. In practice, according to the determining authority (BAMF), a request for explicit withdrawal may be made orally or in writing directly to the BAMF or to the aliens’ authorities which would forward the request to the BAMF. Where an applicant asks orally to withdraw the asylum application at the BAMF’s office, the BAMF informed UNHCR that it records the request in writing and the applicant is asked to sign the statement.

13 Section 13 APA states that: “(1) An asylum application shall be deemed to have been made if it is clear from the foreigner’s written, oral or otherwise expressed desire that he is seeking protection in the Federal territory from political persecution or that he wishes protection from deportation or other return to a country where he would be subject to the threats defined in Section 60 (1) of the Residence Act.

(2) Every application for asylum is an application for recognition of refugee status as well as for recognition of entitlement to asylum, unless the foreigner expressly objects.”

14 If no application for asylum is filed, but a request is made only for subsidiary protection, this is decided upon by the aliens’ authorities and not the determining authority. According to Section 72 (2) Residence Act, the determining authority (BAMF) needs to be consulted all the same by the aliens’ authority before taking a decision.

15 The possibility of an explicit withdrawal of the application for asylum can be deduced from Section 32 1st Sentence APA: “If the asylum application is **withdrawn** or abandoned in the meaning of Section 14a (3), the Federal Office shall indicate in its decision that the asylum procedure has been discontinued and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7) Residence Act [i.e. national and European forms of subsidiary protection].” The consequences of abandonment in the meaning of Section 14a (3) are not further examined in the framework of this study, as they refer to a special form of abandonment: While Section 14a (1) APA states that “application[s] also includes each unmarried child under age 16 residing in the Federal territory[...], if the child has not already filed an application for asylum,” Section 14a (3) APA offers the possibility to “[t]he child’s representative [...] [to] waive the processing of an asylum application for the child at any time by stating that the child faces no threat of political persecution.”

16 Section 32 APA: “If the asylum application is withdrawn [...] the Federal Office shall indicate in its decision that the asylum procedure has been discontinued and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7). [...]”.

17 In 2008, there were 99 cases of voluntary withdrawal in Belgium.

18 Model M53 requires the applicant to name the legal adviser s/he has consulted with about the withdrawal.

19 This is the practice in Bulgaria (interviews with stakeholders in the Methodology Directorate).

20 Article 14 (1) PD 90/2008.

21 C11/3.5 Aliens Circular. In 2008, according to statistical information provided by the determining authority (IND), 670 applications were explicitly withdrawn. According to the IND Section on Policy Development, this number was influenced by the so-called Dutch ‘*Pardon-regeling* (Rules on acquiring an amnesty)’ which required applicants for international protection to withdraw their application in order to qualify for a residence permit in accordance with other strict conditions.

22 Article 91 APL. UNHCR audited three decisions in which the application had been explicitly withdrawn: Cases Nr. 0709018, 0209119, 0209120. In all three cases, there was a written statement by the applicant.

23 Article 50 (1) of the IPA.

24 Article 65 of the AGAP.

It is essential that the written statement or record clearly conveys the applicant's intention to withdraw the application and testifies that the applicant is fully aware of the consequences of this action. For instance, an applicant in the Czech Republic, who was informed that the Czech Republic was responsible for the examination of her application under the Dublin II Regulation, stated in writing that she wanted Germany to continue the examination of her application. The determining authority in the Czech Republic interpreted this statement as a request for withdrawal. The appeal court annulled the decision on the grounds that it was not explicit that the applicant intended to withdraw the application.²⁵ As such, the determining authority is obliged to verify both the applicant's intent and ensure that s/he is fully aware of the consequences.

It is, therefore, problematic that the determining authority in the Netherlands does not consider itself responsible to explain to an applicant who wishes to withdraw the application, the consequences of his or her action. The determining authority instead relies on the fact that the applicant has the right to consult a legal adviser,²⁶ but with regard to those applicants who are not in detention, there is no formal written record of whether the applicant in fact consulted with a legal adviser and is aware of the consequences.

Similarly, in Germany, the determining authority (BAMF) has reported to UNHCR that providing applicants with specific information on the legal consequences of explicit withdrawal is not required.²⁷ BAMF noted that most requests for explicit withdrawal are made in writing by the applicants' lawyers and it is therefore assumed that the applicants are aware of the legal consequences of this action. However, the lawyers consulted by UNHCR confirmed that applicants are not always informed of the legal consequences of the withdrawal,²⁸ and in fact are (often) not aware of the consequences,²⁹ especially when withdrawal is declared at the aliens' authorities.³⁰

The only Member State, of those surveyed, that has no national legislation regarding explicit withdrawal is France. In practice, if an applicant wishes to withdraw his or her application for international protection, this must be done in writing, although there is no specific form for this.³¹

Recommendation

UNHCR recommends, for the purposes of legal certainty, that Member States have in place legislation, regulations or administrative provisions, which clarify the procedure in the case of explicit withdrawal of the application.

As a matter of good practice, UNHCR recommends that the determining authority explicitly informs the applicant of the consequences of withdrawal.

It is essential that a request by an applicant to withdraw an application be recorded in writing and clearly testifies both to the intent of the applicant to withdraw the application and to the applicant's awareness of the consequences of this action. As a matter of good practice, UNHCR would recommend that any request by an applicant to withdraw an application is recorded in writing, signed by the applicant and the legal representative (if appointed) as confirmation of the fact that the applicant was informed of the consequences of the explicit withdrawal.

²⁵ Judgment No. 4 Azs 34/2008 – 58 of 31 October 2008, available at www.nssoud.cz. Unofficial translation.

²⁶ For at most two hours in the accelerated procedure.

²⁷ The legal expert R. Marx is of the opinion that both the BAMF and the aliens' authorities have the duty to fully inform the applicant of the consequences of withdrawal, especially the fact that any further application will be treated as a subsequent application, and refers in this regard to Section 25 Administrative Procedure Act (R. Marx, Commentary on the Asylum Procedure Act, 7th edition (2009), Section 32, paragraph 8.) Section 25 (1) 2nd Sentence states inter alia: "*It [the authority] shall, where necessary, give information regarding the rights and duties of participants in the administrative proceedings.*"

²⁸ Lawyer X₃ states that unfortunately, applicants also consult lawyers only after they have withdrawn their application.

²⁹ Lawyers X₁, X₂, X₃.

³⁰ Lawyer X₁.

³¹ Based on information provided in an interview with the Legal Department of OFPRA. In 2008, according to OFPRA figures, there were 152 explicit withdrawals.

Decision following explicit withdrawal

The APD directs Member States on what action should be taken if an applicant explicitly withdraws his or her application. Article 19 (1) APD, on the procedure in case of withdrawal of the application, states that:

“Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law, when an applicant for asylum explicitly withdraws his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application.” Article 19 (2) APD adds, *“Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority enters a notice in the applicant’s file.”*

The Directive, therefore, provides for three options:

- (a) a decision to discontinue the examination;
- (b) a decision to reject the application;
- (c) no decision is taken, but the examination is discontinued and a notice is placed in the applicant’s file.

It should be highlighted that the APD does not stipulate the legal consequences of a “decision to discontinue” or the “discontinuation of the examination without a decision”. However, as will be seen below, if an applicant changes his or her mind about the withdrawal and decides to pursue the original application, the legal consequences of a decision to discontinue the examination or to discontinue the examination without a decision in one Member State may be the same as a decision to reject the application in another Member State.

UNHCR is concerned that the APD permits Member States to reject an application simply because it has been explicitly withdrawn. It is UNHCR’s view that a negative decision on an application for international protection should only be issued when there has been a complete examination of an application and it has been determined that the applicant is not a refugee and does not qualify for subsidiary protection status. UNHCR is of the opinion that a negative decision should not be issued when there has been no examination of the merits of the application because the applicant has withdrawn the application, either before s/he has substantiated the application in accordance with Article 4 of the Qualification Directive, and/or before the determining authority has assessed all the relevant facts and circumstances and completed the examination in accordance with Article 4 of the Qualification Directive.³² In such situations, UNHCR recommends that Member States either take a decision to discontinue the examination or Member States discontinue the examination of the application without taking a decision, and enter a notice in the applicant’s file.

UNHCR notes that the overwhelming majority of the Member States surveyed either take a decision to discontinue the examination or they discontinue the procedure without taking a decision. A decision to discontinue

³² Article 4 of the Qualification Directive, entitled “Assessment of facts and circumstances”, among other things, provides that “Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application”. Article 4 also provides that “the assessment of an application for international protection is to be carried out on an individual basis”, and sets out elements to be taken into account in that assessment.

the examination is taken in Belgium,³³ Bulgaria,³⁴ the Czech Republic,³⁵ Finland,³⁶ Germany³⁷ and Slovenia.³⁸ As mentioned above, however, in Germany the determining authority will continue its examination on the merits with regard to subsidiary protection, notwithstanding a decision to discontinue the examination of the asylum claim regarding constitutional asylum and refugee status.³⁹ In Italy, a decision to discontinue the examination will be taken if the application is explicitly withdrawn before the personal interview.⁴⁰

In France,⁴¹ the Netherlands,⁴² Spain⁴³ and the UK,⁴⁴ the determining authority discontinues the examination without taking a decision and enters a note in the applicant's file.

Of the Member States surveyed, Greece represents an exception. The legislative provision in Greece is unclear as national legislation gives the determining authority the option to either reject the application or discontinue its examination without taking a decision.⁴⁵ However, the legislation does not determine in which circumstances the application should be rejected or in which circumstances the examination should be discontinued. The Greek Council of State has ruled that the national legislation is not compatible with the APD on this ground⁴⁶ and in an interview with UNHCR, the determining authority concurred that this provision of the law is flawed and should be revised. However, the determining authority informed UNHCR that, in practice, a decision to reject the application is taken. As such, Greece is the only Member State of those surveyed to reject an application when it has been explicitly withdrawn. UNHCR is concerned that an application may be rejected notwithstanding the fact that the applicant may have withdrawn the application before proceeding to substantiate it, or regardless of its merits.

³³ Article 33 of the Royal Decree of 11 July 2003, concerning the procedure to be followed by the CGRA.

³⁴ Article 15 (1) item 6 LAR. Article 77 (3) LAR states that a decision to discontinue will be taken by the Chairperson of SAR. During the accelerated procedure, the interviewer may also take a decision to discontinue the proceedings based on explicit withdrawal, as stipulated in Article 70 (1), item 2 LAR.

³⁵ Section 25 ASA.

³⁶ This is referred to as a "decision on annulment of the application" in the Government Bill 86/2008.

³⁷ Section 32 1st Sentence APA: "If the asylum application is **withdrawn** [...] the Federal Office shall indicate in its **decision** that the asylum procedure has been **discontinued** [...]."

³⁸ Article 50 (3) of the IPA.

³⁹ Section 32 1st Sentence APA: "[...] [T]he Federal Office shall indicate in its decision that the asylum procedure has been discontinued and **whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7).**"

⁴⁰ Article 23 of the d.lgs. 25/2008 states "in the case that the applicant decides to withdraw the application before the interview with the competent Territorial Commission, the withdrawal is formalized in writing and communicated to the Territorial Commission that declares the extinction of the procedure."

⁴¹ Note that there is no national legislation in France. Information is based on information received in an interview with the Legal Department of OFPRA during the research period.

⁴² Article 3:47 Aliens Regulation.

⁴³ Article 91 (2) of the APL. Note that the procedure is declared "terminated" rather than "discontinued". This means that the procedure cannot be continued after the ten day time limit. (The ten day time limit only operates if there is an interested third party. If not, the termination is immediate). Article 91 (2) APL establishes that a formal decision of termination of the procedure should be adopted, which is never done in practice.

⁴⁴ Immigration Rules 333C contains a permissive clause which states that if "an application for asylum is withdrawn either explicitly or implicitly, consideration of it may be discontinued." The Asylum Policy Instruction (API) on withdrawal of asylum applications states that "When a decision is made to treat the application withdrawn, consideration of the asylum application will be discontinued and a decision **will not** be made on the claim." API on *Withdrawal of Asylum Claims* dated 04.04.08.

⁴⁵ Article 14 (1) of PD 90/2008 states that "when an applicant for asylum withdraws his/her application in writing, the determining authority shall have the option to either reject the application or discontinue its examination without taking a decision and attach a relevant notice to that effect to the applicant's file.

⁴⁶ Council of State, 2008. *99/2008 Praktika synedriaseos ke gnomodotisi tou Symvoulou tis Epikratias Tmima E': Epeksergasia shediou proedrikou diatagmatos gia tin Proarmogi tis ellinikis nomothesia pros tis diataksis tis Odigias 2005/85/EC. [99/2008 Records and re-script of E' Department's session: On the forthcoming Presidential Decree for the Adaptation of Greek legislation to the provisions of Council Directive 2005/85/EC]. Athens: Council of the State.*

Recommendation

UNHCR recommends that, where the applicant has withdrawn an application before having substantiated it, and the determining authority has not assessed the application in accordance with Article 4 of the Qualification Directive, a decision to discontinue the examination should be taken, or the procedure should be discontinued without taking a decision. UNHCR recommends that the APD be amended to this effect.⁴⁷

Applicants who decide to pursue an application previously explicitly withdrawn

Where a decision has been taken to discontinue the examination of the previous application, or the determining authority discontinued the examination of the previous application without taking a decision, Article 19 does not provide an instruction to Member States on what action should be taken in a particular situation, namely if an applicant who previously explicitly withdrew the application for international protection changes his or her mind and requests to pursue the original application.

However, it is implicit in Article 39 APD, which deals with the right to an effective remedy, that the applicant should be able to request the re-opening of the examination of the application. Article 39 (1) (b) states that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against “*a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20.*” However, Article 39 (2) APD stipulates that Member States shall provide for time limits within which an applicant must exercise his/her right to an effective remedy pursuant to paragraph 1. An applicant who wishes to pursue a previous application may find that the relevant time limit has expired. UNHCR notes that the automatic and mechanical insistence on the application of time limits may be at variance with the prohibition of *refoulement* and the protection of fundamental human rights embodied in Article 3 of the European Convention on Human Rights.⁴⁸

The only other explicit reference to a previous application which has been explicitly withdrawn is made in Article 32 (2) (a) APD, on subsequent applications, which states that “*Member States may apply a specific procedure ... [preliminary examination procedure] where a person makes a subsequent application for asylum after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20*”. However, the application of this provision, when the previous application was explicitly withdrawn, without a complete examination of the merits of the application, may be problematic. Firstly, the APD allows Member States which operate such a specific procedure to derogate from some of the basic principles and guarantees which might otherwise apply to the first instance procedure, including permitting the omission of the personal interview.⁴⁹ Secondly, the APD provides that the subsequent application shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application, new elements or findings have arisen or have been presented by the applicant.⁵⁰ This may be wholly inappropriate where an applicant expresses the wish to pursue a previous application which was not previously substantiated and/or examined fully and completely on its merits, and the term ‘new elements or findings’ is interpreted as requiring the submission of new reasons for an application (i.e. reasons other than those stated in the previous application) or new evidence in support of the application.⁵¹

⁴⁷ This would also require an amendment of Article 28 (1) APD.

⁴⁸ *Jabari v. Turkey*, Application No. 40035/98, judgment of 11 July 2000.

⁴⁹ Article 24 (1) (a) and Article 34 (2) (b) APD. See Section 15 of this report on subsequent applications for further information.

⁵⁰ Article 32 (3) APD. See Section 14 of this report on subsequent applications for further information.

⁵¹ Note that Article 32 (4) APD stipulates that the application shall be further examined if new elements or findings have arisen or been presented by the applicant which “*significantly add to the likelihood of the applicant qualifying as a refugee*”.

UNHCR wishes to stress that an applicant may explicitly withdraw an application for international protection for reasons unrelated to his or her protection needs. For example, an applicant may withdraw his or her application in the belief that s/he may be allowed to remain in the Member State on some other ground(s). If this assumption turns out to be mistaken or incorrect, the applicant may report again to the determining authority and request to pursue the original application.

UNHCR is of the opinion that an applicant who explicitly withdraws an application, without having proceeded to substantiate the application under Article 4 of the Qualification Directive, or without the determining authority having assessed all the relevant facts and circumstances under Article 4 of the Qualification Directive – but then changes his/her mind and decides to pursue the application – should be able to request that the file is re-opened and the examination is continued (without the requirement to raise new elements or findings). This would enable the gathering of all the evidence, and the assessment of the merits of the application, in accordance with Article 4 of the Qualification Directive. A re-opening of the application should be possible without the imposition of time limits. This is necessary in order to prevent the risk of *refoulement* in contravention of the 1951 Refugee Convention and to prevent the risk of return in violation of the European Convention of Human Rights and the UN Convention against Torture.

UNHCR considers positive the situation in a number of the Member States surveyed, which impose no requirement that the applicant must submit a new application raising new elements or findings: Belgium,⁵² the Czech Republic,⁵³ France,⁵⁴ Italy,⁵⁵ the Netherlands⁵⁶ and Spain.⁵⁷

The situation in Finland with regard to explicit withdrawal was still unclear at the time of writing. During UNHCR's research, the draft law, preparatory works and administrative guidelines did not provide guidance on the action that would be taken if an applicant decided to pursue an application that s/he had previously withdrawn.

However, UNHCR notes with some concern that in five of the Member States surveyed, following an explicit withdrawal, if an applicant changes his or her mind and decides to pursue the original application, s/he must submit a subsequent application raising new elements or findings.⁵⁸

In Greece, following explicit withdrawal, a decision to reject the application is taken. An applicant who changes his or her mind and decides to pursue the application can apply for judicial review of the negative decision to the Council of State on a point of law, if the time limit has not expired; or alternatively can submit a subsequent application, but the applicant must submit new elements. UNHCR is concerned that neither of these options guarantees that the application will receive a complete examination of the facts and circumstances.

⁵² The examination will be continued if the request to re-open is made within 15 days of the application being withdrawn. Otherwise a new application can be made and there is no requirement that new elements or findings are raised.

⁵³ A new application can be made on the same grounds as the previous application.

⁵⁴ According to information received in an interview with the Legal Department of OPFRA, in practice, the applicant can submit a subsequent application without raising new elements or findings when the first application was not considered on its merits.

⁵⁵ The applicant should have the right to re-open the procedure at a later stage when the application was explicitly withdrawn before the personal interview, but UNHCR is not aware of any such request made since 2005, when the decentralized procedure was established.

⁵⁶ A new application must be filed. According to the determining authority (IND), the applicant does not have to apply on new grounds and Article 4:6 GALA on subsequent applications is not applicable.

⁵⁷ The applicant can submit a new application on the same grounds as the original application, although in practice credibility doubts might arise.

⁵⁸ Bulgaria, Germany, Greece, Slovenia and the UK. See Section 14 of this report (on subsequent applications) concerning the procedures that are applied.

In the remaining four of these Member States, notwithstanding a decision to discontinue examination following explicit withdrawal, if an applicant changes his or her mind and decides to pursue the original application, s/he must still submit a subsequent application which contains new elements or findings (Bulgaria,⁵⁹ Germany,⁶⁰ Slovenia⁶¹ and the UK).⁶²

In Bulgaria, the subsequent application will be considered manifestly unfounded unless it includes “*new circumstances of significant importance regarding his/her [the applicant’s] personal situation or the situation in his/her country of origin.*”⁶³

In Germany, “[i]f after the withdrawal or non-appealable rejection of a previous asylum application, the foreigner files a new asylum application (follow-up application), a new asylum procedure shall be conducted only if the conditions of Section 51 (1) through (3) of the Administrative Procedure Act are met; [...]”⁶⁴ Thus, no distinction is made between withdrawal and a non-appealable rejection, and the full range of requirements set by law for the conduct of follow-up procedures must be fulfilled, including new evidence or a change of the legal situation in favour of the applicant.⁶⁵ The time limit of three months beginning “*with the day the person affected learnt of the grounds for resumption of proceedings*” also applies.⁶⁶

In Slovenia, an applicant who “*has explicitly withdrawn the application may file a new one, only if s/he submits new evidence proving that s/he meets the conditions for acquiring international protection under this Act.*”⁶⁷

In the UK, if the applicant decides to pursue the original application and procedure after withdrawal, s/he must make a new application. This is treated as a subsequent application, which must meet the two-limbed test for a “fresh claim”. The application must be significantly different from previous material in that, firstly, it has not already been considered; and secondly, taken together with previous material, it has a realistic prospect of success (i.e. the claim is not clearly unfounded).⁶⁸ Cases are normally explicitly withdrawn before the personal interview, so that the previous material gathered has not been considered, and the first criterion is therefore usually considered fulfilled. However, the second criterion still applies.

⁵⁹ Paragraph 1, item 6 of the Additional Provisions of LAR in relation to Article 13 (1), item 5 LAR.

⁶⁰ Section 71 (1) 1st Sentence APA: “*If, after the **withdrawal** or non-appealable rejection of a previous asylum application, the foreigner files a new asylum application (follow-up application), a new asylum procedure shall be conducted only if the conditions of Section 51 (1) through (3) of the Administrative Procedure Act are met; this shall be examined by the Federal Office.*”

⁶¹ Article 56 of the IPA.

⁶² Immigration Rule 353.

⁶³ Article 13 (1), item 5 LAR.

⁶⁴ Section 71(1) 1st Sentence (first part) APA.

⁶⁵ Section 51 (1) APA: “*The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when: 1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected; 2. new evidence is produced which would have meant a more favourable decision for the person affected; 3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure.*”

⁶⁶ Section 51 (1) APA: “*The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings.*”

The referral to Section 51 (2) Administrative Procedure Act remains unclear in cases of explicit withdrawal: “*An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy.*”

⁶⁷ Article 56 of the IPA. Note that the draft Act on changes and amendments to the Act on International Protection, which was pending before the National Assembly at the time of writing, proposes a change to this provision requiring that “*circumstances after submission of the previous application have changed significantly*”.

⁶⁸ Following the recent House of Lords decision in *ZT Kosovo*, it appears that the threshold of having a realistic prospect of success at appeal is the same as showing that the claim is not clearly unfounded. *ZT (Kosovo) v SSHD [2009] UKHL 6*.

Section 14 of this report, on subsequent applications, provides further information regarding the interpretation given to the above-mentioned national legal provisions and the procedures in which subsequent applications are examined. This section addresses the extent to which this approach may hinder access to a fair and effective procedure for the determination of protection needs and status.

In UNHCR's view, it is not appropriate to treat a request to pursue an original application as a subsequent application in terms of the APD, where the application is made following explicit withdrawal of the earlier application and that earlier application was not substantiated by the applicant and/or assessed by the determining authority in accordance with Article 4 of the Qualification Directive. UNHCR considers that a requirement that the applicant submit a subsequent application raising new elements or findings, which is examined in a procedure which may derogate from the basic principles and guarantees of Chapter II of the APD, may place applicants at risk of *refoulement*. Rather, UNHCR would urge Member States to provide in national legislation for the re-opening of the asylum procedure.⁶⁹

Recommendations

UNHCR recommends that an applicant should be entitled to request that the examination of his/her original application is re-opened following explicit withdrawal.

If Member States treat requests for re-opening of an examination after explicit withdrawal of a claim, and Article 32 (2) (a) is applied, Member States should interpret "new findings and elements" in a protection-oriented manner, in line with the object and purpose of the 1951 Convention. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements.

Implicit withdrawal or abandonment of applications

"Implicit withdrawal or abandonment of the application" refers to the circumstances in which the determining authority can assume that, in the absence of an explicit statement by the applicant, an applicant no longer wishes that the determining authority proceed with the examination of the application for international protection. The Directive sets out a non-exhaustive list of indicators which relate to failures by the applicant to comply with procedural obligations.

It is crucial that any 'indicators' of implicit withdrawal or abandonment do not encompass, nor are applied to, applicants who have no intention of abandoning the procedure, but who may have failed to comply with procedural obligations for other reasons.

In this regard, it is essential that Member States adhere to their obligation of informing applicants, in a language which they understand, of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities.⁷⁰ This information must be provided to all applicants systematically, and at the earliest possible point in the proce-

⁶⁹ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing status, UNHCR, London, 24 October 2007.

⁷⁰ Article 10 (1) (a) APD. However, note that UNHCR urges Member States to ensure that this is done in a language which the applicant understands rather than in a language which the applicant "may reasonably be supposed to understand" as stated in the APD. Stakeholders in Greece expressed concerns that applicants were not informed of the possible consequences of not complying with their obligations, and they received no written information regarding the consequences of non-compliance with procedural obligations.

sure. Moreover, all relevant authorities must ensure that they have appropriate administrative and communication systems and procedures in place to manage and monitor procedural obligations efficiently.

It must also be recognized that a failure to comply with procedural obligations, or the abandonment of the application, does not necessarily indicate that an applicant does not qualify for refugee or subsidiary protection status. Applicants with protection needs may abandon the application for various reasons unrelated to the merits of their claims. For example, they may lack trust in the asylum procedure to recognize their protection needs; they may be coerced or advised by others to abandon the procedure; they may wish to submit an application for international protection in another Member State where they believe they have better prospects of recognition or integration, or other reasons.

The provisions on implicit withdrawal should not be used to deny claimants, who wish to reactivate their application, a complete and appropriate examination of their application.⁷¹ Member States remain bound by the international legal obligation not to remove any person contrary to the principle of *non-refoulement* and the provisions of the European Convention on Human Rights and the UN Convention against Torture.

In this regard, it should also be recalled that provisions on implicit withdrawal in the APD must be coherent and consistent with the provisions of the Dublin II Regulation.⁷² UNHCR has already stated its view that when an asylum applicant is returned to a Member State pursuant to Article 3 (1) of the Dublin II Regulation, s/he should enjoy effective access to national asylum procedures and his/her application should be examined substantively.⁷³

There may be cases in which an applicant may lodge an application for international protection in one Member State, and then abandon the application before substantiating the application in order to apply for international protection in another Member State. If s/he is later returned to the first Member State in accordance with the Dublin II Regulation, s/he may find that the original application in the responsible Member State has been rejected or discontinued in his/her absence, on the ground that it was considered implicitly withdrawn. An applicant who wishes to pursue his or her original application may find that the determining authority cannot re-open the application, or the time limit for re-opening the application has expired.⁷⁴ Time limits for lodging an appeal may also have expired.⁷⁵ This problem has been widely discussed and documented by UNHCR and others.⁷⁶ It is, therefore, crucial that Member States have in place the necessary safeguards to ensure that a person, whose application has been implicitly withdrawn in the responsible Member State, but who expresses the wish to pursue the previous application, is able to reactivate the examination of the previous application, or submit an application which

⁷¹ Article 14 of the Universal Declaration of Human Rights and Article 18 of the EU Charter on Fundamental Rights. See also UNHCR ExCom Conclusion No. 65 XLII, 1991, paragraph (o); ExCom Conclusion No. 82 (XLVIII) on safeguarding asylum, 1997, paragraph (d) (ii); ExCom Conclusion No. 85 (XLIX) on international protection, 1998, paragraph (q), which reiterate that asylum seekers have access to fair and effective procedures for determining their status and protection needs.

⁷² At the time of writing, the Dublin II Regulation is being considered for revision and UNHCR has expressed its views in *UNHCR Comments on the European Commission's Proposal for a recast of the Dublin II Regulation and Eurodac*, 18 March 2009.

⁷³ *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, 15 April 2008, available at: <http://www.unhcr.org/refworld/docid/4805bde42.html>.

⁷⁴ Article 20 (2) APD states that "*Member States may provide for a time limit after which the applicant's case can no longer be re-opened.*"

⁷⁵ This concern was highlighted by the European Parliament in its Report on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Committee on Civil Liberties, Justice and Home Affairs, A6-0222/2005, pg. 46, amendment 100.

⁷⁶ *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, 15 April 2008, available at: <http://www.unhcr.org/refworld/docid/4805bde42.html>.

is examined fully and properly on its merits and the applicant is given the opportunity to provide evidence in a personal interview.

Transposition

UNHCR's research has found that the majority of the Member States surveyed have legislation or pending draft legislation which sets out the circumstances in which an application will be considered to be implicitly withdrawn or abandoned, and which stipulates the action which should be taken by the determining authority. This is the case in Belgium,⁷⁷ Bulgaria,⁷⁸ the Czech Republic,⁷⁹ Finland,⁸⁰ Germany,⁸¹ Greece,⁸² the Netherlands, Slovenia,⁸³ Spain⁸⁴ and the UK.⁸⁵ The Government of the Netherlands claims that Article 20 APD is reflected in national legislation, but this is considered arguable.⁸⁶ Nevertheless, the Netherlands does have policy guidance on implicit withdrawal.⁸⁷

The notable exceptions are France and Italy, where there is no national legislation and no administrative provisions on implicit withdrawal. In France, the determining authority does in practice, in certain circumstances, consider applications to be implicitly withdrawn.⁸⁸ However, in Italy, an application can only be withdrawn explicitly. In other circumstances, the determining authority simply proceeds with the procedure and takes a decision on the basis of the information and evidence which has been submitted by the applicant.

UNHCR has found that legislation and practice are very divergent amongst the States surveyed. As a result, the consequences of a failure to comply with procedural obligations differ greatly for applicants, depending on the Member State where the application has been lodged.

77 Article 52 of the Aliens Act and Article 57/10 of the Aliens Act.

78 Article 14 and Article 15 LAR.

79 Section 25 (d), (e), (f), (h) ASA.

80 Section 95 (c) *Ulkomaalaislaki* (Aliens' Act, 301/2004) is amended by the the Hallituksen esitys 86/2008 (Government Bill 86/2008).

81 Section 33 APA: "(1) An asylum application shall be deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the Federal Office. The request by the Federal Office shall inform the foreigner of the consequences resulting from the preceding sentence.

(2) The asylum application shall furthermore be deemed to have been withdrawn if the foreigner has traveled to his country of origin during the asylum procedure.

(3) The foreigner shall be turned back at the border if upon entry into the country it is determined that he traveled to his country of origin during the asylum procedure and the asylum application is therefore deemed to have been withdrawn pursuant to (2). A decision of the Federal Office pursuant to Section 32 shall not be required. Section 60 (1) through (3) and (5) and Section 62 of the Residence Act shall be applied *mutatis mutandis*." The provisions concerning implicit withdrawal existed before the entry into force of the APD, and remain unchanged. Moreover, Section 32a (2) APA allows for the presumption of implicit withdrawal, however, this applies only to cases dealt with in Section 32a (1) APA referring to temporary protection within the meaning of Council Directive 2001/55/EC. Furthermore, this provision has not been applied so far.

82 Article 14 (2) PD 90/2008.

83 Article 50 (2) of the IPA.

84 Article 92 APL, and Article 27 of the New Asylum Law.

85 Immigration Rule 333C.

86 According to the Government of the Netherlands' table of correspondence, Article 20 APD is reflected in Article 31 (1) of the Aliens Act which states that an application should be rejected if the alien has not made a plausible case that his/her application is based on circumstances which, either in themselves or in connection with other facts, constitute a legal ground for the issue of a permit.

87 Aliens Circular C14/7.

88 Information received in an interview with the Legal Department of OFPRA during the research period.

Grounds for implicit withdrawal

In Article 20 (1), the APD sets out a non-exhaustive list of the circumstances in which Member States may assume that an applicant has implicitly withdrawn or abandoned his/her application. These circumstances are all related to a failure to comply with obligations to cooperate with the competent authorities.⁸⁹ According to Article 20 (1) APD, Member States may assume that an applicant has implicitly withdrawn or abandoned his/her application, *in particular*, when it is ascertained that the applicant:

- has failed to respond to requests to provide information essential to his/her application in terms of Article 4 of the Qualification Directive, unless the applicant demonstrates within reasonable time that the failure to appear was due to circumstances beyond his or her control;
- has not appeared for a personal interview, unless the applicant demonstrates within reasonable time that the failure to appear was due to circumstances beyond his or her control;
- has left or absconded from his or her place of residence or detention without authorization, and without contacting the competent authority within a reasonable time;
- has not complied, within a reasonable time, with reporting duties or other obligations to communicate.

Some Member States have legislation or administrative provisions which stipulate specific grounds for implicit withdrawal.⁹⁰ Germany has a broader legislative provision which states that an asylum application is “*deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the [BAMF].*”⁹¹ Similarly, legislation in Spain permits the determining authority to declare the procedure terminated because of a “*lack of action on the side of the applicant*”, referring to failure to take procedural steps which are needed to adopt a decision on the case.⁹² However, the New Asylum Law, which entered into force after the period of UNHCR’s research, has now added the following provision: “*In any case, it might be assumed that the applicant has withdrawn the application if, after 30 days, s/he has failed to respond to requests to provide essential information to his/her application, s/he did not present him/herself to a scheduled interview or s/he did not present him/herself for the renewal of the documentation s/he had been provided with.*”⁹³

And as mentioned above, there are no legislative grounds for implicit withdrawal in France or Italy.

⁸⁹ In this regard, Article 11 APD sets out a non-exhaustive list of the obligations that Member States may impose upon applicants to cooperate with the competent authorities, insofar as these obligations are necessary for the processing of the application. These include reporting requirements, the obligation to hand over all documents in their possession, to inform the competent authorities of their address and notify of any change of address, and to allow the competent authority to photograph the applicant and record their statements. Article 7 (6) of Directive 2003/9/EC states that “*Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible*”.

⁹⁰ Although note that the national legislation in Greece, Article 14 (2) PD 90/2008, closely mirrors the language of the APD and uses the term ‘in particular’, so that the stated grounds are non-exhaustive.

⁹¹ Section 33 (1) APA: “*An asylum application shall be deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the Federal Office. The request by the Federal Office shall inform the foreigner of the consequences resulting from the preceding sentence.*” In theory, this rule covers each failure of applicants to fulfil their obligations, provided that no specific rule applies and that the formal asylum application has already been filed. Obligations arising before this point in time do not fall under this provision (as the applicant has not yet applied for asylum, there is nothing that could be withdrawn). The legal consequence of the failure to pursue the claim comes into effect by act of law. The statement of the BAMF, that the proceedings (with regard to refugee protection) are terminated, is of a declaratory nature. Nonetheless, the BAMF must take a decision on the merits with regard to subsidiary protection “on the basis of the record as it stands”. (Section 32 2nd Sentence APA. Section 32 APA: “*If the asylum application is withdrawn or abandoned in the meaning of Section 14a (3), the Federal Office shall indicate in its decision that the asylum procedure has been discontinued, and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7). In the cases listed in Section 33, the Federal Office shall decide on the basis of the record as it stands.*”)

⁹² Article 92 APL and Art. 24 (5) ALR.

⁹³ Article 27 of the New Asylum Law.

The table below shows whether the grounds for implicit withdrawal expressly stated in the APD are also reflected, or potentially encompassed as grounds in Member States' national legislation and administrative provisions. UNHCR has found that the grounds for implicit withdrawal differ across the Member States.

Member State	Failure to provide essential information	Failure to attend personal interview	Absconded from residence	Failure to report or communicate
Belgium	√	√	√	√
Bulgaria	√ ⁹⁴	√	√ ⁹⁵	√ ⁹⁶
Czech Republic	√	√		
Finland			√ ⁹⁷	√ ⁹⁸
France ⁹⁹	N/A	N/A	N/A	N/A
Germany	√ ¹⁰⁰			√ ¹⁰¹
Greece	√	√	√	√
Italy ¹⁰²	N/A	N/A	N/A	N/A
Netherlands		√	√	
Slovenia		√	√	√ ¹⁰³
Spain	√	√		√ ¹⁰⁴
UK		√		

UNHCR's research has found that, in accordance with the four grounds stated in the table above, the following circumstances are considered by at least some of the determining authorities in the surveyed States, to indicate the implicit withdrawal or abandonment of an application:

- failure to report at a designated place to be fingerprinted;
- failure to return the application form or other asylum questionnaire;
- failure to attend a screening interview, without reasonable explanation;
- failure to address a gap in the file details, for example, a failure to provide name, date of birth, place of residence or mailing address;
- leaving an interview, without reasonable explanation, prior to its completion;
- failure to report to the determining authority for examination;

⁹⁴ This is expressed as a failure to cooperate with officials of the determining authority in accordance with Article 14, item 3 LAR.

⁹⁵ This situation would be covered by the provision relating to the failure to notify the determining authority or reception centre of a change of address in accordance with Article 14, item 2 LAR.

⁹⁶ Specifically, this is a failure to notify the determining authority or reception centre of a change of address in accordance with Article 14, item 2 LAR.

⁹⁷ According to the draft law, Government Bill 86/2008, Section 95 (c) will be amended, so that an application is considered implicitly withdrawn if the location of the applicant, according to the reception centre, has been unknown for at least two months. In this situation, the applicant is assumed to have left Finland.

⁹⁸ According to the draft law, Government Bill 86/2008, Section 95 (c) will be amended so that an application is considered implicitly withdrawn if it has been impossible to contact the applicant at the last address notified for at least two months. In this situation, the applicant has failed to notify an address and is assumed to have left Finland.

⁹⁹ National law does not provide for implicit withdrawal and there are no procedural instructions.

¹⁰⁰ This may fall within the legal provision for implicit withdrawal which provides that "[a]n asylum application is deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the [BAMF]": Section 33 (1) APA. However, if the failure to provide essential information is related to a failure to appear for the personal interview, the provision on implicit withdrawal may not be applied. Section 25 (4) or (5) APA may be applied instead, which allows the BAMF to take a decision on the application on the basis of the record as it stands.

¹⁰¹ Ibid.

¹⁰² National law does not provide for implicit withdrawal, and there are no procedural instructions.

¹⁰³ Specifically, this is a failure to notify the competent authority of a change of address which results in unsuccessful deliveries of requests for attendance or any other mail, despite several attempts.

¹⁰⁴ Specifically, this is a failure to renew documentation in accordance with Article 27 of the New Asylum Law.

- failure to respond to question(s) sent in writing as to whether the applicant wishes to pursue application for international protection;
- refusal to co-operate in clarifying circumstances pertaining to the application, including age assessment examinations;
- failure to notify the competent authority of a change of address.

UNHCR's research also found that national legislation or administrative provisions provide the determining authorities in some Member States with additional grounds to consider an application as implicitly withdrawn, which are not explicitly stated in the APD:¹⁰⁵

- applicant has made an unauthorized entry or an attempt at unauthorized entry into the territory of another country during the course of the proceedings (The Czech Republic);¹⁰⁶
- applicant has acquired nationality of a Member State (Belgium,¹⁰⁷ Bulgaria,¹⁰⁸ The Czech Republic);¹⁰⁹
- applicant has received another form of protection granting the same rights (Bulgaria);¹¹⁰
- applicant authorized to remain for unlimited time on other grounds (Belgium);¹¹¹
- applicant has definitively and voluntarily returned to country of origin (Belgium,¹¹² Bulgaria);¹¹³
- applicant has voluntarily reacquired the nationality of his/her country of origin or acquired another country's nationality (Bulgaria);¹¹⁴
- death of the applicant (Bulgaria,¹¹⁵ the Czech Republic,¹¹⁶ Finland);¹¹⁷
- applicant has travelled to her/his country of origin during the asylum procedure (Germany).¹¹⁸

Furthermore, as mentioned above, it must be borne in mind that the legislative provisions in some of the Member States are broad or non-exhaustive and therefore may encompass further grounds for implicit withdrawal.¹¹⁹

Recommendation

Criteria used by Member States as grounds for implicit withdrawal or abandonment should not encompass, nor be applied to, applicants who have no intention of abandoning the procedure, but who may have failed to comply with procedural obligations for other reasons.

¹⁰⁵ Some of these grounds mirror grounds for cessation of refugee status under the Qualification Directive. See Article 11 of the Qualification Directive.

¹⁰⁶ Section 25 (h) ASA.

¹⁰⁷ Article 35 of the Royal Decree of 11 July 2003 states that the application becomes void. In 2008, there were 20 cases.

¹⁰⁸ Article 15 (1), item 4 LAR.

¹⁰⁹ Section 25 (g) ASA: "*the applicant for international protection has been granted citizenship of the Czech Republic in the course of the proceedings.*"

¹¹⁰ Asylum granted by the President of the Republic of Bulgaria: Article 15 (1), item 9 LAR.

¹¹¹ In 2008, there were 39 cases. The applicant has a period of 60 days to request by registered mail that the asylum procedure continue.

¹¹² Article 34 of the Royal Decree of 11 July 2003. In 2008, there were 59 cases, all of applicants returning with IOM.

¹¹³ Article 15 (1), item 5 LAR.

¹¹⁴ Art. 15 (1), item 3 LAR.

¹¹⁵ Art. 15 (1), item 8 LAR.

¹¹⁶ Section 25 (c) ASA.

¹¹⁷ Section 95 (c) *Ulkomaalaislaki* (Aliens' Act, 301/2004) as amended by the *Hallituksen esitys* 86/2008 (Government Bill 86/2008).

¹¹⁸ Section 33 (2) and (3) APA. The relevance and frequency of application of these provisions in practice remains unclear. None of the asylum lawyers consulted by UNHCR had ever been confronted with a case falling under Section 33 (2) or (3) APA. It is not explicitly required that the applicant has travelled **voluntarily** to the country of origin, however, the BAMF has reported to UNHCR that this is a precondition for the application of this provision. Section 33 (2) APA: "*The asylum application shall furthermore be deemed to have been withdrawn if the foreigner has travelled to his country of origin during the asylum procedure.*" Section 33 (3) APA: "*The foreigner shall be turned back at the border if upon entry into the country it is determined that he travelled to his country of origin during the asylum procedure and the asylum application is therefore deemed to have been withdrawn pursuant to (2). A decision of the Federal Office pursuant to Section 32 shall not be required. Section 60 (1) through (3) and (5) and Section 62 of the Residence Act shall be applied mutatis mutandis.*"

¹¹⁹ For example, Germany, Greece and Spain.

Failure to comply with procedural requirements should not be treated as grounds for implicit withdrawal or abandonment, where the failure is due to circumstances beyond the applicant's control, or where there is a reasonable explanation.

The particular situation of some asylum seekers, which may render it difficult or impossible for them to comply with requirements, should be given particular attention in considering whether applications may be considered implicitly withdrawn or abandoned.¹²⁰

Reasonable time limits and reasonable cause

There are a variety of reasons, unrelated to the credibility of the applicant or the merits of his or her application, why an applicant may fail to respond to a request for information, to attend a personal interview, to report as obliged or to advise the competent authority that s/he is leaving the place of residence. Article 20 APD consequently provides that a reasonable time should elapse before the determining authority has reasonable cause to consider that an application has been implicitly withdrawn or abandoned. This time may be used by the authorities to take reasonable steps to try and contact the applicant and his/her legal representative, if appointed, and if contact is made the applicant should be given an opportunity to explain the reasons for the failure to comply. It is crucial that Member States have in place the necessary safeguards to ensure that a person who expresses the wish to pursue the application is able to reactivate the examination or submit an application which is examined fully and properly on its merits.

However, what constitutes a "reasonable time" is left to the discretion of Member States and the APD in Article 20 (1) simply states that "*Member States may lay down time-limits or guidelines*". This is a permissive clause. However, UNHCR believes that a lack of guidelines creates legal uncertainty for personnel of the determining authority and for applicants, regarding whether circumstances have given reasonable cause to consider an application implicitly withdrawn.

UNHCR's research found that some Member States do provide time limits and/or guidelines which vary from one Member State to another, and also vary depending on the nature of the non-compliance.

By way of example, if an applicant fails to appear for a personal interview, a decision will be taken on implicit withdrawal after approximately four months in Bulgaria,¹²¹ 2.5 months in Belgium,¹²² after 30 days in Greece¹²³ and Spain,¹²⁴ and after five days in the UK.

The UK applies a significantly lesser period than in other Member States, and UNHCR is concerned that the designated time limit is too short to reliably indicate an intention to abandon the application. In the UK, a letter is sent to any applicant who does not appear for an interview, allowing him/her five days to provide an explanation. The case owner checks if s/he is at the address and if not, the application is considered withdrawn and the ex-

¹²⁰ For example, the claims of asylum seekers who are ill or suffer from limits on their physical movement should not be dismissed as withdrawn or abandoned in cases where they might be unable to meet reporting requirements or attend appointments.

¹²¹ In Bulgaria, if the applicant fails to appear for an interview, s/he is invited to appear for a re-scheduled interview. If the applicant does not appear for the re-scheduled interview, the procedure is suspended for 10 days after which, if the applicant does not make contact, a decision is taken to suspend examination for three months. If the period of three months expires and the applicant has not made contact to explain the failure to appear, a decision is taken to discontinue the procedure.

¹²² In Belgium, an applicant has 15 days from the date of the interview within which to explain the failure to appear; otherwise a decision may be taken within two months (Article 52, Aliens Act).

¹²³ 30 days from the date of the scheduled interview, according to information obtained during an interview with S1.

¹²⁴ Article 27 of the New Asylum Law. Regarding the instruction to attend a scheduled interview, the rules laid down for the common administrative procedure must be followed, which require that the invitation for the interview is first sent by post; if the applicant does not appear for the interview, the interview will be re-scheduled and notification will be made by posting a public notice at the city council (of the last known address) and in the Official State Journal.

amination is discontinued.¹²⁵ In the context of a reception system which disperses applicants throughout the UK, information held by the determining authority on the address of the applicant can be out of date, and the five day time limit is considered to be too short.

In Slovenia, in law, the applicant is expected to provide prior notification of non-attendance at an interview, and thus does not receive any subsequent time period within which to explain his or her absence. The law states that *“the application shall be considered withdrawn: if the applicant fails to attend the interview or an oral hearing without any prior reason.”*¹²⁶ This is not in compliance with the APD, which provides that the applicant should have a reasonable time within which to explain his/her failure to attend the interview.

Two other Member States have not laid down time limits with regard to explanations for non-appearance at the personal interview, namely the Czech Republic¹²⁷ and the Netherlands. In the regular procedure in the Netherlands, no time limit applies and instead, the applicant is summoned to a re-scheduled interview. If s/he fails to attend the re-scheduled interview, the application is considered withdrawn. UNHCR’s audit of case files in the Czech Republic found that they included information regarding non-compliance and the audit indicated that in practice, decisions are taken at least one month after the non-compliance.¹²⁸ However, in one case, a decision to discontinue the examination was taken two days after the applicant absconded from the asylum centre, and on the day that the applicant failed to appear for interview.¹²⁹ UNHCR considers that two days is too short to be indicative of an intention to abandon the application. The determining authority sought to reassure UNHCR that efforts are always made to trace the applicant.

In Italy, there is no national legislation with regard to implicit withdrawal. In practice, if an applicant fails to appear for the personal interview, s/he is summoned to a re-scheduled interview. If s/he fails to attend the re-scheduled interview, the determining authority takes a decision on the basis of the available evidence.

Vast divergence can also be seen in the approach taken to applicants who are considered to have left their place of residence without authorization, or who have changed their address without notifying the determining authority.

In Finland, the location of an applicant must be unknown for at least two months before the application can be considered withdrawn.¹³⁰ In Germany, in order to apply the legal provision on implicit withdrawal, administrative guidelines require that the determining authority first issues a request to the applicant to pursue the asylum application. This request can only be issued on the basis of factual grounds suggesting that the applicant has actually lost interest in the continued conduct of the procedure.¹³¹ The request which is sent to the applicant has to be formulated in a way that informs the person concerned of the concrete action which needs to be taken in order to pursue the application.¹³² Moreover, the request must contain information about the legal consequences of further inactivity.¹³³ The legal provision on implicit withdrawal comes into effect if the applicant does not provide reasons for failing to pursue the application within the stipulated time-limit of one month.¹³⁴

¹²⁵ Explanatory Memorandum to Statement of Change in Immigration Rules laid on 17 March 2008 (HC 420) accessed via EIN website.

¹²⁶ Article 50 (2) IPA.

¹²⁷ According to Section 25 of ASA, the proceedings shall be discontinued if: “d) *the applicant for international protection failed to appear for an interview without any serious reason or ...*”

¹²⁸ Xo32 and Xo60: 1 month and 1 week; Xo16 and Xo40: 1.5 months; Xo14: 6.5 months.

¹²⁹ Xo59.

¹³⁰ Section 95 (c) *Ulkomaalaislaki* (Aliens’ Act, 301/2004) as amended by the *Hallituksen esitys 86/2008* (Government Bill 86/2008).

¹³¹ Information provided by the BAMF as well as contained in the Internal Guidelines for the Asylum Procedure, under: “deemed withdrawal” (1/1).

¹³² Information provided by the BAMF as well as contained in the Internal Guidelines for the Asylum Procedure, under: “deemed withdrawal” (1/1).

¹³³ Section 33 (1) 2nd Sentence APA.

¹³⁴ Section 33 (1) APA.

In stark contrast, in the Netherlands, if the applicant leaves his/her place of residence without authorization, a decision can be taken on the application immediately. The determining authority is not required to try to trace or contact the applicant. Similarly, in Belgium, where an applicant has attempted to enter the country illegally and then absconds from the detention centre at the border, a decision can also be taken immediately.¹³⁵ UNHCR considers the immediate issuance of a decision to be incompatible with the APD, which requires that applicants be given a reasonable time to contact the competent authority. In Greece, if the applicant absconds from the place where s/he was detained, or leaves without authorization the place where s/he lived without requesting permission or informing the competent authorities, a decision to reject the application can also be taken immediately by law.¹³⁶ However, the determining authority informed UNHCR that the police make efforts to trace the applicant, and a negative decision is only taken upon the lapse of 30 days.¹³⁷

In Slovenia, the application is considered withdrawn when the applicant has left the asylum centre or private address and has not returned within three days. In the past, this has presented problems where an applicant, for example, left his or her residence on a Friday and returned on a Monday to find that the application was considered withdrawn. This is indicative of the fact that the time limit is too short, and is not a reliable indicator of intention to abandon the application.

It should also be considered that a failure to make contact with an applicant may be due to shortcomings in the determining authority's own administrative and communication systems or procedures. UNHCR's audit of case files in Spain revealed three cases in which it was assumed that the applicant had abandoned the application because s/he failed to attend the personal interview.¹³⁸ In each case, the determining authority had followed the legally established procedure for notification. This requires that the notification of an interview date is sent by post to the last known address of the applicant. If the applicant fails to attend the interview, a second interview is scheduled and notification is made through a public notice in the official State Journal and at the city council of the last known address. After this second unsuccessful effort to notify the applicant of the scheduled interview, the application is considered as implicitly withdrawn and the examination is discontinued.¹³⁹ This was done in each of the three cases audited, but the applicants failed to appear for their scheduled interviews. In all three cases, the applicants continued to report to the authorities to renew their documentation. These opportunities were not taken, however, to inform the applicants of the scheduled interview dates. Instead, in two of the cases, the determining authority concluded that the applicants were abusing the asylum system because they had not attended the scheduled interviews but had continued to report to renew their documentation in order to maintain a legal status.¹⁴⁰ It had not been taken into account that the notification might not have reached the applicant for one reason or another.¹⁴¹

Recommendation

Member States are urged to ensure that national legislation or administrative provisions give guidance on the steps to be taken to ensure that applicants have the opportunity and a reasonable time to explain any failure to comply with a procedural obligation.

¹³⁵ Article 52 of the Aliens Act.

¹³⁶ Article 14 (2) (c) and (d) PD 90/2008.

¹³⁷ Interview with S1.

¹³⁸ Cases numbers. 0508112, 1008113, and 1006090.

¹³⁹ The case is declared terminated.

¹⁴⁰ Case numbers 1008113, 1006090.

¹⁴¹ The postal notice indicating "*recipient unknown*" or "*recipient absent*" is included in the file but no further information was available.

All Member States should ensure, by law, that applicants are granted a reasonable time after the date of the scheduled personal interview to demonstrate that their failure to attend the interview was due to circumstances beyond their control or for good reason. All Member States should ensure, by law, that applicants who are presumed to have absconded or left their residence without authorization, or have not notified the competent authority of a change of address, are given a reasonable time within which to inform the competent authority.

Decision following implicit withdrawal or abandonment of an application

Article 20 (1) APD states that:

“When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC.”

Unlike the three options for a decision granted to Member States under Article 19 relating to explicit withdrawal, Article 20 (1) APD directs Member States to either take a decision to discontinue the examination of an application, or reject an application on the basis of a failure to establish entitlement to refugee status.

UNHCR is of the opinion that the APD is flawed in directing Member States to reject the application for non-compliance with procedural obligations on the basis that the applicant has not established an entitlement to refugee status. The wording of the APD can be interpreted as permitting Member States to reject an application on purely formal grounds. Such an interpretation would appear to be reinforced by Article 28 (1) APD which states **“Without prejudice to Articles 19 and 20, Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to Directive 2004/83/EC [Qualification Directive]”**.

In UNHCR’s view, an applicant for international protection may fail to comply with reporting or communication requirements for a variety of reasons which are not necessarily related to a lack of protection needs. A failure to comply with a procedural obligation does not necessarily mean that an applicant is not a refugee or does not qualify for subsidiary protection status. It should also be stressed that it is possible for an applicant to establish an entitlement to refugee status or subsidiary protection status, notwithstanding a failure to comply with procedural obligations. The APD is, therefore, flawed in stating that **“Member States shall ensure that the determining authority takes a decision to ... reject the application on the basis that the applicant has not established an entitlement to refugee status.”**

UNHCR considers that a negative decision on an application for international protection should only be issued when there has been an appropriate examination of all the relevant facts and circumstances in accordance with Article 4 of the Qualification Directive, and it has been determined that the applicant is not a refugee or does not qualify for subsidiary protection status.

UNHCR is of the opinion that a negative decision should not be issued when there has been no examination of the substance and merits of the application in accordance with Article 4 of the Qualification Directive, because the applicant has not complied with relevant procedural obligations. In such situations, UNHCR recommends that Member States either take a decision to discontinue the examination, or discontinue the examination of the application without taking a decision.

With the exception of France and Italy, all the Member States surveyed have existing or pending legislation, regulations or administrative provisions determining what action will be taken if an application is considered to be implic-

itly withdrawn. However, it should be noted that the legislation in Greece grants the determining authority the option either to discontinue the examination or reject the application. Furthermore, the legislation does not determine in which circumstances the application should be rejected, or in which circumstances the examination should be discontinued. This is considered incompatible with the APD by the Council of State.¹⁴² UNHCR was informed by the determining authority that, in practice, the determining authority in Greece has decided to reject such applications.

The following tables attempt to provide an overview of practice in the Member States surveyed, with regard to the circumstances highlighted as potential grounds for implicit withdrawal in the APD. However, it should be borne in mind that these grounds are not necessarily reflected as grounds for implicit withdrawal in each Member State (see table above setting out the grounds for implicit withdrawal). Moreover, in practice, in the case of the abandonment of the procedure, a number of the grounds may be applicable. For example, an applicant who disappears before a personal interview may be considered to have ‘failed to provide essential information’, ‘failed to attend a personal interview’, ‘absconded or left his or her place of residence without authorization’ and/or ‘failed to comply with the obligation to report or communicate’. Moreover, the decision which is taken by the determining authority may depend on the stage at which the procedure was deemed to be abandoned by the applicant, or the procedure in which the application was being examined.

Failure to provide essential information

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on basis of available evidence
Belgium				√
Bulgaria	√ (For 3 months) ¹⁴³	√ (3 months after suspension) ¹⁴⁴	√ ¹⁴⁵	√ ¹⁴⁶
Czech Republic		√ ¹⁴⁷		√ ¹⁴⁸
Finland ¹⁴⁹				√
France ¹⁵⁰				√
Germany		√ ¹⁵¹		√ ¹⁵²

¹⁴² The Council of State in Greece has ruled in 2008 that the Greek legislation is not compatible with the APD because it does not rule which cases should be treated as discontinued or rejected. It is expected that an amendment will be made to the legislation following this ruling.

¹⁴³ This is on the ground of a refusal to cooperate in accordance with Article 14, item 3 LAR – for example a refusal to be subjected to an age assessment under Article 118 (1) IRR.

¹⁴⁴ Ibid.

¹⁴⁵ Article 13 (1), item 3 LAR: An application shall be rejected in the accelerated procedure as manifestly unfounded if there are no grounds for refugee or humanitarian status, and the facts stated by the applicant do not include a detailed description of the circumstances and personal details to clarify the case.

¹⁴⁶ This may occur if a personal interview has taken place.

¹⁴⁷ Section 25 (d) ASA: “*The proceedings shall be discontinued if ... the applicant for international protection ... fails to provide information required for the reliable establishment of the actual state of the matter and a decision cannot be made on the basis of the facts established so far.*”

¹⁴⁸ Section 25 (d) ASA, *a contrario*, i.e. if a personal interview has been conducted and there is sufficient information upon which to take a decision.

¹⁴⁹ This is not a stated ground for implicit withdrawal in the Government Bill 86/2008.

¹⁵⁰ Note that there is no legislation or administrative instructions in France relating to implicit withdrawal. This information refers to practice and is based on information received in an interview with the Legal Department of OFPRA.

¹⁵¹ A failure to provide essential information may fall within Section 33 (1) APA, which stipulates that an asylum application shall be deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the BAMF, and therefore, a decision to discontinue may be taken in accordance with Section 32 APA.

¹⁵² A decision will be taken on the basis of the available evidence if the failure to provide essential information results from a failure to appear for the personal interview in accordance with Section 25 (4) and (5) APA.

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on basis of available evidence
Greece			√	
Italy ¹⁵³				√
Netherlands				√
Slovenia ¹⁵⁴				√
Spain		√		
UK				√

Failure to attend personal interview

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on the basis of available evidence
Belgium				√
Bulgaria	√ (For 3 months) ¹⁵⁵	√ (3 months after suspension)		
Czech Republic		√ ¹⁵⁶		√ ¹⁵⁷
Finland ¹⁵⁸				√
France ¹⁵⁹				√
Germany				√ ¹⁶⁰
Greece			√	
Italy ¹⁶¹				√
Netherlands		√ ¹⁶²	√ ¹⁶³	√ ¹⁶⁴
Slovenia		√		
Spain		√		
UK	√			

¹⁵³ There is no legislative provision for implicit withdrawal in Italy.

¹⁵⁴ This is not a ground for implicit withdrawal under Article 50 (2) of the IPA.

¹⁵⁵ This period starts to run once 10 days have expired from the date of the re-scheduled interview.

¹⁵⁶ If insufficient facts.

¹⁵⁷ If facts established sufficiently.

¹⁵⁸ This is not a stated ground for implicit withdrawal in the Government Bill 86/2008.

¹⁵⁹ Note that there is no legislation or administrative instructions in France relating to implicit withdrawal. This information is based on information received in an interview with the Legal Department of OFPRA.

¹⁶⁰ Section 25 (4) and (5) APA.

¹⁶¹ In accordance with Article 12 (4) d.lgs. 25/2008 which states that a decision is taken on the basis of available documentation.

¹⁶² In the regular procedure and whereabouts unknown: C14/7 Aliens Circular.

¹⁶³ In the accelerated procedure: C 12/2 Aliens Circular. If the asylum seeker fails to attend the detailed personal interview in the accelerated procedure, the determining authority will nevertheless formulate an intended decision. If the asylum seeker appears after the intended decision was issued, but before the decision was issued, the asylum seeker will be interviewed. In the regular procedure, if the whereabouts of the applicant are known and the applicant fails to attend the personal interview after being summoned twice, the application will be rejected.

¹⁶⁴ In the regular procedure, if the applicant disappears after the 'intended decision' has been taken; a decision will be taken in conformity with the 'intended decision'.

Absconded or left residence without authorization

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on the basis of available evidence
Belgium				√
Bulgaria	√ (For 3 months) ¹⁶⁵	√ (3 months after suspension) ¹⁶⁶		√ ¹⁶⁷
Czech Republic		√ ¹⁶⁸		√ ¹⁶⁹
Finland		√		
France ¹⁷⁰		√		
Germany ¹⁷¹				
Greece			√	
Italy ¹⁷²				√
Netherlands		√ ¹⁷³		√ ¹⁷⁴
Slovenia		√		
Spain ¹⁷⁵				
UK				√

¹⁶⁵ The provision of Article 14, item 2 LAR is explicit about failure to inform the authorities about a change in address. However, in practice, it includes absconding or leaving the residence without authorization.

¹⁶⁶ Following suspension under Article 14, item 2 LAR.

¹⁶⁷ This may occur if a personal interview has taken place.

¹⁶⁸ If it is considered that insufficient facts have been gathered. Section 25 (d) ASA: “*The proceedings shall be discontinued if... the applicant for international protection ... fails to provide information required for the reliable establishment of the actual state of the matter and a decision cannot be made on the basis of the facts established so far.*”

¹⁶⁹ If it is considered that there are sufficient facts already gathered: Section 25 (d) ASA *a contrario*.

¹⁷⁰ Note that there is no legislation, nor administrative instructions in France relating to implicit withdrawal. In practice, the claim is “struck out” which is interpreted by UNHCR as a decision to discontinue. This information is based on information received in an interview with the Legal Department of OFPRA.

¹⁷¹ This is not a stipulated ground for implicit withdrawal and is not expressly stated as a procedural obligation under Section 15 (1) and (2) APA, although this sets out a non-exhaustive list of procedural obligations. However, if abandonment of the place of residence results in failure to comply with an obligation to report or communicate, this situation may fall within Section 33 (1) APA, allowing the application to be treated as withdrawn if the applicant fails to pursue the claim for one month.

¹⁷² There is no legislative provision for implicit withdrawal in Italy.

¹⁷³ If the applicant absconds before intended decision is taken in the regular procedure, C14/7 Aliens Circular.

¹⁷⁴ If the intended decision has been taken in the regular procedure, the decision is taken on the basis of the intended decision. In the accelerated procedure, the intended decision is taken on the basis of available evidence. C12/2.1.2. Aliens Circular.

¹⁷⁵ There is no obligation to seek authorization to leave or change the place of residence, although all changes of address must be notified. Failure to notify of a change of address has no direct legal consequences, but it might indirectly lead to the application being discontinued if notifications related to invitations for interviews, or requests to provide essential information, do not reach the applicant because s/he did not notify a change of address.

Failure to comply with obligation to report or communicate

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on the basis of available evidence
Belgium				√
Bulgaria ¹⁷⁶	√ (For 3 months) ¹⁷⁷	√ (3 months after suspension)		√ ¹⁷⁸
Czech Republic ¹⁷⁹				√
Finland		√ (After 2 months)		
France ¹⁸⁰		√ ¹⁸¹		
Germany		√ ¹⁸²		
Greece			√	
Italy ¹⁸³				√
Netherlands				√
Slovenia		√		
Spain ¹⁸⁴		√ ¹⁸⁵		
UK				√

In Bulgaria, Finland, France, Slovenia, and Spain a decision is taken to discontinue the examination when it is considered implicitly withdrawn. In Bulgaria, however, if the personal interview has taken place and sufficient evidence has been gathered, a decision on the merits may be taken.

In the Czech Republic, the determining authority may take a decision to discontinue the examination, if the determining authority considers that it has gathered sufficient evidence to take a decision, for example, if the applicant disappears having submitted the essential elements and provided oral evidence in a personal interview. In this case, the determining authority will issue either a positive or negative decision on the merits.¹⁸⁶

In Germany, the legal provision for implicit withdrawal expresses in broad terms that an asylum application is “deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite

¹⁷⁶ There are no such reporting duties or other obligations to communicate under Bulgarian legislation other than the obligation to notify of a change of address.

¹⁷⁷ The date runs from the day it becomes known that the applicant changed his/her address without notifying the determining authority.

¹⁷⁸ This may occur if a personal interview has taken place.

¹⁷⁹ This is not a ground for discontinuation of proceedings under Section 25 ASA.

¹⁸⁰ There is no national legislation on this issue in France. In practice, the claim is “struck out” which is interpreted by UNHCR as a decision to discontinue. This information is based on information received during an interview with the Legal Department of OFPRA.

¹⁸¹ This relates to the obligation to inform the determining authority of a change of address.

¹⁸² Section 15 (1) APA states that “foreigners shall be personally required to cooperate in establishing the facts of the case.” And subsection (2) states that the applicant shall be, in particular, required to “3. comply with statutory and official orders which require him to report to specific authorities or institutions or to personally appear there”. Section 10 (1), (2) APA states that: “(1) During the asylum procedure, the foreigner shall ensure that communications of the Federal Office, the responsible foreigners authority and any court he has resorted to can reach him at all times; in particular, he shall inform the aforementioned agencies of any change of address without delay.” A failure to comply with an obligation to report or communicate may, therefore, fall within Section 33 (1) APA and the application may be deemed withdrawn if “the foreigner has failed to pursue it for a period exceeding one month, despite a request by the Federal Office.”

¹⁸³ There is no legislative provision for implicit withdrawal in Italy.

¹⁸⁴ Although the determining authority should be notified of all changes of address, a failure to notify of an address change has no direct legal consequence. However, it might indirectly lead to the application being discontinued if notifications related to invitations for interviews or requests to provide essential information do not reach the applicant because s/he did not notify a change of address.

¹⁸⁵ This relates to the obligation to report in order to renew documentation under the New Asylum Law.

¹⁸⁶ Section 25 ASA and observed in audited case X058.

a request by the [BAMF].”¹⁸⁷ In theory, this provision encompasses, *inter alia*, a failure to comply with any of the procedural obligations stipulated in law,¹⁸⁸ including obligations to “cooperate in establishing the facts”, to “provide the necessary information”, “to report to specific authorities or institutions or to personally appear there” and to provide relevant agencies with contact details and inform those “agencies of any change of address without delay”.¹⁸⁹ Application of this law regarding withdrawal will result in the examination being discontinued with respect to constitutional asylum and refugee status, but the determining authority must take a decision on the merits with regard to subsidiary protection, that is “on the basis of the record as it stands”.¹⁹⁰

However, an exception is made if an applicant fails to appear for a personal interview without an adequate reason. The determining authority may instead take a decision on the merits of the asylum application (including subsidiary protection) “on the basis of the record as it stands”.¹⁹¹ The decision is most likely to be negative, given that the personal interview has not been conducted and the non-appearance of the applicant is taken into account.¹⁹² Furthermore, if a person intentionally or by gross negligence does not comply in time with a referral to the designated reception centre before lodging his/her asylum application at the respective BAMF office, this circumstance is not governed by the provisions for implicit withdrawal. Nevertheless, if the application is lodged at a later date it is treated as a subsequent application, and follow-up procedures will be applied in accordance with law.¹⁹³ It should be noted also that no decision on subsidiary protection can be taken, as the applicant has formally not yet applied for asylum.

¹⁸⁷ Section 33 (1) APA: *An asylum application shall be deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the Federal Office. The request by the Federal Office shall inform the foreigner of the consequences resulting from the preceding sentence.*”

¹⁸⁸ Provided that no specific rule applies and that the formal asylum application has already been filed.

¹⁸⁹ Section 15 (1), (2) APA: “(1) Foreigners shall be personally required to cooperate in establishing the facts of the case. This shall apply also to foreigners represented by a legal adviser. (2) The foreigner shall be required in particular to:

1. provide the necessary information orally, and on request also in writing, to the authorities responsible for implementing this Act;
2. inform the Federal Office without delay if he has been granted a residence title;
3. comply with statutory and official orders which require him to report to specific authorities or institutions or to personally appear there;
4. present, hand over and surrender his passport or passport substitute to the authorities responsible for implementing this Act;
5. present, hand over and surrender all necessary certificates and any other documents in his possession to the authorities responsible for implementing this Act;
6. cooperate, if he does not have a valid passport or passport substitute, in obtaining an identity document;
7. undergo the required identification measures.”

Section 10 (1), (2) APA further provides: “(1) During the asylum procedure, the foreigner shall ensure that communications of the Federal Office, the responsible foreigners authority and any court he has resorted to can reach him at all times; in particular, he shall inform the aforementioned agencies of any change of address without delay.”

¹⁹⁰ Section 32, 2nd Sentence APA: “If the asylum application is withdrawn or abandoned in the meaning of Section 14a (3), the Federal Office shall indicate in its decision that the asylum procedure has been discontinued and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7). In the cases listed in Section 33, the Federal Office shall decide on the basis of the record as it stands.”

¹⁹¹ Section 25 (4) APA: “For a foreigner required to reside in a reception centre, the interview should be arranged to coincide with the filing of the asylum application. It shall not be necessary to issue special summons requiring the foreigner and his legal adviser to appear. This provision shall apply *mutatis mutandis* if the foreigner is informed of the interview date at the time he files his application or within one week thereafter. If the interview cannot take place on the same day, the foreigner and his legal adviser shall be informed without delay of the date of the interview. If the foreigner fails to appear at the interview without an adequate excuse, the Federal Office shall decide, on the basis of the record as it stands, taking into account the foreigner’s failure to cooperate.” Section 25 (5) APA: “In the case of foreigners who are not required to reside in a reception centre, a personal interview may be dispensed with if the foreigner fails to comply with a summons for a personal interview without an adequate excuse. In this case, the foreigner shall be given opportunity to state his case in writing within a period of one month. If the foreigner fails to state his case within this period, the Federal Office shall decide on the basis of the record as it stands, taking into account the foreigner’s failure to cooperate. Section 33 shall remain unaffected.”

¹⁹² However, it should be noted that in both cases – the decision to discontinue the procedure as well as the decision to reject the claim – a new asylum application will only be considered if the requirements for a follow-up procedure are fulfilled. Thus, in case of negative decisions, the difference between a decision to discontinue the procedure and a rejection is not a decisive factor.

¹⁹³ Section 22 (3) APA, Section 20 (2) APA: “If after filing an asylum application [Explanatory remark: The term is misleading in so far as it refers to the request of asylum, for example at a police office and not the formal asylum application.], the foreigner fails to comply with (1) purposely or due to gross negligence, Section 71 shall apply to any later application for asylum *mutatis mutandis*. In derogation from Section 71 (3) third sentence, a hearing shall be held. The authority to which the foreigner has applied for asylum shall inform him in writing of these legal consequences, and the foreigner shall acknowledge receipt of this information. If it is impossible to inform the foreigner pursuant to the third sentence, the foreigner shall be escorted to the reception centre.”

The provisions in the Netherlands regarding which decision is taken are even more complicated. In the Netherlands, in the regular procedure, if the whereabouts of the applicant are known but the applicant fails to attend the personal interview after being summoned twice, then the application will be rejected. But if the whereabouts of the applicant are unknown, a decision to discontinue is taken. However, if the applicant disappears after the ‘intended decision’ has been taken, a decision will be taken in conformity with the ‘intended decision’. On the other hand, if the application is being examined in the accelerated procedure, an ‘intended decision’ to reject will be formulated even if the applicant disappeared before the detailed personal interview, and the failure to cooperate will likely be included as one of the grounds upon which the application is rejected.

In the UK, failure to appear for a personal interview will result in the examination being discontinued and a note will be placed in the file.¹⁹⁴ However, if an applicant fails to disclose fully the material facts or assist in establishing the facts, including a failure to report for fingerprinting, a failure to complete the questionnaire or a failure to report as required, this is not considered as implicit withdrawal, and the application can be rejected if there is insufficient evidence to substantiate the application.

In France and Italy, where there is no national legislation providing for implicit withdrawal, when the applicant fails to provide information essential to his or her application or fails to appear for a personal interview, a decision is taken on the basis of the evidence submitted, even if scarcely any information has been submitted. In practice, this is likely to be a negative decision as the information gathered will be scant. For example, in Italy, if the applicant does not attend the personal interview, the application is decided on the basis of the completed *Modello C3*,¹⁹⁵ a registration document completed by the police which in principle should contain, in addition to basic bio-data, a brief statement of the reasons for the application, but which often contains only basic and brief information which does not provide sufficient evidence for the determining authority to grant status.¹⁹⁶ A decision to reject is normally taken.¹⁹⁷

Similarly, in Belgium, where the applicant, for example, has not attended a personal interview or has not submitted evidence to support the application, the application is likely to be rejected on the basis that the applicant has not substantiated his/her application and established an entitlement to refugee status or subsidiary protection.¹⁹⁸ In Belgium, a negative decision called a ‘technical refusal’ is taken.¹⁹⁹ In 2008, 341 technical refusals were made by the determining authority.²⁰⁰ UNHCR’s audit of case files²⁰¹ found that ‘technical refusal’ decisions were explained with the following standard paragraphs:

“As authorized by article 57/10 of the Aliens Act, I refuse the recognition of refugee status and the granting of subsidiary protection status. You were not present at the personal hearing on (date), which was notified to you through () and you have not provided me with a valid reason within 15 days after notification.

¹⁹⁴ See rule 333C. The Explanatory Memorandum to HC 420 of 17 March 2008 amending rule 333C states that treating such claims as withdrawn represents a change from the previous policy of rejecting such claims, because the Government believes that treating the claim as withdrawn reflects the fact the applicant never intended to make a legitimate application for asylum.

¹⁹⁵ This is the registration of the application for international protection.

¹⁹⁶ UNHCR audited three decisions that were taken in this manner. The decision in each was negative: D/55/FERI/N, D/62/M/BAN/N, D/63/M/PAK(N).

¹⁹⁷ Note that in Italy the determining authority appears to have the power to re-examine applications and schedule an interview if the applicant wishes to pursue the application. This is the power of ‘*autotutela*’ which means that the authority can correct a matter without legal process.

¹⁹⁸ The Constitutional Court has held that the determining authority cannot refuse protected status on purely formal grounds and all applications must be examined fully on their merits. *Cour constitutionnelle*, 26 June 2008, no. 95/2008, B.77, available at www.arbitrage.be

¹⁹⁹ When based on Article 57/10 of the Aliens Act. A negative decision can also be taken on the basis of Article 52 of the Aliens Act.

²⁰⁰ Asylum statistics, 2008, CGRA, published on 8 January 2009.

²⁰¹ Case file nrs. 47, 51, 56, 62, 81, 82, 86 and 88.

*Consequently, you have made it impossible for me to judge whether, in your circumstances, there is a well-founded fear of persecution as defined in the Geneva Convention or a real risk of serious harm warranting subsidiary protection.*²⁰²

UNHCR is concerned by the practice whereby some determining authorities take a decision on the available evidence, even if the applicant has not, for example, attended the personal interview and, therefore, has not submitted evidence essential to the assessment of the application. In such situations, UNHCR recommends that Member States either take a decision to discontinue the examination, or discontinue the examination of the application without taking a decision.

UNHCR's audit of decisions in Greece suggests that decisions to reject were taken on the grounds of non-compliance with procedural obligations alone. Of the decisions audited, 17 were rejected as implicitly withdrawn because the authorities could not find the applicant at his/her declared address. The decision made no reference to whether the applicant had established an entitlement to refugee status or subsidiary protection status. Each decision had the following standard phraseology:

“S/he left without authorisation the place where s/he lived without informing the competent authorities; his or her place of residence is unknown and therefore s/he is considered to have implicitly withdrawn his/her application.”

UNHCR emphasises that a negative decision should not be issued on solely formal grounds. This is not in compliance with the 1951 Convention.

UNHCR has also noted that a failure to comply with procedural obligations may be deemed indicative of a lack of credibility by some determining authorities.²⁰³ UNHCR's audit of decisions in Belgium found that the following was stated in some decisions:

“Moreover, your behaviour shows a lack of cooperation /disinterest in the asylum procedure, which is incompatible with the existence, in your circumstances, of a real risk of persecution as defined in the Geneva Convention or a real risk of serious harm warranting subsidiary protection, and the duty of the asylum applicant to cooperate with the determining authority.”

The determining authority in Greece expressed the same view that *“those who have serious reasons to apply for asylum do not disappear and follow up their case”*.²⁰⁴

UNHCR recalls that a failure to comply with procedural obligations is not necessarily indicative of a lack of credibility. An applicant who is a refugee or qualifies for subsidiary protection status may fail to comply with procedural obligations.

²⁰² Audit of case files numbers. 47, 51, 56, 62, 81, 82, 86 and 88. The reasons of the applicants for not appearing at the interview were not clear. In three case files, the applicants did not appear for their second hearing. In the other three case files, the applicants did not present themselves for their first hearing. In this last instance, the fact that the interviews only took place 4 or 5 months after the application was made might be a relevant factor. The case files of some applicants mentioned that they had left the country. Other applicants simply disappeared, without even informing their lawyer for instance. In one case, the implementation of Article 57/10 Aliens Act was contested: the legal representative of the applicant claimed that the National Post had made a mistake in delivering the summoning to the applicant and stated that reasonableness had to prevail, as well as granting the applicant the benefit of the doubt, by revoking the technical refusal and summoning the applicant again for a personal hearing.

²⁰³ It should be noted that Article 12 (6) of the APD provides that “irrespective of Article 20 (1), Member States, when deciding on the application for asylum, may take into account the fact that the applicant failed to appear for the personal interview, unless s/he had good reasons for the failure to appear.”

²⁰⁴ Interview with S1.

Recommendation

UNHCR recommends that when an applicant does not report within a reasonable time for an essential procedural step related to the assessment of facts and circumstances under Article 4 of the Qualification Directive, Member States either take a decision to discontinue the examination, or discontinue the examination without taking a decision and enter a notice in the applicant's file.

Consequences of a decision to discontinue the examination or a decision to reject the application

The significance of a decision either to discontinue the examination or reject the application really depends on the consequences when the applicant wishes to pursue the application. UNHCR's main concern is that an applicant should have the possibility to pursue the original application, with the necessary guarantee that the application will be examined in substance, and an assurance that the applicant is not removed contrary to the principle of *non-refoulement*.

The difference between "discontinue the examination" and "reject the application", in terms of the consequences of the decision, is not explained and is not stated in the definitions set out in Article 2 of the APD. However, it appears from UNHCR's research that if an applicant expresses the wish to pursue an application which is previously considered to have been withdrawn, the consequences of a decision to discontinue the examination may be the same, in some Member States, as the consequences of rejection of the application in other Member States.²⁰⁵ Indeed, notwithstanding a decision to reject an application in one Member State, the applicant in that Member State may have a more effective opportunity to pursue his or her previous application, than an applicant in another Member State where a decision was taken to discontinue the examination of the previous application.²⁰⁶

Under the APD, regardless of whether the determining authority takes a decision to discontinue examination, should the applicant report again to the determining authority and express the wish to continue the procedure, there is no guarantee for the applicant that the original application will be re-opened, nor any obligation for the State to re-open it.²⁰⁷

Article 39 (1) (b) APD does stipulate that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20. However, in practice, this may not constitute a remedy if the time limit within which to lodge an appeal has expired.

²⁰⁵ In Germany as well as in the UK, if the applicant wishes to pursue his/her application following a decision to discontinue, a new application must be submitted which must fulfil the criteria of a subsequent application or "fresh claim". Similarly, in Bulgaria, following the expiry of the three-month period during which proceedings are suspended, a decision to discontinue the examination is taken and the application cannot be re-opened. The applicant may submit a subsequent application, but the application cannot be based on the same grounds as the original application if these grounds have already been considered. Also, in Spain, if the applicant wishes to pursue his/her application following a decision to discontinue, a new application must be presented which may be declared inadmissible if identical to the previous application. In Greece, following a decision to reject an application, a subsequent application must be submitted which raises new elements or findings.

²⁰⁶ In Belgium, following a decision to reject the application as withdrawn, an applicant may submit a new application on the same grounds without raising new elements or findings.

²⁰⁷ Article 20 (2) APD provides that the applicant is only entitled to **request** that his/her case is re-opened, and it permits Member States to provide for a time limit after which the applicant's case can no longer be re-opened.

Similarly, where an application has been rejected on the ground of implicit withdrawal, there may be no right of appeal against this decision if the time limit within which to lodge an appeal has expired, before the applicant resumed contact with the determining authority.

The APD instead offers the framework of a subsequent application.²⁰⁸ This may be problematic because, in the case of implicit withdrawal, the original application may not have been examined and assessed on the basis of all the relevant facts. A subsequent application, in accordance with the APD, may be subjected to a preliminary examination which does not offer the basic principles and guarantees of the APD.²⁰⁹ In particular, a personal interview may be omitted.²¹⁰ Moreover, the application may be subjected to a test to determine whether new elements or findings relating to the examination of whether s/he qualifies as a refugee have arisen or have been presented by the applicant.²¹¹ Depending on the interpretation given by Member States to the phrase “new elements or findings”, this may act as a bar to the applicant accessing the asylum procedure and may carry a risk of *refoulement*.²¹²

UNHCR’s research has found that practice amongst Member States varies, and some noteworthy good practices emerged. Some Member States may take a decision to “discontinue the examination” in certain circumstances (Finland, France, the Czech Republic,²¹³ the Netherlands and Slovenia).²¹⁴ If the applicant then expresses the wish to pursue the application, the determining authority either re-opens the original application (Finland²¹⁵ and France)²¹⁶ or invites the applicant to submit a new application which may be on the same grounds as the previous application, and no new elements or findings need to be raised (Finland,²¹⁷ the Czech Republic,²¹⁸ the Netherlands,²¹⁹ and Slovenia).²²⁰ No time limit applies. In this way, the determining authority ensures that the decision to either grant international protection or to reject the application is based on an assessment of all the facts and evidence submitted and available.

Exceptionally, while the determining authority in Belgium may reject an application in cases of non-compliance, the law compensates against the risks of such a decision by making an exception to the normal requirements of a subsequent application. This means that when a previous application has been rejected on grounds of non-compliance, the applicant who submits a subsequent application does not have to present new elements, and the application will be considered by the determining authority in accordance with all the basic guarantees, including the right to remain.²²¹

In Bulgaria, a time limit is imposed within which an application may be re-opened, but certain conditions need to be fulfilled. An initial decision is taken to suspend proceedings for three months. Within this period, an applicant

²⁰⁸ Article 32 (2) APD states that “Member States may apply a specific procedure [preliminary examination] where a person makes a subsequent application for asylum: (a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20”. Moreover, Article 33 states that “Member States may retain or adopt the procedure provided for in Article 32 (subsequent applications) in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time.”

²⁰⁹ Article 24 (1) (a) APD.

²¹⁰ Article 34 (2) (c) APD.

²¹¹ Article 32 (3) APD.

²¹² See section 14 on subsequent applications for further information.

²¹³ Unless there is sufficient evidence upon which to take a decision to reject, for example if the applicant absconds having submitted information and attended a personal interview.

²¹⁴ See tables above.

²¹⁵ *Hallituksen esitys* 86/2008 (Government Bill 86/2008).

²¹⁶ There is no relevant legal provision in France. This information was received in an interview with the Legal Department of OFPRA.

²¹⁷ *Hallituksen esitys* 86/2008 (Government Bill 86/2008).

²¹⁸ Section 10 ASA contains an exemption from the requirement to submit new elements or findings.

²¹⁹ Article 4:6 General Administrative Law and Aliens Circular C14/5.1.

²²⁰ The procedure in these cases is not explicitly defined in the IPA, but it derives from general regulations of the administrative procedure as defined in the AGAP and was observed in case no. 7-2009.

²²¹ Article 51/8 of the Aliens Act.

may ask to resume proceedings and the original application may be re-opened if “*the alien seeking protection produces evidence that objective obstacles have made him or her change address or have prevented him or her from appearing or cooperating with the officials.*”²²² However, following the expiry of the three month period, a decision to discontinue the examination is taken and the application cannot be re-opened. The applicant may submit a subsequent application, but this cannot be based on the same grounds as the original application. The subsequent application must raise new circumstances of significant importance regarding the personal situation of the applicant, or regarding the situation in the country of origin. If it does not, it will be rejected as manifestly unfounded. However, if the applicant abandoned the initial procedure before the personal interview, then it is considered that the applicant had not presented elements relating to the reasons for the application for international protection, and the merits of the application have not been considered. Any reasons submitted as part of the subsequent application will be considered to constitute new circumstances.²²³ UNHCR audited one case which exemplifies the issues, as follows:

In Decision 60, the applicant, a national of Afghanistan, left without authorization the reception centre where he had been accommodated, and did not notify the determining authority of a new address. The applicant had had an interview with the determining authority. The interview record stated that the purpose of the interview was to gather information about his identity, nationality and travel route but not to consider the reasons for the application. Nevertheless, the applicant was asked at the end of the interview to state his reasons for requesting protection in the Republic of Bulgaria and the applicant had briefly stated his reasons. The proceedings were suspended, and after the expiry of three months, during which the applicant failed to make contact with the determining authority, a decision was taken to discontinue the examination. One month later, following the submission of an application for international protection in Belgium and in accordance with the Dublin II Regulation, Bulgaria accepted responsibility for the examination of the application and the applicant was returned from Belgium. The applicant submitted a subsequent application in Bulgaria. The decision to grant humanitarian status did not refer to any need to establish new significant circumstances.

UNHCR’s research has found that three States require an applicant, whose application was previously discontinued and who wishes to pursue the original application, to submit a subsequent application.²²⁴

In Germany, following withdrawal of the application the determining authority takes the decision to discontinue the procedure. However, if the applicant wishes to pursue the original application, the original application is not re-opened, but the standards for subsequent applications apply, including new evidence or a change of the legal situation in favour of the applicant,²²⁵ and the three-month time limit beginning “*with the day the person affected learnt of the grounds for resumption of proceedings.*”²²⁶ Moreover, despite the discontinuation of the procedure with regard to refugee protection, a decision on the merits is taken concerning subsidiary protection.

²²² Article 77(2) (Supplemented, SG No. 52/2007).

²²³ See Decision 60.

²²⁴ Germany, the UK and Spain.

²²⁵ Section 51 (1) Administrative Procedure Act: “*The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:*

1. *the material or legal situation basic to the administrative act has subsequently changed to favour the person affected;*
2. *new evidence is produced which would have meant a more favourable decision for the person affected;*
3. *there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure.*”

²²⁶ Section 51 (1) Administrative Procedure Act: “*The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings.*” The referral to Section 51 (2) A remains unclear in cases of explicit withdrawal: “*An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy.*”

In the UK, the examination of an application may be discontinued if an applicant fails to attend the personal interview without reasonable cause. However, if the applicant then expresses the wish to pursue the application, the original application is not re-opened, and instead s/he must submit a subsequent application. The subsequent application must fulfil the criteria of a “fresh claim” (subsequent application), i.e. the content of the submission must be significantly different from the previous application, in that (i) the content has not already been considered and (ii) taken together with the previously considered material, it creates a realistic prospect of success. In practice, a new application will normally fulfil the first criterion when the previous application was discontinued and the merits of the application were not considered. However, the second criterion still applies.

Similarly, in Spain, a decision to discontinue the examination may be taken in certain circumstances, but if the applicant then expresses the wish to pursue the application, the original application is not re-opened, and instead s/he must submit a new application. However, the new application must not be on exactly the same grounds as the previous application. In Spain, an application which is considered identical to a previous application submitted by the applicant will be declared inadmissible unless there are particular extenuating circumstances. However, this latter point is a matter of discretion for the determining authority.

As has been noted above, notwithstanding a failure to comply with a procedural obligation, some Member States may take a decision on the basis of the available evidence. This is likely to be a decision to reject the application when the applicant has not attended a scheduled personal interview or has failed to provide essential information. In these Member States, if the applicant wishes to pursue the original application, and a final decision was taken on the application, s/he must submit a subsequent application raising new elements or findings: France,²²⁷ Greece,²²⁸ Italy,²²⁹ the Netherlands²³⁰ and the UK.²³¹

With respect to returns under the Dublin II Regulation, Greek national legislation states that “*in the case that a foreign national is transferred to Greece, in application of Council Regulation 343/2003 [Dublin Regulation], any decision of the determining authority to **discontinue the examination** of such application shall be automatically revoked.*”²³² [Emphasis added]. However, according to the determining authority, in practice, the determining authority does not take decisions to discontinue the examination of applications and therefore this legislative provision does not apply. Instead, as mentioned above, the determining authority takes a decision to reject the application on non-compliance grounds which is served on the applicant when transferred back to Greece. This decision cannot be revoked and the original application cannot, therefore, be re-opened. The only remedy which remains is a right of appeal on a point of law to the Council of State if the time limit has not expired, or the submission of a subsequent application which must raise new elements or findings.²³³

In the UK, a failure to report or communicate may result in the application being rejected for “non-compliance”.²³⁴ As a permissive provision, the decision-maker has discretion not to reject the application. The decision must be based on the available material, and policy instructions stress that the application cannot be rejected on the basis of non-compliance alone.²³⁵ If the application is rejected and the applicant wishes to pursue the applica-

²²⁷ Article R.723-3 *Ceseda*.

²²⁸ Article 18 PD 90/2008.

²²⁹ Article 29 (b) of the d.lgs. 25/2008.

²³⁰ Article 4:6 General Administrative Law Act.

²³¹ Immigration Rule 353.

²³² Article 14 (3) PD 90/2008.

²³³ According to the determining authority in Greece, no subsequent application has been submitted since the entry into force of PD 90/2008.

²³⁴ Immigration Rule 339M.

²³⁵ The API *Non-compliance refusals*.

tion, a subsequent application must be submitted which must fulfil the criteria of a fresh claim as stated above. Since the non-compliance provisions require the decision-maker to consider the claim based on the available material,²³⁶ an application on the same ground may not pass the first limb of the test (that the material has not been considered before). This puts the applicant in a worse position than if the claim was simply treated as “discontinued”. The claim must also satisfy the second limb of the test and have a reasonable prospect of success at appeal, as discussed above. However, if the application has been rejected for non-compliance and it comes to the attention of the decision-maker that the decision was flawed, the API on *Non-Compliance* includes guidance for the decision-maker on how to take corrective action, including re-opening the normal asylum procedure. This depends, however, on the discretion and initiative of the decision-maker, and is not a right of the applicant.

A discretionary power also exists in Italy. Where a decision to reject the application has been taken because the applicant did not appear for the personal interview, the negative decision may contain a statement which indicates that the determining authority may be prepared to re-examine the application and schedule a new personal interview, if the applicant wishes to pursue the application and can provide serious and justified reasons for his/her non-appearance.²³⁷ The determining authority has the power to take a new decision ‘*in via di autotutela*’ which legally means to put the matter right without legal process. This is a discretionary power of the public administration. This positive practice should, however, be reinforced by a clear provision of law.

In the Czech Republic, an application may also be rejected on non-appearance grounds. However, the practice can be differentiated from the situations noted above, in that a decision to reject will only be taken if it is considered that sufficient facts have been gathered, for example, where the personal interview was conducted with the applicant. As such, a subsequent application should then state new facts which could not have been raised in the earlier procedure.

Recommendation

In UNHCR’s view, in cases of implicit withdrawal where the applicant did not proceed to substantiate the previous application in accordance with Article 4 of the Qualification Directive, the examination of the application should be discontinued. Member States should ensure that an applicant who reports to the competent authority after a decision to discontinue has been made, is entitled to have his/her case re-opened or submit a new application on the same grounds. The applicant’s claim should receive a full examination of the substance and the applicant should be given the opportunity of a personal interview.

²³⁶A non compliance refusal must deal with any substantive information held about the claim, and not just the non-compliance: *Ali Haddad* (HX/74078/97 (STARRED) [00/HX/00928]. See the API *Non-compliance refusals*.

²³⁷UNHCR audited negative decisions which stated “*considering that the applicant did not appear for the personal interview having been legally summoned; considering that the statements made to the police are not sufficient to ground the alleged fear of persecution; considering that the Commission [determining authority] could not acquire the information necessary to support the written declarations by means of a personal interview; considering the [Commission’s] faculty to proceed with a new summons if the person concerned gives serious and justified reasons for their absence; decides to reject the application.*”

SECTION VIII: THE COLLECTION OF INFORMATION ON INDIVIDUAL CASES

Introduction

Transposition

Informing the applicant about the confidentiality of proceedings

Obtaining information from the country of origin

Contacting the authorities of the country of origin in Member States

Rendering decisions anonymous

Introduction

Member States must observe and comply with general international and regional legal standards on data protection, including European Union law on the processing of personal data, in the conduct of their asylum procedures.¹ In accordance with EC law, personal data encompasses any information relating to an identified applicant, or which can identify an applicant directly or indirectly.² Moreover, European Community rules apply to any operation which is performed upon such personal data in the course of the asylum procedure.³ With respect to the protection of personal data in general, international law requires that an applicant for international protection must consent to the sharing of his or her personal data with a third party, unless there is an overriding interest at stake, either of the individual concerned, or of another individual or of society at large. Circumstances in which consent is not required are an exception, in which case disclosure must be necessary, in accordance with law, and proportionate to the legitimate aim pursued.⁴

Confidentiality in asylum procedures is critically important, as the unauthorized disclosure of information regarding an individual application for international protection – or even regarding the fact that an application has been made – to third parties in the country of origin or elsewhere could:

- (i) endanger any family members, community members, or associates of the applicant living in the country of origin;
- (ii) endanger the applicant in the event of his or her return to the country of origin;
- (iii) endanger the applicant in the host State;
- (iv) result in the applicant becoming a refugee ‘*sur place*’.⁵

UNHCR has repeatedly stressed the need to protect the confidentiality of the applicant and the application throughout the asylum procedure,⁶ and reiterated the well-established principle that information regarding applicants for international protection should not be shared with the country of origin.⁷

¹ The Data Protection Directive (95/46/EC). See also Article 8 of the European Convention on Human Rights and the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Council of Europe. Article 41 of the APD stresses that Member States must ensure that the authorities implementing the APD are bound by the confidentiality principle as defined in national law.

² Article 2 (a) of the Data Protection Directive states that “‘personal data’ shall mean any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”

³ Article 2 (b) of the Data Protection Directive states that “‘processing of personal data’ (‘processing’) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.”

⁴ UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004, Paragraph 40.

⁵ UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004. This is also referred to in Section 14 of this report on subsequent applications.

⁶ UNHCR ExCom Conclusion No. 91 (LII) (2001) on the registration of refugees and asylum seekers. See also *Asylum Processes (Fair and Efficient Asylum Procedures)*, Global Consultations on International Protection, Third Track – Executive Committee Meetings, EC/GC/01/12, 31 May 2001, paragraph 50(m): “The asylum procedure should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request. No information on the asylum application should be shared with the country of origin.”

⁷ UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection – UNHCR’s Perspective*, 29 November 2001, Rev.1, available at: <http://www.unhcr.org/refworld/docid/3cob880eo.html>.

As such, in general terms, UNHCR welcomed the inclusion of Article 22 in the APD, which regards the specific issue of the collection of information on individual cases.

Article 22 of the APD provides that:

“For the purposes of examining individual cases, Member States shall not:

(a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;

(b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.”

However, the efficacy of this provision as a safeguard is significantly undermined by the use of the word ‘directly’. Article 22 only prohibits *direct* disclosure of information regarding the application for asylum, and prohibits obtaining information in way that the actor of persecution is *directly* informed that an application has been made by an applicant. As such, it does not prohibit the *indirect* disclosure of information regarding an application for international protection to alleged actors of persecution, which could jeopardise the life, liberty and security of the applicant and/or his/her family members still living in the country of origin. UNHCR recommends that national legislation omits the term ‘direct’ and encompasses disclosure in any manner.

Transposition

Most of the Member States surveyed have transposed or reflected Article 22 of the APD in national legislation. These are Bulgaria,⁸ the Czech Republic,⁹ Finland,¹⁰ France,¹¹ Greece,¹² Italy,¹³ the Netherlands¹⁴ and the UK.¹⁵ German asylum law does not explicitly prohibit the determining authority (BAMF) from contacting a potential actor of persecution with a view to gaining information about the applicant. However, contacting such authorities or other actors is not possible if the “overriding interests” of the person concerned would be affected.¹⁶ According to the BAMF’s interpretation of the relevant provision, this excludes not only passing on information to public

8 Article 63(4) LAR which states that “no information about aliens who are seeking or have been granted protection shall be gathered from or divulged to the persecuting official authorities and organizations”.

9 Section 19 ASA: “(1) The Ministry is entitled to establish any and all data required for issuing decisions on the matter of international protection. When establishing the data pursuant to the first sentence, the Ministry will take into consideration the protection of an applicant for granting of international protection and his/her family members in the country of which the applicant is a citizen or in case of a stateless person, a country of his/her last permanent residence. The Ministry or other state or public administration bodies, if applicable, shall not disclose any information regarding the application for granting of international protection to any person who is allegedly responsible for persecution or serious harm in any manner, and shall not obtain any information on the applicant for granting of international protection from any person who is allegedly responsible for persecution or serious harm in connection with the proceedings on international protection. (2) The Ministry shall inform the participant in the proceedings about its obligation to care for personal data protection.”

10 *Ulkomaalaislaki* (Aliens’ Act 301/2004). The new section 97 b of the Aliens’ Act will state: “Designated authorities may not in an individual matter concerning international protection obtain information in a manner that would result in the persecutor or the one inflicting serious harm being informed of the fact that an application has been made by the applicant in question, and would jeopardize the applicant or his or her dependants.”

11 Article R. 723-2 *Ceseda* states: “The collection of information necessary for this examination shall not result in direct disclosure of information regarding individual application for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum.”

12 Article 16 PD 90/2008: “For the purposes of examining individual cases, the authorities competent to receive and examine an application, the Central Authority and the authorities competent to decide shall not: (a) disclose information regarding individual applications or the fact that an application has been made, to the alleged actors of persecution of the applicant; (b) ask for any information from the alleged actors of persecution in a manner that would result in directly or indirectly informing them of the fact that an application has been made by the applicant in question, and would jeopardize the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.”

13 Article 25 of the d.lgs. 25/2008, states that “for the purposes of carrying out the procedure, in no case can information be disclosed to the alleged actors of persecution of the applicant. In no case can the Territorial Commissions and the National Commission disclose information on the application of international protection lodged by the applicant or other information that might jeopardize the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still residing in the country of origin”.

14 Article 2:5 General Administrative Law Act states that anyone involved in the performance of the duties of an administrative authority who in the process gains access to information which s/he knows, or should reasonably infer, to be of a confidential nature, and who is not already subject to a duty of secrecy by virtue of his/her office or profession or any statutory regulation, shall not disclose such information unless s/he is by statutory regulation obliged to do so or disclosure is necessary in consequence of his/her duties (1); this applies to institutions, and persons belonging to them or working for them, involved by an administrative authority in the performance of its duties, and to institutions and persons belonging to them or working for them, performing a duty assigned to them by or pursuant to an Act of Parliament as well (2).

15 Immigration Rule 3391A states that “For the purposes of examining individual applications for asylum (i) information provided in support of an application and the fact that an application has been made shall not be disclosed to the alleged actor(s) of persecution of the applicant, and (ii) information shall not be obtained from the alleged actor(s) of persecution that would result in their being **directly** informed that an application for asylum has been made by the applicant in question and would jeopardise the physical integrity of the applicant and his dependants, or the liberty and security of his family members still living in the country of origin. This paragraph shall also apply where the Secretary of State is considering revoking a person’s refugee status in accordance with these Rules.”[inserted by HC 82 with effect from 1st December 2007]

16 Section 7 (2) Asylum Procedure Act: *The data shall be collected from the data subject. They may also be collected from other public authorities, foreign authorities and non-public agencies without involving the data subject if*

1. *this is allowed or expressly required by this Act or another legal provision;*
2. *it is obviously in the interest of the data subject and there is no reason to assume that he would refuse his/her consent if he were aware of his personal data being collected;*
3. *the cooperation of the data subject is not sufficient or would require an unreasonable effort;*
4. *the task at hand, by its very nature, makes it necessary to collect data from other persons or agencies or*
5. *it is necessary in order to verify information provided by the data subject.*

Data may only be collected on the basis of sentence 2, items 3 and 4 and from foreign authorities or non-public agencies if there are no indications suggesting that overriding interests of the data subject that warrant protection might be affected.

authorities of any alleged State where persecution occurs, but also prohibits any contact or communication of the BAMF with these bodies which might suggest that an application for asylum has been made.

Article 22 APD is partially transposed in Slovenia, in that Article 22(b) is not adequately reflected in national legislation, and the provision does not encompass non-state actors of persecution.¹⁷ At the time of UNHCR's research, Belgium and Spain had not transposed or reflected Article 22 of the APD in national legislation, regulations or administrative provisions. However, at the time of writing, a proposal for amendments to the Royal Decree of 11 July 2003 concerning the CGRA provides for the transposition of both Articles 22 and 41 of the APD in Belgian legislation.¹⁸ The new Asylum Law in Spain transposes Article 22 (b) APD.¹⁹

UNHCR is pleased to note that the standard set in the national legislation of the majority of states surveyed is higher than that of the APD insofar as it is not limited to direct disclosure. The national legislation of Bulgaria, the Czech Republic, Finland, Greece, Italy, the Netherlands, Slovenia and Spain is not qualified in this way and prohibits disclosure in any manner.

Recommendation

UNHCR welcomes the explicit reaffirmation of the confidentiality principle in relation to applicants for international protection. However, in UNHCR's view, state responsibility in this regard extends not only to direct but also to indirect disclosure to alleged actors of persecution or serious harm. UNHCR, therefore, recommends that Article 22 of the APD be amended to omit the word "directly".²⁰

Informing the applicant about the confidentiality of proceedings

An applicant may not provide a full account of the reasons for the application for international protection, if s/he fears that information regarding the application may be divulged to the alleged actor of persecution or serious harm, placing at risk any family or community members or others still living in the country of origin. It is, therefore, of the utmost importance that the applicant is informed, at the very outset of the procedure and in a language s/he understands, that the Member State will not disclose the fact that the application has been made, and will not disclose any information regarding the application to the alleged actor of persecution or serious harm.²¹

¹⁷ Article 129 IPA states "(1) All confidential asylum data presented in the procedure under this Act by an applicant and person granted international protection in the Republic of Slovenia shall be protected by the competent authorities for the implementation of this Act from the authorities of the applicant's country of origin. The interested public may only be informed upon the applicant's consent".

¹⁸ The proposal foresees a new paragraph to be added to Article 4 of the Royal Decree of 11 July 2003 concerning the CGRA. It should nevertheless be noted that Article 10 of the Royal Decree of 2 October 1937 regarding the statute of public service requires the case manager to be discreet and have respect for the privacy of the asylum applicant, and case managers must observe the law of 8 December 1992 concerning the protection of private life.

¹⁹ Article 26 New Asylum Law states: "The Administration shall seek to ensure that the information needed for the evaluation of applications for protection is not obtained from the actors of persecution or the parties responsible for the serious harm being informed that the person concerned is applying for international protection or that his or her application is being considered, or in any way that would jeopardize the integrity of the person concerned or the persons for whom the applicant is responsible, or the freedom and safety of his or her family members who are still living in the country of origin."

²⁰ Recast Article 26(a) would address this need: APD Recast Proposal 2009.

²¹ See UNHCR Handbook paragraph 200: "it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed."

In a number of the Member States surveyed, UNHCR observed that the applicant is informed of the confidentiality of proceedings in written form.²² UNHCR observed that in some Member States, applicants were routinely informed of the confidentiality of proceedings at the outset of interviews.²³

Recommendation

All Member States must ensure that all applicants are informed, at the earliest possible stage, and in a language that s/he understands, that no information regarding the fact of the application, or regarding the application itself, shall be disclosed to the alleged actor of persecution or serious harm. Such information should be reiterated before the beginning of the personal interview.

Obtaining information from the country of origin

Country of origin information is crucial in determining who is in need of international protection. The information needed to assess an application for international protection is both general and case-specific. In other words, in addition to information relating to the general situation prevailing in countries and regions of origin, determining authorities may desire specific information relating to particular issues raised by an individual applicant, or relating to the applicant him/herself.

In practice, the determining authorities of some Member States obtain information from sources in the country of origin. Some Member States address case-specific questions to their embassy or consular services in the country of origin. The embassy or consular services in the country of origin may consult local and national authorities, institutions, NGOs, groups or private individuals in the country of origin in order to gather the relevant information. Some Member States conduct fact-finding missions to countries of origin where they meet with various organizations, groups or private individuals of interest. These fact-finding missions are used to gather information regarding general circumstances in the country of origin and also to address specific questions regarding individual applicants.²⁴

Recourse to information sources in the country of origin can, in appropriate circumstances, be a useful means of helping to establish the facts of an application for international protection.²⁵ However, it is critical that any such contacts or requests do not result in the disclosure of information regarding the application for international protection to the alleged actors of persecution or serious harm. It is also essential to ensure the safety of the sources consulted. As such, Member States are obliged to take all necessary precautions and ensure that national, regional and international standards for the protection of personal data are observed.

In the course of this research, UNHCR was informed by the research department of the determining authority in Belgium (CEDOCA) that researchers never reveal the names of applicants and the person concerned is only described.²⁶ The case workers are trained on how to pose questions to researchers. If the question is posed in a

²² Belgium, the Czech Republic, France, Slovenia and Spain.

²³ The Czech Republic, Finland, France, Italy, the Netherlands, Slovenia, Spain (with regard to interviews in the regular procedure but not always with regard to application interviews), and the UK. See also Section 5 on the requirements of a personal interview.

²⁴ For example, Finland has conducted such fact-finding missions. For indications as to the contacts that are used, see the lists of interviewed organizations and persons annexed to the reports from the fact-finding missions to Afghanistan and Iraq available at: <http://www.migri.fi/netcomm/content.asp?path=8,2470,2673,2680>.

²⁵ UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004,.

²⁶ The determining authority, CGRA, is supported by the Centre for Documentation and Research ("Centrum voor Documentatie en Research", henceforth; CEDOCA).

way that would endanger the asylum applicant and/or family members still in the country of origin, the question is rephrased by the researcher. Sometimes the embassy is told a name, but they are instructed not to use the name when contacting the alleged actor(s) of persecution. CEDOCA noted that when there is a chance that the alleged actor(s) have become aware of the fact that an asylum application has been made by the applicant, the applicant is recognized as a *réfugié sur place*. However, CEDOCA assured UNHCR that this only happens rarely.²⁷

UNHCR's audit of case files in Belgium, Bulgaria, the Czech Republic, Finland, Greece, the Netherlands, and Spain did not reveal any concerns regarding disclosure of information to the authorities of the countries of origin, or to alleged non-state actors of persecution or serious harm.²⁸

However, a few concerns were raised for UNHCR during the research which should be noted.

UNHCR's audit of case files in France did not raise any concerns regarding disclosure of information by the determining authority, OFPRA. However, there is concern regarding the conduct of some of the Prefectures which are responsible for the issue of residence permits and removal orders and their enforcement. One of the case files audited by UNHCR in France revealed that the Prefecture had contacted police officers within the French Embassy in the country of origin, who in turn contacted the authorities of the country of origin.²⁹ Evidence in the case file revealed that the authorities in the country of origin were informed of the application for asylum, as they gave their views on the manifestly unfounded nature of the claim. The determining authority subsequently recognised the applicant as a refugee. The Ministry of Immigration informed UNHCR that it has repeatedly reminded all actors involved with asylum applicants of the law requiring non-disclosure of information, and that prefectures have been instructed not to directly contact French embassies and consulates abroad.

In Germany, the determining authority (BAMF) reported that in case further clarification of the facts of a case is required, BAMF, through the Ministry of Foreign Affairs, requests the German diplomatic representations abroad to conduct investigations, if necessary with involvement of trusted third parties. Pursuant to the internal guidelines of the BAMF, only certain units have exclusive responsibility for these requests.³⁰ From the case files audited by UNHCR, no conclusion could be drawn with regard to the actual practice of the BAMF, as in none of the case-files was it evident from the inserted documents that further investigations had been made. However, one of the lawyers consulted by UNHCR in the course of this research reported that requests for information submitted by the BAMF or administrative courts to the Ministry of Foreign Affairs have sometimes been researched in a manner which could put the relatives of the person concerned at risk, or make probable the disclosure of the applicant's name to the authorities of the country of origin.³¹ Another lawyer³² drew attention to the fact that the authorities responsible for repatriation (*Zentrale Rückführungsstellen*) in Bavaria conduct their own hearing even before the BAMF interview has been carried out. The lawyer reported that, in the course of such hearings, applicants are asked to obtain identity documents or other documents through the authorities of the country of origin, or with the help of relatives. He mentioned an incident in which the *Zentrale Rückführungsstelle* called authorities in the country of origin during the hearing in order to verify facts as presented by the applicant.

27 Interview with the head of the Centre for Documentation and Research (CEDOCA), at the CGRA on 20 January 2009.

28 No audit of relevant case files was conducted in Slovenia.

29 Case file 26A where the SCTIP '*Service de coopération technique internationale de police*' was contacted.

30 Internal Guidelines for the Asylum Procedure, under: "Enquiries to the MfA", p. (1/4);

Internal Guidelines for the Asylum Procedure, under: "Data Exchange on the international level", p. (1/1).

31 Lawyer X1.

32 Lawyer X2.

In June 2006 and February 2007, prior to the entry into force of the APD, the Spanish determining authority OAR undertook two fact-finding missions to Colombia in order to verify with Colombian authorities the authenticity of supporting documentation in asylum applications. The last of these missions related to 1,400 documents from 700 asylum applications. The missions were engaged in checking if the documents presented by the applicants in support of their applications were registered with the public authorities who had apparently issued them. The OAR asserted that in this process, the applicants' data were not disclosed and that the Colombian government was not the alleged actor of persecution or serious harm. However, UNHCR, NGOs and lawyers assisting applicants expressed serious concerns regarding the potential risk of violating the principle of confidentiality, and thereby placing applicants and/or their family members at risk. Links between the authorities and the actors of persecution in Colombia have frequently been denounced.³³

Recommendations

Member States must take all necessary steps to ensure that competent authorities do not disclose information regarding individual applications for international protection, nor the fact that an application has been made, to the alleged actors of persecution or serious harm.

Any personnel authorized to seek or obtain information from the country of origin must have received specific training and instructions on data protection and the protection of confidentiality.

Contacting the authorities of the country of origin in Member States

It is UNHCR's position that the need to ensure confidentiality applies to all stages of the asylum procedure.³⁴ In accordance with Article 22 of the APD, Member States should not, throughout the procedure, disclose the fact that an application has been made by a specific applicant.

In the course of this research, UNHCR was informed that there is concern that when asylum applicants are held in administrative retention centres in France, some Prefectures continue to organize the removal of applicants while the examination of their applications for international protection by the determining authority is ongoing. The NGO Cimade has reported a number of cases in which asylum applicants have been taken to the consulates of their country of origin to obtain a "consular pass." This is in spite of an instruction from the Ministry of the Interior of 7 August 2006, which recalled that this practice is prohibited as long as the examination of the application by the determining authority OFPRA is ongoing. It has also been reported that the IND Departure and Return Unit in the Netherlands engages with applicants before a negative decision has been issued, which could raise the same problematic practices.

In two of the case files UNHCR audited in the UK, it appeared from correspondence with the embassies of the countries of origin, undertaken prior to the decision on the application, that the determining authority UKBA may have disclosed information regarding the asylum application (including the fact it had been made) to the applicant's country of origin.³⁵ This was done notwithstanding a Ministerial statement of June 2007 stating that the

³³ See among others: <http://report2009.amnesty.org/en/regions/americas/colombia> and <http://www.nrc.no/?did=9401258>.

³⁴ UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004, paragraph 39.

³⁵ DAF20 and DAF40: in both cases, travel documents were applied for prior to reaching a decision on the asylum application.

Home Office would not ask an asylum applicant to meet officials from the embassy of their country of origin until and unless a negative decision was taken in respect of his/her claim for protection.³⁶

Concern was also raised in Italy that asylum applicants and illegal immigrants are housed together in Identification and Expulsion Centres (CIEs). Consulate personnel of countries of origin visit the CIEs to verify the nationality of illegal immigrants. This was considered to pose a potential risk for asylum applicants.³⁷

Recommendations

Member States must take all necessary steps to ensure that all relevant authorities are informed that they should not contact, nor instruct applicants for international protection to contact, representatives of the country of origin, unless and until a final negative decision has been taken on the application for international protection. Applicants for international protection should not be placed in a position where they can be observed or accessed by the embassy or consular services of the country of origin.

If all legal remedies have been exhausted, and an applicant is finally determined not to be in need of international protection, any disclosure of information to the authorities of the country of origin should be in accordance with law, and necessary and proportionate to the legitimate aim pursued, for example, readmission. Such information should not indicate that the person claimed asylum and was found to have no protection needs.

Rendering decisions anonymous

The need to protect the identity of applicants for international protection and the details of their applications from alleged actors of persecution or serious harm extends throughout the procedure, and includes any appeal.

In a number of Member States of focus, UNHCR found that the published decisions of the appeals bodies are anonymized (Belgium, Finland,³⁸ France,³⁹ Germany,⁴⁰ Greece, the Netherlands, Slovenia and Spain).⁴¹

However, UNHCR has noted that whilst some of the courts in Bulgaria and the Czech Republic anonymize decisions, some of the courts do not.⁴² In Bulgaria, notwithstanding condemnation of the practice by the Supreme Judicial Council and the Commission on Personal Data Protection, the Supreme Administrative Court of the Republic of Bulgaria (SAC) and the Administrative Court in Sofia City continue to reveal the identity of appellants in published decisions. In Italy, there is no specific rule requiring the anonymization of appeal decisions. The general rule is

³⁶ Hansard HC Report, 21 June 2007, Col 2073.

³⁷ This also occurs in Spain. The authorities have assured that consular personnel only visit illegal immigrants and not applicants for international protection. The Dutch Ombudsman has also condemned the presentation of asylum applicants in an asylum seeker centre.

³⁸ The *Laki oikeudenkäynnin julkisuudesta hallintotuomioistuimissa* (Act on Openness of Trials in Administrative Courts 381/2007) stipulates that registers with information about asylum seekers' claims must not be publicly available. The anonymization concerns only a very few (under five) cases that each year are published by the Supreme Administrative Court. No other cases are anonymized. However, asylum cases are classified under Finnish legislation and cannot be shared with the public.

³⁹ CNDA decisions are not anonymized but CNDA decisions posted on the website are.

⁴⁰ Court decisions are anonymized. See, for example, "Decisions in asylum law" under "Entscheidungssuche" on the website of the Federal Administrative Court: www.bverwg.de.

⁴¹ Agreement of 18 June 1997, of the full assembly of the General Council of the Judiciary, which modifies regulation number 5/1995, about the access to judicial acts.

⁴² Administrative Court of Sofia City and the Supreme Administrative Court in Bulgaria do not anonymize. And RC in Prague; RC in Usti n. Labem; RC in Hradec Kralove; and RC in Ostrava (Websites accessed on 19 April 2009) do not anonymize the dicta of the decisions. The website was accessed again on 18/19 November 09 and the practice appeared to have improved at most of the courts, but a non-anonymized letter was found on the webpage of one court. Full texts of decisions published on the webpage of the Supreme Administrative Court are always anonymized.

that all court decisions are public and according to the Code on the Protection of Personal Data, an individual may request that a court decision is anonymized when publicised. In practice, this occurs rarely. Furthermore, in the UK, the specialized Asylum and Immigration Tribunal does anonymize the parties in all decisions, but this practice does not continue in the higher courts unless a request for anonymity is made and ordered.

Recommendations

All published decisions, including published decisions by appeal bodies, should be made anonymous.

If information regarding an individual application for international protection or the fact that an application has been made is disclosed directly or indirectly to the alleged actor(s) of persecution or serious harm, this will constitute a significant fact in the assessment of whether the applicant qualifies for refugee or subsidiary protection status. With regard to subsequent applications, it must constitute a new element, fact or finding.

SECTION IX:

PRIORITIZED AND ACCELERATED EXAMINATION OF APPLICATIONS

Introduction

Overview of practice

Who decides to prioritize or accelerate the examination of an application?

The information basis upon which a decision is taken to prioritize or accelerate the examination of an application

Opportunity to challenge the decision to prioritize and/or accelerate the examination

Procedural standards and safeguards in accelerated procedures

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Use of time limits

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Right of appeal following a decision taken in the accelerated procedure

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Applications raising issues under the exclusion clauses

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Applicants with special needs

Statistics

Introduction

Article 23 of the APD stipulates that the examination procedure at first instance must be conducted in accordance with the basic principles and guarantees of Chapter II of the APD, and should be concluded as soon as possible, without prejudice to an adequate and complete examination.¹ The duration of an examination procedure in which all relevant issues are examined thoroughly will clearly vary, depending on a number of factors, including the particular issues raised by an application. Article 23 APD implicitly assumes, however, that generally it should be possible for the determining authority to take a decision within a limited time frame of around six months.²

Article 23 (3) APD states that Member States may prioritize or accelerate any examination.³ The terms ‘prioritize’ and ‘accelerate’ are not further defined in the Directive and no definition has been proposed in the European Commission’s proposal for a recast of the APD.⁴ Therefore, for the purpose of this research, ‘prioritize’ is understood to mean when a Member State decides to give precedence to an application and examine it prior to the examination of other applications. ‘Accelerate’ is understood to mean when a Member State decides to conduct the examination of an application at greater speed than other applications so that a first instance decision is taken within a shorter timescale than in the general or regular procedure.⁵

In UNHCR’s view, with regard to the acceleration of examinations, the first step towards reducing the duration of the asylum procedure is to ensure the quality of the first instance procedure. UNHCR strongly believes that Member States need to invest resources in the first instance examination in order to produce reliable good quality first instance decisions. This requires that the first instance examination procedure is implemented by sufficient numbers of trained specialist personnel, supported by qualified interpreters⁶ and good quality, up-to-date country of origin information; and that the procedure encompasses all necessary procedural safeguards.⁷

Time is also an essential resource. The trained personnel must have the necessary time to conduct a thorough and complete examination of applications. This includes the necessary time to prepare the personal interview, the necessary time to conduct the interview(s) and draft a full interview transcript, and the necessary time to gather country of origin or other information, assess all the oral and documentary evidence and draft a well-reasoned and sustainable decision.

¹ Article 23 (1) and (2) APD.

² Article 23 (2) APD provides that “Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either: (a) be informed **of the delay**; or (b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected.” In this regard, it should be noted that the European Commission, in its proposal for a recast of the APD, has proposed that the Directive explicitly stipulate that “Member States shall ensure that a procedure is concluded within 6 months after the application is lodged. Member States may extend that time limit for a period not exceeding a further 6 months in individual cases involving complex issues of fact and law” (New Article 27 (3)): APD Recast Proposal 2009. The Commission’s proposal for a recast of the Reception Conditions Directive also proposes that asylum-seekers should receive permission to work if their asylum claims have not been determined within a period of 6 months: European Commission, *Proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)*, COM (2008) 815 final 2008/0244 COD (SEC (2008)2944, 2945), 3 December 2008.

³ Article 23 (3) APD states that “Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.”

⁴ APD Recast Proposal 2009.

⁵ The timescale may be shorter due to the fact that shorter time limits are imposed and/or due to the fact that the first instance accelerated procedure derogates from procedural steps applicable to the regular procedure.

⁶ This should take into account the need to conduct gender-appropriate interviews, and age-appropriate interviews with regards to children.

⁷ This includes that all applicants should have the opportunity of a personal interview unless they are certified as unfit for the interview. See section 4 on personal interviews for further information.

Applicants also require reasonable time to fulfil their obligation to provide any relevant documentary evidence, and reasonable time to prepare for the personal interview. It is in Member States' interests that their first instance decisions are based on all the available evidence.

Moreover, European Community law has established that:

*“detailed procedural rules governing actions for safeguarding an individual’s rights under Community law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by Community law”.*⁸

As such, applicants must be given adequate time to exercise their rights to consult in an *effective* manner a legal adviser or other counsellor, and/or to communicate with a refugee-assisting organization.⁹ Any acceleration of the examination must be in accordance with these general legal principles of Community law and must not render practically impossible or excessively difficult the exercise of the right to legal assistance under Article 15 (1) APD, or the fulfilment of any of the other principles and guarantees under Chapter II of the APD.

UNHCR recognizes and supports the need for efficient asylum procedures. This is in the interests both of applicants and Member States. However, Member States should not dispense with key procedural safeguards or the quality of the examination procedure to meet time limits or statistical targets. Sacrificing key procedural safeguards and/or setting short time limits for the examination may result in flawed decisions which will defeat the objective of an efficient asylum procedure, as they may prolong proceedings before the appeal instance. Good quality first instance decision-making should alleviate the demands on the appeal instance.

UNHCR understands that some Member States wish to expedite the examination of applications which they assume to be clearly unfounded. It is UNHCR’s position that national procedures for the determination of refugee status and subsidiary protection status may usefully include special provision for dealing in an expeditious manner with applications which are obviously without foundation. However, UNHCR considers that such acceleration could most effectively occur at second instance, through shorter but reasonable time limits for submitting appeals, without prejudice to their fair examination.¹⁰ Applications which could be subject to such acceleration are those which are ‘clearly abusive’ or ‘manifestly unfounded’. However, these terms must be defined and interpreted restrictively.

The APD appears to impose no restrictions on the grounds upon which the examination of an application can be prioritized or accelerated, provided the examination is in accordance with the basic principles and guarantees of Chapter II APD. Any application may be prioritized and any examination may be accelerated. This is stated explicitly in Article 23 (3) of the Directive.¹¹ In the light of the wording of Article 23 (3) APD, the long and expansive list of 16 permissible grounds for prioritization and/or acceleration, set out in Article 23 (4) APD, appear only illustrative. The use of the word “also” in Article 23 (4) APD, however, suggests that this may not have been the intention of the legislator.¹² UNHCR is concerned that the APD does not explicitly limit the circumstances in which

⁸ Paragraph. 47 of *Unibet* judgment and paragraph. 5 of *Rewe* judgment, Case 33/76.

⁹ Article 15 (1) APD and Article 10 (1) (c) APD.

¹⁰ UNHCR ExCom Conclusion No. 30 (XXXIV) of 20 October 1983 on the problem of manifestly unfounded or abusive applications for refugee status or asylum. See also Parliamentary Assembly Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe Member States.

¹¹ Article 23 (3) states that “Member States may prioritise or accelerate **any** examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.”

¹² Article 23 (4) APD: “Member States may **also** provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:”

an application may be examined in an accelerated manner to those applications which are obviously without foundation. Furthermore, provision should be made to ensure that certain applications may be exempted from prioritized and/or accelerated examination when this would undermine a fair and effective procedure, due to the special needs of the applicant.

The only condition established by Article 23 (3) and (4) of the APD is that any prioritized or accelerated examination must be in accordance with the basic principles and guarantees of Chapter II of the APD. However, UNHCR is seriously concerned that Chapter II of the APD permits Member States to derogate from a crucial and basic guarantee of the asylum procedure – the personal interview – on a wide range of grounds. All of these grounds are explicitly stipulated as permissible grounds for the prioritization and/or acceleration of the examination procedure.¹³

Moreover, UNHCR is also concerned that excessively short time frames for the examination of an application may nullify and render misleading in practice some of the basic principles and guarantees of Chapter II of the APD, and severely constrain applicants' ability to fulfil their obligations under the Qualification Directive to submit all elements needed to substantiate the application for international protection.¹⁴ They may also hinder applicants' ability to exercise their rights under the APD.

It should be stressed that, in accordance with Article 23 (2) of the APD, any acceleration should be without prejudice to an adequate and complete examination of the claim.¹⁵ The curtailment of procedural guarantees – such as the right to be heard in a personal interview; and excessively short time frames which restrict applicants' ability to fulfil their obligations and exercise their rights, as well as the manner in which the determining authority fulfils its obligations – can result in an inadequate and incomplete examination of some applications.

UNHCR's research has found that law and practice on the prioritization and acceleration of examinations in the 12 Member States of focus are disparate and difficult to compare. With no definition in the APD of what constitutes an 'accelerated examination', the term 'accelerated procedure' simply implies that, at the national level, the examination is conducted within a shorter timescale than another or other procedure(s). At the supra-national European Union level, however, as will be seen, the label 'accelerated procedure' is attached to procedures that are so diverse in form and duration that the term becomes ambiguous and unhelpful.

All aspects of the examination procedure diverge across the 12 Member States, including the grounds for prioritization and/or acceleration, the authority that decides to prioritize or accelerate, the purpose of the accelerated procedure, the manner in which the examination is accelerated, the safeguards which apply, and the time frames within which decisions should be taken. Some accelerated procedures operate within very short time frames which render the exercise of rights and obligations by the applicant, and the conduct of a complete examination by the determining authority, extremely difficult. Indeed, in some States' accelerated procedures, an essential safeguard – the personal interview – may be omitted. This increases the potential for erroneous first instance decisions. In some Member States, the average duration of and safeguards applicable to the accelerated examination are comparable to the regular procedures of other Member States.

¹³ Article 12 (2) (c) APD permits the omission of the personal interview on the grounds set out in Article 23 (4) (a), (c), (g), (h) and (j) APD.

¹⁴ Article 4 of the Qualification Directive.

¹⁵ Article 23 (2) APD states that "*Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.*"

In some Member States surveyed, the acceleration of the examination appeared to be the norm¹⁶ or risks becoming the norm rather than the exception.¹⁷ In this context, the use of the terms ‘accelerated’ and ‘regular’ becomes an issue of semantics only.

Member States have to achieve a balance between, on the one hand, the need to examine an application for international protection efficiently and, on the other, the need to ensure that the procedure is capable of identifying those in need of protection in accordance with international law. UNHCR’s findings regarding the extent to which some Member States are achieving this balance are set out in the following pages.

Overview of practice

At the time of UNHCR’s research, all the surveyed Member States prioritized and/or accelerated the examination of some applications in certain varied circumstances.

However, it should be noted that since UNHCR’s research, new legislation has entered into force in Greece.¹⁸ Whilst this legislation has not amended the provisions on accelerated procedures contained in the previous legislation,¹⁹ in practice, the accelerated procedure no longer operates and all applications are, at the time of writing, examined in one procedure. The evidence in this section of the report, therefore, relates to the legislative provisions under PD 90/2008 which has not been amended by the more recent PD 81/2009; and to the prior practice at the time of UNHCR’s research in early 2009.

Similarly, new legislation has entered into force in Spain in between the time UNHCR conducted its research and the writing of this report.²⁰ This section of the report refers to both the legislation and practice at the time of UNHCR’s research, as well as the legislative amendments made by the New Asylum Law.

The following paragraphs seek to provide a snapshot of the prioritization and/or accelerated procedures in operation at the time of UNHCR’s research.

Two of the Member States surveyed, Bulgaria and Spain, operated an initial ‘filter’ procedure through which nearly all applications were examined on their merits, and in which a decision was taken by the determining authority to reject the application, or discontinue the examination, or submit the application to a general or regular procedure. A positive decision to recognize refugee status (or to grant subsidiary protection status)²¹ could not be taken in these procedures. However, neither of these procedures were purely admissibility procedures, as an application was assessed on its merits, and could be rejected on grounds beyond those stipulated as grounds for inadmis-

16 Greece: according to UNHCR Athens figures, from January to November 2008, 95% of applications were examined in the accelerated procedure. Slovenia: of the total of 65 reviewed decisions taken in 2008, 51 were taken in the accelerated procedure.

17 In the Netherlands, there is a proposal to introduce a ‘normal’ eight day procedure. In 2009, in the parliamentary document with respect to the proposal for a new Aliens Act, dated 29 June 2009, 31 994 no. 3, the State Secretary of Justice stated on page 6 that prolonged procedures increasingly will be the exception, and expects that 40% of applications will be dealt with in the proposed eight day procedure. All asylum seekers would be interviewed, receive the intended decision and would have to provide corrections and additional information in the first four days of this proposed procedure. There would be a rest period of six days before this procedure, during which some research into the asylum claim would be conducted (e.g. fingerprinting and Eurodac search).

18 PD 81/2009 entered into force on 20 July 2009.

19 Article 17 (3) PD 90/2008.

20 Law 12/2009 regulating the Right to Asylum and to Subsidiary Protection – henceforth referred to as the ‘New Asylum Law’ – entered into force on 20 November 2009.

21 With regard to Bulgaria. In Spain, under the former law, it was possible to declare an application inadmissible but nevertheless grant subsidiary protection status, although this occurred only rarely.

sibility in the APD.²² These procedures, therefore, operated as initial ‘filter’ procedures, to wean out applications which were considered to be manifestly unfounded or inadmissible. It is arguable that the examination of applications in these procedures is not ‘accelerated’ in that close to all applications in these Member States were examined in these procedures. This meant that there was no differentiation in the speed with which applications were examined, or in the procedural steps applied.

However, in Bulgaria, this ‘filter’ procedure is referred to, in national law, as an accelerated procedure.²³ The statutory time frame for the procedure is three days.²⁴ This is considerably shorter than the three (to six) months taken for the examination of applications in the general procedure. The only applications exempted from this accelerated procedure are those by unaccompanied children and beneficiaries of temporary protection.²⁵ As such, in 2008, 98.3% of all applications were examined in this accelerated procedure²⁶ and about 35% of these applications were decided in this procedure instead of being admitted to an examination in the general procedure.²⁷ It should be noted that, at the time of UNHCR’s research, the determining authority informed UNHCR that there was an unwritten policy that applications by Iraqis should not be rejected in the accelerated procedure, and should automatically be channelled into the general procedure for examination.²⁸ A personal interview is conducted in this accelerated procedure, and the reasons for the application for international protection are examined.²⁹ Applications may be rejected in this accelerated procedure on the ground that they are considered manifestly unfounded in accordance with national law,³⁰ or discontinued on inadmissibility or withdrawal grounds.³¹

At the time of UNHCR’s research, Spain also operated a ‘filter’ procedure, referred to as the ‘admissibility procedure’, in which all applications were examined. The admissibility procedure was operated both at the border and in-country. At the border, the Asylum Law established a seven day procedure.³² However, in practice, the procedure was quicker because the Implementing Regulation (ALR) established that an applicant at the border should be admitted to the territory if an initial decision had not been taken on the application within 72 hours. Thus, in practice, the overall procedure would take six days from the submission of the application. In-territory, a decision on inadmissibility had to be taken within 60 days of the application being formally submitted. Applications could be rejected as inadmissible in this procedure on grounds which extended beyond the scope permitted by

²² Article 25 (2) APD.

²³ Section II: Accelerated Procedure, Chapter Six: Proceedings, LAR.

²⁴ This period starts after the Dublin II procedure in Bulgaria is completed, and the decision that Bulgaria is the responsible State enters into force (7 days after the decision has been issued, if it has not been appealed or, if appealed, the day the judicial appeal body confirms that Bulgaria is the responsible State). In those cases where Bulgaria accepts the decision of another Member State that Bulgaria is responsible, this term begins from the moment that the documentation relating to the applicant is received in accordance with Article 68 (2) LAR. In the case of a subsequent application, this period starts upon registration of the applicant.

²⁵ Article 71 (1) and (2) LAR. Article 71 (2) LAR has not yet been applied. In 2008, the number of applicants, out of a total of 746 applications, who were unaccompanied children, was 13. In 2009, out of the total number of 853 asylum applications, 8 were from unaccompanied minors.

²⁶ Official figures provided to UNHCR.

²⁷ According to the Report on the Activities of the State Agency for Refugees within the Council of Ministers for 2008, Part I, Section 2, p.2, 35% of applications in 2008 (excluding those by Iraqi applicants) were either discontinued or rejected in the accelerated procedure.

²⁸ Interviews with stakeholders in the Methodology Directorate.

²⁹ However, the sample questions for this personal interview are shorter than the sample questions for the personal interview in the general procedure.

³⁰ Article 70 (1), item 1 LAR in relation to Article 13 (1) LAR.

³¹ Article 70 (1), item 2 LAR in relation to Article 13 (2) and Article 15 (1) LAR.

³² Law 5/1984 of 26 March regulating the right to asylum and refugee status: four days for an initial decision by the determining authority, 24 hours within which the applicant could request a re-examination and two days within which the determining authority should issue a decision on the re-examination request.

Article 5 (2) of the APD,³³ and included grounds considered to be indicative of a manifestly unfounded application and grounds for exclusion.³⁴ Therefore, this was not strictly an admissibility procedure.

Since UNHCR's research, Spain has passed new legislation which introduces both an admissibility procedure and an accelerated procedure at the border and in-country.

In accordance with Article 21 (2) of the New Asylum Law, an application which is lodged at the border (and by applicants in detention) will be examined in an accelerated procedure and, following an application interview, will either be admitted for further examination in the in-country regular procedure, or declared inadmissible,³⁵ or rejected on one of the following grounds:

- the application does not raise issues related to recognition of refugee status or the granting of subsidiary protection status;³⁶
- the applicant is from a safe country of origin;³⁷
- the applicant is excluded from international protection on exclusion grounds set out in national legislation;³⁸
- the applicant is denied international protection on the grounds that s/he constitutes a danger to the security of Spain or s/he has received a final sentence for a serious crime and constitutes a threat to the community; or³⁹
- the applicant has made inconsistent, contradictory, improbable or insufficient representations or representations which contradict country of origin information, which has been sufficiently verified, and make his/her claim clearly unfounded as regards a well-founded fear of being persecuted or suffering serious harm.⁴⁰

An initial decision in the accelerated border procedure must be adopted within four working days of the application. In the case of a negative decision, the applicant may request a re-examination of the application by the determining authority within two working days and a decision on any such request must be adopted within two working days.⁴¹ The legislation provides that where the determining authority is minded to reject the application

³³ This provides that Member States may consider an application for asylum as inadmissible if (a) another Member State has granted refugee status; (b) a country which is not a Member State is considered as a first country of asylum; (c) a country which is not a Member State is considered as a safe third country; (d) the applicant is allowed to remain in the Member State concerned on some other grounds and as a result s/he has been granted a status with equivalent rights and benefits to refugee status; (e) the applicant is allowed to remain in the territory on another ground which protects against *refoulement* pending a decision on the status set out in (d); (f) the applicant has lodged an identical application after a final decision; (g) a dependant of the applicant lodges an application after consenting to be a dependant to another application and there are no facts relating to the dependant's situation which justify a separate application.

³⁴ Under Article 5.6 AL these grounds were: that the application falls within the exclusion clauses of the 1951 Convention; raises no grounds for recognition of refugee status; is identical to an application previously rejected; is based on facts, information or allegations which are openly false, improbable or no longer valid; or where Spain is not the responsible state under international treaties, first country of asylum, and safe third country.

³⁵ An application will be declared inadmissible, in accordance with Article 20 of the New Asylum Law, if the Dublin Regulation is to be applied; if Spain is not responsible for the examination of the application; if there is a first country of asylum or a safe third country; if the application is identical to a previous application lodged by the same applicant which has already been examined and rejected; if the applicant has lodged another asylum application stating different personal data; if or the applicant is a EU national.

³⁶ Article 25 (1) (c) New Asylum Law.

³⁷ Article 25 (1) (d) New Asylum Law.

³⁸ Article 25 (1) (f) New Asylum Law in conjunction with Article 8 (exclusion from refugee status) and Article 11 (exclusion from subsidiary protection).

³⁹ Article 25 (1) (f) New Asylum Law in conjunction with Article 9 (grounds for denial of asylum) and Article 12 (grounds for denial of subsidiary protection).

⁴⁰ Article 21 (2) New Asylum Law.

⁴¹ These time limits also apply to applications by applicants held in internment centres for aliens (CIE).

on exclusion or security grounds, UNHCR can request an extension of the time limit of up to ten days (in practice an additional six days). The implementing regulation for the New Asylum Law will have to clarify this procedure.

With regard to applications which are submitted in-country, if, following an application interview, the application is declared admissible in the admissibility procedure,⁴² it will then be considered in either the regular or the accelerated procedure. The application will be examined in the in-country accelerated procedure if:

- the application is clearly well-founded;
- the applicant has special needs, particularly unaccompanied children;
- any of the five above-mentioned grounds in relation to the accelerated border procedure apply; or
- the application was presented after the one month time limit.⁴³

In contrast with the approximately four to seven day accelerated border procedure, a decision has to be adopted within three months of the submission of the application in the in-country accelerated procedure. However, if an application is made by an applicant who is held in an in-country detention centre for aliens (CIE), the application is examined within the time limits established for the accelerated border procedure. By way of comparison, the New Asylum Law establishes that a decision in the regular procedure should be taken within six months of the application being lodged.⁴⁴

The practice in the Netherlands is conceptually different to those described above. Following an initial interview with all applicants, the determining authority decides whether it considers that a decision can be taken on the application within 48 procedural hours,⁴⁵ instead of the six months allocated for a decision in the regular procedure.⁴⁶ If so, the application is examined within an accelerated procedure with strict timeframes for each procedural stage, and an overall timeframe of 48 procedural hours. If not, the application is channelled into the regular procedure. However, the determining authority adheres to a policy that most applications can be examined and decided upon within 48 procedural hours. Therefore, with the exception of applicants from countries to which categorical protection applies,⁴⁷ all applications are considered eligible for examination in the accelerated procedure, provided it is considered that a quick decision can be taken. In 2008, 3,039 applications (21% of all applications) were examined in the accelerated procedure.⁴⁸

Slovenia and the UK also allocate applications to the regular procedure or an accelerated procedure following a screening or application interview.

In Slovenia, following an application interview by the determining authority, a decision is taken to consider the application either in the accelerated procedure or the regular procedure. National law sets out numerous grounds, along the lines of those set out in Article 23 (4) APD, for channelling applications into the accelerated procedure.⁴⁹

⁴² Refer above footnote no. 35. There is a one month time limit for applying under the in-country admissibility procedure.

⁴³ The time limit of one month is stipulated in Article 17 (f) of the New Asylum Law.

⁴⁴ Article 23 (3) New Asylum Law.

⁴⁵ Working hours for the 48 hours procedure are 8.00-18.00, so the procedure normally takes 5-6 days.

⁴⁶ Article 3:117 Aliens Decree.

⁴⁷ Aliens Circular C12/3 states that applications by applicants who are (without doubt) from countries to which the categorical protection policy is applied by the Dutch government should be examined in the regular and not the accelerated procedure.

⁴⁸ This represented a decrease as compared to previous years. See www.ind.nl. Of these, 10% resulted in the grant of a residence permit. Over the years, various members of Parliament have expressed the view that up to 40% of applications can be examined in the accelerated procedure; and a former Minister expressed the view that up to 80% of applications can be examined in the accelerated procedure.

⁴⁹ Article 55 IPA.

The overwhelming majority of applications are submitted to the accelerated procedure.⁵⁰ There is no prescribed time limit for the accelerated procedure. The personal interview may be, and generally is, omitted in practice. In practice, a positive decision to grant international protection has never been taken in the accelerated procedure in Slovenia.

Similarly, in the UK, an application may be channelled into an accelerated procedure following a screening interview. However, the UK is the only Member State of those surveyed which operates distinct accelerated procedures conducted by separate units within the determining authority. It is also the only Member State of those surveyed that detains applicants whose applications are routed into the accelerated procedures. Following a screening interview, an application may be channelled into the regular procedure or one of two distinct accelerated procedures:

- (i) the detained fast track (DFT) procedure; or
- (ii) the detained non-suspensive appeal (DNSA) procedure.

Approximately 7% to 8% of total applications were examined in the DFT and DNSA procedures in 2007, although the proportion has increased in subsequent years.⁵¹ The DFT and DNSA procedures have time frames of three⁵² and six or ten working days⁵³ respectively.

In seven of the Member States surveyed, there is no distinct accelerated procedure which operates parallel to a regular procedure or is conducted by a separate unit, but the examination of certain applications are prioritized and/or accelerated. These are Belgium, the Czech Republic, Finland, France, Germany, Greece⁵⁴ and Italy.

In Belgium, there are three distinct legal provisions which permit the examination of an application to be accelerated and each stipulates a different time frame:

- (i) Article 52 Aliens Act sets out extensive grounds considered to be indicative of clearly unfounded or clearly abusive applications, and sets a shorter timeframe of two months within which a decision should be taken;
- (ii) Article 52/2 Aliens Act sets a time frame of 15 calendar days for the examination of applications by persons detained at the border or in-territory, detained in prison, or considered to pose a danger to public order or national security. It also applies where the Minister of the Interior requests an accelerated examination in the context of a mass influx of applicants from a particular country; where it is suspected that there is a manifest improper use of the asylum procedure; or that a network of smugglers in human beings is active; and
- (iii) Article 57/6, § 2, of the Aliens Act provides that the applications of EU nationals may be prioritized and examined within five working days if the statement of the applicant does not permit the conclusion that s/he qualifies for international protection.

⁵⁰ Of the 65 reviewed decisions taken in 2008, 51 were taken in the accelerated procedure.

⁵¹ Home Office Statistical Bulletin, UK 2007; Research, Development and Statistics Directorate, The Home Office, ISSN 1358 – 510 X ISBN 978 – 1- 84726-815-0; 21 August 2008. Total applications made in 2007 was 23,430. In 2007, 320 applicants were received at Oakington, 745 were received at Harmondsworth, and 520 were received at Yarls Wood. Total fast track for 2007 is 1,585. i.e. 6.76% of all applications were detained procedures. Home Office Statistics for 1st Quarter 2008. ISBN 978 1 84726 675 0. Total applications Q1 2008 = 6,595. Oakington 90; Harmondsworth 245; Yarls Wood 120. Total 455. i.e. 7% of total applications. The UKBA confirmed the 8% figure in interview on 1 April 09.

⁵² This is three working days for a first instance decision.

⁵³ Decisions are issued on day 6 if the application is not 'clearly unfounded' and on day 10 – together with removal directions – if the application is considered clearly unfounded under NIAA 2002.

⁵⁴ This was the case at the time of UNHCR's research. Note that since the entry into force of PD 81/2009, it is reported that the examination of certain applications is no longer accelerated.

Although in law there are extensive grounds upon which the examination of an application may be prioritized and accelerated, in practice, examination is accelerated principally when applicants are detained at the border or in-territory.⁵⁵

In the Czech Republic, there are two distinct legal provisions which may result in the accelerated examination of an application:

- (i) Section 16 ASA sets out grounds considered to be indicative of clearly unfounded or clearly abusive applications, states that a decision that an application is manifestly unfounded must be issued within a time frame of 30 days.⁵⁶
- (ii) Section 73 (4) ASA provides that when an application is submitted by an applicant at the border, and s/he is not allowed entry to the territory, the application should be examined within four weeks, otherwise entry to the territory must be granted.⁵⁷

There were no published statistics available to UNHCR with regard to the Czech Republic, but UNHCR did have access to a list of all decisions taken on the basis of Section 16 ASA between 1 February 2008 and 31 October 2008. Of all the negative decisions taken in this period, 43.75% were taken following an accelerated examination in accordance with Section 16 ASA. This represents 22% of all decisions taken in the same period. Figures regarding the border procedure were not available.

In Finland, legislation stipulates that a decision shall be taken within seven calendar days of the minutes of the personal interview being completed, where the applicant is considered to come from a safe country of asylum (this includes the concept of both first country of asylum and safe third country) or a safe country of origin.⁵⁸ The examination of an application may also be accelerated when an application is considered to be manifestly unfounded under national law; and when it is a subsequent application which does not raise any new issues or evidence.⁵⁹ However, in these latter cases, there is no legal requirement that the decision be taken within a certain time frame. In 2008, the average time frame within which a decision was taken on all the above-mentioned grounds was 67 days, as compared to the average of 130 days for other decisions.⁶⁰ On the basis of the deter-

⁵⁵ There were no specific statistics available to UNHCR on the number of applications examined in an accelerated manner. This statement is based on information obtained through interviews with different officials within the determining authority, the CGRA, and the AO, which is responsible for the registration of applications. In 2008, 351 applications were made by applicants at the border, according to CGRA's asylum statistics, published on 8th January 2009, http://www.cgvs.be/nl/binaries/STAT-ASIEL%20CGVS%202008_tcm127-39640.pdf.

⁵⁶ Section 16 (3) ASA states that "A decision to reject an application due to its manifestly unfounded nature shall be issued not later than 30 days from the date of commencement of the proceedings on the granting of international protection." This is 30 calendar days.

⁵⁷ Section 73 (4) ASA: "The Ministry will decide on the application for international protection within 4 weeks of the date of the Declaration on International Protection made by an alien. Should the Ministry fail to decide within the given period, it will enable the alien to enter the territory without the decision and transport him/her into an asylum facility in the territory. The Ministry will make a decision on whether the alien is allowed to enter the Territory or not within five days since the date of the Declaration on International Protection. An alien a) whose identity was not established in a reliable manner, b) who produced falsified or altered identity documents, or c) for whom there is a well-founded assumption that s/he could threaten security of the state, public health or public order, will not be allowed to enter the Territory." Note that this is a transposition of Article 35 (4) APD on border procedures.

⁵⁸ Section 104 of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009). However, note that the personal interview may be omitted on safe country of asylum grounds, and therefore this time frame cannot always be applied in practice.

⁵⁹ Section 103 (2) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 27.4.2009).

⁶⁰ These times do not include the days (up to a month) required for the police or border guards to transfer a case to the determining authority. Also, note that the seven day time frame for decisions on safe country or asylum or origin grounds is commonly exceeded, due to delays in securing agreement from the other relevant country to take back the applicant. Statistics for average processing times at the Immigration Services are available at <http://www.migri.fi/netcomm/content.asp?article=3129>.

mining authority's official statistics for 2008, 13.7% of all decisions were taken following an accelerated examination.⁶¹

In France, the priority procedure (*procédure prioritaire*) is *de facto* an accelerated procedure in which the examination of applications is both prioritized and accelerated. According to national law,⁶² an application is examined in the accelerated procedure when the applicant has been refused a temporary residence permit, or had the permit withdrawn on the grounds that:

- (i) the applicant is a national of a country to which Article 1C(5) of the 1951 Convention applies, or that of a safe country of origin;
- (ii) the applicant is considered to constitute a serious threat to public order, public security or the security of the State;
- (iii) the application is considered to be deliberately fraudulent, to constitute an abuse of the asylum procedures, or is considered to have been lodged solely to prevent a removal order which has been issued or is imminent.

Applications examined in the accelerated procedure should be decided by the determining authority within 15 days of receipt of the application from the *Préfecture*. Applications by applicants who are detained in administrative retention centres should be decided within an even shorter timeframe of 96 hours.⁶³ An increasing proportion of applications are examined in the accelerated procedure. In 2008, according to the OFPRA Activity Report, 30.7% of all applications submitted were examined in the accelerated procedure.⁶⁴ This represented a 26% increase compared to 2007.⁶⁵

In Germany, examination of the following categories of applications is prioritized internally – but not accelerated – by the determining authority, the BAMF, on grounds set out in the internal guidelines of the BAMF:⁶⁶

- (i) applications submitted by persons already in detention or by persons having committed a crime;
- (ii) applications considered to be manifestly unfounded;⁶⁷
- (iii) subsequent applications which are not considered to require the opening of a new asylum procedure; and
- (iv) multiple applications.

The only accelerated procedure in Germany is the airport procedure. Entry to the territory of Germany can be denied at the airport if the BAMF rejects an application as manifestly unfounded within two days of submission

61 Official translation available at www.migr.fi. A total of 1,995 decisions were taken in 2008, of which 84 were on safe country of origin grounds and 189 were considered manifestly unfounded (including subsequent applications). However, these statistics do not explicitly state the decisions taken on safe country of asylum grounds (first country of asylum), although such decisions were audited by UNHCR. These statistics do not include decisions taken on the basis of the Dublin Regulation.

62 Article L.723-1 and L.741-4-2° to 4° *Ceseda*.

63 Article R.723-3 *Ceseda*.

64 Page 69 (annexes). This is 30.7% of the total flow ("*flux total*"), including both first and subsequent applications. 16.9% of initial applications were examined in the accelerated procedure, whereas 82.6% of subsequent applications were examined in the accelerated procedure. This rate is 50% in French overseas territories.

65 The number of applications examined in the accelerated procedure was less than 10% in 2003; 16 % in 2004; 23 % in 2005; 30% in 2006, and 28% in 2007.

66 Internal Guidelines for Adjudicators: "*Priority*" (1/1), Date: 12/08, p. 1.

67 No further explanation of this term could be found in the Internal Guidelines for Adjudicators. The term is further specified in Section 30 APA: "(1) An asylum application shall be manifestly unfounded if the prerequisites for recognition as a person entitled to asylum and the prerequisites for granting refugee status are obviously not met. (2) In particular, an asylum application shall be manifestly unfounded if it is obvious from the circumstances of the individual case that the foreigner remains in the Federal territory only for economic reasons, or in order to evade a general emergency situation or an armed conflict."

Further specific reasons are foreseen in paragraph. (3) to (5).

of the application.⁶⁸ If a decision cannot be taken within this period, the applicant is admitted to the territory and the application is further examined in the regular procedure.⁶⁹

In Greece, at the time of UNHCR's research in early 2009, applications for international protection were examined in an accelerated procedure when they were considered to be manifestly unfounded according to national law, or when the applicant was considered to be from a safe country of origin, or had come from a safe third country, as defined in national law. In the accelerated procedure, a decision had to be issued within 30 calendar days of the application, whereas decisions could be taken within six months in the regular procedure.⁷⁰ In 2008, the overwhelming majority of applications were examined in the accelerated procedure.⁷¹

In Italy, an application will be examined with priority when:

- (i) the application is considered to be clearly well-founded;
- (ii) the applicant is considered a vulnerable person under national law; or
- (iii) the application is from an applicant who has been sent to a reception centre (CARA – reception centre for refugees and asylum seekers)⁷² on the basis of Article 20, 2 (b), or (c) of Legislative Decree No. 25/2008, or to a detention centre (CIE – identification and expulsion centre) on the basis of Article 21 of Legislative Decree 25/2008.⁷³

In practice, the applications of applicants residing in 'informal' reception centres (non-CARAs) have also been prioritized in order to try and prevent disorderly protests against lengthy procedures.⁷⁴ The compatibility of this policy with the law has been questioned, and it is considered to result in the prolongation of the procedure for other applicants.⁷⁵

When the applicant is detained in a CIE, the determining authority should conduct the personal interview within seven days of receipt of the documentation concerning the applicant (rather than 30 days in the regular procedure) and a decision should be issued within the following two working days (instead of three working days). No other time limits apply. The National Commission for the Right of Asylum (CNDA) does not maintain statistics on the number of applications that are prioritized or accelerated. However, a significant majority of asylum seekers in Italy are accommodated in a CARA upon arrival on the basis of Article 20, 2 (b) and (c) of Legislative Decree No. 25/2008. Their application is, therefore, in principle prioritized, as compared to the minority of applicants who are not accommodated in a CARA. For example, at one of the Territorial Commissions for the Recognition of International Protection (CTRPI),⁷⁶ which is located in the premises of a reception centre for asylum seekers (CARA), it is estimated that 95-98% of applications are, in principle, prioritized.⁷⁷ It is evident that even though a significant number of applications are *de jure* prioritized, as at this CTRPI, none of them are *de facto* prioritized.

68 Section 18a (3), (6) No. 2 APA.

69 If a decision were to be taken, within the two day time limit, to reject the application as simply 'unfounded', the applicant would also be admitted to the territory. S/he would receive a negative decision with the obligation to leave Germany, which could be subject of an appeal in the administrative court with suspensive effect. However, in practice, it is observed that all applications that are not rejected as manifestly unfounded within two days are admitted to the territory and the regular procedure.

70 Article 17 (4) PD 90/2008.

71 According to UNHCR Athens figures, from January-November 2008, 95% of applications were examined in the accelerated procedure.

72 Except when this has been ordered in order to verify or check the personal identity of the applicant.

73 Article 28 (1) d.lgs. 25/2008.

74 As reported in the press in January 2009, when protests took place at the Red Cross reception centre in Massa.

75 Stated in the opinion of the Department for Civil Liberties and Immigration of 3 March 2009 and in the circular letter of the National Commission for the Right of Asylum (CNDA, IT) of 31 March 2009.

76 The determining authority.

77 According to the UNHCR member of the said CTRPI.

Who decides to prioritize or accelerate the examination of an application?

With the exception of France, in all the Member States surveyed, any decision to prioritize and/or accelerate the examination of an application is taken by the determining authority.⁷⁸

In France, the determining authority is OFPRA. However, the decision to prioritize and submit an application to the accelerated procedure is effectively taken by the Prefectures (*Préfectures*).⁷⁹ Before applying for international protection, all applicants must compulsorily apply for a temporary residence permit at the *Préfecture* closest to their domicile.⁸⁰ The *Préfectures* may refuse to issue a temporary residence permit if they consider that an applicant is from a safe country of origin; that the applicant constitutes a serious threat to public order or security; that the asylum application is deliberately fraudulent, or constitutes an abuse of the asylum procedures; or is solely lodged to prevent a removal order which has been issued or is imminent.⁸¹ If the *Préfecture* issues a temporary residence permit, the application for international protection will be examined in the regular procedure by the determining authority. However, if the *Préfecture* refuses the application for a temporary residence permit on the grounds stated above, the application for international protection is channelled into the accelerated procedure (*procédure prioritaire*). National law states that “the OFPRA prioritizes the examination of applications made by persons to whom the temporary residence permit ... has been refused or withdrawn”.⁸²

UNHCR considers it problematic that an authority other than the determining authority is called upon to make such an assessment and effectively determine whether an application is examined in the regular or accelerated procedure. Guidelines to the *Préfectures* stipulate that the assessment of the abusive nature of an application should be based solely on the administrative and procedural context of the application.⁸³ Yet it is not possible, for example, to assess whether an asylum application “is solely lodged in order to prevent a removal order which has been issued or is imminent” without examining the reasons for the application for international protection. Furthermore, it is not possible to determine whether a subsequent application “constitutes an abuse of the asylum procedures” without examining the evidence presented with the new claim, together with the assessment of the previous application.⁸⁴

Préfectures are required to attach a “*Fiche de saisine en procédure prioritaire*” to the application, specifying the ground upon which the temporary residence permit has been refused and the application routed into the accelerated procedure. Although these are not always well-reasoned, they may allow the determining authority to check

⁷⁸ Note that in Bulgaria, all applications with the exception of applications by unaccompanied children and beneficiaries of temporary protection are automatically examined in the accelerated procedure.

⁷⁹ The *Préfectures* are responsible for the admission and residence of aliens in France, including asylum applicants. *Préfectures* are not the determining authority as defined by Article 4 (1) of the APD. They do not fall either under the definition of responsible authorities under Article 4 (2) of the APD (except for their role in processing cases according to the Dublin Regulation and, to a certain extent, for their role in taking decisions in the light of national security provisions). In the framework of this research, UNHCR was only able to interview one *Préfecture*, the *Préfecture* of Rhône (Lyon). The divergent practices of all the *Préfectures* are reviewed in detail in a report published by the NGO Cimade (“*Main basse sur l’asile. Le droit d’asile (mal) traité par les Préfets*”, June 2007).

⁸⁰ Article L.741-2 and Article R.741-1 *Ceseda*. Since 2007, the delivery of temporary residence permits is conducted on a regional basis (one *Préfecture* does it for several *départements*). This was first experimented in some regions. Since 20 April 2009, it is applicable to the whole territory (except Paris and its region).

⁸¹ Article L.741-4--2° to 4° *Ceseda* (unofficial translation into English).

⁸² Unofficial translation of Article L.723-1 *Ceseda* « [§2] L’office statue par priorité sur les demandes émanant de personnes auxquelles le document provisoire de séjour prévu à l’article L.742-1 a été refusé ou retiré pour l’un des motifs mentionnés aux 2° à 4° de l’article L.741-4, ou qui se sont vu refuser pour l’un de ces motifs le renouvellement de ce document ».

⁸³ *Circulaire N° NOR : INT/D/05/00051/C du 22 avril 2005*.

⁸⁴ NGOs have alleged in the past that some *Préfectures* exceed their role, and assess evidence submitted in support of a subsequent application: Cimade, « *Main basse sur l’asile* » June 2007 and CFDA, « *Les demandeurs d’asile sans papiers : les procédures Dublin II et prioritaires* », April 2006.

the *Préfecture's* decision to channel the application into the accelerated procedure.⁸⁵ However, OFPRA does not have any authority over the *Préfectures*. OFPRA can only share its view with the *Préfectures* and examine the application within the period it deems necessary for a complete examination, which may exceed the time lines of the accelerated procedure.⁸⁶

Recommendation

UNHCR recommends that only the determining authority decide whether to prioritize and/or accelerate the examination of an application.

The information basis upon which a decision is taken to prioritize or accelerate the examination of an application

In some Member States, the information required to decide to prioritize and/or accelerate the examination depends on the potentially applicable ground for prioritization/acceleration.⁸⁷ For example, in some Member States, the examination of an application will be prioritized and/or accelerated when the applicant is in detention. This decision can be taken immediately by the determining authority upon receipt of relevant information about the detention (or otherwise) from a competent authority.⁸⁸ However, other grounds for prioritization and/or acceleration of the examination may only emerge at a later stage of the procedure – for example, on the basis of information gathered during the personal interview.⁸⁹

In practice, in Slovenia and Spain, the decision to accelerate the examination of the application is taken on the basis of information gathered during the application interview and any other evidence submitted or gathered prior to a decision being taken on which procedure is appropriate.⁹⁰

⁸⁵ For example, in audited Case File 51R (RUS) of the sample, the application was channeled into the accelerated procedure by the prefecture, while OFPRA considered that it should be examined under the regular procedure.

⁸⁶ Note that an applicant may challenge the decision of the *Préfecture* through the administrative tribunal which has the power to repeal the decision of the *Préfecture*, and order issuance of a temporary residence, and that the application officially be routed into the regular procedure. However, this legal remedy has no suspensive effect and, except when the case is referred to the court under an emergency procedure, the tribunal's judgment can take several months and even years.

⁸⁷ Belgium, the Czech Republic, Finland and Germany.

⁸⁸ For example, in Belgium such a decision would be taken by the determining authority following receipt of information contained in the registration form from the competent authority, the Aliens Office (AO). In Finland, the decision would be taken upon receipt of information from the police or border guards. In Germany, the examination of an application is prioritized by the BAMF when it is informed that the applicant is in detention. In Italy, this decision would be taken on the basis of an informal recommendation received from the reception centres and the *Questuras*.

⁸⁹ Belgium, the Czech Republic, Finland and Germany.

⁹⁰ In Slovenia, according to Article 54 IPA, the competent authority can decide the application in the accelerated procedure if “*the entire operative event has been established on the basis of facts and circumstances from the first to the eighth sub-paragraph of Article 23 of this Act inasmuch as they have been presented.*” Indent 1-8 of Article 23 states: “*When examining the requirements for international protection the official shall particularly consider the following:*

- *information and statement in the application;*
- *information collected during **the personal interview**;*
- *evidence produced by the applicant;*
- *documentation produced by the applicant particularly with respect to his age, origins, including the origin of relatives, identity, nationality, former countries and places of permanent residence, previous applications, travel routes, personal and travel documents as well as the reasons for filing the application;*
- *evidence collected by the competent authority;*
- *official information available to the competent authority;*
- *documentation acquired before filing the application;*
- *general country of origin information, especially the country's social and political situation as well as the adopted legislation.”*

In the Netherlands and the UK, the decision to prioritize and/or accelerate the examination is taken upon information gathered during an initial screening interview. The purpose of the screening interview is to establish nationality and identity, as well as to explore an applicant's travel route. Bio-data, fingerprints, photos, identity and travel documents will be obtained so that a EURODAC search can be carried out. The purpose of this interview is not to gather the detailed reasons for the application for international protection.⁹¹ In the UK, however, the screening interview does allow for a brief indication of the basis for the application. Based on this limited information,⁹² the determining authority may decide to channel an application into an accelerated procedure when it considers that a quick decision can be taken.

In France, as mentioned above, the decision to prioritize and accelerate the examination of an application is effectively taken by the *Préfecture* on the basis of the content of a form which must be completed in writing and in French by the applicant.⁹³ No assistance, in terms of a translator or interpreter, is provided by the state to applicants who cannot write in French. The form contains questions relating to nationality, identity, links with France and the travel route. The completed form does not provide any information on the reasons for the application for international protection. Yet, without knowing the reasons for the application for international protection, the *Préfecture*, which is not the determining authority, has the power to determine whether it considers the application for international protection to be, for example, abusive, dilatory or fraudulent.⁹⁴

Guidelines have been issued to the *Préfets* which stress that the examination of the substance of the application for international protection falls within the exclusive competence of OFPRA, the determining authority, and the appeal tribunal (CNDA), and that the assessment of the abusive nature of an application should solely result from the administrative and procedural context of the application, and should be applied on a case-by-case basis.⁹⁵ However, as stated above, it may be impossible in fact to determine whether an application constitutes "an abuse of the asylum procedures" without examining the reasons for the application for international protection. For example, it is not possible to determine whether an application has been made solely to prevent the enforcement of a removal order, unless the reasons for the application for international protection are examined. According to NGOs, in practice, some *Préfectures* tend to consider in general that an application for international protection submitted by a person who is detained in an administrative retention centre is abusive or dilatory,⁹⁶ and that subsequent applications are "an abuse of the asylum procedures". Some *Préfectures* also appear to consider that an asylum application submitted a few days or weeks after entry into France is abusive.⁹⁷ To take such decisions on the basis of the administrative and procedural context only, may result in applications which are well-founded or not clearly unfounded being examined in an accelerated manner.⁹⁸

In Italy, the decision to prioritize the examination of an application is taken on the basis of the limited information contained in the registration form⁹⁹ (and documentation attached thereto, such as the appointment of a guardian

91 Lower Court Rotterdam, 30 December 2009, awb, 09/44220.

92 In the Netherlands, this concerns the country of origin and travel details.

93 The application form for a temporary residence permit (*Formulaire uniforme de demande d'admission au séjour en France*) exists in 18 languages but must be completed in French without the services of an interpreter or translator. Applicants sometimes have a friend or relative to assist with the language. The *Préfecture* can also decide that the examination of an application should be accelerated during the examination of the application by OFPRA if it determines there is fraud or a threat to public order.

94 Article L.741-4--2° to 4° *Ceseda* (unofficial translation into English).

95 *Circulaire* N° NOR : INT/D/05/00051/C, 22 April 2005. The text adds that the use of the accelerated procedure should not be systematic and should take into account the individual circumstances, even in the case of subsequent applications.

96 According to the 2008 OFPRA Activity Report, applicants held in administrative retention centres represent 18% of cases which are examined under the accelerated procedures (1, 894 cases). 64% of applications are initial applications.

97 Report « *Les demandeurs d'asile sans papiers : les procédures Dublin II et prioritaires* », CFDA, avril 2006.

98 The recognition rate by OFPRA in the accelerated procedure is 11.1% according to the OFPRA 2008 Activity Report, page 30.

99 *Modello C3*

for a child, an age assessment certificate, etc.). This documentation is sent by the police departments (*questuras*) to the determining authority and, when available, the recommendation/referral letter from the social services in the identification and expulsion centre (CIE), reception centre (CARA or SPRAR), or from NGOs providing voluntary assistance to asylum-seekers. Clearly well-founded applications and applications by vulnerable applicant are prioritized on the basis of referrals from NGOs assisting asylum-seekers, or from the psycho-social services present in the reception centres (CARA and SPRAR).¹⁰⁰ In order to ensure that such referrals are systematic and based on clear criteria, a specific provision is expected to be included in the implementing regulation for Legislative Decree 25/2008 which is being drafted at the time of writing. Applications that are prioritized because the applicant was sent to a reception centre (CARA) or to an identification and expulsion centre (CIE) on the basis of Articles 20 2 (b) and (c) and 21 of Legislative Decree No.25/2008 are in principle prioritized on the basis of the information forwarded by the police departments (*questuras*) to the Territorial Commission. This information should set out the grounds upon which the decision was taken to host the applicant in a CARA or to detain the applicant in a CIE. In practice, the grounds for the decision to accommodate in a CARA are not always clear and explicit, and this may have implications both for the prioritization of the examination and for any appeal. This could also be addressed if the implementing regulation being developed at the time of this research, which includes an explicit requirement to inform both the applicant and the Territorial Commission of the grounds for the decision to accommodate the applicant in a CARA.¹⁰¹

Opportunity to challenge the decision to prioritize and/or accelerate the examination

In Bulgaria, applications are automatically examined in the accelerated procedure. Therefore, there is no formal decision which can be challenged other than via appeal against a decision to reject the application as manifestly unfounded, or to discontinue the examination, following its consideration in the accelerated procedure.

In some Member States, applicants will not even be aware that their application is being examined with priority and/or in an accelerated manner, as no formal decision is taken to prioritize and/or accelerate the examination.¹⁰² Indeed, it is often only evident from the decision on the application itself that the application was examined in an accelerated manner.¹⁰³ As a result, there is no formal decision which can be legally challenged, except upon appeal following a negative first instance decision taken in the accelerated procedure.

¹⁰⁰ Several projects funded by the Ministry of Interior (supported by national ERF funds) and implemented in 2009-10 aim to improve mechanisms for identification and referral of vulnerable cases. These projects are coordinated by the Ministry of Interior and implemented by international organizations (UNHCR and the International Organization for Migration (IOM) with the *Praesidium* project), NGOs (Save the Children, CIR, ASGI), or public institutions (SPRAR, Public Health Sector).

¹⁰¹ This is a recommendation which UNHCR has made to the Italian Government.

¹⁰² The Czech Republic, with regard to decisions taken on the basis of Section 16 ASA; Finland and Germany with regard to the informal prioritization of some examinations; Greece, Slovenia and Spain with regard to applications examined in the accelerated border procedure (although applicants do have the opportunity to request a re-examination of the initial decision, which may include a challenge to the decision to accelerate the examination). In Spain, if the application is admitted to the procedure – whether at the border or in-country – s/he is notified whether admission is to the regular or the accelerated procedure. This constitutes notification and not a formal decision, and therefore cannot be appealed before the courts.

¹⁰³ For instance, decision 77 in Finland, where the fact that the decision stated that the application was manifestly unfounded was indicative of the fact that the examination had been conducted in an accelerated manner. However, there was no other record in the case file to indicate that the examination had been accelerated. Similarly, in the Czech Republic, an applicant will only learn that the application was examined under Section 16 ASA once the decision is taken that the application is manifestly unfounded. This is also apparent in decisions in Slovenia.

In the Netherlands and the UK, a legal representative may request that a ‘decision’ to accelerate the examination be re-considered, but the decision is at the discretion of the case manager.¹⁰⁴ In the Netherlands, the legal representative has the possibility to submit his/her opinion after his/her client has been interviewed on the merits of the claim. S/he can request that the authorities do not take the first decision, and instead refer the application to the regular procedure in order to have more time to provide background information. However, given that the report of the personal interview is key, and later statements are not easily taken into account, referral of a case to the regular procedure may be of limited assistance.¹⁰⁵ In the UK, the ‘acceleration’ element of the detained accelerated procedure (rather than the ‘detention’ element) can be queried by the legal representative, either by asking for an adjustment to timescales within the detained fast-track procedure, or by requesting that their client’s application be removed from the accelerated (detained) procedure entirely (and thereby placed in the ‘regular’ procedure).

In the Czech Republic, a decision by the determining authority not to allow entry into the territory (which results in an application for international protection being examined in the accelerated procedure under Section 73 ASA) can be challenged administratively with the determining authority, DAMP, one month after the decision was taken. Alternatively, it can be appealed to the administrative courts.¹⁰⁶ By contrast, it is not possible to challenge the decision to accelerate the procedure taken under Section 16 ASA (manifestly unfounded applications).

Similarly, in France, the decision of the *Préfecture* not to grant a temporary residence permit (which results in the application for international protection being examined in the accelerated procedure) is a formal decision which can be appealed before the administrative tribunal.¹⁰⁷ This legal remedy has no suspensive effect, except when the case is referred to the court under an emergency procedure (“*référé*”), and the judgement can take months or years.¹⁰⁸ The decisions of the *Préfectures* in principle should be reasoned and duly notified to the applicant.¹⁰⁹ In practice, however, this is not always the case. UNHCR audited 20 case files examined in the accelerated procedure. In most, there was a “*fiche de saisine de l’OFPPA en procédure prioritaire*” stating the decision of the

¹⁰⁴ In the UK, see *Detained Fast Track Processes Operational Instruction on Flexibility in the Fast Track Process* (26 April 2005 – UKBA website) and the *Detained Fast Track (DFT) & Detained Non-Suspensive Appeal (DNSA) – Intake Selection (AIU Instruction) v.2*. In UNHCR’s fifth Quality Initiative report to the Minister in March 2008, UNHCR noted its concern that in just over one in seven of the cases it had reviewed, a request was made for taking the case from the DFT procedure which was not granted, and in a number of these cases inappropriate or inadequate reasons were given for refusing the request. In some cases there was no clear indication from the case file as to whether the request had been considered, or why it was refused: Paragraphs 2.3.68 and 2.3.70 of the fifth Quality Initiative report.

¹⁰⁵ Evidence which is not raised during the personal interview or in the submitted opinion of the legal representative, but is only raised at a later stage, may adversely impact the credibility.

¹⁰⁶ UNHCR obtained some evidence to suggest that the CC in Prague does not always manage to take a decision within the maximum four month period in which an applicant may be detained at the airport. A local NGO, whose lawyer commutes to the transit area of the international airport showed UNHCR, on 22 April 2009, a copy of two decisions in which it took nine and ten months respectively for the CC in Prague to take a decision (No. 5 Ca 53/2008-37 of 12 December 2008 and No. 10 Ca 35/2008-83 of 3 December 2008).

¹⁰⁷ In the Rhône *Département*, the court is systematically seized by applicants who were refused a temporary residence permit and whose application was therefore channeled into the accelerated procedure.

¹⁰⁸ Cf. Article L.521-1 *du code de justice administrative*. In this regard, the Administrative Court in Lyon (« *tribunal administratif* ») always considers that the emergency procedure should be applied. This tribunal tends to suspend the decision of the *Préfecture* refusing a temporary residence permit for applicants who are nationals of safe countries of origin, and/or who apply for asylum in the framework of a subsequent application, and to order the *Préfecture* to deliver a temporary residence permit to these applicants, which should be valid until the decision of the CNDA on appeal. Therefore this case law creates a suspensive remedy before the CNDA (NB: this case law comes from a first instance administrative tribunal. It does not rule on the substance of the case, it can be overturned by a higher administrative court and it has no binding effect on other administrative tribunals. Only a ruling from the Council of State (*Conseil d’Etat*) would set a precedent. Cf. *Tribunal administratif de Lyon, M. B.P, Ordonnance du juge des référés, 2 février 2007, N°0700354*; *Tribunal administratif de Lyon, Mme EC, Ordonnance du juge des référés, 3 avril 2009, N° 0901637*; *Tribunal administratif de Lyon, Mr. KC, Ordonnance du juge des référés, 3 avril 2009, N° 0901635*).

¹⁰⁹ This is the case in the *Préfecture* of Rhône, which has a longstanding tradition of motivating its decisions because of the strict control undertaken by the administrative court (“*tribunal administratif*”). This is however not the case in all the *Préfectures*.

prefecture regarding the request for a temporary residence permit. However, these decisions were not always well reasoned, and some were more detailed than others.

Procedural standards and safeguards in accelerated procedures

All asylum procedures must be able to identify effectively individuals with international protection needs. Given the inherent challenges in accurately assessing refugee claims within accelerated procedures, effective safeguards are required to ensure that all protection concerns are adequately and appropriately identified and met.

Article 23 (3) and (4) APD provide that any prioritization or acceleration of the examination of an application must be in accordance with the basic principles and guarantees of Chapter II of the APD. And in all the Member States surveyed, national legislation complies with the basic principles and guarantees of Chapter II of the APD.¹¹⁰

However, UNHCR's concern is two-fold. Firstly, UNHCR considers that Chapter II of the APD does not guarantee all the effective safeguards required to ensure that all protection concerns are adequately and appropriately identified and met. Secondly, in practice, the context of accelerated procedures, where the timescales are shorter than the regular procedure, it is critical that the speed with which the procedure is conducted does not nullify or adversely hinder the exercise of rights and guarantees.

With regard to the first concern, UNHCR particularly regrets that Article 12 (2) (c) in conjunction with Article 23 (4) of Chapter II of the APD set out five circumstances in which a personal interview may be omitted, and the examination of an application may be accelerated.¹¹¹

UNHCR considers that the personal interview is an essential component of and safeguard in the asylum procedure, as it provides the applicant with what should be an effective opportunity to explain comprehensively and directly to the authorities the reasons for the application. It also gives the determining authority the opportunity to establish, as far as possible, all the relevant facts and to assess the credibility of the evidence. The right to the opportunity for a personal interview, in a language which the applicant understands, on the reasons for the application should be granted to all applicants, regardless of whether the examination is accelerated or not, unless the applicant is certified as unfit or unable to attend the interview owing to enduring circumstances beyond his/her control.¹¹²

¹¹⁰ Note that in practice there may be shortcomings in implementation which affect all applicants, but the impact on applicants whose application is examined in the accelerated procedure may be more acute due to the shorter time frame of the procedure. For further information, see other sections of this report generally.

¹¹¹ According to Article 12 (2) (c) APD, the following are grounds both to omit the personal interview and accelerate the examination of an application: Article 23 (4) (a) regarding applications which raise issues of minimal or no relevance to international protection; Article 23 (4) (c) regarding applicants considered to come from a safe country of origin or have arrived from a safe third country; Article 23 (4) (g) regarding applicants who are considered to have made inconsistent, contradictory, improbable or insufficient statements; Article 23 (4) (h) regarding subsequent applications which do not raise any relevant new elements, and Article 23 (4) (i), when it is considered that the application is merely in order to delay or frustrate a removal order.

¹¹² See section 4 for further information. See also UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983 on the problem of manifestly unfounded or abusive applications for refugee status or asylum paragraph (e) (i), available at: www.unhcr.org/41bo41534.html. See also Resolution 1471 (2005) of the Parliamentary Assembly of the Council of Europe on Accelerated Procedures in CoE Member States (paragraph 8.10.2) available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/tao5/eres1471.htm> and "Guidelines on human rights protection in the context of accelerated asylum procedures" of the Council of Europe (adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies) paragraph IV (1) (d) available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec%282009%291062/4_5&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDBo21&BackColorLogged=F5D383.

UNHCR notes that in some Member States, the procedural guarantees which apply in law¹¹³ to the first instance procedure are the same for the examination of all first-time applications, regardless of whether the examination of the application is accelerated or not.¹¹⁴ This is the case in Belgium, Bulgaria, the Czech Republic, France, Germany,¹¹⁵ Italy, the Netherlands and Spain.¹¹⁶ In particular, UNHCR notes with approval that national legislation in Belgium, Bulgaria,¹¹⁷ Germany, Italy, the Netherlands and Spain provides that applicants whose applications are examined in an accelerated manner are given the opportunity of a personal interview.

In France, national legislation does not differentiate between the accelerated and regular procedures in terms of the procedural guarantees which apply in law. With regard to the personal interview, it may be omitted in law on four grounds which may apply regardless of whether the application is examined in the regular or accelerated procedures.¹¹⁸ The fact that the application is examined in the accelerated procedure is not a ground, as such, for omitting an interview. However, one of the grounds in law for channelling an application into the accelerated procedure is that a temporary residence permit has been refused on the ground that the applicant is a national of a country to which Article 1 C (5) of the 1951 Convention applies.¹¹⁹ This is also a ground for the omission of the personal interview.¹²⁰ Another ground for refusing a temporary residence permit and channelling an application into the accelerated procedure is that the application is considered to be deliberately fraudulent, or to constitute an abuse of the asylum procedures, or is considered to have been solely lodged to prevent execution of a removal order which has been issued or is imminent.¹²¹ *Préfectures* exercise a wide margin of appreciation in their interpretation of this legal provision. The personal interview may be omitted by the determining authority on a further ground, when the application is considered to be manifestly unfounded.¹²² The term ‘manifestly unfounded’ is not further defined in French legislation or guidelines and, therefore, the determining authority has a wide margin of appreciation in law in deciding whether to omit the personal interview. Since applicants have less time to complete their written application form in French in the accelerated procedure, and they do not receive the services of an interpreter or translator for this purpose, it is perhaps more likely that an application will be considered as manifestly unfounded and thus be examined without a personal interview.

Statistics from the determining authority OFPRA indicate that in the accelerated procedure, 55% of applicants are summoned to an interview, and 46% are actually interviewed.¹²³ According to the OFPRA Report, in 2008, 43% of the applications examined in the accelerated procedure were initial applications, while 57% were subsequent applications. The report maintains that, due to a change of policy, 100% of first-time applicants are now invited to a personal interview. This would suggest that, in recent practice, personal interviews were omitted when the

¹¹³ However, note that enjoyment of these procedural guarantees may be hindered in practice by the time constraints of accelerated procedures. See below.

¹¹⁴ This excludes the preliminary examination of subsequent applications.

¹¹⁵ The airport procedure provides the same guarantees as the regular procedure, but in an extremely short time frame of two days, which applies with a view to a denial of entry on the ground of a rejection of the application as manifestly unfounded. If the deadline cannot be kept or another decision is envisaged, the application will be channeled into the normal procedure).

¹¹⁶ Note that, as stated in Article 16 (2) of the New Asylum Law, legal assistance is mandatory for applicants whose applications are lodged at borders and at CIEs.

¹¹⁷ Although a personal interview is conducted in the accelerated procedure in Bulgaria, it should be noted that the sample questions for the interview are much shorter than the sample questions for an interview in the general procedure.

¹¹⁸ Article L.723-3 *Ceseda* provides that OFPRA may omit the interview where: a) the OFPRA is able to take a positive decision on the basis of elements available; b) the asylum seeker is a national of a country to which article 1C5 of the 1951 Convention is applied; c) the elements which substantiate the claim are manifestly unfounded; and d) medical reasons prevent the conduct of the interview.

¹¹⁹ Article L.723-1 *Ceseda* in conjunction with Article L.741-4-2° *Ceseda*.

¹²⁰ Article L.723-3 *Ceseda*.

¹²¹ L.741-4-4° *Ceseda*.

¹²² Article L.723-3 *Ceseda* states that OFPRA may omit the interview where “(c) *the elements which substantiate the claim are manifestly unfounded*”.

¹²³ 2008 OFPRA report.

application was a subsequent application.¹²⁴ However, during the period of the research, UNHCR audited three case files in which initial applications to OFPRA were examined without a personal interview because OFPRA considered the applications to be manifestly unfounded. Their subsequent applications were examined in the accelerated procedure, also without a personal interview.¹²⁵

In some of the other Member States surveyed, applicants whose applications are examined in an accelerated first instance procedure may not enjoy all the same procedural guarantees as applicants whose applications are examined in a regular procedure. For example, in Finland, Greece, Slovenia and the UK, the personal interview may be omitted on certain grounds set out in law.¹²⁶

In Finland, the grounds in law upon which a personal interview may be omitted are limited. If an applicant is considered to come from a safe (first) country of asylum or origin, a decision on the application should be made within seven days of the date when the minutes of the interview were completed.¹²⁷ However, the personal interview can also be omitted on safe (first) country of asylum grounds.¹²⁸ In the absence of a personal interview, and therefore an interview transcript, it is not clear in such cases how the time limits for an accelerated procedure can be applied.

However, in Greece, Slovenia and the UK, national legislation provides wide scope for the omission of the personal interview, although this is not always reflected in practice.

In Greece, national legislation provides that “*applications for asylum shall be examined with the accelerated procedure when they are manifestly unfounded or when the applicant is from a safe country of origin ... or from a safe third country*”.¹²⁹ The grounds set out for considering an application manifestly unfounded mirror the grounds set out in Article 23 (4) APD.¹³⁰ However, since new legislation entered into force (PD 81/2009), the above-mentioned legislative provision is still applicable, but is reportedly no longer implemented. In accordance with national legislation, the personal interview may be omitted when the determining authority considers the application to be manifestly unfounded.¹³¹ In practice, according to the determining authority, there is oral guidance that the interview is omitted only when an applicant claims to have left the country of origin exclusively for economic reasons, and their country of origin does not have disorderly conditions and/or is among those countries that do not produce refugees.¹³²

In Slovenia, national legislation sets out 16 grounds upon which the competent authority “*shall reject an application in an accelerated procedure as unfounded*”.¹³³ In 2008, 79% of all decisions reviewed by UNHCR were taken in

¹²⁴ UNHCR’s audit of 60 case files in France revealed eight case files concerning subsequent applications. All the subsequent applications in the sample were examined under the accelerated procedure and none of the applicants were invited to an interview: Case file 52R (AFG); Case file 58R (DRC); Case file 59R (SLK); Case file 49R (SLK); Case file 50R (PAK); Case file 51R (RUS); Case file 57R (TR); and Case file 48R (TR). See section 4 on personal interviews for further details.

¹²⁵ This may be due to the fact that the first procedure in these cases pre-dated the new policy to offer all first-time applicants a personal interview.

¹²⁶ See section 4 on personal interviews for further information.

¹²⁷ Section 104 of the *Ulkomaalaislaki* (Aliens Act 301/2004).

¹²⁸ Section 103 (1) of the *Ulkomaalaislaki* (Aliens Act 301/2004). The determining authority informed UNHCR that in practice, the personal interview is omitted on first country of asylum grounds, and not safe third country grounds. This was confirmed by UNHCR’s audit of case files. None of the audited cases concerning safe countries of asylum (audited cases 98, 99, 100, 102, 106 and 107) included interviews with applicants. In all of these cases the applicant had been granted protection status elsewhere.

¹²⁹ Article 17 (3) PD 90/2008.

¹³⁰ With the exception of Article 23 (4) (c) on safe country of origin, and safe third country which are mentioned explicitly in Article 17 (3) PD 90/2008 as grounds for examination in the accelerated procedure.

¹³¹ Article 10 (2) (c) PD 90/2008.

¹³² Of the 202 case files that UNHCR audited in Greece, the interview was omitted in ten cases because the applicants, all Pakistani nationals, allegedly declared that they arrived in Greece for economic reasons. In all the other case files, an interview was conducted. However, note that UNHCR has very serious concerns regarding the quality of personal interviews in ADA, Athens. See section 4 for further details.

¹³³ Article 55 IPA.

the accelerated procedure.¹³⁴ By law, the personal interview may be omitted whenever the accelerated procedure is conducted,¹³⁵ and in practice, no interviews are held in that procedure. The Administrative and Supreme Courts have held that this does not constitute a breach of Article 12 (2) (c) APD on the ground that prior to the decision to submit the application to the accelerated procedure, the determining authority conducts an application interview with the applicant. This is considered to constitute a meeting in terms of Article 12 (2) (b) APD which permits Slovenia to omit the ‘personal interview’.¹³⁶

In the UK, although national rules establish seven grounds upon which the personal interview may be omitted,¹³⁷ published written policy states that the determining authority normally interviews each applicant before refusing an asylum claim substantively.¹³⁸ In practice, in the accelerated detained fast track (DFT) and detained non-suspensive appeals (DNSA) procedures, the applicant is offered the opportunity of a personal interview.

In addition to the omission of the personal interview, UNHCR’s research also noted the following differentiated standards relating to the accelerated procedure in some Member States:

- The determining authority is only required to refer to country of origin information relating to general circumstances in the country of origin in the accelerated procedure. This is as opposed to more specific, detailed, in-depth and individual country of origin information, which must be taken into account in regular procedure, for example in Slovenia.¹³⁹ Moreover, if the general credibility of the applicant is not established, country of origin information does not need to be taken into account at all.¹⁴⁰
- Decisions are taken by the interviewer in the accelerated procedure, rather than the Chair of the determining authority, in Bulgaria. Decisions taken in the accelerated procedure are not subject to the same quality control as in the general procedure.

Recommendations

All applicants for international protection should enjoy the same procedural safeguards and rights, regardless of whether the examination is prioritized, accelerated or conducted in the regular procedure.

All applicants for international protection should be given the opportunity of a personal interview. The personal interview should only be omitted when the determining authority is able to take a positive decision with regard to refugee status on the basis of the available evidence, or when it is certified that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control.

Article 12 (2) (c) APD should be amended and the references to Articles 23 (4) (a) (irrelevant issues), 23 (4) (c) (safe country of origin), 23 (4) (g) (inconsistent, contradictory, improbable and insufficient representations) and 23 (4) (j) (merely to delay or frustrate removal) should be deleted.¹⁴¹

¹³⁴ Statistics are not publicly available. UNHCR reviewed all decisions taken in 2008. Of the 65 reviewed decisions, 51 were decided in the accelerated procedure and 7 were decided in the regular procedure.

¹³⁵ Article 46 (1), indent 1 of the IPA states that “*the personal interview may be omitted: when the competent authority may decide in an accelerated procedure*”.

¹³⁶ U728/2008, 9 April 2008 and U129/2008, 6 February 2008.

¹³⁷ Immigration Rules HC 395, paragraph 339NA. See Section 4 for further details.

¹³⁸ API, *Conducting the Asylum Interview*.

¹³⁹ Article 23 IPA.

¹⁴⁰ Article 22/4 IPA.

¹⁴¹ Deletion of this provision is suggested in recast Article 13(2) of the APD Recast Proposal 2009.

Impact of time limits on procedural standards

As stated above, UNHCR is aware that the effectiveness of procedural guarantees and rights in law may be nullified or adversely hindered in practice by the speed with which the procedure is conducted. In accordance with EU law, the examination of the application must not be accelerated to such an extent that it renders the exercise of rights afforded by the *acquis*, including the APD, practically impossible or excessively difficult and, therefore, nullifies the effectiveness of legal guarantees.¹⁴² Moreover, acceleration should not prejudice an adequate and complete examination of the application.¹⁴³ In the context of accelerated examinations, this may require Member States to take specific action to facilitate the exercise of rights and guarantees in order to ensure an adequate and complete examination.

UNHCR is concerned that in some Member States, in certain circumstances, the examination of applications is accelerated to such an extent that it renders excessively difficult the exercise of rights conferred by the APD.¹⁴⁴ Some stakeholders interviewed by UNHCR in this research have expressed the concern that very short time limits do not permit an adequate and complete examination of the application in accordance with Article 23 (2) APD.

Use of time limits

The overwhelming majority of the Member States surveyed have imposed time limits within which the accelerated examination or certain accelerated procedures should be conducted. The exception is the accelerated procedure in Slovenia which is not subject to specific time limits. However, the comparison of time limits across the procedures in Member States is not straightforward.

The time limits run from different points in time, depending on the Member State, and sometimes depending on the procedure. For example, in the Czech Republic, the four-week time limit for the accelerated border procedure begins when the applicant declares an intention to apply for international protection. However, the 30 day accelerated procedure under Section 16 ASA begins when the formal application is made. In some other surveyed Member States, the time limit starts from when the determining authority formally receives the application.¹⁴⁵

In Bulgaria, the three-day time limit begins the day after entry into force of the decision that Bulgaria is the state responsible to examine the application; or in the case of a subsequent application, the day after the application is registered.¹⁴⁶

¹⁴² European Community law has established that “*the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by Community law*”: Paragraph 47 of Unibet judgment and paragraph 5 of Rewe judgment, Case 33/76.

¹⁴³ Article 23 (2) APD.

¹⁴⁴ See, for example, *Implementation of the Aliens Act 2000: UNHCR’s Observations and Recommendations*, July 2003 with regards to the accelerated procedure in the Netherlands. In 2007, the Committee against Torture also expressed its concerns with respect to the Dutch accelerated procedure in the Concluding Observations. In the UK, in its fifth Quality Initiative report to the Minister, (March 2008), UNHCR expressed concern that the speed of the DFT process may inhibit the ability of case owners to produce quality decisions.

¹⁴⁵ Belgium, France, Greece and Italy. The Czech Republic, with regard to the 30 day Section 16 procedure according to Section 16 (3) ASA. Germany, with regard to the two day time limit for a denial of entry in the context of the airport procedure (Section 18 a (3), (6) No. 2 APA).

¹⁴⁶ This period starts after the Dublin II procedure in Bulgaria (which precedes the accelerated procedure) is completed, and the decision that Bulgaria is the responsible state enters into force (7 days after the decision has been issued, if it has not been appealed; or, if appealed, the day the judicial appeal body confirms that Bulgaria is the responsible state). In interviews, stakeholders stated that the approximate duration of the Dublin II procedure in Bulgaria is 10 days. In those cases where Bulgaria accepts the decision of another Member State that Bulgaria is the responsible state, this term begins from the moment that the documentation relating to the applicant is received in accordance with Article 68 (2) LAR.

In the Netherlands, the 48 hour procedure begins with the preliminary interview regarding identity, nationality and travel route, which is conducted by the Aliens Police or, at Schiphol airport, by the Royal *Marechaussee*. According to Aliens Circular C10/1.2., this should commence not more than four hours after an applicant reports to start the examination of the application. However, it should be borne in mind that applicants can be asked to wait in one of the so-called Temporary Emergency facilities. At the time of UNHCR's research, applicants were held there for periods sometimes exceeding three months before they were able to report to lodge the application and start the examination procedure.

In the UK, time limits for the detained fast track (DFT) and detained non-suspensive appeal (DNSA) procedures initiate from the moment the applicant arrives at the detention centre and has an induction.¹⁴⁷

In Finland, the seven-day time limit does not begin to run until the date the report of the personal interview is completed, and in Spain the time limits run from the moment the application is formalized, which occurs after the application interview takes place and the completed application is signed by the applicant.¹⁴⁸

Time limits are also expressed variably in procedural hours, working days or calendar days, depending on the Member State and applicable law.

In some Member States, there is one overall time limit for the conduct of the accelerated examination. In some of the Member States surveyed, in addition to the overall time limit, there are shorter time limits for specific procedural steps.¹⁴⁹ For example, in the Netherlands there are strict time limits for each procedural step.¹⁵⁰ In the regular procedure, the applicant is given a rest period of six days before the personal interview. This period does not apply, however, in the accelerated procedure, in which the personal interview should take place as soon as possible after the screening interview, subject to the two procedural hours of legal assistance provided after the initial screening interview and before the detailed personal interview.¹⁵¹ In the regular procedure, following receipt of an intended decision to reject, the applicant has four weeks within which to submit any views or further evidence. In the accelerated procedure, the applicant has only three hours after receipt of the interview report, with legal assistance, to consider the report of the personal interview, to discuss the intended decision and submit any further views or evidence.¹⁵²

In Spain, in accordance with the New Asylum Law, an initial decision in the accelerated border procedure (applied at borders and at internment centres) should be adopted in four working days. In the case of an initial negative decision, the applicant can, within two working days of notification, request a re-examination of the application. A decision on this request for re-examination should be taken in two working days from the date the request for re-examination was lodged.

¹⁴⁷ See *Asylum Instruction, 'Fast Track process Overview'*.

¹⁴⁸ Article 21 (2) New Asylum Law, with regard to the border procedure (and applications lodged by applicants in internment centres), and Article 25(4) New Asylum Law (which refers to Article 24 (3) New Asylum Law) with regard to in-country applications.

¹⁴⁹ In France, the applicant must complete and submit the OFPRA application form within 15 calendar days of notification of the refusal to issue a temporary residence permit. An applicant who is issued a temporary residence permit has 21 days to complete and submit the OFPRA application form: Article R. 723-1, al.4 *Ceseda*. According to the 2008 OFPRA Activity Report, *Préfectures* are flexible regarding the requirement that applicants have a 15-day time frame to transmit their application. In Belgium, additional evidence must be submitted within 24 hours of the personal interview if the applicant is detained, or within five days for other accelerated procedures.

¹⁵⁰ There are strict time periods for legal assistance, the detailed personal interview, the provision of supplementary or amended information and evidence, the intention procedure and the decision.

¹⁵¹ Article 3.111 in conjunction with 3.112 (1) (b) Aliens Decree. At the time of this research, there was a proposal to reform these procedural time lines so that the initial screening interview is conducted on day 1, day 2 is reserved for the submission of any corrections to the report of the screening interview and to prepare for the detailed personal interview, and on day 3 the personal interview is conducted.

¹⁵² Article 39 Aliens Act in conjunction with 3.115 (2) (a), 3.117 (3) and 3.118 (2) Aliens Decree, C15 Aliens Circular.

In some Member States, if a decision cannot be taken within the overall time limit or if the time limit is exceeded, the application is further examined within the time frames of the regular procedure.¹⁵³ As such, in the Czech Republic, if the time limit is exceeded when the applicant is detained at the border, s/he is allowed to enter the territory.¹⁵⁴ Similarly, in Germany, if an application in the airport procedure is not rejected as manifestly unfounded within the time limit of two days, the applicant is admitted to the territory and the application will be further dealt with in the regular procedure.¹⁵⁵ On the other hand, in the Netherlands, when the applicant is detained at the border, a decision to transfer the application into the regular procedure may result in the applicant being released from detention and accommodated in an open reception centre in-country; or the applicant may remain in detention.¹⁵⁶

In some Member States, exceeding the time limit may mean that a certain decision may no longer be issued. For example, in the Czech Republic, exceeding the 30 day time limit means that the application cannot be rejected as manifestly unfounded.¹⁵⁷ In Finland, if the time limit in which to take a negative decision on safe (first) country of asylum or safe country of origin grounds is exceeded, the decision will be taken that the application is manifestly unfounded instead. That decision is not subject to a time limit, but has the same procedural consequences with regards to the enforcement of the decision and appeal rights.¹⁵⁸

On the other hand, in other Member States, the time limits for the determining authority are merely indicative and not binding.¹⁵⁹ In Belgium, if the applicant is detained at the border and the time limit of 15 days is exceeded, detention continues. If after two months, no final decision has been taken on the application, the applicant is released from detention.¹⁶⁰ In France, the time limit for a decision by the determining authority on the application is also indicative.¹⁶¹ However, if the applicant is held in an administrative retention centre, the maximum duration of detention is 32 days.¹⁶² Similarly, in Italy, the time limit for a decision by the determining authority on the application is also indicative. If the applicant is detained in a CIE and the first instance decision is not taken within the relevant time limit, detention is prolonged for a maximum period of six months.

Bearing in mind all the variances noted above, UNHCR has noted that the legally stipulated time frames of accelerated procedures vary widely across Member States.

¹⁵³ Bulgaria, the Czech Republic, the Netherlands and Spain (New Asylum Law: at borders, if no decision is notified to the applicant within the established time frames, the application will be admitted to the regular RSD procedure. In the case of applications lodged at CIEs, the application will be admitted to the accelerated RSD procedure).

¹⁵⁴ Section 73(4) ASA.

¹⁵⁵ Section 18 a (3), (6) No. 2 APA.

¹⁵⁶ The relevant criteria are set out in Aliens Circular C12/2.2.1. It should be noted that there is no maximum duration of detention for aliens in Dutch law.

¹⁵⁷ Section 16 ASA.

¹⁵⁸ *Ulkomalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009) section 101 (3).

¹⁵⁹ Belgium, France and Italy. However, in Belgium, in the explanatory statement of the Law of 2006, amending the Aliens Act, it was made clear by the Government that exceeding these time limits may cause a backlog which would oblige the Commissioner-General to develop a management plan to address the backlog; and a failure to meet time limits would be taken into account in the evaluation of the work of the Commissioner-General and all staff. In Spain, with the New Asylum Law, if the three month time limit for a decision in the in-country accelerated procedure is exceeded, no specific consequence is established in law or guidelines. It is too early to draw any conclusion on practice at the time of writing.

¹⁶⁰ According to information obtained by the NGOs CIRE and *Vluchtelingenwerk Vlaanderen*, there exists an unofficial 'gentleman's agreement' between the AO and the CGRA to grant entry to the territory to those applicants whose application requires examination for longer than two months, especially where complex cases or vulnerable persons are involved. NGOs are concerned that this is a discretionary and *ad hoc* arrangement. See Note on the evaluation of the asylum procedure distributed during the hearing in the Senate, 24 March 2009.

¹⁶¹ However, note that if the applicant is held in an administrative retention centre, and s/he fails to submit the OFPRA application form within five days, this time limit is not indicative and his/her application can be declared inadmissible.

¹⁶² Article L. 552-1 and L 552-7 *Ceseda*.

For example, in Spain, with regard to the in-country accelerated procedure, a decision should be adopted within three months of the application being lodged.¹⁶³ The in-country accelerated procedure for applicants in Belgium who are not detained is two calendar months, and the average accelerated procedure in Finland takes 67 days.¹⁶⁴

The accelerated procedure is approximately one month in the Czech Republic,¹⁶⁵ which was also the duration of the accelerated procedure in Greece when it operated.¹⁶⁶

In France, by contrast, the in-territory accelerated procedure for applicants who are not detained is 15 days.¹⁶⁷ This is also the time frame for examination of the applications of those in detention in Belgium.¹⁶⁸

Some time frames for the examination of applications are extremely short. The airport procedure in Germany has a time frame of two days.¹⁶⁹ The detained fast track procedure in the UK has a time scale of three working days, and the accelerated procedure in Bulgaria also has a three-day time frame.¹⁷⁰ The accelerated procedure in the Netherlands has a time frame of 48 procedural hours, which equates to approximately five working days. The accelerated procedure for those in detention in France is 96 hours,¹⁷¹ nine days in Italy, and six or ten days for those in the detained non-suspensive appeal (DNSA) procedure in the UK. In Spain, the timeframe for the accelerated procedure conducted at the border and for applicants who are held in detention centres is four working days, extendable up to a maximum of eight working days if a request for re-examination is made. Belgium also has a five-day procedure for applications by EU nationals.¹⁷²

UNHCR recognizes that with regard to applicants who are detained, it is not in their interests that the examination of their application is prolonged if this extends the duration of their detention.¹⁷³ Nevertheless, UNHCR recalls that persons who are detained may be persons in need of international protection. As mentioned below with regards to the grounds for acceleration of the examination, the national legislation of some Member States permits the accelerated examination of an application simply on the ground that the applicant is detained, or when the ap-

¹⁶³ Article 25 (4) of the New Asylum Law.

¹⁶⁴ Statistics for average processing times at the Immigration Services are available at <http://www.migri.fi/netcomm/content.asp?article=3129>.

¹⁶⁵ Section 16 (3) ASA states that “A decision to reject an application due to its manifestly unfounded nature shall be issued not later than 30 days from the date of commencement of the proceedings on the granting of international protection.” This is 30 calendar days. With regard to the border procedure, Section 73(4) ASA states that “The Ministry will decide on the application for international protection within 4 weeks of the date of the Declaration on International Protection made by an alien.”

¹⁶⁶ Article 17 (4) PD 90/2008.

¹⁶⁷ In practice, the median duration for the examination of initial applications in the accelerated procedure is 21 days, and four days for subsequent applications: OFPRA Activity Report 2008, p. 12.

¹⁶⁸ Article 52/2, § 2, 1° of the Aliens Act – administratively detained asylum seekers; and Article 52/2, §2, 2°- asylum applicants in prison. In Belgium, AO takes about 10 days to transfer an application to the CGRA, which then has 15 days to take a decision in the accelerated procedure for detained applicants. This time limit is however not binding. On average, the process takes about three weeks.

¹⁶⁹ This is the time within which the determining authority should issue a decision that an application is manifestly unfounded if it wishes to deny the applicant’s admission to the territory.

¹⁷⁰ Note that this begins seven days after the decision in the Dublin II procedure which stakeholders estimated takes approximately ten days. Therefore, approximately 17 days from the date the applicant is registered. However, this is not applicable for subsequent applications.

¹⁷¹ Article R 723-3 *Ceseda*.

¹⁷² Article 57/6, 2° of the Aliens Act: if the statement of the applicant does not raise issues which are relevant to qualification for international protection.

¹⁷³ In the case of border procedures that derogate from Article 35 (1) APD (which requires that border procedures are conducted in accordance with the basic principles and guarantees of Chapter II), a decision must be taken within four weeks; otherwise the applicant must be granted entry to the territory in order for the application to be processed in accordance with the other provisions of the APD: Article 35 (4) APD.

plicant is detained at the border.¹⁷⁴ These grounds for accelerating the examination are clearly unrelated to the merits of the application itself, which may be strong. Moreover, in France, the applications of persons who are detained in administrative retention centres are routinely considered to be an abuse of the asylum procedure, without reference to the reasons for the application and, therefore subject to a 96 hour accelerated examination.¹⁷⁵

All applicants, including those in detention, must have an effective opportunity to substantiate their application in accordance with Article 4 of the Qualification Directive, to obtain relevant documentary evidence, if any, and to consult effectively with a legal adviser or other counsellor. Moreover, the determining authority requires time to prepare the personal interview, conduct the interview, gather country of origin or other information, assess all the relevant evidence and draft a well-reasoned decision.

The extremely shortened time frame of some accelerated procedures may mean that applicants whose applications are examined in an accelerated manner are significantly disadvantaged, as compared to applicants whose applications are examined within the regular time frames. The following were highlighted as adverse factors by interviewees:

- **Less time to submit application form to determining authority.** For example, in France, according to national law, a person who is detained must complete and submit a written asylum application form in French within five days of being informed of their right to apply for asylum. Otherwise, any application will be considered inadmissible.¹⁷⁶ Those persons in-country who have not been issued a temporary residence permit, whose applications must therefore be examined in the accelerated procedure, must complete and submit the application form in French within 15 calendar days.¹⁷⁷ They must do this without the services of an interpreter being provided by the state. Applicants in-country who have been issued a temporary residence permit (so that the application is to be examined in the regular procedure) have 21 days within which to submit the written application form to the determining authority.

¹⁷⁴ Belgium: Article 52/2 Aliens Act sets a time frame of 15 calendar days for the examination of applications by persons detained at the border or in-territory or detained in prison. The Czech Republic: Section 73 (4) ASA which provides that when an application is submitted by an applicant at the border and s/he is not allowed entry to the territory, the application should be examined within four weeks, otherwise entry to the territory must be granted. This is a transposition of Article 35 (4) APD on border procedures. Italy: Article 28 (1) d.lgs. 25/2008 provides that when the applicant is detained in a CIE, the determining authority must issue a decision on the application within 9 days of receipt of the documentation concerning the applicant (rather than 30 days). In Spain, the New Asylum Law applies the border procedure to applications lodged by applicants held in internment centres. (Note that according to Spanish law, aliens who are placed in internment centres are under so-called 'administrative detention' and not regular detention, and are referred to as 'interned persons' instead of detainees, meaning that they are not under the same legal regime. Under the 'administrative detention' regime, they are only held in the internment centres for expulsion/ return purposes, for a maximum of 60 days, after which they are set free if return cannot take place. People held in regular detention that apply for asylum have their application examined in the in-country asylum procedure). In Germany, only so-called *retention* at the airport triggers a deadline of two days from the submission of a claim for a rejection as manifestly unfounded if entry to the territory is to be denied (Section 18a APA). The examination of applications by applicants otherwise in detention is not accelerated but simply prioritized according to the internal guidelines of the BAMF (cf. Internal Guidelines for Adjudicators: Priority (1/1), Date: 12/08, p. 1.).

¹⁷⁵ This is based on the *Préfetures'* interpretation of Article L.741-4-4 *Ceseda*.

¹⁷⁶ *Loi du 26 novembre 2003* and *Décret No 2006-617 du 30 mai 2005 relatif à la rétention et aux zones d'attente*. According to Article L. 551-3 *Ceseda*, when a foreigner arrives at the administrative retention centre, s/he receives the notification of the right to apply for asylum. S/he is informed in particular that his/her asylum application will not be admissible during his/her period in retention if it is not formulated within five days of notification.

¹⁷⁷ 15 calendar days from the date of notification regarding the non-issue of a temporary residence permit. According to the *Préfecture* of Rhône, if the applicant fails to meet the 15 day deadline either the *Préfecture* would take a decision to oblige the applicant to leave the territory or it would deliver another application form for "humanitarian reasons" to enable the applicant to apply for international protection.

- **Less time to prepare for interview.** For example, in 12 out of 16 audited case files in accelerated procedures in the Czech Republic, the personal interview took place on the same day as the application was lodged.¹⁷⁸ This is particularly the case at the airport where applicants are informed of the interview the same day it takes place. In Germany, in the airport procedure, there is a deadline of two days for a decision on the application if entry is to be denied, so the interview must be carried out before the expiry of this deadline. The law speaks of carrying out the interview “without undue delay”.¹⁷⁹ In the Netherlands, applicants have just two hours with a lawyer before the personal interview. In the regular procedure, by contrast, applicants have a six day rest period before the personal interview takes place. In the UK, the personal interview takes place on the day after arrival at the detention centre in the detained fast track procedure.
- **Less time within which to contact and consult a legal adviser.** For example, lawyers interviewed by UNHCR in Belgium stressed that their appointment is often too late to provide legal assistance to applicants in the accelerated border procedure, and that they face practical difficulties finding a suitable interpreter at late notice.¹⁸⁰ Of the 19 audited case files concerning the accelerated border procedure at Brussels airport, in only three instances was a lawyer present at the interview with the applicant.¹⁸¹ In Germany, access to a lawyer is guaranteed in the airport procedure only after the personal interview.¹⁸² Consequently, there is no organizational support to access a lawyer before the interview¹⁸³ which should take place before the deadline of two days has expired. UNHCR was also informed that applicants in detention in France and Italy have little practical opportunity to contact and consult effectively with legal advisers, notwithstanding their right to do so in accordance with Article 15 (1) APD.
- **More difficulty in conducting a gender-appropriate interview.** For example, the short three day time frame for the detained fast track (DFT) procedure in the UK and the 96 hour procedure in France means that the interview date cannot be postponed, if required, in order to satisfy a request for an interviewer and interpreter of the same sex.¹⁸⁴ In the UK DFT procedure, applicants cannot refuse to comply with the interview summons on the ground that the interview is not gender-appropriate.
- **Less time for the applicant to gather and submit additional evidence.** For example, applicants whose applications are examined in the accelerated procedure in the Netherlands only have three hours following receipt of the interview report in which to provide any additional evidence. In the regular procedure, applicants have four weeks. In the UK detained fast track procedure, a decision-maker can extend the timescale on a discretionary basis if it is considered that the further evidence an applicant proposes to provide is central or critical to the issues on which the decision is likely to turn. By contrast, applicants have five days after the interview in the regular procedure within which to submit additional evidence.¹⁸⁵ Applicants

¹⁷⁸ This was observed in practice, despite the fact that under Section 59 of CAP a summons to any action in the proceedings which requires the presence of an applicant (i.e. including a summons to an interview) must be in writing and delivered to the applicant sufficiently in advance, normally not later than five days in advance.

¹⁷⁹ Section 18a (1) 4 APA (“unverzüglich”).

¹⁸⁰ This relates to the interpreter services provided by the Local Bureau of Legal Assistance to facilitate communication between lawyers and their clients.

¹⁸¹ On the basis of the audit, it was not possible to determine why the applicants in the 16 cases did not have a lawyer present, and it was not possible to determine whether they benefited from legal assistance.

¹⁸² Section 18 a (1) 5 APA.

¹⁸³ According to an NGO report, for asylum-seekers arriving at Duesseldorf Airport, provision is made for assistance to be provided by an employee of an NGO before the interview; this mechanism is not applied at other airports. Cf. Leidt, Skerutsch, *Erläuterung zum Asylverfahrensgesetz – vorgeordnetes Verfahren*, German Red Cross 2008, p. 18, footnote 19.

¹⁸⁴ In France, such a request is rarely satisfied in any procedure, mainly for practical reasons.

¹⁸⁵ See Operational Instruction on *Flexibility in the Fast Track Process*.

in Belgium who are detained have 24 hours to submit any further evidence, and other applicants whose applications are examined in an accelerated manner have five days.

- Some stakeholders in the UK have stated that the accelerated procedures are too quick to allow applicants an effective opportunity to disclose traumatic experiences.¹⁸⁶
- **Less time for the determining authority to gather and assess the evidence.** For example, UNHCR's audit of case files in the Czech Republic observed that there was less country of origin information in the case files of applications which were examined in the accelerated procedure.¹⁸⁷ In Greece, where most applications were examined in the accelerated procedure at the time of UNHCR's research, there was no evidence from the case files, decisions or observation of interviews that country of origin information was used in the assessment of applications for international protection. In the UK's detained fast track procedure, decision-makers have only one day within which to gather and assess the necessary country of origin or other information.¹⁸⁸ In the course of this research, UNHCR conducted interviews with interviewers and decision-makers of the determining authorities. A number of those interviewees expressed concern about the time limits in which they have to conduct the examination, which, they felt, constrained their ability to investigate thoroughly the issues.
- **Less time for the determining authority to draft the decision.** An emphasis on speed risks compromising the quality of assessment and decisions.¹⁸⁹

Moreover, stakeholders reported that shortcomings in the asylum process generally, which affect all applicants, tend to be accentuated when the examination of the application is accelerated.¹⁹⁰

Recommendation

The examination of the application must not be accelerated to such an extent that it renders the exercise of rights, including those afforded by the APD, excessively difficult or impossible. Where Member States set time limits for procedural steps, these should be of a reasonable length which permits the applicant to pursue the claim effectively, and the determining authority to conduct an adequate and complete examination of the application.

This recommendation applies also to applicants in detention or in border or transit zones, who must have an effective opportunity to substantiate their application in accordance with Article 4 of the Qualification Directive, obtain relevant evidence, and to consult effectively with a legal adviser.

¹⁸⁶ Bail for Immigration Detainees, *Briefing Paper on the detained fast track – February 2009*; Independent Asylum Commission, *Deserving Dignity: Third Report of Conclusions and Recommendations, July 2008*.

¹⁸⁷ In five case files, there was no COI in the case file, and UNHCR considered that the application raised issues which required the gathering and assessment of COI: Xo10, Xo12, Xo17, Xo28, and Xo64. In two cases, there was only one source of COI and UNHCR considered that the application warranted reference to further sources of COI: Xo19 and Xo35.

¹⁸⁸ See Operational Instruction on *Flexibility in the Fast Track Process*.

¹⁸⁹ See section 3 for further information. In the UK, in its fifth Quality Initiative report to the Minister, (March 2008), whilst noting some examples of good practice, UNHCR noted that the findings from the QI audit indicated that Detained Fast Track (DFT) decisions often failed to engage with the individual merits of the claim. Decisions made within the DFT procedure were often based on incorrect application of refugee law concepts and adopted an erroneous structural approach to asylum decision-making. UNHCR expressed concern that the speed of the DFT process may inhibit the ability of case owners to produce quality decisions. In Germany, certain shortcomings in the airport procedure potentially linked to the high time pressure were criticized in a report published by an NGO, see I. Welge, *Hastig, unfair, mangelhaft – Untersuchung zum Flughafenverfahren gem. § 18a AsylVfG*, 2009, p. 220 et seq.

¹⁹⁰ For example, delays in the provision of information, a lack of competent and specialised lawyers, weak communication systems between the determining authority, applicant, legal advisers and reception centres.

Impact of reception conditions on procedural guarantees in accelerated procedures

It must also be noted that different standards in the reception of applicants whose applications are examined in an accelerated manner may have an adverse impact on procedural guarantees.

In France, applicants whose applications are examined in the accelerated procedure do not receive a temporary residence permit¹⁹¹ and therefore do not benefit from the same reception conditions in-territory as applicants whose applications are examined in the regular procedure. They have no access to social benefits¹⁹² (financial benefits¹⁹³ and accommodation centres)¹⁹⁴ or to the regular social security scheme.¹⁹⁵ This has an adverse impact upon their ability to exercise procedural rights as compared to applicants whose applications are examined in the regular procedure. For example, without a right to accommodation in the reception centres for asylum seekers, applicants do not benefit from the information, guidance and assistance which are provided to those in these centres.¹⁹⁶ They often receive very little notice of the date of their personal interview because notification is sent by post.¹⁹⁷ Furthermore, as they do not receive any financial support, they may not have the money to fund their travel to attend the personal interview at OFPRA in Paris.¹⁹⁸ Travel costs to Paris for applicants in the regular procedure to attend the personal interview are paid by the state. As such, there is inequality in the treatment of applicants in the regular and accelerated procedures. According to NGOs, this different treatment combined with shorter time limits, adversely affects the ability of applicants in the accelerated procedure to complete their OFPRA application forms in French and provide supporting documentation, and to prepare for and attend the personal interview.¹⁹⁹

UNHCR has consistently emphasized that appropriate reception conditions for asylum-seekers are essential to ensure a fair and effective examination of protection needs.²⁰⁰

¹⁹¹ They do however have the right to remain in France until notification of the decision of the OFPRA (cf. Article L.742-6 *Ceseda*). This is in compliance with Article 7 of the APD which states that the right to remain shall not constitute an entitlement to a residence permit.

¹⁹² However according to a recent decision from the Council of State (*Conseil d'Etat, Décision du 16 juin 2008, n°300636*), all asylum seekers, whatever the procedure (regular or accelerated) which is applied to them should benefit from the ATA (*Allocation Temporaire d'Attente*), until the OFPRA decision (the present case concerned a national of a "safe country of origin", but the legal reasoning is the same for all grounds upon which applications are processed under French accelerated procedure).

¹⁹³ ATA (*Allocation Temporaire d'Attente*).

¹⁹⁴ In a CADA (*Centre d'Accueil pour Demandeurs d'Asile*).

¹⁹⁵ CMU (*Couverture Maladie Universelle*).

¹⁹⁶ Applicants whose applications are examined in the regular procedure reside in specialized reception centres (CADA: *Centre d'Accueil pour Demandeurs d'Asile*) which provide social and legal guidance to applicants. Some "départements" (counties) do not have reception facilities for asylum seekers while others have facilities for all foreigners, and others have specific 'reception platforms' (*plateformes d'accueil*) for asylum seekers which fulfill different tasks.

¹⁹⁷ In practice, given the short time period for summoning the applicant for an interview, it happens that some applicants do not receive the letter in due time (cf. Cimade, "*Main basse sur l'asile*"; June 2007).

¹⁹⁸ Unless they are detained in an administrative retention centre, in which case they are escorted to Paris for the personal interview, or have a video-interview if detained in Lyon's administrative retention centre or *Mayotte*.

¹⁹⁹ In particular, the CFDA (*Coordination Française pour le Droit d'Asile*) which gathers the following member agencies: ACAT (*Action des chrétiens pour l'abolition de la torture*), Act-Up Paris, Amnesty International – French section, APSR (*Association d'accueil aux médecins et personnels de santé réfugiés en France*), CAEIR (*Comité d'aide exceptionnelle aux intellectuels réfugiés*), CASP (*Centre d'action sociale protestant*), Cimade (*Service oecuménique d'entraide*), Comede (*Comité médical pour les exilés*), ELENA, FASTI (*Fédération des associations de soutien aux travailleurs immigrés*), France Libertés, Forum Réfugiés, FTDA (*France terre d'asile*), GAS (*Groupe accueil solidarité*), GISTI (*Groupe d'information et de soutien des immigrés*), LDH (*Ligue des droits de l'Homme*), MRAP (*Mouvement contre le racisme et pour l'amitié entre les peuples*), Association Primo Levi (*Soins et soutien aux victimes de la torture et des violences politiques*), Secours Catholique (Caritas France), SNPM (*Service national de la pastorale des migrants*), SSAE (*Service social d'aide aux émigrants*).

²⁰⁰ See relevant Conclusions of UNHCR's Executive Committee, in particular ExCom Conclusions No. 93 "Conclusion on reception of asylum-seekers in the context of individual asylum systems", No. 44 "Detention of refugees and asylum-seekers" and No. 47 "Refugee children", No. 105 "Conclusion on Women and Girls at Risk", No. 107 "Conclusion on Children at Risk", all available at <http://www.unhcr.org/refworld/type/EXCONC.html>.

Impact of detention on procedural guarantees in the accelerated procedure

Some of the Member States surveyed examine applications in an accelerated manner when the applicant is detained.²⁰¹ In France, the applications of persons who are detained in administrative retention centres are routinely considered to be an abuse of the asylum procedure and, therefore subject to a 96 hour accelerated examination.²⁰²

In the UK, an applicant whose application is submitted to the accelerated procedures is detained.²⁰³ The detained accelerated procedures in the UK have been criticized for their failure to comply with the terms of Article 18 (1) APD which states that Member States shall not hold a person in detention for the sole reason that s/he is an applicant for asylum. Nevertheless, the detained accelerated procedures have successfully withstood challenges to their legality brought before the national courts²⁰⁴ and before the European Court of Human Rights.²⁰⁵ The UK Government has recently chosen to opt out of the proposed recast Reception Conditions Directive in part because opting in would have made it harder for the determining authority to operate the detained accelerated procedures.²⁰⁶ The issue remains contentious. In the UK, applicants are in detention throughout the detained fast track procedures. Children can be detained with their parents. The determining authority reported to the Children's Commissioner in England and Wales that 991 children were detained across the detention estate during 2008.²⁰⁷

The detention of asylum-seekers is, in the view of UNHCR, inherently undesirable.²⁰⁸ This is even more so in the case of vulnerable groups such as children.

Applicants' enjoyment of the procedural guarantees and rights conferred by the APD and national legislation may be even further impeded when the applicant is detained. Interviewees highlighted in particular that access to NGOs and legal advisers may be severely curtailed,²⁰⁹ and that detainees experience severe constraints on their ability to gather elements in support of their application.

²⁰¹ Belgium, the Czech Republic and Italy. Belgium: Article 52/2 Aliens Act sets a time frame of 15 calendar days for the examination of applications by persons detained at the border or in-territory or detained in prison. The Czech Republic: Section 73 (4) ASA which provides that when an application is submitted by an applicant at the border and s/he is not allowed entry to the territory, the application should be examined within four weeks; otherwise entry to the territory must be granted. An accelerated procedure does not apply to applicants detained in in-country detention centres. Italy: Article 28 (1) d.lgs. 25/2008 provides that when the applicant is detained in a CIE, the determining authority must issue a decision on the application within 9 days of receipt of the documentation concerning the applicant (rather than 30 days). In Spain, the New Asylum Law applies the border procedure to applications lodged by applicants held in internment centres. (Note that according to Spanish law, aliens who are placed in internment centres are under so called 'administrative detention' and not regular detention, and are referred to as 'interned persons' instead of detainees, meaning that they are not under the same legal regime and are only in the centres for expulsion/ return purposes with a maximum of 40 days after which they are set free if return cannot take place. People held in regular detention that apply for asylum have their application examined in the in territory asylum procedure). In the Netherlands, asylum seekers arriving at Schiphol airport whose requests are handled in the accelerated procedure are detained at the airport.

²⁰² According to the 2008 OFPRA Activity Report, applicants held in administrative retention centres represented 18% of the applications examined in the accelerated procedure. Statistics from the same report indicate that 72% of applicants held in retention centres are invited to an interview and that the actual rate of interviews for this category in the accelerated procedure is 57%.

²⁰³ With reference to the detained fast-track (DFT) and detained non-suspensive appeals (DNSA) procedures.

²⁰⁴ *R (ex p Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481.

²⁰⁵ *Saadi v UK* 13229/03 European Court of Human Rights 29.1.08.

²⁰⁶ Letter from Lin Homer, Home Office to UNHCR dated 6.3.09.

²⁰⁷ 11 Million: *the arrest and detention of children subject to immigration control*, Report following the Children's Commissioner for England and Wales' visit to Yarl's Wood Immigration Removal Centre; 2009.

²⁰⁸ See EXCOM Conclusion No. 44 (XXXVII) and UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, February 1999.

²⁰⁹ NGOs may only visit detention centres on specific days and/or only in response to a specific referral.

According to the NGO Cimade,²¹⁰ applicants who are detained in certain administrative retention centres in France sometimes face insurmountable practical difficulties.²¹¹ The application form for asylum is not always handed out in due time by staff in the detention centres; and some centres prohibit the possession of pens which are regarded as dangerous objects. The application form must be completed in writing in French within five days without the services of an interpreter provided by the state.²¹² Sometimes the application form is completed in the language of the applicant and Cimade endeavours to find an interpreter who agrees to work for free and within the very short mandatory deadlines in order to provide a written summary in French.²¹³ According to Cimade, applicants are not informed of their rights and obligations during the procedure. OFPRA has 96 hours within which to examine the application, and if not omitted, summon the applicant for a personal interview in Paris under police escort,²¹⁴ conduct the interview, assess the evidence with reference to country of origin information and write a reasoned decision. If the applicant wishes to appeal a negative decision by OFPRA, the appeal does not have suspensive effect.

Following a visit to France from 21 to 23 May 2008, Thomas Hammarberg, the Council of Europe Commissioner for Human Rights²¹⁵ raised concerns regarding the asylum procedure as applied to applicants detained in administrative retention centres and considered that the “*entire asylum procedure at holding centres is clearly so summary that the implicit presumption is that applications are unjustified*”.²¹⁶

Recommendation

In the context of accelerated procedures, Member States need to take specific action to facilitate the exercise of rights by and ensure guarantees for persons in detention in order to ensure an adequate and complete examination.

Good practice example on legal assistance:

On arrival at a closed centre in Belgium, applicants are asked if they already have a lawyer or if they would like to exercise their right to free legal assistance.²¹⁷ If they opt for the latter, according to a report published

210 Cimade is a specialized NGO whose mandate is to provide legal assistance to foreigners held in administrative retention centres. Until 2008, Cimade was the only NGO present in administrative retention centres. This mission should be shared with other NGOs in the near future.

211 See Cimade 2007 Annual report on the administrative retention centres and its report “*Main basse sur l’asile*”, June 2007.

212 The 5 day time limit begins when the foreigner begins his/her detention. According to the most recent circular (*Circulaire du 31 décembre 2008*) this period should be counted in full days (“*jours francs*”).

213 According to the Government, in its reply to the Hammarberg Report, the written application form constitutes only one element in the claim and the applicant can provide more details when s/he is summoned to the personal interview with OFPRA. However, it should be noted that by law, OFPRA can omit the personal interview on the basis of the application form if it is considered to be manifestly unfounded.

214 Unless the applicant is detained in the administrative retention centre in Lyon and Mayotte where video interviews are conducted.

215 Cf. CommDH(2008)34, Strasbourg, 20 November 2008, Memorandum by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008. Recommendations were also made by the CPT in its report published on 10 December 2007. The United Nations Committee against Torture has also raised some concerns about this procedure.

216 Following a more recent visit to the Netherlands, Commr Hammarberg concluded that asylum seekers arriving by plane are routinely subjected to border detention during and immediately following the accelerated asylum determination procedure at the Schiphol Application Centre. If further investigations are deemed necessary beyond the 48-hour accelerated procedure and in certain other circumstances, asylum seekers may face continuous border detention, lasting on average almost 100 days (including investigation, objection and appeal procedure), and in some cases as long as 381 days. This includes people who have suffered traumatic experiences, including victims of trafficking, unaccompanied minors and people who fall under the Dublin Regulation. In the view of the Dutch government, the administrative detention of asylum seekers is designed to guarantee a fair and speedy determination of their asylum claims. However, there is no evidence supporting that it achieves this aim: Paragraph 51, report of 11 March 2009.

217 Article 62-66 Royal decree 2 August 2002 establishing the regime and organization of detention centres.

in November 2008,²¹⁸ it may take anything from several hours to four to five days to appoint a lawyer for an applicant. It is, therefore, worth highlighting as an example of good practice that the Social Service of the closed Centre 127 (at the border) in Belgium has cooperated with the Local Bureau of Legal Assistance (Brussels) to adjust and accelerate procedures for the appointment of lawyers, to enable social assistants at the closed centres in all cases to appoint a lawyer for an applicant from updated lists of available lawyers furnished by the Local Bureau. The automatic appointment of lawyers providing free legal advice in detention in this way is a positive step in which should be rolled out to other closed centres and open reception centres in Belgium.

Right of appeal following a decision taken in the accelerated procedure

The right to an effective remedy is discussed in greater detail in section 16. However, it is worth stating briefly here that UNHCR's overview of the national legislation of the Member States of focus has shown that, following some negative decisions taken in the accelerated procedure, appellants may not enjoy the same safeguards or procedural standards on appeal as appellants who have received a negative decision taken in the regular procedure. Furthermore, the time limit within which an appeal should be lodged may be significantly shorter than the time limit for appeal following a negative decision in the regular procedure. For example:

	Regular Appeal Procedure (days)	Time limit following certain negative decisions in accelerated procedure
Bulgaria	14 ²¹⁹	7 ²²⁰
Czech Republic	15 ²²¹	7 ²²² or 15 ²²³
Germany	14 ²²⁴ or 7 ²²⁵	3 ²²⁶

²¹⁸ *“Recht op recht in de gesloten centra”* (“Right to right in the closed centres”), produced by eight Belgian refugee-assisting NGOs, describing access to legal assistance in closed centres. The report recommended that the system of automatic appointment of lawyers should be rolled out in other Belgian centres, namely Centre 127 bis, Vottem, Bruges and Merksplas.

²¹⁹ Decisions relating to Articles 34 (3) LAR (family reunification), 39a (2) LAR (family reunification as regards beneficiaries of temporary protection), 75 (1) Items 2 and 4 LAR (refusal to grant refugee and/or humanitarian status), 78 (5) LAR (withdrawal or discontinuation of status) and 82 (2) LAR (discontinuation of temporary protection) may be appealed in a period of 14 days following service of the decision. For any decisions under LAR where time limits are not specified, general administrative rules will apply, which provide for a 14-day time limit (Article 149 (1) of the Administrative Procedures Code). These are not working days; however if the term ends on a non-working day, the first working day following this is considered the final day.

²²⁰ Decisions relating to Article 51 (2) LAR (rights of the alien during proceedings) and Article 70 (1), items 1 and 2 LAR (negative decision or discontinuation in the accelerated procedure) must be appealed within a time limit of 7 days. This also applies to decisions under the Dublin procedure.

²²¹ Section 32 (1) ASA provides that an appeal against decisions on applications must be lodged within 15 days from delivery of a decision.

²²² Under Section 32 (2) ASA, a seven-day time limit is an exception from the general 15-day time limit for decisions which b) were served on an alien in a detention centre; or c) decisions dismissed as inadmissible usually on Dublin grounds or if a subsequent application.

²²³ The 15 day time limit applies in accordance with Section 32 (1) ASA if the decision is one of merely ‘unfounded’.

²²⁴ Section 74 (1) 1 APA.

²²⁵ As set out above, the decision is not taken in an accelerated procedure, but a qualified rejection as irrelevant or manifestly unfounded prompts an acceleration by shortened deadlines for appeals (Sections 74 (1) 2, 36 (3) APA).

²²⁶ This applies to rejections as manifestly unfounded in the airport procedure. This is the deadline for an application for an interim measure for granting leave to enter and preliminary protection against deportation, Section 18a (4) APA. The deadline for the submission of the main application for appeal is disputed (see Marx, *Commentary on the Asylum Procedure*, 7th edition, 2009, Section 18a, paragraph 177); in practice, it is advisable to submit the main application together with the application for an interim measure since the latter is an accessory to the first. The reasoning of the appeal may be submitted within another four days if such an extension of the deadline is applied for (see Federal Constitutional Court, official collection, vol. 94, 166, at 207). Theoretically, a rejection as simply “unfounded” may also be taken in the airport procedure within the deadline of two days which would not lead to a denial of entry. However, this situation is not relevant in practice.

	Regular Appeal Procedure (days)	Time limit following certain negative decisions in accelerated procedure
Italy	30 ²²⁷	15 ²²⁸
Netherlands ²²⁹	28	7 ²³⁰
Slovenia ²³¹	15	3
Spain	60 ²³²	2 and 60 ²³³
United Kingdom ²³⁴	10 ²³⁵	2 ²³⁶

UNHCR's research has also found that a significant number of the Member States surveyed do not afford automatic suspensive effect in appeals against negative decisions taken in the accelerated procedure. This is the case in Finland,²³⁷ France,²³⁸ Germany,²³⁹ Greece,²⁴⁰ Italy,²⁴¹ the Netherlands,²⁴² Spain²⁴³ and the UK.²⁴⁴ UNHCR considers the lack of automatic suspensive effect problematic in light of the shortcomings it has observed in first instance accelerated procedures in some Member States.

²²⁷ If the applicant is not placed in a reception centre (CARA) or identification and expulsion centre (CIE). (Article 35 (1) of the d.lgs. 25/2008).
²²⁸ Article 35 (1) of the d.lgs. 25/2008. This time limit applies if the applicant was sent to a reception centre (CARA) or Identification and Expulsion Centre (CIE) on the grounds stipulated by Article 20 (2) (a, b and c) d.lgs. 25/2008, i.e. when identification is necessary because the applicant is undocumented, when the applicant has applied for international protection after s/he was stopped by the police having evaded or attempted to evade border controls, or having been stopped by the police in conditions of irregular stay; and by Article 21 (1) (a, b and c) d.lgs 25/2008 i.e. when the applicant is in the conditions stated in Article 1F of the 1951 Convention, the applicant was previously condemned in Italy for a serious crime, or the applicant had been issued with an expulsion order. Clarification regarding the application of the grounds should be provided in the forthcoming implementing regulation for legislative decree 25/2008.

²²⁹ Article 69 (1), (2) and (3) Aliens Act 2000.

²³⁰ In practice, an appeal should be lodged within 24 hours.

²³¹ Article 74 (2) IPA: "Against the decision issued in a regular procedure, the action may be brought within 15 days after the receipt of the decision. Against the decision issued in an accelerated procedure, the action may be brought within three days after receipt of the decision."

²³² For appeals against applications made on the territory, there is a time limit of two months including decisions taken in the regular procedure (this also applies for appeals made at diplomatic missions abroad).

²³³ Following refusal at the border, and prior to appeal to the courts, there is the possibility of an administrative re-examination (not an appeal) that has to be lodged within two working days of the notification of the inadmissibility/rejection decision. After a second negative decision, the applicant has two months to lodge an appeal to the judges of the Administrative High Court. The applicant will during this time not be detained at the border. In practice, s/he will be expelled and will have to lodge the eventual appeal through the relevant Spanish diplomatic mission abroad.

²³⁴ These time limits relate to appeals to the Asylum and Immigration Tribunal as set down in the AIT (Procedure) Rules 2005.

²³⁵ Section 7 (1) (b) AIT (Procedure) Rules 2005: 10 days for non-detained cases in the regular procedure.

²³⁶ Section 8 (1) AIT (Fast Track Procedure) Rules 2005: two days for the detained fast track procedure.

²³⁷ Section 200 (1) of the Aliens Act 301/2004 on grounds of safe country of asylum or origin which are the same grounds upon which the procedure may be accelerated.

²³⁸ They thus can be removed before the CNDA has taken a decision on their claim. Since 1 January 2007, *Préfectures* can decide to apply an OQTF ("*Obligation de Quitter le Territoire Français*"). This new measure combines both a refusal of residence permit and a removal order. This removal order is enforceable after a one-month delay. This order can be challenged before the administrative court which may decide before the CNDA has decided upon the asylum application. It is important to note that there is no priority or accelerated procedure at CNDA level (See details in section 16 on effective remedies).

²³⁹ Section 75 APA. This relates only to a decision that the application is 'manifestly unfounded'.

²⁴⁰ Note that in Greece automatic suspensive effect is not afforded to any appeals after the entry into force of PD 81/2009 (which amended PD 90/2008 and abolished the second instance appeal procedure). Before the amendment of PD 90/2008, any appeal against a negative decision (regardless of the procedure) had automatic suspensive effect (Article 25 (2)). See section 16 on effective remedies for further details.

²⁴¹ According to Article 35 (7) and (8) d.lgs. 25/2008, automatic suspensive effect is not afforded to appeals by applicants who are resident in a CARA on the basis of Article 20, comma 2 (b) or (c) of d.lgs 25/2008; or applicants detained in a CIE on the basis of Article 21 of d.lgs 25/2008; or applications declared manifestly unfounded. Applicants who are detained in a CIE have their applications examined in an accelerated first instance procedure.

²⁴² Article 82 (2) Aliens Act.

²⁴³ However, Article 29 (2) of the New Asylum Law has reinforced some guarantees in that it establishes that if, when lodging a judicial appeal against any administrative decision in the asylum procedure, a request for suspensive effect is made, it will automatically be dealt with as a request for an urgent precautionary measure – Article 135 of the Law on the Administrative Jurisdiction. This implies automatic provisional suspensive effect until a decision on the urgent precautionary measure is adopted within three days.

²⁴⁴ The appeal available following a decision in the Detained Fast Track procedure has suspensive effect unless the case is certified as 'unfounded' which thereby precludes an in-country right of appeal. Section 94 of the Nationality, Immigration and Asylum Act 2002 provides for the certification process.

In Bulgaria, there is a right of appeal with suspensive effect following a negative decision in the accelerated procedure. The appeal must be lodged before an Administrative Court with one judge presiding rather than the Supreme Administrative Court with a panel of three judges as following a negative decision in the general procedure.²⁴⁵

Recommendation

Applicants whose claims are examined in accelerated procedures must nevertheless have access to an effective remedy against a negative decision. This requires, among other things, a reasonable time limit in which to submit the appeal, as well as at least the opportunity to request suspensive effect, where this is not automatically granted.

Grounds for prioritization and/or acceleration of the examination

The APD appears to impose no restrictions on the grounds upon which the examination of an application can be prioritized or accelerated. Any examination may be prioritized or accelerated according to Article 23 (3) APD.²⁴⁶ In the light of Article 23 (3) APD, the long and expansive list of 16 optional grounds for prioritization or acceleration, set out in Article 23 (4) APD, appear only illustrative. However, the use of the word “also” in Article 23 (4) APD hints at the fact that this was not the intention of the legislator. Article 23 (4) APD states: “*Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritized or accelerated if ...*”. Article 23 (4) APD then sets out 16 (non-exclusive) grounds on which Member States may provide for a prioritized or accelerated procedure.²⁴⁷

The consequences of this lack of clarity in the APD regarding whether there are any restrictions on the grounds for prioritization or acceleration, is particularly reflected in the national legislation of two of the Member States surveyed: the Netherlands and the UK.

In the Netherlands, the only criterion for a decision to accelerate the examination of an application is whether it is possible to assess and take a decision on the application within 48 procedural hours.²⁴⁸ As such, all applications (except those applicants to whom categorical protection policy applies²⁴⁹ and unaccompanied minors under the age of 12) are eligible for examination in the 48 procedural hour process, if the determining authority considers that a decision can be taken within that timeframe. Similarly, in the UK, the only criterion for a decision to examine an application in the accelerated (DFT) procedure, and one of the two criteria to route an application into the accelerated (DNSA) procedure, is whether a “quick decision” may be made.²⁵⁰ There is a general assumption

²⁴⁵ In addition, the decision of the SAC is subject to a cassation appeal.

²⁴⁶ Article 23 (3) APD: “*Member States may prioritize or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs*”.

²⁴⁷ See full text of Article 23 (4) APD, annexed to section 2.

²⁴⁸ Aliens Circular C10/1.1.

²⁴⁹ Aliens Circular C12/3: Those applicants who, upon return to their country of origin, would in the opinion of the Minister be subjected to exceptional hardship in the context of the overall situation there. At the end of May 2009, there was a categorical protection policy only for the Ivory Coast and part of Sudan. The categorical protection policy with respect to Central and South Somalia was lifted at the beginning of May 2009. The State Secretary has announced the abolition of the categorical protection policy in general in different Parliamentary documents, e.g., in a letter of the State Secretary of Justice dated 11 December 2009, Parliamentary Documents 2009-2010, 19 637, nr. 1314.

²⁵⁰ This is also a ground for routing an application into the accelerated, detained non-suspensive appeal (DNSA) procedure, together with the criterion that the applicant must come from a safe country of origin or ‘NSA country’ under Section 94 (4) of the NIA Act 2002. At the time of writing, there were 24 listed safe countries of origin. The grounds for processing a claim in the detained fast track (DFT) and the DNSA procedures are not prescribed by law but are contained in Home Office Guidance, the AIU instruction “*DFT and DNSA – Intake Selection*”, 21.07.08. See <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/>.

that the majority of asylum applications can be resolved with a quick decision, unless there is evidence to suggest otherwise. Cases where a quick decision *may* not be possible *may* include where further material evidence is required, or where necessary translations cannot be obtained in the normal indicative time scales for the DFT or DNSA processes.²⁵¹

The interpretation that Article 23 (4) APD sets out only illustrative grounds for prioritization or acceleration is also clear in the national legislation of a number of Member States, which require that applications by persons who are detained in-country are examined in an accelerated manner.²⁵² This is not a ground set out in Article 23 (4) APD. Moreover, this ground for accelerating the examination is not necessarily related to the merits of the application itself. The mere fact that an applicant is in detention when s/he applies for international protection is not necessarily indicative of a manifestly unfounded or even an unfounded application. An applicant in detention may be a refugee or qualify for subsidiary protection.

Given that accelerated procedures deviate from the time frames which are normally considered necessary to complete an adequate assessment of an application, UNHCR considers that limited grounds for accelerating an examination should be clearly and exhaustively defined in the APD and national legislation.

At present, UNHCR is deeply concerned that the explicit illustrative grounds set out in Article 23 (4) APD are wide-ranging and include grounds which are totally unrelated to the merits of the application.²⁵³ They also include grounds which, if interpreted literally, fail to take into consideration the circumstances of applicants for international protection.²⁵⁴ Moreover, some of the stated grounds do not take into account the fact that an applicant who does not qualify for refugee status may nevertheless qualify for subsidiary protection status. This is crucial if such protection needs are assessed in a single procedure.

Many of the grounds stated in Article 23 (4) APD are transposed or reflected as grounds for the prioritization or accelerated examination of applications in the national legislation of the Member States surveyed: Belgium,²⁵⁵ the Czech Republic,²⁵⁶ Finland,²⁵⁷ Greece,²⁵⁸ France,²⁵⁹ Germany,²⁶⁰ Slovenia²⁶¹ and Spain.²⁶²

²⁵¹ The AIU (Asylum Intake Unit) instruction “DFT & DNSA – Intake Selection”, approved by B. Thompson, Deputy Director, Performance Directorate, 21.07.2008, Policy section, accessed via UKBA website 5.01.2009.

²⁵² Belgium, Italy (with regard to applicants detained in identification and expulsion centres on the basis of Article 21 of d.lgs 25/2008) and Spain (with regard to those applicants held in internment centres). See above sub-section on detention.

²⁵³ For example, Article 23 (4) (i) APD which permits the acceleration of the examination of an application when the applicant failed, without reasonable cause, to apply earlier, having had the opportunity to do so; and Article 23 (4) (l) APD which permits acceleration of the examination of the application when the applicant entered the territory of the Member State unlawfully, or prolonged the stay unlawfully and, without good reason, has either not presented him or herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry.

²⁵⁴ For example, Article 23 (4) (f) APD: “*the applicant has not produced information establishing with a reasonable degree of certainty his/her identity or nationality*” and Article 23 (4) (g): “*the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution*”.

²⁵⁵ Article 52 Aliens Act, Article 52/2 Aliens Act and Article 56/7, § 2, of the Aliens Act.

²⁵⁶ Section 16 ASA.

²⁵⁷ Sections 103(2) and 104 of the Aliens' Act (*Ulkomaalaislaki*) 301/2004, as in force 29.4.2009.

²⁵⁸ Article 17 (3) and Article 24 (i) of PD 90/2008.

²⁵⁹ Article L.741-4-2° to 4° *Ceseda* sets out the grounds upon which the Prefectures can refuse a temporary residence permit and therefore the application is channelled into the accelerated procedure. According to the Ministry of Immigration in an interview of 26 March 2009, the three limitative grounds set out in Article L.741-4-2° to 4° *Ceseda* encompass 11 of the grounds explicitly stipulated in Article 23 (4) APD.

²⁶⁰ Sections 29, 29a, 30, 71 APA.

²⁶¹ Article 55 IPA.

²⁶² Article 25 (1) of the New Asylum Law with regard to border and internment centre applications, and Article 21 (2) of the New Asylum Law with regard to in-territory applications.

In some Member States, the grounds are more broadly defined in national legislation than in the APD. For example, in Finland, the examination of an application may be accelerated when it is considered to be ‘manifestly unfounded’. In response to criticism, in 2007, the determining authority in Finland launched an internal review of the interpretation and application of the concept of ‘manifestly unfounded’. This review resulted in new guidelines and a consequent drop in the numbers of applications being declared manifestly unfounded. Similarly, in Germany, one of the grounds for the prioritization of the examination of an application is when the application is considered to be ‘manifestly unfounded’.²⁶³

Moreover, in France, one of the grounds for refusal of a temporary residence permit (which results in the application being channelled into the accelerated procedure) is that “*the asylum application [...] constitutes an abuse of the asylum procedures*”.²⁶⁴ This is a broad definition which may, in practice, be interpreted to encompass a vast range of circumstances. In fact, with reference to this ground, certain Prefectures routinely consider that first applications for international protection by persons who are detained, and subsequent applications, are an abuse of the asylum procedure.²⁶⁵

The table below sets out, with reference to Article 23 (4) APD, the grounds in national legislation, regulations and guidelines for the prioritization or acceleration of the examination of applications. The table excludes the Netherlands and the UK because both States have a single criterion which simply relates to whether a quick decision can be taken.²⁶⁶ The table also excludes Bulgaria, as its three day accelerated procedure is a ‘filter’ procedure through which nearly all applications are examined.²⁶⁷ The column on Spain relates to the provisions of the New Asylum Law which was not in force during the period of UNHCR’s research in Spain. Note that in the border procedure, application of these grounds leads to accelerated rejection of the application and in the in-country procedure, they lead to admission of the application to the accelerated RSD procedure.

²⁶³ The term is further specified in Section 30 APA: “(1) An asylum application shall be manifestly unfounded if the prerequisites for recognition as a person entitled to asylum and the prerequisites for granting refugee status are obviously not met. (2) In particular, an asylum application shall be manifestly unfounded if it is obvious from the circumstances of the individual case that the foreigner remains in the Federal territory only for economic reasons or in order to evade a general emergency situation or an armed conflict”.

²⁶⁴ Article L.741-4-4°.

²⁶⁵ Administrative retention centres and premises are places where foreigners awaiting removal may be held. At the end of 2007, there were 24 administrative retention centres (CRA, « *Centres de Rétention Administrative* ») in France, with a reception capacity of 1 700 persons. When there is no CRA close to the place where the person is arrested, Prefectures have created administrative retention premises (LRA, “*Locaux de Rétention Administrative* »). Foreigners can be held in these premises for a 48 hour maximum duration before being transferred, if needed, to a CRA. According to the NGO Cimade, which provides legal assistance to foreigners in the CRAs, these decisions to accelerate the examination of applications by applicants in CRAs can concern foreigners who have just arrived in France and who did not have enough time to submit their application, or who expected to gather more elements to substantiate their claim or who wished to submit their application in another country. On the other hand, according to the Ministry of Immigration, foreigners who apply for asylum while they are detained in a CRA are persons who, when they are arrested for illegal stay in France, had been present on French territory for a long time and had not presented themselves to the authorities to apply for asylum during this time; or persons who lodge a subsequent applications while they are held in the CRA after one or more negative decisions from the OFPRA or CNDA (cf. reply of the French government to the Hammarberg Report). In this regard, it is important to note that according to the 2008 OFPRA Activity Report, 64% of applications by persons held in CRAs which are channelled into accelerated procedures concern initial or first applications. This means that only 36% relate to subsequent applications.

²⁶⁶ In the UK, with regard to the DFT procedure, this is the only criterion; and one of only two criteria for the DNSA procedure.

²⁶⁷ The only applications exempted from the accelerated procedure are those by unaccompanied children and beneficiaries of temporary protection.

Art. 23 (4) APD grounds	Be	Cz	Es²⁶⁸	De	Fi	Fr	Gr²⁶⁹	It	Si
(a) raised issues of no or minimal relevance	√	√	√		√	√	√		√
(b) clearly not a refugee	√	√	√		√	√	√		√
(c) (i) safe country of origin		√	√		√	√	√		√
(c) (ii) safe third country		√			√		√		
(d) presents false info or withholds info	√	√			√	√	√		√
(e) another application stating other personal data	√					√	√		√
(f) identity or nationality uncertain	√	√			√		√		√
(g) inconsistent, contradictory, improbable or insufficient statements	√	√	√ (border)		√	√	√		√
(h) subsequent application and no new elements	√			√ ²⁷⁰	√	√	√		
(i) application could have been made earlier	√		√ (in-country)			√	√		√
(j) application merely to delay or frustrate removal	√	√			√	√	√		√
(k) failure to comply with procedural obligations	√					√	√		√
(l) unlawful entry and delay in applying		√					√		√
(m) danger to national security or public order	√		√			√	√		√
(n) refusal to provide fingerprints	√						√		√
(o) subsequent application by previously dependant unmarried minor							√		
Other nationally stipulated grounds							√		
Applicant has made another application or multiple applications	√			√ ²⁷¹					
Applicant does not inform that has made application in another country	√								√
Applicant is detained	√		√ ²⁷²	√ ²⁷³				√ ²⁷⁴	
Applicant is detained at the border	√	√	√	√ ²⁷⁵			√		

268 Unless otherwise stated in the table, the grounds are applied to both in-country and border procedures (where they exist).

269 This relates to the provisions of Article 17 (3) PD 90/2008, although at the time of writing it was reported that the determining authority no longer implements this legal provision.

270 With regard to subsequent applications, there is a general provision allowing for the omission of a hearing, Section 71 (3) 3 APA.

271 Informal priority is given to the examination of applications submitted by applicants who have submitted multiple applications according to the BAMF internal guidelines, cf. *Internal Guidelines for Adjudicators: Priority (1/1)*; this prioritization does not imply any reduction of procedural guarantees.

272 This relates to those detained in internment centres for aliens (CIEs) only.

273 Informal priority is given to the examination of applications submitted by applicants who are in detention according to the BAMF internal guidelines, cf. *Internal Guidelines for Adjudicators: Priority (1/1)*; this prioritization does not imply any reduction of procedural guarantees.

274 This relates to applications by applicants who are detained in an identification and expulsion centre (CIE) under Article 21 (1) of the d.lgs. 25/2008 on grounds that (a) their application fulfils the criteria of Article 1 F of the 1951 Convention (the exclusion clauses); or (b) the applicant has been convicted of a crime under the criminal procedure code or crimes relating to drugs, sexual offences, assisting illegal immigration/emigration, prostitution, or the exploitation of prostitution or employment of minors in irregular activities; or (c) the applicant has been issued with an order of expulsion or return.

275 Applications submitted by applicants at the airport are examined in the accelerated two-day airport procedure. Whilst German legislation refers to 'accommodation' at the airport premises, UNHCR considers that confinement at the airport, including transit zones, albeit for two days, amounts to a deprivation of liberty in line with the case law of the European Court of Human Rights.

Art. 23 (4) APD grounds	Be	Cz	Es ²⁷⁶	De	Fi	Fr	Gr ²⁶⁹	It	Si
Applicant has committed a crime			√ ²⁷⁶	√ ²⁷⁷					
Exclusion clauses apply			√						
Positive injunction right of the Minister ²⁷⁸	√								
EU national who is clearly not a refugee	√								
First country of asylum					√				
Applicant resides in a reception centre								√ ²⁷⁹	
Applicant tried to illegally enter another country or entered another country and was returned									√
Application is considered to be manifestly unfounded				√ ²⁸⁰					

One of the fundamental concerns is that the APD permits Member States to accelerate the examination of applications in a wide range of cases and that these grounds are not interpreted restrictively by some Member States.

²⁷⁶The applicant has received a final sentence for a serious crime and constitutes a threat to the community: Article 25 (1) (f) in conjunction with Article 9 and Article 12 New Asylum Law.

²⁷⁷Informal priority is given to the examination of applications submitted by applicants who have committed a crime according to the BAMF internal guidelines, cf. *Internal Guidelines for Adjudicators: Priority (1/1)*; this prioritization does not imply any reduction of procedural guarantees.

²⁷⁸Article 52/2 § 2, 3^o of the Aliens Act permits the Minister of the Interior to instruct that certain categories of applications are examined in an accelerated manner. The Belgian government considers that it might use this right in the case of a mass influx of asylum applications by applicants from a certain country or region where there is suspicion that there is a manifest improper use of the asylum procedure, or that a network of smugglers of human beings is active.

²⁷⁹This relates to an application by an applicant who has been ordered to reside in a CARA under Article 20 (2) d.lgs. 25/2008 as amended by Article 1 (1) (d) d.lgs. 159/2008 on the grounds that (b) s/he has applied for international protection after being arrested for evading or attempting to evade border controls or immediately thereafter; and (c) s/he has applied for international protection after being arrested for illegal residence.

²⁸⁰The examination of applications which are considered to be manifestly unfounded should be prioritized according to the BAMF internal guidelines, cf. *Internal Guidelines for Adjudicators: Priority (1/1)*, Date: 12/08. Many of the reasons mentioned in the table can be found in the German law as grounds for rejecting a claim as manifestly unfounded (Section 30 APA). Since this leads to shortened deadlines only after a decision has been taken, the respective information has not been included into the table. However, the content of Section 30 APA should not go unmentioned: "(1) An asylum application shall be manifestly unfounded if the prerequisites for recognition as a person entitled to asylum and the prerequisites for granting refugee status are obviously not met.

(2) In particular, an asylum application shall be manifestly unfounded if it is obvious from the circumstances of the individual case that the foreigner remains in the Federal territory only for economic reasons or in order to evade a general emergency situation or an armed conflict.

(3) An unfounded asylum application shall be rejected as being manifestly unfounded if

1. key aspects of the foreigner's statements are unsubstantiated or contradictory, obviously do not correspond to the facts or are based on forged or falsified evidence;
2. the foreigner misrepresents his/her identity or nationality or refuses to state his/her identity or nationality in the asylum procedure;
3. S/he has filed another asylum application or asylum request using different personal data;
4. S/he filed an asylum application in order to avert an imminent termination of residence although s/he had had sufficient opportunity to file an asylum application earlier;
5. S/he grossly violated his obligations to cooperate pursuant to Section 13 (3) second sentence, Section 15 (2) nos. 3 through 5, or Section 25 (1) above, unless s/he is not responsible for violating his obligations to cooperate or there are important reasons why s/he was unable to comply with his obligations to cooperate;
6. S/he has been forcibly expelled pursuant to Sections 53 and 54 of the Residence Act; or
7. the asylum application has been filed on behalf of a foreigner without legal capacity under this Act, or is considered under Section 14a to have been filed after asylum applications by the parent(s) with the right of custody has been incontestably rejected.

(4) Furthermore, an asylum application shall be rejected as manifestly unfounded if the requirements of Section 60 (8) first sentence of the Residence Act or of Section 3 (2) apply.

(5) An application filed with the Federal Office shall also be rejected as manifestly unfounded if, due to its content, it does not constitute an asylum application in the sense of Section 13 (1)."

By way of example, Article 23 (4) (i) of the APD states that an examination procedure may be accelerated if “*the applicant has failed without reasonable cause to make his/her application earlier, having had the opportunity to do so.*” In Slovenia, this is reflected in a national legal provision which states that an application can be examined in the accelerated procedure if the applicant did not file an application as soon as possible.²⁸¹ UNHCR’s audit of decisions in Slovenia revealed a significant number of applications which were rejected in the accelerated procedure on this ground. They included:

- (i) a case where the applicants applied for asylum one day after arrival, having consulted a refugee advisor;²⁸²
- (ii) a case where the application was submitted three days after the applicant was accommodated in the Centre for Foreigners;²⁸³
- (iii) a case where the application was submitted five days after the applicant was accommodated in the Centre for Foreigners, and the applicant claimed to have tried to apply at the border but was not “heard”;²⁸⁴ and
- (iv) a case where the application was submitted one week after arrival in Slovenia.²⁸⁵

It also included numerous cases where the applicant was intercepted whilst travelling through Slovenia.²⁸⁶ Moreover, this provision has been applied extra-territorially. Applications have been rejected in the accelerated procedure on this ground where it was considered that an applicant could have applied for protection in a third country. The following was cited in decisions audited:

*“Since the applicants were traveling to the Republic of Slovenia through Bosnia and Herzegovina and stayed there for two days, and through the Republic of Croatia, they could have applied for asylum already there”;*²⁸⁷ and *“the applicant did not present any founded reasons for not applying for asylum in one of countries through which he was traveling.”*²⁸⁸

Article 23 (4) (j) APD provides that an examination procedure may be accelerated if “*the applicant is making an application **merely** in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal*”. This requires the determining authority to ascertain whether this is the **only** reason for the application; or whether, by contrast, there are any other relevant reasons for the application. However, in Slovenia, this provision is reflected in national law as a requirement that an application is filed as soon as possible; and if not, the application is deemed to be a means to delay or frustrate a removal.²⁸⁹

UNHCR audited a number of case files in which the application had been examined in an accelerated manner and found that these applications were not clearly unfounded.

For example, in Belgium, an application will be examined within an accelerated 15 day time frame by law when submitted by an applicant detained at the border. Such applications may be meritorious. In 2008, 351 applications

²⁸¹ Article 55, indent 5 of IPA.

²⁸² Case No. 11-2008.

²⁸³ Case No. 32-2008.

²⁸⁴ Case No. 20-2008.

²⁸⁵ Case No. 7-2008.

²⁸⁶ Case No. 10-2008; No.12-2008; No. 29-2008, No. 31-2008.

²⁸⁷ Case No. 26-2008, 27-2008 and 19-2008.

²⁸⁸ Case No. 33-2008 referring to Croatia, Bosnia and Herzegovina, and Montenegro.

²⁸⁹ Case No. 16-2008, 20-2008, 22-2008, 23-2008, 26-2008, 28-2008, 29-2008, 30-2008, 31-2008, 32-2008, 36-2008.

were submitted at the border, of which only 100 received a positive decision (either refugee status or subsidiary protection status).²⁹⁰ UNHCR's audit of case files concerning applications submitted at the border revealed applications raising complex issues such as homosexuality in Iran and PKK affiliation in Turkey.²⁹¹ However, the audit also revealed that in these cases, the determining authority exceeded the indicative 15 day time limit for the accelerated border procedure.²⁹²

In France, applications by persons detained in administrative retention centres are routinely considered to constitute an abuse of the asylum procedure and are examined in an accelerated 96 hour procedure. Even though the application may be well-founded, as previously mentioned, applicants face sometimes insurmountable obstacles in submitting a fully evidenced application in the accelerated procedure.

In Greece, due to the extremely limited information contained in the audited interview reports and the lack of any other information in the case files, it was difficult for UNHCR to assess whether applications were appropriately channelled into the accelerated procedure. In all the reviewed case files, the police officer who conducted the personal interview proposed in a standard phraseology that the application should be examined in the accelerated procedure because it was manifestly unfounded and did not satisfy the requirements for the granting of refugee status. No other reasoning was provided. These included seven cases in which the applicants claimed to fear persecution by non-state actors,²⁹³ a Syrian applicant of Kurdish origin who claimed to have suffered persecution on the grounds of his origin,²⁹⁴ two applicants from Syria and Pakistan who claimed to fear persecution on account of their political activities,²⁹⁵ an Iranian Zoroaster who alleged that he had been persecuted on account of his religion²⁹⁶ and an Iranian homosexual who claimed to fear persecution on account of his sexual orientation.²⁹⁷ With the exception of the last-mentioned case, in all the other cases, the examiner from ADGPH endorsed the proposal of the interviewer and recorded his/her recommendation in the case file, always with the same standard phraseology:

"... From the presented elements it cannot be justified that the applicant suffered or will suffer any individual persecution by the authorities of his country for reasons of tribe, religion, ethnic group, social group or political opinion. The applicant abandoned his/her country in order to find a job and improve his living conditions. There is doubt regarding the applicant's identity since s/he neither showed nor handed in any national passport or any other travel documents that could prove or certify his/her identity.

For the above reasons it is recommended that the application should be processed with the accelerated procedure and be rejected since it does not fulfil the criteria of Article 1 (A) of the 1951 Geneva Convention and of article 15 of PD 96/2008."

²⁹⁰ This is a recognition rate of 28.4%.

²⁹¹ Case files nrs. 11, 13, 14, 17, 18 and 100.

²⁹² Decisions were taken within 3 to 4 weeks.

²⁹³ CF77IRQ25, CF27AFG3, CF29AFG5, CF31AFG7, CF40AFG16, CF14SYR5 and CF25AFG1.

²⁹⁴ CF13SYR4.

²⁹⁵ CF16SYR7 and CF147PAK35.

²⁹⁶ CF1IRN1

²⁹⁷ CF9IRN9

Recommendations

The grounds for accelerating an examination, particularly in a procedure which may have reduced safeguards, should be clearly and exhaustively defined in the APD and national legislation. Grounds for examining claims in an accelerated procedure should be interpreted strictly and cautiously.

The wide-ranging grounds expressed in Article 23 (4) should be significantly reduced.²⁹⁸ In particular, grounds which are unrelated to the merits of the application should not be included in the list of criteria for examining a claim in an accelerated procedure. This includes grounds relating purely to non-compliance with procedural requirements, in cases where the applicant's circumstances may have made such non-compliance unavoidable, or where there could be a reasonable explanation for such non-compliance. This includes, among other things, failure to produce proof of identity, or failure to apply earlier.

Where an applicant is in detention, s/he should be afforded all safeguards necessary to ensure that s/he can pursue and support his/her claim, including through gathering and provision of evidence. The disadvantages faced by detained applicants in pursuing their claims should be taken into account.

Applications raising issues under the exclusion clauses

Parliamentary Assembly Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe Member States recommended that applications raising issues under the exclusion clauses of the 1951 Refugee Convention be exempted from accelerated procedures.²⁹⁹

UNHCR's research has found that such applications are not exempted from accelerated examination by law in Belgium,³⁰⁰ Bulgaria, the Czech Republic, Greece,³⁰¹ France,³⁰² the Netherlands and the UK. Indeed, the New Asylum Law in Spain establishes that this is a ground for the accelerated examination of the application.³⁰³ However, in some Member States, in practice, the prescribed time limits for the examination of the application would be exceeded if the application raised issues under the exclusion clauses, according to the determining authorities.

²⁹⁸In this regard, it is noted that the European Commission, in its proposal for a recast of the APD,

has proposed deletion of the following sub-paragraphs of Article 23(4): (c) applicant clearly does not qualify as a refugee; (e) applicant has filed another application stating other personal data; (f) failure to produce information establishing identity or nationality; (j) failure without reasonable cause to apply earlier, having had opportunity; (k) failure without good reason to fulfil obligations to substantiate claim; (l) unlawful entry or prolonged stay without filing an application or presenting to the authorities; (m) applicant is danger to national security or public order; (n) refusal to have fingerprints taken; (o) application of a dependent minor has been rejected, with no new elements: APD Recast Proposal 2009.

²⁹⁹Paragraphs 8.9 and 8.11.

³⁰⁰The asylum authorities underlined that "accelerated" does not mean "a less careful examination". The examination will be as thorough as an examination in a regular procedure, but the time period in which it takes place will be shorter: telephone call on 23rd of June 2009 with Legal Service of CGRA.

³⁰¹Interview with the Head of ARD in ADGPH.

³⁰²Applications raising issues under the exclusion clauses can be examined in the accelerated procedure since the decision to channel an application into the accelerated procedure is made by the *Préfecture* without examination of the substance of the claim. In practice, it is likely that the OFPRA would take more time for the examination of the application and exceed the time limit for the accelerated procedure.

³⁰³UNHCR has raised serious concerns regarding this provision. UNHCR's comments on the final text of the Law Regulating the Right to Asylum and the Subsidiary Protection approved by the Plenary of the Congress on October 15 2009 stated: "*It is deeply worrying that according to Articles 21 and 25 of the new Law, exclusion assessments can be made at the accelerated procedure stage, including in the border procedure, before a substantive assessment of inclusion criteria has taken place. The exclusion clause is to be examined during the substantive part of the asylum procedure, given the far-reaching consequences of its application and the need to balance it against the asylum-seeker's persecution claim.*"

In Germany, an application raising issues under the exclusion clauses would prompt a prioritization of the examination of the application.³⁰⁴ In addition, in case the person concerned is excluded, the case would be rejected as manifestly unfounded,³⁰⁵ resulting in shortened deadlines for appeal.

In the UK, reference would be made to the War Crimes Unit which is a specialized unit within the determining authority.

In Slovenia, national legislation provides that an application should be rejected in the regular procedure as unfounded if the exclusion clauses apply.³⁰⁶ There is no specific legislation on this matter in Finland, but according to stakeholders, a complex case raising the exclusion clauses would in practice be examined in the regular procedure.³⁰⁷

UNHCR considers it is essential that rigorous procedural safeguards be built into the procedures for dealing with any claim that raises exclusion issues.

Recommendation

UNHCR recommends that given the grave consequences of exclusion, exclusion decisions should in principle be dealt with in the context of the regular status determination procedure, and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made.

Well-founded applications

Article 23 (3) APD is explicit in stating that applications which are likely to be well-founded may be prioritized or accelerated. This is reflected in the national legislation of Greece,³⁰⁸ Italy,³⁰⁹ Slovenia³¹⁰ (although this has never been applied in practice) and Spain.³¹¹ It is not reflected in the national legislation of Belgium, Bulgaria,³¹² the Czech Republic,³¹³ Finland, France, Germany,³¹⁴ the Netherlands³¹⁵ or the UK.

³⁰⁴ BAMF *Internal Guidelines for Adjudicators: Priority (1/1)*, Date: 12/08, p. 1.

³⁰⁵ Section 30 (4) APA.

³⁰⁶ Article 53 IPA.

³⁰⁷ Interview 9.12.2008.

³⁰⁸ Article 8 (2) PD 90/2008 states that examination of an application may be prioritized when it may reasonably be considered to be well-founded.

³⁰⁹ Article 28 of Legislative Decree No. 25/2008.

³¹⁰ Article 54 IPA: “*The competent authority can decide the application in the accelerated procedure if the entire operative event has been established on the basis of facts and circumstances from the first to the eighth sub-paragraph of Article 23 of this Act inasmuch as they have been presented.*”

³¹¹ Article 25 (1) (a) of the New Asylum Law provides that the urgent RSD procedure will be applied to manifestly well-founded applications lodged in country only.

³¹² In Bulgaria, a decision to recognize refugee status or grant subsidiary protection status cannot be taken in the accelerated procedure. If an application is not manifestly unfounded or the procedure is not discontinued, a decision is taken to submit the application to the general procedure under Article 70 (1) LAR. Also, according to Article 71 (2) LAR, the accelerated procedure is not applicable when the application was submitted by an alien who has already been granted temporary protection.

³¹³ According to the determining authority DAMP, such applications would be prioritized in practice, but UNHCR’s research was unable to confirm or refute this.

³¹⁴ With the exception of cases, in which constitutional asylum is granted; the omission of the hearing is possible in such cases, Section 24 (1) 4 APA.

³¹⁵ Note that in accordance with Aliens Circular C12/3 applications by applicants who fall under the non-removal policy of categorical protection, or for whom there is a moratorium on decisions or departure, must be examined in the regular procedure.

Recommendation

UNHCR welcomes provision for prioritized and/or accelerated examination of well-founded claims, which can lead to expeditious grants of status. UNHCR considers that this is in the interests of claimants and of states which seek to improve the efficiency of asylum procedures and outcomes.

Applicants with special needs

Article 23 (3) APD is also explicit in stating that when an applicant has special needs, the examination of his/her application may be prioritized or accelerated.

This is reflected in the national legislation of Greece³¹⁶ and Italy.³¹⁷ It is partially reflected in the national legislation of Slovenia, in that the examination of applications by unaccompanied children must be treated with priority.³¹⁸ In Spain, it has been reflected in the New Asylum Law to the extent that applications lodged in-country by persons with specific needs, particularly unaccompanied children, should be examined in the urgent RSD procedure.³¹⁹

However, it is not reflected in the national legislation of Belgium, Bulgaria,³²⁰ the Czech Republic, Finland, France, Germany, the Netherlands, or the UK.

Some determining authorities informed UNHCR that, although there is no legal provision, in practice, some applications may be prioritized. The determining authority in Belgium stated that it always prioritizes the examination of applications by unaccompanied children and that applications by other applicants with special needs may be prioritized on humanitarian grounds.³²¹ This was supported by UNHCR's audit of case files in Belgium, which revealed two cases in which the determining authority was requested to and did prioritize the examination.³²² Similarly, UNHCR was informed by the determining authority in Bulgaria that when the authority has the capacity, the applications of persons with special needs may be prioritized in the framework of the general procedure.³²³

Prioritization may ensure that certain categories of claims are examined at an early stage, without the need for the applicant to wait for lengthy periods that may sometimes apply to other claims. This can bring positive benefits for applicants, provided that the prioritized examination includes all of the necessary guarantees to ensure

³¹⁶ Article 8 (2) PD 90/2008 states that examination of an application may be prioritized when the applicant belongs to a vulnerable group.

³¹⁷ Article 28 (1) d.lgs. 25/2008 requires the determining authority, the Territorial Commissions, to examine an application with priority when the applicant is considered a vulnerable person in accordance with Article 8 of the legislative decree of 30 May 2005, No. 140 [minors, disabled persons, old people, pregnant women, single parents with minors, persons who have suffered torture, rape or other serious acts of psychological, physical or sexual violence].

³¹⁸ Article 16 (1), indent 3 of IPA.

³¹⁹ Article 25 (1) (b). Although Article 25(1) (b) does not define the term 'persons with specific needs', Article 46 stipulates that the specific situation of applicants and beneficiaries of international protection who are especially vulnerable, including unaccompanied minors, persons with disabilities, elderly people, pregnant women, single parent families with minors, victims of torture, rape or other severe forms of psychological, physical or sexual violence and victims of trafficking will be taken into account. It also includes those persons who, because of their personal characteristics, could have been victims of persecution on account of several of the reasons laid down in the present law.

³²⁰ By law, applications by unaccompanied minors and juveniles are exempted from the accelerated procedure in accordance with Article 71 (1) LAR.

³²¹ Interview with the Commissioner-General on 27 April 2009.

³²² Cases 19 and 23.

³²³ Article 30a of LAR refers to vulnerable persons as minor or juvenile persons, pregnant women, elderly persons, single parents with their minor or juvenile children, persons with disabilities and persons who were victims of serious psychological, physical or sexual harassment.

a fair determination of the claim, including reasonable deadlines and opportunities for the applicant to prepare for interviews, gather and furnish evidence, and other steps. Prioritization may help ensure, for example, that applicants with special needs are not obliged to experience lengthy waiting periods due to backlogs or other administrative delays.

However, the special needs of some applicants may be such that it is wholly inappropriate to accelerate the examination of their applications. This may include persons with serious physical or psychological problems, those exhibiting symptoms of trauma, and separated children.

UNHCR believes that particularly vulnerable persons should have their applications exempted from accelerated procedures and their applications should instead be examined in the regular procedure or a prioritized procedure with all necessary safeguards.³²⁴ UNHCR's research has found that many of the Member States surveyed do not have legal exemptions from accelerated procedures in place for applicants with special needs: Belgium, Finland, France, Germany,³²⁵ Greece, the Netherlands³²⁶ and Slovenia. The exemption of applications by victims of torture or sexual violence from the accelerated examination in the airport procedure has frequently been called for in Germany, but has not been introduced in legislation or guidelines.³²⁷

A few of the surveyed Member States have made some legal provision to exempt certain applications from accelerated procedures.

In Bulgaria, applications by unaccompanied children and juveniles are exempted from the accelerated procedure and admitted directly to the general procedure.³²⁸ But there is no legal provision relating to other applicants with special needs. Similarly, in France, unaccompanied children do not require a temporary residence permit from the *Préfecture* and their applications are not routed into the accelerated procedure in practice.³²⁹ However, there is no legislative provision regarding other applicants with special needs.

In the Czech Republic, applications by unaccompanied children are also excluded from accelerated procedures³³⁰ and a broader category of applicants with special needs is excluded from the accelerated border procedure.³³¹

³²⁴ See also Parliamentary Assembly Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe Member States which recommends that certain categories of persons be excluded from accelerated procedures due to their vulnerability and the complexity of their cases, namely separated children/unaccompanied minors, victims of torture and sexual violence and trafficking.

³²⁵ There is neither an exemption of applicants with special needs from the airport procedure nor a prioritization of their applications in the normal procedure. However, unaccompanied minors, persons having suffered gender specific persecution or traumatized persons shall be heard by specially trained personnel (cf. *Internal Guidelines for Adjudicators: Adjudicators with special tasks* (1/3), Date 12/08.).

³²⁶ With the exception that C13/2 Aliens Circular provides that the detailed personal interview of unaccompanied minors under the age of 12 should not, in principle, take place in an application centre.

³²⁷ Cf. for instance, Marx, *Commentary on the Asylum Procedure*, Section 18a, paragraph. 99 et seq. UNHCR, Representation for Austria and Germany, *Eckpunkte-Papier zum Flüchtlingsschutz anlässlich der Konstituierung des Deutschen Bundestages und der Deutschen Bundesregierung zur 17. Legislaturperiode*, October 2009, p. 6.

³²⁸ Article 71 (1) LAR.

³²⁹ Interview with *Préfecture* of Rhône; Interview with Ministry of Immigration.

³³⁰ Section 16 (4) ASA.

³³¹ Section 73 (7) ASA: "The Ministry will decide on the permit to enter the Territory for an alien who has made the Declaration on International Protection in the transit zone of an international airport and transport him/her into a reception centre at the Territory, if the alien is an unaccompanied minor, a parent or a family with handicapped minors or persons of full age, seriously handicapped alien, pregnant woman or a person who has been tortured, raped or subject to any other forms of mental, physical or sexual violence."

In the UK, there are administrative provisions setting out which applicants are unsuitable for detention for the purpose of examining their application in accelerated procedures.³³² However, these criteria set a very high threshold. The categories of people described in the ‘suitability exclusion criteria’ are:

- women who are 24 or more weeks pregnant;
- unaccompanied asylum-seeking children, whose claimed date of birth is accepted by the determining authority;
- those with a medical condition requiring 24-hour nursing or medical intervention;
- those presenting with physical and/or learning disabilities requiring 24 hour nursing care;
- those with a disability, except the most easily manageable;
- those presenting with acute psychosis, for instance schizophrenia, who require hospitalization;
- those with an infectious/contagious disease which cannot be effectively and appropriately managed within a detained environment;
- those for whom there is independent evidence from a reputable organization that they have been a victim of trafficking;³³³ and
- those for whom there is independent evidence of torture.

If the claimed date of birth of an unaccompanied asylum-seeking child is disputed by the determining authority, who believe that the person is an adult, the application may be channeled into the Detained Fast-track procedures.³³⁴ In the UK, UNHCR audited a case in which a disputed minor was assessed by the determining authority as being nineteen years old. The official guidance states that disputed minors should only be in the detained processes where there is strong evidence that they are over eighteen years of age or their physical appearance or demeanour very strongly indicate that they are significantly over 18 years of age.³³⁵ The applicant’s representative had arranged for an independent medical age assessment to be carried out, and requested that the case be taken out of the detained fast-track procedure so that the appropriate examinations could take place, failing which more time should be given for the age assessment to be completed. This was refused, as was the asylum application, and the applicant was removed to Afghanistan.³³⁶ UNHCR also audited a case of an unaccompanied child whose application was refused for non-compliance and his case was determined under accelerated procedures when it would have been more appropriate to discontinue the examination.³³⁷

Although, as stated above, many of the Member States surveyed have no legal provision to exempt applications by persons with special needs from accelerated procedures, some determining authorities informed UNHCR that applications may be exempted in practice. The determining authority in Greece informed UNHCR that, in practice, applications by unaccompanied children were exempted from accelerated procedures.³³⁸ In Finland, in practice, applications by unaccompanied children are exempted from accelerated procedures.³³⁹ In France, humanitarian

³³² The AIU (Asylum Intake Unit) instruction “*DFT & DNSA – Intake Selection*”, 21.07.2008, Policy section, accessed via the UKBA website 5.01.2009 lists the suitability exclusion criteria.

³³³ Extract from the guidance:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/victimsoftrafficking.pdf?view=Binary>.

³³⁴ The AIU (Asylum Intake Unit) instruction “*DFT & DNSA – Intake Selection*”, 21.07.2008, Policy section, accessed via the UKBA website 5.01.2009.

³³⁵ *DFT and DNSA Intake Selection* (AIU instruction).

³³⁶ DAF22.

³³⁷ DAF51.

³³⁸ Interview with the Head of ARD in ADGPH.

³³⁹ Interview 8.12.2009.

considerations can be taken into account by the *Préfectures* in practice, in determining the procedure for the examination of an application.³⁴⁰

For example, in Italy, examination of an application by a vulnerable person is prioritized (not accelerated) on the basis of referrals or medical certificates. However, when the medical certificate recommends that the interview be postponed, the interview is postponed rather than prioritized. This practice, which has been supported by UNHCR, has happened in the case of victims of torture or persons who have suffered particularly serious trauma during the journey to Italy.³⁴¹

With regard to Spain, in the case of unaccompanied children, although by application of Article 15 (4) ALR these cases should be prioritized, in practice it is not automatically done. It has to be said that, in many cases relating to unaccompanied children, the legal representative of the child, or the NGO providing legal assistance asks for the examination of the case to be slowed down instead of accelerated due to the nature of the special needs, and eligibility officials generally agree to do so. In other cases of applicants with special needs, this practice is also used. This was the case in one of the interviews observed in the regular RSD procedure. The application had been lodged in 2005 but due to the medical condition of the applicant, the assisting NGO asked for the case not to be further examined and decided upon until the applicant was able to be interviewed.³⁴²

It should also be added that procedures should be in place to identify and respond to those cases which are unsuitable for examination within accelerated procedures, due to the nature of the special needs of the applicant. Personnel of the determining authority should act proactively to remove applications from the accelerated procedure if the applicant's vulnerability is such that s/he is hindered from fully substantiating the application within the time scales of the accelerated procedure.

Recommendation

Member States should legislate or provide guidelines to ensure that certain applications may be exempted from prioritized and accelerated examination due to the special needs of the applicant.

Statistics

UNHCR's research found that a number of Member States do not publish statistics on the numbers of and grounds upon which applications are examined in an accelerated or prioritized manner: Belgium,³⁴³ Bulgaria, the Czech Republic, Greece, Italy, and Slovenia. In France, there are no statistics for the grounds upon which the *Préfectures* deny a temporary residence permit and consequently submit an application to the accelerated procedure, although plans exist to do this from 2010.

³⁴⁰ Information obtained from the *Préfecture* of Rhône.

³⁴¹ The European Commission has provided for the tabling of medico-legal reports in recast Article 17, APD Recast Proposal 2009.

³⁴² Case Nr. 0502102.

³⁴³ There are no statistics on all the applications that are examined in an accelerated procedure. There are statistics regarding the applications examined at the border which constitute the majority of applications examined in an accelerated procedure.

SECTION X: INADMISSIBLE AND UNFOUNDED APPLICATIONS

Inadmissible applications

Unfounded and manifestly unfounded applications

Inadmissible applications

Article 25 of the APD states that, in addition to cases in which an application is not examined in accordance with the Dublin II Regulation,¹ Member States are not required to examine whether the applicant qualifies as a refugee if his/her claim is considered inadmissible because of the following reasons:²

- (a) *Another Member State has granted refugee status;*
- (b) *A country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;*
- (c) *A country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;*
- (d) *The applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC;*
- (e) *The applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d);*
- (f) *The applicant has lodged an identical application after a final decision;*
- (g) *A dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation, which justify a separate application.*

Table 1 below sets out, with reference to Article 25 (2) APD, the grounds in national legislation, regulations and guidelines for considering an application as inadmissible. The other two tables highlight respectively whether a special admissibility procedure exists (table 2) and whether national legislation, regulations or administrative provisions permit the omission of the personal interview in the examination of admissibility (table 3).

¹ Regulation (EC) No 343/2003.

² Article 25 (2) APD

Table 1 – Art. 25 (2) APD: Inadmissibility grounds	Be	Bg	Cz	De ³	Es	Fi	Fr	Gr	It	Nl	Si	UK
(a) another Member State has granted refugee status;		√	√		√	√		√	√		√	√ ⁴
(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;		√ ⁵	√		√	√		√ ⁶	√		√	√
(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;					√	√ ⁷		√ ⁸			√	√
(d) the applicant is allowed to remain in the Member State concerned on some other grounds and as a result of this he/she has been granted a status equivalent to the rights and benefits of refugee status by virtue of Directive 2004/83/EC;		√ ⁹									√	
(e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against <i>refoulement</i> pending the outcome of a procedure for the determination of status pursuant to point (d);		√									√	
(f) the applicant has lodged an identical application after a final decision;			√		√			√	√		√	√
(g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation, which justify a separate application.								√				

3 In Germany, apart from the procedure under the Dublin II Regulation, no other procedure is explicitly designated as an admissibility procedure. However, other similar concepts are used for rejection. Applications can be deemed "irrelevant" (*unbeachtlich*) if the applicant had already found safety from persecution in another state and rejected, and the applicant can be returned within three months to that State or another State where s/he is safe from persecution. In cases that would fall under Art. 25 (2) (c) APD, no admissibility decision is taken; however, entry to the territory may be denied by the Federal Police (but this concept is of limited practical relevance because of the Dublin II Regulation). In cases falling under Art 25 (2) (f) APD, the application is considered in the framework of the procedure for subsequent applications. Since an identical application would not meet the criteria to conduct a further asylum procedure, the respective decision is taken and the application will not be examined on its merits.

4 The application is likely to be treated as inadmissible under s33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants Etc.) Act 2004, enabling removal of the individual to a third country through the issuance, by the determining authority, of a certificate.

5 Limited only to persons granted refugee status according to Art. 26 (a) APD.

6 The first country of asylum should have granted international protection status or a residence permit *inter alia* protecting him/her from *refoulement*.

7 In order to dismiss the application on this ground, the decision must be made within seven days of the date when the minutes of the interview were completed and the information on their completion was entered in the Register of Aliens.

8 The safe third country should have granted international protection status or a residence permit *inter alia* protecting him/her from *refoulement*.

9 In case the alien has been granted asylum or there is an open procedure for granting asylum with regard to the particular alien. Under national law, 'asylum' is a form of special protection granted by the President of the Republic of Bulgaria to aliens persecuted for their convictions or activities in protecting internationally recognized rights and freedoms.

10 Article 25 (2) (f) APD has not been transposed. The fact that the applicant does not present any significant new circumstances relating to his/her personal situation or country of origin is to be considered as a ground for rejecting the application as manifestly unfounded. However, the nature of proceedings on subsequent applications within the accelerated procedure in practice is specific and one could conclude that filing an identical application after a final decision is *de facto* an inadmissibility ground.

Table 1 – Art. 25 (2) APD: Inadmissibility grounds	Be	Bg	Cz	De ³	Es	Fi	Fr	Gr	It	Nl	Si	UK
Lack of legitimate interest	√											
Pending RSD procedure or appeal	√											
Falling under the jurisdiction of another state authority	√											
Lack of signature	√ ¹¹											
State not responsible for the examination of the application under any international treaty it is party to				√								
Others:												
Protocol (No 29)			√		√		√ ¹²					
on asylum for nationals of Member States of the European Union (1997)												
The applicant has lodged a new application with other personal data					√							

Table 2 – Special admissibility procedure	Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Existence of special admissibility procedure					√			√			√	√

Table 3 – Derogation from principles and guarantees of chapter II	Be	Bg	Cz	De ¹³	Es	Fi	Fr	Gr	It	Nl	Si	UK
Omission of personal interview		√	√			√ ¹⁴			√			√

11 The requirement of a signature is a general requirement in Article 29 (2) of the Administrative Procedure Code. The IRR of SAR in its Art. 10(1), item 5, provides that the registration office of SAR checks for a signature in the asylum application.

12 See the decision of the *Conseil d'État* N° 305226 of the 30 December 2009.

13 Explicitly foreseen by law in cases dealt with under the provisions for subsequent applications (falling under Art. 25 (2) (f) APD).

14 Section 104 of the *Ulkomaalaislaki* (Alien Act 301/2004) stipulates that a decision applying the safe country of asylum or origin concepts [i.e. admissibility ground] must be taken within seven days of completion of the record of the personal interview, thus implicitly requiring that an interview should take place. However, UNHCR's interviews with the determining authority revealed that interviews are not conducted when it is considered that the applicant enjoyed protection in a safe country of asylum, is still protected there, and may be returned. The omission of the personal interview is based on an interpretation of Section 103(1) of the Aliens Act, which provides that an application for international protection may be dismissed if the applicant has arrived from a safe country of asylum. As the application may be dismissed and not examined on its merits, it is considered by the determining authority that an interview is not required.

Unfounded and manifestly unfounded applications

Article 28 (1) of the APD states that, without prejudice to Articles 19 and 20 (on withdrawal or abandonment of the application), Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to Directive 2004/83/EC (the Qualification Directive).

Article 28 (2) APD states that, in the cases mentioned in Article 23 (4) (b) APD and in cases of unfounded applications for asylum in which any of the circumstances reported below and listed in Article 23 (4) (a) and (c) to (o) APD apply, Member States may also consider an application as manifestly unfounded, where it is defined as such in the national legislation. These are:

- (a) *The applicant, in submitting his/her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC;*
- (b) *The applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83/EC;*
- (c) *The application for asylum is considered to be unfounded:*
 - (i) *because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31, or*
 - (ii) *because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28(1);*
- (d) *The applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision;*
- (e) *The applicant has filed another application for asylum stating other personal data;*
- (f) *The applicant has not produced information establishing with a reasonable degree of certainty his/her identity or nationality, or it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality;*
- (g) *The applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC;*
- (h) *The applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin;*
- (i) *The applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so;*
- (j) *The applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal;*
- (k) *The applicant has failed without good reason to comply with obligations referred to in Article 4(1) and (2) of Directive 2004/83/EC or in Articles 11(2)(a) and (b) and 20(1) of the APD;*
- (l) *The applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented him/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry;*
- (m) *The applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law;*

- (n) *The applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation;*
- (o) *The application was made by an unmarried minor to whom Article 6 (4) (c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.*

It is important to note that in Slovenia, in apparent breach of Article 25 (2) of the APD, in the accelerated procedure the determining authority does not have to conduct an assessment of the merits and examine whether an applicant qualifies for refugee status if one of the grounds listed in Article 55 IPA is fulfilled.¹⁵ The application may be rejected as manifestly unfounded in the accelerated procedure on a ground other than the fact that the applicant does not qualify for refugee status. The practice has been upheld by the Supreme Court which took a position that an application can be rejected as manifestly unfounded when only one of the reasons defined in Article 55 of the IPA is established. Surprisingly, this position has been affirmed also by the Constitutional Court.¹⁶ This practice is problematic, when the initial procedure for the submission of an application is not conducted in line with minimum standards for a personal interview and the decision does not reflect that an analysis of the merits of the claim has been conducted.

Table 4 below sets out, with reference to Article 28 (2) APD, the grounds in national legislation, regulations and guidelines for considering a claim as manifestly unfounded (marked with “√”).

¹⁵ Article 55: (Reasons to reject the application in the accelerated procedure) *“The competent authority rejects the application in the accelerated procedure as manifestly unfounded if:*

- the applicant came to Slovenia exclusively for economic reasons;*
- on filing the application the applicant presented only facts that are insufficient, irrelevant or can be neglected for the examination of his entitlement to international protection by virtue of this Act;*
- it is obvious that the applicant does not meet the requirements for international protection set out in Articles 26 and 28 of this Act;*
- the applicant falsely presented the reasons he refers to particularly if his statements are inconsistent, contradictory, non-credible and contrary to the information on his country of origin under the eighth sub-paragraph of Article 23 of this Act;*
- without any well founded reason the applicant did not express an intention to file the application in the shortest possible time but had ample opportunity to do so;*
- the applicant filed his application with the purpose of postponing or precluding his deportation from the country;*
- the applicant refuses the dactyloscopy and does not want his photograph to be taken;*
- the applicant substantiated his application using false identity or counterfeit documents or concealed important information or documents about his identity or nationality (citizenship);*
- the applicant deliberately destroyed or expropriated his travel document, personal or identification document with a photograph that proves his identity or citizenship or any document containing a photograph that could prove his identity or citizenship;*
- the applicant deliberately destroyed or expropriated other documents (papers, tickets, certificates) that could be relevant for establishing his identity, citizenship or entitlement to international protection;*
- in spite of his assurance the applicant failed to produce documents and information under the fourth sub-paragraph of Article 23 of this Act within the agreed deadline;*
- the applicant filed another application with different personal data;*
- the applicant is coming from a safe country of origin under Article 65 of this Act;*
- the applicant can endanger public security or public order of the country by committing a criminal offence and has been for these reasons issued with an enforceable order to leave the country as a secondary punishment or the order has already been carried out but the deadline for the prohibition of entry into European Union has not yet expired;*
- the applicant concealed that he had filed an application before in another country particularly if he used a false identity;*
- the applicant tried to enter in another country illegally before the competent authority’s decision and was apprehended by the police or entered in another country illegally and was returned to Slovenia.”*

¹⁶ Up-240/2005, 21 April 2005, Up-794/2005, 20 October 2005, Up-1525/06, 21 June 2007, Up-2195/06-14.

Table 4 – Art. 28 (2) APD: Manifestly unfounded applications	Be	Bg ¹⁷	Cz	De ¹⁸	Es ¹⁹	Fi	F ²⁰	Gr	It	N ²¹	Si	UK ²²
(b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83/EC;	✓	✓	✓	✓ ²³		✓		✓	✓		✓	✓
i) because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31		✓	✓	✓ ²⁴		✓					✓	✓
(c) the application for asylum is considered to be unfounded: (i) because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28(1)		✓	✓			✓ ²⁵						✓
(d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision;								✓			✓	

¹⁷ In Bulgaria, a claim can be considered as manifestly unfounded only if the claimant does not qualify for both refugee status and **subsidiary protection**.

¹⁸ In addition to the reasons mentioned below, German law establishes another ground to reject an application as manifestly unfounded, if the application does not constitute an asylum application in the sense of the Asylum Procedure Act.

¹⁹ In Spain, Article 28 (2) APD has not been transposed and is not applied in practice. The Spanish legislation does not define applications as manifestly unfounded. However, under Articles 21.2 (border procedure) and 25.1 (in-territory procedure) of the New Asylum Law, the situations listed in Article 23 (4) a, b, c (i), g and i lead to the channeling of the application into the 'urgent procedure'.

²⁰ In France, Article 28 (2) APD has not been transposed and is not applied in practice. Of note though is the fact that the notion of manifestly unfounded applications is used in the border procedure to determine whether an applicant should be granted or refused leave to enter France to apply for international protection; and the notion is also used as a ground for omitting a personal interview in the first instance asylum procedure. The term 'manifestly unfounded' is not defined in French law or regulations but is apparently based on the definition contained in the non-legally binding Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum.

²¹ In the Netherlands, Article 28 (2) APD has not been transposed and is not applied in practice.

²² The term "clearly unfounded" is used in UK law, but the term "manifestly unfounded" is not. According to section 94 (2) NIAA 2002, any application for international protection may be certified as "clearly unfounded". It can be said that the term "clearly unfounded" roughly equates to the term "manifestly unfounded". However, it appears from the fact that the term "manifestly unfounded" has been used in UK legislation in the past, but not in the current legislation, that the decision not to use the term "manifestly unfounded", which is part of the language of international instruments, is deliberate. The definition of "clearly unfounded" has been set out in various decisions of the UK Courts. A generally accepted definition is that a clearly unfounded claim is one which is "so clearly without substance that it is bound to fail". An asylum application could therefore be deemed clearly unfounded under NIAA 2002 594 (2) in a number of the situations set out in Article 23(4) APD, even though these grounds are not specifically provided for in section 94 (2) NIAA 2002.

²³ In addition, German law further specifies that an application is manifestly unfounded, if it is obvious from the circumstances of the individual case that the foreigner stays in the Federal territory only for economic reasons or in order to escape a general emergency situation or an armed conflict ("*kriegerische Auseinandersetzung*").

²⁴ The asylum application of a foreigner from a safe country of origin shall be turned down as manifestly unfounded. However, the presumption of safety from persecution can be rebutted on the basis of the presentation of facts or evidence by the applicant. The case will be reviewed on its merits and a personal interview will be conducted.

²⁵ Only if the determining authority has not been able to issue a decision on the application within seven days from when the minutes of the interview were completed. If a decision is taken within the seven-day time limit, the application may be dismissed as inadmissible. See above.

Table 4 – Art. 28 (2) APD: Manifestly unfounded applications	Be	Bg ²⁷	Cz	De ¹⁸	Es ¹⁹	Fi	Fr ²⁰	Gr	It	Nl ²¹	Si	UK ²²
(e) the applicant has filed another application for asylum stating other personal data;				✓				✓			✓	
(f) the applicant has not produced information establishing, with a reasonable degree of certainty, his/her identity or nationality, or it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality;		✓	✓	✓		✓ ²⁶		✓			✓	
(g) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC		✓	✓	✓	✓ ²⁷	✓		✓			✓	
(h) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin;		✓						✓	✓			
(i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so;		✓	✓ ²⁸					✓		✓		
(j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal;		✓	✓ ²⁹	✓		✓		✓	✓		✓	
(k) the applicant has failed without good reason to comply with obligations referred to in Article 4(1) and (2) of Directive 2004/83/EC or in Articles 11(2)(a) and (b) and 20(1) of this Directive		✓ ³⁰		✓				✓			✓	

²⁶ The Aliens Act does not make reference to situation where the applicant has failed to produce information on identity or nationality. However, Section 101(2)(c) making reference to situations where the applicants impedes the establishment of his/her claim in other fraudulent manners as a ground for considering applications manifestly unfounded, must be seen as covering also situations referred to in Article 23 (f) where the applicant has disposed of documentation.

²⁷ Article 21.2.b of the New Asylum law, establishes that applications which meet the conditions laid down in Article 23 (g) will be processed in accelerated procedures if lodged at the border. However the expression “which make his/her claim clearly unconvincing” is substituted by the expression “which make his/her application manifestly unfounded” and it adds that applications will also be considered under this provision if the allegations contradict established country of origin information.

²⁸ This ground must be combined with the ground defined at letter j to declare a claim manifestly unfounded.
²⁹ Please see comment in footnote 29.

³⁰ Only Article 11 (2) (b) APD and to some extent Article 4 (2) of the Qualification Directive apply as grounds for establishing a claim to be manifestly unfounded.

Table 4 – Art. 28 (2) APD: Manifestly unfounded applications		Bg ³⁷	Cz	De ³⁸	Es ³⁹	Fi	Fr ²⁰	Gr	It	Nl ²¹	Si	UK ²²
(l)	the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry;	√		√ ³¹				√			√	
(m)	the applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law;			√				√			√	
(n)	the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation;	√						√			√	
(o)	the application was made by an unmarried minor to whom Article 6(4)(c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.			√				√				

³¹ The relevant German provision with regard to the latter part of Art 23 (4) (l) APD does not relate to the formal asylum application, but to the request for asylum with the police or an aliens authority.

SECTION XI:

THE CONCEPT OF FIRST COUNTRY OF ASYLUM

Introduction: international standards

Application in law and practice

Criteria for designating a country as a first country of asylum

The notion of ‘sufficient protection’

Inadmissibility grounds

Readmission: how Member States satisfy themselves that an applicant will be readmitted to the first country of asylum

Authorities responsible for taking decisions applying the concept of first country of asylum

Use of the criteria set out in Article 27 (1) when applying the concept of first country of asylum

Introduction: International Standards

The concept of first country of asylum is defined in Article 26 of the APD:

A country can be considered to be a first country of asylum for a particular applicant for asylum if:

- (a) s/he has been recognised in that country as a refugee and s/he can still avail him/herself of that protection; or*
- (b) s/he otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement;*
and provided that s/he will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27 (1).

It should be noted that Member States are not required to apply the concept of first country of asylum, as Article 26 is a permissive provision.¹ However, in accordance with the APD, those Member States which apply the concept are not required to examine whether an applicant qualifies as a refugee or for subsidiary protection status, where a country which not a Member State is considered as a first country of asylum for the applicant pursuant to Article 26.² In other words, the Member State may consider such applications as inadmissible.

Destination countries may have interests in reducing irregular movements. As such, the concept of first country of asylum may be seen as a potential deterrent to irregular movements by refugees. However, UNHCR notes that the causes of secondary movements are manifold and include, among other things, a lack of durable solutions, limited capacity to host refugees and a failure to provide effective protection in some third countries. Therefore, the assessment of whether a third country does constitute a first country of asylum requires a careful and individualised case-by-case examination.

It is worth underlining that both criteria in Article 26 (2) (a) and (b) APD are subject to the proviso that the designated first country of asylum will re-admit the applicant. This is a critical safeguard, as it seeks to ensure that the application of the first country of asylum concept does not result in refugees ‘in orbit’, who are denied admission by the third country and shuttled consecutively from one country to another. If admission to the third country cannot be assured, then the application should be substantively examined by the Member State where the application has been made. The application of the first country of asylum concept without ensuring that the applicant will be re-admitted by the third country would constitute a violation of Article 26 APD.

The burden is on Member States to ensure that the applicant can avail him/herself of protection in the third country. UNHCR has welcomed the requirement that a third country be considered a first country of asylum only if the recognized refugee can still avail him/herself of that protection. However, UNHCR has serious concerns regarding Article 26 (b) APD.

¹ Article 26 states “A country **can be** considered to be a first country of asylum ...”

² Article 25 (2) (b) APD.

UNHCR has noted that the term ‘*sufficient protection*’ in Article 26 (b) APD is not defined. The article explicitly states only that the concept includes that the applicant should benefit from the principle of *non-refoulement*. However, individuals who qualify under the 1951 Convention acquire more than the right of *non-refoulement*. Article 26 only includes a permissive clause stating that “*Member States may take into account Article 27 (1)*” which sets out four principles to be satisfied in order to apply the safe third country concept.³ The application of Article 27 (1) APD is not obligatory under the APD.

UNHCR has cautioned that the term ‘*sufficient protection*’ may not represent an adequate safeguard or criterion when determining whether an applicant can be returned safely to a first country of asylum.⁴ In UNHCR’s view, the protection in the third country should be effective and available in practice. Therefore, UNHCR recommends using the term ‘*effective protection*’ in national legislation and suggests the elaboration of explicit benchmarks in line with the standards outlined in the 1951 Convention and the Lisbon Conclusions on ‘*effective protection*’⁵ Furthermore, the capacity of the third state to provide effective protection in practice should be taken into consideration by Member States, particularly if the third state is already hosting large refugee populations. Countries where UNHCR is engaged in refugee status determination under its mandate should, in principle, not be considered first countries of asylum. UNHCR often undertakes such functions because the state has no capacity to conduct status determination or to provide effective protection. Generally, resettlement of persons recognized to be in need of international protection is required. The return of persons in need of international protection to such countries should therefore not be envisaged.

It is UNHCR’s position that the following elements, whilst not exhaustive, are critical factors in the assessment of whether an applicant enjoys effective protection in the potential first country of asylum:⁶

- a) The person has no well-founded fear of persecution in the third state on any of the 1951 Convention grounds, and there is no risk of serious harm, as stipulated in Article 15 of the Qualification Directive, in the third state.
- b) There is and will be respect for fundamental human rights in the third state in accordance with applicable international standards, including but not limited to the following:
 - there is no real risk to the life of the person in the third state;
 - there is no real risk that the person would be deprived of his/her liberty in the third state without due process.

³ Art. 27 (1) APD stipulates that Member States must be satisfied that the applicant will be treated in accordance with the following principles in the third country concerned: “(a) *life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion*; (b) *the principle of non-refoulement in accordance with the Geneva Convention is respected*; (c) *the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected*; (d) *the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*”

⁴ UN High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, available at: <http://www.unhcr.org/refworld/docid/42492b302.html>

⁵ UN High Commissioner for Refugees, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>

⁶ *Ibid.*

- c) There is no real risk that the person would be sent by the third state to another state in which s/he would not receive effective protection, or would be at risk of being sent from there on to any other state, where such protection would not be available.
- d) While accession to international refugee instruments and basic human rights instruments is a critical indicator, the actual practice of states and their compliance with these instruments is crucial to the assessment of the effectiveness of protection. Where the return of an asylum-seeker to a third state is involved, accession to and compliance with the 1951 Convention and/or 1967 Protocol are essential, unless the destination country can demonstrate that the third state has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.
- e) The person has access to means of subsistence sufficient to maintain an adequate standard of living, and steps are undertaken by the third state to enable the progressive achievement of self-reliance, pending the realization of durable solutions.
- f) The third state takes account of any special vulnerabilities of the person concerned and maintains the privacy interests of the person and his/her family.
- g) Effective protection will remain available until a durable solution can be found.

UNHCR also reminds Member States that they must take into consideration the applicant's right to family unity and consider the applicant's family links in the destination country. In UNHCR's view, a person's fundamental right to family unity is an overwhelming consideration that countries of asylum should consider. It should thus take precedence over the availability of effective protection provided by the third country, in the assessment of whether the person should be returned to that country.

Application in law and practice

Belgium and France⁷ have not transposed Article 26 in national legislation. The other surveyed Member States, i.e. Bulgaria,⁸ the Czech Republic,⁹ Finland,¹⁰ Germany,¹¹ Greece,¹² Italy,¹³ the Netherlands,¹⁴ Slovenia,¹⁵ Spain¹⁶ and the UK¹⁷ have transposed or reflect the concept of the first country of asylum in their respective national laws.

- 7 According to the table of transposition made available by the French government, Article 26 is an optional provision which is not transposed in French legislation.
- 8 Article 13 (2) item 2 (Amended, SG No. 52/2007) of the Law on Asylum and Refugees states that: *“The refugee status or humanitarian status determination procedure shall not start or if it has already started it shall be terminated when the alien has:*
 1. *refugee status granted in another European Union Member State;*
 2. *refugee status granted in a safe third country provided that s/he will be allowed to stay in that country;[...]*”
- 9 Section 2 (3) of the Asylum Act, Act No. 325/1999 Coll. on Asylum and Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act), and Amendment to Act No. 359/1999 Coll. on Social and Legal Protection of Children, as amended; published in Issue No. 106/1999 of the Collection of Laws of the Czech Republic (pp. 7385-7404) on December 23, 1999, and entered into force on 1 January 1 2000.
- 10 Section 99 of the *Ulkomaalaislaki* (Aliens' Act 301/2004, in force 28.4.2009) defines a safe country of asylum: *“When deciding on an application in the asylum procedure, a State may be considered a safe country of asylum for the applicant if it is a signatory, without geographical reservations, to the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights (Treaty Series of the Statute Book of Finland 8/1976) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaty Series of the Statute Book of Finland 60/1989) and adheres to them”*. The legal preparatory works implementing the APD, the *Hallituksen esitys 86/2008* (Government Bill 86/2008), state that the Finnish legal concept of safe country of asylum is equivalent to Article 26 and 27 together in the APD. Compared to the concept of first country of asylum in the APD, the major difference lays in the fact that the safe country of asylum concept is applicable both to countries where the applicant has enjoyed or *could have enjoyed* international protection. In practice, however, the concept of safe country of asylum is applied mainly to other EU countries (see section 12 on safe third countries for further details).
- 11 Even though Sections 27 and 29 APA in this regard remained unaffected by transposition legislation and do not fully reflect the wording of Article 26 APD, these are the norms reflecting the concept of first country of asylum in German law. See Bundestag printed papers 16/5065, p. 217. Section 29 (3) APA was deleted by the Transposition Act 2007; this amendment was not prompted by the transposition of the APD. The version valid before the Transposition Act 2007 entered into force contained the rule that an application for which another country was responsible under the Dublin system would be turned down as “irrelevant”. With a view to such decisions in the Dublin system, a new Section 27 a APA was introduced providing for turning down the respective application as “inadmissible”.
- 12 Article 19 of Presidential Decree 90/2008 is a verbatim transposition of Article 26 of the APD.
- 13 Article 29 of the Legislative Decree 25/2008.
- 14 Article 30 (1) (d) and Article 31 (2) (i) of the Aliens Act. Article 30 (1): *“An application for the issue of a residence permit for a fixed period as referred to in section 28 shall be rejected if: (d) the alien will be transferred to a country of earlier residence on the grounds of a treaty obligation between the Netherlands and the other country concerned, which is a party to the Convention on Refugees, the Convention for the Protection of Human Rights and Fundamental Freedoms (Trb. 1951, 154) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Trb. 1985, 69) or has otherwise undertaken to observe Article 33 of the Convention on Refugees, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.”*
 Article 31 (2) (i) provides that: *“The screening of an application [for the issuance of a residence permit] shall take account, among other things, of the fact that: (i) the alien will be admitted to a country of earlier residence until s/he has found lasting protection elsewhere.”*
- 15 Article 67 of the International Protection Act provides that *“(1) A country can be considered to be a first country of asylum where: the applicant has been granted refugee status which still applies; or the refugee enjoys sufficient protection, including benefiting from the principle of non-refoulement (2) The concept of first country of asylum shall be applied provided that s/he will be readmitted to that country. (3) In applying the concept of first country of asylum the competent authority shall take into account Article 63 of this Act”* [on the concept of safe third country].
- 16 Article 5.6 (f) of the Asylum Law 9/1994 provides that the concept of first country of asylum applies *“If the applicant has already been recognized as a refugee and has the right to reside or to be granted asylum in another State, or if s/he has arrived from another State whose protection s/he could have asked for. In either case, there must be no danger to his life or liberty in the said State, nor may s/he be exposed to torture or other inhuman or degrading treatment there and s/he must also be effectively protected against refoulement to the persecuting country, under the conditions laid down in the Geneva Convention”*. Article 5.6 (f) covers the concepts of first country of asylum and safe third country. The New Asylum Law separates both concepts and states that a case might be declared inadmissible if: *“according to Article 25.2 (b) and Article 26 of Directive 2005/85/CE, the applicant has been recognized as a refugee and has the right to reside or obtain effective international protection in a third state provided that s/he will be re-admitted to that country, his/her life or liberty are not threatened, nor may s/he be exposed to torture or inhuman or degrading treatment and s/he is effectively protected against refoulement to the persecuting country, in accordance with the Geneva Convention.”*
- 17 The First Country of Asylum concept has not been transposed in the UK. It is subsumed within the third country provisions. The UK transposition table says that no action is required.

Belgium, Bulgaria, the Czech Republic, Greece¹⁸ and Slovenia do not apply in practice the concept of first country of asylum. All other Member States of focus in this research applied it rarely.



In Bulgaria, the concept as laid down in Article 13 (2), item 1 and 2 LAR, is not applied in practice. Being a beneficiary of protection in another country has been used simply as a ground for rejecting an application (rather than a ground for inadmissibility or discontinuation of proceedings).¹⁹

In Finland, the concept has been applied solely to other European Union countries, such as Hungary and Poland.²⁰ In addition, Section 104 of the Aliens' Act 301/2004 stipulates the requirement for a document to be issued to all removed applicants whose applications are rejected on grounds of safe country of asylum, stating that the application has not been examined in substance in Finland. The same Section states that a decision applying the safe country of asylum or origin concepts must be taken within seven days of completion of the record of the personal interview, thus implicitly requiring that an interview should take place. However, UNHCR's interviews with the determining authority revealed that interviews are not arranged and conducted when it is considered that the ap-

¹⁸ Interviews with S1, S2, S7, S9 and S10.

¹⁹ Information from interviews with stakeholder-interviewers and the Head of Proceedings and Accommodation Department.

²⁰ During the past years, Finland has received a number of asylum seekers from Russia who had already been recognized in Hungary or Poland. As such, the determining authority has considered it impossible to use Dublin II mechanisms to facilitate return to these countries, as protection had already been granted. Instead, the Council of Europe *Agreement on the Transfer of Responsibility for Refugees*, signed in Strasbourg on 16 October 1980 (available at: <http://www.unhcr.org/refworld/docid/3ae6b37620.html>) has been used, and Poland and Hungary have been considered to be safe countries of asylum. Finland has no readmission agreements with either Poland or Hungary.

plicant enjoyed protection in a safe country of asylum, is still protected there, and may be returned. The omission of the personal interview is based on an interpretation of Section 103 (1) of the Aliens Act, which provides that an application for international protection may be dismissed if the applicant has arrived from a safe country of asylum. As the application may be dismissed and not examined on its merits, an interview is not required by the determining authority. In consideration of the above, this interpretation of Section 103 (1) of the Aliens Act would appear to be inconsistent with Section 104 (1), which states that a decision applying the safe country of asylum concept must be taken within seven days of completion of the record of the personal interview. Statistics collated by the Finnish determining authority do not mention the application of the first country of asylum concept in their asylum procedure. However, the lists of decisions made available to UNHCR did include decisions taken on the ground of first country of asylum, as did the decisions audited.²¹ Both the Government Bill transposing the APD and stakeholders in the procedure confirm that the safe country of asylum concept is only used in cases where an *ad hoc* agreement on the readmission of the specific applicant to the first country of asylum has been reached.

French law has not transposed the concept of first country of asylum, and in practice, an applicant for asylum with refugee status in another country may still benefit from protection in France, provided s/he fulfills the requirements for legal entry to French territory applied to all foreigners in France, and receives a long-term residence permit. On the basis of this document, the OFPRA examines his/her application and, provided no exclusion or cessation clauses apply, transfers his/her refugee status to France, under a “transfer of protection” arrangement. Transfer of protection is applied only when a recognized refugee holds a long term entry visa (which subsequently allows him/her to apply for the requisite long-term residence permit). The Council of Europe Agreement on Transfer of Protection²² is not explicitly cited as the legal basis for this practice. If the refugee claims international protection based on threats to his/her security in the first country of asylum, an examination of the application, with reference to the country of first asylum, takes place without the need for the applicant to fulfill the requirement of holding a long term-residence permit. In such a case, the applicant has to establish that s/he has a well founded fear of persecution within the meaning of Article 1A (2) of the 1951 Convention. However, this practice is limited to beneficiaries of the 1951 Convention. For those who were protected in a third state on another basis (for instance based on the OAU Convention or subsidiary protection), their applications would be examined for potential protection needs in the country of origin.

In Germany, Section 29 APA related to the concept of safety elsewhere is of very little practical application. According to the BAMF, there are so few rejections as to be “irrelevant” in practice.²³ In 2008, only three decisions were based on Section 29 APA. They all concerned a Bosnian family which had applied for protection after having lived for seven years in the USA and held a 15-year residence title for that country.

In the Netherlands, the Aliens Circular states the order in which issues need to be examined. Under its provisions, the examination starts with safe third country grounds, and only if that concept is not applicable, should first country of asylum then be considered.²⁴ This approach implies a hierarchy between Articles 26 and 27 of the APD, which

21 The lists of decisions made available to the NPO included five decisions on safe country of asylum grounds. Of the audited cases, cases 98, 99, 100, 102, 106 and 107 concerned safe countries of asylum and applicants with protection status in Hungary and Poland. Of the additionally audited cases, 11 made reference to the concept of safe country of asylum (including an applicant with refugee status in Poland) but were granted nonetheless residence permit in Finland on the grounds of family ties.

22 Council of Europe *Agreement on the Transfer of Responsibility for Refugees*, signed in Strasbourg on 16 October 1980 available at: <http://www.unhcr.org/refworld/docid/3ae6b37620.html>.

23 This is confirmed by interviews with the lawyers. Section 27 APA, establishing a concept of safety elsewhere from persecution, is outside the scope of the APD since it only applies directly to constitutional asylum under Article 16 (a) Basic Law. However, according to information submitted by the asylum authority, in reviewing the application of Section 29 APA, the criteria of Section 27 (2) and (3) APA are taken into account.

24 Aliens Circular C 4/3.9.1

the Directive itself does not stipulate nor require. However, UNHCR's audit of case files included no such cases, and interviews with stakeholders confirmed that the concept of first country of asylum is rarely applied in practice.

In Spain, it is noteworthy that although the concept of first country of asylum may be applied as a ground for inadmissibility (see further details below), in practice the concept is seldom applied. When used, it is never the sole ground for inadmissibility. In the UK, the first country of asylum concept is subsumed within the safe third country provisions. Information on countries considered safe in 2008 based on the Article 26 criteria is not available.

Criteria for designating a country as a first country of asylum

Some Member States in this study have not transposed or do not reflect elements of the specific Article 26 APD criteria in their national legislation.

Bulgaria,²⁵ the Czech Republic²⁶ and Italy,²⁷ for instance, have only reflected Article 26 (a), i.e. the fact that the applicant “has been recognized in that country as refugee and s/he can still avail him/herself of that protection”, thereby setting a higher standard of protection in these three countries.

In Slovenia, Article 67 of the International Protection Act omits an important part of Article 26 (a) of the APD i.e. “and s/he can still avail him/herself of that protection”, which has been replaced by a requirement that the refugee status remains valid. However, even if the applicant's refugee status still applies, it may be that s/he is unable to avail him/herself of that protection in practice. Given that the APD sets minimum standards, including in its permissive provisions, such transposition raises questions about compatibility with the APD.

Likewise, in Spain, the wording of the Asylum Law does not require that the applicant can still avail him/herself of the refugee protection. Instead, it requires that the applicant has the “right to reside” in the third country. The new Asylum Law maintains the same wording. In practice, however, claims are not rejected on this ground where protection would no longer be available. The absence of a right of residence in the third country is taken to mean that the applicant cannot avail him/herself of the refugee protection, as in the case of mandate refugees recognized by UNHCR in Morocco, or in the case of applications by recognized refugees at Spanish embassies around the world.²⁸

25 Article 13 (2) item 2 (Amended, SG No. 52/2007) of the Law on Asylum and Refugees states that: “*The refugee status or humanitarian status determination procedure shall not start or if it has already started it shall be terminated when the alien has: 1. refugee status granted in another European Union Member State; 2. refugee status granted in a safe third country provided that s/he will be allowed to stay in that country; [...]*”

26 Section 2 (3) of the Asylum Act provides that “*The first country of asylum means a country other than that of which the alien is a citizen, or in case of a stateless person, the country of his/her last permanent residence, where the alien had stayed before s/he entered the Territory if the other country granted him/her refugee status pursuant to an international agreement*”. In addition, a footnote in the ASA adds: “*1b) in case the alien may still avail him/herself of the protection and may safely return to the other country.*”

27 Decreto legislativo 25/2008, Article 29 (a); available at: www.camera.it/parlam/leggi/deleghe/testi/o8o25dl.htm

28 Article 5.6 (f) of the Asylum Law 9/1994 provides that the concept of first country of asylum applies “*if the applicant has already been recognized as a refugee and has the right to reside or to be granted asylum in another state, or if s/he has arrived from another state whose protection s/he could have asked for. In either case, there must be no danger to his/her life or liberty in the said state, nor may s/he be exposed to torture or other inhuman or degrading treatment there and s/he must also be effectively protected against refoulement to the persecuting country, under the conditions laid down in the Geneva Convention*”. Article 5.6 (f) covers the concepts of first country of asylum and safe third country. The New Asylum Law separates both concepts and states that a case might be declared inadmissible if: “*according to article 25.2 (b) and Article 26 of Directive 2005/85/CE, the applicant has been recognized as a refugee and has the right to reside or obtain effective international protection in a third state provided that s/he will be re-admitted to that country, his/her life or liberty are not threatened, nor may s/he be exposed to torture or inhuman or degrading treatment and s/he is effectively protected against refoulement to the persecuting country, in accordance with the Geneva Convention.*”

In Finland, the concept of a safe country of asylum can be applied if the applicant “*may be returned*”²⁹ to a country “*where s/he enjoyed or could have enjoyed protection*”. That country can be considered as safe “*if it is signatory, without geographical reservations, to the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and adheres to them.*”³⁰

Despite the fact that the law does not make reference to Article 26 (a) APD, requiring that s/he can still avail him/herself of the protection of that state, the preparatory works for the Finnish legislation clearly state that the concept of safe country of asylum can only be used in respect of countries where the applicant in question is still protected in accordance with international standards, and where s/he enjoys protection from *refoulement*. Further, the preparatory works require that the country be willing to take back the person in question.³¹

In the United Kingdom, the provisions of Section 33 and Schedule 3 of the 2004 Act give power to the Secretary of State to remove an applicant to a ‘safe country’ (which encompasses a ‘first country of asylum’), subject to being satisfied that the safe country is a place where the applicant’s life or liberty will not be threatened for a 1951 Convention reason, and is a place which protects the person against *refoulement*. However, the second limb of Article 26 (a) APD, i.e. that the applicant can still avail him/herself of that protection, and Article 26 (b) with respect to the requirement that the applicant enjoys “sufficient protection,” are not reflected in Section 33 and Schedule 3 of the 2004 Act. The criterion found in the Immigration Rules, that there is clear evidence of his/her admissibility to the safe country at hand, does not correspond to the requirement in Article 26 APD that the applicant will be re-admitted to that country.³² The Immigration Rule expressly states that, provided the Secretary of State is satisfied that a case meets this criterion, s/he is “under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory.” The Immigration Rules do not further clarify what is meant by “clear evidence of admissibility.”

In Greece, Article 19 of PD 90/2008³³ is a *verbatim* translation of Article 26 APD. However the wording of paragraphs 1 a and 1 b of Article 19 is ambiguous. In fact, it is not clear if the condition “s/he will be readmitted to that country” applies to both paragraphs, or to paragraph (b) only.

In the Netherlands, the Aliens Act seems to require a previous stay, but the Aliens Circular states otherwise. Article 31 (2) (i) Aliens Act refers to a “country of earlier stay,” while the Aliens Circular C4/392 and 3.93 defines as one of the criteria that the asylum seeker stayed or *could have stayed* in that country, under circumstances that are not abnormal according to the local standards. According to the Aliens Circular C4/3.9.3, (under ‘b’), Article 31 (2)

29 Section 103 of the Aliens’ Act: “An application for international protection may be dismissed if: 1) the applicant has arrived from a safe country of asylum defined in section 99 where s/he enjoyed or could have enjoyed protection referred to in sections 87 and 88 and where s/he may be returned”, *Ibid*.

30 Section 99 of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 28.4.2009) gives the definition of a safe country of asylum: “When deciding on an application in the asylum procedure, a state may be considered a safe country of asylum for the applicant if it is signatory, without geographical reservations, to the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights (Treaty Series of the Statute Book of Finland 8/1976) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaty Series of the Statute Book of Finland 60/1989) and **adheres to them.**” Available at: <http://www.migri.fi/netcomm/content.asp?path=2760>

31 *Hallituksen esitys* 28/2008 (Government Bill 28/2008), 36. In the audited cases where the safe country of asylum concept was used in a first country of asylum sense, the decisions focused to a great extent on providing reasons for why a future safe return and stay were possible. See audited cases 98, 99 and 106.

32 Immigration Rule, Paragraph 345.

33 “1. A country shall be considered to be a first country of asylum for a particular applicant for asylum if: a. s/he has been recognized in that country as a refugee and can still avail him/herself of that protection; or b. s/he otherwise enjoys sufficient protection in that country, including benefiting from the principle of non *refoulement* provided that s/he will be readmitted to that country ...”

(i) of the Aliens Act is only applicable if it appears from objective facts or circumstances that the applicant did not have the intention to travel to the Netherlands, at the moment s/he was in the country of origin. In the same paragraph of the Circular, under “ad b”, a further criterion is included, relating to the asylum seeker’s intention to travel to the Netherlands. A stay of two weeks or more in the third country is taken to indicate that the applicant did not intend to travel to the Netherlands, whereas a stay of less than two weeks indicates that the applicant did intend to travel to that country. This indication can be rebutted, however, on the basis of objective facts and circumstances. If the authorities conclude there was no intention to travel to the Netherlands, they can assume protection was available in the third country. Under the Aliens’ Circular, the claim can also be rejected if the applicant did not stay in that third country, for two weeks or at all – but could have stayed there, in the authorities’ view.

By contrast, Spain has expanded upon the criteria included in Article 26 of the APD. In fact, the Spanish Asylum law further defines the concept of *refoulement* referred to in Article 26 of the APD.³⁴ While the concept of danger to the applicant’s life or liberty is transposed without further elaboration, that of protection against *refoulement* is limited to the 1951 Convention grounds, and solely linked to return to “the persecuting country,” as opposed to any territories where his life or freedom would be threatened.³⁵

In Germany, Section 27 APA³⁶ provides that constitutional asylum will not be granted if the applicant has been safe from persecution in another State (i.e. in a state not covered by the safe third country concept). Safety from persecution is assumed if the applicant has been issued a refugee travel document by that third state, or has stayed for more than three months in that country. This provision does not have legal consequences with a view to refugee or subsidiary protection. However, according to information provided by BAMF, the criteria of Section 27 (2) and (3) APA are also reviewed when applying Section 29 APA, and thus used for an eventual rejection of an application as irrelevant.³⁷ Section 29 APA, which may also be applied with a view to refugee protection, provides that an application is “irrelevant” (*unbeachtlich*)³⁸ if the applicant evidently was safe from persecution in another third country, and can be returned within three months to that state, or another state where s/he is safe from persecution. In this case, the application is turned down as irrelevant. This means that an asylum procedure reviewing the material criteria of the claim is not carried out.

³⁴ Article 5.6 (f) of the former Asylum Law 5/1984 provides that: “*there must be no danger to his/her life or liberty in the said state, nor may s/he be exposed to torture or other inhuman or degrading treatment there and s/he must also be effectively protected against refoulement to the persecuting country, under the conditions laid down in the Geneva Convention*”. Article 20 (1) c of the New Asylum Law (Law 12/2009) transposing the APD states: “*...there must be no danger to his/her life or liberty in the said state, nor may s/he be exposed to torture or other inhuman or degrading treatment and s/he must also be effectively protected against refoulement to the persecuting country, under the conditions laid down in the Geneva Convention*”

³⁵ 1951 Convention Relating to the Status of Refugees, Article 33.1.

³⁶ Section 27 APA: Safety elsewhere from persecution: “(1) A foreigner who was already safe from political persecution in another third country shall not be recognized as a person entitled to asylum. (2) If the foreigner holds a travel document issued by a safe third country (Section 26a) or by another third country pursuant to the Convention related to the status of refugees, it shall be presumed that s/he was safe from political persecution in that country. (3) If before entering the Federal territory, a foreigner has lived for more than three months in another third country where s/he is not threatened by political persecution, it shall be presumed that s/he was safe there from political persecution. This shall not apply if the foreigner provides plausible evidence that deportation to another country where s/he is threatened by political persecution could not be ruled out with reasonable certainty.”

³⁷ Section 29 APA: [Irrelevant] applications for asylum: “(1) An asylum application shall be [irrelevant] if it is obvious that the foreigner was already safe from political persecution in another third country and if it is possible to return him to this country or to another country where s/he is safe from political persecution. (2) If it is impossible to return him within a period of three months, the asylum procedure shall be continued. The Aliens Authority shall inform the Federal Office without delay.”

³⁸ The translation provided on the internet by the Federal Ministry of the Interior (www.en.bmi.bund.de) speaks of “unfounded “applications. This is not an accurate translation. The term used in German is “*unbeachtlich*” which means “irrelevant”. More particularly, the subsumption of an application under this provision has the procedural consequence that an application is not examined on the merits. Therefore, the concept of “irrelevant” applications in German asylum procedures law constitutes a concept of inadmissibility.

The notion of ‘sufficient protection’

As described earlier, Bulgaria, the Czech Republic and Italy have not transposed Article 26 (b) of the APD in their respective national legislations; as such no interpretation of the notion of ‘sufficient protection’ is provided in law.

While Article 5.6 (f) of the former Spanish Asylum Law only mentions (actual or possible) refugee status and the right to reside in the third country,³⁹ the new Asylum Law introduces the notion of ‘effective protection.’⁴⁰

In the United Kingdom also, Article 26 (b) APD encompassing the notion of “sufficient protection” is not reflected,⁴¹ and there is no requirement for the Secretary of State to be satisfied that there is “sufficient protection” before removing an applicant to a first country of asylum. UNHCR⁴² and others⁴³ have noted that the term “sufficient protection” has not been defined in the Directive, and may not represent an adequate criterion when determining whether an asylum seeker or refugee can be returned safely to a first country of asylum. In turn, the provisions in UK law do not define “sufficient (or effective) protection.” UNHCR and others therefore have recommended that the national legislative provisions should state that the applicant should have “effective” (and not merely “sufficient”) protection in the first country of asylum.

Greece has a verbatim translation of Article 26 of the APD, and thus no interpretation is offered in its legislation of the notion of ‘sufficient’ protection. However, interviewees declared that ‘sufficient protection’ is interpreted to mean subsidiary or humanitarian protection.⁴⁴ In Slovenia, the official translation of Article 67 of the International Protection Act states ‘sufficient protection’ (without further details as in Article 26 (b) of the APD), though the original Slovene word could be interpreted to mean ‘actual protection’. As there is no practice as yet applying this concept, no further interpretation is available in Slovenia.

In defining ‘sufficient protection’, the Dutch legislation requires that the applicant already received or could have received sufficient protection against *refoulement*;⁴⁵ the existence of an agreement to readmit with the third country; and an undertaking by that to respect the principle of *non-refoulement* or Article 3 of the relevant human rights treaties.⁴⁶ This compliance must be confirmed by agreements, treaties or written declarations of the state concerned, supported by practical experience. However, having signed or ratified the Conventions is not a condition.⁴⁷ Article 26 (b) APD requires that the applicant “enjoys sufficient protection, including benefiting from the principle of *non-refoulement*.” This suggests that the notion of “sufficient protection” extends beyond protection from *refoulement*. Given the Dutch legislation appears to only require protection from *refoulement*, it does not fulfil the requirements of Article 26 (b) APD.

³⁹ Article 5.6 (f) of the Asylum Law provides that the concept of first country of asylum applies “*If the applicant has already been recognized as a refugee and has the right to reside or to be granted asylum in another state, or if s/he has arrived from another state whose protection s/he could have asked for*”.

⁴⁰ Article 20.1 (c) “*The person has already been recognized as a refugee and has the right to reside or to obtain effective international protection.*”

⁴¹ The UK’s implementation table indicates “No action required.”

⁴² UNHCR, *Comments on the UK implementation of Council Directive 2005/85/EC (the Asylum Procedures Directive)*, 24 October 2007.

⁴³ Refugee Council, *Response to UK Implementation of Council Directive 2005/85/EC (the Asylum Procedures Directive)*, October 2007.

⁴⁴ Interview with S1, S2 and S9.

⁴⁵ According to the C4/3.9.2 Aliens Circular, the concept of first country of asylum can already apply if the asylum seeker had or could have had sufficient protection against *refoulement* in that country, and the asylum seeker stayed or could have stayed in that country.

⁴⁶ Article 30 (1) (d) of the Aliens Act provides that “*An application for the issue of a residence permit for a fixed period as referred to in section 28 shall be rejected if: (d) the alien will be transferred to a country of earlier residence on the grounds of a treaty obligation between the Netherlands and the other country concerned, which is party to the Refugee Convention, the Convention for the Protection of Human Rights and Fundamental Freedoms (Trb. 1951, 154) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Trb. 1985, 69) or has otherwise undertaken to observe Article 33 of the Refugee Convention, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.*”

⁴⁷ C3/5, Aliens Circular.

In Germany, while the wording “sufficient protection” including *non-refoulement*, has not been formally transposed, section 29 APA requires safety from persecution. This includes safety from *refoulement* as well as protection from eventual persecution by third parties, and from other significant disadvantages or dangers in the third state. This is implied in the jurisprudence of the Federal Constitutional Court, which emphasizes that mere safety from persecution is insufficient, but the necessary support for overcoming the negative consequences of the flight must be available to the refugee.⁴⁸ Moreover, section 27 (2) and (3) APA also applied in connection with section 29 APA contains an assumption of safety if the applicant holds a refugee passport issued by the other state, or has stayed there for more than three months.⁴⁹ As an additional criterion, German law requires that safety from persecution in the third state be evident (*offensichtlich*).⁵⁰

Recommendation

UNHCR considers that the phrase “sufficient protection” in Article 26 (b) APD is not defined and does not represent an adequate safeguard when determining whether an asylum seeker may be returned to the first country of asylum. The APD should be amended and the term “sufficient protection” replaced by “effective protection”. In addition, it is recommended to draw up an Annex to the APD, setting out the criteria for “effective protection” for the purposes of Article 26 (b) in line with the 1951 Convention and the Lisbon Conclusion on “effective protection.”⁵¹

Inadmissibility grounds

Article 25 (2) (b) APD provides that “Member States may consider an application for asylum as inadmissible ... if: (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26”. Several Member States of focus in this research use the notion of first country of asylum as a ground for inadmissibility.

In Bulgaria, Article 13 (2)⁵² of the Law on Asylum and Refugees provides that the procedure shall not start – or in case it has already started, shall be discontinued – if the applicant has refugee status in a safe third country. Article 13 (2), item 2, obliges the decision-maker first to establish that the third country is safe in the meaning of paragraph 1, item 9 of the Additional Provisions of the Law on Asylum and Refugees⁵³ before s/he may rely on this inadmissibility ground. In practice, however, this article is not applied as a ground for inadmissibility. Article

⁴⁸ BVerfGE 78, 332, 344 et seq.

⁴⁹ The latter assumption is refutable by making credible that safety from *refoulement* cannot be excluded with sufficient certainty. Despite the fact that Section 27 (2) APA does not contain an explicit provision on rebuttal, the presumption is seen as being refutable. (R. Marx, *Commentary on the Asylum Procedure*, 7th edition, section 27, in particular paragraph 57 and 58). An example for rebutting the assumption of safety is cited, namely, that the passport may have been issued for reasons of allowing onward travel to refugees not legally staying in the country in accordance with Article 28 (1) 2 of the 1951 Convention.

⁵⁰ The BAMF did not provide explanations or examples illustrating this approach.

⁵¹ UNHCR, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>

⁵² Law on Asylum and Refugees, above note 26. See also Article 70 (1) of the Law on Asylum and Refugees, item 2: “In a term of three days after proceedings have started, the interviewing body may: ...2. discontinue the proceedings on the grounds of Article 13 (2). See also Article 77 (3) of the Law on Asylum and Refugee: “Acting on a proposal by the interviewing body, when the requirements of the law are present or based on an application by the alien, the Chairperson of SAR discontinues the proceedings.”

⁵³ Paragraph 1, item 9 of the Additional Provisions of the Law on Asylum and Refugees provides that: “Safe third country” shall mean a country other than the country of origin where the alien who has applied for status has resided and: a) there are no grounds for the alien to fear for his/her life or freedom due to race, religion, belonging to a particular social group or political opinions or beliefs; b) the alien is protected from being returned to the territory of a country in which there are prerequisites for persecution and risk to his/her rights; c) the alien is not in danger of persecution, torture, inhuman or degrading treatment or punishment; d) the alien has the opportunity to request refugee status and when such status is being granted s/he shall enjoy protection being a refugee; e) there are sufficient reasons to believe that the alien will be allowed on the territory of such country.”

13 (2) item 2 LAR refers to Paragraph 1, item 9 LAR by a direct reference, using a legal term which is defined in the Additional Provisions of the law: “safe third country.”

In Finland, section 103 of the Aliens’ Act stipulates that an application for international protection may be dismissed if the applicant has arrived from a safe country of asylum where or s/he enjoyed or could have enjoyed protection,⁵⁴ but this provision has rarely been used, and not at all during recent years, according to official information.⁵⁵ In Germany, the application is rejected as irrelevant, which means that an asylum procedure reviewing the material criteria of the claim is not carried out.⁵⁶ In Italy, applications are declared inadmissible and not subject to personal interviews when “the applicant has been recognized as a refugee by a state that has signed the Geneva Convention and is still able to avail him/herself of such protection.”⁵⁷

In Spain, while it appears little used,⁵⁸ the concept of first country of asylum is applicable as a ground for inadmissibility.⁵⁹ In the regular refugee status determination procedure, there is no specific provision establishing the concept of first country of asylum as a ground for rejection. Nevertheless, if a claim that could have been declared inadmissible passes the admissibility stage, the definition of first country of asylum in article 20 (1) (c) may then be used, if applicable, for rejection in practice. In the Czech Republic, section 10a of the Asylum Act provides that “*The application for international protection shall be inadmissible (...) (d) if the alien have found effective protection in the first asylum country*”. However, UNHCR was informed that this provision has never been used. In Slovenia,⁶⁰ the concept of first country of asylum is not applied in practice. However, the law foresees that claims are dismissed.

In Bulgaria, the direct reference to “safe third country” means the applicant should be given the opportunity to rebut at least the presumption of safety (Article 99 LAR). However, there is no evidence of practice in the use of any of the concepts. In Germany, section 29 APA qualifies the respective applications as “irrelevant” (“*unbeachtlich*”), thus providing a ground for inadmissibility, since an irrelevant application would not be examined on the merits. However, according to the BAMF, section 29 APA in practice is applied in connection with the refutable presumptions of section 27 (2) and (3) APA. In Slovenia the applicant may show evidence that the relevant country is not a safe country for him. According to Article 67 (3) of the IPA in connection with Article 63 (2) of the IPA, this applies also to concept of first country of asylum (in both cases, the same procedural rules apply).

54 *Ulkomaalaislaki* Aliens’ Act 301/2004 (as in force 28.4.2009) Section 103: “[...]An application for international protection may be dismissed if: 1) the applicant has arrived from a safe country of asylum defined in section 99 where s/he enjoyed or could have enjoyed protection referred to in sections 87 and 88 and where s/he may be returned;[...]” available at: <http://www.migri.fi/netcomm/content.asp?path=2760>

55 *Hallituksen esitys* (Government Bill) 86/2008. Some decisions made on safe country of asylum grounds may be recorded as manifestly unfounded, based on the rule in *Ulkomaalaislaki* (Aliens’ Act 301/2004) section 104 (1) requiring a decision to be made within seven days of filing the record of the asylum interview. The lists made available to the NPO included five references to safe country of asylum decisions, which were not included among those audited. Some of the audited cases were not included in these lists, as some of the decisions using safe country of asylum considerations were only included in the decisions reviewed at the District Administrative Court.

56 *Infra*, note 39.

57 Article 29 (1) (a) of the Legislative Decree 25/2008.

58 None of the cases and decisions audited showed that the concept of first country of asylum had been applied.

59 In application of Article 5 (6) (f) of the Asylum Law.

60 Article 67 (3) of the International Protection Act refers to the Article 63 of the same Act when applying the concept of first country of asylum. The latter provides that “(1) *The competent authority shall dismiss by decision the application of any alien who arrives from a safe third country in the sense of the procedures under Articles 60 and 62 of this Act*”.

Recommendation

The APD should be amended to state explicitly that asylum seekers should have the possibility to rebut the presumption of safety and, where applicable, to challenge a decision to declare their claims inadmissible under the concept of first country of asylum.

Readmission: how Member States satisfy themselves that an applicant will be readmitted to the first country of asylum

In Finland, both the Government Bill transposing the APD and participants in the procedure confirm that the safe country of asylum concept is only used in cases where an agreement on readmission of the applicant to the first country of asylum has been reached.

In most other surveyed Member States, it is difficult to ascertain which criteria they apply to ensure that applicants will indeed be readmitted to the first country of asylum before returning them to that country. This is due in part to the fact that this concept has not been extensively used in practice, but also to the absence of details regarding the implementation of this provision in the relevant rules and regulations.

In Bulgaria and Spain, the procedure involves contacting the authorities of the first country of asylum. In Bulgaria, according to the determining authority, there is a general obligation for all state authorities to provide information necessary to clarify the circumstances of a particular claim if requested by the State Agency for Refugees (SAR) within the Council of Ministers of the Republic of Bulgaria.⁶¹ This means that in principle, SAR could contact the Foreign Ministry, who would further contact the relevant authorities in the first country of asylum, and receive information on their position regarding a particular applicant. In addition, the Ministry of Interior is the competent authority to execute expulsion orders and remove aliens from the territory of the Republic of Bulgaria. SAR decision-makers on applications for asylum would be advised when the requirement for readmission by the first country of asylum is satisfied, enabling a decision to be taken on this ground.⁶²

Spanish determining authorities seek confirmation of the re-admissibility of the applicant either through UNHCR or the authorities of the first country of asylum.⁶³ Of additional note for Spain is the fact that the new Asylum Law introduces the concept of readmission in connection with use of the first country of asylum rule.⁶⁴ For both Bulgaria and Spain, the criteria applied in this procedure are legally uncertain, as they are not defined in legislation.

In Germany, Article 29 APA requires that the return to the country must be “*possible*”. According to commentators, this requires certainty that the person will be re-admitted to the third state.⁶⁵ According to information provided by the BAMF, the legal availability of return options is reviewed (for instance, based on eventual readmission agreements, residence titles, issuing of a travel document). Moreover, the factual possibility to return is reviewed. In cases where obstacles to return arise, for example because of illness impeding travel, the asylum procedure is opened.

⁶¹ Article 64 of the Law on Asylum and Refugees.

⁶² This was based on the hypothetical conclusions of the Head of the Proceedings and Accommodation Department of RRC-Sofia, as there is no relevant practice.

⁶³ Information provided by UNHCR.

⁶⁴ The new Asylum Law retains the same definition of first country of asylum but adds “... provided that s/he is readmitted to the said country...”

⁶⁵ R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition, Section 29, in particular paragraph 27 and 31.

Finally, in the United Kingdom, provided the applicant did not arrive directly from the country where s/he fears persecution, and there is clear evidence of his/her admissibility to a third country, there is no obligation to consult the authorities of the receiving country before removal to that country.⁶⁶ Paragraph 345 of the Immigration Rules does not clarify what is meant by “clear evidence of admissibility.” There is therefore no methodology set out in the United Kingdom law by which the authorities satisfy themselves that the applicant will be readmitted to the first country of asylum.

Recommendation

Member States’ legislation and practice should require that the competent authority is satisfied that an applicant will be re-admitted by the third country before dismissing a claim based on the first country of asylum concept.

Authorities responsible for taking decisions applying the concept of first country of asylum

In all Member States of focus in this research, the refugee status determination authorities are responsible for taking decisions relating to the concept of first country of asylum.

There may be some national variations. For instance, in the United Kingdom, the Third Country Unit (TCU) is responsible for taking decisions applying the concept of the first country of asylum. The TCU is a specialist unit within the determining authority. In Spain, the application is examined by the Asylum and Refuge Office (OAR) in the Ministry for Interior (determining authority), during the admissibility procedure, and the decision is made by the Minister of Interior (acting as the determining authority), upon proposal of the OAR. In a regular RSD procedure, the decision is taken by the Minister of Interior upon proposal by the Inter-ministerial Commission on Asylum and Refuge (CIAR), which is adopted after examination and initial proposal by the OAR. In Italy, following the decentralization of the asylum determining authorities, each Territorial Commission for the Recognition of International Protection (CTRPI) has the authority to apply the concept of first country of asylum.

In Bulgaria, the interviewers in the State Agency for Refugees⁶⁷ may take a decision to discontinue the proceedings based on the concept of first country of asylum.⁶⁸ The Chairperson of SAR may also take a decision to discontinue the proceedings⁶⁹ based on a proposal by the interviewing body. In Germany, the decision is taken by the BAMF, the determining authority responsible for asylum procedures.

⁶⁶ According to Immigration Rule Paragraph 345 (of HC 395) as amended by HC 112 with effect from 25 October 2004, and by HC 82 from 1 December 2007: “(1) In a case where the Secretary of State is satisfied that the conditions set out in Paragraphs 4 and 5 (1), 9 and 10 (1), 14 and 15 (1) or 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are fulfilled, s/he will normally decline to examine the asylum application substantively and issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as appropriate. (2) The Secretary of State shall not issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 unless: (i) the asylum applicant has not arrived in the United Kingdom directly from the country in which s/he claims to fear persecution and has had an opportunity at the border or within the third country or territory to make contact with the authorities of that third country or territory in order to seek their protection; or (ii) there is other clear evidence of his admissibility to a third country or territory. Provided that s/he is satisfied that a case meets these criteria, the Secretary of State is under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory.”

See also API on Safe Third Country Cases (Feb 2007, re-branded December 2008).

⁶⁷ Art. 48 (1), item 10 LAR.

⁶⁸ Decision under Article 70 (1), item 2 (directly referring to Article 13 (2) of the Law on Asylum and Refugees) in the accelerated procedure.

⁶⁹ Decision under Article 77 (3) of the Law on Asylum and Refugees: “Acting on a proposal by the interviewing body, when the requirements of the law are present or based on an application by the alien, the Chairperson of SAR discontinues the proceedings.”

Use of the criteria set out in Article 27 (1) when applying the concept of first country of asylum

Article 27 (1) requires that, before applying the safe third country concept, the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

- “(a) *life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*
- (b) the principle of non-refoulement in accordance with the Geneva Convention is respected;*
- (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and*
- (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.”*

Most Member States of focus in this research, who have transposed or reflected the concept of first country of asylum in their respective national laws and use this provision, do not in practice take into account the criteria set out in Article 27 (1) APD relating to the concept of safe third country when applying the concept of first country of asylum.

In Finland, the definition of the concept of a safe country of asylum is not directly drawn from Article 27 (1) APD. However, the definition makes a reference to the 1951 Convention and its application in the country in question (as per Article 27 (1) (b)).

In the Netherlands, the Dutch government does not use the criteria set out in Article 27 (1) APD when applying the concept of first country of asylum. In principle, the third country’s compliance with the *non-refoulement* principle is required. If, however, the third country does not comply with the obligations of the 1951 Convention, the country can still be regarded as a country of first asylum if the asylum seeker has a valid residence permit in that country, which offers sustainable protection against return, or if it is proven that s/he is able to obtain such a permit.

By contrast, some Member States have explicitly transposed the criteria outlined in Article 27 (1) APD. Greece for instance, has literally transposed this article as a permissive clause.⁷⁰ In Spain, the transposition in the new Asylum Law has been made with some changes. The new Asylum Law in Article 20.1 (c)⁷¹ does not limit the threat to life and liberty to grounds of race, religion, nationality, membership of a particular social group or political opinion, as provided by Article 27 (1) (a) APD. However, in the Spanish transposition, the principle of *non-refoulement* is linked to the persecuting country and not the third country; and the possibility of receiving protection in the third country becomes a mere possibility to ask for protection (but does not necessarily require that the applicant receive it).

⁷⁰ Article 20 of Presidential Decree 90/2008. According to article 19 (2) of the Presidential Decree 90/2008, the content of Article 20 may be taken into account when applying the concept of first country of asylum.

⁷¹ New Asylum Law Article 20 (1) c defines the concept of first country of asylum as one in which: “*the applicant has been recognised as a refugee and has the right to reside there or to obtain effective international protection, provided that (...) and s/he is effectively protected against refoulement to the persecuting country under the terms established in the Geneva Convention.*”

In Bulgaria, Article 13 (2), item 2 of the Law on Asylum and Refugees refers directly to the legal definition of safe third country.⁷² This definition reflects in general the requirements under Article 27 (1) APD, which must be established by the decision-maker on a case-by-case basis.

In Germany, there is no explicit provision incorporating the criteria of Article 27 (1) APD. However, according to information provided by the BAMF, the criteria of Article 27 (1) APD are applied in practice. The BAMF emphasizes that, under the German concept, the criteria must evidently be fulfilled (“*offensichtlich*”).⁷³

⁷² Paragraph 1, item 9 of the Additional Provisions of the Law on Asylum and Refugees, above note 54.

⁷³ The BAMF did not provide explanations or examples to illustrate this approach.

SECTION XII:

THE SAFE THIRD COUNTRY CONCEPT

Introduction

Application of the safe third country concept

The responsible authority

Criteria for designating countries as safe third countries

The methodology for applying the safe third country concept

Country information

Connection with the safe third country

Opportunity to rebut the presumption of safety

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Unaccompanied children and safe third countries

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Effective remedies

Time limit to lodge the appeal

Provision of a document on rejection regarding non-examination in substance

Refusal by third country to readmit applicant

Introduction

Within the framework of the procedures at first instance set out in Chapter III of the Asylum Procedures Directive (APD), Article 27 concerns the possibility for Member States to apply the safe third country concept. The safe third country notion, as set out in the APD, is the concept that Member States may send applicants to third countries with which the applicant has a connection, such that it would be reasonable for him/her to go there, and in which the possibility exists to request refugee status and if s/he is found to be a refugee, it must be possible for him/her to receive protection in accordance with the 1951 Convention. In that third country, the applicant must not be at risk of persecution, *refoulement* or treatment in violation of Article 3 ECHR. On the basis of this presumption, Member States may decide to consider the application as manifestly unfounded in accordance with Article 28 (2) APD¹ or inadmissible in accordance with Article 25 (2) (c) APD.² It should be underlined that Article 27 APD is a permissive provision, allowing but not obliging Member States to apply the concept.

The safe third country concept is also reflected in Article 36 APD which foresees the possibility to establish a list of European safe third countries. However, Article 36 (3) APD requiring the adoption of a common list of European safe countries by the Council was annulled by the European Court of Justice as the procedure was deemed to infringe EC law.³ As such, no common list of European safe third countries has been adopted and Article 36 APD can not be applied at the time of writing. Therefore, this research study did not address Article 36 APD.

According to the APD, a third country can only be designated as a safe third country if it fulfills four conditions relating to safety and asylum practices in the third country:⁴

- (a) *life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*
- (b) *the principle of non-refoulement in accordance with the Geneva Convention is respected;*
- (c) *the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and*
- (d) *the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*

In addition, certain conditions relating to the applicant have to be fulfilled, including:

- the applicant must have a connection with the third country in accordance with rules laid down in national legislation (Art. 27 (2) (a) APD);
- given the nature of the connection, it must be reasonable for the applicant to go that third country (Art. 27 (2) (a) APD);

¹ The application must be unfounded in the sense that the applicant does not qualify for refugee status pursuant to the Qualification Directive.

² Recital 23 APD states that “Member States should also not be obliged to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country.”

³ *European Parliament v. Council of the European Union*, C-133/06, European Union: European Court of Justice, 6 May 2008, available at: <http://www.unhcr.org/refworld/docid/4832ddb92.html>.

⁴ Article 27 (1) APD.

- the determining authority should have conducted an individual examination to ensure that the putative safe third country is safe for the particular applicant;
- the applicant, as a minimum, must have had the opportunity to challenge the application of the safe third country concept on the grounds that s/he would be subjected to torture, cruel, inhuman or degrading treatment or punishment (Art. 27 (2) (c) APD);
- if the decision is based solely on safe third country grounds, the applicant must have been informed of the decision and provided with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance (Art. 27 (3) (a) and (b));
- it is implicit in Art. 27 (4) APD, that application of the concept is subject to the proviso that the applicant is admitted to the third country. If an applicant is not admitted to the third country, in accordance with Art. 27 (4) APD, the applicant must be given access to an asylum procedure in the Member State.

Also, the concept cannot be applied unless the Member State has laid down rules in national legislation regarding the methodology by which the competent authorities conclude that the safe third country concept may be applied to a particular country or a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant, and/or national designation of countries considered to be generally safe.⁵ Finally, it should be noted that Article 27 (5) APD requires Member States to periodically inform the Commission of the countries to which the concept is applied.

The safe third country notion is far less relevant in the EU following the accession of twelve new Member States since 2004, as the Dublin II Regulation supersedes the safe third country concept within the EU. Other States outside the EU (Iceland, Norway⁶ and Switzerland)⁷ have been included in the Dublin II regime so that the safe third country concept is no longer relevant with regard to those countries. Beyond these borders, none of the remaining countries now at the periphery of the Union could legitimately be considered safe. As emerged during the research, of the 12 Member States surveyed, only two reportedly apply the safe third country concept in law and in practice.⁸ The UK has applied the concept to Canada and the United States of America.⁹ Only Spain seems to extend the use of the concept, in practice and on a case-by-case basis, to some Latin American and African States.¹⁰

⁵ Art. 27 (2) (b) APD.

⁶ Council Decision 2001/258/EC of 15 March 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001D0258:EN:HTML>.

⁷ Council Decision 2008/147/EC of 28 January 2008 on the conclusion on behalf of the European Community of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:053:0003:0004:EN:PDF>.

⁸ Spain and the UK. In the Czech Republic, national law provides for the concept and there is an internal list of safe third countries that was last updated in May 2007 but not made public. Reportedly the list has not been applied since 2006. In the Netherlands, there is no available record of the application of the concept, nor the countries to which the concept has been applied, and UNHCR found no evidence of the application of the concept in its audit of case files and decisions.

⁹ In the UK, the Asylum Procedures Instruction on Safe Third Countries (dated Feb 2007, rebranded December 2008) gives United States of America, Canada and Switzerland as examples of countries to which returns have taken place under Part 5 of Schedule 3. Information on countries considered safe in 2008 is not available.

¹⁰ Although the safe third country concept is reportedly never applied as the sole grounds for inadmissibility, or rejection of an application.

If a Member State nevertheless wishes to rely on the safe third country concept, UNHCR considers that certain conditions should be met to ensure that the third country is safe, i.e. that it is able and willing to determine needs for international protection and to provide effective protection, including:¹¹

- a) The applicant should be protected against *refoulement*¹² and be treated in accordance with accepted international standards in the third country. Safety should be ensured in practice, and not just under formal obligations that it may have assumed.¹³
- b) The applicant should have a genuine connection or close links with the third country. In UNHCR's view, the mere fact of having had the opportunity to seek protection or having transited through a country does not represent a meaningful link.¹⁴
- c) While the Directive foresees that national legislation shall permit the applicant to challenge the presumption on the ground that s/he would be subject to torture, cruel, inhuman or degrading treatment or punishment, it does not ensure the possibility to rebut the presumption on the basis of a fear of persecution on 1951 Convention grounds, and other individual risks which would found an entitlement to protection such as, for instance, the fact that the third state would apply more restrictive criteria in determining the claimant's status than the State where the application has been presented¹⁵ or the fact that the third state would not assess whether there is a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹⁶ Moreover, the APD does not explicitly permit the applicant to challenge the application of the concept on the ground that the criteria stated in Article 27 (2) (a) APD are not fulfilled and it would not be reasonable for him/her to go to the third country.

As highlighted by the preamble to the 1951 Convention and a number of Conclusions adopted by UNHCR's Executive Committee,¹⁷ satisfactory solutions to the problems of refugees cannot be achieved without international cooperation. The primary responsibility to provide protection remains with the state where the claim is lodged. Transfer of responsibility for an asylum application might be envisaged in some circumstances, but only between states with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities. By contrast, the concept of safe third country as defined in the Directive rests on a unilateral decision by a state to invoke the responsibility of another state to examine an asylum claim. Application of this concept is, therefore, less preferable to such multilateral agreements,¹⁸ which ensure access to effective protection for asylum seekers under legally-defined conditions.¹⁹ Under both kinds of arrangement, the third country should expressly agree to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure.

¹¹ Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, 7 October 2005, 1471 (2005), paragraph 8(3), available at: <http://www.unhcr.org/refworld/docid/43f349e04.html>.

¹² UN High Commissioner for Refugees, *General Conclusion on International Protection*, 8 October 1999, No. 87 (L) – 1999, letter j), available at: <http://www.unhcr.org/refworld/docid/3ae68c6ec.html>.

¹³ This partially reflected by Article 27 (1) (a), (b) and (c) APD.

¹⁴ UN High Commissioner for Refugees, *Aide Mémoire: Directive on Minimum Standards on Procedures on Granting and Withdrawing Refugee Status*, 18 November 2003, available at: <http://www.unhcr.org/refworld/docid/402a2d6e4.html>.

¹⁵ See, *inter alia*, *T.I. v. The United Kingdom*, Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b6dfc.html>.

¹⁶ This is grounds for qualification for subsidiary protection status in accordance with Article 15 (c) Qualification Directive.

¹⁷ UN High Commissioner for Refugees, *Thematic Compilation of Executive Committee Conclusions*, August 2008, Third edition, available at: <http://www.unhcr.org/refworld/docid/48b6c62f2.html>.

¹⁸ UN High Commissioner for Refugees, *Global Consultations on International Protection/Regional Meetings: Conclusions (Regional Meeting in Budapest, 6-7 June 2001)*, paragraph 14, 15 June 2001, EC/GC/01/14, available at: <http://www.unhcr.org/refworld/docid/3b36f29b1.html>.

¹⁹ UN High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, available at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

Application of the safe third country concept



Article 27 of the APD is a ‘may’ provision – which permits, but does not require, its transposition in national legislation, regulations and/or administrative provisions.

The 12 Member States of focus in this research fall into three broad categories in relation to their use of the safe third country concept. Firstly, there are two countries only which apply the safe third country concept in law and in practice: Spain²⁰ and the United Kingdom.²¹ However, in Spain, the concept is reportedly never used as the sole ground for inadmissibility or rejection, and UNHCR’s research found no evidence of the UK applying the safe third country concept to countries other than the USA, Switzerland or Canada.²² In addition, there are no publicly available statistics confirming the numbers of removals nor to which countries the UK removes applicants under this concept.

²⁰ Article 20 (1) of the New Asylum Law.

²¹ Section 33 and Schedule 3 (part 3, 4 and 5) to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

²² In the UK, the Asylum Procedures Instruction on Safe Third Countries (dated February 2007, rebranded December 2008) gives United States of America, Canada and Switzerland as examples of countries to which returns have taken place under Part 5 of Schedule 3.

The second group comprises Bulgaria,²³ Czech Republic,²⁴ Finland,²⁵ Greece,²⁶ the Netherlands²⁷ and Slovenia,²⁸ where the concept is reflected in the law. However, it is not applied, or it is unclear whether and how it is applied in practice.

In the third group, namely Belgium,²⁹ France and Italy,³⁰ the concept of the safe third country is not reflected in national legislation, nor is it applied in practice.

Germany represents an exception to these categories in that the concept exists in German law and practice but only outside the scope of the APD. In the German asylum procedure, the safe third country concept is only applied in relation to constitutional asylum.³¹ According to section 26a APA, an applicant who has entered Germany through a safe third country is not granted constitutional asylum.³² However, the denial of constitutional asylum does not impact on the granting of refugee status, since the safe third country concept as defined in Article 27 APD has not been transposed into German law. According to the Explanatory Report of the Transposition Act 2007, the additional application of the safe third country rule was regarded as superfluous due to the application of the Dublin II system.³³

Within the first group of Member States (i.e. those applying the safe third country concept in law and practice), Spain has transposed Article 27 but with some differences.³⁴ The UK law provides for three categories of safe third countries. The first and second categories refer to lists of safe countries. However, the lists have never been adopted, and hence these categories have never been used. The third category refers to countries that are not listed, but that are considered safe for individuals because they meet certain criteria.

With regard to the second group of Member States described above, i.e. those reflecting the safe third country concept in legislation without implementing it in practice, Bulgaria, Finland, Greece and the Netherlands are noteworthy.

The safe third country concept is reflected in Bulgarian law, but it is currently inapplicable as it is related to the designation of a list of safe third countries. No such list is currently in force.³⁵

²³ Paragraph 1, item 9 Additional Provisions of LAR.

²⁴ Section 2 (2) ASA.

²⁵ Section 99 of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009).

²⁶ Article 20 of PD 90/2008.

²⁷ Articles 30 (1) (d), 31 (2) (h) and 31 (3) Aliens Act and Article 3.106a Aliens Decree.

²⁸ Articles 60, 61, 62, 63 and 64 IPA.

²⁹ Since the Aliens Act was modified by the Law of 22 December 2008, this concept is not applicable in Belgium in law.

³⁰ Article 40 (1) (a) of the d.lgs. n. 25/2008.

³¹ The institution of constitutional asylum has a strong tradition in Germany since the adoption of the Basic Law in 1949. However, being based on a particular concept of persecution (so called "political persecution"), it is in certain respects different from the concept of 1951 Convention refugee status.

³² Section 26a APA: "(1) Any foreigner who has entered the Federal territory from a third country within the meaning of Article 16a (2) first sentence of the Basic Law (safe third country) **cannot invoke Article 16a (1) of the Basic Law**. He shall not be recognized as being entitled to asylum. The first sentence above shall not apply if: 1. the foreigner held a residence title for the Federal Republic of Germany at the time he entered the safe third country; 2. the Federal Republic of Germany is responsible for processing an asylum application based on European Community law or an international treaty with the safe third country; or if 3. the foreigner has not been refused entry or removed on account of an order pursuant to Section 18 (4) no. 2 above. (2) In addition to the Member States of the European Union, safe third countries are those listed in Appendix I. (3) The Federal Government shall resolve by statutory ordinance without the consent of the Bundesrat that a country listed in Appendix I is no longer deemed a safe third country if changes in its legal or political situation give reason to believe that the requirements mentioned in Article 16a (2) first sentence of the Basic Law have ceased to exist. The ordinance shall expire no later than six months after it has entered into force."

³³ Bundestag printed papers, 16/5065, page 215.

³⁴ Article 20 (1) New Asylum Law.

³⁵ The last list was adopted in 2005, and is no longer applicable, as it should be adopted or re-adopted each year.

Finland does not apply the safe third country concept *per se*. Instead, it uses the ‘safe country of asylum’ concept that encompasses the ‘first country of asylum’ (Article 26 APD) and ‘safe third country’ concepts.³⁶ During recent years, the ‘safe country of asylum’ concept has solely been applied to ‘first country of asylum’ cases.

It is doubtful if and how the safe third country concept is applied in practice in Greece. Until March 2009, there was no relevant precedent-setting case-law, and all the reviewed decisions lacked specific reasoning which could indicate whether and how the concept is used.

In the Netherlands, there is no recording of statistics on cases where the concept is applied, or information on the countries to which it is applied. In addition, UNHCR found no evidence of the application of the safe third country concept in the case files and decisions audited. The Aliens Act foresees two provisions referring to the safe third country concept. The first provision states that the asylum claim will be rejected if the asylum seeker will be transferred to a safe third country on the ground of a treaty obligation.³⁷ The asylum seeker must have stayed in that country, and the country should be party to the 1951 Convention, the ECHR and the CAT, or have undertaken to observe the *non-refoulement* principle laid down in these conventions.³⁸ If the conditions of this provision are met, the authorities are not allowed to examine the application in substance.³⁹ The second provision states that the assessment of an application shall take account, *inter alia*, of the fact that the alien has stayed in a third country that is party to the 1951 Convention and the ECHR or the CAT, and that that alien has not made plausible his/her claim that this country does not fulfill its treaty obligations with regard to him/her.⁴⁰ It follows that if the conditions of the provision are met, the authorities can reject the application, but they are not obliged to do so.

Within the third group of Member States, i.e. those that do not reflect the safe third country concept in law and practice, in Italy there may be a constitutional problem. In fact, while Article 12 of the l. 13/2007 that has delegated the Government to adopt the d.lgs. 25/2008, provided for the maintenance of the safe third country concept; Article 40 (1) (a) of the d.lgs. n. 25/2008 itself has expressly repealed the safe third country concept.

UNHCR has also undertaken a limited review, outside the terms of the research, of the state of application of the safe third country concept in other Member States (other than those which are the subject of this survey). It found that of the remaining 14 Member States,⁴¹ it is contained in the law of and utilised in practice by three Member

³⁶ Section 99 of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 28.4.2009): “When deciding on an application in the asylum procedure, a State may be considered a **safe country of asylum** for the applicant if it is a signatory, without geographical reservations, to the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights (Treaty Series of the Statute Book of Finland 8/1976) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaty Series of the Statute Book of Finland 60/1989) and adheres to them”. Section 103 of the *Ulkomaalaislaki*: “An application for international protection may be dismissed if: 1) the applicant has arrived from a safe country of asylum defined in section 99 where he or she **enjoyed or could have enjoyed** protection referred to in section 87 and 88 and where he or she may be returned”. Emphasis added.

³⁷ Article 30 (1) (d) Aliens Act. In the Explanatory Memorandum of the Royal Decree that implements the Directive, it is explained that in this context the term “treaty obligation” refers to a readmission agreement or a readmission clause in a general agreement.

³⁸ Reneman, M., *Implementation of the Procedures Directive in the Netherlands*, in AAVV, *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, 2008, p.134.

³⁹ Aliens Circular C3/5.

⁴⁰ Article 31 (1) (h) Aliens Act.

⁴¹ Note that, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of the APD and is, therefore, not bound by it or subject to its application.

States.⁴² Ten Member States have transposed the concept in law, but do not apply it in practice;⁴³ while Poland does not feature the concept in law or practice. This leads UNHCR to conclude that, while Member States appear to support the notion, the concept is largely symbolic, and holds little practical use.

The responsible authority

In the Member States reflecting the safe third country concept in national law, the determining authority under Article 4 (1) APD is responsible for taking the decision to apply the safe third country concept.

In only one Member State of those surveyed – the UK – decisions applying the safe third country concept and the Dublin II Regulation are taken by a specialised unit, the Dublin/Third Country Unit (TCU), within the determining authority.

Criteria for designating countries as safe third countries

Article 27 (1) of the APD provides that:

Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

In Greece,⁴⁴ the Netherlands⁴⁵ and Slovenia,⁴⁶ the criteria set out in the national legislation for designating countries as safe third countries correspond to those of Article 27 (1).

⁴² Austria, Hungary and Portugal. The Austrian Federal Asylum Agency informed that 25 first instance decisions were issued in 2009 in application of the safe third country concept (Article 4 of the 2005 Asylum Act available at: http://www.unhcr.at/fileadmin/unhcr_data/pdfs_at/information_in_english/asyl2005-eng-logo.pdf).

No information is available regarding which third countries were considered as safe in these decisions. According to an internet research, for the period 1 January 2009 to 25 February 2010, the Asylum Court (second instance) issued 6 decisions related to the safe third country concept. Four of them concerned the application of the safe third country concept to Switzerland. The Asylum Court quashed all these decisions as the Dublin II Regulation should have been applied instead. In the remaining two decisions the Asylum Court confirmed the Federal Asylum Agency's assessment that Croatia was a safe third country. No information is available regarding practice in Hungary and Portugal.

⁴³ Cyprus, Estonia, Ireland, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovakia, and Sweden.

⁴⁴ Article 20 of PD 90/2008 contains a verbatim translation of Article 27 (1).

⁴⁵ Article 3.106a, Aliens Decree.

⁴⁶ Article 61 (1) of the IPA.

In the other Member States reflecting the safe third country concept in law, the criteria do not precisely correspond. The Bulgarian legislature has expanded the criterion of Article 27 (1) (a) introducing the subjective element of fear,⁴⁷ but has not included the prohibition of removal in Article 27 (1) (c) APD.⁴⁸ In the Czech Republic, the legislature modified the wording of the APD, thereby expanding the provision of Article 27 (1) (a).⁴⁹ However, it did not transpose the provision related to the prohibition of *refoulement* under Article 27 (1) (b) APD or the prohibition of removal in Article 27 (1) (c) APD. In Finland, the criteria set out in the national legislation do not make explicit reference to the criteria of Article 27 (1) APD. The legislature required rather that a state may be considered as a “safe country of asylum” if it is a signatory and adheres to the 1951 Convention, the ICCPR and the CAT.⁵⁰

In Spain, the New Asylum Law reflects the wording of Article 27 (1) of the APD (except for the fact that respect for the principle of *non-refoulement* is not linked to the 1951 Convention). In the United Kingdom, the criteria set out in the national legislation for designating countries as safe third countries correspond to those of Article 27 (1), except for the requirements of Article 27 (1) (c) and (d), *i.e.* the prohibition of removal and the possibility to request refugee status and receive protection.

Recommendation

Where the “safe third country” concept is used, the APD’s criteria should be articulated in law and observed in practice. In addition to the existing criteria in Article 27 (1), the APD should require that in the third country there be: (a) no risk of serious harm, as defined in the Qualification Directive;⁵¹ and (b) the possibility to request a complementary form of protection against a risk of serious harm.

The methodology for applying the safe third country concept

Article 27 (2) (b) APD requires that the application of the safe third country concept is subject to the establishment of rules, in national legislation, on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or a particular applicant. It further states that “[s]uch methodology shall include case-by-case consideration of the safety of the country for a particular applicant **and/or** national designation of countries considered to be generally safe.”⁵² Although Article 27 (2) (b) APD would appear to permit the option of national designation alone, Article 27 (2) (c) APD nevertheless requires an individual examination of whether the third country concerned is safe for a particular applicant.⁵³

47 Item 9(a) of Paragraph 1 of the Additional Provision of the LAR: “There are no grounds **for the alien to fear** for his/her life or freedom due to race, religion, belonging to a particular social group or political opinion or beliefs” (emphasis added).

48 Item 9(c) of Paragraph 1 of the Additional Provision of the LAR: “the alien is not at risk of persecution, torture, inhuman or degrading treatment or punishment”.

49 Section 2(2) ASA: “[...] without being subject to persecution, torture, inhuman or degrading treatment or punishment”.

50 Section 99 of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 28.4.2009).

51 This is suggested in proposed recast Article 32 (1): APD Recast Proposal 2009.

52 Emphasis added.

53 Article 27 (2) (c) APD states that “[t]he application of the safe third country concept shall be subject to rules laid down in national legislation, including rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant”.

The question of whether a particular third country is safe for the purpose of sending an asylum seeker cannot, in UNHCR's view, be answered in a generic fashion, for example by 'national designation' of Parliament or another body, for all asylum seekers in all circumstances. In UNHCR's view, the question of whether an asylum seeker can be sent to a third country for determination of his/her claim must be answered on an individual basis.⁵⁴

In Bulgaria, Article 98 (2) of the LAR defines the methodology the Council of Ministers should follow to approve the nationally designated list of safe third countries.⁵⁵ The list should be adopted by the Council of Ministers and reviewed every year following the same procedure. In addition, case-by-case consideration of applications is guaranteed by Article 13 (3)⁵⁶ and Article 99 of the LAR.⁵⁷ However no list of designated safe third countries has been adopted after the amendments to LAR in 2007.⁵⁸ Therefore, the safe third country concept is currently inapplicable.

In the Czech Republic, the methodology is defined by an internal regulation of the director of the Department of Asylum and Migration Policy of the Ministry of the Interior, establishing a list which is not publicly available. This internal regulation reportedly states that decision makers should use the list of safe third countries when making decisions under Section 16 (1) (e) ASA. The regulation emphasises that there is a rebuttable presumption embodied in that provision, and that in case it is found that the particular country cannot be considered safe, the application must be dealt with in a regular procedure. It seems implied in the internal regulation that the presumption must be rebutted by the applicant during the procedure. However, it is unclear how the applicant would learn (before the decision is taken) that the safe third country concept would be applied to him or her, given that the list of safe third countries is confidential. The list of safe third countries, which is not public, was last updated in May 2007, but reportedly the list has not been applied since 2006.⁵⁹

In Finland, there is neither in law nor in administrative guidelines any reference to the precise methodology by which countries are to be designated as 'safe countries of asylum'. It appears that the concept of 'safe countries of asylum' is not applied in practice with regards to the 'safe third country' concept.⁶⁰ However, in practice, with

54 UN High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, available at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

55 Article 98(2) of the LAR: "In the process of approval the Council of Ministers shall take into account sources of information from European Union Member States, the United Nations High Commissioner for Refugees, the Council of Europe or other international organizations and shall make a judgment of the extent to which a country provides protection against persecution based on:

1. pieces of legislation adopted in this area and the method by which they are enforced;
2. the manner of observing rights and freedoms provided for in the Convention on the protection of Human Rights and Fundamental Freedoms, in the International Covenant on Civil and Political Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
3. the manner of enforcing the Prohibition of Expulsion or Return in the sense of the Convention relating to the Status of Refugees from 1951; and
4. the existence of an effective penal system for violations of those rights and freedoms".

56 Stipulating the fact that the applicant comes from a safe third country **may not be the sole grounds** for rejecting an application as manifestly unfounded.

57 Stipulating the right to rebut the presumption of safety.

58 The last list of safe third countries was adopted in 2005 and included: Bosnia and Herzegovina; Republic of Macedonia; Romania; Russian Federation; Serbia and Montenegro; and Ukraine. It also included a general comment: "The Republic of Bulgaria acknowledges as Safe Third Countries, all countries which have ratified the 1951 Geneva Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and which provide effective protection to asylum seekers".

59 This was confirmed by the Head of Asylum Procedure Unit in an interview of 7 April 2009 and verified by UNHCR's review of all applications rejected as manifestly unfounded since December 2007.

60 No evidence of the use of the safe third country concept was found by this research and the *Hallituksen esitys 86/2008* (Government Bill 86/2008) implementing the APD states that the possibility to dismiss applications on the grounds of a "safe country of asylum" has rarely been used.

regard to the ‘first country of asylum’ concept, the cases audited showed that the designation of a country as a safe country of asylum is made on an individual basis taking into account the particular applicant.

It should perhaps be mentioned here, as a point of interest only, that under the German constitutional asylum concept (which is outside the scope of the APD), safe third countries include all EU Member States plus Norway and Switzerland.⁶¹

No rules on methodology are stated in Greek legislation and, therefore, Article 27 (2) (b) APD has not been transposed. All interviewees participating in this research concurred that Greece does not have a list of nationally designated safe third countries. However, according to the Head of the Asylum and Refugees Department in the Aliens’ Directorate of the Greek Police Headquarters, there is case-by-case consideration of the safety of relevant third countries, on the basis of precise and up-to-date information as to the general situation prevailing in the countries through which applicants have transited.⁶² However it is unclear if and how the safe third country concept is applied in practice, and the decisions audited by UNHCR lacked any specific legal reasoning which would allow identification of the application of the concept.

In the Netherlands, in response to the obligation to lay down rules on the methodology in Article 27 (2) (b) APD, the law provides for application of the safe third country concept when *‘[i]n the opinion of our Minister, all relevant facts and circumstances being taken into account’*.⁶³ There is no list of nationally designated safe third countries, but a case-by-case consideration of the safety of the country for a particular applicant should be conducted. However, if applied in practice, there is no available record of the number of times it has been applied, nor with regard to which countries it has been applied and UNHCR found no evidence of the application of the concept in the case files and decisions audited during this research.

In Slovenia, Article 61 (2) and (3) of the IPA requires that a list of safe third countries is adopted by the Government. No reference is made in law to case-by-case consideration of the safety of the country for a particular applicant, but the law does state that *“[a]n applicant may, during the course of the procedures ... show evidence that the relevant country is not a safe country for him/her”*.⁶⁴ Slovenia does have a safe third country list which contains only one country – the Republic of Croatia.⁶⁵ However, in practice, the safe third country concept and procedure, as defined in Article 63 of the IPA, is not applied and an application has not been dismissed on this legal ground. However, it should be noted that UNHCR audited decisions which rejected applications as manifestly unfounded in the accelerated procedure on the basis of Article 55 indent 5 of the IPA (*“the applicant has failed without reasonable cause to make his/her application as soon as possible, having had the opportunity to do so”*). This provision was applied extra-territorially in the sense that it was considered that an applicant could have applied for protection in a third country.⁶⁶ The following was cited in decisions audited:

*“Since the applicants were travelling to the Republic of Slovenia through Bosnia and Herzegovina and stayed there for two days, and through the Republic of Croatia, they could have applied for asylum already there”;*⁶⁷ and *“the ap-*

61 Section 26a(2) APA, Annex I to the APA.

62 Such information is gathered by ADGPH in *Police Online* database.

63 Article 3.106a (3) Aliens Decree.

64 Article 63 (2) IPA.

65 Ordinance on the proclamation of the Republic of Croatia as safe third country, Official Gazette of the Republic of Slovenia No. 50/2008, of 23 May 2008.

66 See section 9 of this report on prioritised and accelerated examination of applications.

67 Case No. 26-2008, 27-2008 and 19-2008.

plicant did not present any founded reasons for not applying for asylum in one of countries through which he was travelling.”⁶⁸

Spain does not yet provide rules in national legislation on the methodology by which the competent authorities decide that the safe third country concept may be applied to a particular country or to a particular applicant. There is no legal provision stipulating designation by list, nor stipulating case-by-case consideration. However, the latter is carried out in practice.⁶⁹ The New Asylum Law refers to application of the concept “...in view of the applicant’s personal circumstances...,” but no more specific rules are established. Such rules should be addressed in the implementing regulation to the New Asylum Law that must be elaborated within six months of entry into force of the Law (i.e. by May 2010). UNHCR was informed that the countries that are most regularly considered to represent safe third countries are those with a solid democratic system, for which COI reveals there is an effective legal system, and that it is feasible for the applicant to request and eventually obtain effective protection, bearing in mind the applicant’s nationality. The concept has been applied in relation to Canada, Australia, some Latin American States (Argentina, Brazil, Chile, and Mexico). UNHCR was also informed that it has been applied to some African States, although details regarding which states were not available. No statistics are kept regarding the number of cases to which the concept is applied. Depending on the applicant’s travel route, it is apparently often used as an additional inadmissibility/ rejection ground, on the assumption that the applicant could have applied for protection in a ‘safe’ country through which s/he transited or stayed. It is not, however, used as the sole ground for inadmissibility or for rejecting a claim.

In the UK, Schedule 3 to the Asylum and Immigration Act 2004 sets out the methodology by which the determining authority satisfies itself that the safe third country concept may be applied.⁷⁰ These are supplemented by Asylum Policy Instructions (APIs)⁷¹ and Guidance. At present, the provisions contained in Section 33 and Schedule 3 part 3 and part 4 of the 2004 Act permitting the adoption of lists of safe third countries are not used and, therefore, there has been no national designation or listing of countries considered to be generally safe. The countries considered to represent safe third countries are those to which applicants are sent as a result of individual certification in terms of Part 5 of Schedule 3, i.e. case-by-case consideration. The Asylum Policy Instruction on Safe Third Countries lists Canada, Switzerland and the USA as countries to which applicants have been removed under Schedule 3 Part 5.⁷² Information on countries considered safe in 2008 is not available. Article 27 (5) APD – which requires Member States to inform the Commission periodically of the countries to which the safe third country concept has been applied – has not been transposed. In its transposition note, the UK authorities state that they will inform the Commission of how the concept is used “*as requested*”. In terms of the procedure, there is no personal interview held to inquire about the potential safety of a country for an applicant, little case analysis and no apparent opportunity to rebut the presumption of safety. Because the rules laid down in national legislation do not provide for adequate case-by-case consideration, questions have been raised about conformity with the requirements of Article 27 (2) (b) APD.

⁶⁸ Case No. 33-2008 referring to Croatia, Bosnia and Herzegovina, and Montenegro.

⁶⁹ Information provided by the OAR Direction and confirmed by UNHCR.

⁷⁰ Asylum and Immigration (Treatment of Claimants, etc.), Act 2004 [United Kingdom of Great Britain and Northern Ireland], 2004 Chapter 19, 22 July 2004, available at: <http://www.unhcr.org/refworld/docid/46e5350e2.html>

⁷¹ API Safe Third Countries (dated February 2007, updated December 2008) paragraph 7.1 and 7.4, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/safethirdcountrycases?view=Binary>.

⁷² API Safe Third Countries (dated February 2007, updated December 2008) paragraph 7.1 to 7.3, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/safethirdcountrycases?view=Binary>.

Recommendations

Member States should ensure that, if the concept is applied, case-by-case consideration of the safety of a particular country for a particular applicant is always assured, even where there has been national designation of the country as safe.

Any Member State which provides for the national designation of countries considered to be generally safe should have a clear, transparent and accountable process for such national designation and any lists of safe third countries should be made publicly available along with the sources of information used in designating a particular country as safe.

In view of the need to take account of both gradual and sudden changes concerning the safety of a particular country, Member States should have in place appropriate mechanisms for the review of safe third country lists, as well as “benchmarks” and criteria that would trigger and inform such a review.

Country information

Article 8 (2) (b) APD requires that *“precise up-to-date information is obtained from various sources [...] as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited and that such information is made available to the personnel responsible for examining applications and taking decisions.”*

In Bulgaria, Article 98 (2) LAR requires that, in the process of approval of the list of safe third countries, the Council of Ministers shall take into account different sources of information.⁷³ In addition, Article 75 (2) LAR stipulates a general obligation to take into consideration all relevant facts concerning the personal situation of the applicant, his/her country of origin, or third countries. This rule is provided in Section III, Chapter Six LAR and thus is related to the general procedure only. Interviewers at SAR were of the opinion that a country information report would be necessary in all cases. However, as stated above, a current list of safe third countries required by national legislation has not been established, and hence the concept is not applied.

In the Czech Republic, there is no provision in the ASA requiring personnel taking a decision on the safe third country concept to consult information related to that country. A binding internal list of safe third countries is drawn up by the Head of the COI Unit in the asylum authorities, and thus it would appear that country information is taken into account when preparing the list. However, the list does not specify potentially more vulnerable categories of applicants, for whom the presumption of safety may be rebuttable.

In Finland, there is no legal or administrative rule stating that the decision-maker is obliged to consult country information before taking a decision in cases of ‘safe countries of asylum’. However, in practice, all of the audited ‘safe country of asylum’ decisions included extensive analysis of country information. Even though the audited cases related exclusively to ‘first country of asylum’ and not to ‘safe third country’ decisions, there is nothing to suggest that the same approach would not be used in cases relating to a safe third country.

In Greece, according to Article 6 of PD 90/2008, ADGPH should gather and assess precise and up-to-date information as to the general situation prevailing in the countries of origin of applicants for asylum, and in countries

⁷³ *Ibid.*

through which they have transited. According to the Head of ARD in ADGPH, the determining authority should consult this information before taking a decision to apply the safe third country concept.

In the Netherlands, the official proposing to take a decision on the application of the safe third country concept is obliged to consult country information on the third country before doing so.⁷⁴

In Slovenia, the obligation is not transposed in national law. Likewise, in Spain, as the safe third country concept is in practice considered on a case-by-case basis, updated country information would appear to be needed in each case, although there is no specific formal obligation. The New Asylum Law does also not establish any rules in that respect.

In the UK, the Asylum Policy Instruction on Safe Third Countries indicates that “*if relevant*”, decision makers “*should also consider information about the third country*”.⁷⁵ The research was unable to verify if that took place in individual cases.

Recommendations

If the safe third country concept is reflected in national law, Member States should ensure a specific obligation for the authorities taking a decision on the application of this concept, or designating countries considered to be safe, to consult updated country information on the third country in their assessment.

The future European Asylum Support Office (EASO) could usefully support the identification and collation of common information sources to be used by Member States for the purpose of designating a third country as a safe third country.

Connection with the safe third country

Article 27 (2) (a) APD requires a “connection” between the person seeking asylum and the third country concerned, on the basis of which it would be reasonable for that person to go to that country.

In UNHCR’s view, this requires that the applicant has a meaningful link with the third country. Mere transit alone does not constitute such a connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between the relevant countries, based on their comparable asylum systems and standards. Transit through a particular country is often the result of coincidental circumstances, and does not necessarily imply the existence of any meaningful link or connection. Similarly, a simple entitlement to entry would not alone constitute a meaningful link on the basis of which it would be reasonable for the person to go to that country. Examples of links which might be reasonably considered are family links, including between members of extended families. In some cases, links to a broader community could also amount to such a connection; as well as previous residence, such as long-term visits or studies; and linguistic or cultural links. Such links should be required in addition to transit through the country.

Formally, only the domestic legislation of the Netherlands seems to require forms of connection that, according to the above, may be considered a meaningful link. The Dutch legislation requires in Article 3.106a (2) and (3)

⁷⁴ Aliens Circular C4/3.8.1.

⁷⁵ API, *Safe Third Countries*, paragraph 8.4 accessed as above.

Aliens Decree⁷⁶ a connection between the applicant and the third country that would make it reasonable for the person to go to that country. For the application of Article 30 (1) (d) Aliens Act,⁷⁷ the connection must be so close that it is reasonable to require the asylum seeker to return to that country and resume his/her earlier residence. In the examination, all relevant facts and circumstances will be taken into account, including the type, the duration and the circumstances of the stay. The acceptance by that country of a request from the Netherlands to readmit the person based on a readmission agreement will be regarded as an indication of such a connection.⁷⁸ With regard to the interpretation of the term “stay”, the content of the readmission agreement will be decisive.⁷⁹

The application of Article 31 (2) (h) Aliens Act⁸⁰ depends on the intention of the applicant to travel to the Netherlands, which is more than the APD requires. The following criteria, laid down in C4/3.8.2 Aliens Circular, are applied in determining if the applicant’s passage constituted a “stay” in the country:

- A stay of two weeks or more in a third country indicates that the asylum seeker did not have the intention to travel to the Netherlands, unless from objective facts and/or circumstances it appears that s/he had this intention.
- If the asylum seeker stayed less than two weeks in a third country, it is assumed that the asylum seeker had the intention to travel to the Netherlands, unless the opposite appears from objective facts or circumstances; for instance, if his/her travel documents lack any indication of onward travel to the Netherlands.

Article 27 (2) (a) APD has not been transposed in Bulgaria. However, it is partially reflected in the very definition of a safe third country – requiring that the applicant should have resided in the concerned country.⁸¹ Residence is not further defined. No requirements regarding duration or intentions of the alien need to be taken into consideration by the determining authority (SAR). In this context, Article 44 (2) of the Law on the Foreigners in the Republic of Bulgaria⁸² might be applied, by analogy, but there is no such explicit obligation on the competent authorities. The provision requires only that, after protection has been refused and the alien is to be removed from Bulgarian territory (by an authority different from SAR), his/her ties (connection) with his/her country of origin should be examined.⁸³

76 Article 3.106a (2) and (3) Aliens Decree: “(2). An application for the issue of a residence permit for a fixed period as referred to in section 28 shall only be rejected on the grounds of Article 30 (1) (d) or Article 31(2)(h) Aliens Act, if there is a **connection** between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

3. In the assessment whether the connection, as meant in paragraph 2, can be established, all relevant facts and circumstances will be taken into account, such as the character, the period and the circumstances of the earlier stay in that country”.

77 Aliens Act Article 30 “(1) An application for the issue of a residence permit for a fixed period as referred to in section 28 shall be rejected if: (d) the alien will be transferred to a country of **earlier residence** on the grounds of a treaty obligation between the Netherlands and the other country concerned, which is a party to the Convention on Refugees, the Convention for the Protection of Human Rights and Fundamental Freedoms (Trb. 1951, 154) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Trb. 1985, 69) or has otherwise undertaken to observe article 33 of the Convention on Refugees, article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment”.

78 Aliens Circular C3/5.

79 Parliament 1999-2000, 26732, nr. 7, p. 143.

80 Article 31 (2) (h) Aliens Act 2. “The screening of an application shall take account, among other things, of the fact that: (h) the alien has resided in a third country that is a party to the Convention on Refugees and one of the conventions referred to in section 30 (d) and the alien has not made a plausible case that such country does not fulfil its treaty obligations with regard to him”.

81 Paragraph 1, item 9 Additional Provisions, LAR: “Safe third country” shall mean a country other than the country of origin where the alien who has applied for status **has resided**.

82 Law on the Foreigners in the Republic of Bulgaria, Article 44 (2) (Amend. SG No.36/2009: “When imposing compulsory administrative measures, the competent authorities shall take into consideration the duration of the residence of the alien in the Republic of Bulgaria, his/her family status, as well as the existence of family, cultural and social ties in the country of origin of the person.”

83 Article 44 (2): “When executing the compulsory administrative measures, the competent authorities should take into account the duration of the alien’s stay on the territory of the Republic of Bulgaria, his/her family situation, as well as family, cultural and social ties (connection) with his/her country of origin.”

In the Czech Republic, there are no specific rules regarding examination of the connection between the applicant and the third country. The national law merely requires that it must be a country “*where the alien had stayed before s/he entered the territory and to which the alien may return*”.⁸⁴ As the safe third country concept has not been applied since December 2007, no case law has been developed. In the past, an additional provision was added, stating that the safe third country concept could not be applied to applicants who were merely “*crossing*” (*projížďěl*) third countries. Since that provision was annulled, it is unlikely that prior case-law might be applied today, except with regards to the term “had stayed”. In case No. 3 Azs 372/2005 – 64 of 30 November 2006,⁸⁵ the fact the applicant had an opportunity to contact local offices and apply for asylum was interpreted as satisfying the term “had stayed”. This interpretation might differ today as the interpretation of S. 2(2) ASA might take into account the wording of the APD.

In order for the ‘safe country of asylum’ concept to be used in Finland, it is required that the applicant has or could have enjoyed protection in the allegedly safe country.⁸⁶ In the cases where this concept has been applied, there has been an obvious link to the country in that the applicant has previously lived there.⁸⁷ The preparatory works consider the connection requirement of Article 27 (2) (b) APD satisfied by the rules in the Aliens’ Act,⁸⁸ on the basis that the Directive does not impose any more detailed requirements.⁸⁹

Article 27 (2) (a) APD has not been transposed in Greek legislation and the term “reasonable” has not been interpreted. However, it is worth noting that, according to Article 18 (b) of PD 90/2008, an application can only be rejected as inadmissible if the safe third country has granted to the applicant international protection status or a residence permit, *inter alia* protecting him/her against *refoulement*.

Article 60 of the IPA stipulates that a safe third country shall be a country where the applicant was present prior to coming to the Republic of Slovenia, and which is thus competent to examine an application in substance.⁹⁰ Since the concept is not applied in practice, it is difficult to define how the requirement of ‘presence’ in the safe third country prior to coming to the Republic of Slovenia would be interpreted.

The New Asylum Law reflects Article 27 (2) (a) as it allows use of the concept, “*provided that there is a connection on the basis of which it would be reasonable for that person to go to that country.*” Conditions that are normally taken into account are:⁹¹

- how long the person stayed in the third country;
- the possibility to have asked for protection there; and
- whether the person has a legal status in that country.

⁸⁴ Section 2(2) ASA.

⁸⁵ “*..In the case it was proven, and the petitioner did not rebut this fact, that she entered the Czech Republic through Poland, where she stayed for about 18 hours, and she had to undergo control of identity at the border, so she was in contact with Polish police and customs authorities. The petitioner had a real opportunity to apply for asylum already in Poland, which is (...) so-called safe third country within the meaning of Section 2(2) ASA.*”

⁸⁶ Section 103 of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 28.4.2009): “*An application for international protection may be dismissed if: 1) the applicant has arrived from a safe country of asylum defined in section 99 where he or she enjoyed or could have enjoyed protection referred to in sections 87 and 88 and where he or she may be returned.*”

⁸⁷ *Ibid.* However, again, these decisions concerned first countries of asylum, not safe third countries.

⁸⁸ *Ulkomaalaislaki* 103 (1) (1) (Aliens’ Act 301/2004, as in force 11.7.2009).

⁸⁹ *Hallituksen esitys 86/2008* (Government Bill 86/2008), 37.

⁹⁰ Article 60 of the IPA: “*(nacionalni koncept varne tretje države) Varna tretja država je država, v kateri se je prosilec nahajal pred prihodom v Republiko Slovenijo, in je zato pristojna za vsebinsko obravnavanje prošnje.*” “A safe third country shall be a country where the applicant was present prior to coming to the Republic of Slovenia and which is thus competent to examine an application in substance”.

⁹¹ Information provided by the Special Procedures Unit at the OAR and confirmed by UNHCR.

In the UK, the connection between the applicants and the third country to which the determining authority can return them, is set down in Immigration Rule 345.⁹² To establish the connection required by Article 27 (2) (a) APD, this Rule requires that the applicant:

- did not arrive directly from the country in which s/he fears persecution;
- had an opportunity at the border or within the third country or territory to make contact with the authorities of that country or territory, in order to seek their protection; or
- is considered to have other clear evidence of his/her admissibility to a third country or territory.

Provided it is satisfied that a case meets these criteria, the determining authority is under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory.⁹³ Transit alone seems to suffice to establish a connection.⁹⁴ “Clear evidence of admissibility” suggests an even more tenuous link with the third country, as this may be established even without the applicant having been to the third country. UNHCR (and others) consider that neither transit alone nor clear evidence of admissibility is a meaningful link. Therefore, this rule does not satisfy the UK’s obligations under the APD which require a connection between the person seeking asylum and the third country, based on which it would be reasonable for him/her to go there in accordance with Article 27 (2) (a).⁹⁵ Paragraph 345 of the Immigration Rules further states that the determining authority is under no obligation to consult the authorities of the third country before the removal of an asylum applicant to that country or territory. This also applies in the case of non-EU states.

Recommendation

Member States should ensure that in the transposition and interpretation of Article 27 (2) (a), a meaningful link is required to establish a connection between the asylum seeker and the third country, on the basis of which it would be reasonable for the person to go to that country.

Opportunity to rebut the presumption of safety

National designation of a safe third country raises a refutable presumption under Article 27 APD. The individual concerned should be given an effective opportunity to challenge the application of the safe third country concept during the first instance examination. This is an essential safeguard. A right of appeal should not be relied upon alone, in view of the challenges faced by applicants in accessing an effective remedy in some Member States.⁹⁶

⁹² Immigration Rule 34: “345 (1) In a case where the Secretary of State is satisfied that the conditions set out in Paragraphs 4 and 5(1), 9 and 10(1), 14 and 15(1) or 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are fulfilled, he will normally decline to examine the asylum application substantively and issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as appropriate. (2) The Secretary of State shall not issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 unless: (i) the asylum applicant has not arrived in the United Kingdom directly from the country in which he claims to fear persecution and has had an opportunity at the border or within the third country or territory to make contact with the authorities of that third country or territory in order to seek their protection; or (ii) there is other clear evidence of his admissibility to a third country or territory. Provided that he is satisfied that a case meets these criteria, the Secretary of State is under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory.”

⁹³ The *Enforcement Instructions and Guidance (Chapter 27 on Third Country cases)* states that documentary evidence is required by the Third Country Unit that the applicant arrived directly from a safe third country and had the opportunity to seek asylum there.

⁹⁴ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC page 24.

⁹⁵ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status page 24; ILPA response to the BIA Consultation on the transposition of the EU Asylum Procedures Directive 2005/85/EC into National Law 19 October 2007 page 18,19.

⁹⁶ These are elaborated in detail in Part 2, section 16 of this report.

This would create a risk of return to persecution or serious harm, in contravention of the 1951 Convention and other relevant instruments.⁹⁷

Given that this research found that, of the Member States surveyed, the concept is only applied in Spain and the UK, UNHCR's observations with regard to the opportunity to rebut the presumption of safety, is largely based on a review of legislation and administrative provisions; and interviews with stakeholders. Among the Member States of focus in this survey, it would appear that only the law and procedure in the Netherlands would provide the applicant with an effective opportunity to challenge the presumption of safety.

In Bulgaria, LAR provides explicitly for an opportunity to rebut the presumption of safety (Article 99 LAR). This is further supported by the fact that Article 13 (1), item 13 LAR, which regulates the application of the concept, is not an inadmissibility ground but a ground which is considered in the accelerated procedure; and Article 13 (3) LAR⁹⁸ stipulates that the application of the concept may not be the sole ground for rejecting an application as manifestly unfounded. However, although the concept is not currently applied in practice, a serious concern arises as to whether there would be an effective opportunity to rebut the presumption of safety if it were to be applied in practice. This is because all of the interviewed stakeholders, who were interviewees with the asylum authority, stated that if they considered a certain country a safe third country for the applicant or a safe country of origin, they would not inform the applicant of their presumption. This would seriously undermine the right of the applicant to know the case 'against' him/herself, and in practice would considerably limit the opportunity to rebut the presumption.

Similarly, in the Czech Republic, whilst the opportunity to rebut the presumption of safety exists in law; it is unclear whether the applicant would be informed in advance that s/he might be sent to a safe third country. The safe third country list in the Czech Republic is internal and not made public. Information, about the applicable law, is not included in the general written information handed to applicants at the beginning of the procedure; and from the ASA, it does not follow that this information should be given to applicants, unless the internal regulation with the list of safe third countries is part of the individual case files, and the applicant learned about the fact from the case file. Since the concept has not been applied since the entry into force of the APD, it was not possible to verify practice.

In Finland, there is no explicit legal norm, nor any administrative statement regarding the grounds on which the applicant can rebut the presumption of safety. However, on the basis of the findings of the research, it is clear that, with regard to the application of the first country of asylum concept, considerable effort is devoted to actually determining that the third country is safe by assessing relevant COI, and providing reasoning in support of removal to the third country.⁹⁹ Nonetheless, applicants are not informed of the intention to apply the 'safe country of asylum' concept in advance. All applicants in the Finnish asylum procedure however, including those in the accelerated procedure, have both in law and practice the possibility to contact legal advisers.

97 UN High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/b4, Asile 64, of 9 November 2004)*, 10 February 2005, available at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

98 Article 13 (3) LAR: "If the fact stipulated under paragraph 1, item 13 is in place, this cannot by itself be a reason to reject the application as manifestly unfounded".

99 Ibid. In Finland, the 'safe country of asylum' concept exists in law. This encompasses both the 'first country of asylum' concept and the 'safe third country' concept. However, UNHCR was informed that the 'safe third country' concept is not applied. These findings are based on practice which relates to first countries of asylum.

In Greece, Article 27 (2) (c) APD has not been transposed in national legislation. According to the determining authority, the applicant would not be informed in advance of the authorities' intention to apply the concept, but would be informed when the negative decision is issued and could appeal the decision.¹⁰⁰ However, given the standard phraseology used in all negative decisions which does not provide specific legal reasoning, it would appear unlikely, on the basis of the decisions observed by UNHCR, that the applicant would be informed of the application of the concept. Moreover, following amendment of PD 90/2008, the appeal procedure has ceased to exist and applicants may only apply for judicial review on a point of law to the Council of State.¹⁰¹

As a good practice example, only the Netherlands seems to offer the guaranteed opportunity, in both law and practice, to rebut the presumption of safety. The standard practice in the Dutch procedure, both in the accelerated procedure (Article 3.117 Aliens Decree) and in the regular procedure (Article 3.115 Aliens Decree), is that before issuing a decision, the determining authority first gives the applicant its 'intended decision'. This gives the applicant and his/her lawyer the opportunity to formulate a view on the intended decision and submit any counter-indications. The view of the applicant and his/her lawyer is taken into account before the decision is issued by the determining authority. This procedure is called the intention procedure, and is applied in all asylum procedures. The applicant, therefore, would be informed in advance of a decision being taken, that the determining authority considers a country as a safe third country and the applicant would have the chance to rebut the presumption of safety.

In Slovenia, Article 63(2) of the IPA foresees that the applicant may, during the course of the procedure, submit evidence that the relevant country is not a safe country for him/her. This implies that s/he should be informed in advance of a decision being taken, that the determining authority considers a particular country as a safe third country. However, as the concept has not been applied in practice, it is difficult to say how the Ministry would conduct this procedure and implement the provision.

In Spain, the applicant is not informed of the presumption of safety, as in the Spanish asylum procedure, or of the proposed decision on the case prior to the adoption of the inadmissibility or rejection decision. The only possibility to discover the grounds that are being considered in the examination of the case, is through lawyers and specialized NGOs. They could potentially contact the OAR officials, who are sometimes open to disclosing this information. The decision will state that the application is considered inadmissible.¹⁰² The applicant has the opportunity to consult with a legal advisor, to assist him/her to challenge the country information which has led to the determination of the safe third country. The applicant or his/her legal advisor, in general, can present arguments and supporting documentation at any time. If the legal advisor learns in advance that the case might be declared inadmissible on third country grounds, s/he may take the opportunity to present supporting documentation or relevant argumentation. However there is no formal opportunity to rebut the presumption of safety.

In the UK, the opportunity to rebut the presumption of safety is given in law, but not effectively in practice. In practical terms, the applicant is not informed in advance of a decision that the determining authority considers that there is a potential safe third country to which the person could be sent. Although applicants should be informed at the start of screening that information may be shared with other countries which may have responsibility for determining their claim, they are not given a realistic opportunity to comment or object to the application of the safe third country concept before a decision is taken. Therefore, the applicant does not have an

¹⁰⁰ Interview with the Head of the Asylum and Refugees Department (ARD) in the ADGPH, and the Police Warrant Officer/Examiner of case-files in ARD in the ADGPH.

¹⁰¹ For further information, see section 3 on the requirements for a decision and section 16 on the right to an effective remedy.

¹⁰² By application of Article 20 (1) of the New Asylum Law.

opportunity to consult with a legal adviser, in advance of a negative decision, regarding the potential application of the safe third country concept. According to Parts 3 and 4 of Schedule 3 (list 2 and 3) to the 2004 Act, there is an opportunity to rebut the presumption of safety on appeal in-country, on human rights grounds, only if the Secretary of State does not certify the claim as clearly unfounded. Part 5 of Schedule 3 to the 2004 Asylum and Immigration Act provides for individual certification of cases. The applicant can in theory rebut the presumption of safety in cases considered under Part 5 of Schedule 3 to the 2004 Act on any ECHR grounds, not merely Article 3 as provided for in Article 27 (2) (c) APD. However, there is normally just three working days between the date of certification and the date for which removal directions are set. This does not give the individual a practical opportunity to challenge the decision in-country via judicial review.¹⁰³

Recommendation

Member States must ensure, in law and in practice, that the applicant is given an effective opportunity to rebut the presumption of safety, by informing him/her in advance that his/her claim might not be examined in the Member State based on safe third country grounds, with the result that s/he might be sent to that third country. S/he must have a reasonable time to challenge the presumption of safety of that country in his/her particular circumstances.

Personal interviews

Article 12 (2) (c) APD, together with Article 23 (4) (c) (ii) APD, permits Member States to omit the personal interview on the ground that the determining authority considers that there is a safe third country for the applicant. However, as mentioned above, in accordance with Article 27 (2) (c) APD and international law, Member States must conduct an individual examination to ascertain whether a proposed safe third country is actually safe for the particular applicant. Moreover, the applicant must be given the opportunity to, at least, challenge the application of the safe third country concept. An interview of the applicant would provide the applicant with the opportunity to raise grounds, if any, to challenge the application of the concept, and enable the determining authority to ascertain whether the proposed safe third country is actually safe for the particular applicant.

Of the Member States of focus, the interview can only be omitted in Greece, Slovenia and the UK on safe third country grounds.¹⁰⁴

¹⁰³ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC page 25: “Part 5 of schedule 3...provide for an individual determination as to whether a third country is safe. However, there are no safeguards for asylum seekers, and there is a real risk of return to persecution or serious harm for the following reasons: there is no in-country or out-of-country right of appeal on 1951 Convention grounds either on the basis that the applicant would be at risk of persecution in the third country or on the grounds that the third country may send the applicant on to another country such as to expose them to a risk of persecution; the applicant can only challenge the Secretary of State’s certificate that the third country removal is safe on 1951 Convention grounds by judicial review. While an in-country right of appeal exists against refusal of a claim for protection based on risk of human rights violations the Home Office may certify any such claim as ‘clearly unfounded’. If the claim is certified, the applicant will have to successfully challenge the certificate by judicial review in order to retain the human rights in-country right of appeal. Alternatively the applicant can only appeal from out of the country on human rights grounds; normally, just three working days are allowed from the date of certification before removal takes place. Therefore, Part 5 of Schedule 3 does not allow the applicant to challenge the application of the safe third country concept effectively in accordance with Article 27(2)(c) of the Directive, the 1951 Convention and other international human rights instruments.”

¹⁰⁴ In Germany, the omission of the personal interview is possible, according to Section 24 (1) Sentence 4, 2nd Alternative APA. However, this refers only to constitutional asylum and does **not affect** cases covered by the APD: “[t]he interview may be dispensed with if [...] the foreigner claims to have entered the Federal territory from a safe third country (Section 26a).” This provision was already introduced in 1993 and was justified with the aim of securing an expedient deportation as provided for in Section 34a APA (Bundestag printed papers, 12/4450 page 20). Thus, the assessment of the danger of being persecuted was not seen as being decisive any longer, and the asylum authority only investigated the travel route (Bundestag printed papers, 12/4450 page 20; cf. also R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 24, paragraph 65).

In Greece, according to Article 10 (2) (c) of PD 90/2008, on the basis of a complete examination of information provided by the applicant, the interview can be omitted if the applicant comes from a safe third country. In Slovenia, the possibility is stipulated in Article 46 (1), indent 3 of the IPA: “*when an application is examined within the Dublin procedure and procedures according to the concept of the national or European safe third country, and the concept of the country of the first asylum.*” In the UK, asylum applications are not considered substantively in safe third country cases. This means that applicants do not have the opportunity of a personal interview. Guidance instructs officers to refer cases to the Third Country Unit before screening is concluded.¹⁰⁵

However, in the majority of Member States surveyed which have reflected Article 27 APD in national legislation, the interview may not be omitted in safe third country cases. This is the case in Bulgaria, the Czech Republic, Finland, the Netherlands and Spain.

It is worth mentioning that in the Netherlands, if a readmission agreement is applicable in accordance with Article 30 (1) (d) Aliens Act, the personal interview can be focused on the question whether the applicant can be transferred to that third country (C3/13.6 of the Aliens Circular).

Recommendation

Member States should ensure, if they apply the safe third country concept, that the applicant is always given the possibility of an interview in which to challenge the application of the concept. The APD should be amended to guarantee this safeguard in all safe third country cases.¹⁰⁶

Grounds to challenge the presumption of safety

Article 27 (2) (c) APD at present foresees that national legislation shall permit the applicant to challenge the presumption of safety on the ground that s/he would be subject to torture, cruel, inhuman or degrading treatment or punishment. However, it does not ensure the possibility to rebut the presumption of safety or the application of the concept based on wider international protection grounds and non-fulfillment of any of the other stipulated criteria for application of the concept.

Of the countries of focus in this research, the applicant can rebut the presumption of safety on any grounds in Bulgaria and Slovenia.

In Bulgaria, the applicant may challenge the presumption of safety on any ground as per the legal definition under Para.1, item 9 Additional Provisions, LAR. It may relate to the fact of residence in the country; the lack of possibility for readmission; alleged fear of threats to his/her life and freedom based on race, religion, nationality, belonging to a particular social group, or political opinion; non-observance of the *non-refoulement* principle, or the possibility to be returned to a country where his/her rights are threatened; Article 3 ECHR grounds; access to an RSD procedure; and being able effectively to enjoy the rights of a refugee.

¹⁰⁵ Chapter 27.2 of Enforcement Instructions and Guidance document available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/enforcement/>.

¹⁰⁶ This is suggested in the proposed recast Article 13 (2), read together with recast Article 27 (6): APD Recast Proposal 2009.

In Slovenia, no special limitations are defined in the law. Normally, however, the applicant would be permitted to rebut his/her alleged connection with the country, and other criteria upon which it was assessed that a particular country is considered as a safe third country for him/her.

In the Czech Republic, in theory, the applicant can rebut the presumption of safety on any grounds within Section 2 (2) ASA, i.e. (1) that s/he had not stayed in that country; (2) that s/he may not return and/or apply for refugee status there; (3) that s/he would be subjected to persecution, torture, inhuman or degrading treatment or punishment. Since the definition of a safe third country is somewhat different in the ASA than that in the APD [see above], the examination of Article 3 ECHR grounds should be automatically part of the examination of the claim. However, there is no practice to date.

In Finland, there is no explicit legal norm, nor any administrative statement regarding the grounds on which the applicant can rebut the presumption of safety. As the argumentation in some of the audited cases related to issues beyond the scope of Article 3 ECHR, this would appear to suggest that the presumption may be rebutted on grounds beyond Article 3 ECHR. However, this could not be verified as the audit did not include any cases where the presumption was in fact rebutted and all the audited cases relating to the ‘safe country of asylum’ concept concerned first countries of asylum.

In Greece, Article 27 (2) (c) APD has not been transposed and none of the audited decisions contained reasoning relating to the safe third country concept.

In the Netherlands, with regards to application of Article 30 (1) (d) Aliens Act, the grounds on which the applicant can challenge the application of the safe third country concept are limited to Article 3 ECHR grounds, as stated in Article 27 (2) (c) APD.¹⁰⁷ The Netherlands implemented paragraph (c) in a minimal way, as this provision refers to international law. It adds that the examination shall, as a minimum, permit the applicant to challenge the application of the safe third country concept on the grounds that s/he would be subjected to “torture, cruel, inhuman or degrading treatment”.

In the UK, the applicant can in theory rebut the presumption of safety in cases considered under Part 5 of Schedule 3 to the 2004 Act (relating to individual certification of safe third countries). This can be on any ECHR ground, and not merely Article 3 as stated in Article 27 (2) (c) APD.

Recommendation

Article 27 (2) (c) APD should be amended to include the possibility for the applicant to challenge the application of the safe third country concept on wider international protection grounds, including all the grounds set out in Article 27 (1), and on the grounds that Article 27 (2) (a) APD is not fulfilled.¹⁰⁸

¹⁰⁷ Article 3. 106a(4) Aliens Decree.

¹⁰⁸ If adopted, the proposed recast Article 32(2) would address this concern: APD Recast Proposal 2009.

Humanitarian exceptions

Of the states examined in this research, only in Spain, and to a limited extent in the Netherlands, does the law permit exceptions from the application of the safe third country rule.

In Spain, Article 37 of the New Asylum Law establishes that in case of inadmissibility or rejection, according to the Aliens Law, the applicant may be granted authorization to stay or reside in Spain on humanitarian grounds.

With regards to the Dutch legislation, the wording of Article 30 (1) (d) Aliens Act (the claim “shall be rejected” if the applicant “shall be transferred”), would suggest that exceptions may not be made on humanitarian grounds when applying this safe third country rule. However, in the Parliamentary documents, the Government explained that there is an individual examination in which ‘all relevant facts and circumstances’ are taken into account. Moreover, Article 31 (1) Aliens Act makes clear that the asylum seeker has the possibility to make a reasonable case that the country does not comply with its treaty obligations in his/her specific situation. Furthermore, according to Article 29 (1) (c) Aliens Act, an applicant can be admitted on humanitarian grounds, if the humanitarian reasons (for instance, trauma) are related to his/her situation in the country of origin. It should also be noted that the general obligation to weigh different interests, laid down in the administrative law, is applicable.¹⁰⁹ Finally, the Secretary of State is empowered to grant a residence permit, if s/he deems this to be the right decision, but there are no criteria in law for the use of this discretion.

In Finland, according to stakeholders, although the law and administrative provisions do not define any exception to the application of the ‘safe country of asylum’ concept, exceptions based on humanitarian reasons have been made in practice, granting the applicants other (non-asylum) forms of residence permits.

In Bulgaria, no exceptions are defined in law, apart from the general exception regarding applications by unaccompanied minors/juveniles and persons granted temporary protection, which are not examined in the accelerated procedure. In the Czech Republic, Greece and Slovenia, no exceptions to the application of the safe third country for humanitarian reasons are defined in law. In Greece, according to the determining authority, although it is not defined by law, the concept of the safe third country would not be applied in cases where there are humanitarian considerations.¹¹⁰

In the UK, Parts 4 and 5 of Schedule 3 give the determining authority some discretion about whether to certify an asylum application for removal to a safe third country. However, no specific exceptions for humanitarian or other reasons are defined in law. The case of *R (AM) Somalia [2009] EWCA Civ 114 C of A*¹¹¹ considered the operation of Schedule 3 to the 2004 Act (with regards to Dublin II Regulation) and observed that it did not allow for challenges to the safe third country rule for humanitarian reasons. This stands in contrast with the previous certification regime, which did allow for such challenges.

Unaccompanied children and safe third countries

In the Member States of focus in this research, there are no specific provisions related to the exemption of unaccompanied children from the application of the safe third country concept. However, in Bulgaria¹¹² and the Czech Republic,¹¹³ unaccompanied children are automatically exempted from accelerated procedures. Thus the concept of safe third countries should not apply to them.

¹⁰⁹ Article 3:4 Awb, the General Administrative Law Act.

¹¹⁰ Interview with the Head of ARD in ADGPH.

¹¹¹ *R (on the application of AM (Somalia)) v. Secretary of State for the Home Department*, [2009] EWCA Civ 114, United Kingdom: Court of Appeal (England and Wales), 25 February 2009, available at: <http://www.unhcr.org/refworld/docid/49abde822.html>.

¹¹² Article 71 (1) LAR.

¹¹³ Section 16(4) ASA: “An unaccompanied minor’s application may not be dismissed as manifestly unfounded.”

UNHCR was informed by the determining authority in a number of the Member States surveyed that the safe third country concept would not be applied to unaccompanied children.¹¹⁴

In Bulgaria, the law does not provide for an explicit exception to the application of the safe third country concept with regard to unaccompanied minors.¹¹⁵ However, the ‘best interests of the child’ principle is stipulated in the general provision of Article 6a LAR¹¹⁶ and applies to all procedures under LAR. Furthermore, as mentioned above, applications by unaccompanied minors are exempted from the accelerated procedure. Interviewed stakeholders from the determining authority stated that the concept of safe third country would not be applied with regard to unaccompanied minors/juveniles in any procedure.

In Finland, the ‘safe country of asylum’ concept is not applied in practice to unaccompanied minors.¹¹⁷ Similarly, although there is no specific provision in Greek legislation, according to the Head of the Asylum and Refugees Department in the Aliens’ Directorate of the Greek Police Headquarters, there is a verbal instruction to the competent authorities that the safe third country concept should not apply to unaccompanied minors.¹¹⁸

However, in a number of other Member States, it appeared that, by law, the concept may be applied to unaccompanied children.¹¹⁹

In Spain, applications by unaccompanied minors are automatically admitted to the regular RSD procedure.¹²⁰ However, the safe third country concept may be applied only if a child has relatives in a third country that would take care of him/her and it is feasible for the child to go there. Such cases are very rare.¹²¹

In the UK, the safe third country concept is applied with regard to applications by unaccompanied minors.¹²² The *API Third Country Cases: Referring and Handling* refers to the principle of the ‘best interests of the child’ where the child has not claimed asylum in the third country, but statements or evidence suggests that family members are in the third country.¹²³ The methods used by the determining authority for family tracing in unaccompanied minors’ cases have been criticized.¹²⁴

Recommendation

National legislation, regulations or administrative provisions should permit for exceptions to be made to the application of the safe third country concept when, *inter alia*, it is not considered in the best interests of separated children and other vulnerable persons.

¹¹⁴ Bulgaria, Finland and Greece.

¹¹⁵ Except that their applications are exempted from examination in the accelerated procedure.

¹¹⁶ Article 6a LAR: (*New, SG No. 52/2007*) *The interests of the child are of utmost priority with respect to the application of this law.*

¹¹⁷ This is not based on a legal provision, but has emerged as a practice of the determining authority.

¹¹⁸ Interview with the Head of ARD in ADGPH.

¹¹⁹ The Netherlands, Slovenia, Spain, and the UK.

¹²⁰ Information provided by the Special Procedures Unit and the Protection Procedures Unit.

¹²¹ Information provided by the UNHCR.

¹²² *API Third Country Cases: Referring and Handling* 14.1.09 accessed via UKBA website 2.05.09.

¹²³ *API Third Country Cases: Referring and Handling* paragraph 4.3.4.

¹²⁴ Crawley H., *When is a child not a child? Asylum, age disputes and the process of age assessment*, ILPA May 2007.

Safe third country claims as inadmissible or manifestly unfounded

Article 28 (2) APD permits Member States, in the case of an unfounded application, to declare the application “manifestly unfounded” where a third country is considered to be a safe third country for the applicant; or, in accordance with Article 25 (2) (c), to declare the application inadmissible. The wording of Article 28 (1) and (2) APD indicates that Member States are required to examine the application in substance and establish that the applicant does not qualify for refugee status (or subsidiary protection status), as well as establish that the safe third country concept applies, before an application could be declared manifestly unfounded on this ground. However, it is not clear from UNHCR’s research whether this occurs in practice. In practice, the designation of a case as inadmissible may make it extremely difficult for the applicant to rebut the presumption of safety, and may negatively impact on the applicant’s rights on appeal.

Applications, to which the safe third country concept is applied, may be declared manifestly unfounded in Bulgaria, Czech Republic, Finland, and the UK. In Finland, Greece, Slovenia, Spain and the UK such applications may be declared inadmissible. It should be noted that in two Member States, the application of the safe third country concept may result in an application being declared either inadmissible or manifestly unfounded.¹²⁵

In the Netherlands, applications that raise safe third country grounds are not declared ‘inadmissible’ in terms of Article 25 (2) (c), nor as ‘manifestly unfounded’ under Article 28 (2) APD. The rejection of the application on the grounds of a safe third country is a standard decision with the regular procedural rights. That implies a right to an appeal to the courts.

In Bulgaria, applications rejected on safe third country grounds may be deemed manifestly unfounded under Article 13 (1), item 13 LAR. As such, they may be decided in the accelerated procedure. The LAR provides, however, that even if the applicant comes from a designated safe third country and the grounds for protection (Article 8 and 9 LAR) are not met, this does not constitute sufficient grounds for declaring an application manifestly unfounded.¹²⁶

In Finland, an application for international protection may be dismissed as inadmissible if the “*applicant has arrived from a safe country of asylum ... where he or she enjoyed or could have enjoyed protection ... and where he or she may be returned*”.¹²⁷ In order to dismiss the application on this ground, the decision must be made within seven days of the date when the minutes of the interview were completed and the information on their completion was entered in the Register of Aliens.¹²⁸ Alternatively, the application may be assessed and declared manifestly unfounded “*if the applicant comes from a safe country of asylum or origin where he or she may be returned, and the Finnish Immigration Service has, for weighty reasons, not been able to issue a decision on the application within the time limit laid down in section 104 (973/2007)*”.¹²⁹ [Emphasis added.]

In Greece, applications are declared “inadmissible”. According to Article 18 (b) of PD 90/2008, an application can be rejected as inadmissible if the safe third country has granted to the applicant international protection status or a residence permit, *inter alia* protecting him/her against *refoulement*.

¹²⁵ See section 10 on inadmissible and manifestly unfounded applications for further information.

¹²⁶ Article 13 (3) LAR: “*If the fact stipulated under paragraph 1, item 13, is in place, this cannot by itself be a reason to refute the application as manifestly unfounded*”.

¹²⁷ Section 103 (1) of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 28.4.2009.

¹²⁸ Section 104 (1) of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 28.4.2009.

¹²⁹ Official translation, available at www.migri.fi.

In Spain, if the safe third country is identified and applied in the admissibility procedure, the application will be declared inadmissible. If it is identified and applied at a later stage, the case will be rejected in the regular procedure. The New Asylum Law maintains the same approach.

In the UK, applications to which safe third country grounds apply are generally declared inadmissible in line with Article 25 (2) (c) APD. Where countries are treated as safe for individuals under Part 5 of Schedule 3, the instructions are not to conduct a full screening interview prior to referring to the Third Country Unit (TCU). If the removal is approved by the TCU, a Third Country Certificate and a non-suspensive appeal notice will be issued.¹³⁰ This amounts to a claim being treated as inadmissible. Alternatively, the provisions of Part 5 of Schedule 3 of the 2004 Act and the provisions of the Nationality Immigration and Asylum Act 2002 S94 permit safe third country applications to be ruled as clearly unfounded in line with Article 28 (2) APD.

Recommendation

Where applications are to be declared inadmissible and the safe third country concept is applied, the decision should indicate clearly that the application was not examined in substance and should be examined by the third country.

Effective remedies

Article 39 (1) provides that Member States must ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum. This encompasses a decision to declare an application inadmissible, unfounded or manifestly unfounded on safe third country grounds.¹³¹

However, as found in this research and set out in greater detail in section 16, in practice, prospective appellants face various and numerous impediments in some Member States, relating among other things to inadequate information provided to applicants on how to appeal, and to which appeal body. Additional impediments include: extremely short time-limits within which to appeal; lack of linguistic assistance for applicants with regard to information on how to appeal and with the submission of the appeal; a shortage of legal advisers and a lack of competent legal advisers; a requirement to lodge the appeal in person, which is impossible for some applicants to fulfil in practice; difficulties in accessing the case file in a timely manner; and limited physical access to the court or tribunal due to distance and lack of financial resources to travel. Moreover, in some Member States, submission of an appeal may not afford automatic suspensive effect and the applicant must request suspension of the execution of any removal order, sometimes within very short time limits. An overview of the circumstances in which automatic suspensive effect is not afforded to an appeal is set out, for each Member State surveyed, in section 16 of this report.

However, the following specific concerns relating to applications rejected on ‘safe third country’ grounds should perhaps be highlighted here.

In the Czech Republic, although in practice the safe third country concept has not been applied since the entry into force of the APD, if it were applied, the applicant would have the right to seek a remedy before a court against the

¹³⁰ Chapter 27 of the Enforcement Instructions and Guidance (EIG). Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/>

¹³¹ Article 39 (1) (a) (i) APD explicitly refers to decisions of inadmissibility.

decision, but the appeal would not have suspensive effect.¹³² It is not clear whether the right to a remedy before a court against a decision would be effective, as a court may discontinue proceedings if the applicant's place of residence cannot be established.¹³³ As the appeal has no suspensive effect, the applicant may be expelled to the third country following delivery of the decision and it is not clear whether s/he would have sufficient opportunity to contact the local Czech court (1) to file an appeal, (2) to give the court a new address in the third country in order to be contacted, (3) to communicate with the court, as all communication is in the Czech language, and it is unlikely that the applicant would understand the documents of the court, or would be able to find a translator for the Czech language abroad. While in practice the safe third country concept has not been applied, similar problems have been observed in Dublin II cases and court proceedings related to those cases.

In Finland, when the determining authority takes a negative decision on an application, on the ground that a country is a safe country of asylum or origin, or declares an application manifestly unfounded, an expulsion order is issued and becomes enforceable eight days after notification.¹³⁴ Applicants in remote areas of Finland, where legal representation and interpreter services are scarce, experience difficulties in applying for the suspension of the expulsion order within the eight days. Moreover, notwithstanding a pending request for suspensive effect, an expulsion order may nevertheless be executed.

In Greece, following amendment of PD 90/2008, Article 25 has been repealed and the former appeal procedure no longer applies. An applicant may only submit a request for judicial review on a point of law to the Council of State.

In the Netherlands, if an application is rejected in the regular procedure, an appeal has automatic suspensive effect.¹³⁵ However, if an application is rejected in the accelerated procedure or if the applicant has been taken into custody, the appeal does not have automatic suspensive effect.¹³⁶ Asylum seekers have the right to ask the court for an interim measure to suspend removal. However, a request to the President of a District Court in the Netherlands to grant suspensive effect does not in itself have automatic suspensive effect. There is therefore no guarantee in law that an expulsion order will not be executed before the President of the District Court takes a decision on the request for suspensive effect.¹³⁷ Moreover, the Aliens Circular is explicit in stating that, notwithstanding a request for suspensive effect, an expulsion order may be executed where there is a risk that the opportunity to return the person to the country of origin or **a third country** will be missed.¹³⁸ [Emphasis added].

In the UK, where a Safe Third Country Certificate is issued under Schedule 3 and an application is treated as non-admissible, there will either be no appeal right at all to challenge the safety of the third country, or if there is one, it will be non-suspensive (out of country). The only remedy is judicial review. If a challenge to removal on human rights grounds is certified as clearly unfounded, any appeal right will also be non-suspensive.¹³⁹ The only potential challenge to the certificate is by judicial review.¹⁴⁰ UNHCR has expressed the view that Part 5 of Schedule 3 does

¹³² Section 32 (3) ASA: "The filing of an action pursuant to Subsection (1) and (2) **has a suspensive effect, except for an action against discontinuation of the proceedings pursuant to Section 25 and an action against a decision pursuant to section 16(1)(d) and (e).**"

¹³³ Section 33 ASA "The court shall discontinue the proceedings if (...) b) the place of stay of an applicant for international protection (petitioner) cannot be established".

¹³⁴ Section 201 (2) and (3) *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009).

¹³⁵ Article 82(1) Aliens Act.

¹³⁶ Article 82(2)(a) and (4) Aliens Act.

¹³⁷ According to the Aliens Circular, however, an asylum applicant is **in general** allowed to await the decision of the President of the District Court, **provided that the request has been submitted in a timely fashion.**

¹³⁸ C22/5.3 Aliens Circular.

¹³⁹ NIAA 2002 S94 provides for non-suspensive appeals in "unfounded" cases, and this can include Safe Third Country Certificates under Schedule 3 to the 2004 Act. If the claim has been certified under Schedule 3 to the 2004 Act, and there is an appeal right, it will be non-suspensive.

¹⁴⁰ API of Feb 2007, on Safe Third Country Cases (re-branded December 2008) at paragraph 9.1- 9.4.

not allow the applicant to challenge the application of the safe third country concept effectively, in accordance with Article 27 (2) of the Directive, the 1951 Convention and other international human rights instruments.¹⁴¹

Recommendations with regards to the right to an effective remedy are set out in section 16 of this report.

Time limit to lodge the appeal

In practical terms, the applicant must have sufficient time and facilities in order to undertake all the steps required to exercise the right of appeal. This is also in line with the principle of equality of arms.¹⁴² In this regard, short time limits for lodging appeals may render a remedy ‘ineffective’. European Community law has established that:

*“the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by Community law”.*¹⁴³

UNHCR is concerned that in some Member States, the time limits imposed may be too short, given the procedural steps that need to be taken and the general circumstances of applicants. These time limits may render excessively difficult the exercise of the right to an effective remedy conferred by the APD. They may result in a failure to exercise the right of appeal, or in incomplete or hastily-completed appeals which run the risk of being dismissed.

Information regarding applicable time limits in each of the Member States surveyed for this research is set out in section 16 of this report.

UNHCR also notes that the time limit within which an applicant must apply for suspensive effect should not be so short as to render the remedy ineffective. In this regard, UNHCR is concerned that the time limit within which applicants must apply for suspensive effect in the Netherlands is only 24 hours.¹⁴⁴ UNHCR is also concerned that, in the UK, in safe third country cases, there are only 72 hours between the date when a safe third country certificate is issued and the date for which removal is set. This does not give the applicant a practical opportunity to challenge the decision by judicial review.

Recommendations on this issue may be found in section 16 of this report.

Provision of a document on rejection regarding non-examination in substance

According to Article 27 (3) APD, when implementing a decision solely based on Article 27, Member States shall:

- (a) inform the applicant accordingly; and
- (b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

¹⁴¹ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC page 25.

¹⁴² Article 34 ECHR read in conjunction with Article 13 ECHR.

¹⁴³ Unibet vs Justitiekanslern, Case C-432/05, European Union: European Court of Justice, 13 March 2007, paragraph 47; and Rewe-Zentral-finanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, Case C-33/76. European Union: European Court of Justice, 16 December 1976, paragraph 5.

¹⁴⁴ In the Netherlands, the decision itself states that the asylum seeker must formally request an interim measure within 24 hours.

UNHCR's research revealed that only five of the eight Member States of focus which have implemented this concept in national legislation, have transposed or partially transposed this provision.¹⁴⁵ In two Member States where this has not been transposed, it was reported that Article 27 is never the sole basis for a negative decision. However, in one Member State which applies the concept, Article 27 (3) APD has not been transposed and is not implemented in practice.

In the Czech Republic, *“if the Ministry rejects the application for international protection as manifestly unfounded due to the fact that the alien came from a safe third country, its decision will be accompanied by a document notifying the safe third country in its official language that during the proceedings on granting of international protection the compliance with reasons for granting asylum or subsidiary protection was not considered.”*¹⁴⁶

In Finland, legislation states that any alien who is returned to a safe country of asylum is issued with a document stating that his or her application was not examined in substance.¹⁴⁷

In Greece, Article 27 (3) APD has been literally transposed in domestic legislation through a verbatim translation.

In Slovenia, *“In the implementing procedures of the European and national safe third country concept stipulated in Articles 60 and 62 of this Act, the competent authority shall provide the applicant with a document informing the safe third country that the application has not been examined in substance in the procedure for international protection. The document shall be translated into the language of the safe third country.”*¹⁴⁸

The UK has transposed Article 27 (3) APD through Immigration Rule 345 (2A). It provides that the asylum applicant shall be informed in a language that s/he may reasonably be expected to understand regarding his/her removal to a safe third country, and be provided with a document informing the authorities of the safe third country, in the language of that country, that the asylum application has not been examined in substance by the authorities in the United Kingdom.

In Bulgaria, the application of the safe third country concept may not be the sole basis for a decision. It may not be the sole ground for a decision establishing that the application is manifestly unfounded in accordance with Article 13 (3) LAR. It may also not be the sole basis for a decision establishing that an application is unfounded as the lack of grounds for protection (Article 8 and 9 LAR) would need to be established in any case.¹⁴⁹ This means that the claim is always examined in substance and no document in the terms of Article 27 (3) APD would be needed.

In the Netherlands, Article 27 (3) APD is not implemented, and the Parliamentary documents do not refer to this provision. Thus, an applicant transferred to a third country cannot prove that his/her application has not yet been examined substantively.

In Spain, this provision has not been transposed in domestic law. In practice, the safe third country concept should not be the sole ground for a decision, and the decision notified to the applicant would indicate if the non-admission/rejection decision is based on, *inter alia*, safe third country grounds.

¹⁴⁵ The Czech Republic, Finland, Greece, Slovenia and the UK.

¹⁴⁶ Section 28 (3) ASA.

¹⁴⁷ Section 104 (2) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009).

¹⁴⁸ Article 64 of the IPA.

¹⁴⁹ This was confirmed by interviews with stakeholders, Methodology Directorate.

Recommendation

Member States should ensure that all applicants who are removed to safe third countries are furnished with a document in accordance with Article 27 (3) APD, stating that their applications have not been considered in substance.

Refusal by third country to readmit applicant

According to Article 27 (4) APD, where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

Out of the eight Member States that have transposed the safe third country concept in national law, only three have transposed Article 27 (4) APD: Greece,¹⁵⁰ the Netherlands¹⁵¹ and Spain.¹⁵²

In the Czech Republic, this article is not explicitly transposed, and if the applicant were not permitted to enter the territory of the safe third country, access to the procedure on international protection is not sufficiently guaranteed. The applicant might in theory fall within inadmissibility procedures under 10a (e) ASA.¹⁵³

In Finland, Article 27 (4) APD has not been transposed as such. However, the preparatory works to the legal transposition of the Directive make direct reference to the fact that Finnish administrative legislation demands that applicants have their applications considered in substance.¹⁵⁴ This implies, according to the same preparatory works, that if the applicant cannot be returned to the safe country of asylum, the application must be considered in Finland.

Where the asylum applicant is not admitted to the safe third country, admission to the asylum procedure in the UK will be “*subject to determining and resolving the reasons for his non admission*”. This does not comply with Article 27(4) APD, because it imposes an additional condition. Information was not available on how this provision is implemented in practice.

Recommendation

Where the individual is not readmitted to the safe third country, access to a substantive asylum examination in the Member State should be guaranteed in law and practice.

¹⁵⁰ Article 20 (2) and (3) of PD 90/2008.

¹⁵¹ Article 31a, Aliens Act.

¹⁵² Article 21 (1) d of the New Asylum Law.

¹⁵³ Section 10a ASA: “*The application for international protection shall be inadmissible (...) e) if the alien **repeatedly filed** an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien.*”

¹⁵⁴ *Hallituksen esitys* 86/2008 (Government Bill 86/2006).

SECTION XIII:

THE SAFE COUNTRY OF ORIGIN CONCEPT

Introduction

National designation of third countries as safe countries of origin

Applicable criteria for designating third countries as safe countries of origin

The process for and consequences of designating a third country as a safe country of origin

Procedural guarantees in the application of the safe country of origin concept

Provision of an individual examination

The burden of proof and opportunity to rebut the presumption of safety

Provision for a personal interview

Introduction

The safe country of origin concept is a presumption that certain countries can be designated as generally safe for their nationals insofar as, according to the APD, “it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC [Qualification Directive], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict”.¹ The presumption is, therefore, that an application for international protection by an applicant from a country of origin which is considered to be generally safe is likely to be unfounded.

UNHCR does not oppose the notion of ‘safe country of origin’ as long as it is used as a procedural tool to prioritize and/or accelerate examination of an application in very carefully circumscribed situations. It is critical that:

- each application is examined fully and individually on its merits in accordance with certain procedural safeguards;
- each applicant is given an effective opportunity to rebut the presumption of safety of the country of origin in his or her individual circumstances;
- the burden of proof on the applicant is not increased; and
- applicants have the right to an effective remedy in the case of a negative decision.²

UNHCR recognizes the inherent difficulties in making an assessment of general safety. Displacement situations, and general conditions, can be volatile in many countries. Moreover, any assessment by states is susceptible to political, economic and foreign policy considerations. This latter point is in fact recognized in recital (19) of the APD which states:

*“In the light of the political importance of the designation of safe countries of origin, in particular in view of the implications of an assessment of the human rights situation in a country of origin and its implications for the policies of the European Union in the field of external relations, the Council should ...”.*³

Therefore, if the safe country of origin concept is to be employed, there must be clear and objective benchmarks for the assessment of general safety; and mechanisms for the regular review of assessments. The process must be flexible enough to take account of changes, both gradual and sudden, in any given country.⁴

The APD, when originally adopted, only foresaw two modes for the designation of third countries as safe countries of origin.

The first, set out in Article 29, was a common list of safe countries of origin agreed by the European Council, acting by a qualified majority on a proposal from the Commission and after consultation with the European Parliament. However, following a decision of the European Court of Justice, Article 29 (1) and (2) of the APD was annulled as the above-mentioned procedure for the adoption of a common list of safe countries of origin was

¹ Annex II of the APD on the “Designation of safe countries of origin for the purposes of Articles 29 and 30 (1)”.

² See section 16 on the right to an effective remedy for further information in this regard.

³ Recital (19) with reference to the proposed minimum common list of third countries regarded as safe countries of origin under Article 29 of the APD.

⁴ See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, *Global Consultation on International Protection*, EC/GC/01/12, 31 May 2001.

deemed to infringe EC law.⁵ Any future adoption of a common list of safe countries of origin must be carried out in compliance with the co-decision procedures stipulated by the EC Treaty and reiterated in the TFEU. At the time of UNHCR's research, no such common list had been adopted and therefore, this report does not address Article 29 APD.

Instead, at the time of UNHCR's research, the only mode for the designation of third countries as safe countries of origin under the APD was the second mode, set out in Article 30. This notion thus forms the subject of focus of this research.

Article 30 APD concerns the national designation of third countries as safe countries of origin, or the designation of part of a country as safe. It must be stressed that this is a permissive article, and the national designation of countries as safe countries of origin or part of a country as safe is optional. Article 30 sets out three specific conditions which must be met for any national designation:

- (1) member States must have in force national legislation which permits the national designation of third countries as safe countries of origin;⁶
- (2) designation must be in compliance with the criteria set out in the APD;⁷
- (3) member States must notify the Commission about the countries that are designated as safe countries of origin.⁸

With regard to the national designation of third countries as safe countries of origin, Article 30 APD defines the criteria to be applied, and the circumstances and sources of information to be taken into account. The APD does not prescribe the authority responsible for the national designation of third countries as safe countries of origin, nor the modalities for national designation. However, the use of the term 'national designation', and the requirement to notify the Commission of countries which have been nationally designated in accordance with Article 30, suggests a formal act of designation which is executed independently of and prior to its application in the examination of any individual application. However, as will be seen in the subsections below, UNHCR's research has found that there are a number of Member States which have national legislation in place which permits the application of the safe country of origin concept on a case-by-case basis without a transparent, formal, published act of national designation as foreseen by Article 30 APD.

UNHCR has voiced its reservations about the APD provision allowing Member States to retain or introduce legislation that permits national designation of third countries as safe countries of origin. UNHCR notes that such national designation is not conducive to, and indeed militates against, the uniformity of approach which is required to establish a Common European Asylum System.⁹ As will be shown, UNHCR's research has revealed that, with regard to those Member States surveyed that apply the safe country of origin concept, there is divergence regarding those countries which have been assessed to be safe countries of origin.

⁵ *European Parliament v. Council of the European Union*, C-133/06, and European Union: European Court of Justice, 6 May 2008, available at: <http://www.unhcr.org/refworld/docid/4832ddb92.html>. It must be added that, as regards the future adoption of the lists of safe countries and their amendment, the Council must proceed in compliance with the procedures established by the Treaty on the Functioning of the European Union.

⁶ Article 30 (1) APD. This may include designation of part of a country as safe.

⁷ Article 30 (1), (2), (4) and (5) APD, in conjunction with Annex II.

⁸ Article 30 (6) APD.

⁹ UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, available at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

Recital (21) APD recognizes that the “*designation of a third country as a safe country of origin ... cannot establish an absolute guarantee of safety for nationals of that country*”, and states that the assessment underlying the designation of a third country as a safe country of origin, by its nature, can only take into account “*the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned*”.

As such, an application by an applicant from a designated safe country of origin must nevertheless be subject to an individual and complete examination in which the presumption of safety can be rebutted. Therefore, designation of a country as a safe country of origin cannot be a ground for inadmissibility.¹⁰ It must be stressed that Article 31 APD stipulates that the concept of safe country of origin cannot be applied to a particular applicant unless there has been an individual examination of the application. This individual examination must be conducted by the determining authority.¹¹ While under Article 23 (4) (c) (i) APD, it may be a ground for the prioritization and/or acceleration of the examination of the application, the examination must nevertheless be individual, and comply with the basic principles and guarantees of Chapter II APD.

According to the APD, a designated safe country of origin can only be considered to be safe for a particular applicant if, after an individual examination of the application, it is found that the applicant is a national of the country¹² and “*has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances*”.¹³ For this reason, the national designation of a country of origin as safe is not relevant for an applicant who shows that “*there are serious reasons to consider the country not to be safe in his/her particular circumstances*”.¹⁴ Moreover, recital (17) reiterates that a third country cannot be considered as a safe country of origin for a particular applicant if s/he presents serious counter-indications.¹⁵ It is, therefore, implicit that national legislation which sets out further rules and modalities for the application of the safe country of origin concept should ensure that applicants have an effective opportunity to “*present serious counter-indications*” and “*submit any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances*”.¹⁶

In this regard, UNHCR recommends that Member States inform all applicants at the outset of the asylum procedure when their country of origin has been designated as or is considered to be a safe country of origin; and explain the implications for the examination of the application. Applicants should be given an effective opportunity to consult a legal adviser in this regard. Member States should offer all applicants from nationally-designated safe countries of origin the opportunity of a personal interview, in which they are explicitly asked whether there are any grounds for considering that the country is not safe in their particular circumstances, thereby giving an effective opportunity to rebut the presumption of safety. UNHCR regrets that Article 12 (2) (c) APD permits the

¹⁰ The concept cannot be used to exclude an examination of the application, since to do so would be in breach of international law. It would constitute a violation of the 1951 Convention, in particular of Article 42 which prohibits reservations to Article 1 A (2), and Article 3 which requires States to apply its provisions without discrimination as to country of origin. It would de facto introduce a geographic limitation to the 1951 Convention which is incompatible with the intent of the 1967 Protocol; and it would be inconsistent with the individual character of refugee status. It would also risk violations of Article 33 of the 1951 Convention and Article 3 of the European Convention on Human Rights. See UNHCR, *Background Note on the Safe Country Concept and Refugee Status*, 26 July 1991, EC/SCP/68, available at: <http://www.unhcr.org/refworld/docid/3ae68ccec.html> [accessed 13 January 2010]. See also ‘The Application of the Safe Country of Origin Concept in Europe – An Overview’, February 2005, ELENA, ECRE. Note that it is not a ground for inadmissibility under Article 25 APD.

¹¹ Article 4 APD.

¹² Article 31 (1) (a) provides that s/he is a national of that country, or s/he is a stateless person and was formerly habitually resident in that country: Article 31 (1) (b) APD.

¹³ Article 31 (1) APD.

¹⁴ Recital 21 APD.

¹⁵ Recital 17 APD states that “*A key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.*”

¹⁶ Article 31 (1) APD.

omission of the personal interview on safe country of origin grounds and strongly urges Member States not to omit the personal interview on this ground in their national legislation or in practice.¹⁷

The concept of safe country of origin also has an evidentiary impact as it requires the applicant to rebut the presumption that the country of origin is safe with regard to his/her particular circumstances. However, this should not result in an unreasonably increased burden of proof on the applicant. The shared duty between the applicant and the determining authority to ascertain the facts still applies.¹⁸

Finally, it is noted that under APD, where an applicant is from a nationally-designated safe country of origin and, following an individual examination of the application, it is determined that s/he has not submitted any serious grounds for considering the country not to be safe in his/her particular circumstances, the application may be deemed to be simply unfounded¹⁹ or manifestly unfounded.²⁰ A certification as ‘manifestly unfounded’ may have an impact on the applicant’s right to an effective remedy.²¹

National designation of third countries as safe countries of origin

Article 30 APD sets out the circumstances under which Member States may, at the national level, designate third countries as safe countries of origin.

Article 30 (1) provides that “*Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries ... as safe countries of origin for the purposes of examining applications for asylum*”. Furthermore, this “*may include designation of part of a country as safe where the conditions in Annex II are fulfilled in relation to that part*”.

However, by derogation from paragraph 1 cited above and the criteria in Annex II, Member States may retain legislation in force on 1 December 2005 that allows for the national designation of countries as safe countries of origin, as long as they are satisfied that persons in the third countries concerned are generally neither subject to persecution as defined in Article 9 of the Qualification Directive, nor torture or inhuman or degrading treatment or punishment.²²

Moreover, Member States, again by derogation from Article 30 (1) APD, may retain legislation in force on 1 December 2005 that allows for the national designation of part of a country as safe, or a country or part of a country as safe for a specified group of persons in that country. This is possible as long as they are satisfied that persons in that part of the country, or the specified group of persons in the country, are generally neither subject to persecution as defined in Article 9 of the Qualification Directive, nor torture or inhuman or degrading treatment or punishment.²³

If Member States derogate from Article 30 (1) APD, in assessing whether a country is a safe country of origin, “*Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned*”.²⁴

¹⁷ See also section 4 on the opportunity for a personal interview.

¹⁸ Paragraph 196, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

¹⁹ Article 28 (1) APD.

²⁰ Article 28 (2) APD, in conjunction with Article 23 (4) (c) (i) APD.

²¹ See section 16 on the right to an effective remedy.

²² Article 30 (2) APD.

²³ Article 30 (3) APD.

²⁴ Article 30 (4) APD. See below for more detailed analysis.

UNHCR regrets that the APD permits Member States to derogate from Article 30 (1), as UNHCR considers the criteria laid out in Annex II of the APD broadly adequate. In UNHCR's view, the derogation undermines the uniformity of approach required to achieve the objective of a Common European Asylum System.

As regards the possibility to designate a part of a country as safe, UNHCR notes that, in principle, a country cannot be considered 'safe' if it is so only for part of its territory. Furthermore, UNHCR wishes to emphasize that the designation of a safe part of a country does not necessarily represent a relevant or reasonable internal flight alternative.²⁵ The existence of a 'safe' part of a country is but one element in an examination of whether a particular applicant has such an alternative.²⁶ The complex questions which arise in the application of the internal protection alternative require a careful examination of the individual case in the regular procedure and should not be dealt with in an accelerated procedure.²⁷

Six of the 12 Member States under focus in this research have in place national legislation permitting the national designation of third countries as safe countries of origin, namely: Bulgaria,²⁸ France,²⁹ Germany,³⁰ Greece,³¹ Slovenia³² and the UK.³³ However, of these six Member States, only three – France, Germany and the UK – actually have operational national lists of designated safe countries of origin.³⁴

25 The terminology used in Article 8 of the Asylum Procedure Directive is 'internal protection alternative'.

26 Article 8 of the Qualification Directive.

27 Page 8, UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.unhcr.org/refworld/docid/3f2791a44.html>

28 Article 13 LAR (Amended, SG No. 31/2005) (1) (Supplemented, SG No. 52/2007): "Refugee status or humanitarian status shall not be granted with respect to an alien whose application is manifestly unfounded, where conditions under article 8 (1) and (9), respectively article 9 (1), (6) and (8) are not met and the alien: ... 13. (new, SG No. 52/2007) comes from a safe country of origin or from a safe third country listed in the Minimum Common List adopted by the Council of the European Union or in the national lists adopted by the Council of Ministers." Article 98 (New, SG No. 52/2007) (1) "By November 30 every year the Chairperson of the State Agency for Refugees in coordination with the Minister of Foreign Affairs shall submit national lists of safe countries of origin and safe third countries to the Council of Ministers for their adoption."

29 Article L.722-1-2 *Ceseda*: "The board [of the OFPRA][...], in compliance with relevant EC provisions in this matter, designates the list of countries considered at the national level as safe countries of origin". [Unofficial translation]. The concept of safe country of origin did not exist in French legislation before the adoption of the Asylum Act of 10 December 2004 (entry into force on 1 January 2004).

30 Section 29a APA: "(1) The asylum application of any foreigner from a country within the meaning of Article 16a (3) first sentence of the Basic Law (safe country of origin) shall be turned down as being manifestly unfounded, unless the facts or evidence produced by the foreigner give reason to believe that he faces political persecution in his country of origin in spite of the general situation there. (2) In addition to the Member States of the European Union, safe countries of origin are those listed in Appendix II.

(3) The Federal Government shall resolve by statutory ordinance without the consent of the Bundesrat that a country listed in Appendix II is no longer deemed a safe country of origin if changes in its legal or political situation give reason to believe that the requirements mentioned in Article 16a (3) first sentence of the Basic Law have ceased to exist. The ordinance shall expire no later than six months after it has entered into force."

Article 16a (3) Basic Law: "By a law requiring the consent of the Bundesrat, states may be specified in which, on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists. It shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds."

31 Article 22 of PD 90/2008 (with retrospective effect from 01/12/07) states that "safe countries of origin are ... third countries ... which are included in the national list of safe countries of origin, compiled and kept, for the purpose of the examination of an asylum application, by the Central Authority".

32 Article 65 (3) IPA: "(3) Based on the criteria referred to in Article 30 of Directive 2005/85/EC, the Government of the Republic of Slovenia may designate third countries other than those appearing on the minimum common list. The Government of the Republic of Slovenia shall notify the European Commission thereof".

33 The UK has legislation allowing for the designation of third countries as safe countries of origin in the Nationality Immigration and Asylum Act 2002, Section 94 (3), (4), (5) and (6). Subsection 94 (3) provides for the certification of a claim as unfounded if the applicant is entitled to reside in a safe country of origin. Subsection 94 (4) lists the states originally designated by Parliament as safe countries of origin. Subsection 94 (5) and (6) of the 2002 Act allows the Secretary of State to add or remove states to those designated in the legislation 'by order'. The 2002 Act came into force on 7 November 2002, and was amended by the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (with effect from 1 October 2004) and by the Immigration Asylum and Nationality Act 2006.

34 Bulgaria adopted a list of safe countries of origin in 2005 under the old law – Article 48 (3) LAR – before amendments were made in June 2007 which set out the principles for designation. As the legal provision on which the list was based no longer exists in the LAR, the decision of the Council of Ministers has not been amended accordingly, and the list has not been reviewed in four years. The determining authority, in an interview with UNHCR, stated that the list is considered obsolete. See below for further information.

At the time of UNHCR's research, France had designated 15 countries as safe,³⁵ and Germany had designated the Member States of the EU, plus another two countries as safe.³⁶ The UK had designated 24 countries as safe. Only eight countries appeared on the lists of both France and the UK.³⁷ Only one country (Ghana) appeared on the list of all three States – although in the UK, Ghana was considered a safe country of origin for male applicants only.

Four Member States do not have legislation in place which provides for the 'national designation' of safe countries of origin, but nevertheless do have legislation in place which provides for the application of the safe country of origin concept in the examination of applications: the Czech Republic,³⁸ Finland,³⁹ the Netherlands⁴⁰ and Spain.

Although the Czech Republic does not have legislation providing for the 'national designation' of third countries as safe countries of origin, there is a list of nationally designated safe countries of origin drawn up by internal regulation of the Director of the Department for Asylum and Migration Policies. The list is not public.⁴¹

Before the adoption of the Aliens Act 2000, the Netherlands designated countries as safe countries of origin.⁴² During the legislative process, the Parliament decided that the application of the concept of safe countries of origin should not be limited to listed countries and, by amendment of the Aliens Act, all countries that have ratified the 1951 Refugee Convention and the European Convention on Human Rights or Convention against Torture can be presumed to be safe by the determining authority.⁴³

At the time of UNHCR's research, Spain did not have legislation that allowed for the designation of third countries as safe countries of origin and there were no rules or criteria laid down in law to apply the concept.⁴⁴ However,

35 For the full list of safe third countries designated by France, see below (text at footnotes 107,108). A decision of the Board of the OFPRA made on 13 November 2009 added three countries to the list of designated safe countries of origin: Armenia, Turkey and Serbia. At the time of writing, there are, therefore, 18 designated safe countries of origin.

36 Section 29a (2) APA in connection with Annex II (on Section 29a): Ghana and Senegal.

37 For the full UK list at time of writing, see below (text at footnote 143). Bosnia-Herzegovina, India, Macedonia, Mauritius, Mongolia and Ukraine. Ghana and Mali were also designated as safe by France, whereas they were designated as safe for men only in the UK. See below for further details.

38 Section 2 ASA which entered into force on 1 January 2000. It was amended by A379, in 2007, but merely by adding reference to serious harm (subsidiary protection). Section 2 ASA states the criteria according to which a country can be considered a safe country of origin.

39 The norms on safe countries of origin were initially introduced to the Finnish asylum procedure in 2000, through an amendment to the *Ulkomaalaislaki* (Aliens' Act, 378/1991) and in force from 01/3.1991. Section 100 of the *Ulkomaalaislaki* (Aliens Act 301/2004, as in force 28.4.2009) states: "(1) When deciding on an application in the asylum procedure, a State where the applicant is not at risk of persecution or serious violations of human rights may be considered a safe country of origin for the applicant. (2) When assessing a safe country of origin, particular account is taken of: 1) whether the State has a stable and democratic political system; 2) whether the State has an independent and impartial judicial system, and whether the administration of justice meets the requirements for a fair trial; and 3) whether the State has signed and adheres to the main international conventions on human rights, and whether serious violations of human rights have taken place in the State." Official translation, available at www.migri.fi

40 Article 31 Aliens Act 2000 (in force on 1 April 2001): "1. An application for the issue of a residence permit for a fixed period as referred to in section 28 shall be rejected if the alien has not made a plausible case that his application is based on circumstances which, either in themselves or in connection with other facts, constitute a legal ground for the issue of the permit. 2. The screening of an application shall take account, among other things, of the fact that: (g) the alien comes from a country which is a party to the Convention on Refugees and one of the other conventions referred to in section 30 (d) and the alien has not made a plausible case that such country does not fulfil its treaty obligations with regard to him."

41 According to the internal regulation, the list should be reviewed once a year or when need arises. It was last updated in May 2007.

42 The national list of safe countries of origin was: Bulgaria, Ghana, Hungary, Poland, Romania, Senegal, Slovakia and the Czech Republic.

43 Note that the Government has stated in Parliamentary papers that it is a requirement that the countries also comply with their treaty obligations in practice. Senate 2000-2001, 26 732 en 26975, nr. 5b, p. 27-28; Senate 2000-2001, 26 732 and 26 975, nr.

44 In practice, there were some situations where countries were considered generally safe, specifically for example where UNHCR was conducting return operations (for example Sierra Leone and Liberia). No official declaration was made, however, and this assumption was still applied on a case-by-case basis. On the other hand and in an indirect way, those applications from nationals of countries which have a democratic tradition and which are considered to have an effective protection system accessible for all nationals were declared inadmissible. This included not only EU countries, but also others such as the United States, Canada or Australia.

new legislation (Law 12/2009) in force since 20 November 2009 has introduced the concept into Spanish law and practice.⁴⁵

Of the Member States surveyed, only Belgium and Italy do not have legislation which permits the designation of third countries as safe countries of origin or the application of the concept in the examination of applications.

Of those ten states which provide for the national designation of third countries as safe countries of origin, or have legislation in place which provides for the application of the safe country of origin concept in the examination of individual applications, the following have retained legislation in effect prior to 1 December 2005. This allows them to continue to designate countries as safe, in derogation from the requirements under Annex II: Czech Republic,⁴⁶ Finland, France,⁴⁷ Germany,⁴⁸ the Netherlands and the UK.⁴⁹

Only two surveyed states permit designation of part of a country as safe or as safe for a specified group of persons: Greece and the UK. Greece allows designation of part of a country as safe provided that prescribed conditions are met.⁵⁰ The UK has in place legislation allowing both the designation of part of a country as safe,⁵¹ and the designation of parts of a country as safe for a specified group of persons in that country.⁵²

Although a number of the Member States surveyed have in place legislation allowing the national designation of third countries as safe countries of origin, or have legislation providing for application of the safe country of origin concept in the examination of individual applications, at the time of UNHCR's research, several of these

⁴⁵ Article 25 (1) (d) of the Law regulating the Right to Asylum and to Subsidiary Protection (Law No. 12/2009) introduces the safe country of origin concept as a ground for applying the accelerated procedure to claimants both in country and at borders. The definition is the same as that established in Article 20 (1) (d) for defining the third country concept. The safe country of origin concept is defined in article 25 (1) (d), establishing that the application shall be channeled through the urgent procedure if: *“the applicant comes from a country of origin considered as safe in the terms established in article 20(1) (d), and possesses the nationality of that country, or if stateless, is habitually resident in the country.”*

⁴⁶ Although the definition of a safe country of origin in Section 2 (1) ASA is almost in line with Annex II of the APD.

⁴⁷ The concept of safe country of origin was introduced with the Asylum Act of 10 December 2003 (which entered into force on 1 January 2004). Article 30 (2) was transposed in French legislation by Article 92 of the Law dated from 24 July 2006 which modified Article L.722-1 *Ceseda* in order to take into account the adoption of the APD. The French list will be cumulative with the common EU list if it is ever adopted.

⁴⁸ Article 16 (a) (3) 1 Basic Law and Section 29 (a) APA entered into force in 1993, however, the Member States of the European Union were introduced as safe countries of origin only in 2007 (see: 2007 Transposition Act (Bundestag printed papers, 16/5065, re Section 29a, page 217).

⁴⁹ The transposition note in the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007 (SI 2007 No. 3187) confirms that the UK has derogated from Article 30 (1) APD.

⁵⁰ Article 22 (1) (b) of PD 90/2008.

⁵¹ Nationality Immigration and Asylum Act 2002 s 94 (5): *“The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that- (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom’s obligations under the Human Rights Convention.”*

⁵² The NIAA 2002 Sections 94 (5A) (5B) and (5C) allows for the designation of part of a country as safe for a specified group of persons in that country: *“(5A) If the Secretary of State is satisfied that the statements in subsection (5) (a) and (b) are true of a State or part of a State in relation to a description of person, an order under subsection (5) may add the State or part to the list in subsection (4) in respect of that description of person. [inserted by Section 27 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004]. (5B) Where a State or part of a State is added to the list in subsection (4) in respect of a description of person, subsection (3) shall have effect in relation to a claimant only if the Secretary of State is satisfied that he is within that description (as well as being satisfied that he is entitled to reside in the State or part). (5C) A description for the purposes of subsection (5A) may refer to- (a) gender, (b) language, (c) race, (d) religion, (e) nationality, (f) membership of a social or other group, (g) political opinion, or (h) any other attribute or circumstance that the Secretary of State thinks appropriate.”* [Inserted by Section 27 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004].

states did not apply the safe country of origin concept in practice. These are specifically Bulgaria,⁵³ the Czech Republic⁵⁴ and Slovenia.⁵⁵



In the Netherlands, the concept was not applied in any of the cases which UNHCR audited for this research. Following interviews with lawyers and a judge, it was not clear whether, and if so to what extent, the concept is applied in practice at all.

Greece has national legislation which provides that “safe countries of origin are ... third countries ... which are included in the national list of safe countries of origin, compiled and kept, for the purpose of the examination of an asylum application, by the Central Authority”. However, at the time of UNHCR’s research, there was no national

53 At the time of UNHCR’s research, there was no valid list of safe countries of origin. The last was adopted in 2005 under previous legislative provisions, and therefore now considered obsolete. See below.

54 This appears to be due to the fact that there have been no applicants from the designated safe countries of origin since 1 December 2007.

55 At the time of research, no list of safe countries of origin had been adopted by the Slovene Government (as defined in A. 65/3 of the IPA); and Article 29 of the APD to which Article 65 of the IPA explicitly refers, has been annulled.

list of safe countries of origin. Due to the lack of information in case files and the lack of reasoned decisions, it was not possible to determine whether the concept of safe country of origin had been applied in the cases audited. However, according to two interviewees,⁵⁶ in practice the concept is applied indiscriminately and to the vast majority of applications.

In practice, the concept of safe country of origin is applied as a procedural tool to assign applications to the accelerated procedure in Finland, France, Spain and the UK; and to prioritize applications in Germany.⁵⁷ Of these five states, only France, Germany and the UK have nationally designated countries as safe countries of origin as foreseen in the Procedures Directive. By contrast, as stated above, there is no nationally designated list of safe countries of origin in Finland and Spain. Instead, the concept is applied on a case by case basis.

Some Member States, such as Bulgaria and the Netherlands, actually applied the concept more extensively (and had in place operative safe country of origin lists now defunct) prior to the advent of the APD. Only Greece and Spain have introduced the safe country of origin concept into national legislation as a direct consequence of transposing the APD.

Recommendation

UNHCR considers it important that continuous scrutiny be maintained of all countries with legislation in force permitting the designation of countries as safe countries of origin, given the potential prejudice to asylum applicants if this concept is applied unfairly or inappropriately.

UNHCR recommends the deletion of the optional provision under Article 30 (1) APD allowing the safe country of origin concept to be applied to a particular part of a country or territory.⁵⁸

Applicable criteria for designating countries as safe countries of origin

The applicable minimum criteria in the APD for designating a third country as a safe country of origin depend on whether this concept is exercised in accordance with Article 30 (1) or Article 30 (2) and/or (3) APD.

Designation under Article 30 (1) is subject to Annex II APD which stipulates:

“A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

⁵⁶ Interview with S1 and S2.

⁵⁷ In Germany, such applications are prioritized without any negative effect on procedural guarantees, based on the internal instructions of the BAMF, *Internal Guidelines for Adjudicators: Priority (1/1)*, Date: 12/08, p. 1. Moreover, the qualified rejection (compulsory in case of rejection) as manifestly unfounded leads to an acceleration in the deadlines applying for submitting appeals (Sections 74 (1) 2, 36 (3) APA), and, in case of confirmation of the qualified rejection as manifestly unfounded by a court, to a denial of any further appeal (Section 78 (1) APA).

⁵⁸ The European Commission has proposed deletion of the relevant wording in the current Article 30 (1). See proposed recast Article 33: APD Recast Proposal 2009.

In making this assessment, account shall be taken, *inter alia*, of the extent to which protection is provided against persecution or mistreatment by:

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- (c) respect of the non-refoulement principle according to the Geneva Convention;
- (d) provision for a system of effective remedies against violations of these rights and freedoms.”

Where states rely on Articles 30 (2) or 30 (3) APD to retain alternative designation criteria under national legislation (provided the legislation was in force on 1 December 2005), this is nonetheless subject to a requirement – namely, that persons in the country of origin concerned are generally neither subject to: (a) persecution as defined in Article 9 of Directive 2004/83/EC; nor (b) torture or inhuman or degrading treatment or punishment.⁵⁹ Furthermore, in making such an assessment, it is required that “*Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned*”.⁶⁰

UNHCR’s research revealed significant divergence in the criteria applied by Member States in designating third countries as safe countries of origin. Such inconsistency is to be regretted in the context of efforts to develop a Common European Asylum System. UNHCR is particularly concerned to observe that some national designation criteria examined are not fully in accordance with minimum standards contained in the APD, or in international refugee and human rights law.

Bulgaria, Greece, Slovenia and Spain do not have derogating legislation under Article 30 (2) APD and thus are required to comply with the designating criteria contained in Annex II APD.

Greece has literally transposed Annex II in its entirety.⁶¹ Slovenia does not explicitly refer to any of the requirements under Annex II in national legislative provisions, but simply makes a general reference to meeting the criteria under Article 30 (1) APD.⁶²

Although Bulgaria has transposed an almost literal translation of Annex II,⁶³ UNHCR notes some significant omissions. These include a failure to reflect terminology from the first paragraph of Annex II requiring that there is “*generally and consistently no persecution*,” as well as the omission of an explicit reference to the definition of persecution under Article 9 of the Qualification Directive. Of most serious concern is the failure to include in the definition of a safe country of origin the requirement that there be “*no torture or inhuman or degrading treatment or punishment*”. This omission could result, if the legislation was applied in practice, in potential beneficiaries of subsidiary protection being designated as originating from a safe country, and thus excluded from receiving the

⁵⁹ Article 30 (2) APD.

⁶⁰ Article 30 (4) APD.

⁶¹ Article 22 (4) (a-d) of PD 90/2008.

⁶² Article 65 (3) IPA: “(3) Na podlagi kriterijev iz 30. člena Direktive 2005/85/ES lahko Vlada Republike Slovenije določi dodatni seznam varnih izvornih držav. Based on the criteria referred to in Article 30 of Directive 2005/85/EC, the Government of the Republic of Slovenia may designate third countries other than those appearing on the minimum common list. O tem obvesti Evropsko komisijo. The Government of the Republic of Slovenia shall notify the European Commission thereof”.

⁶³ Definition provided in Paragraph.1, item 8 Additional Provisions of LAR. “8. “Safe country of origin” shall mean a country where the rule of law is respected and laws are enforced in a democratic social system whereby persecution or acts of persecution are not allowed and there is no risk of violence in situations relating to internal or international armed conflicts.”

protection to which they are entitled. Provisions transposing the second paragraph of Annex II broadly reflect its requirements,⁶⁴ and even contain higher standards, in that no distinction is made between derogable and non-derogable rights under the European Convention on Human Rights.

In Spain, the criteria for a ‘safe country of origin’ are the same as the criteria for a ‘safe third country.’⁶⁵ Article 20 (1) (d) defines the concept of safe third country in the following terms: “...when the applicant, in accordance with article 27 of Council Directive 2005/85/CE, and with the list that might eventually be elaborated by the European Union, comes from a safe third country where in view of his/her personal circumstances, his/her life, integrity and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; the principle of non-refoulement is respected, as well as the prohibition of removal in violation of the freedom of torture or cruel, inhuman or degrading treatment; the possibility exists to apply for asylum and, in case of being a refugee, he/she can avail him/herself of that protection in accordance with the Geneva Convention; provided that the applicant is re-admitted to that country and there are links between the applicant and the said country that make it reasonable that the applicant goes to that country....”

As such, the above definition does not reflect the requirement of Annex II of the APD that there should be no torture or inhuman or degrading treatment or punishment, and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. Nor does it make any reference to the second paragraph and subsections a, b and d of Annex II of the APD.

Of those states permitted to derogate under Article 30 (2) or (3) APD (the Czech Republic, Finland, France, Germany, the Netherlands and the United Kingdom), the extent of incorporation of or reference to Annex II criteria contained in national legislation varies considerably.

The Czech Republic has not fully transposed Annex II, although criteria in its national legislation broadly reflect the requisite requirements under Article 30 (2) and (4) APD.⁶⁶ Notable divergences from Annex II criteria include the absence of an explicit reference to “respect for the principle of non-refoulement or the existence of a system of effective remedies against violations of rights and freedoms”, or a requirement that there is “generally and consistently” no persecution in the country concerned.

Although Finland has not literally transposed Annex II, its criteria for designating safe countries of origin under national legislation broadly reflect the requirements of Annex II, and in any case fully incorporate the requirements

⁶⁴ Article 98 (2) LAR: *In the process of approval the Council of Ministers shall take into account sources of information from European Union Member States, the United Nations High Commissioner for Refugees, the Council of Europe or other international organizations and shall make a judgment of the extent to which a country provides protection against persecution based on:*

1. *pieces of legislation adopted in this sphere and the method by which they are enforced;*
2. *the manner of observing rights and freedoms provided for in the Convention on the protection of Human Rights and Fundamental Freedoms, in the International Covenant on Civil and Political Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*
3. *the manner of enforcing the Prohibition of Expulsion or Return in the sense of the Convention relating to the Status of Refugees from 1951.*
4. *the existence of an effective penal system for violations of those rights and freedoms.*

⁶⁵ The safe country of origin concept is defined in article 25 (1) (d) of Law 12/2009, establishing that the application shall be channeled through the urgent procedure if: “*the applicant comes from a country of origin considered as safe under the terms established in article 20 (1) (d), and possesses the nationality of that country, or if stateless, is the country of regular residence.*”

⁶⁶ See Section 2(1) ASA: “*(1) A safe country of origin means the country of which the alien is a citizen, or in case of a stateless person, the country of his/her last permanent residence, a) where the state powers respect human rights and are capable of ensuring compliance with human rights and legal regulations, b) which is not abandoned by its citizens or stateless persons for reasons referred to in Section 12 or 14a, c) which has ratified and complies with international human rights and fundamental freedoms agreements, d) which allows legal entities supervising the status of compliance with human rights to carry out their activities.*”

under Article 30 (2) and (4).⁶⁷ Indeed, Finnish legislative provisions that require a stable and democratic political system and that the state has an independent and impartial judicial system (meeting the requirement for a system affording fair trials), go beyond the criteria under Annex II, as does the requirement to examine “*whether serious violations of human rights have taken place.*” UNHCR welcomes this evidence of good practice. However, while Finnish legislation does not provide for the designation of parts of countries as safe, it is of concern that in practice parts of countries have been considered as generally safe.⁶⁸

In Germany, there is an inconsistency between national legislation and Article 30 (2) APD which results from a mixing of the German concept of constitutional asylum and refugee protection under the 1951 Convention and the Qualification Directive. The criteria established in Article 16a (3) 1 GG for declaring a country of origin as safe are not fully equivalent to the criteria of Article 30 (2) (a) APD. Article 16a (3) 1 GG refers to the concept of “political persecution” under German constitutional law, which does not encompass all cases of persecution by non-state agents. This concept clearly does not equate to Articles 6 and 9 of the Qualification Directive. Even though the absence of inhuman or degrading treatment constitutes an additional criterion, this will not necessarily cover all serious violations of fundamental human rights (for instance, a serious violation of the right to freedom of religion) which constitute an act of persecution under the Qualification Directive. If such acts emanate from non-state agents, the German legislation – theoretically – would allow such risks of persecution to be ignored in establishing the safety of the country of origin under Article 16a (3) of the Basic Law and Section 29a APA. It may be argued, however, that since the review of safety, according to the terminology, does not encompass dangers emanating from non-state agents, the concept of safe country of origin is not applicable at all in such contexts. In practice, such dangers are taken into account as a possibility for rebutting the presumption of safety, as was witnessed in UNHCR’s audit of case files.⁶⁹ According to information provided by the determining authority (BAMF), the decision makers have been instructed to be particularly alert to situations of non-state persecution for gender-specific reasons in Ghana – a designated safe country of origin.

On the other hand, the German provisions require that “*on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment takes place*” in the relevant country.⁷⁰ These requirements do not reflect certain aspects of Annex II. For instance, there is no explicit requirement for a “democratic system” as in Annex II APD, even though this is required by the case-law of the Federal Constitutional Court.⁷¹ Moreover, the terms *generally and consistently* are not explicitly contained in the German provisions. Also, there is no explicit reference to *indiscriminate violence in situations of international or internal armed conflict*, nor to any of the criteria set out in sub-clauses (a) to (d). According to the interpretation of the Federal Constitutional Court, an overall assessment of all relevant

67 Section 100 of the *Ulkomaalaislaki* (Aliens Act 301/2004, as in force 28.4.2009) states: “(1) *When deciding on an application in the asylum procedure, a State where the applicant is not at risk of persecution or serious violations of human rights may be considered a safe country of origin for the applicant. (2) When assessing a safe country of origin, particular account is taken of: 1) whether the State has a stable and democratic political system; 2) whether the State has an independent and impartial judicial system, and whether the administration of justice meets the requirements for a fair trial; and 3) whether the State has signed and adheres to the main international Conventions on human rights, and whether serious violations of human rights have taken place in the State.*”

68 This has, as of 1.12.2007, concerned parts of Afghanistan other than Kabul and, based on UNHCR reports, for the majority population in these areas; and northern Iraq for Kurds stemming from this area. In addition, northern Somalia, areas outside of Kabinda in Angola, and areas other than Chechnya in Russia have been considered safe. It should be noted that despite the fact that northern Iraq is considered safe for some people, no returns to this area have been carried out, as there is no agreement between Finland and Iraq on the return of failed asylum seekers.

69 01GHA2; 01GHA3; 01GHA4; 01GHA7; 01GHA10.

70 Article 16a (3) 1 Basic Law, to which the provision of Section 29a (1) APA refers regarding the criteria for designating a country of origin as safe.

71 Federal Constitutional Court of Germany, official collection vol. 94, 115, at 140 et seq. In the same decision the court concluded that the term *inhuman treatment* also includes *torture*.

factors would have to be made.⁷² Despite this requirement, past discussions about the designation of Ghana as a safe country of origin (1993) show that some criteria may still be disputed (for instance, the relevance of the abolition of the death penalty, of a catalogue of human rights in national law, or of the necessary degree of stability in a post-dictatorial state).⁷³

The German safe country of origin concept only applies to cases of constitutional asylum and cases of Section 60 (1) Residence Act. It is not applied with regard to subsidiary protection (national forms and those of the Qualification Directive).⁷⁴ This is confirmed, in principle, by UNHCR's audit of case files which included the case files of applicants from Ghana (designated as a safe country of origin). The text modules used in these cases explicitly apply the presumption of rebuttal with regard to all cases of constitutional asylum as well as all cases falling within the scope of Section 60 (1) Residence Act, but not to subsidiary protection under Section 60 (2) to (7) Residence Act.⁷⁵

The criteria in Dutch legislation⁷⁶ are less detailed than those in Annex II and are simply limited to ratification (rather than observance) of the 1951 Convention and the ECHR or CAT, based on an assumption that ratification implies compliance with the requisite obligations under these treaties. The authorities are, however, obliged to assess whether the country concerned complies with the stated international treaties in practice.⁷⁷ There is notably no reference to the International Covenant for Civil and Political Rights. Moreover, the criteria do not appear adequately to reflect Articles 30 (2) and (4) APD, with no reference to the general political situation prevailing in the country of origin.

The United Kingdom has derogated from Article 30 (1) APD and has not transposed Annex II.⁷⁸ Instead, the UK has retained criteria under national legislation in place prior to 1 December 2005 which falls short of the requirements of Annex II.⁷⁹ Unlike Annex II, the UK legislation does not require a *consistent* (in addition to general) absence of persecution.⁸⁰ There is no explicit requirement that the application of the law *in a democratic system* be used as a basis for considering safety; no reference to *threat by reason of indiscriminate violence in situations of international or internal armed conflict*, nor a requirement that the absence of persecution *can be shown*. Nevertheless, national legislation is broadly in compliance with Articles 30 (2) and (4) APD although the criteria are expressed

⁷² Federal Constitutional Court of Germany, official collection 94, 115 (139).

⁷³ See R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 29a, paragraph. 53, 65, 69; dissenting votes in the judgment of the Federal Constitutional Court, official collection, vol. 94, 115, at 157 et seq.

⁷⁴ Cf. also R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 29a, paragraph 112-114.

⁷⁵ The relevance of this approach in practice could not be verified on the basis of the case files.

⁷⁶ Article 31 Aliens Act (in force on 1 April 2001): "*The alien comes from a country which is a party to the Convention on Refugees and one of the other conventions referred to in section 30 (d) and the alien has not made a plausible case that such country does not fulfil its treaty obligations with regard to him.*"

⁷⁷ Aliens Circular C 4/3.7.

⁷⁸ The transposition note in the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007 (SI 2007 No. 3187) states that no action is required in relation to Article 30 (1) APD.

⁷⁹ Nationality Immigration and Asylum Act 2002 s 94 "(5) *The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.*" "(5D) *In deciding whether the statements in subsection (5) (a) and (b) are true of a State or part of a State, the Secretary of State – (a) shall have regard to all the circumstances of the State or part (including its laws and how they are applied), and (b) shall have regard to information from any appropriate source (including other member States and international organisations).*" [inserted by the Asylum (Procedures) Regulations 2007]

⁸⁰ UNHCR has expressed its concern that the provision refers to persecution and human rights breaches "in general" rather than using internationally recognized standards. UNHCR *Comments on the UK implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for procedures in Member States for granting and withdrawing refugee status*, October 2007.

more generally. For example, with regard to Article 30 (4) APD, the criteria do not refer to the need to consider the *general political circumstances in the third country concerned*.

French legislation merely states that a country is considered to be a safe country of origin if “*it makes sure that the principles of freedom, democracy and the rule of law, as well as human rights and fundamental freedoms are fulfilled*”.⁸¹ According to the French authorities, the requirement that the country makes sure that these principles are respected guarantees that persons in the third countries concerned are generally neither subject to persecution, nor torture or inhuman or degrading treatment or punishment as required by Article 30 (2) of the APD. The requirement that the country concerned “*makes sure*” that these principles are respected is, according to the Senate which introduced the legislation, a guarantee that not only the laws and regulations of the country concerned comply with these principles, but that they are enforced in practice in accordance with Article 30 (4) of the APD. Moreover, according to the Ministry of Immigration,⁸² the definition given under Article L.741-4-2° is inclusive and, even though it does not explicitly incorporate Annex II of the APD, the elements contained therein are taken into account by the Board⁸³ of the OFPRA in its designation of safe countries of origin. Furthermore, the effective application of laws and remedies are taken into account in its assessment.⁸⁴

UNHCR welcomes the inclusive approach claimed by the French authorities, but considers that it would be preferable if reference to Annex II requirements were formally incorporated in binding legislation.

As mentioned above, of the Member States surveyed for this research, only Greece and the UK allow, by law, for the designation of part of a country as safe. UNHCR considers that in principle a country cannot be considered ‘safe’ if it is so only for part of its territory. In this regard, UNHCR considers that Articles 7 and 8 of the Qualification Directive on actors of protection and the internal protection alternative are relevant to an assessment of whether part of a country is safe for an applicant.⁸⁵ Article 8 of the Qualification Directive requires that in the purported safe part of the country:

“*there is no well-founded fear of being persecuted or no real risk of suffering serious harm **and** the applicant can reasonably be expected to stay in that part of the country.*” [Emphasis added].

Moreover, in conducting this assessment “*Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country **and** to the personal circumstances of the applicant.*” [Emphasis added].

81 Article L. 741-4-2 Ceseda: 2° “*The alien who applies for asylum is a national of a country to which Article 1C(5) of the 1951 Geneva Convention is applicable or of a country considered as a safe country of origin. A country is considered as such if it makes sure that the principles of freedom, democracy and the rule of law, as well as human rights and fundamental freedoms are fulfilled. The taking into account of the safe nature of the country of origin can not hinder the individual examination of each application.*” [Unofficial translation].

82 Interview, 26 March 2009.

83 The Board of OFPRA is a political body whose members are representatives of the state (several ministries), of the staff of the determining authority OFPRA, Members of the Parliament and three “qualified personalities”.

84 The 2007 OFPRA Activity Report recalls that when the first list was adopted, the Board of OFPRA, in its 30 June 2005 session, did not exclude the possibility that, in spite of a number of guarantees provided by these countries, human rights violations might be committed, since even institutions which respect human rights cannot prevent all inhuman treatment. In the specific case of Mali, the OFPRA Board noted that female genital mutilation remained widespread within society, in spite of the clear will of the authorities to eradicate this practice. It was therefore important to examine carefully and on a case-by-case basis the effective protection likely to be provided by the authorities.

85 Article 7 of the Qualification Directive sets out the criteria for considering that an actor provides protection. Article 7 (2) QD states that “*Protection is generally provided when the actors [of protection] take reasonable steps to prevent the persecution or suffering of reasonable harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.*”

It must be underlined that the designation of a safe part of a country does not necessarily establish a relevant or reasonable internal protection alternative. The existence of a ‘safe’ part of a country may be but one element in an examination of whether a particular applicant has such an alternative. Moreover, the complex questions which arise in the application of the internal protection alternative require a careful examination of the individual case in the regular procedure and should not be dealt with in an accelerated procedure.⁸⁶ Therefore, UNHCR is concerned that Article 30 APD in conjunction with Article 23 (4) (c) (i) APD permits the accelerated examination of applications raising such complex issues.

UNHCR takes the view that the criteria under Annex II APD for designating a third country as a safe country of origin are broadly adequate. It is of serious concern that so few of the Member States surveyed have fully incorporated these criteria in their national legislation. This not only risks the inappropriate designation of some countries as safe, but also undermines efforts to harmonise national procedures as part of the process of developing a Common European Asylum System. A consistent application among Member States is essential if the concept of safe country of origin is to provide any added value. Pending revision of the APD, UNHCR encourages all Member States to adopt good practice by incorporating and abiding by the criteria under Annex II in their entirety, even if not expressly obliged to do so. Notwithstanding this recommendation, those states permitted to derogate should, as a minimum, ensure that their national provisions are in line with Articles 30 (2) and (4) APD.

Recommendation

UNHCR recommends the deletion of the standstill clause under Article 30 (2 – 4) APD allowing Member States to derogate from the material requirements under Annex II for designating a country or part thereof as safe, or to apply the notion to a specified group of persons.⁸⁷

All Member States which have national legislation providing for the designation of safe countries of origin should incorporate in their national legislation, and adhere to, the material criteria under Annex II when designating a third country as a safe country of origin, even if not expressly required to do so under the current terms of the APD.

All Member States should review their current national designation criteria with reference to Annex II APD.

The process for and consequences of designating a third country as a safe country of origin

Article 30 (5) APD requires that *“the assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organizations”*.

UNHCR’s research revealed that there are significant differences and disparities in the type of information used to designate a country as safe across the Member States of focus. Furthermore, there are variations with regard to which authority is responsible for making designations, as well as whether this is done through the creation of safe country of origin lists, or exclusively on a case by case basis. Also, there is evidence of inconsistent state practice in relation to arrangements for periodically reviewing the safety of designated safe countries of origin.

⁸⁶ Page 8, UNHCR, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.unhcr.org/refworld/docid/3f2791a44.html>

⁸⁷ This is suggested in proposed recast Article 33: APD Recast Proposal 2009

Finally, there are significantly different procedural consequences that follow from designation as a safe country of origin. The information below provides a snapshot of the process in the respective states examined, looking first at those states which either do not apply the concept in practice or do so only rarely or on a case by case basis. States are then examined which apply the concept more extensively on the basis of national lists.

Bulgaria has literally transposed the requirements of Article 30 (5) APD concerning the sources of information which should be referenced in designating a country as a safe country of origin.⁸⁸ A prescribed process exists whereby a draft list is submitted by the Chairperson of the determining authority SAR,⁸⁹ in coordination with the Minister of Foreign Affairs, to the Council of Ministers for final approval and adoption.⁹⁰ Review of the list is stipulated to occur annually and follows the same procedure as for its initial adoption. However, at the time of UNHCR's research, there was no list of safe countries of origin, the last one having been adopted back in 2005 under previous legislation and now considered obsolete.⁹¹ Given that reference to a list is a statutory requirement for its application to declare a claim as manifestly unfounded,⁹² the current absence of a national list precludes application of the safe country of origin concept in practice. If it were to be applied on a case-by-case basis, the claim would be assessed in the same way as any other application under the regular procedure.⁹³

Slovenian legislation, which entered into force on 4 January 2008, had foreseen the possibility of applying a common EU list of safe countries of origin.⁹⁴ Given the absence of such a list, Slovenia has not yet applied the safe country of origin concept in practice. The power to designate countries as safe countries of origin nevertheless rests with the government,⁹⁵ and would be exercised only on a case by case basis rather than through the creation of a national list of safe countries of origin.⁹⁶ There are no specific legislative provisions specifying what information should be relied on in designating a country of origin as safe. However, Article 55 indent 13 IPA provides that the “competent authority **shall reject an application in an accelerated procedure as unfounded if: the applicant is from a safe country of origin**”. As mentioned in section 9 on accelerated procedures, according to national law, the determining authority does not have to refer to specific detailed country of origin information as it would in the regular procedure, but should establish the situation based on, *inter alia*, “general information on the country of origin, in particular on the social political situation and the adopted legislation”.

Similarly, the Czech Republic does not apply the safe country of origin concept in practice and there have been no reported cases since 1 December 2007. Although there is a list of designated safe countries (last updated in May 2007), the list is short and there have not been any applications by nationals of those countries. The list is drawn up by the DAMP Country Information Unit but is not made public. It was introduced by an internal regulation

88 Article 98 (2) LAR: “In the process of approval the Council of Ministers shall take into account sources of information from European Union Member States, the United Nations High Commissioner for Refugees, the Council of Europe or other international organizations and shall make a judgment...”

89 Article 21, item 11 of the Statute of SAR provides that within SAR, the function of preparing and updating the draft list is delegated to the International Affairs and European Refugee Fund Directorate.

90 Article 98 LAR (New SG No. 52/2007) “(1) By November 30 every year the Chairperson of the State Agency for Refugees in coordination with the Minister of Foreign Affairs shall submit national lists of safe countries of origin and safe third countries to the Council of Ministers for their adoption.”

91 Confirmed during interviews with stakeholders, interviewees and the Methodology Directorate. However, the list was accepted and taken into consideration as written evidence in a recent case before the Administrative Court of Pazardzhik (for example, Decision 282/22.07.2008). The list of 3 May 2005 contains: Albania, Armenia, Bosnia and Herzegovina, Georgia, Republic of Macedonia, Serbia and Montenegro, Turkey, Ukraine, Bangladesh, India, China, Algeria, Ghana, Ethiopia, Nigeria and Tanzania.

92 Articles 13 (1) item 13 and 13 (3) LAR.

93 The application shall be considered under the regular procedure unless other grounds for acceleration under 13 (1) LAR apply.

94 Article 65 IPA

95 Article 65 (3) IPA.

96 Information provided by representatives from the Ministry of Interior. Article 65 (3) IPA states that “the Government of the Republic of Slovenia may designate third countries other than those appearing on the minimum common list.”

which provides for a review once a year or when the need arises. There are no legislative provisions governing the sources of information that should be relied upon in designating a country as safe. The current lack of transparency and regulation is of concern, particularly if in future the scope of the list were to be broadened.

In the Netherlands, the determining authority is responsible for determining that a third country is a safe country of origin, and relies on information collected by the Ministry of Foreign Affairs and from various other sources, including Member States, UNHCR and the Council of Europe, in order to provide relevant information in its country reports. There is, at present, no list of designated safe countries of origin, and the concept is presumed to be applied on a case by case basis only, although stakeholders reported that it is rarely applied at all in practice. Previously the Netherlands did have a safe country list,⁹⁷ but with the introduction of the Aliens Act 2000 the list was abolished and broader criteria (outlined above) were introduced. A finding that a country of origin is safe may mean that the determining authority considers that a decision can be taken within 48 procedural hours and the application would then be further examined in the accelerated procedure. Such a presumption of safety would also impact on the burden of proof but, in the case of a negative decision, the application would not be certified as manifestly unfounded.

Greek legislation similarly fully incorporates the requirements of Article 30 (5) APD by requiring that in evaluating whether a country is a safe country of origin, the Aliens' Directorate of the Greek police Headquarters (ADGPH) should take into account information from other Member States, and international organizations such as UNHCR and the Council of Europe.⁹⁸ The ADGPH, as the 'Central Authority'⁹⁹ is responsible for the designation of third countries as safe countries of origin.¹⁰⁰ At present there is no designated list of safe countries of origin, and the approach claimed by the Greek authorities is that case by case consideration takes place.¹⁰¹ Following the applicant's personal interview, UNHCR was informed that the determining authority (ADGPH) "*examines the nationality and the grounds of the applicant's claim and uses precise and up-to-date information in order to assess if, in the country of the applicant, there is generally and consistently no persecution, no torture, inhuman or degrading treatment or punishment, and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.*"¹⁰² However, from UNHCR's research, it cannot be verified whether this methodology is applied in practice, in the absence of specific reasoning in any of the case files examined. According to two interviewees,¹⁰³ in practice the concept is applied indiscriminately and to the vast majority of asylum claims.

In Finland, there is similarly no list of designated safe countries of origin, and the concept is applied on a case by case basis. Indeed, it has been held on constitutional grounds that safe country lists do not comply with the Finnish legal order.¹⁰⁴ As such, case-by-case designation is done by the determining authority. Sources used in the assessment of whether a country is a safe country of origin are the same sources of country of origin information normally used in the regular procedure. These include reports from international organizations and governments as well as fact-finding enquiries and missions to the country in question. As of 1 December 2007, Bulgaria, Latvia,

⁹⁷ Bulgaria, Ghana, Hungary, Poland, Romania, Senegal, Slovakia and the Czech Republic.

⁹⁸ Article 22 (1) (b) of PD 90/2008.

⁹⁹ Article 2 (1) of PD 90/2008.

¹⁰⁰ Article 22 (1) (b) of PD 90/2008.

¹⁰¹ In accordance with articles 22 (2) and (3) PD 90/2008.

¹⁰² Information provided by head of ARD in ADGPH.

¹⁰³ Interview with S1 and S2.

¹⁰⁴ In 1998, the *Perustuslakivaliokunta* (Constitutional Committee of the Finnish Parliament) held, in response to the *Hallituksen esitys 50/1998* (Government Bill 50/1998) that such lists do not comply with the Finnish legal order. The issue concerned lists of safe countries of asylum. However, the discussion in the Constitutional Committee was linked to the forming of lists in general in the asylum procedure. See Parliamentary Constitutional Committee Communication 23/1998.

Romania, Hungary, Italy and Poland have been considered as safe countries of origin.¹⁰⁵ Designation of a safe country of origin is both a procedural measure to channel the application into an accelerated procedure, as well as a tool for the assessment of claims. In Finland, legislation stipulates that a decision shall be taken within seven calendar days of completion of the personal interview, if the applicant is considered to come from a safe country of origin.¹⁰⁶ If the time limit is exceeded, a negative decision can still be taken, but on the ground that the application is manifestly unfounded.

According to French law, the authority responsible for the national designation of the list of safe countries of origin is the Board of the OFPRA.¹⁰⁷ The sources of information used by the Board of OFPRA in compiling the list of safe countries of origin have not been made public. According to the Government, however, in order to establish and monitor the list, the Board of OFPRA relies on many sources of information including reports from embassies, UNHCR and NGOs. However, UNHCR is concerned that France has not transposed Article 30 (5) APD or introduced detailed provisions regulating what sources of information should be relied upon.

As of February 2008, the list compiled by the Board of the OFPRA featured 15 countries:¹⁰⁸

*Benin, Bosnia-Herzegovina, Cape Verde, Croatia, Georgia, Ghana, India, Madagascar, Mali, Macedonia (ARYM), Mauritius, Mongolia, Senegal, Tanzania, and Ukraine.*¹⁰⁹

There is no specific legal provision for the revision of the list, or criteria to determine what would trigger a review, whether to add or remove countries. UNHCR is concerned about this lack of transparency, which risks undermining the fair and proper application of the safe country of origin concept. It is noteworthy that the content of lists to date has been challenged by NGOs in the French courts.¹¹⁰ One challenge resulted in a decision against the designation of Albania and Niger as safe countries of origin,¹¹¹ both of which have since been removed from the list.¹¹²

¹⁰⁵ Information based on the official statistics of the determining authority, available at <http://www.migri.fi/netcomm/content.asp?article=3129www.migri.fi>. If the determining authority has not been able to make a decision on the matter involving a safe country of origin within seven days from the filing of the record of the interview, a decision may be taken to reject the claim as manifestly unfounded. Thus, there may be decisions other than those statistically referred to as implementing grounds of safe country of origin that *de facto* use this concept.

¹⁰⁶ The applications that raise the issue of safe countries of origin are, in accordance with section 103 (2) the *Ulkomaalaislaki* (Aliens' Act 301/2004), assessed in the accelerated procedure. Section 104 of the *Ulkomaalaislaki* (Aliens' Act 301/2004) states the 7 day time limit.

¹⁰⁷ The OFPRA, as an administrative body, is the determining authority in the meaning of the APD. However, its Board is a political body whose members represent the state (several ministries), staff of OFPRA, Members of Parliament and three "qualified personalities". Cf. Article R.722-1 *Ceseda*.

¹⁰⁸ In addition to this list, Article L.741-4-2° makes reference to "national(s) of a country to which Article 1C5 of the 1951 Geneva Convention is applicable". Some of these countries used to be countries which are now part of the list of safe countries of origin. In practice, only Argentina and Chile would be concerned.

EU Member States are also considered as safe countries of origin for other EU Member States, according to the Aznar Protocol (annexed to the Amsterdam Treaty). In practice, nationals of these countries would be likely to be channelled into the accelerated procedure.

¹⁰⁹ A decision of the Board of the OFPRA made on 13 November 2009 added three countries to the list: Armenia, Turkey and Serbia.

¹¹⁰ French NGOs are generally against this list. They consider it surprising that France is able to establish a list of safe countries of origin while EU Member States have failed to establish a common list. They also note that the French list includes unstable countries which still produce significant numbers of refugees (cf. recognition rates in Annex) and which have not abolished serious practices such as FGM (for example Mali). Cf. CFDA, *Bilan des 3 ans d'application de la loi, note de mars 2007*.

¹¹¹ *Conseil d'Etat statuant au contentieux N° 295443 Association Forum réfugiés, 13 février 2008*. The Council of State concluded that "accord-ing to the evidence produced and in spite of the improvements made, the Republic of Albania and the Republic of Niger did not present, when the decision [to designate them as safe countries of origin] was made, taking into account in particular the instability of the political and social context of each of these countries, the characteristics which justified the designation as safe countries of origin on the list in the meaning of Article L. 741-4-2° *Ceseda*".

¹¹² *Circulaire du 7 mars 2008 du ministère Immigration demandant aux Préfets de tirer les conséquences de cette décision*.

The response to this court decision demonstrates that the list of safe countries of origin can be modified, and indeed illustrates both the need to and importance of keeping the list under regular review. However, the Board of OFPRA has not to date taken the initiative to remove countries from the list, in spite of the unstable situation in some of them.¹¹³

In this context, it is noteworthy that recorded applications by nationals of countries designated as safe countries of origin in France doubled between 2007 and 2008. According to OFPRA's 2008 activity report, they represented 9.5% of the total number of applications.¹¹⁴ The OFPRA recognition rate for these applicants was 34.8% in 2008.¹¹⁵ UNHCR observes that according to Article 30 (2) of the APD, a safe country of origin is a country where persons “are generally neither subject to persecution as defined in Article 9 of the Qualification Directive nor torture or inhuman or degrading treatment or punishment”. The high recognition rates both at OFPRA level and at CNDA for claimants from countries designated as safe should call into question the application of the designation criteria by the Board of OFPRA and the legality of the inclusion of certain countries on the list.¹¹⁶ It also further illustrates the need for transparent review procedures. Moreover, it could support an inference that the main objective of the list is to dissuade nationals of designated countries from seeking protection in France, and to curb flows of such applicants accordingly, regardless of their protection needs.

During his visit to France, the Council of Europe Commissioner for Human Rights raised concerns regarding the use of this list.¹¹⁷

The designation of a third country as a safe country of origin is a procedural tool in France in order to channel the application into an accelerated procedure.¹¹⁸ However, the initial application of the safe country of origin concept is not by the determining authority, OFPRA, but rather by the Prefectures which are responsible for decisions on whether or not to issue temporary residence permits.¹¹⁹ Before applying for international protection, it is compulsory for all applicants to apply for a temporary residence permit at the Prefecture of their domicile.¹²⁰ The Prefectures may refuse to issue a temporary residence permit if they consider that an applicant is from a listed safe country of origin.¹²¹ If the Prefecture refuses the application for a temporary residence permit on this ground, the application for international protection is channelled into the accelerated procedure.¹²² There is no effective opportunity for applicants to challenge the presumption of safety before the Prefecture, given that it is bound to

¹¹³ For example, the situations in Madagascar and Georgia. In this context, French NGOs from the CFDA asked the Board of the OFPRA to remove Georgia from the list of safe countries of origin. It is interesting to note that whereas Georgia was not removed from the list, instructions were given by the Ministry to the prefectures in the summer 2008 not to remove nationals of this country to Georgia.

¹¹⁴ Page 14.

¹¹⁵ Source OFPRA, Activity Report 2008.

¹¹⁶ The OFPRA Activity Report 2008 cites an OFPRA recognition rate of 34.8% with regard to all of the then designated safe countries of origin. The CNDA recognition rate on appeal was 21.7%.

¹¹⁷ He expressed the “need for equal treatment of asylum seekers irrespective of their country of origin” and invited the French authorities “to be as cautious as possible in their use of this list, and to ensure that it does not have an automatic effect on the processing of asylum applications, which should always be examined individually”. Cf. CommDH(2008)34, Strasbourg, 20 November 2008, Memorandum by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008 §119.

¹¹⁸ It is accepted however that it plays a role in the credibility assessment. Nonetheless, OFPRA decisions regarding applicants from safe countries of origin do not make explicit reference to the safety or non-safety of the country of origin, and always make reference to the individual facts of the case.

¹¹⁹ See Section 9 on accelerated procedures for further information.

¹²⁰ Article L.741-2 and Article R.741-1 *Ceseda*. Since 2007, the delivery of temporary residence permits is conducted on a regional basis (one Prefecture issues for several *départements*). Following trials of this in some regions, since 20 April 2009, it is applicable to the whole territory (except Paris and its region).

¹²¹ Article L.741-4 *Ceseda* (unofficial translation into English).

¹²² Unofficial translation of Article L.723-1 *Ceseda* « [S2] L'office statue par priorité sur les demandes émanant de personnes auxquelles le document provisoire de séjour prévu à l'article L.742-1 a été refusé ou retiré pour l'un des motifs mentionnés aux 2^o à 4^o de l'article L.741-4, ou qui se sont vu refuser pour l'un de ces motifs le renouvellement de ce document ».

apply the designated list according to the nationality of the applicant alone – and has no jurisdiction to examine substantive grounds for protection.¹²³ Most applications will be channelled into the accelerated procedure accordingly.¹²⁴

Moreover, applicants who do not receive a temporary residence permit do not benefit from the same reception conditions as other applicants and this can adversely impact upon their procedural rights.¹²⁵ However, an individual substantive examination is nonetheless usually guaranteed under the accelerated procedure, at least at first instance.¹²⁶ UNHCR's audit of case files found no discernible difference in the examination of applications of applicants from nationally-designated safe countries of origin in the accelerated procedure, compared to the examination of applications in the regular procedure.¹²⁷

In Germany, Article 16a (3) 1 Basic Law allows for the designation of third countries as safe countries of origin by a federal law adopted by the Bundestag (Federal Parliament) with the consent of the *Bundesrat*. According to the standards elaborated by the Federal Constitutional Court, the German legislator needs to verify the safety of a country by taking into account all relevant, accessible and reliable sources, in particular, the reports of the Ministry of Foreign Affairs and UNHCR.¹²⁸ The asylum application of a foreigner from a State designated as a safe country of origin by the legislator shall be turned down as manifestly unfounded, unless the facts presented by the foreigner give reason to believe that s/he faces “political persecution” in his/her country of origin contrary to the general presumption of safety.¹²⁹

¹²³ The assessment of the Prefectures takes place in the framework of a request for a temporary residence permit in France, and not on the substance of the protection claim. Thus information will be elicited concerning the applicant's travel, civil status, family composition and possible links with France but not related to the reasons for applying for international protection. Prefectures can in some circumstances take into account “humanitarian reasons” linked to the situation of the applicant in France (factors linked to private and family life), which are not directly linked to the reasons for fleeing the country of origin. Applicants are informed about the fact that their application will be channelled into an accelerated procedure on the safe country of origin ground when they receive the decision from the Prefecture refusing the temporary residence permit. Applicants can in theory challenge the decision of the Prefecture before the administrative court but this legal remedy has no suspensive effect and, except when the case is referred to the court under an emergency procedure (“référé”), the judgement can take several months or even years. The Administrative Court in Lyon tends to suspend Prefecture decisions refusing temporary residence permits to applicants who are nationals of safe countries of origin, and to order the Prefecture to deliver a temporary residence permit which should remain valid until any decision by the CNDA. As such, an appeal to the CNDA would have suspensive effect. In a recent decision concerning an applicant from Georgia (*Tribunal administrative de Lyon, Mme EC, Ordonnance du juge des référés, 3 avril 2009, No. 0901637*), the applicant alleged that the decision of the Prefecture was illegal because it relied on a list of safe countries of origin which does not comply with the provisions of Article 30 APD. Without assessing the substance of the application for protection, the court recognized that there was a doubt regarding the legality of the decision of the prefecture and suspended it. However, a previous decision of the Council of State (*Conseil d'Etat, 7 août 2007, No. 301540*) held that a decision of the Administrative Court of Lyon suspending a decision of the Prefecture to refuse a temporary residence permit to an applicant from Albania, and ordering the delivery of a permit, was illegal. The Councils of State reaffirmed that an appeal before the CNDA had no suspensive effect for nationals of safe countries of origin. It is therefore important that the Council of State makes a ruling on the right to a suspensive right of appeal before the CNDA for these applicants (as for all applicants whose applications are processed under accelerated procedures).

¹²⁴ See Section 9 on the accelerated examination of applications for further details on the accelerated procedure in France.

¹²⁵ See section 9 on the accelerated examination of applications for further details on the impact of reception conditions on procedural rights in France.

¹²⁶ This is reaffirmed specifically under the provision regarding nationals from safe countries of origin under Article L.741-4-2° *Ceseda*.

¹²⁷ The audit examined 12 case files related to nationals of a safe country of origin (Georgia and Bosnia-Herzegovina). From the six case files from Bosnia-Herzegovina, five were processed under the accelerated procedure and one was processed under the regular procedure. All were given an opportunity for an interview the assessment conducted by protection officers seems to be the same as for other applications from non-designated countries. From the six case files from Georgia, three were processed under the accelerated procedure and three were processed under the regular procedure. Five out of six were given an opportunity for an interview, and the assessment conducted by protection officers appeared thorough, with reference to COI in three of the decisions. Out of a total of 14 interviews on the territory, three cases (case file 3 (BOS); case file 5 (GEO); case file 6 (GEO)) and they were all processed under the accelerated procedure. In practice, the way the interviews were conducted appeared the same as for other interviews. At the end of the interview, protection officers briefly explain the consequences of this specific procedure in terms of delays and remedies before the CNDA.

¹²⁸ Federal Constitutional Court of Germany, official collection vol. 94, p. 115 (at p. 143). For a criticism of the German situation in view of the potential influence of political considerations in a parliamentary process, see Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 29a, paragraph. 90.

¹²⁹ Article 16a (3) 2 Basic Law.

If the situation in a State changes in a way that the criteria for safety are no longer fulfilled, the respective State may be removed from the list of safe countries of origin by an order of the Federal Government which does not require the consent of the second Chamber of Parliament, the *Bundesrat*. Such an order will cease to apply automatically after six months. In practice, this provision for removing a State from the list has been used twice: in 1994 regarding Gambia¹³⁰ after a coup d'état by the military, and Senegal in 1996.¹³¹ Only the removal of Gambia was confirmed by a formal law,¹³² so Senegal remained on the list after the expiry of six months after the adoption of the government order.

At the time of writing, in addition to the designation of EU Member States as safe countries of origin in Section 29a (2) APA,¹³³ there are two States on the German list of safe countries of origin: Ghana and Senegal.¹³⁴

The legal consequence of the concept being applied to an individual application is that the application is rejected as manifestly unfounded.¹³⁵ This in turn triggers the denial of entry to the territory in the case of an application examined in the airport procedure;¹³⁶ shortened deadlines for an appeal both in the airport procedure and in the regular in-country procedure;¹³⁷ and, if confirmed as manifestly unfounded by the administrative court, the limitation of an appeal before administrative courts to one instance.¹³⁸

In the United Kingdom, the Secretary of State for the Home Department has the power to add or remove a state (or part thereof) from the existing list of states designated as safe countries of origin by statute by the UK Parliament.¹³⁹ National legislation outlines the sources of information that should be relied upon.¹⁴⁰ This broadly complies with the requirements of Article 30 (1) (5) APD, although it is regrettable that there is no explicit reference to information either from UNHCR or the Council of Europe. It is unclear whether there is any independent oversight of the actual designation of countries as safe by the Secretary of State, although the remit of the recently established Advisory Group on Country Information will allow for the review of relevant country of origin information produced by the determining authority on some of the designated safe countries of origin.¹⁴¹ There is no publicly available information which determines what may trigger a review of the safety of designated countries. The Independent Chief Inspector of the UK Border Agency (the determining authority) has a statutory duty to monitor the case-by-case certification process.¹⁴² Individual applicants can challenge, by way of judicial review to the Administrative Court, the decision to certify their application as unfounded and this may include a challenge to the legality of the country of origin being designated as a 'safe country of origin'. The most recent successful challenge related to the inclusion of Bangladesh on the designated list of safe countries of origin.¹⁴³ The inclusion of Bangladesh was held to be irrational and was subsequently removed from the list by Order.

¹³⁰ Federal Law Gazette, 1994 vol. I, p. 2480.

¹³¹ Federal Law Gazette, 1996 vol. I, p. 551.

¹³² Federal Law Gazette, 1995 vol. I, p. 430.

¹³³ As introduced by the Transposition Act 2007, Federal Law Gazette I, p. 1970.

¹³⁴ Annex II (on Section 29a) APA.

¹³⁵ Section 29a (1) APA.

¹³⁶ Section 18a (3) 1 APA.

¹³⁷ Sections 18a (4); 74 (1), 36 (1) APA.

¹³⁸ Section 78 (1) APA.

¹³⁹ NIAA 2002 s 94 (5).

¹⁴⁰ NIAA 2002 s 94 (5) (D) (b) "...shall have regard to information from any appropriate source (including other Member States and international organisations)."

¹⁴¹ <http://www.ociukba.homeoffice.gov.uk/independent-advisory-group/Terms-of-Reference.asp>

¹⁴² Section 48 Borders Act 2007. The office of the Chief Inspector usurps the function of the 'Certification Monitor' which was established under the Nationality Immigration and Asylum Act 2002 s111.

¹⁴³ *R (Zakir Husan) v Secretary of State for the Home Department*, EWHC 189 (Admin).

The 24 countries listed at the time of writing are:¹⁴⁴

<i>Albania</i>	<i>Mauritius</i>	<i>Ghana (men only)</i>
<i>Bolivia</i>	<i>Moldova</i>	<i>Gambia (men only)</i>
<i>Bosnia-Herzegovina</i>	<i>Mongolia</i>	<i>Kenya (men only)</i>
<i>Brazil</i>	<i>Montenegro</i>	<i>Liberia (men only)</i>
<i>Ecuador</i>	<i>Peru</i>	<i>Malawi (men only)</i>
<i>India</i>	<i>Serbia inc. Kosovo</i>	<i>Mali (men only)</i>
<i>Jamaica</i>	<i>South Africa</i>	<i>Nigeria (men only)</i>
<i>Macedonia</i>	<i>Ukraine</i>	<i>Sierra Leone (men only)</i>

Eight states have been listed as safe for men only since 1 December 2007. They are Ghana, Nigeria,¹⁴⁵ Gambia, Kenya, Liberia, Malawi, Mali and Sierra Leone.¹⁴⁶

The designation of a third country as a safe country of origin is a procedural tool, in order to channel the application into an accelerated procedure.¹⁴⁷ The law does not state that applications will be automatically rejected or declared inadmissible or unfounded. However, the consequences of a claim being channelled into an accelerated procedure can be significant. In the UK, applicants whose applications are channelled into the DNSA accelerated procedure are detained.¹⁴⁸

In the UK, the designation of a third country as a safe country of origin is not solely a procedural tool; it also creates a quasi-presumption of safety, and therefore impacts upon the burden of proof (see below). Legislation provides that an asylum claim by a national of one of the designated countries shall be certified as clearly unfounded “*unless the Secretary of State is satisfied that it is not clearly unfounded*”.¹⁴⁹ The effect of certification is procedural: it prevents an in-country appeal being brought.

Notwithstanding the varied approaches taken by Member States in their national processes, by which safe countries of origin are designated, there are a number of common issues of concern. Although most states have adequately transposed Article 30 (5) APD, and refer to broadly similar sources of information as part of the designation process, the generic formulation of this article permits wide divergences in the precise sources used by states. This fact, combined with major differences in the designation criteria applied, inevitably results in inconsistency in the designation of safe countries of origin. This is evident from a comparison between those states which currently have in place a national list, most significantly France, Germany and the UK.¹⁵⁰ At the time of UNHCR’s research, only eight countries appeared on the lists of both France and the UK.¹⁵¹ Only Ghana appeared

¹⁴⁴ API/APM of 20/11/2007, *Certification under Section 94 of the NIAA 2002*.

¹⁴⁵ Ghana and Nigeria are listed under SI 2005 No 3306 with effect from 3 December 2005.

¹⁴⁶ These six countries are listed under SI 2007 No 2221 with effect from 28 July 2007.

¹⁴⁷ See details regarding the procedural standards and the reception standards under section 9 on accelerated procedures.

¹⁴⁸ Applicants in the DFT and DNSA accelerated procedure are detained; the DFT procedure is a three day procedure. See section 9 for further information.

¹⁴⁹ NIAA 2002 s 94(3).

¹⁵⁰ At the time of UNHCR’s research, French and UK safe country of origin lists featured 15 [18 as of November 2009] and 24 countries respectively, but only had 6 countries in common (Bosnia-Herzegovina, India, Macedonia, Mauritius, Mongolia and Ukraine). Moreover, the UK recognized Ghana and Mali as being generally safe only for men; whereas these are listed as safe countries in France. It is noteworthy that France considered Georgia a safe country, but the UK did not; and that the UK considered Serbia a safe country, but France did not (although Serbia was added to the French list in November 2009). Moreover, Albania features on the UK list, but has recently been removed from the French list following a legal challenge. Germany has designated Ghana and Senegal as safe countries of origin in its national list, as well as all EU Member States, under the APA.

¹⁵¹ Bosnia-Herzegovina, India, Macedonia, Mauritius, Mongolia and Ukraine. Ghana and Mali were also designated as safe by France, whereas they were designated as safe for men only in the UK. See below for further details.

on the list of all three States; however, in the UK, Ghana is only designated as a safe country of origin with regard to male applicants. UNHCR considers that the proposed European Asylum Support Office (including through the involvement of UNHCR and independent experts) could usefully play a role in helping to collate and identify common information to be relied on by Member States for the designation process.

A second concern relates to an apparent lack of regulation, transparency, and accountability in the process by which countries are designated as safe countries of origin. This includes particularly an absence of clear provisions for reviewing the safety of countries, including what criteria would trigger a decision to either add or remove a country from the list. Only Bulgaria and Germany have in place detailed legislative provisions concerning the process for adopting a list. Bulgaria also has a requirement for annual review (if a list is in existence). German law provides for the possibility of withdrawing a country from the list by an order of the Government for a preliminary period of six months, at which point the Federal Parliament must adopt a formal law if the withdrawal is to remain in force. However, there is no mechanism for a regular review of the lists. Although countries have been removed from the list in France, this resulted from a legal challenge and has never been instigated by the French authorities.

UNHCR considers that appropriate mechanisms should be in place to provide for a regular review of the safety of designated countries on national lists. Furthermore, the designation of such countries by law or regulation should be flexible enough to take account of changes, both gradual and sudden, in a given country. UNHCR supports the creation of appropriate ‘benchmarks’ to ensure that this is done fairly and consistently, and in order to reduce the risk of the designation process becoming politicized. UNHCR further considers that safe country of origin lists, and the information sources relied upon in making a designation, should be publicly available.

Recommendations

A Member State which applies the safe country of origin concept should have in place a clear, transparent and accountable process for the designation of third countries as safe countries of origin, and any lists of safe countries of origin should be publicly available, along with the sources of information used in the designation process.

The future European Asylum Support Office (EASO) should support the identification and collation of common information sources to be used by Member States for the purpose of designating safe countries of origin.

In view of the need to take account of both gradual and sudden changes in a particular country, Member States should have in place appropriate mechanisms for the review of safe country of origin lists, as well as benchmarks and criteria that would trigger and inform such a review.

Applicants should not be afforded a lower standard of reception conditions and/or detained solely because they are nationals of a country designated as a safe country of origin.

Procedural guarantees in the application of the safe country of origin concept

Article 31 APD stipulates that:

1. *A third country designated as a safe country of origin in accordance with either Article 29 or 30 may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if:*
 - (a) *he/she has the nationality of that country; or*
 - (b) *he/she is a stateless person and was formerly habitually resident in that country;*

and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC.

[. . .]

3. *Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.*

UNHCR accepts the safe country of origin concept in principle where it is used as a procedural tool for the prioritized and/or accelerated examination of applications, in carefully circumscribed situations. However, it is critical that each case be examined fully and individually on its merits, and that each applicant should be given an effective opportunity to rebut the presumption of safety of the country of origin, on the basis of his/her individual circumstances. Article 31 (1) APD explicitly confirms the need for an individual examination; albeit at the same time appearing to place the burden of proof on the applicant to demonstrate that his/her country is not a safe country of origin in his/her particular circumstances.

Article 31 is silent on whether or how applicants be given an effective opportunity to rebut a presumption of safety; although sub-section (3) does require states to lay down in national legislation further rules and modalities for application of the safe country of origin concept.

UNHCR therefore considers that in assessing the transposition and implementation of Article 31, all relevant procedural factors must be considered. These are, namely, the requirement to conduct an individual examination; availability of a personal interview; burden of proof applied; and whether the applicant is provided with an effective opportunity to rebut a presumption of safety (including the question of access to adequate advance information and legal assistance). Other relevant rules and modalities include the certification of safe country of origin cases as ‘manifestly unfounded’. Each of these components is considered below.

Provision of an individual examination

Some states surveyed do not directly address the issue of an individual examination for safe country of origin cases in their national legislation. Bulgarian legislation does not contain any explicit provisions concerning the requirement for an individual examination. However, it does stipulate that the grounds for refugee and humanitarian status must not be present;¹⁵² and that the fact that the applicant comes from a designated safe country of origin may not be the sole reason to consider an application manifestly unfounded.¹⁵³ The possibility to rebut the presumption of safety is also explicitly stated.¹⁵⁴

Slovenia has no specific provisions concerning the assessment of applications by applicants from designated safe countries of origin. However, general provisions for accelerated procedures, in which applications by applicants considered to be from a safe country of origin would be examined,¹⁵⁵ require that the facts and circumstances are established. This requires taking into account oral and documentary evidence provided by the applicant, evidence obtained by the determining authority, documentation obtained prior to submitting the application and general country of origin information.¹⁵⁶

¹⁵² Article 13 (1) LAR.

¹⁵³ Article 13 (3) LAR.

¹⁵⁴ Article 99 LAR.

¹⁵⁵ Article 55 indent 13 IPA.

¹⁵⁶ Article 54 IPA with reference to Article 23 IPA, which contains a requirement to consider facts and circumstances relating to the applicant, but not specific and individual COI.

Greek legislation likewise contains a general provision that all asylum applications should be considered individually, comprehensively, objectively and impartially. However, this was not evidenced in the audit of case files, which indicated that a proper and individual examination is not conducted in practice for the vast majority of claims, regardless of the type of procedure.

Other states clearly prescribe the need for an individual examination of safe country of origin cases. In the UK, explicit guidance instructs decision makers to carry out an individual assessment of the merits of the claim in safe country of origin cases, since designation as such will result in removal of the in-country right of appeal.¹⁵⁷ On the gathering of information, guidance instructs decision makers to consider the relevant Operational Guidance Note (OGN), and relevant country information.¹⁵⁸

According to French law, the individual examination of each claim on the substance by the OFPRA shall be guaranteed.¹⁵⁹ The audit of case files and the observation of personal interviews confirmed that in practice an individual examination was provided in accordance with Article 31 (1) APD, taking account of both country of origin information and the particular circumstances of the applicant. This was found to be the case regardless of whether safe country of origin cases was considered under the accelerated or the regular procedure.¹⁶⁰

In Finland, the examination of safe country of origin cases is always made on an individual basis, which requires the assessment of COI as well the individual circumstances of the applicant. Stakeholders reported that this “works well” in practice.¹⁶¹

In Germany, the safe country of origin concept foresees a qualified rejection as manifestly unfounded, but this does not relieve the authorities of any of the procedural guarantees; the case will be reviewed on its merits after a personal interview of the applicant. The presumption of safety from persecution can be rebutted on the basis of the presentation of facts or evidence by the applicant.¹⁶²

Moreover, in the Netherlands, the designation of a third country as a safe country of origin does not affect the obligation to conduct an individual examination, including the requirement that the determining authority consider COI as well as the particular circumstances of the applicant.¹⁶³

In Spain, the definition in Article 25 (1) (d) in the New Asylum Law includes the expression “...in view of his/her personal circumstances...” This clause is interpreted as requiring an individual examination of the case.

¹⁵⁷ The API/APM of 20/11/2007, Certification under Section 94 of the NIAA 2002.

¹⁵⁸ The API/APM of 20/11/2007, Certification under Section 94 of the NIAA 2002 country information.

¹⁵⁹ This is reaffirmed specifically under the provision regarding nationals from safe countries of origin under Article L.741-4-2° *Ceseda*.

¹⁶⁰ The audit examined 12 case files related to nationals of a safe country of origin (Georgia and Bosnia-Herzegovina). From the six case files from Bosnia-Herzegovina, five were processed under the accelerated procedure and one was processed under the regular procedure. All were given an opportunity for an interview. The assessment conducted by protection officers seemed to be the same as for other applications from non-designated countries. From the six case files from Georgia, three were processed under the accelerated procedure, and three were processed under the regular procedure. Five out of six were given an opportunity for an interview, and the assessment conducted by protection officers appeared thorough, with reference to COI in three of the decisions. Out of a total of 14 in-country interviews, three cases (case file 3 (BOS); case file 5 (GEO); case file 6 (GEO)) related to nationals of a safe country of origin and they were all processed under the accelerated procedure. In practice, the way the interviews were conducted appeared the same as for other interviews. At the end of the interview, protection officers briefly explain the consequences of this specific procedure in terms of delays and remedies before the CNDA.

¹⁶¹ As the audited cases did not raise the concept of safe country of origin, this information is based on interviews with stakeholders.

¹⁶² This does not amount to imposing the burden of proof on the applicant. It is sufficient that facts or evidence submitted by the applicant “give reason to believe” (Section 29a APA) that the applicant is in danger of persecution, despite the general situation in the country.

¹⁶³ Aliens Circular C4/3-7.

The burden of proof and opportunity to rebut the presumption of safety

The majority of states that apply the safe country of origin concept have legislation which increases the burden of proof on the applicant, as envisaged by Article 31 (1) APD, namely: the Czech Republic,¹⁶⁴ Greece,¹⁶⁵ Slovenia¹⁶⁶ and the United Kingdom.¹⁶⁷

For example, under UK legislation, where the applicant comes from a designated safe country of origin, there is a quasi-presumption that the case is clearly unfounded. Certification as such is mandatory unless the determining authority is satisfied that the claim is not clearly unfounded.¹⁶⁸ In practice, this means that the burden of proof rests entirely on the applicant with regards to submitting serious grounds for considering the country not to be a safe country of origin.

In Bulgaria, by law, the applicant may rebut the presumption of safety which in principle impacts on the burden of proof on the applicant.¹⁶⁹ However, national law also reflects the principle that the examiner and the applicant share responsibility in establishing the facts of the application.¹⁷⁰

In Germany, the presumption of safety from persecution can be rebutted on the basis of the presentation of facts or evidence by the applicant. This does not amount to imposing the full burden of proof on the applicant; it is sufficient that the facts or evidence submitted by the applicant “give reason to believe” that the applicant is in danger of persecution, despite the general situation in the country.¹⁷¹ According to information provided by the BAMF, if such facts or evidence are presented by an applicant, the review of the claim must be carried out on the basis of an individual assessment, and not by way of reference to the general situation. The BAMF emphasized that it has a particular responsibility to establish the facts in this context which means that the adjudicator must research the possibility of an exceptional case by the use of targeted questions.¹⁷² However, the presentation by the applicant must be credible, given the assessment of the country as safe by the German legislator.¹⁷³

In the Netherlands, national legislation requires that the applicant make a plausible case that the country of origin does not fulfill its international human rights treaty obligations with regard to him or her.¹⁷⁴ As such, the burden

¹⁶⁴ Section 16 (1) (d): “arrives from a country which the Czech Republic considers to be a safe third country or a safe country of origin unless it is proven that in his/her particular case this country cannot be deemed to be such country”.

¹⁶⁵ Greek legislation has transposed literally Article 31 (1) (b) APD with Article 22 (2) (a) PD 90/2008.

¹⁶⁶ Article 66 IPA.

¹⁶⁷ NIAA 2002 594 (3).

¹⁶⁸ NIAA 2002 594 (3).

¹⁶⁹ Article 99 LAR: “An alien who has applied for status may rebut the presumption of safety of the country included in the lists under Article 96 or Article 98.” Article 75 (2), (Am., SG, issue 52 of 2007) states that: “When a pronouncement is made on the application for status, all relevant facts shall be assessed that relate to the applicant’s personal circumstances, country of origin or third countries. Where the applicant’s assertions are not supported by evidence, they shall be deemed trustworthy if s/he has made efforts to substantiate his/her application and has provided a satisfactory explanation of the lack of evidence. The lack of sufficient data of persecution, due inter alia to a failure to conduct an interview, cannot operate as a ground for refusing the grant of status.”

¹⁷⁰ Article 6 (1) LAR reflects paragraph 196 of the UNHCR Handbook. Article 6 (1) LAR: “The jurisdiction under this law is realized through the officials in the SAR. They establish all facts and circumstances relative to the proceedings for granting refugee or humanitarian status and assist the aliens who have applied for protection.”

¹⁷¹ Section 29a APA.

¹⁷² In practice, the granting of protection occurs but on a very exceptional basis. In 2009, of 193 decisions on applications by persons from Ghana, one person was granted refugee status and two were granted subsidiary protection (according to the Qualification Directive or national provisions including health related reasons); in 12 decisions on applications by persons from Senegal, one person was granted refugee status and another subsidiary protection (source: statistics provided by the BAMF).

¹⁷³ See R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 29a, 127.

¹⁷⁴ Article 31 (2) (g) Aliens Act: “The alien comes from a country which is a party to the Convention on Refugees and one of the other conventions referred to in section 30 (d) and the alien has not made a plausible case that such country does not fulfil its treaty obligations with regard to him/her.”

of proof on the applicant is greater, but this does not relieve the determining authority of its duty to gather evidence. Similarly, in Finland, it is for the applicant to rebut the presumption of safety and, therefore, in theory the burden of proof shifts to the applicant. However, in practice, as verified by UNHCR's audit of case files, the assessment of whether a country is safe is made in cooperation with the applicant. Responsibility for establishing the facts is shared.¹⁷⁵

In France, the presumption that the nationally designated countries of origin are safe applies to the Prefectures which are empowered to refuse a temporary residence permit to an applicant from a listed safe country of origin. As a consequence, the application for international protection is routed into the accelerated procedure. However, the concept is not applied as such by the determining authority in its examination of the application for international protection. There is no explicit provision of legislation placing the burden of proof entirely on the applicant in safe country of origin cases. However, the burden of proof on the applicant appears nevertheless be greater in practice, and it may play a role in the credibility assessment.

It is essential that the applicant is given an effective opportunity to rebut any presumption of safety, both in law and practice. In addition to requiring an individual examination, this also involves a shared duty of investigation, prior notification of the intention to designate a country as safe, and other necessary procedural safeguards. UNHCR's research has revealed divergence among Member States with regards to the opportunity given to applicants to rebut a presumption of safety in practice.

In France, the applicant is informed by the Prefecture that s/he is deemed to be a national of a designated safe country of origin and that the application for international protection will be channelled into the accelerated procedure when s/he receives the decision refusing the temporary residence permit. The list of safe countries of origin is also mentioned in the Information Guide which should be distributed to all applicants when they arrive at the *Prefecture*. Therefore, s/he is notified in advance of the examination by the determining authority of the application for international protection.

In the Netherlands, the applicant has the opportunity to rebut the presumption of safety in both law and practice. The intention to designate the applicant's country of origin as safe is notified to the applicant in advance of taking a decision under the Dutch 'intention procedure'. This allows the applicant an opportunity to submit grounds as to why a designated country would not be safe in his/her particular circumstances. It must be borne in mind, however, that if the application is examined in the accelerated procedure, the applicant will only have three procedural hours in which to submit serious grounds to rebut the presumption.

A common problem identified in several states (Bulgaria, the Czech Republic, and Slovenia) is that no provision is made for applicants to be informed that their country of origin is considered safe, until the point at which they are notified of the decision to refuse their application. Thus in effect, the only and first opportunity to challenge the presumption of safety would be at appeal.

Bulgarian legislation explicitly provides the applicant an opportunity to rebut the presumption of safety,¹⁷⁶ but interviewed stakeholders from the determining authority indicated they would not notify the applicant that they considered his/her country to be safe. This would *de facto* deny the applicant the opportunity effectively to rebut the presumption of safety during the first instance procedure, although a possibility to rebut the presumption at

¹⁷⁵ Audited cases 98, 99, 100, 102, 106 and 107.

¹⁷⁶ Article 99 LAR and further guaranteed in Article 13 LAR.

appeal would remain. In the Czech Republic, by law, there is the right to rebut the presumption of safety, although it is unclear whether this right would be effective in practice.¹⁷⁷ Information about safe country of origin designations and procedures is not included in the general written information provided to applicants at the start of the procedure. Moreover, legislation does not require prior notice to applicants of an intention to apply the safe third country concept to their claims.

Similarly, although the concept of safe country of origin is yet to be applied there in practice, applicants in Slovenia would not have an opportunity to rebut the presumption of safety during the first instance procedure. Prior to the issuing of a refusal notice, there would be no advance notification of the decision to designate a country as safe. Moreover, although by law an application may be routed into the accelerated procedure on safe country of origin grounds, the personal interview may be omitted and, in practice, is omitted in the accelerated procedure.¹⁷⁸ Therefore, there would be no effective opportunity to rebut the presumption of safety. The applicant would be entitled to appeal a negative decision on safe country grounds within three days of notification of the decision.¹⁷⁹

In Greece, there is no provision for advance notice of any decisions, and reasons for refusal are only supplied when the negative decision is issued. Moreover, the standard phraseology included in all refusal decisions does not make reference to safe country of origin considerations. Therefore in practice there is no opportunity for the applicant to rebut the presumption of safety, or seek the assistance of a lawyer in relation to this.

In Spain, the new asylum procedure establishes that the applicant will be notified about a decision to channel the application into the accelerated procedure.¹⁸⁰ However, there is no information on the specific ground upon which the decision to channel the application into the accelerated procedure is taken. The applicant or the assisting NGO or lawyer would have to contact the determining authority (OAR) directly in order to obtain that information from the case file, and eventually present grounds to rebut the presumption, which would be taken into account in the individual assessment of the claim. On the other hand, UNHCR is informed of all cases that are channelled into the accelerated procedure. UNHCR has the opportunity to study them and give its opinion on the decision to channel the application into the accelerated procedure. This opinion would also be taken into account in the individual examination. Such an arrangement does not, however, effectively replace an effective opportunity for the applicant to rebut the presumption.

In the UK, there is no indication that the applicant is told in advance of a decision that the determining authority considers the country of origin is safe. In relation to the substantive interview, the applicant is not given any greater opportunity than other applicants to submit further evidence after the interview – within 48 hours in the detained processes and within five working days in the non-detained procedure.¹⁸¹ UNHCR considers this of particular concern, given that the effect of certification as clearly unfounded (and designation as a safe country of origin) under UK law is to deny the applicant an in-country appeal right.

¹⁷⁷ Due to the fact that the SCO concept is not currently applied in practice.

¹⁷⁸ Article 46 (1), indent 1 IPA. See section 4 on the opportunity for a personal interview and section 9 on the accelerated examination of applications for further information.

¹⁷⁹ The application would be dismissed as manifestly unfounded, which means that according to article 74 (2) IPA, the applicant can appeal to the Administrative Court within three days.

¹⁸⁰ Article 25 (1) of the New Asylum Law.

¹⁸¹ The API/APM of 20/11/2007 Certification under Section 94 of the NIAA 2002 invitation for further evidence given during the substantive interview.

Provision for a personal interview

Article 12 (2) (c) APD together with Article 23 (4) (c) APD permits states to derogate from the requirement to afford a personal interview to an applicant whose country of origin is designated as safe.¹⁸² However, of those Member States surveyed, only Slovenia¹⁸³ and Greece¹⁸⁴ have transposed this provision.

There is no provision to omit the personal interview on the grounds that the applicant is deemed to be from a safe country of origin in Bulgaria, the Czech Republic, Finland, France,¹⁸⁵ Germany, the Netherlands, Spain or the United Kingdom. UNHCR considers that this reflects the essential nature of an interview as part of a full, fair and individual examination.

In conclusion, where states apply the safe country of origin concept, or have in place legislation that envisages this possibility, it is crucial that each case be examined individually on its merits and that each applicant should be given an effective opportunity to rebut the presumption of safety of the country of origin, on the basis of his/her individual circumstances. This should be clearly stated in relevant legislation and in guidance to decision makers. It is of concern to UNHCR that this is not currently the case in all Member States.

Moreover, applicants should be provided with information necessary for them to be able effectively to challenge the presumption of safety, including the fact that their country of origin is considered generally safe. It is neither fair nor efficient that in several states, there is at present only provision for such notification to occur after a claim has been refused. This prevents legal advice being obtained to potentially assist an applicant to rebut the presumption of safety during the first instance procedure. In this regard, applicants should be given the opportunity of a personal interview. UNHCR is also concerned that currently states may place the burden of proof entirely on the applicant, sometimes in the context of an accelerated procedure, without adequately recognizing the necessity of a shared examination of the claim.

Recommendations

All Member States should have in place provisions which explicitly provide for the full and individual examination of safe country of origin claims, and express guidance and training should be provided to decision makers accordingly.

Even where Member States have transposed Article 31 (1) APD, express guidance should be provided to decision-makers concerning the shared duty to establish the facts.

Applicants originating from a designated safe country of origin should be provided with an effective opportunity to rebut the presumption of safety, in both law and practice. This necessitates the applicant being informed in advance that his/her country is considered to be safe, and receiving the opportunity to make representations accordingly, including a personal interview.

¹⁸² Under Article 12 (2) (c) of the APD, a personal interview may be omitted where the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded because the applicant is from a safe country of origin within the meaning of Articles 30 and 31.

¹⁸³ Article 46 (1) IPA.

¹⁸⁴ Article 10 (2) (c) of PD 90/2008.

¹⁸⁵ In practice, statistics from the 2008 OFPRA Activity Report show that the percentage of applicants originating from safe countries of origin who were invited to a personal interview amounts to 71.7%.

SECTION XIV:

SUBSEQUENT APPLICATIONS

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Introduction

Article 32 of the Asylum Procedures Directive (APD) addresses the situation where a person who has already applied for asylum in a Member State raises new issues or presents new evidence in the same Member State. These new issues or evidence are referred to in the APD as “further representations” or a “subsequent application”.¹ Article 32 APD sets out the situations in which Member States may consider that further submissions by a person represent a subsequent application,² and sets out the ‘frameworks’ within which a subsequent application may be examined. The rationale for these provisions is stated in recital 15 of the APD:

“Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant.”

As such, Article 32 (2) and (3) APD provides that a subsequent application, submitted after the (explicit or implicit) withdrawal of the previous application, or after a (final) decision on the previous application has been taken, may be examined in a specific procedure in which it shall first be subject to a preliminary examination to determine whether new facts or evidence have arisen or have been presented by the applicant.³ The minimum procedural guarantees which are applicable to the preliminary examination are more limited than the basic guarantees set out in Chapter II of the Directive.⁴ The APD, moreover, does not guarantee that the preliminary examination is conducted by the determining authority.⁵ Furthermore, Member States may lay down in national law rules on the preliminary examination, but these must not “render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access”.⁶ If it is determined that relevant “new elements or findings” have arisen or have been presented by the applicant, the determining authority must examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.⁷

UNHCR, in principle, agrees that subsequent applications may be subjected to a preliminary examination of whether new elements have arisen or been presented which would warrant examination of the substance of the claim. Such an approach permits the quick identification of subsequent applications which do not meet these requirements. However, in UNHCR’s view, such a preliminary examination is justified only if the previous claim was considered fully on the merits.⁸

¹ Article 32 (1) APD.

² Note that Article 33 also states that “Member States may retain or adopt the procedure provided for in Article 32 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time.”

³ Article 32 (3) APD.

⁴ Article 24 (1) (a) APD stipulates that Member States may provide for a preliminary examination of subsequent applications which derogates from the basic principles and guarantees of Chapter II. Article 34 (1) APD limits the procedural guarantees to those set out in Article 10 (1) APD and Article 34 (3) (a) requires Member States to ensure that “the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in the case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision”. Notably, the APD does not guarantee the applicant the opportunity of a personal interview during the preliminary examination, nor the requirements for the examination of applications set out in Article 8.

⁵ Article 4 (2) (c) APD.

⁶ Article 34 (2) APD.

⁷ Article 34 (3) (b) APD.

⁸ For further information, see subsection below on subsequent applications following the withdrawal of the previous application, and section 7 of this report on the withdrawal or abandonment of applications.

There are many reasons why an applicant may wish to submit further evidence or raise new issues following the examination of a previous application for international protection, including:

- (i) The situation in the country of origin may have changed and a well-founded fear of persecution or a real risk of suffering serious harm may be based on events which have taken place in the country of origin since the examination of the previous application.
- (ii) A well-founded fear of persecution or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant or convictions held by the applicant since s/he left the country of origin.
- (iii) A well-founded fear of persecution or a real risk of suffering serious harm may arise if there has been a direct or indirect breach of the principle of confidentiality during or since the previous procedure, and the alleged actor of persecution or serious harm has been informed of the applicant's application for international protection in the Member State.
- (iv) Deficiencies or flaws in the previous procedure may have prevented an adequate examination and assessment of all the relevant facts and evidence. For example, a lack of timely and appropriate information to the applicant on the procedure and his/her rights and obligations; lack of access to legal advice; a lack of competent interpretation; the omission of or poor conduct of the personal interview; a failure to provide a gender-appropriate interview; accelerated procedures may have been too quick for the applicant to acquire all the relevant evidence; etc.
- (v) Trauma, shame, or other inhibitions may have prevented full oral testimony by the applicant in the previous examination procedure, particularly in the case of survivors of torture, sexual violence and persecution on the grounds of sexuality.
- (vi) There may have been a change in the legislation, policy or case-law of the Member State since the examination of the previous application.
- (vii) Further relevant evidence may have been obtained by the applicant or arisen after the previous examination.
- (viii) The previous examination may have been discontinued or terminated on grounds of withdrawal or abandonment without a complete examination of all the relevant elements.⁹
- (ix) The previous application may have been submitted on behalf of a dependant who later wishes to submit an independent application in his/her own right.
- (x) Short time-limits within which to exercise a right of appeal, and/or restrictions on the admissibility of evidence on appeal, may have prevented the use of an appeal to raise new elements or findings.

UNHCR also recognises that some applicants may wish to submit a second application with a view to delaying or frustrating the enforcement of a removal order.

In some Member States, the issue of subsequent applications is significant. For example, in Belgium, in 2008, 27.1% of all applications submitted were subsequent applications; in the Czech Republic, 36% of applications lodged in 2008 were subsequent applications¹⁰ and in France, they represented 17% of all applications in 2008.¹¹ In Germany, even though the number of subsequent applications filed in 2009 was 16.3 %, which repre-

⁹ Note that in this circumstance, it is UNHCR's view that a request to pursue the original application should not be treated as a subsequent application in the sense that the applicant should not have to raise new grounds or evidence. See subsection below on subsequent applications following the withdrawal of the previous application and section 7 of this report on the withdrawal or abandonment of applications.

¹⁰ A total number of 1,656 applications were submitted in 2008 of which 596 were subsequent applications.

¹¹ In Bulgaria, the determining authority does not maintain statistics on the number of subsequent applications; however, a significant number of subsequent applications involve applicants from Armenia. In Slovenia, according to statistics of the Ministry of the Interior, in 2007, the percentage of subsequent applications was 8.9%; in 2008, it was 7% of all applications lodged and no change of trend is foreseen for 2009.

sented the lowest level since 1995,¹² subsequent applications became especially significant following cessation decisions.¹³ In contrast, according to the determining authority in Greece, no subsequent application has been submitted since the entry into force of PD 90/2008.

UNHCR is not aware of any qualitative research or data which analyzes the reasons for the submission of subsequent applications in Member States. However, to the extent that subsequent applications may be due to deficiencies in first instance procedures or restrictions on appeal, UNHCR's recommendations throughout this report are aimed at reducing these as causes for subsequent applications.

This section principally addresses the Directive's provisions on the treatment of subsequent applications as set out in Articles 32 and 34. However, other articles of the Directive are also relevant and the reader is referred to other sections of this report as appropriate.

The right to submit a subsequent application

Article 32 APD refers to both 'further representations' and 'subsequent applications'. Neither of the terms is explicitly defined by the APD and, therefore, the definitions applied in Member States depend on national legislation.

Article 32 (1) APD is a permissive clause according to which Member States *may* examine further representations or the elements of a subsequent application submitted by an applicant in the same Member State. This may be either in *"the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework"*.

Moreover or alternatively, Member States *may* apply a specific procedure for the preliminary examination of subsequent applications.¹⁴ Such a procedure may be applied in the event of the previous application having been withdrawn or abandoned by virtue of Articles 19 and 20 APD,¹⁵ and/or after a decision or a final decision has been taken on the previous application.¹⁶

¹² 1995: 23.4%; 1996: 22.0%; 1997: 31.2%; 1998: 33.2%; 1999: 31.2 %; 2000: 33.2%; 2001: 25.4%; 2002: 22.2%; 2003: 25.5%; 2004: 29.0%; 2005: 32.6%; 2006: 30.1%; 2007: 36.8%; 2008: 21.2%; 2009: 16.3%. (BAMF supplement to "Entscheiderbrief" 2/2010; "Aus der Geschäftsstatistik des Bundesamtes für das Jahr 2009"; p. 1; published on 11 February 2010; available on www.bamf.de.) While in 2008, 5,933 subsequent applications were lodged, there was a decrease of 9.3% during the same period in 2009 (Jan. to Dec.) when 5,384 follow-up applications were made. Comparative figures for the months of November and December 2009 show a decline in the number of subsequent applications from 398 to 344, i.e. a decrease of 13.6 %. (BAMF brochure "Aktuelle Zahlen zu Asyl", p. 2; published on 21 January 2010; available on www.bamf.de.)

¹³ This refers to cases in which a final decision has been taken on the withdrawal of international protection. The examination of applications in the procedure for subsequent applications after a previous revocation of refugee status is not actually encompassed by the wording of Section 71 (1) 1 APA ("withdrawal," "non-appealable rejection").

¹⁴ Article 32 (2) APD

¹⁵ Article 32 (2) (a) APD

¹⁶ Article 32 (2) (b) APD states that such a specific procedure may be applied where the subsequent application is submitted *"after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken."* According to Article 2 of the APD a *"final decision" means a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive"*. Chapter V of the APD sets out the provisions on appeal procedures and Article 39 of Chapter V stipulates the right to an effective remedy.

As such, neither Article 32 (1) nor (2) APD explicitly requires Member States to examine any further representations or a subsequent application submitted by an applicant. Nevertheless, as Member States are obliged under international law to ensure that applicants are not sent to a country in breach of the principle of *non-refoulement* or in breach of their legal obligations under international human rights treaties, Member States should ensure that a requirement to examine further representations and subsequent applications is stipulated in national legislation.

UNHCR's research has found that all the Member States surveyed for this research have legislation which allows an applicant to submit further representations or a subsequent application in particular circumstances. This is the case in Belgium,¹⁷ Bulgaria,¹⁸ the Czech Republic,¹⁹ Finland,²⁰ France,²¹ Germany,²² Greece,²³ Italy,²⁴

¹⁷ Article 51/8 of the Aliens Act stipulates that the minister or his authorized representative can decide not to take an asylum application into consideration when the foreigner, who has entered the country without fulfilling the necessary entry requirements, has already made the same application and he does not produce new elements containing significant indications for a well-founded fear of persecution as defined in the 1951 Convention, or containing significant indications of a real risk of serious harm warranting subsidiary protection. These new elements must relate to facts or situations that have taken place after the last phase in the procedure where the applicant could have produced them. The minister or his authorized representative must however take the asylum application into consideration when applicant has been notified earlier of a refusal decision which was taken based on article 52, § 2, 3^o, 4^o and 5^o, § 3, 3^o, § 4, 3^o or article 57/10. Only an appeal for annulment at the CALL can be lodged against a decision not to consider a subsequent application. A request for suspension of this decision cannot be lodged.

¹⁸ LAR provides a legal definition of the term 'subsequent application' in its Additional Provisions, Paragraph 1, item 6: "*Subsequent application* shall mean an application for status in the Republic of Bulgaria which was submitted by an alien whose refugee or humanitarian status has been revoked or discontinued or in case the status determination procedure in the Republic of Bulgaria has ended with an effective decision." There is no special procedure for subsequent applications and they are usually transferred into the standard accelerated procedure under Article 68 LAR. (Amended, SG No. 52/2007) "(1) An accelerated procedure shall be launched: ... 3. upon the registration of an alien who has submitted a subsequent status application." The exception is for subsequent applications by unaccompanied minors which are admitted directly to the regular procedure (Article 71(1), Article 72 (2), item 3 LAR), and this is also the case for beneficiaries of temporary protection (Article 71 (2) LAR).

¹⁹ Section 10a (e) ASA according to which "*the application is inadmissible e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien.*"

²⁰ Section 102 of the Aliens' Act states: "(1) A subsequent application means an application for international protection filed by an alien after his or her previous application was rejected by the Finnish Immigration Service or an administrative court while he or she still resides in the country, or if he or she has left the country for a short time after his or her application was rejected. (2) If a new application is filed while the matter is still being processed, the information given by the applicant is submitted to the authorities processing the matter to be considered as a new statement in the matter. (3) A decision on a subsequent application may be issued without an asylum interview."

²¹ Article R.723-3 *Ceseda*, Article R.742-1 *Ceseda* and the Circular of 22 April 2005.

²² Section 71 (1) APA in conjunction with Section 51 (1) to (3) Administrative Procedure Act.

Section 71 (1) APA: "*If, after the withdrawal or non-appealable rejection of a previous asylum application, the foreigner files a new asylum application (follow-up application), a new asylum procedure shall be conducted only if the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are met; this shall be examined by the Federal Office. The same shall apply to a child's application for asylum if the representative under Section 14a (3) has waived the processing of the asylum application.*"

Section 51 (1) to (3) Administrative Procedure Act: "(1) The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when: 1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected; 2. new evidence is produced which would have meant a more favourable decision for the person affected; 3. there are grounds for resumption of proceedings under section 58o of the Code of Civil Procedure. (2) An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy."

²³ Article 23 of PD/2008.

²⁴ Article 29 (b) of the d.lgs 25/2008.

the Netherlands,²⁵ Slovenia,²⁶ Spain²⁷ and the United Kingdom. However, bearing in mind the fact that Article 32 APD contains permissive clauses, UNHCR's research revealed that practice among these states varies significantly with regard to the conduct of the preliminary examination of subsequent applications, including the opportunity for a personal interview, the information provided to applicants and other procedural guarantees enjoyed by applicants. The section below provides a snapshot of practice in the different states surveyed and some common themes identified.

Recommendation

The APD should be amended to stipulate that Member States shall examine further representations or the elements of a subsequent application in order to ensure compliance with Member States' legal obligations under international refugee and human rights law.

Examination in the framework of the examination of the previous application

Article 32 (1) APD stipulates:

“Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application ... insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.”

25 The Netherlands has transposed Article 32 APD in its national law, regulations and administrative provisions by means of Article 4:6 General Administrative Law Act (*Algemene wet bestuursrecht*). The policy regarding subsequent applications is found in C14/5 Aliens Circular and in IND working instruction 2006/27 of 22 November 2006 on the application of Article 4.6 General Administrative Law Act.

26 Article 56 IPA (filing a new application): “(1) A third country national or a stateless person whose application in the Republic of Slovenia has already been finally rejected, or has explicitly withdrawn the application, may file a new one only if he/she submits new evidence proving that he/she meets the conditions for acquiring international protection under this Act. (2) The new evidence shall occur after the issue of a preliminary decision, or may have existed already during the first procedure, although the person referred to in the preceding paragraph did not enforce these due to justified reasons.” Article 57 IPA (procedure for filing a new application): “(1) The persons referred to in the first paragraph of the preceding Article shall file a request with the competent authority for the introduction of a new procedure. In such request, the person shall produce evidence justifying the procedure. Filing of the request shall, *mutatis mutandis*, be subject to the provisions of Articles 47 and 48 of this Act. The applicants shall enjoy all basic procedural guarantees referred to in Article 8 of this Act. (2) If a legal representative, after issuing a request for the initiation of a new procedure, files the first application for a child born in the Republic of Slovenia, such an application shall be considered as the application referred to in the preceding paragraph. (3) A request for the introduction of a new procedure shall be decided by the competent authority with a decision. Upon the competent authority's establishment that the conditions referred to in the second paragraph of the preceding Article are met, the competent authority shall permit a new application to be submitted and shall act pursuant to Article 43 of this Act. (3) Otherwise, it shall reject the request for the introduction of a new procedure with a decision. (4) If a request for the introduction of a new procedure is filed the person referred to in the first paragraph of the preceding Article, on the basis of a decision by the police issued on the basis of the provisions of the Aliens Act, shall be accommodated by the authority, responsible for deportation. (5) If the person referred to in the first paragraph of the preceding Article withdraws the request for the introduction of a new procedure prior to the decision taken by the competent authority, the procedure shall be closed with a decision. (6) The person referred to in the first paragraph of the preceding Article shall become an applicant under this Act from the day of filing a complete new application.”

27 There is no restriction on the possibility to present subsequent applications. Articles 9 AL and 38 ALR provided for the possibility to request a re-examination of an application upon which a negative decision in the regular procedure had already been adopted (this excluded applications that had been considered inadmissible). With the New Asylum Law, this possibility has disappeared and it remains only for those applications that were decided upon before the entry into force of the New Asylum Law.

Of the 12 Member States surveyed for this research, the only state which might be considered to examine further representations in the framework of the examination of the previous application, after a decision has been taken on the previous application, is the UK.

The UK transposition note with regard to the APD states that the UK is not establishing the kind of specific procedure for a preliminary examination of subsequent applications referred to in Articles 32 (2) to (4) and (7) APD,²⁸ although national legislation and immigration rules appear to contain many of the elements of a specific procedure for subsequent applications.²⁹ The UK immigration rules speak of “further submissions” rather than “further representations” or “a subsequent application”. The rules on further submissions will only be applied following a final negative decision on the previous application (when all appeal remedies have been exhausted)³⁰ or withdrawal of a previous application. By way of an exception, applicants who have had their previous application certified as clearly unfounded under the Nationality, Immigration and Asylum Act,³¹ and therefore, only have an out-of-country right of appeal, may nonetheless make further submissions prior to removal which must be considered in line with the national criteria.³²

If an applicant makes further submissions in the UK, the material will be considered by the determining authority. The determining authority may, on the basis of an examination, take a decision to grant a protection status or leave to remain on other grounds. On the other hand, if the determining authority considers that the further submissions do not warrant a grant of leave and it upholds its previous negative decision on the previous asylum application, the determining authority will then determine whether the material put forward in the further submissions amount to a “fresh claim”.³³ If the determining authority decides that the further submissions amount to a fresh claim, the applicant ordinarily has a right to appeal the decision to refuse the fresh claim.³⁴ In other words, it is possible that having examined the further submissions, the determining authority upholds its previous negative decision on the application, but then nevertheless determines that the further submissions amount to a fresh claim. If the determining authority determines that the further submissions do not amount to a fresh claim, the applicant does not have a right to appeal to the Asylum and Immigration Tribunal (AIT).³⁵

²⁸ See Explanatory Memorandum to the Asylum Procedures (Regulations 2007: SI 2007 No. 3187).

²⁹ Immigration Rules 353 and 353A, together with NIAA 2002 s 96.

³⁰ The API on *Further Submissions* states that if it has not been possible to raise the new material during the course of the appeal for any reason, the case owner of the determining authority should consider it after the conclusion of the appeal and apply Rule 353 on fresh claims (subsequent applications).

³¹ S. 94

³² *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6.

³³ Paragraph 353 and 353A of the UK Immigration Rules: *Fresh Claims* 353. *When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim.* The criteria for a fresh claim are considered below.

³⁴ This is because the decision to refuse a fresh claim is regarded as an ‘immigration decision’. Only ‘immigration decisions’ ordinarily attract a right of appeal in accordance with the Nationality, Immigration and Asylum Act 2002 s 82 (1). However, if the determining authority certifies that the submissions could have been raised in an earlier appeal, then there is no right of appeal against the refusal of the fresh claim in accordance with the Nationality, Immigration and Asylum Act s 96(1) and 2.

³⁵ This is due to the fact that the further submissions are considered not to constitute a fresh claim and the decision of the determining authority to uphold its previous negative decision on the previous application does not constitute an ‘immigration decision’ under the Nationality, Immigration and Asylum Act.

This procedural construct is the opposite of the specific procedure foreseen in the APD, whereby first a preliminary examination is conducted to determine whether the further representations or subsequent application constitute new elements or findings, and if so, then the determining authority further examines the subsequent application.³⁶ In the UK, the determining authority first examines the further submissions and, only if rejected, does the determining authority then determine whether the further submissions constitute a fresh claim for the purpose of determining whether the applicant has a right of appeal. The UK's curious approach appears motivated by a desire to deny a right of appeal to applicants whose further submissions are considered not to constitute a fresh claim. Information on the criteria for a fresh claim and on the right of appeal is further discussed in the sub-sections below.

It is also perhaps worth noting that, in Italy, an applicant may request that the determining authority re-open the previous procedure or the determining authority may itself decide to re-open a previous procedure, by virtue of the power of *autotutela*, in the case of, for example, a returnee under the Dublin II Regulation.³⁷

Examination in the framework of an appeal

The APD also provides that Member States may examine further representations or the elements of a subsequent application “*in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.*”³⁸

In practice, it must be borne in mind that, as is discussed in section 16 of this report on the right to an effective remedy, short time limits within which to lodge an appeal and general procedural rules governing the admissibility of evidence on appeal may preclude the introduction of new elements or findings in this framework. The above-mentioned provision would not, therefore, be applicable.

³⁶ Article 32 (3) APD: *A subsequent application for asylum shall be subject **first** to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2 (b) of this Article on this application has been reached, **new elements or findings** relating to the examination ... **have arisen or have been presented by the applicant.***

³⁷ In *via di autotutela* legally means to “put the matter right without legal process”.

³⁸ Article 32 (1) APD.

In some of the Member States surveyed, such further representations or new elements can be submitted to and examined by the appellate body. This is the case in Bulgaria,³⁹ Finland,⁴⁰ France,⁴¹ Germany,⁴² Italy⁴³ and the UK.⁴⁴

However, in some Member States, conditions or restrictions are placed on the admissibility of new elements or evidence on appeal which may mean that this is not an option for the applicant. This is the case in Belgium,⁴⁵ the Netherlands⁴⁶ and Slovenia.⁴⁷ Moreover, in Greece, the only appellate body is the Council of State which only has jurisdiction to review the legality of the determining authority's decision and not the facts.

By way of example, in Belgium, the appellate body (CALL) is required to consider new elements subject to three cumulative conditions: firstly, the new elements must be linked to the original petition for international protection; secondly, the new elements are such that they can establish in a firm manner the founded or unfounded character of the appeal; and thirdly, the applicant was not able to invoke these elements earlier in the administrative procedure.⁴⁸ However, these formalistic requirements have been given a less strict interpretation by the

39 Article 171 (2) APC. The judges interviewed by UNHCR were unanimous that such new facts or elements would be taken into consideration as all facts which are submitted up until the oral hearings must be taken into consideration. However, the judicial instance may not decide on the merits of the case and it shall be returned to the determining authority SAR for a review of the decision.

40 *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009) section 102. If a decision on the first application has been appealed to the Helsinki District Administrative Court or to the Supreme Administrative Court and a subsequent application is filed during the course of the processing of the appeal, the claims in the subsequent application will be treated as new elements in the proceedings before the appellate organ. The appellate organs of the Finnish asylum procedure are not restricted in any manner when it comes to the processing of new facts or evidence in the procedure.

41 The only restriction is that new evidence has to be submitted at least 3 days before the hearing, if any.

42 New elements and findings established before the decision has become final primarily have to be presented in an appeal. Section 51 (2) Administrative Procedure Act: "*An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy.*" The internal guidelines of the determining authority (BAMF) contain detailed information on how to proceed with subsequent applications lodged while the appeals procedure is still ongoing. (Different case scenarios are explained, for example, submission of an application to the BAMF before/after the oral hearing at court; applications in cases in which the BAMF is of the opinion that the appeal is inadmissible.) Section 77 (1) APA: "*In disputes resulting from this Act, the court shall base its decision on the factual and legal situation at the time of the last oral proceedings; if the decision is taken without oral proceedings, it shall be based on the situation at the time the decision is taken.* Section 74 (2), second sentence shall remain unaffected." According to Section 74 (1) APA, as a rule, the appeal can only be filed within two weeks from the day on which the decision was served. The deadline for filing an appeal is only one week, where it is provided in the law that a request for suspensive effect must be submitted within one week. In all cases, the reasoning for the appeal has to be submitted within a deadline of one month from the date on which the decision was served (Section 74 (2) APA). (Modified deadlines apply in case of a rejection as manifestly unfounded and the denial of entry in the airport procedure (Section 18 (4) APA).) However, the court may preclude facts and evidence not presented in the reasoning of the appeal within the one-month deadline if their admission would delay the procedure, and there are not sufficient grounds to excuse the delayed submission, and the applicant was informed of the consequences of failing to meet the deadline (Section 74 (2) 2 APA in conjunction with Section 87b (3) Code of Administrative Courts Procedure). In contrast, facts which become known only after the expiry of this deadline may be submitted later on without specific limitations (Section 74 (2) 4 APA). Section 36 (4) 2, 3 APA, applying in cases of irrelevant and manifestly unfounded applications, stipulates: "*Facts and evidence not stated by the persons involved shall not be considered unless they are obvious or known to the court. The introduction of facts and evidence which were not considered in the administrative procedure pursuant to Section 25 (3) and facts and circumstances within the meaning of Section 25 (2), which the foreigner did not produce in the administrative procedure may be left unconsidered by the court if the decision would otherwise be delayed.*" Section 25 (2) and (3) APA: "*(2) The foreigner shall relate all other facts or circumstances which preclude deportation or deportation to a specific country. (3) If the foreigner produces such facts only at a later stage [i.e. after the personal interview], they may be ignored if the decision of the Federal Office would otherwise be delayed. The foreigner shall be informed of this provision and of Section 36 (4) third sentence.*" Other possibilities to achieve a modification of the decision pursuant to the general administrative laws will not be further discussed in the framework of this chapter.

43 Article 35 (10) of the d.lgs. 25/2008.

44 The Asylum and Immigration Tribunal is able legally to consider new elements or findings that have not been examined by the Secretary of State (Nationality Immigration and Asylum Act 2002 s 85(4)).

45 This is governed by criteria laid down in Article 39/76 of the Aliens Act.

46 Article 83 of the Aliens Act 2000.

47 Article 52 of the Administrative Dispute Act, 1 January 2007.

48 Article 39/76 of the Aliens Act. This further defines "new elements" as follows: "*(1) elements regarding facts or situations which have occurred after the last phase in the administrative procedure during which the applicant could have invoked them, or (2) all new elements or proof supporting facts or reasons which were already brought forth during the administrative procedure.*"

Constitutional Court,⁴⁹ although this has in turn been brought into question by a further ruling in another case.⁵⁰ Moreover, stakeholders interviewed by UNHCR indicated that there is a difference in the treatment of new elements between the French-speaking and the Flemish-speaking sections of the CALL, whereby the French-speaking chambers seem more inclined to put formalistic conditions aside and address the content of the new elements. One unfortunate consequence identified by this research is that this legal uncertainty has prompted some lawyers to advise their clients not to raise new elements at appeal but instead to withhold them for a subsequent application, for fear of otherwise “burning” this evidence. This is clearly not conducive to an efficient streamlining of the procedure.

Similarly, in the Netherlands, there are significant restrictions and strict conditions placed on the submission of additional or new evidence to the District Courts. The District Courts do not accept additional oral or documentary evidence which relates to circumstances which occurred before the determining authority took its decision.⁵¹ The court will take into account facts and circumstances that have arisen subsequent to the first instance decision, unless this violates the principle of due process or unless the completion of the case will be delayed disproportionately.⁵² With regard to the question of whether there are such facts and circumstances, the same criteria to establish the ‘newness’ of these elements are used as the criteria under Article 4:6 General Administrative Law Act. This has led to jurisprudence stating that it is up to the applicant to decide whether s/he wants to present any new elements in the framework of an appeal or to file a subsequent application.⁵³

The option either to pursue a legal remedy on appeal or to submit a subsequent application does not arise in the UK, as applicants with an exercisable right of appeal must, in accordance with administrative guidelines, raise any new evidence or elements in the framework of the appeal.⁵⁴ As mentioned above, no restrictions are imposed on the admissibility of new evidence or elements to the appellate authority. However, applicants who have had their initial application certified as clearly unfounded under the Nationality, Immigration and Asylum Act 1999 and have an out-of-country right of appeal may nonetheless make further submissions prior to removal without having to exhaust their appeal remedy.

In this regard, it should be noted that Article 32 (6) APD states that “*Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations ... in the previous procedure, in particular by exercising his/her right to an effective remedy*”. UNHCR stresses that the implementation of such a procedural bar may lead to a potential breach of the Member State’s *non-refoulement* and human rights obligations. It has been stated that it is “*doubtful if it could validly prevent the*

49 GWH 27 May 2008, nr. 81/2008, B.29.1-B.30. The Court stated that the CALL must examine each new element that the applicant introduces and which is of such nature that it can show, in a firm way, the well-founded character of the appeal.

50 30 October 2008, nr. 148/2008, B.6.5. This ruling by the Constitutional Court appeared to re-introduce a requirement that the requesting party must give a plausible explanation of why it did not communicate the new elements earlier in the procedure. CALL judges interviewed by UNHCR, however, indicated that their approach remained flexible where the new element was of significant importance.

51 See section 16 of this report on the right to an effective remedy for further details.

52 Article 83 Aliens Act reads: “1. *In assessing an application for judicial review, the District Court may take into account facts and circumstances that have occurred since the disputed order was made, unless this would be contrary to due process of law or the examination of the case would as a result be delayed to an unacceptable extent.* 2. *The power referred to in subsection 1 shall exist only in so far as the facts and circumstances may be relevant to the decision on the residence permit referred to in Articles 28 and 33.* 3. *The District Court shall request the Minister to inform the opposing party and the Court in writing as quickly as possible whether the facts and circumstances that have been invoked are grounds for upholding, altering or revising the disputed order.*”

53 See Council of State, 12 May 2003, 200103069/1.

54 If the applicant raises new material after his/her asylum application has been refused, but before the appeal is heard, the *API Further Submissions* state that the applicant should raise this material in the context of the appeal and Rule 353 should not be applied. In fact, if further submissions are made and after an initial consideration they are refused but meet the national criteria of a “fresh claim”, there will be no right of appeal to the Tribunal if the Secretary of State certifies that the applicant could have raised the evidence or issues in an earlier appeal: Nationality, Immigration and Asylum Act 2002, s96. The only recourse is judicial review.

making of a fresh application even where the claimant ought to have brought forward the material now relied on at an earlier stage”.⁵⁵ However, UNHCR’s research has found similar clauses in Member States’ national legislation, for example, the Czech Republic.⁵⁶

Recommendation

Member States should not automatically refuse to examine a subsequent application on the ground that the new elements or findings could have been raised in the previous procedure or on appeal. Such a procedural bar may lead to a breach of Member State’s *non-refoulement* and human rights treaty obligations.

Examination in the framework of a specific procedure for the preliminary examination of subsequent applications

Article 24 (1) (a) APD states that Member States may provide for a specific procedure for the preliminary examination of subsequent applications.⁵⁷ Article 32 (2) APD states that this procedure may be applied where a person makes a subsequent application for asylum:

- (a) after his/her previous application has been withdrawn or abandoned;
- (b) after a decision has been taken on the previous application or only after a final decision has been taken on the previous application i.e. all legal remedies with regard to the previous application have been exhausted.⁵⁸

The purpose of the preliminary examination is to determine whether, after the withdrawal of the previous application or after the (final) decision on the previous application, new elements or findings relating to the examination of whether the applicant qualifies as a refugee have arisen or have been presented by the applicant.⁵⁹ UNHCR notes that in those Member States which operate a single procedure for the determination of both refugee and subsidiary protection status, such a preliminary examination should also assess whether new elements or findings relating to the examination of whether the applicant qualifies for subsidiary protection status have arisen or have been presented by the applicant.

It must be underlined that Article 24 (1) (a) and Article 32 (2) APD are permissive and Member States are not required to establish a specific procedure for the preliminary examination of subsequent applications. However, where a specific procedure is applied, Article 32 (3) APD stipulates that a “*subsequent application for asylum shall be subject first to a preliminary examination*” as to whether new elements or findings exist.

55 See ‘A Manual for Refugee Law Judges relating to European Council Qualification Directive 2004/83/EC and European Council Procedures Directive 2005/85/EC’, John Barnes, 2007 at p.76.

56 Section 10a ASA states that the non-examination of the new facts or findings in the previous procedure must not be due to the alien.

57 Article 24 APD deals with specific procedures which may derogate from the basic principles and guarantees of Chapter II APD.

58 A “final decision” is defined in Article 2 (d) APD as “a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive [on appeals] irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome”.

59 Art. 32 (3) APD.

UNHCR's research has found that six of the 12 Member States surveyed conduct a specific procedure for the preliminary examination of subsequent applications: Belgium,⁶⁰ Germany,⁶¹ Greece,⁶² the Netherlands,⁶³ Slovenia⁶⁴ and Spain.⁶⁵ In Germany⁶⁶ and Slovenia,⁶⁷ this specific procedure is only applied to subsequent applications made following a final decision on the previous application (when all appeal remedies have been exhausted or expired) or following withdrawal of the application.⁶⁸

In contrast, UNHCR's research has found that in Bulgaria,⁶⁹ the Czech Republic,⁷⁰ Finland, France⁷¹ and Italy,⁷² there is no specific procedure. Instead, the preliminary examination is conducted by the determining authority as an initial step or phase of the normal procedures. Also, in Spain, if the applicant has exhausted all his/her legal remedies with regard to the previous application, so that the decision on that previous application is final or if the application was declared inadmissible, a subsequent application will be examined within the normal admissibility procedure which is applied to all applications.⁷³ Similarly, in Bulgaria,⁷⁴ Czech Republic,⁷⁵ Finland⁷⁶ and France,⁷⁷ a subsequent application can only be submitted following a final decision on the previous application.⁷⁸ In Italy, by contrast, a subsequent application may be submitted after the decision of the determining authority on the previous application has been issued.⁷⁹

60 Article 51/8 of the Aliens Act.

61 In particular Section 71 (3) APA: *"In the follow-up application the foreigner shall give his address as well as the facts and evidence to fulfil the conditions listed in Section 51 (1) to (3) of the Administrative Procedure Act. The foreigner shall provide this information in writing upon request. A hearing may be dispensed with. Section 10 above shall apply mutatis mutandis."*

62 Article 23 of PD 90/2008.

63 Article 4:6 General Administrative Law Act provides that: *"1. If a new application is made after an administrative decision has been made rejecting the whole or part of an application, the applicant shall state new facts that have emerged or circumstances that have altered; 2. If no new facts or changed circumstances are put forward, the administrative authority may, without applying Article 4:5, reject the application by referring to its administrative decision rejecting the previous application."*

64 Article 57 IPA (procedure for filing a new application).

65 At the time of UNHCR's research, Article 9 AL and Article 38 ALR provided for a re-examination procedure. The procedure was applied after a decision had been taken by the determining authority on the previous application, but appeal remedies had not been exhausted. With the entry into force of the New Asylum Law, the re-examination procedure has been abolished and at the time of writing is only applied to applicants who lodged their applications prior to the entry into force of the New Asylum Law on 20/11/2009.

66 Section 71 (1) 1st sentence APA: *"(1) If, after the withdrawal or non-appealable rejection of a previous asylum application, the foreigner files a new asylum application (follow-up application), a new asylum procedure shall be conducted only if the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are met; this shall be examined by the Federal Office."*

67 Article 56 IPA states that the previous application must have been *"finally rejected"* or *"explicitly withdrawn"*.

68 Note that with regard to Slovenia, this refers to explicit withdrawal only. German legislation foresees the possibility of submitting a subsequent application only after the (explicit as well as implicit) withdrawal or non-appealable rejection of a previous asylum application.

69 In Bulgaria, subsequent applications are usually decided upon in the accelerated procedure. However, the interview is based on a specific sample questionnaire which differs from that used for the interview of first-time applicants in the accelerated procedure. This sample is focused entirely on eliciting any new elements.

70 Section 10a ASA: *"The application for international protection shall be inadmissible (...) e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection on which a final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien"*.

71 Article R.723-3 *Ceseda*, Article R.742-1 *Ceseda* and the Circular of 22 April 2005.

72 Article 29 (b) of the d.lgs. 25/2008. A preliminary examination is conducted in the framework of the admissibility procedure. If the determining authority considers that there are new elements or findings, the examination is conducted in the ordinary procedure. If new elements or findings are not established, the application is declared inadmissible without a personal interview of the applicant.

73 This is not an explicit legal provision but the law does not provide for any other alternative.

74 Additional Provisions, Paragraph 1, item 6 LAR: *"'Subsequent application' shall mean an application for status in the Republic of Bulgaria which was submitted by an alien whose refugee or humanitarian status has been revoked or discontinued or in case the status determination procedure in the Republic of Bulgaria has ended with an effective decision."* The decision becomes effective when it is no longer subject to a remedy on appeal, or after the court has rejected the appeal, or the time limit for appeal has lapsed. In cases of revoked or discontinued protection status, it is not explicit in the text whether the decision of SAR must be final.

75 Section 10a ASA.

76 Section 102 (2) of the Aliens Act.

77 Article R.723-3

78 Article 2 (d) APD defines a *'final decision'* as one which is no longer subject to a remedy on appeal.

79 Article 29 (b) d.lgs. 25/2008. A subsequent application may be submitted after a decision has been issued by the determining authority.

The approaches taken by the Member States surveyed to the preliminary examination of subsequent applications are considered in more detail below.

Preliminary examination as a first stage within the normal procedures

As mentioned above, six of the twelve Member States surveyed, conduct the preliminary examination, as to whether a subsequent application raises new relevant elements or findings, as a first step within the normal asylum procedures. In two of these Member States, the preliminary examination is conducted within the assessment of admissibility which applies to all applications.⁸⁰ In Italy, the determining authority will conduct an assessment of admissibility if it is informed that the application is a subsequent application.⁸¹ In Bulgaria, the preliminary examination is conducted within the accelerated ‘filter’ procedure which applies to applications for international protection.⁸² In two Member States, it is conducted as part of the substantive examination in either the accelerated or regular procedures.⁸³ The various approaches are briefly outlined in the following paragraphs.

In Bulgaria, there are no legislative or administrative provisions explicitly requiring a specific procedure for the preliminary examination of subsequent applications. Upon registration, subsequent applications are admitted to the standard accelerated procedure in which all applications are examined.⁸⁴ The only exceptions being, as with first-time applications, subsequent applications submitted by unaccompanied minors⁸⁵ or beneficiaries of temporary protection⁸⁶ which are instead admitted directly into the general procedure. However, in practice, a consistent and particular approach is nonetheless taken to subsequent applications. The applicant is interviewed by the determining authority for approximately 15 minutes⁸⁷ and five standard questions are asked, which are provided in a sample interview form for subsequent applications.⁸⁸ If the applicant does not provide statements or present evidence of new circumstances regarding his/her personal circumstances or the country of origin, the subsequent application is rejected in the accelerated procedure as manifestly unfounded.⁸⁹ If, however, new significant circumstances are raised, the subsequent application is admitted to the general procedure for further examination.⁹⁰ This, therefore, constitutes a *de facto* preliminary examination.

⁸⁰ The Czech Republic and Spain.

⁸¹ It will also conduct such an examination of admissibility if it is informed that the applicant has already been recognised as a refugee by a state party to the 1951 Convention.

⁸² See section 9 of this report for further details on the accelerated procedure in Bulgaria.

⁸³ Finland and France.

⁸⁴ Article 68 LAR. (Amended, SG No. 52/2007) (1) An accelerated procedure shall be launched: ... 3. upon the registration of an alien who has submitted a subsequent status application. See section 9 of this report for further details.

⁸⁵ Article 71 (1), Article 72 (2), item 3 LAR.

⁸⁶ Article 71 (2) LAR.

⁸⁷ UNHCR observed three interviews involving subsequent applications. The duration was confirmed by stakeholders.

⁸⁸ A sample interview form is prepared for interviews following the provision of Article 76 (2) IRR (interview in the accelerated procedure). It includes the following questions: “1. Do you understand the interpretation by (name of the interpreter)? 2. Are there any impediments of health or psychological character as to the conduct of an interview in this moment? 3. Why do you not want to go back to your country of origin? Are there any new circumstances related to your personal situation or to your country of origin different from those you have already presented? 4. Do you have anything to add to what you have already said?” There is also one last question 5 on family status – to provide the names, current location and date of birth of spouses and children.

⁸⁹ Article 13 (1), item 5 LAR. “Refugee status or humanitarian status shall not be granted with respect to an alien whose application is manifestly unfounded, where conditions under article 8 (1) and (9) respectively, and article 9 (1), (6) and (8) are not met and ... 5. (new, SG No. 52/2007) he/she has submitted a subsequent application which does not include any new significant circumstances relevant to his/her personal situation or to his/her country of origin.” UNHCR audited 9 subsequent applications in the accelerated procedure which were rejected with reference to Art. 13 (1), item 5 LAR. One audited subsequent application concerned an applicant who was returned from Belgium under the Dublin II Regulation. The issue of the presentation of new elements was not raised and a positive decision was taken.

⁹⁰ The application will also be automatically submitted to the general procedure if no decision is taken in the accelerated procedure within the 3 day time limit: Article 70 (2) LAR.

In the Czech Republic, a subsequent application, like all applications, is firstly assessed by the determining authority with regard to its admissibility. A subsequent application will be considered inadmissible if the applicant *“repeatedly filed an application for granting of international protection without stating any new facts or findings, which were not, for reasons for which the alien is not to be blamed, examined as reasons for granting international protection in previously legally completed proceedings on international protection”*.⁹¹ In such circumstances, the subsequent application is dismissed as inadmissible and the procedure is discontinued.⁹² However, if the applicant presents new facts or findings and the failure to do so earlier, within the framework of the previous examination, was not due to the applicant, the application is further examined within the regular procedure. This assessment of admissibility, therefore, in fact constitutes a preliminary examination.

Likewise, in Italy, a subsequent application is firstly assessed by the determining authority with regard to its admissibility. A subsequent application will be considered inadmissible if *“the applicant has reiterated an identical application after a decision has been issued by the Commission itself [the determining authority] without alleging new elements concerning his/her personal conditions or the situation in his/her country of origin.”*⁹³ In such circumstances, in practice, instead of proceeding to the personal interview of the applicant, the determining authority issues an immediate decision of inadmissibility. If the applicant raises relevant new elements, the application is further examined in the regular procedure.

As in the Czech Republic, subsequent applications lodged in Spain, following a decision of inadmissibility or a final decision on a previous application examined in Spain,⁹⁴ are treated like all first-time applications and firstly assessed by the determining authority as to their admissibility. At the time of UNHCR’s research, one of the grounds upon which an application could be deemed inadmissible was that the *“application is identical to a previous one that has already been rejected in Spain, provided that no new circumstances have arisen in the country of origin that may have resulted in a substantial change in the merits of the application.”*⁹⁵ Thus, the previous application would be taken into account in examining the admissibility of the application.⁹⁶ In accordance with the New Asylum Law, an application can be declared inadmissible if *“the applicant presents a new application which is a mere reiteration of a previously rejected application in Spain, or if s/he presents a new application with different personal data, provided that no relevant new elements are raised with respect to his/her particular circumstances or to the situation in his/her country of origin.”*⁹⁷

Finnish legislation does not provide for a specific procedure for the preliminary examination of subsequent applications. Within the framework of the procedures which apply to all applications, the determining authority first assesses whether the subsequent application includes *“new grounds for staying in the country that would influence the decision”*.⁹⁸ If it considers that the application does not raise new grounds, the subsequent application is channelled into the accelerated procedure for further examination by the determining authority. A negative decision is issued in the accelerated procedure if no new elements are raised. This may be a decision that the application is manifestly unfounded if one of the grounds set out in national law apply.⁹⁹ If new elements are

91 Section 10a (e) ASA. This is a translation made by the Ministry of Interior.

92 Section 25 ASA

93 Article 29 d.lgs. 25/2008

94 Or if an applicant decided under the former law (Law 9/1994) to present a new application instead of a request for re-examination.

95 Article 5 (6) AL

96 UNHCR audited three case files in which subsequent applications were declared inadmissible under Article 5 (6) c). Cases Nr. 0203029, 0903061 and 0303063.

97 Article 20 (1) e)

98 *Ulkomalalaislaki* (Aliens’ Act 301/2004, as in force 29.4.2009) section 103.

99 Section 101 of the Aliens Act 301/2004. For example: no relevant grounds raised; applicant obviously intends to abuse the asylum procedure; deliberately giving false, misleading or deficient information on matters essential to the decision on the application; filing an application after a procedure for removing him or her from the country has begun.

raised, the application is channelled into the regular procedure for further examination by the determining authority. Thus, although the determining authority conducts a preliminary examination, its purpose is to determine in which procedure – accelerated or regular – the application is to be further examined.

In France, if following a final negative decision on a previous application, an applicant wishes to submit new elements in a subsequent application, s/he must, in the same way as first-time applicants, request a (new) temporary residence permit from the Prefecture of his or her domicile.¹⁰⁰ As discussed in greater detail in section 9 of this report, the Prefectures may refuse to issue a temporary residence permit if they consider that an applicant is from a safe country of origin, or the applicant constitutes a serious threat to public order or security, or the asylum application is deliberately fraudulent, or constitutes an abuse of the asylum procedures or is solely lodged to prevent a removal order which has been issued or is imminent.¹⁰¹ If the Prefecture issues a temporary residence permit, the application for international protection will be examined in the regular procedure by the determining authority. However, if the Prefecture refuses the application for a temporary residence permit on the grounds stated above, the application for international protection is channelled into the accelerated procedure (*procédure prioritaire*).

The Prefectures are not the determining authority and should not consider or examine the substance of any application, including subsequent applications. Guidelines were given to the *préfets* in a circular¹⁰² which recalls that the examination of the substance of the claim falls within the exclusive competence of the determining authority, OFPRA, and the CNDA which is the appeal body. Therefore, the Prefectures should not conduct a “preliminary examination” of the subsequent application to determine whether there are new findings or elements. This is the task of OFPRA. However, in practice, according to NGOs,¹⁰³ some Prefectures tend to request a new document, if possible official, from the applicant in order to register the new application. Moreover, Prefectures tend to consider that most subsequent applications constitute “*an abuse of the asylum procedures*” or have been “*solely lodged to prevent a removal order*” and therefore refuse to grant a temporary residence permit so that a significant number of subsequent applications are channelled into the accelerated procedure.¹⁰⁴ According to the above-mentioned circular, the assessment by the Prefectures of the abusive nature of an application should solely result from the administrative and procedural context of the application,¹⁰⁵ and should be applied on a case-by-case basis. The text adds that the use of the accelerated procedure should not be systematic and should take into account individual circumstances even in the case of subsequent applications. However, some Prefectures may question how they can assess whether a subsequent application is abusive without considering the new elements submitted.

If the Prefecture issues a temporary residence permit,¹⁰⁶ the applicant must submit his/her subsequent application to the determining authority OFPRA within eight days of receipt of the permit.¹⁰⁷ If the Prefecture does not issue a

¹⁰⁰ Article L.741-2 and Article R.741-1 *Ceseda*. Since 2007, the delivery of temporary residence permits is conducted on a regional basis (one prefecture does it for several *départements*). This was first experimented in some regions. Since 20 April 2009, it is applicable to the whole territory (except Paris and its region).

¹⁰¹ Article L.741-4--2° to 4° *Ceseda* (unofficial translation into English)

¹⁰² *Circulaire N° NOR : INT/D/05/00051/C du 22 avril 2005*.

¹⁰³ Cf. Report « *Les demandeurs d'asile sans papiers : les procédures Dublin II et prioritaires* », CFDA, avril 2006.

¹⁰⁴ In 2008, 82.6% of subsequent applications were examined in the accelerated procedure. 57% of all applications examined in the accelerated procedure were subsequent applications: 2008 OFPRA Report.

¹⁰⁵ For example, a short duration between the notification of the subsequent application and receipt of a previous refusal decision, or in the case of repetitive subsequent applications.

¹⁰⁶ According to Article R.742-1 *Ceseda*, its validity is limited to 15 days. This is a shorter period of validity as compared to first-time applicants who receive a permit valid for one month.

¹⁰⁷ Art. R723-3 *Ceseda*. This is a shorter time-frame than for first-time applicants who have 21 days within which to submit the application: Article R723-1 *Ceseda*.

temporary residence permit, the applicant has 15 days within which to submit the subsequent application to the Prefecture which forwards the application to OFPRA. Applicants whose subsequent applications are to be examined in the regular procedure, therefore, have less time within which to submit their application as compared to applicants who do not receive a temporary residence permit and whose application is to be examined in the accelerated procedure. There is a specific OFPRA form for subsequent applications which explicitly requires the applicant to submit new elements or findings. The preliminary examination, in the terms of the APD, is conducted by OFPRA as a first step within the context of either the accelerated or regular procedure depending on the decision of the Prefecture.

Specific procedures for the preliminary examination of subsequent applications

Six of the Member States surveyed operate a specific procedure for the preliminary examination of subsequent applications.

In Belgium, this specific procedure is not conducted by the determining authority (CGRA), but by the Aliens Office (AO).¹⁰⁸ The AO, in accordance with national law, examines whether the subsequent application:

- is not identical to the previous application;
- raises new elements containing significant indications of a well-founded fear of persecution or a real risk of serious harm;

and whether:

- these new elements relate to facts or circumstances which have taken place after the last phase of the procedure in which the applicant could have produced them.¹⁰⁹

If the AO considers that these conditions are fulfilled, it decides that the application should be further examined by the determining authority, and the latter and the applicant are informed accordingly. However, if the AO considers that the conditions are not fulfilled, it issues a negative decision to the applicant.¹¹⁰

In Germany, the decision whether to conduct another asylum procedure following a subsequent application is taken by the determining authority. With regard to the preconditions for further examination, German asylum law¹¹¹ refers to the general rules applicable in administrative law. Section 51 (1) Administrative Procedure Act¹¹² stipulates the criteria which must be fulfilled for the resumption of proceedings:

“The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:

- 1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected;*

¹⁰⁸ Also referred to as the Immigration Department (*Office des Etrangers/Dienst Vreemdelingenzaken*). See below for further information regarding the competence of the Aliens Office.

¹⁰⁹ Article 51/8 of the Aliens Act.

¹¹⁰ A negative decision is given in the form of an annex called an “*annex 13 quatre*”.

¹¹¹ Article 71 (1) Sentence 1 APA: “[...] a new asylum procedure shall be conducted only if the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are met [...]”.

¹¹² Translation provided by the MOI on its website: <http://www.en.bmi.bund.de>.

2. *new evidence is produced which would have meant a more favourable decision for the person affected;*
3. *there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure.*¹¹³

Section 51 (2) and (3) of the Administrative Procedure Act set further requirements for the resumption of proceedings which relate to the reasons why the elements or findings were not presented at an earlier stage, as well as the time limits for lodging a subsequent application.¹¹⁴

Legislation in Greece stipulates that a subsequent application will first be subject to a preliminary examination by the competent authority to determine whether the applicant has provided new substantial elements.¹¹⁵ The examination is conducted by the police and the decision is taken by the Director of the Police Directorate, which is the determining authority, where the subsequent application was submitted. If, following the preliminary examination, it is considered that new significant elements have been presented; the application is further examined by the determining authority. Otherwise, a negative decision is taken.

In the Netherlands, national legislation, regulations and administrative provisions provide that subsequent applications are subjected to a preliminary examination by the determining authority to determine whether the applicant has raised new facts that have emerged or circumstances that have altered.¹¹⁶ If the applicant does not raise new facts or circumstances, in accordance with criteria set out in law and regulations, the determining authority may reject the subsequent application by reference to its previous negative administrative decision on the previous application.¹¹⁷ If the determining authority considers that the applicant has raised new facts or circumstances and the application cannot be examined within 48 procedural hours, the application is submitted to the regular procedure for further examination.

In Slovenia, following a final negative decision or explicit withdrawal, an applicant can file a request with the determining authority asking that a new procedure is initiated. With the request, the applicant must submit new evidence demonstrating that s/he qualifies for international protection and that a new procedure is, therefore, justified.¹¹⁸ The determining authority will grant the request and permit a new application to be submitted if new evidence, according to stipulated criteria, is submitted. Otherwise, the determining authority will dismiss the request to initiate a new procedure.

At the time of UNHCR's research in Spain, according to the former law, an applicant, who had received a negative decision on his/her application for international protection in the first instance procedure (including a negative decision with regard to refugee status but a positive decision on subsidiary protection, but excluding a decision of inadmissibility) before appeal remedies had been exhausted, could request that the determining authority re-examine the application on the ground that the applicant could produce new evidence of his/her statements, or considered that the grounds for rejection had disappeared.¹¹⁹ The re-examination procedure included a pre-

¹¹³ Section 580 of the Code of Civil Procedure contains several grounds for the resumption of proceedings, *inter alia*, that the party concerned discovers another document or is enabled to use such a document which would have resulted in a more favorable decision for the person affected (No.7 b)).

¹¹⁴ Section 51 (2) and (3) Administrative Procedure Act read as follows: "(2) *An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of legal remedy.*

(3) *The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings.*"

¹¹⁵ Article 7 PD 81/09

¹¹⁶ Article 4:6 General Administrative Law Act, C14/5 Aliens Circular and the IND working instruction 2006/27 of 22 November 2006 on the application of Article 4:6 General Administrative Law Act.

¹¹⁷ Article 4:4 General Administrative Law Act

¹¹⁸ Article 57 IPA and Article 56 IPA.

¹¹⁹ Article 9 AL and Article 38 ALR

liminary examination by the determining authority to determine whether the information submitted justified re-examination under national law. This preliminary examination was conducted by the same official who examined the original application. It was decided solely on the basis of written submissions, and had to be decided within one month.¹²⁰ If a decision was made not to re-examine the application, then this decision had to be reasoned and notified to the applicant along with information on how to appeal.¹²¹ If the request for re-examination was accepted, then the application would be assessed in the same way as the initial application, with the exception of those procedural steps that had already been completed for the original application. No information was provided to applicants concerning the possibility to request a re-examination, and an interpreter would only be provided if the determining officer considered that an interview was required. In practice, this meant that if the applicant did not have a lawyer, then s/he was unlikely to know about this possibility or how to substantiate a request for re-examination. With the entry into force of the New Asylum Law, this procedure no longer exists and is only applied to applications that were lodged prior to the entry into force of the New Asylum Law on 20 November 2009.

Who conducts the preliminary examination?

Article 4 (1) of the APD stipulates that all Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications for international protection. However, in derogation, Article 4 (2) (c) APD states that Member States may provide that another authority is responsible for the purposes of conducting a preliminary examination of subsequent applications, “*provided this authority has access to the applicant’s file regarding the previous application*”; and provided that “*the personnel of such authorities have the appropriate knowledge or receive the necessary training to fulfil their obligations*”.¹²²

Article 4 (2) (c) APD is an optional provision. UNHCR notes that 11 out of the 12 Member States surveyed have not derogated from the requirement that the determining authority examine subsequent applications for international protection. In all these Member States, it is the determining authority which conducts the preliminary examination of subsequent applications.¹²³

The exception is Belgium. As mentioned above, it is the Aliens Office (AO) and not the determining authority (CGRA) which conducts the preliminary examination of subsequent applications. The decision to leave the AO with the competency to conduct the preliminary examination of subsequent applications has been very much criticized by NGOs and lawyers.

The AO must apply Article 51/8 of the Aliens Act and assess whether a subsequent application raises new elements which contain significant indications for a well-founded fear of persecution as defined in the 1951 Convention or contain significant indications of a real risk of serious harm warranting subsidiary protection status. This requires the personnel of the AO to compare the subsequent application with the previous application and the decision of the CGRA and, if any, the judgment of the appeal body (CALL). The AO requests the CGRA to forward the case file of the applicant for this purpose. Given the CGRA conducted the examination of the previous application, it is arguable that the determining authority is better placed to carry out this assessment. Moreover, the AO must determine whether any new elements may indeed be considered “new” in accordance with national law and, if so, whether these new elements constitute “significant indications” of persecution or serious harm. However, in light

¹²⁰ Article 38 (3) ALR

¹²¹ Article 38 (3) ALR

¹²² Article 4 (3) APD

¹²³ Bulgaria, the Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Slovenia, Spain and the UK. Note that with regard to the UK, the determining authority examines further submissions and if leave is refused, the determining authority determines whether the further submissions amount to a “fresh claim”. See above.

of the case law, the AO is not competent to assess the new elements in the framework of the 1951 Convention or legal provisions on subsidiary protection; or to evaluate the credibility of purported new elements as the AO has a purely administrative role.¹²⁴ According to NGOs and lawyers, this underlines the inappropriateness of the AO as the competent authority to conduct the preliminary examination of subsequent applications. The application of Article 51/8 of the Aliens Act requires that the examining authority is able to assess the new elements in the light of the 1951 Convention and subsidiary protection provisions, which the AO cannot. UNHCR is of the view that the notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object and purpose of the 1951 Convention and provisions on subsidiary protection. The AO must also evaluate up-to-date country of origin information, although it is the determining authority which monitors developments in countries and regions of origin. The AO asylum section informed UNHCR that it has regular briefing meetings (every two weeks) with the CGRA on the situation in certain regions and countries of origin.

This arrangement was stongly criticised by NGOs, who subsequently sought annulment of it on the grounds that it breached Article 8 (2) APD,¹²⁵ and was in violation of the non-discrimination principle (i.e. the principle of equal treatment presupposes that all protection claims be considered by the same body with sufficient knowledge and expertise to assess their relevance in deciding whether an individual should qualify for a protection status). However, the Constitutional Court has upheld the arrangement whereby the AO conducts the preliminary examination of subsequent applications as non-discriminatory.¹²⁶

UNHCR welcomes the fact that in the overwhelming majority of Member States surveyed, it is the determining authority which is tasked with the conduct of preliminary examinations. The determining authority would appear in most cases to be the body best placed to compare the basis of the subsequent application with the facts of the previous application, and to determine the significance of further representations with regard to the law and country of origin information.

Recommendation

UNHCR recommends that the determining authority should be responsible for conducting preliminary examinations of subsequent applications. Article 4 (2) (c) APD, permitting states to allocate the task to another authority, should be deleted.¹²⁷

Procedural safeguards accorded to the preliminary examination of subsequent applications

As mentioned above, a number of the Member States surveyed conduct the preliminary examination of subsequent applications within the normal first instance asylum procedures. Therefore, the procedural safeguards accorded to these procedures apply. These should include the basic principles and guarantees set out in Chapter II of the APD¹²⁸ and, as such, applicants should enjoy greater procedural safeguards than the minimum standards

¹²⁴ *RvS* 7 March 1997, nr. 65.692; *RvS* 11 July 2000, nr. 88.870, *RvV* 15 May 2008, nr. 11.217.

¹²⁵ Article 8 (2) APD sets out the requirements for the examination of applications.

¹²⁶ Decision of the Constitutional Court of 26 June 2008, *GWH* 26 June 2008, nr. 95/2008, B.70-B.74.

¹²⁷ Such deletion is suggested by the European Commission in proposed recast Article 4(3): APD Recast Proposal 2009.

¹²⁸ These relate to access to the procedure (Art. 6), the right to remain (Art. 7), the requirements for the examination of applications (Art. 8), requirements for a decision (Art. 9), guarantees for applicants (Art. 10), obligations of the applicants (Art. 11), the personal interview (Arts. 12, 13 & 14), right to and scope of legal assistance and representation (Arts. 15 & 16), guarantees for unaccompanied minors (Art. 17), detention (Art. 18), withdrawal (Arts. 19 & 20), the role of UNHCR (Art. 21) and the collection of information on individual cases (Art.22).

for the preliminary examination of subsequent applications set out under Article 34 APD. However, it is worth highlighting at this point, that Chapter II of the APD contains an optional but significant derogation from the right to the opportunity of a personal interview when the determining authority considers that a subsequent application does not raise any relevant new elements.¹²⁹

Some of the Member States surveyed conduct a specific procedure for the preliminary examination of subsequent applications and according to Article 24 (1) (a) APD, such specific procedures can derogate from the basic principles and guarantees of Chapter II APD but must be conducted within the framework set out in Section IV APD.

UNHCR has already stated its opposition to the derogation contained in Article 24 (1) (a) and can see no reason why safeguards and guarantees associated with due process should not apply to the preliminary examination of subsequent applications.¹³⁰

The minimum procedural rules for such specific procedures are outlined in Article 34 of Section IV APD. Under Article 34 (1) APD, Member States are required to ensure that an applicant whose subsequent application is subject to a preliminary examination enjoys the guarantees provided for in Article 10 (1) APD.¹³¹ Article 34 (2) APD allows Member States to lay down national rules for the conduct of the preliminary examination which may, amongst other things, “*oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure*”.¹³² Member States are expressly permitted to lay down time limits within which this information must be provided¹³³ and to conduct the examination on the sole basis of written submissions without a personal interview.¹³⁴

UNHCR is concerned that the APD, as currently formulated, expressly allows states to exclude an interview which, in practice, may prevent a proper examination of new reasons justifying protection. It is imperative that new elements submitted are examined fully and individually. Article 34 (2) (b) APD allowing states to lay down time limits is also particularly problematic, and its application would risk putting states in conflict with their *non refoulement* obligations under international law.

Recommendation

Basic procedural safeguards and guarantees should be available in the case of the preliminary examination of subsequent applications. The derogations permitted by Article 34 (2) could prevent the effective identification and consideration of a subsequent application which is based on new elements. In particular, the imposition of strict time limits for applicants to submit new material is problematic. Accordingly, Article 34 (2) (b) APD should be deleted.¹³⁵

¹²⁹ Article 12 (2) (c) APD. See subsection below and section 4 of this report for further information.

¹³⁰ UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005.

¹³¹ Namely, to be informed about the procedure in a language which they are reasonably supposed to understand (subsection a), to receive the services of an interpreter (subsection b), to communicate with UNHCR (subsection c), to be given reasonable notice of the decision (subsection d) and to be informed of the decision in a language which they are reasonably supposed to understand (subsection e).

¹³² Art. 34 (2) (a) APD

¹³³ Those rules may “*require submission of the new information by the applicant concerned within a time-limit after s/he obtained such information*”: Art. 34 (2) (b) APD.

¹³⁴ Article 34 (2) (c) APD.

¹³⁵ UNHCR notes in this connection that its deletion is proposed by the European Commission in its proposed recast article 36: European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)*, 21 October 2009, COM(2009) 554 final; 2009/0165 (COD).

Provision of information on the right to submit a subsequent application and the procedure for the preliminary examination of subsequent applications

Regardless of whether Member States conduct the preliminary examination of subsequent applications within the framework of the previous application, or as a first stage within the normal asylum procedures, or within a specific procedure, Member States must ensure that applicants are informed of the procedure to be followed including their rights, obligations, the time-frame, as well as the means at their disposal to submit all the necessary elements.¹³⁶ This information must be given in time to enable the applicant to exercise the rights guaranteed by the Directive and to comply with any obligations.¹³⁷ Furthermore, according to the APD, the information must be provided in a language which the applicant may reasonably be supposed to understand.¹³⁸ On this point, UNHCR would urge Member States to provide information in a language which *the applicant understands*.

UNHCR's research has found that, in practice in some Member States, information is provided to applicants on the possibility to make a subsequent application, as well as information on the preliminary examination and applicants' rights and duties. The extent of the information provided may however be limited; it may only be provided in writing within a brochure or on a website in a limited number of languages; or it may be provided only after the subsequent application has been filed. However, in other Member States, no information is provided, in apparent non-compliance with Article 34 (1) APD and Article 10 (1) (a) APD.

UNHCR has noted that some of the Member States surveyed have developed general information brochures for all applicants which include some information on subsequent applications. For example, in Belgium, all asylum seekers receive an information leaflet at the start of the procedure which has a small dedicated section on subsequent applications. Similarly, in France, a new information guide, which has been translated into six languages, has a specific section on subsequent applications describing the grounds upon which a subsequent application may be submitted, with the procedure and the time-frames.

However, in some Member States, the information provided in these brochures is very limited with regard to subsequent applications.

In Bulgaria, the 'Instructions' which applicants should receive immediately before registration only states that if an alien, who does not belong to a vulnerable group, files a subsequent application, s/he will not have the right to shelter, food and social assistance during the procedure.¹³⁹ It is only after an applicant files a subsequent application that s/he receives a specific information document.

In Germany, an information leaflet¹⁴⁰ is provided by the BAMF when an applicant actually files the subsequent application.¹⁴¹ This leaflet, which is available in almost 60 different languages, mainly contains "*Instructions to applicants submitting subsequent applications for asylum concerning their obligations and general notes relating*

¹³⁶ When the examination is carried out within the normal procedures, this is required by Article 10 (1) (a) APD. When the examination is conducted within the framework of a specific procedure, this is required by Article 34 (1) in conjunction with Article 10 (1) (a) APD.

¹³⁷ Article 10 (1) (a) APD.

¹³⁸ Article 10 (1) (a) APD.

¹³⁹ This is a rule stipulated in Article 29, paragraph. (5), item 1 LAR.

¹⁴⁰ The beginning of the English version of the leaflet states: "*Sir/Madam, You have submitted a subsequent application for asylum. [...]*". The BAMF flyer, "The German Asylum Procedure", solely mentions "follow-up applications" without any further explanation.

¹⁴¹ The practice of informing applicants when filing the subsequent application has been confirmed by the BAMF. In case the applicant shows up in person, s/he receives, *inter alia*, the aforementioned information on the procedure in writing; in case of a written application, the respective information is sent to the applicant. Further information on the specifics of this procedure might be given by the counseling services of NGOs.

to the asylum procedure.” Information on the criteria for a subsequent application is, however, very limited and generally worded.¹⁴²

The standard information sheet for all applicants in the Czech Republic states that a subsequent application will not be admissible unless it raises new facts which were not known to the applicant during the examination of the previous application. It does not, however, provide any further information and does not advise applicants that they may not be offered the opportunity of a personal interview. Similarly, the information brochure given to all applicants in Finland states, in the negative, that any “renewed” application for asylum will be denied if the applicant’s situation has not changed since the first application.¹⁴³ The brochure does not provide further information on the procedure or the applicant’s rights and obligations. In Slovenia, some information is provided in the brochure which is given to all applicants on arrival at the Asylum Home. It explains that a request for a repeat procedure must contain evidence proving change in significant circumstances since the previous procedure and explains that an applicant will be accommodated at a facility for the deportation of aliens, with restrictions on movement, pending a decision on the request.

General concerns relating to the translation and distribution of written information leaflets which were highlighted during UNHCR’s research are referred to in section 3 of this report. As discussed in that section, it is critical that Member States supplement the distribution of written brochures with the systematic provision of oral information to applicants. Even where a written brochure provides complete information on the examination of subsequent applications, the brochure may not be available in all the languages understood by applicants, some applicants may not understand the information contained therein, and some applicants may be illiterate. In a number of Member States, no information is provided orally.

In this regard, UNHCR welcomes the Finnish draft legislation¹⁴⁴ which explicitly states that the requirement to provide information to asylum seekers is applicable also in situations of subsequent applications.¹⁴⁵ Moreover, in practice, information on subsequent applications is provided orally (with interpretation) at information meetings held at reception centres by the NGO Refugee Advice Centre for all newly arrived asylum seekers in Finland.

In the Netherlands, there is no information about subsequent applications provided to applicants as part of the general information given at the start of the procedure. In practice, the determining authority relies on the appointed legal adviser to provide information on the possibility to submit a subsequent application and the procedures, as appropriate. However, the determining authority has a specific telephone line – the so-called HASA line – for applicants who wish to submit a subsequent application. The applicant is informed over the phone of the procedural actions s/he must take in order to submit a subsequent application.

¹⁴² “The decision of the Federal Office on your subsequent asylum application may be based on the facts, arguments and evidence already presented by you. [...] You must present the facts and evidence which are to justify carrying out a further asylum procedure and which were not submitted during the previous procedure. [...]”. The applicant is, however, informed of the fact that an interview may not take place.

¹⁴³ See page 2 of the brochure “Information to asylum seekers” available at <http://www.migri.fi/netcomm/content.asp?path=2484&language=EN> (visited 15.6.2009). This brochure is available in 10 languages.

¹⁴⁴ *Hallituksen esitys 86/2008* (Government Bill 86/2008) states explicitly in reference to the transposition of Article 10 of the APD into a new section 95 a of the *Ulkomaalaislaki* (Aliens Act 301/2004).

¹⁴⁵ *Hallituksen esitys 86/2008* (Government Bill 86/2008), 52. The new section 95 a reads: The applicant for international protection is informed about the asylum procedure and his rights and obligations in the procedure. The police or the border guards gives information to the applicant when he or she applies for asylum. Information can be given also by the Immigration Service or the reception centre as soon as possible after the application has been made. The information is given either in the mother tongue of the applicant or in a language he or she reasonable can be expected to understand.

In the UK, there is no mechanism to inform applicants of the possibility of making further submissions. Information on how to make further submissions is only provided for applicants on the determining authority's website.¹⁴⁶ Basic information is available on the website in 16 languages.¹⁴⁷ Moreover, since October 2009, applicants are required to make further submissions in person. Concern has been expressed by stakeholders in the UK that applicants may be unable to attend either the Further Submission Unit or their respective regional reporting centre due to either the costs involved or to their vulnerability.

According to stakeholders interviewed on this issue in Greece, Italy, and Spain, applicants are generally not informed of the possibility of submitting a subsequent application, or the grounds upon which such an application may be submitted. In practice this means that if the applicant does not receive legal advice from a lawyer or non-governmental organisation, then s/he is unlikely to know about the possibility to submit a subsequent application.

Recommendations

Member States should inform applicants in a language they understand of the possibility of submitting a subsequent application, stating clearly the circumstances in which and the grounds upon which a subsequent application may be made. This should take place at the time an applicant is notified of a negative first instance decision.

Member States must ensure that a person who wishes to make a subsequent application has an effective opportunity to lodge the application and obtain access to the procedure for the preliminary examination of the subsequent application.

Member States must ensure that applicants submitting subsequent applications are effectively informed in a language which they understand of the procedure to be followed; of their rights and obligations during the procedure; the possible consequences of not complying with their obligations and not cooperating with the authorities; and the time-frame, as well as the means at their disposal for fulfilling the obligation to submit new elements or findings. This information must be given in time to enable the applicant to exercise the rights guaranteed by the APD and to comply with any obligations.

Services of an interpreter

Member States are required to transpose and implement Article 10 (1) (b) APD on the provision of interpreter services during the preliminary examination of subsequent applications.¹⁴⁸ Article 10 (1) (b) APD provides that applicants “*shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary.*” However, the second sentence allows Member States to limit the provision of interpreter services to the personal interview when appropriate communication cannot be ensured without such services.¹⁴⁹ The implementation of this limitation could mean that applicants do not have the services of an interpreter in order to submit a subsequent application, and it would nullify the guarantee of the services of an interpreter in those Member States which omit the personal interview during the preliminary examination.

¹⁴⁶ <http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccessfulapplications/further-submissions/>

¹⁴⁷ As updated 13 October 2009 [Checked on 28 January 2010].

¹⁴⁸ This is required by Article 34 (1) APD with regard to specific procedures for the preliminary examination of subsequent applications.

¹⁴⁹ “*Member States shall consider it necessary to give these services at least when the determining authority calls upon the applicant to be interviewed ... and appropriate communication cannot be ensured without such services.*”

In some Member States, according to legislation and/or practice, interpreter services should be available for the submission of the subsequent application (Belgium,¹⁵⁰ Bulgaria,¹⁵¹ the Czech Republic,¹⁵² Finland,¹⁵³ Greece,¹⁵⁴ Italy,¹⁵⁵ the Netherlands,¹⁵⁶ Slovenia¹⁵⁷ and the UK).¹⁵⁸ In Germany, as a rule, written submissions can be made in a foreign language and are translated by the determining authority into German.¹⁵⁹ In case of the conduct of an interview,¹⁶⁰ an interpreter, provided for by the determining authority, will be present.¹⁶¹

However, in other surveyed countries, the state does not provide the services of an interpreter for the submission of the application. For example, in France, interpreter services are not provided for the submission of any application, including subsequent applications.

Without the services of an interpreter or a translator for the submission of the subsequent application, an applicant who does not know the language of the Member State, may be unable to make further representations or may be unable to fully substantiate the subsequent application. This is particularly significant in those Member States which may omit the personal interview, as highlighted below, and which insist that any documentary evidence submitted is in or translated into the language of the Member State.

With regard to the provision of interpreter services during personal interviews, it must again be noted that some Member States may omit the personal interview during the preliminary examination of subsequent applications.¹⁶² The reader is referred to section 5 of this report on the requirements for a personal interview which details further information and general concerns regarding the provision of interpreter services during personal interviews. During this research, no specific issues or concerns were raised with regard to interpreter services during the personal interviews of applicants of subsequent applications.

Recommendations

All applicants, including in cases of subsequent applications, should receive the services of an interpreter for submitting their application to the competent authorities whenever necessary. Applicants should be informed accordingly in advance of submitting an application.

UNHCR considers that the term “whenever necessary” used in Article 10 (1) (b) APD should be interpreted and applied broadly, to ensure effective communication in subsequent application cases.

¹⁵⁰ Article 51/4 Aliens Act and Article 14 of the Royal Decree of 11 July 2003 (asylum procedure at the AO).

¹⁵¹ Article 29 (1), item 7 LAR

¹⁵² Section 22 (1) ASA

¹⁵³ Article 10 of the Aliens Act.

¹⁵⁴ Articles 23 and 8 of PD 90/2008.

¹⁵⁵ Article 10 (4) of the d.lgs. 25/2008, which states that “*during all steps of the procedure related to the presentation and the examination of the application, if necessary, the applicant is granted the assistance of an interpreter of his/her language or a language he/she knows*”; the same principle is stated in Article 14 (2) of the d.P.R. 303/2004.

¹⁵⁶ C14/5 Aliens Circular

¹⁵⁷ Article 57 (1) IPA

¹⁵⁸ The determining authority informed UNHCR that applicants are required to submit a ‘further submissions’ application in person by appointment. An interpreter is available to assist when an applicant attends to submit the application if one is requested.

¹⁵⁹ Information submitted to UNHCR by the BAMF. The law (in particular Section 17 APA concerning interpreters) does not contain any further specification in this regard.

¹⁶⁰ This might be either an exploratory hearing in order to examine whether a further asylum procedure will be conducted or a personal interview in the formal sense.

¹⁶¹ In the leaflet, applicants are informed: “*The hearing will take place in the presence of an interpreter. You will have the right to call in a competent interpreter of your own choice, at your own expense.*”

¹⁶² See below.

Opportunity of a personal interview¹⁶³

The APD does not guarantee applicants of subsequent applications a personal interview during the preliminary examination.

When the preliminary examination is conducted within the framework of the normal asylum procedures, the basic principles and guarantees set out in Chapter II of the APD apply. Article 12 (1) of Chapter II APD establishes the guarantee that before a decision is taken by the determining authority, “*the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview*”. However, Article 12 (2) (c) APD permits derogation on specific grounds. With regard to subsequent applications, Article 12 (2) (c) APD in conjunction with Article 23 (4) (h) APD provides that the determining authority, on the basis of a complete examination of information provided by the applicant, may omit the personal interview when it considers the application to be unfounded because the applicant has submitted a subsequent application which does not raise any relevant new elements concerning his/her particular circumstances or the situation in his/her country of origin.

Moreover, Article 34 (2) (c) APD, which sets out the procedural rules for a specific procedure for subsequent applications, is explicit in permitting the preliminary examination to be conducted “*on the sole basis of written submissions without a personal interview*”.

UNHCR’s research shows that national legislation, regulations or administrative provisions provide for the possibility to omit the personal interview during the preliminary examination of subsequent applications in the following Member States surveyed:

	Be	Bg	Cz	De	Es ¹⁶⁴	Fi	Fr	Gr	It	Nl	Si	Uk
Personal interview may be omitted			√	√ ¹⁶⁵		√ ¹⁶⁶	√ ¹⁶⁷	√ ¹⁶⁸	√ ¹⁶⁹			√

UNHCR notes that in law and in practice, applicants submitting subsequent applications in Belgium, Bulgaria, the Netherlands, Slovenia and Spain¹⁷⁰ are given the opportunity of a personal interview in which to raise the new elements or findings in support of a new procedure.

¹⁶³ Note that this issue is considered more generally in section 4 of this report.

¹⁶⁴ Note that the personal interview is omitted during the preliminary examination in the re-examination procedure. The preliminary examination in the re-examination procedure in Spain is decided solely on the basis of written submissions, and must be decided within one month: Article 38 (3) ALR. However, following the entry into force of the New Asylum Law, the re-examination procedure has ceased to exist and is only applied to those applications lodged prior to the entry into force of the New Asylum Law on 29 November 2009. A personal interview is not omitted if a subsequent application is submitted as the formalization of the application takes place by means of an interview.

¹⁶⁵ Section 71 (3) 3rd sentence: “*A hearing may be dispensed with.*” However, note that a differentiated approach is taken and an ‘exploratory hearing’ may be conducted in the context of the preliminary examination.

¹⁶⁶ Section 102 (3) of the Aliens Act states that “*A decision on a subsequent application may be issued without an asylum interview.*” Official translation, available at www.migri.fi. This was also observed by UNHCR in case file 81 where the personal interview was omitted.

¹⁶⁷ The personal interview cannot be omitted on the ground that it is a subsequent application which raises no new facts or elements. However, the personal interview may be omitted on the ground that the elements which substantiate the claim are manifestly unfounded: Art. L.723-3 *Ceseda*. This legislative provision is applicable to all applications, including subsequent applications.

¹⁶⁸ Article 10 (2) PD 90/2008 which literally transposes Art. 12 (2) (c) APD.

¹⁶⁹ Article 29 d.lgs 25/2008 provides that an application can be declared inadmissible and the personal interview therefore omitted when the applicant has submitted a subsequent application, after a decision of the CTRPI has already been issued, without raising any new elements as to his/her personal circumstances or the situation in his/her country of origin.

¹⁷⁰ Note that, as an exception, with regard to the re-examination procedure which only applies to those applications lodged prior to the entry into force of the New Asylum Law, there is no interview during the preliminary examination; and if it is decided that the application should be further examined, the eligibility official will conduct an interview at his/her discretion if it is deemed necessary. All applicants who lodge an application after the entry into force of the New Asylum Law are given the opportunity of a personal interview.

In Belgium, the Aliens Office conducts the personal interview which focuses on whether there are any new elements and drafts a report of the interview to which it attaches any relevant documents. This report is read back to the applicant to check and sign.¹⁷¹ The applicant receives the services of an interpreter during the personal interview, if this was requested in advance.¹⁷² In Bulgaria, the determining authority conducts a brief personal interview which is based on a standard form of five questions.¹⁷³ Similarly, in the Netherlands the personal interview, which is conducted by the determining authority, is based on a specific interview template for subsequent applications which focuses on establishing any new elements or findings. In Slovenia, the personal interview is conducted by the determining authority but there is no specific template or guidance for the interview in the case of subsequent applications. In Spain, the formalization of the subsequent application is done by means of a personal interview.

However, in a significant number of Member States surveyed, the applicant of a subsequent application may not be given the opportunity of a personal interview in which s/he can explain the facts, circumstances or evidence which s/he believes justify a new procedure. This is of particular concern to UNHCR in cases where, as noted above, some Member States may not provide the services of an interpreter or translator to assist with the written submission of the subsequent application. This service may only be available in the context of a personal interview.

In France, for example, the personal interview may be omitted when the determining authority considers that the subsequent application is manifestly unfounded.¹⁷⁴ According to the determining authority, OFPRA, 22% of applicants of subsequent applications were offered a personal interview and 17% of applicants of subsequent applications were actually interviewed in 2008.¹⁷⁵ In the course of this research, UNHCR audited eight case files in France which involved subsequent applications. All these subsequent applications were examined in the accelerated procedure and none of the applicants were invited to a personal interview. The legal ground upon which the personal interview was omitted was not stated in any of the case files. Furthermore, three of the eight applicants had not been given the opportunity of a personal interview during the examination of their initial application because the determining authority considered that the previous applications were manifestly unfounded.¹⁷⁶ As such, these three applicants were never given the opportunity of a personal interview.

In Germany, the relevant legal provision on subsequent applications provides that “[a]hearing may be dispensed with”¹⁷⁷ and the specific information leaflet for applicants informs that: “[A]sylum procedures relating to subsequent applications do not necessarily require personal hearings of applicants by the Federal Office.” With regard to its practice, the determining authority (BAMF) reported that if an interview is deemed necessary for the assessment of the preconditions for opening the procedure,¹⁷⁸ a so-called “exploratory hearing” is carried out.¹⁷⁹ This is

¹⁷¹ Articles 15, 16 and 17 of the Royal Decree of 11 July 2003 on the asylum procedure at the AO.

¹⁷² Article 51/4 of the Aliens Act and Article 14 of the Royal Decree of 11 July 2003 on the asylum procedure at the AO. In practice, it appears that the need for an interpreter is determined at the time the request for asylum is made i.e. in advance of the personal interview.

¹⁷³ It includes the following questions: “1. Do you understand the interpretation by (name of the interpreter)? 2. Are there any impediments of health or psychological character as to the conduct of an interview in this moment? 3. Why do you not want to go back to your country of origin? Are there any new circumstances related to your personal situation or to your country of origin different from those you have already presented? 4. Do you have anything to add to what you have already told?” There is also one last question – 5, on family status – to provide the names, current location and date of birth of spouses and children. UNHCR observed three such interviews which took approximately 15 minutes each. Stakeholders confirmed that this is the approximate duration of an interview in the case of a subsequent application.

¹⁷⁴ Article L.723-3 *Ceseda*. The term ‘manifestly unfounded’ is not further defined in national law. See section 4 of this report for further details.

¹⁷⁵ 2008 OFPRA Report.

¹⁷⁶ Case File 58R (DRC); Case File 50R (PAK); Case File 48R (TR).

¹⁷⁷ Section 71 (3) 3rd sentence APA.

¹⁷⁸ Section 51 Administrative Procedure Act.

¹⁷⁹ According to the guidelines, this is, for example, the case when the applicant has been back in his country of origin and now brings forward individual grounds for being persecuted. (Internal Guidelines for the Asylum Procedure, under: “follow-up applications”, 5.4, (7/14).)

an informal hearing, not a personal interview in the sense of the regular procedure.¹⁸⁰ Beforehand, the applicant is informed of the fact that this exploratory hearing is carried out to determine whether a follow-up procedure will be initiated at all.¹⁸¹ The BAMF assumes, in its internal guidelines, that if a decision has been taken to carry out a follow-up asylum procedure, a personal interview in the formal sense has to take place.¹⁸² For this purpose, the exploratory hearing may be turned into a personal interview in the formal sense.¹⁸³ A corresponding entry has to be made in the hearing report.¹⁸⁴ The audited case files in Germany contained only four cases of subsequent applications.¹⁸⁵ In three of these,¹⁸⁶ only exploratory hearings took place before a positive decision on subsidiary protection was taken. In one of the cases,¹⁸⁷ according to the submitted protocol, the hearing had been a formal one, however, in the internal note¹⁸⁸ the same hearing is referred to as an “exploratory hearing”. According to a legal expert, the conduct of a personal interview in the formal sense constitutes the exception rather than the rule in cases of subsequent applications.¹⁸⁹

In Greece, by law the personal interview may be omitted if it is considered that the subsequent application raises no new elements or findings.¹⁹⁰ The Head of ARD informed UNHCR that there is the possibility of a personal interview. However, NGO stakeholders interviewed declared that, in practice, the preliminary examination is conducted on the sole basis of written submissions.¹⁹¹

In Italy, the preliminary examination is generally conducted on the sole basis of written submissions.¹⁹² This includes the completed ‘*Modello C3*’ forms for the first application and the subsequent application, as well as the interview report and decision by the determining authority for the first application. However, if the determining authority issued a negative decision on the previous application, without having conducted a personal interview, the applicant is generally re-summoned for a personal interview in the context of the preliminary examination.

Likewise, in the UK, the examination is normally conducted on the basis of written submissions. There is a specific form for this purpose which applicants are expected, although not obliged, to use and to which any relevant documentation must be attached. However, the case-owner has discretion as to whether to conduct a personal interview when dealing with further submissions. If the case-owner deems that a decision can be reached based

¹⁸⁰ Section 25 APA.

¹⁸¹ The legal expert, in his commentary, states that the BAMF intentionally avoids the term “hearing” in the formal sense of Section 25 APA (and replaces it with the term “exploratory hearing”) in order to circumvent the procedural safeguards applying to the personal interview. (R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 71, paragraph 174.)

¹⁸² Internal Guidelines for the Asylum Procedure, under: “follow-up applications”, 5.5, (8/14). The guidelines refer to the common rule of Section 24 (1) APA: “*The Federal Office shall clarify the facts of the case and compile the necessary evidence.*”

¹⁸³ The legal expert Marx states in his commentary that in case the BAMF decides during the exploratory hearing that the application has been made for legitimate reasons; a positive decision is issued without carrying out the formal personal interview. Thus, the admissibility decision would be merged with the decision on the merits. (R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 71, paragraph 174.)

¹⁸⁴ Internal Guidelines for the Asylum Procedure, under: *Follow-up applications*, 5.5, (8/14). Furthermore, it is stated in the guidelines that in cases in which it cannot be clarified during the exploratory hearing whether the grounds for opening follow-up proceedings are given (for example, the genuineness of a evidence has to be examined) it should be noted in the report of the personal interview (reference to Section 25 APA is made) that the hearing has only been conducted as a precautionary measure.

¹⁸⁵ 11IRQ01, 00TUR04, 00NIG05, 01RUS08.

¹⁸⁶ 00TUR04, 00NIG05, 11IRQ01.

¹⁸⁷ 01RUS08.

¹⁸⁸ Positive decisions are issued without reasons in fact. These reasons are contained in an internal note which forms part of the record.

¹⁸⁹ R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 71, paragraph 168.

¹⁹⁰ Article 10 (2) PD 90/2008 which literally transposes Article 12 (2) (c) APD.

¹⁹¹ S8 and S9

¹⁹² The *Modello C3* form is used for all applications i.e. first and second applications. There is no specific procedure or form at the level of the *Questura* (police department). Article 29 d.lgs 25/2008 provides that an application can be declared inadmissible and the personal interview, therefore, omitted when the applicant has submitted a subsequent application, after a decision of the CTRPI has already been issued, without raising any new elements as to his/her personal circumstances or the situation in his/her country of origin.

on the written information provided, an interview will not be conducted. However, if further information is required, an interview may be conducted.¹⁹³

Recommendation

UNHCR encourages Member States, as a matter of good practice, to conduct an interview in which the applicant is able to present the new elements or findings which are claimed to justify a new procedure.

Submission of facts and evidence

With regard to the specific procedure for the preliminary examination of subsequent applications, Article 34 (2) (a) APD stipulates that Member States may lay down in national law rules which “*oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure*”. In this regard, UNHCR has noted that the obligation to indicate facts and evidence rests not only on the applicant but also on the examiner.¹⁹⁴

In the Netherlands, if an applicant wishes to make a subsequent application, s/he is required to make a prior appointment by telephone (the so-called *HASA-lijn*).¹⁹⁵ During this telephone call, the applicant is advised by the IND that s/he needs to hand in new documents. These need to be original documents and translated into Dutch. The applicant has to substantiate that with regard to his/her case there are new facts or changed circumstances (also referred to as ‘*nova*’). Similarly, in the UK, the applicant is expected to complete a specific form in writing and attach all documentation in support of the claim. If documents are submitted in a language other than English, an English translation of the document must be submitted; otherwise the document will not be considered. The form requires the applicant to set out in writing, as relevant, the events and/or personal circumstances that have changed, and/or the new evidence which was not previously available. It is not compulsory for applicants to use the specific form, but nonetheless further submissions must be made in writing, including all required information and submitted in person.

In France, Prefectures should only register the subsequent application without assessing whether the elements produced are new or not. In practice, according to NGOs,¹⁹⁶ most of the Prefectures tend to request evidence in the form of a new document, if possible an official document, in order to register the new application.

In Germany, the applicant “*shall give [...]the facts and evidence to fulfil the conditions listed in Section 51 (1) to (3) of the Administrative Procedure Act*” and “[...]shall provide this information in writing upon request.”¹⁹⁷ In case the new evidence concerns a document, this has to be presented. An announcement that these documents will be presented is not sufficient.¹⁹⁸ With reference to the principle of investigation,¹⁹⁹ the internal guidelines of the

¹⁹³ API Further Submissions

¹⁹⁴ UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005.

¹⁹⁵ Aliens Circular 2000, C9.

¹⁹⁶ Cf. Report « *Les demandeurs d’asile sans papiers : les procédures Dublin II et prioritaires* », CFDA, avril 2006.

¹⁹⁷ Section 71 (1) 1st Sentence APA.

¹⁹⁸ However, this does not mean that the submission of documents is a precondition for every case.

¹⁹⁹ Section 24 (1) 1st Sentence: “*The Federal Office shall clarify the facts of the case and compile the necessary evidence.*” Section 24 Administrative Procedure Act: Principle of investigation:

“(1) *The authority shall determine the facts of the case ex officio. It shall determine the type and scope of investigation and shall not be bound by the participants’ submissions and motions to admit evidence.*

“(2) *The authority shall take account of all circumstances of importance in an individual case, including those favourable to the participants.*

“(3) *The authority shall not refuse to accept statements or applications falling within its sphere of competence on the ground that it considers the statement or application inadmissible or unjustified.*”

determining authority (BAMF) state that, following a subsequent application, further investigation by the BAMF might be necessary, for example, in the form of requests for additional written information from the applicant, expert opinions or the conduct of an exploratory hearing.²⁰⁰

Time-limits for the submission of new information

With regard to the specific procedure for the preliminary examination of subsequent applications, Article 34 (2) (b) APD states that Member States may lay down in national law rules which require submission of the new information by the applicant concerned within a certain time after s/he obtained such information. UNHCR considers this clause to be problematic as its application would risk putting states in conflict with their *non-refoulement* obligations under international law.

Eleven of the 12 surveyed Member States have no such rule in their national legislation, regulations or administrative provisions. However, in the UK, applicants are warned that a delay in submitting further submissions could impact upon their appeal rights. The information provided to applicants warns that further submissions that could have been raised sooner may be treated with circumspect and consequently affect the assessment of whether the material amounts to a “fresh claim” and therefore whether there is a right of appeal.²⁰¹ In this regard, the UK appears to be imposing a *de facto* time limit.

The exception is Germany. In Germany, the relevant legal provision with regard to the filing of subsequent applications refers to rules applying in general administrative law. Section 51 (3) Administrative Procedure Act stipulates that “[t]he application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings.” The three-month period begins with the actual knowledge of the new ground, irrespective of whether the person concerned could or should have known it before.²⁰² Nevertheless, the determination of this point in time can be a disputed issue.²⁰³ Moreover, it needs to be taken into account that Section 51 (2) Administrative Procedure Act establishes further criteria with regard to the reasons, why the information was not brought forward earlier: “An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy.”

Recommendation

Member States should not require the submission of new information within a short time-limit commencing from the time when the applicant obtained such information. UNHCR accordingly supports the deletion of Article 34 (2) (b) APD.²⁰⁴

²⁰⁰ Internal Guidelines for the Asylum Procedure, under: “*Follow-up applications*”, 5.4; (7/14).

²⁰¹ UKBA Guidance on further submissions and the specific form for further submissions [accessed 29 January 2010].

²⁰² Kopp/Ramsauer; *Commentary on the Administrative Procedure Act*, 8th edition, Section 51, paragraph. 47. See also R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition, Section 71, paragraph. 316. It should be noted, that if the applicant is represented by a lawyer and wants to base the claim on the change of the German law, the time-limit begins with the date the respective law was published in the Federal Law Gazette. (Cf. also the relevant remark in: H. Heinhold, “*Handbook for Refugees*” (German version), 6th edition (2007), p.85).

²⁰³ For instance, whether the time-limit applies to persons being abroad, or whether the three-month-period only begins with re-entry to the German territory. (Cf. R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition, Section 71, paragraph. 325 and 326). Marx, moreover, assumes with reference to administrative court decisions that the period does not begin, if it was not legally possible for the applicant to bring forward the elements and findings (paragraph. 318).

²⁰⁴ This is proposed in recast Article 36(2): APD Recast Proposal 2009.

The decision

When the preliminary examination is conducted within the framework of the normal asylum procedure, the basic principles and guarantees set out in Chapter II of the APD apply. This includes Article 9 (1) and (2) APD which require Member States to ensure that decisions are given in writing and state the reasons in fact and in law. Section 3 of this report provides a general overview of States' compliance with these provisions.

However, it should be pointed out here that specific concerns regarding decisions on subsequent applications were raised during UNHCR's audit of case files in France, where subsequent applications are examined in the normal asylum procedures.²⁰⁵ Most written decisions regarding subsequent applications were poorly reasoned and the motivation usually stereotyped.²⁰⁶ From these cases, it appeared that the examination of subsequent applications by the determining authority (OFPRA) was considerably less thorough and individualised than for other applications.

With regard to specific procedures for the preliminary examination of subsequent applications, Article 34 (3) (a) APD requires Member States to ensure that *“the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision”*. There is no requirement that the decision be given in writing.

It is interesting to note that the decisions on subsequent applications in Germany might contain both a part on admissibility and a part on the merits. The decision in three of the four audited cases concerning subsequent applications read as follows:²⁰⁷

- “1. *The application for conducting another asylum procedure is dismissed.*
2. *The decision from [date] is to be modified. The preconditions for the prohibition of deportation according to [respective paragraph of Section 60 (2) to (7) APA, i.e. subsidiary protection] are fulfilled.”*

These decisions, at first sight contradictory, can be explained by the fact that when an application for asylum is filed, the examination by the determining authority also includes subsidiary protection forms, which – in such a procedure – cannot be applied for, but are instead assessed *ex officio*. Thus, point one of the decision refers to the denial of the conduct of a further asylum procedure with regard to both forms of refugee protection (constitutional asylum under national law and 1951 Convention refugee status), while point two contains the decision to grant a form of subsidiary protection (national statuses and subsidiary protection status in terms of the Qualification Directive). Different rules apply if the applicant only seeks a positive decision regarding subsidiary protection, but not with regard to refugee protection.²⁰⁸

²⁰⁵ Case File 52R (AFG); Case File 58R (DRC); Case File 59R (SLK); Case File 49R (SLK); Case File 50R (PAK); Case File 51R (RUS); Case File 57R (TR); Case File 48R (TR). These were all examined in the accelerated procedure on the basis of Article L.741-4-4° (*“fraudulent application or abuse of the asylum procedures or solely lodged in order to prevent a removal order which has been issued or is imminent”*).

²⁰⁶ Decisions typically assessed whether the new elements are admissible (sometimes making a distinction between new elements and elements which are not new) and then whether the facts are established. Most of the decisions concluded that the allegations of the applicant (sometimes supported by documents, the authenticity of which was often automatically challenged by OFPRA) did not suffice to establish the reality *“of the facts”* or *“of the fear of persecution or serious threats”* or that the *“new elements cannot be considered as founded”*.

²⁰⁷ 00TUR04, 00NIG05, 01RUS08. A positive decision with regard to refugee protection had been taken in the fourth case (11IRQ01).

²⁰⁸ If, after the conduct of a first asylum procedure, the applicant lodges an application for resumption of proceedings solely with regard to subsidiary protection, the BAMF (and not the aliens authority) is responsible for the assessment. In this case Section 71 APA does not apply, but Section 51 Administrative Procedure Act is directly applicable. Therefore, in contrast to the reference contained in Section 71 APA, Section 51 (5) Administrative Procedure Act also applies: *“The provisions of section 48, paragraph 1, first sentence, and of section 49, paragraph 1 shall remain unaffected.”*, thus foreseeing the possibility to change the decisions, even though the preconditions mentioned in Section 51 (1) to (3) are not met. Section 48 (1) 1 Administrative Procedure Act: *“An unlawful administrative act may, even after it has become non-appealable, be withdrawn wholly or in part either retrospectively or with effect for the future.”* Section 49 (1) Administrative Procedure Act: *“A lawful, non-beneficial administrative act may, even after it has become non-appealable, be revoked wholly or in part with effect for the future, except when an administrative act of like content would have to be issued or when revocation is not allowable for other reasons.”*

Recommendation

Member States should ensure that decisions on all applications for international protection, including subsequent applications, are given in writing.

Notification of the decision

Regardless of whether Member States conduct the preliminary examination of subsequent applications as a first stage within the normal asylum procedures, within the framework of the previous examination or within a specific procedure, Articles 10 (1) (d) and (e) APD apply with regard to the notification of the decision. The applicant must be “*given notice in a reasonable time of the decision by the determining authority*”. Moreover, “[i]f a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant”.²⁰⁹ Furthermore, the applicant must be “*informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available.*”²¹⁰ The information provided must include information on how to challenge a negative decision.²¹¹

Moreover, Article 34 (3) (a) APD provides that when a subsequent application is subject to a preliminary examination, the applicant must be “*informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision*”.

The issue of the notification of the decision is the subject of detailed commentary in section 3 of this report. However, specifically with regard to subsequent applications, it is worth noting here that in the UK, while the pertinent Rule 353 and 353A does not require the determining authority to issue a decision to the applicant following the preliminary examination, administrative guidelines instruct decision-makers to follow the practice of issuing a negative decision to the applicant in person or by recorded delivery post. While there is guidance to decision makers about this, the failure to expressly require it in administrative provisions has been criticized by NGOs.²¹² Case-owners follow the practice of issuing negative decisions to the applicant which, where relevant, would provide information on the right to appeal. In the case of a decision to further examine an application, following consideration of the further submissions, an applicant would be informed of this decision.

The right to remain

When an applicant claims that new elements or findings have arisen or s/he wishes to present new facts or evidence which relate to his/her qualification for refugee status or subsidiary protection status, international law requires that the applicant is not removed to his/her country of origin until and unless it is established, following rigorous scrutiny of the new elements or findings together with the previous application, that there is no real risk of persecution or serious harm to the applicant if returned.²¹³ As such, the applicant should have the right to remain in the Member State pending a decision following the preliminary examination of the subsequent application.

²⁰⁹ Article 10 (1) (d) APD

²¹⁰ Article 10 (1) (e) APD

²¹¹ Article 10 (1) (e) APD

²¹² While the API *Further Submissions* instructs decision-makers to follow the practice of issuing any rejection of the further submissions to the applicant in person or by recorded delivery post, this is not reflected in the Rules. Stakeholders have criticized this gap in the rules: see ILPA response to APD consultation, 2007, page 17.

²¹³ 1951 Convention, European Convention on Human Rights and Article 2 of the UN International Covenant on Civil and Political Rights.

The APD, as currently drafted, is not as clear as it could be with regard to the right to remain during the preliminary examination of a subsequent application. Article 7 (1) APD provides that “*applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III.*” Article 7 (2) APD states that “*Member States can make an exception only where, in accordance with Article 32 and 34, a subsequent application will not be further examined*”.

The lack of clarity relates to the fact that specific procedures for the preliminary examination of subsequent applications are not set out in Chapter III, but in Chapter IV APD. Furthermore, according to Article 4 (2) (c) APD, a preliminary examination may be conducted by an authority other than the determining authority.²¹⁴ Moreover, Article 24 (1) (a) APD expressly permits Member States to provide for specific procedures for the examination of subsequent applications which derogate from the basic principles and guarantees of Chapter II which would include Article 7. Article 34 in Chapter IV of the APD, which sets out the minimum procedural rules for the preliminary examination of subsequent applications, does not explicitly provide the applicant with a right to remain on the territory until a decision is notified to the applicant regarding the preliminary examination. It is, however, implicit in Article 7 (2) APD that the applicant should have the right to remain during the preliminary examination.

In most of the Member States surveyed, applicants submitting subsequent applications have the right to remain pending a decision on the preliminary examination: Belgium,²¹⁵ Bulgaria,²¹⁶ the Czech Republic,²¹⁷ France,²¹⁸ Germany,²¹⁹ Greece,²²⁰ Italy,²²¹ Slovenia,²²² Spain²²³ and the UK.²²⁴ This is considered to be implicit in the legislative provisions in Finland.²²⁵

However, in Germany, during the preliminary examination of a subsequent application, the legal status of a person remains unclear, since the law does not set explicit rules in this regard. In practice, in contrast to the regular procedure, the applicant is not issued a ‘permission to reside’ (“*Aufenthaltsgestattung*”), but only a toleration permit (“*Duldung*”).²²⁶ As “[d]eportation may only be enforced after notification by the Federal Office that the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are not met, unless the foreigner is to be deported to the safe

²¹⁴ This is the case in Belgium. See above.

²¹⁵ Respectively Articles 72bis, 73, 74, 75 and 81 of the Royal Decree of 8 October 1981

²¹⁶ Article 4 (3) LAR and Article 67(1) LAR.

²¹⁷ Articles 2(5), 72, 73 of ASA ; and Article 119 (5) of the Aliens Act.

²¹⁸ Article L.742-6 *Ceseda*

²¹⁹ In particular Section 71 (5) 2nd Sentence APA: “*Deportation may be enforced only after notification by the Federal Office that the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are not met, unless the foreigner is to be deported to the safe third country.*”

²²⁰ Article 23 (4) PD 90/2008.

²²¹ Article 7 of legislative decree 25/2008. When a new *Modello C3* form is filled in, a residence permit is issued. If the applicant had been issued with an expulsion order following a first instance negative decision, s/he may be detained in a CIE (Identification and Expulsion Centre), on the basis of Article 21, comma 1 (c) of Legislative Decree N. 25/2008.

²²² Article 57/4 IPA

²²³ With regard to subsequent applications, the applicant is allowed to remain and is documented according to Article 11(1) ALR and Articles 18(1) and 19 of the New Asylum Law. With regard to the re-examination procedure (under the former asylum law but which is applied to applications lodged before the entry into force of the New Asylum Law) – once the re-examination request has been admitted, the applicant will be documented according to Article 40 ALR. During the preliminary examination, the applicant is not documented. However there is an implicit right to remain, as an administrative decision on the asylum application is pending. At the time of writing, re-examination requests were being automatically admitted and the applicant immediately documented.

²²⁴ Immigration Rule 353 and 353A.

²²⁵ *Ulkomaalaislaki* (Aliens Act 301/2004, as in force 29.4.2009) section 201 (2).

²²⁶ Information submitted to UNHCR by the determining authority. In the information leaflet, the applicant is informed on this matter as follows: “*No temporary residence permit (Aufenthaltsgestattung) shall be given to you as the Federal Office [...] first has to examine the facts allowing it to establish the admissibility of your subsequent application. The geographic limits applicable of the specific area indicated to you in your previous asylum application procedure still apply. You will receive a certificate from the Federal Office confirming the presentation of your subsequent application for asylum. You must always have this certificate with you.*”

third country”,²²⁷ applicants can remain in Germany during the preliminary examination. After a decision has been taken to actually conduct a further asylum procedure, the person concerned can obtain a ‘permission to reside’ in the Federal territory for the purpose of the examination of the asylum application.

In the Netherlands, the Aliens Decree states that an application for a residence permit impedes expulsion, except in the case of a subsequent application.²²⁸ In practice, an applicant can await the outcome of the decision. However, the authorities may communicate that the subsequent application will not stay the expulsion.²²⁹ In that case, the applicant will have to file a request for an interim measure with the court.

Recommendation

UNHCR recommends that both the APD and Member States’ national legislation make clear provision for the applicant’s right to remain during the preliminary examination of subsequent applications.

Reduction or withdrawal of reception conditions

Article 16 (1) (a) of Council Directive 2003/9/EC²³⁰ (henceforth Reception Directive) states that Member States may reduce or withdraw reception conditions where an asylum seeker has already lodged an application in the same Member State.²³¹ This legal provision was introduced to deter applicants from abusing the asylum procedure and the reception system by lodging a subsequent application. However, as stated in the introduction to this section, there are numerous valid reasons why an applicant may wish to make a subsequent application. An applicant who makes a subsequent application may be a refugee or may qualify for subsidiary protection status. The withdrawal or reduction of reception conditions may render applicants destitute, and adversely impact upon their ability to exercise their procedural rights. Therefore, UNHCR opposes the withdrawal of reception conditions from applicants submitting subsequent applications.

The European Commission’s proposal for a recast of the Reception Directive²³² proposes an amendment to Article 16 (1) (a) of the Reception Directive which would delete the possibility to withdraw reception conditions on the grounds that the applicant has already lodged an application in the same Member State. However, it proposes that Member States retain the right to reduce the material reception conditions of applicants of subsequent applications, but that Member States must under all circumstances ensure subsistence, access to emergency health care and essential treatment of illness or mental disorder.²³³ In general terms, UNHCR has welcomed these pro-

²²⁷ Section 71 (5) 2nd sentence APA. With reference to an incompatibility with Article 32 APD, in cases of “manifestly inconclusive” applications, the possibility to enforce deportations without a further examination of the grounds has been deleted from the law. (*Bundestag* printed papers 16/5065 p.219. Section 71 (5) 2nd sentence APA formerly stipulated that “[d]eportation may be enforced only after notification by the Federal Office that the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are not met, unless the application is manifestly inconclusive [...]” The term used was not “manifestly unfounded”. Section 71 (5) 1st sentence APA: “If after a notification announcing deportation or a deportation order issued pursuant to this Act has become enforceable following the filing of the previous asylum application, the foreigner files a follow-up application which does not lead to a new asylum procedure, a new time-limit and a new notification announcing deportation or a deportation order shall not be required in order to enforce deportation.”

²²⁸ Article 3 indent 1, Aliens Decree.

²²⁹ Aliens Circular C14/5.1.

²³⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

²³¹ Article 16 (1) (4) Reception Directive only guarantees access to emergency health care.

²³² European Commission: *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)*, 3 December 2008, COM(2008) 815 final, available at: <http://www.unhcr.org/refworld/docid/493e8ba62.html>

²³³ Article 20 (1) and (4), *Ibid.*

posed amendments which should help to prevent destitution among asylum seekers.²³⁴ However, UNHCR reiterates that adequate reception conditions are a necessary component of fair asylum procedures. Asylum seekers who find themselves in situations of poverty or destitution tend not to be in the physical or psychological condition needed to pursue adequately their asylum applications. Overall, UNHCR considers that if a reduction in the level of reception conditions is necessary, this should take place only in situations of emergency or *force majeure* and for a short time period.²³⁵

UNHCR notes that in Bulgaria, applicants of subsequent applications, who do not fall within the categories of vulnerable groups, lose their right to receive shelter and food; and to receive social welfare allowance, according to the procedure and in the amount applicable to Bulgarian nationals.²³⁶ Also, in France, applicants who do not receive a temporary residence permit do not receive the same reception benefits as applicants who receive a permit.²³⁷ There is evidence to suggest that some Prefectures routinely consider subsequent applications to be abusive and, therefore, do not issue applicants a temporary residence permit with the consequence that significant numbers of applicants of subsequent applications do not have access to specific social benefits²³⁸ (financial benefits²³⁹ and accommodation centres)²⁴⁰ and to the regular social security scheme.²⁴¹ This may have an adverse impact upon their procedural rights.²⁴²

In Slovenia, a person who files a request for a repeat procedure is considered to be an alien and is accommodated by the authority responsible for deportation.²⁴³ This means that until a decision is issued on the request, the applicant's freedom of movement is limited. However, if the request is granted, the person may file a subsequent application with the consequence that s/he becomes an applicant entitled to the reception conditions of other applicants.²⁴⁴

In the Netherlands, there is no entitlement to reception conditions during the appeal proceedings in the event of a negative decision on the subsequent application. Furthermore, a new Circular means that applicants making subsequent applications may now be detained more easily, possibly as part of a policy of deterrence.²⁴⁵

Recommendation

UNHCR encourages states to continue to make available reception conditions to applicants pursuing subsequent applications. At the minimum, these should be at a standard adequate to ensure subsistence, access to emergency health care and essential treatment of physical or mental illness. Amendments to the Reception Conditions Directive should guarantee these.

²³⁴ UNHCR: *Comments on the European Commission's proposal for a recast of the Directive laying down minimum standards for the reception of asylum seekers*, COM (2008) 815 final of 3 December 2008, 1 March 2009.

²³⁵ UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, 1 July 2003.

²³⁶ Article 29 (5), item 1 LAR.

²³⁷ Their applications are also channeled into the accelerated procedure. See section 9 on accelerated procedures.

²³⁸ However according to a recent decision from the Council of State (*Conseil d'Etat, Décision du 16 juin 2008, n°300636*), all asylum seekers, regardless of the procedure (regular or accelerated) applied to their application should benefit from the ATA (*Allocation Temporaire d'Attente*), until the OFPRA decision. (The relevant case concerned a national of a safe country of origin but the legal reasoning is the same for all grounds upon which applications are processed under French accelerated procedure).

²³⁹ ATA (*Allocation Temporaire d'Attente*).

²⁴⁰ In a CADA (*Centre d'Accueil pour Demandeurs d'Asile*).

²⁴¹ CMU (*Couverture Maladie Universelle*).

²⁴² See section 9 on accelerated procedures for further information.

²⁴³ Article 57/4 of the IPA

²⁴⁴ Article 57/6 IPA

²⁴⁵ Change to the Aliens Circular of 23 January 2009, WBV 2009/2, A6/5.3.3.9, *Staatscourant* 2009, nr. 1813, 5 February 2009; also Parliament 2007-2008, 19 637, nr. 1207, p. 24.

Summary findings regarding procedural guarantees

UNHCR, in principle, agrees that subsequent applications can be subjected to a preliminary examination to determine whether new elements or findings have arisen or have been presented by the applicant. However, the procedure must provide an effective opportunity for the applicant to raise and/or present such findings or elements, and should provide all the necessary safeguards and guarantees. UNHCR is concerned that in some Member States, notwithstanding legal requirements, applicants are not informed of the possibility to submit a subsequent application or informed of the procedure for the preliminary examination of subsequent applications. Moreover, in some Member States, applicants may not receive interpretation services for the submission of the subsequent application. Furthermore, they may not be given the opportunity of a personal interview in which they can present the new elements or findings. Only five of the Member States surveyed guarantee to offer the opportunity of a personal interview to applicants of subsequent applications.²⁴⁶ UNHCR is particularly concerned that applicants do not have an effective opportunity to submit and substantiate a subsequent application when all or some of the above shortcomings co-exist.

In Greece, notwithstanding the existence of legislative guarantees, it is disputed whether these are systematically respected in practice. While some stakeholders interviewed by UNHCR suggested that there is an effective opportunity for an applicant to raise new elements and to substantiate a subsequent application,²⁴⁷ others indicated that procedural guarantees are often not respected in practice.²⁴⁸ There is evidence that severe deficiencies in the provision of information to applicants generally, together with limited or poor interpreter services, mean that applicants may be unaware of the possibility to submit a subsequent application.²⁴⁹ UNHCR's research additionally identified another significant problem in practice. Applicants wishing to submit a subsequent application must do so before the competent authorities in person – but applicants are often in fear of being arrested, and therefore reluctant to submit a subsequent application in person.²⁵⁰

In some Member States, concerns about whether the applicant has a realistic opportunity to raise new elements relate less to the procedural arrangements and more to restrictive criteria concerning the interpretation of the requirement for new elements and findings. These are discussed below.

Treatment of subsequent applications after withdrawal or abandonment of the previous application

As stated at the beginning of this section, one of the reasons why an applicant may wish to submit further representations or a second application may be because the examination of the previous application was not completed. This may occur in cases where the application was considered by the determining authority to be withdrawn, and a decision was taken to discontinue the examination; or the determining authority took a negative decision on the basis of the available evidence.²⁵¹ In accordance with Articles 19 and 20 APD, the determining authority may consider an application to be withdrawn if the applicant fails to comply with certain procedural obligations. The explicit and implicit withdrawal of applications is the subject of detailed commentary in section 7 of this report.

²⁴⁶ Belgium, Bulgaria, the Netherlands, Slovenia and Spain.

²⁴⁷ Interviews with S1, S2.

²⁴⁸ Interviews with S7, S8, S13, S15.

²⁴⁹ No information on subsequent applications is provided in the leaflet 'Basic information for asylum seekers'. During none of the interviews observed by UNHCR was there any mention of the possibility of making a subsequent application. None of the 202 case files audited included a subsequent application.

²⁵⁰ Article 9 (1) (a) of PD 90/2008.

²⁵¹ See section 7 for further information on these practices and UNHCR's position.

It is worth reiterating here, however, that a failure by the applicant to comply with procedural obligations during a previous examination does not necessarily indicate that an applicant does not qualify for refugee or subsidiary protection status. The failure to comply may be due, for example, to weaknesses in the determining authorities' administrative or communication systems, or events in the applicant's life. Moreover, a person with protection needs may abandon the application for a variety of reasons unrelated to the merits of his/her application.²⁵²

UNHCR is concerned that an applicant, who explicitly withdrew his/her application or whose application has been discontinued or rejected following non-compliance with a procedural obligation, and who wishes to pursue the original application, may be required to submit a subsequent application which is subject to a preliminary examination. UNHCR notes that Article 20 (2)²⁵³ and Article 32 (2) (a)²⁵⁴ APD explicitly permit Member States to apply a preliminary examination procedure for subsequent applications where an applicant reports again to the competent authorities and requests that his/her case is re-opened following the withdrawal of the previous application.

This is problematic because it is likely that the previous application was not examined and assessed on the basis of all the relevant facts and evidence. As discussed above, a subsequent application, in accordance with the APD, may be subjected to a preliminary examination which does not offer the basic principles and guarantees of the APD.²⁵⁵ In particular, a personal interview may be omitted.²⁵⁶ Moreover, the application may be subjected to a test to determine whether the application presents 'new elements or findings' relating to the examination of whether the applicant qualifies as a refugee have arisen or have been presented by the applicant.²⁵⁷ Depending on the interpretation given by Member States to the term 'new elements or findings', this may act as a bar to the applicant accessing the asylum procedure, and may consequently carry a risk of *refoulement*.

UNHCR, in principle, agrees that subsequent applications can be subjected to a preliminary examination to examine whether new elements have arisen which would warrant examination of the substance of the claim. However, in UNHCR's view, such a limited preliminary examination is justified only if the previous claim was considered fully on the merits.

UNHCR's main concern is that, following the withdrawal of a previous application which was not examined fully on its merits in accordance with Article 4 of the Qualification Directive, an applicant has the possibility to pursue and substantiate the original application. This requires the essential guarantee that the application will be examined in substance, and an assurance that the applicant is not removed contrary to the principle of *non-refoulement*.

UNHCR highlights some notable good state practice in this regard. In some Member States, the determining authority either re-opens the original application (Finland²⁵⁸ and France)²⁵⁹ or invites the applicant to submit a new

²⁵² See section 7 of this report for further information.

²⁵³ Article 20 (2) APD states that "Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue ... is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34".

²⁵⁴ Article 32 (2) (a) states that "Member States may apply a specific procedure ... where a person makes a subsequent application for asylum: (a) after his/her previous application has been withdrawn or abandoned".

²⁵⁵ Article 24 (1) (a) APD.

²⁵⁶ Article 12 (2) (c).

²⁵⁷ Article 32 (3) APD.

²⁵⁸ *Hallituksen esitys 86/2008* (Government Bill 86/2008).

²⁵⁹ Following a decision to discontinue the examination. There is no relevant legal provision in France. This information was received in an interview with the Legal Department of OFPRA.

application which may be on the same grounds as the previous application. No new elements or findings need to be raised (Belgium,²⁶⁰ Finland,²⁶¹ the Czech Republic²⁶² and, with regard to implicit withdrawal, Slovenia).²⁶³

In Bulgaria, an applicant may request to resume proceedings and the original application may be re-opened if the request is made within three months of the decision to suspend proceedings and “*the alien seeking protection produces evidence that objective obstacles have made him or her change address or have prevented him or her from appearing or cooperating with the officials.*”²⁶⁴ However, following the expiry of the three month period, a decision to discontinue the examination is taken and the application cannot be re-opened. The applicant may submit a subsequent application but this must raise new circumstances of significant importance for the personal situation of the applicant or regarding the situation in the country of origin. If it does not, it will be rejected as manifestly unfounded. However, if the applicant abandoned the previous procedure before the personal interview, then it is considered that the applicant had not presented elements relating to the reasons for the application for international protection, and the merits of the application have not been considered. Any reasons submitted as part of the subsequent application will be considered to constitute new circumstances.²⁶⁵ This interpretation reduces the risk of prejudice to a fair examination.

UNHCR’s research has found that three States require an applicant, whose application was previously **discontinued** and who wishes to pursue the original application, to submit a subsequent application.²⁶⁶

In the UK, the examination of an application may be discontinued if an applicant fails to attend the personal interview without reasonable cause. But if the applicant then expresses the wish to pursue the application, the original application is not re-opened and instead s/he must submit a subsequent application. The subsequent application must fulfil the criteria of a fresh claim (subsequent application) i.e. the content of the submission must be significantly different from the previous application in that (i) the content has not already been considered, and (ii) taken together with the previously considered material, it creates a realistic prospect of success. In practice, a new application will normally fulfil the first criterion when the previous application was discontinued and the merits of the application were not considered. However, the second criterion still applies.

Similarly, in Spain, a decision to discontinue the examination may be taken in certain circumstances but if the applicant then expresses the wish to pursue the application, the original application is not re-opened and instead s/he must submit a new application. However, the new application may not be on exactly the same grounds as the previous application. In Spain, an application which is considered identical to a previous application will be declared inadmissible unless there are particularly extenuating circumstances. However, this latter point is a matter of discretion for the determining authority.

²⁶⁰ Article 51/8 of the Aliens Act.

²⁶¹ *Hallituksen esitys* 86/2008 (Government Bill 86/2008).

²⁶² Section 10 (4) ASA contains an exemption from the requirement to submit new elements or findings where the examination of the previous application did not assess all the relevant facts and circumstances. This is applied to Dublin cases which are transferred to the Czech Republic as the responsible state for the examination of the application that was previously not examined on its merits. The previous proceeding is thus “completed” in line with Article 101 CAP through the opening of a new procedure.

²⁶³ This relates to cases of implicit withdrawal and not explicit withdrawal. In both cases, the procedure is discontinued. In the case of an application following implicit withdrawal, the procedure in these cases is not explicitly defined in the IPA, but it derives from general regulations of the administrative procedure as defined in the AGAP. This was observed in case no. 7-2009. However, according to Article 56/1 IPA, in the case of explicit withdrawal, the applicant needs to submit new evidence proving that his/her situation in the country of origin has significantly changed after the filing of the initial application.

²⁶⁴ Article 77 (2) LAR (Supplemented, SG No. 52/2007).

²⁶⁵ See Decision 60.

²⁶⁶ UK, Spain and Germany.

In Germany, no distinction is made with regard to the procedure and criteria applied to a subsequent application, following either a final decision (non-appealable rejection) on an application, or the (explicit and implicit) withdrawal of an application. Thus, even though in case of withdrawal, a decision to discontinue the original procedure has been taken, the applicant must file a subsequent application. No exception is made with regard to the fulfilment of the relevant criteria. This applies, for example, also in cases in which the original application is deemed to have been withdrawn because the applicant travelled to the country of origin during the first asylum procedure.²⁶⁷

As has been noted in section 7 of this report, when an applicant fails to comply with a procedural obligation, some Member States may take a decision on the basis of the available evidence. This is likely to be a decision to reject the application after the applicant has not attended a scheduled personal interview, or has failed to provide essential information. In these Member States, if the applicant wishes to pursue the original application, and a final decision was taken on the application, s/he must submit a subsequent application raising new elements or findings: France,²⁶⁸ Germany,²⁶⁹ Greece,²⁷⁰ Italy,²⁷¹ the Netherlands²⁷² and the UK.²⁷³

In the UK, a failure to report or communicate may result in the application being rejected for “non-compliance.”²⁷⁴ As a permissive provision, this gives the decision-maker discretion not to reject the application. The decision must be based on the available material, and policy instructions stress that the application cannot be rejected on the basis of non-compliance alone.²⁷⁵ If the application is rejected and the applicant wishes to pursue the application, a subsequent application must be submitted which must fulfil the criteria of a fresh claim. Since the non-compliance provisions require the decision-maker to consider the claim based on the available material,²⁷⁶ an application on the same ground may not pass the first limb of the test (that the material has not been considered before). The claim must also satisfy the second limb of the test and have a reasonable prospect of success at appeal, as discussed above. However, if the application has been rejected for non-compliance and it comes to the attention of the decision-maker that the decision is flawed, the API on Non-Compliance includes guidance for the decision maker on how to take corrective action, including reopening the normal asylum procedure. However, this depends on the discretion and initiative of the decision-maker, and is not a right of the applicant.

A discretionary power also exists in Italy. Where a decision to reject the application has been taken because the applicant did not appear for the personal interview, the negative decision may contain a statement which indicates that the determining authority may be prepared to re-examine the application and schedule a new personal interview, if the applicant wishes to pursue the application and can provide serious and justified reasons for their

²⁶⁷ Section 33 (2) APA: “The asylum application shall furthermore be deemed to have been withdrawn if the foreigner has travelled to his country of origin during the asylum procedure.” In this context, it is noteworthy that the threshold for applying the implicit withdrawal is considerably lower than the requirements for cessation of refugee status under Art. 1C (1) of the 1951 Convention.

²⁶⁸ Article R.723-3 *Ceseda*

²⁶⁹ Section 25 (4) 5th sentence APA, Section 25 (5) APA.

²⁷⁰ Article 18 PD 90/2008.

²⁷¹ Article 29 (b) of the d.lgs. 25/2008.

²⁷² Article 4:6 General Administrative Law Act.

²⁷³ Immigration Rule 353.

²⁷⁴ Immigration Rule 339M.

²⁷⁵ The API on non-compliance.

²⁷⁶ A non compliance refusal must deal with any substantive information held about the claim, and not just the non-compliance: *Ali Haddad* (HX/74078/97 (STARRED) [00/HX/00928]. See API *Non-compliance refusals*.

non-appearance.²⁷⁷ The determining authority has the power to take a new decision ‘*in via di autotutela*’ which legally means to put the matter right without legal process. This is a discretionary power of the public administration. This positive practice should, however, be reinforced by a clear provision of law.

It is also perhaps worth noting here that Article 33 APD, under the heading ‘failure to appear’, states that “*Member States may retain or adopt the procedure provided for in Article 32 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time.*” A special problem in this regard pertains to the legal situation in Germany. The applications of persons, who, intentionally or due to gross negligence, fail to comply²⁷⁸ with a referral to a reception centre, or the respective BAMF branch office, fall under the rules for subsequent applications.²⁷⁹ However, at this point in time, these applicants have not even formally filed their first asylum application.²⁸⁰ According to the determining authority, in applying the criteria for a subsequent application, new elements or findings are only those which occurred after the point in time the person concerned should have filed the original application.

Recommendations

In UNHCR’s view, it is inappropriate to treat further representations or a new application as a subsequent application, in cases where the previous application was rejected or discontinued on the grounds of explicit or implicit withdrawal, without an examination of all the relevant facts and circumstances.²⁸¹ National legislation should provide for the right to request the re-opening of the case file and the resumption of the substantive examination, including the opportunity of a personal interview.

Applications should not be treated as subsequent applications following an applicant’s failure to go to a reception centre or appear before the authorities.²⁸²

Interpretation of “new elements or findings”

Article 34 (4) APD provides that “*if, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II*”.

²⁷⁷ UNHCR audited negative decisions which stated “considering that the applicant did not appear for the personal interview, having been legally summoned; considering that the statements made to the police are not sufficient to ground the alleged fear of persecution; considering that the Commission [determining authority] could not acquire the information necessary to support the written declarations by means of a personal interview; considering the [Commission’s] faculty to proceed with a new summons if the person concerned gives serious and justified reasons for their absence; ... decides to reject the application.”

²⁷⁸ Compliance must be within the deadline specified by the relevant authority. However, it should not go unmentioned that the authorities are obliged to inform the persons concerned on the negative consequences resulting from a delay (Section 20 (2) 2 APA). Furthermore, “[i]f it is impossible to inform the foreigner [...] the foreigner shall be escorted to the reception centre.” (Section 20 (2) 3 APA.) The information leaflet, provided by the German police, comprehensively informs the applicant about the negative consequences.

²⁷⁹ Sections 20 (2), 22 (3) APA; (Section 23 APA).

²⁸⁰ The referral to a reception centre or BAMF branch office is made following a request for asylum to an authority, for example, the police. At this point, however, the application has not yet been formally lodged with the BAMF as determining authority.

²⁸¹ The APD recast proposes limiting the application of the procedure for subsequent applications to the situation when the previous application was explicitly withdrawn only: see proposed recast Article 35 (2) (a): APD Recast Proposal 2009.

²⁸² This would entail deleting current Article 33 APD, a proposal which is contained in the European Commission’s proposed recast: See proposed recast Articles 35-6: APD Recast Proposal 2009.

However, there is no explicit guidance in the Directive on the interpretation of what constitutes “*new elements or findings*”, and the research findings reveal a wide divergence in interpretation in practice. It appears that this phrase is subject to differing interpretations across Member States and within Member States. In some instances there is a very strict interpretation whereas in others there is a lack of interpretation, guidelines, or criteria. This means that *de facto* interpretation is left to the discretion of decision-makers, resulting in legal uncertainty and diverse practice. There is also significant divergence between Member States as to if or how they interpret whether new elements “*significantly add to the likelihood qualifying as a refugee*” under Article 32 (4) APD. This compounds the inherent problem with the formulation of this provision in failing to additionally reference beneficiaries of subsidiary protection.

From the research, it is apparent that some of those Member States (Belgium, France, the Netherlands and the UK) that typically receive greater numbers of subsequent applications have developed more extensive interpretation and jurisprudence concerning application of the criteria governing what constitutes new elements and findings. Three of these states (Belgium, the Netherlands and the UK) have adopted a restrictive interpretation, whereas France allows decision-makers a greater margin of appreciation. In Germany,²⁸³ the criteria for subsequent applications are not specific to the asylum procedure, but stem from general administrative law. Many issues that do not necessarily concern matters specific to asylum law are disputed in the legal literature and by the courts. Practice in these five states is considered in more detail below, before examining the situation in other states surveyed.

UK administrative provisions contain relatively explicit criteria governing the assessment of new elements and findings.²⁸⁴ These provide that “*submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered.*” Submissions are considered significantly different if the content (i) had not already been considered by the determining authority or appellate body,²⁸⁵ and (ii) taken together with the previously considered material; create a realistic prospect of success. UK case law has interpreted “realistic prospect of success” to equate to “is not clearly unfounded”.²⁸⁶ The material must be relevant to the applicant and should not have been available prior to the most recent decision on the applicant’s case, unless there is a satisfactory reason why the material was not submitted earlier.²⁸⁷ UK criteria as currently applied would consider the fact of a subsequent worsening of conditions in the country of origin (or a new COI report published even if relating to conditions at the time of the initial procedure) as usually constituting ‘new’ elements. However, this would not normally be the case for facts known at the time of the initial application (for example, sexual violence suffered, homosexuality etc.), or even not necessarily for new documentary proof relating to facts previously known or raised.

²⁸³ Percentage of subsequent applications: 1995: 23.4%; 1996: 22.0%; 1997: 31.2%; 1998: 33.2%; 1999: 31.2 %; 2000: 33.2%; 2001: 25.4%; 2002: 22.2%; 2003: 25.5%; 2004: 29.0%; 2005: 32.6%; 2006: 30.1%; 2007: 36.8%; 2008: 21.2%; 2009: 16.3%. (BAMF supplement to “*Entscheiderbrief*” 2/2010; “*Aus der Geschäftsstatistik des Bundesamtes für das Jahr 2009*”; p. 1; published on 11 February 2010; available on www.bamf.de.)

²⁸⁴ These are set out in Paragraph 353 and 353A of the UK Immigration Rules: *Fresh Claims: 353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, create a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas. 353A: Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.”*

²⁸⁵ Unless there has been a change in legislation, in policy or in case-law since the applicant’s last submission according to UKBA Guidance on Further Submissions, accessed 28 January 2010.

²⁸⁶ *WM (DRC) v SSHD and SSHD v AR (Afghanistan)* [2006] EWCA Civ 1495. This case law clarified that the rule imposes a somewhat ‘modest test’ that the application has to meet before it becomes a “fresh claim” (paragraph 7). It further found that the question is not whether the Secretary of State himself thinks that a new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return (paragraph 11).

²⁸⁷ This may be the initial decision on the application, an appellate decision on the case or a decision on previous further submissions; UKBA Guidance on Further Submissions, accessed 28 January 2010.

In the Netherlands, there is a strict interpretation. The subsequent application will be rejected if the applicant “states no new facts and circumstances”. According to policy, new facts and circumstances (*nova*) are believed to exist if:

- a) they were not known or reasonably could not have been known at the time of the rejection of the first application; and
- b) it is not to be *prima facie* excluded beforehand that these new facts or changed circumstances are reasons to review the rejection of the first application and their motivation.

The authorities may consider evidence which existed or was known during the first instance procedure, but had not been obtained by the applicant during the first instance procedure, as not ‘new,’ on the grounds that it existed before the decision and/or related to issues raised during the first instance procedure.²⁸⁸ This may be rebutted in theory if the applicant can show it was not possible to obtain the evidence before. In practice, however, this is very difficult. Given that the Netherlands operates a 48-hour accelerated procedure, this may mean that evidence in support of the application is never examined, due to the short time frame of the accelerated procedure and the exclusion of evidence on the grounds that it is not new.

The Administrative Division of the Council of State has taken a restrictive approach with respect to this assessment of ‘*nova*’ in two recent decisions.²⁸⁹ In its judgment of May 2008, the Court held that “only if and in so far as new facts and circumstances in the administrative phase of the procedure have been provided, or in case there has been a relevant change of law/policy, the given decision, the motivation and the decision-making procedure may be subject to judicial scrutiny”. This narrow approach is considered to be so strict,²⁹⁰ that even if new information could lead to the conclusion that the asylum seeker may be a refugee, a negative decision is nonetheless taken because the facts could have been provided at an earlier stage.²⁹¹ In another example of strict judicial interpretation, a subsequent application based on circumstances already existing at the time of the first application, but at that moment not deemed to be of importance by the applicant, cannot be a reason to further examine a subsequent application even in the event that the situation in the country of origin has deteriorated with regard to that particular element.²⁹² Moreover, a very heavy burden of proof is placed on the applicant. The determining authority informs the applicant that s/he must hand in new documents, and that these must be original, authentic, dated and translated into Dutch.

Belgian legislation stipulates that new elements must not only relate to facts or circumstances that have taken place after the appeal body (CALL) took a final decision on the previous application, but must also contain significant indications of a well-founded fear of persecution or a real risk of serious harm.²⁹³ The latter component is particularly problematic because it requires the AO – the competent authority to conduct the preliminary examination – to consider questions beyond its jurisdiction.²⁹⁴ In addition to this formalistic objection, there

²⁸⁸ In the Netherlands, in theory, it is possible to rebut the presumption that the applicant should have obtained the evidence during the first instance procedure, but in practice this is reported to be almost impossible.

²⁸⁹ Council of State, 28 May 2008, nr. 200802254/1; Council of State, 9 April 2009, nr. 200806071/1. For an overview see the article by M. Reneman & S. Hubel, *Een tweede kans?, Nieuwsbrief Asiel- en Vluchtelingenrecht 2005*, p. 376-403.

²⁹⁰ UNHCR’s research and C14/5.1 Aliens Circular.

²⁹¹ See for instance District Court Amsterdam AWB 06/36220, 26 April 2007, NAV 2007/40. In this decision the first asylum application had not been dealt with substantively, because the applicant did not appear at the personal interview. In the subsequent application, the fact that his mother had been severely injured when returning to her home, due to a bomb thrown by, according to the applicant, his personal enemies, was not taken into account. There were deemed to be no special circumstances that should impede applying Article 4:6 General Administrative Law Act.

²⁹² Council of State, 29 May 2009, 200809245/1/V2, on Iranian converts.

²⁹³ Article 51/8 of the Aliens Act.

²⁹⁴ From case law of the Council of State and the CALL (*RvS* 7 March 1997, nr. 65.692; *RvS* 11 July 2000, nr. 88.870, *RvV* 15 May 2008, nr. 11.217), it appears that the AO may neither judge the credibility of new elements nor assess them in the framework of the 1951 Convention or subsidiary protection. In particular, it may not state that the new elements do not permit a well-founded fear of persecution to be established. In doing so, the AO applies Article 51/8 of the Aliens Act in a way that goes beyond what is legally permitted (in this sense requiring elements to “significantly add to the likelihood of the applicant qualifying for protection”).

is concern from a practical perspective whether the AO is adequately placed to assess the existence of new elements, given that it was not involved in assessing the original application.²⁹⁵ This has contributed to a lack of legal certainty concerning how the criteria for assessing the existence of new elements are applied, and thus whether subsequent applications should be forwarded to the determining authority for further examination. This has been exacerbated by an apparent difference in interpretation between francophone and Flemish officials, due in part to a corresponding divergence in approach between francophone and Flemish appeal chambers.²⁹⁶ Review of those subsequent applications included in UNHCR's audit of case files has not made the position significantly clearer,²⁹⁷ and there is particular concern that, in one observed case, the AO rejected "new" elements which had been invoked before the appeal body (CALL), but not taken into account at that stage.²⁹⁸

The current lack of a consistent and suitably inclusive approach in interpretation of new elements is of concern in Belgium, and may even be contributing to an increased instance of repeat subsequent applications, if there are grounds for the applicant or his/her lawyer to conclude that a previous subsequent application was not fully or fairly examined. In 2008, there was a 10% increase in the number of subsequent applications which now constitute 27.1% of the total number of applications received in Belgium.²⁹⁹ This significantly increases the workload both of the AO and the CGRA,³⁰⁰ although the reasons for this appear varied.³⁰¹

²⁹⁵ See above.

²⁹⁶ When the representative of the asylum section of the AO was asked why there was such a variety in the practice of implementing Article 51/8 of the Aliens Act, s/he responded that the French-speaking officials deciding on subsequent applications have a more flexible approach towards new elements than the Flemish-speaking officials. This difference in practice stems from the difference in case law between the French-speaking and Dutch chambers of the CALL. According to the representative, it was entirely pointless for the French-speaking officials to maintain the same strict interpretation used by their Flemish-speaking colleagues; as such decisions would be annulled by the French-speaking chambers of the CALL. In anticipation of this, French-speaking officials have adopted a broader interpretation of Article 51/8 of the Aliens Act. An illustration of this is that 22 % of the decisions not to take into consideration a subsequent application taken by French-speaking officials are annulled by the CALL, even with a broader interpretation. Only 6 % of the decisions taken by Flemish-speaking officials to take into consideration subsequent applications, are annulled by the CALL.

²⁹⁷ Audited case files nrs. 1, 3, 4, 5, 6 and 85. From the audit the following examples were accepted as new elements in the decision of the AO:

- oral declarations of a neighbour and convocations of the police
- birth certificate of the applicant and his/her mother
- identity document and proof of cohabitation
- book mentioning the applicant's father as a martyr
- conversion to Christianity
- a video cassette proving the applicant's recent stay in Afghanistan

From these decisions, especially those concerning identity documents, it seems that in some instances, the AO implements quite a broad interpretation of "new elements". On the other hand, in another case, the applicant produced the *taskara* (Afghan identity document) of the woman with whom he had an extramarital relation. In its negative decision the AO stated that the applicant could have shown this document during the previous examination procedure and that it did not in any way support the motives for the application, nor rebut the conclusion of the CGRA.

²⁹⁸ Moreover, this is in contravention to the decision of the Constitutional Court in *GWH* 30 October 2008, nr. 148/2008, B.6-7. This was so stated also in the Enactment reforming the Council of State and establishing the Council for Aliens Litigation, *Parl.St. Kamer* 2005-06, doc. 51, nr. 2479/001, 97. If the CALL has not accepted to take these elements into account, because they did not fulfil the conditions of Article 39/76 Aliens Act, this does not hinder the applicant in introducing the elements in the framework of a subsequent application.

²⁹⁹ These numbers are based on the presentation given by the Minister of Migration and Asylum, on 17 March 2009, during the hearing at the Senate on the evaluation of the Belgian asylum procedure. A total number of 3,331 subsequent applications were introduced in 2008. The top 5 countries for subsequent applications are: Russia, Iran, Iraq, Afghanistan and the Republic of Serbia.

³⁰⁰ In 2008, the CALL heard, in full jurisdiction, 928 appeals against negative decisions taken by the CGRA on a subsequent application. This constitutes 20% of the CALL's workload. In the same period, the CALL heard 421 appeals to annul decisions of the AO not to take a subsequent application into consideration.

³⁰¹ According to NGOs, this increase is due to the introduction in Belgian legislation of subsidiary protection, changed circumstances in countries of origin (Russia, Iran, Iraq and Afghanistan), a shift in the CGRA position regarding Afghanistan, the difficulties of introducing new elements at the level of the CALL, the announcement of new regularization criteria, and other factors. The representative of the AO concurred with this but added that subsequent applications are also sometimes made in order to keep a place in an open reception centre.

In France, according to case law, “new elements” are “*facts that happened after the previous final decision or for which it can be proved that the person concerned could only be aware of them after this decision and which can, provided they are established, justify the fears for persecution that he/she claims*”.³⁰² In addition, the new fact must be “*likely to have an influence on the appreciation of the fears of persecution of the applicant.*” However, new documentary proof of facts already presented in the framework of the previous application is not usually considered as a new relevant fact, for example, a health certificate.

In discussions between UNHCR and the determining authority (OFPRA), it was confirmed that if the applicant mentions a fact such as sexual violence or homosexuality in the subsequent application, which in theory could have been raised before the final decision on the previous application, this would in principle not be considered a “new element”. However, on a case-by-case basis, the determining officer might nonetheless take it into account, depending on the reasons why this fact was raised so late. Similarly, additional evidence which has come into being since the final decision (for example, recently published COI), would in principle not be considered a “new element” but would rather be considered as new evidence regarding facts already presented in the framework of the previous application. However if this COI shows that the OFPRA made an incorrect assessment of the case in the first instance, this could be taken into consideration on a case-by-case basis, even if this is not strictly speaking a “new element”. A worsening of the security situation in the region of origin would be considered a “new element” if this situation would be likely to have an impact on the applicant’s personal situation.

In Germany, the criteria for “new elements and findings”, as well as the prospect of success, are governed by section 71 (1) APA in connection with section 51 (1) to (3) Administrative Procedure Act. The latter stipulates in this regard:

“The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:

- 1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected;*
- 2. new evidence is produced which would have meant a more favourable decision for the person affected;*
- 3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure.”*³⁰³

The decisive point in time to determine the terms “changed” and “new” is generally the day of the original decision by the determining authority, or in case of a decision on appeal, the day of the last oral hearing in court.³⁰⁴ Sub-paragraph two encompasses new evidence with regard to facts which were raised in earlier proceedings (“*would have meant*”),³⁰⁵ whereas sub-paragraph one encompasses subsequent applications raising new facts, and evidence relating to new facts. If the subsequent application is based on a change in the situation in the country of origin, it is not sufficient to simply refer to this change in the general situation, but it must be shown that and how the applicant is affected by this change. Whether a change in the “legal situation” also includes a change in the jurisprudence of the courts remains a disputed issue.³⁰⁶ In addition to the time-limit mentioned above, it is moreover required that “[...] *the person affected was, without grave fault on his part, unable to enforce*

³⁰² *Conseil d’Etat, Décision du 27 janvier 1995, Mlle Gal.* [Unofficial translation].

³⁰³ Section 580 of the Code of Civil Procedure contains several grounds for the resumption of proceedings, *inter alia*, that the party concerned discovers another document, or is able to use such a document, which would have resulted in a more favourable decision for the person affected (No.7 b)).

³⁰⁴ Dealing with the facts of the case.

³⁰⁵ The same is true for the documents mentioned in Section 580 No.7 b) Code of Civil Procedure in connection with No. 3.

³⁰⁶ See, for instance, Marx, *Commentary on the Asylum Procedure Act*, 7th edition, Section 71, paragraph 234 et seq; H. Heinhold, “*Handbook for Refugees*” (German version), 6th edition (2007), p.84).

*the grounds for resumption in earlier proceedings, particularly by means of a legal remedy.*³⁰⁷ According to the determining authority BAMF, the criterion “grave fault” is fulfilled if the applicant intentionally fails to observe, or is grossly negligent in observing, the duties of reasonable care, in particular, if obligations arising in the framework of the asylum procedure are concerned.³⁰⁸ The wording of the provision (“changed in favour” and “more favourable decision”) seems to suggest a higher degree of a prospect of success than a likelihood of a positive outcome. However, in practice, it is not required to assess whether the new elements or findings would actually lead to a more favourable decision, but only that a positive outcome seems to be possible.³⁰⁹

In Bulgaria, there is no explicit guidance in legislative provisions. In practice, however, “new” is interpreted as circumstances which have arisen after the decision has entered into force, or circumstances which were present at the time of previous proceedings, but not known to the applicant.³¹⁰ However, the determining authority assured UNHCR that this would cover evidence which has been in existence during the first instance procedure, of which the applicant had knowledge, but which s/he was unable to obtain before the final decision was taken on the initial application.³¹¹ New elements must be significant and related to the personal situation of the applicant or the situation in his/her country of origin. Given the absence of clear criteria, the interpretation is effectively entirely at the discretion of the individual decision-maker.

Similarly, in Greece there are no legislative or administrative provisions setting out specific criteria for the interpretation of what constitutes new elements. However, interviews with stakeholders identified that in practice, new elements must be crucial and presented for the first time.³¹² According to the Head of ARD, this would cover information in existence and known about by the applicant at the time of the previous procedure, but which could only be substantiated with evidence after a final decision. Moreover, this could cover a worsening of the situation in the country of origin with regard to issues raised in the previous application; new evidence such as recently published COI (provided it relates to the individual situation of the applicant); and in some instances, information known about, but not previously disclosed by, the applicant (depending on the reasons for non-disclosure). Greek legislation requires that new elements or findings should only be further examined if they significantly add to the likelihood of granting refugee status,³¹³ although it is not clear how strictly this test is applied in practice.³¹⁴

In Finland, the criteria simply refer to the requirement to produce “any new grounds for staying in the country that would influence the decision on the matter,” which have not arisen in the previous application.³¹⁵ Case-law indicates that the expression refers to situations of changed circumstances either in the country of origin or the host country. There is little guidance available regarding the interpretation of “new grounds”. Nevertheless, from the audited cases, it is clear that if the applicant presents “new” evidence relating to issues raised in the previous application, it is not likely that the subsequent application will be examined in the regular procedure. The audited cases show that there is a strong reliance on a requirement for new elements/circumstances, and not only new documentary evidence, in order to have the subsequent application dealt with in the regular procedure. If the applicant obtains new evidence, for example, recently published COI relating to the same issues raised in the

³⁰⁷ Section 71 (2) APA.

³⁰⁸ Examples have been provided by the BAMF: applicants who knew the respective grounds already during the appeals procedure, but did not raise them in that procedure, and withdrew their appeal without plausible reasons; and applicants who have filed an application, concealing the fact that they had already filed an asylum application under a different name.

³⁰⁹ According to information provided by the BAMF.

³¹⁰ Interviews with stakeholders, Methodology Directorate.

³¹¹ Interviews with stakeholders, Methodology Directorate.

³¹² Interviews with S1, S2.

³¹³ Article 23 (5) of PD 90/2008.

³¹⁴ According to the Head of ARD, no subsequent application has been submitted since the entry into force of PD 90/2008.

³¹⁵ Section 103 (3) 2) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009).

previous application, the same limitation applies. However, if new grounds for asylum are raised, even such as facts not mentioned in the previous application but which were known at the time of the previous application (for example, sexual violence or torture suffered, homosexuality etc.), there is a greater chance of having the application considered substantively on its merits. Moreover, if the situation in the country of origin changes significantly, it is likely that a subsequent application will be examined in the regular procedure. The same applies for subsequent applications made after a change in key circumstances of the applicant in the host country.³¹⁶

Legislative provisions in the Czech Republic require that new elements must be connected with the reasons for granting international protection; that they were not presented in the previous procedure; and that their omission was through no fault of the applicant (i.e. that s/he failed to raise facts or evidence that could have been stated at the time).³¹⁷ The audit of case files also revealed some evidence to suggest that the submission of wholly new facts may be deemed inadmissible on credibility grounds.³¹⁸

In Spain, the criteria for assessing the existence of new facts or findings would include new evidence that has come into existence since the first procedure, but which relates to issues raised in the first procedure; or changes in the situation in the country of origin, where the new application is based on exactly the same grounds. Such circumstances would be taken into account in the examination of the subsequent application. If they are considered to affect essential elements that could lead to a different decision on the case, then the application would be further examined under the normal procedure.

Italian legislation simply requires that the applicant produce “*new elements concerning his/her personal situation or the situation of his/her country of origin*”. There are no further provisions concerning the interpretation of this requirement.³¹⁹ There is no requirement that the new elements or findings “significantly add” to the likelihood of the applicant qualifying for international protection.

Slovenian legislation requires the submission of new evidence, rather than new elements or findings.³²⁰ There is, however, conflicting case-law regarding the interpretation to be given to the legislation. The Supreme Court has stated that it does not suffice for the applicant to allege the existence of new elements or findings, but the applicant has to submit documentary evidence.³²¹ However, the Administrative Court has held that a statement can be considered as new evidence,³²² and this was subsequently confirmed by the Supreme Court.³²³ By

³¹⁶ See audited case 76, where a woman was granted asylum following a subsequent application, based on changes in her marital status after the decision on the first application.

³¹⁷ Section 10 a ASA: “*The application for international protection shall be inadmissible (...) e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien*”.

³¹⁸ Case XO37.

³¹⁹ Only one decision was examined in the audit of case files where refugee status was recognised after a second application (D/57/F/ETI/P). The case file included no reasons but contained a medical report, a psychological report and a letter from a University Professor of sub-Saharan history.

³²⁰ Article 56 (i) IPA: *A third country national or a stateless person whose application in the Republic of Slovenia has already been finally rejected, or has explicitly withdrawn the application, may file a new one only if he/she submits new evidence proving that he/she meets the conditions for acquiring international protection under this Act.*

³²¹ 1 Up 150/2008, 17 April 2008.

³²² U 992/2008, 7 May 2008. This case also confirmed that the new element relied on may have existed at the time of the initial decision in the event of a reasonable justification for not previously disclosing it. The case in question concerned an applicant who did not report she was raped during the initial procedure, because she was afraid to tell her husband. The competent authority did not accept this as new evidence. In its judgment overturning the decision, the Court cited relevant international case-law, arguing that it victims can not be expected to reveal all details and elements of such violence at their first hearing/procedure (*Hilal v. UK, Hatami v Sweden, Haydin v. Switzerland, Tala v. Sweden, Alan v. Switzerland*).

³²³ Case 1 Up 360/2008, 24 June 2008.

contrast, the determining authority has decided that oral evidence is insufficient, and both the Administrative and Supreme Courts have since confirmed this position. Subsequently, however, the Administrative Court again found that oral evidence suffices.³²⁴ Since the period of UNHCR's research, new legislation has replaced the reference to evidence with a requirement that "*circumstances have significantly changed after lodgement of the previous application*".³²⁵

The significant divergences in interpretation revealed by this research suggest a clear need for greater clarity and consistency through the development of more detailed legislative provisions or other guidance to decision-makers. UNHCR encourages the adoption of a broad and inclusive approach, that takes account of the challenges faced by asylum applicants in substantiating their claims (language barriers, lack of legal advice, having to flee their countries of origin without being able to gather supporting evidence, short procedural time frames etc.) as well as reasons for late disclosure of information (trauma, victims of gender-based violence etc). UNHCR is extremely concerned about the existence of very formalistic criteria in some states which risks excluding evidence that would support a claim for international protection. The adoption of such restrictive practices could put States at odds with their *non-refoulement* obligations under international law.

Recommendation

UNHCR considers that preliminary examinations should extend both to points of fact and law, and the notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object and purpose of the 1951 Convention. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. Procedural requirements, such as time limits, should not be established in a way that could effectively prevent applicants from pursuing subsequent applications.

Wider category of cases afforded a subsequent application

Article 34 (5) APD provides that "*Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons why a procedure has to be re-opened.*" UNHCR has encouraged Member States to interpret such a provision to encompass cases where, for example, trauma, language difficulties, or age-, gender- or culture-related sensitivities may have delayed the substantiation of an earlier claim.

Of the states of focus in this research, none have in place explicit legislative provisions taking advantage of the discretion granted by Article 34 (5) APD. However, there is jurisprudence in some countries supporting such an interpretation, and several states do afford decision-makers discretion to consider wider categories of cases in practice.

³²⁴ In case No. 48-2008, the determining authority decided that an oral statement was not considered to be evidence in this procedure (this decision was taken after the Administrative Court decision cited above). The applicant argued that he was not able to submit new evidence in the applicable 8-day time frame, and that he was not able to submit any evidence at all. In Case U 1923/2008, 2 September 2008, the Administrative and Supreme Court confirmed this position of the Ministry of Interior. However, in Case U 2293/2008, 11 November 2008, the Administrative Court explained what fulfils the standard of "evidence" in such procedures. It stressed that this could also be oral statements on new facts, referring to its own decision in Case No. U 992/2008, 7 May 2008, confirmed by the Supreme Court I Up 360/2008, 24.6.2008.

³²⁵ This amendment was adopted on 15 July 2009 and entered into force on 11 August 2009 (Act amending the International Protection Act, published in the Official Gazette No. 58/2009).

In France, there are no legislative provisions requiring decision-makers to examine subsequent applications in wider categories of cases beyond those where new elements/findings arise. However, there is case law³²⁶ on the assessment of the notion of “*new elements/facts*” to support a requirement that the criteria defining new elements in the main precedent-setting decisions remain subject to an important margin of appreciation.³²⁷ As such, decision-makers have a margin of discretion and there is the possibility that their assessment of the “new element” could take into account factors such as trauma, age, language difficulties, gender sensitivities or other reasons and circumstances explaining why some facts or evidence were not produced earlier. However, it was not clear from UNHCR’s research whether this margin of appreciation is exercised in this way in practice. It was revealed that a significant number of applicants of subsequent applications are not invited to personal interviews and their applications appeared to be assessed in a rather summary manner.

By contrast, there is jurisprudence in the Netherlands to the effect that in principle the authorities are not, according to the Aliens Act, able to examine subsequent applications which do not include new elements/findings in accordance with Article 32(5) and (6) APD.³²⁸ However, there is policy guidance which allows some discretion where (due to trauma) evidence has not been disclosed at the earliest opportunity.³²⁹ This policy translates earlier policy guidance (found in *TBV 2003/24*), in which the Minister indicated when he would not apply Article 4:6 General Administrative Law Act.³³⁰

In Spain, there are no legislative provisions which explicitly prevent consideration of a subsequent application in relation to wider circumstances such as trauma, age, gender, language or other difficulties which have prevented a full disclosure of facts during the initial procedure. However, discretion remains with the determining official as to whether the application is declared admissible in such circumstances. In practice, officials would usually seek guidance from their supervisors.

Slovenian legislation is not explicit on this question either. Other factors may however justify the earlier non-disclosure of elements, and permit them to be treated as new evidence for the purposes of allowing a subsequent application to be admitted for consideration.³³¹ There is case law which would suggest this is possible because applicants cannot be expected to raise traumatic or shameful incidences in a first personal interview.³³²

³²⁶In another precedent setting decision (*CE, 28 avril 2000, 192701, Thiagarasa*), the Council of State added that if the CRR (now CNDA) considers that the new element is established and relevant, it has to rule on the asylum claim “*in the light of all the facts presented by the applicant in his/her subsequent application, including the facts already examined by the CRR*”. This was further reiterated in a precedent setting decision from the CRR (now CNDA) (*CRR, SR, 5 avril 2002, 379929, Keryan*).

³²⁷See below for rate of positive decisions by the CNDA.

³²⁸See also Council of State, 8 May 2008, 200801379/1.

³²⁹In the C14/5.1 Aliens Circular, the following policy is formulated: “*It is up to the applicant, in support of his application, to produce all information and documents necessary for the assessment of the application. Also in the case of traumatic experiences, it is expected of the alien to indicate this, even in a very brief, summary manner. In very exceptional circumstances, for example, in cases of traumatic events (as are to be found in the Aliens Circular 2000 under C2/4.2), it is reasonable to expect that the applicant could not have submitted new facts and circumstances in an earlier state because the applicant was hesitant in telling about these circumstances. This is more likely to be the case if the application was rejected within the 48 hours procedure.*”

³³⁰Reading on *TBV 2003/24*, M. Reneman & S. Hubel, *Een tweede kans?*, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2005, p. 386-388, S. Jansen, *Op de vlucht voor homohaar*, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2006, p. 124146. See also Council of State, 19 May 2004, *JV 2004/313*, Committee Against Torture, view nr. 279/2005 22 January 2007.

³³¹Article 56 (2) IPA: *The new evidence shall occur after the issue of a preliminary decision, or may have existed already during the first procedure, although the person referred to in the preceding paragraph did not enforce these due to justified reasons.*

³³²In case U 992/2008, 7 May 2008. The Administrative Court confirmed that the new element relied on may have existed at the time of the initial decision, if there is a reasonable justification for not previously disclosing it. The case in question concerned an applicant who did not report she was raped during the initial procedure, because she was afraid to tell her husband, which the competent authority did not accept as new evidence. In its judgment overturning the decision, the Court cited relevant international case-law, arguing that it can not be expected that victims reveal all details and elements of such violence during the first procedure (*Hilal v. UK, Hatami v Sweden, Haydin v. Switzerland, Tala v. Sweden, Alan v. Switzerland*).

Similarly, German law does not contain an explicit legal provision in this regard. However, according to information submitted to UNHCR by the determining authority (BAMF), it is possible to take into account subsequent applications where, for instance, an applicant was not able to provide the relevant information in the initial asylum procedure, due to trauma. In such a case, the trauma (for example, proven by a medical certificate) could be interpreted as “new evidence” in the sense of section 51 (1) No. 2 Administrative Procedure Act. The BAMF, as a rule, assumes in such cases of trauma that the person concerned was, “without grave fault on his part”,³³³ unable to bring forward the relevant grounds in the earlier procedure.

According to the determining authority in Bulgaria, in principle it is possible that other factors (for example, trauma, age, language difficulties or gender sensitivities) which have prevented an applicant from fully substantiating his/her initial application could justify a subsequent application even in the absence of “new” elements.³³⁴ However, no concrete examples were provided in practice.

In Finland, the examination of subsequent applications purports to take into consideration wider factors beyond those relating to the application for international protection. In practice, the vast majority of applicants filing subsequent applications are represented by legal representatives who will include issues from this wider context in the application itself. Further, the Finnish asylum procedure is in all stages a “one stop” procedure, where all grounds relating to the issuance of a residence permit are taken into account. Thus, the examination of subsequent applications does in practice focus on a broader spectrum of reasons for residence permits – something that also is reflected by the use of the expression “grounds for staying in the country” contained in the criteria under Finnish legislation.³³⁵

In the United Kingdom, there is no provision requiring the examination of subsequent applications in wider categories of cases beyond those where new elements are presented. UK provisions³³⁶ state that if it has not been possible to raise the new material during the course of the appeal for any reason, the case owner should consider it after the conclusion of the appeal and apply Rule 353. At first sight, this appears to be more generous than the terms of Article 32(6) APD, which allows the Member State to decide to examine the applicant’s further submissions only if the applicant’s inability to assert the situation earlier arose “through no fault of his/her own”. However, the provisions reflect Article 32(6) APD, and if the matters could have been raised in an earlier appeal, then there will be no right of appeal against the refusal of the fresh claim.³³⁷

Recommendation

UNHCR favours utilizing the possibility for Member States to address exceptional circumstances for considering a subsequent application beyond those cases involving new elements or findings. Discretion to re-open a substantive examination may be required in cases where, for example, trauma, language difficulties or age-, gender- or culture-related sensitivities may have delayed or prevented the substantiation of an earlier claim.

³³³ Section 51 (2) Administrative Procedure Act.

³³⁴ Interviews with interviewers.

³³⁵ Article 94 of the Aliens Act.

³³⁶ API *Further Submissions*.

³³⁷ NIAA 2002 Section 96.

Subsequent applications by previous dependants

Article 32 (7) APD provides that the preliminary examination procedure “*may also be applicable in the case of a dependant who lodges an application after he/she has ... consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination ... will consist of examining whether there are facts relating to the dependant’s situation which justify a separate application*”.

UNHCR welcomed this provision and reiterated the importance of ensuring that dependants, who may not have been able to submit a reasoned claim earlier, be given the possibility to have their asylum claims examined. Due consideration should be given in particular to trauma-, culture-, age- or gender-related sensitivities.³³⁸

In Bulgaria, an application by a person who was formerly considered to be a dependant minor, and for whom a final negative decision was taken on the application submitted by a parent, is considered to be a subsequent application. The claim will have to raise significant new circumstances.

In Spain, an application by a former dependant would be assessed in accordance with the normal asylum procedure, although the former application (on behalf of the applicant) will be taken into account.

In the UK, applications by previous dependants are not mentioned in the relevant Rule 353. However, there is guidance which tells decision-makers to treat such claims as ‘swapover’ claims. The guidance instructs officials to consider and judge swapover claims on their own merits, in the same manner as other claims. But consideration of a swapover claim can be cut short by certification³³⁹ under the Nationality Immigration and Asylum Act (NIAA) 2002 s96 (earlier right of appeal). Section 96 can remove appeal rights where a dependant was previously issued with a notice telling them of their right to claim asylum, and they chose not to do so. Rule 353 combined with NIAA 2002 s 96(2) could thus amount to a specific procedure for subsequent applications by previous dependants, since it means that there is no right of appeal against refusal. In this context, UNHCR has suggested the use of the possibility which Article 32 (5) APD provides for Member States to address exceptional circumstances. Discretion to re-open an examination is required where trauma, language difficulties, or age- or gender- related sensitivities may have delayed the substantiation of an earlier claim.³⁴⁰ At present, this will depend on the initiative of the individual decision-maker.

In Germany, if the requirements for family refugee protection are fulfilled, the spouse as well as the children of a person entitled to refugee status can also be granted refugee status.³⁴¹ According to the determining authority, in case the status of the main applicant is revoked, the family members have the opportunity to bring forward their own specific grounds for status within the revocation procedure. Therefore, the filing of a further application would not be necessary.

³³⁸ UNHCR *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 10 February 2005.

³³⁹ Asylum Process Guidance *Handling Swapover claims* 23.4.07 accessed via UKBA website 4.5.09

³⁴⁰ UNHCR comments on the implementation in the UK of the APD, page 28.

³⁴¹ Section 26 APA. In cases where the requirements for family refugee protection are not fulfilled, the individual application of each family member will be examined on its merits in the first instance procedure.

The treatment of *sur place* claims

An applicant may submit a subsequent application due to international protection needs arising whilst s/he has been in the Member State, and since the examination of the previous application. There may have been a significant deterioration in the situation in the country of origin since the examination of the previous application; for example, a change in government policy, a change of government, the outbreak or escalation of armed conflict etc. Such elements would demand a careful examination of the subsequent application.

However, protection needs may also arise if the Member State does not adhere to the requirement of confidentiality and discloses information, directly or indirectly, to the alleged actors of persecution or serious harm in the country of origin, which results in identification of the applicant.³⁴² Subsequent applications which are based on such disclosure should be subject to a thorough examination, to determine whether this disclosure has created a risk which qualifies the applicant for refugee or subsidiary protection status.

Moreover, an applicant may submit a subsequent application which asserts a well-founded fear of being persecuted or a risk of serious harm based on activities in which s/he has engaged in the Member State.³⁴³ Whether such actions are sufficient to justify a well-founded fear of being persecuted or a risk of serious harm should be determined by a careful and thorough examination of the circumstances. Particular attention should be paid to whether such actions may have come to the notice of the authorities of the applicant's country of origin; how they are likely to be viewed by those authorities; and the risk of treatment contrary to the 1951 Convention and the Qualification Directive if the applicant is returned.³⁴⁴ The applicant should qualify for refugee status when all the relevant criteria of the 1951 Convention are satisfied. This also applies where the applicant does not genuinely hold, for example, the political convictions or religious beliefs s/he has expressed in the Member State, but where the mere fact of their expression gives rise to a serious risk of persecution if returned to the country of origin. An applicant may deliberately engage in activities in the Member State which are designed to bring him/her within the criteria for refugee status. If these are known to or may become known by the alleged actor of persecution, creating a real risk for the applicant if returned, s/he should be granted refugee status. There is no 'good faith' requirement in the 1951 Convention.

Contrary to the 1951 Convention, Article 5 (3) of the Qualification Directive (QD) permits Member States to refuse to recognise an applicant's refugee status if the applicant files a subsequent application based on circumstances which the applicant has "*created by his own decision*" since leaving the country of origin.³⁴⁵ UNHCR has strongly criticised this provision of the QD which does not accord with international refugee law.³⁴⁶

³⁴² See section 8 of this report, on the collection of information on individual cases, for further information regarding the requirement of confidentiality.

³⁴³ For example, the expression of political views whilst in the Member State, such as participation in demonstrations against government policies in the country of origin, participation in opposition groups in exile, association with refugees or known opponents to the government of the country of origin; conversion to a religion not tolerated by the authorities in the country of origin; unauthorized stay abroad when this is punished by severe sanctions etc.

³⁴⁴ Paragraphs 94-96, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, re-edited Geneva, January 1992.

³⁴⁵ Article 5 (3) QD states that "*Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.*" Note that the European Commission has not proposed an amendment to this clause in its APD Recast Proposal 2009.

³⁴⁶ See UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004), 28 January 2005.

Of those states surveyed, only Germany³⁴⁷ and Greece³⁴⁸ have explicitly transposed Article 5 (3) of the Qualification Directive in national legislation. Of those Member States surveyed who have not transposed this provision in national legislation, some however do apply a “continuity” test (Italy and the Netherlands)³⁴⁹ requiring that the grounds be a continuation of activities performed or convictions held in the country of origin, or a “purpose” test (Bulgaria³⁵⁰ and the Czech Republic)³⁵¹ which looks at whether the applicant’s activities were engaged in with the purpose of obtaining a protection status. This may limit the grant of refugee status in practice. Moreover, in other states such as Spain and the UK, it will typically be used to dispute credibility.

Italy has not transposed Article 5 (3) of the Qualification Directive. It has reflected Article 5 (2) QD insofar as legislation expressly provides that *“the application of international protection can be justified because of events that have taken place after the applicant has left his/her country of origin or of activities carried out by the applicant after he/she has left his/her country of origin, particularly when it is ensured that the alleged activities are the expression and the continuation of beliefs or orientations already expressed in the country of origin”*.³⁵²

Similarly, in the Netherlands there is in principle no refusal to assess an applicant’s refugee claim, if the applicant files a subsequent application based on circumstances which the applicant has created by his own decision since leaving the country of origin. However, as a starting point, the test of whether there are new facts and circumstances will apply, and this is applied very strictly.³⁵³ Moreover, the so-called ‘continuity test’ –contrary to jurisprudence of the European Court of Human Rights and the Committee Against Torture – is applied.³⁵⁴ This means that activities will only be taken into account if they can be considered as a follow-up of activities performed or convictions held in the country of origin. If not, even though the fear for persecution due to new activities is plausible and credible, this cannot lead to recognition as a refugee ‘*sur place*’.³⁵⁵

Article 5 (3) QD is reflected in Bulgarian legislation to the extent that applications may be refused if they are based on grounds deemed to result from actions committed with the sole purpose of obtaining protection.³⁵⁶

³⁴⁷ Section 28 (2) APA stipulates: *“If the foreigner again applies for asylum after withdrawal or non-appealable rejection of an earlier application, and the new application is based on circumstances of his own creation after the withdrawal or non-appealable rejection of the earlier application, he cannot as a rule be granted refugee status in a subsequent procedure.”* Cf. also Bundestag printed papers 16/5065, p. 217. Art 5 (2) APD is reflected in Section 28 (1a) APA: *“A threat pursuant to Section 60 (1) of the Residence Act may be based on events that occurred after the foreigner left his country of origin, and in particular on conduct by the foreigner that expresses a continuing conviction or orientation that already existed in the country of origin.”*

³⁴⁸ Article 5 (2) PD 96/2008.

³⁴⁹ Article 5 (2) QD states that *“A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.”*

³⁵⁰ Article 8 (6) and Article 9 (3) LAR.

³⁵¹ According to the Head of Asylum Procedure Unit this approach is applied by the determining authority DAMP. This has not been held in the case-law of the courts.

³⁵² Article 4 of the d.lgs. 251/2007.

³⁵³ See R. Bruin, *Individuele toelatingsgronden, Nieuwsbrief Asiel- en Vluchtelingenrecht* 2008, p. 153.

³⁵⁴ Committee Against Torture 29 May 1997, no. 34/1995 and 22 January 2007, no. 280/2005; European Court of Human Rights 4 December 2008, appl. nr. 20113/07, NAV 2009/9, 31 August 2004, appl. nr. 24697/04, 26 July 2005, and appl. nr. 38885/02, NAV 2005/184. See also Article 20 (7) Qualification Directive.

³⁵⁵ See Article 3.37 Aliens Regulation 2000; and C2/6 Aliens Circular 2000.

³⁵⁶ Article 8 (6) LAR: *(New, SG No. 52/2007) Fear of persecution may be based on events that occurred after an alien has left his/her country of origin or an act committed by him/her after departure unless it has been committed with the sole purpose of obtaining protection under this law.* Article 9 (3) LAR: *The real threat of serious harm may be based on events that occurred after an alien has left his/her country of origin or an act committed by him/her after departure unless it has been committed with the sole purpose of obtaining protection under this law.*

Given the new elements of the application, it would be considered in the regular procedure where the question of sole purpose would be duly examined.

The Czech Republic has not transposed Article 5 (3) QD, and there is no explicit provision or guidance concerning the treatment of *sur place* claims. However, information stated by the determining authority suggests that such applications could be dealt with in the admissibility or regular procedure, and that an assessment would be made as to whether the applicant's activities were 'purposeful'. If so, the application would be deemed unfounded.³⁵⁷

In the UK, if the applicant files a subsequent application based on circumstances which s/he has created by his own decision since leaving the country of origin, the UK does not refuse to recognize the applicant's refugee status. However, such actions are likely to damage credibility.³⁵⁸ Spain has not transposed Article 5 (3) QD, but UNHCR has noted that cases are treated quite strictly. Usually subsidiary protection would be granted where there was considered to be a risk on return.

UNHCR particularly welcomes good practice in Finland, where the legislator when implementing the QD³⁵⁹ stated explicitly that Article 5 (3) QD is problematic from the viewpoint of the 1951 Convention; and that the Article would not be transposed into Finnish legislation or practice. A subsequent application based on activities since leaving the country of origin will be examined in the regular procedure with the full support of the procedural and administrative norms of the Aliens' Act.³⁶⁰ Similarly, in France there is jurisprudence accepting as well founded applications stemming from activities undertaken since the leaving the country of origin, including cases involving high profile hunger strikes by Kurdish applicants from Turkey.³⁶¹

UNHCR cautions that refugee status should never automatically be refused merely due to the fact that the fear of persecution or serious harm relates to actions taken by the applicant since leaving the country of origin. UNHCR therefore welcomes the fact that most Member States have not taken the opportunity to transpose Article 5 (3) QD and recommends that this provision be amended accordingly as part of proposed revisions to the Qualification Directive.

Recommendation

All subsequent applications alleging that international protection needs have arisen *sur place* should be subject to a careful and thorough examination in Member States' regular procedures, with reference to both the criteria for refugee status and subsidiary protection status.

³⁵⁷ Interview of 7 April 2009.

³⁵⁸ *Danian v SSHD* [2000] ImmAR 96.

³⁵⁹ *Hallituksen esitys 166/2007* (Government Bill 166/2007).

³⁶⁰ See audited case 76 where asylum was granted on a subsequent application due to the applicant filing for a divorce from her husband, who lived in their country of origin, after the first decision had been made.

³⁶¹ These cases concerned a number of Kurdish applicants from Turkey whose applications had been previously rejected by a final decision, and who filed a subsequent applicant after a hunger strike on French territory. The regular procedure for subsequent applications was applied to them. In a series of CRR decisions, the hunger strike was considered as a "new fact". On the substance of the claims, in order to recognize refugee status, the CNDA looked at the objective of the hunger strike (i.e. the denunciation of the attitude of the Turkish authorities towards the Kurds), the fact that this event was publicized and known by the Turkish authorities. It therefore concluded that it created a well-founded fear of persecution for the applicants in case of return to their country of origin (for example, *CRR Case No 389232, M.D., 24 May 2002*; *CRR Case No 389376, M.Y., 24 May 2002*; *CRR Case No 393449, MB, 24 May 2002*). However, in general, the cases of recognition of refugee status to refugees *sur place* are quite rare.

Limitations on the right to submit a subsequent application

UNHCR is aware and acknowledges that some Member States are concerned to prevent abuse of asylum procedures by applicants who submit multiple subsequent applications. The European Commission has identified this as a problem in some Member States, and has proposed an amendment of the current Article 32 APD. This change would provide an exception to the right to remain, when an applicant submits a second subsequent application following a final rejection of a previous subsequent application – provided the determining authority is satisfied that return will not lead to direct or indirect *refoulement* in violation of international and Community legal obligations. The Commission's proposal also suggests that second subsequent applications may be examined in admissibility or accelerated procedures.

UNHCR's research has found that none of the Member States surveyed have legislation, regulations or administrative provisions which explicitly limit the number of subsequent applications which can be made.

However, as mentioned above, a small number of the surveyed Member States reduce reception conditions or restrict the movement of applicants of subsequent applications as a deterrent.³⁶² At the time of writing, Belgium had also recently introduced legislation which permits reception benefits (except urgent medical assistance) to be cut when an applicant has lodged three or more asylum applications.³⁶³ Reception benefits would be re-granted in the event of a positive decision by the Aliens' Office on the subsequent application's admissibility.³⁶⁴

Furthermore, at the time of writing, some Member States were considering restrictions to appeal rights. For example, in the Netherlands, on 7 December 2009, a motion was filed to restrict the right of appeal, following a negative decision on a subsequent application, to the Council of State only.

Right of appeal against a negative decision following the preliminary examination

Article 39 (1) (c) APD explicitly stipulates that Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal against a decision not to further examine a subsequent application pursuant to a preliminary examination.

³⁶² Bulgaria (reception conditions are reduced) and Slovenia (applicants' freedom of movement is restricted up until a decision is taken on the request for a repeat procedure). In the Netherlands, detention is used as a measure of deterrence following the rejection of a subsequent application. Change of the Aliens Circular of 23 January 2009, WBV 2009/2, A6/5.3.3.9, *Staatscourant* 2009, nr. 1813, 5 February 2009; also Parliament 2007-2008, 19 637, nr. 1207, p. 24. In Germany, "[i]f the foreigner's right of residence during the previous asylum procedure was geographically restricted, the last geographical restrictions shall continue to apply unless otherwise decided." (Section 71 (7) 1 APA.). Moreover, [a] follow-up application shall not preclude an order to take the foreigner into custody awaiting deportation unless a further asylum procedure is carried out." (Section 71 (8) APA).

³⁶³ Law of 30 December 2009 (*Loi du 30 décembre 2009 portant des dispositions diverses, Titre 11, Chapitre 4, M.B., 31 décembre 2009, p. 82925*).

³⁶⁴ UNHCR wrote on 24 September 2009 to the authorities. In the letter UNHCR acknowledged the need to combat abuse but highlighted the fact that the majority of repeat applicants at present originate from countries or areas of conflict, or where there are breaches of human rights (for example, Iran, Iraq, Afghanistan, North Caucasus). Besides abuse, shortcomings in the present asylum procedure were mentioned as one of the potential causes of multiple applications. UNHCR has asked for a case-by-case assessment and exceptions for children and vulnerable persons.

The following states provide for a right of appeal against a decision not to further examine a subsequent application: Belgium,³⁶⁵ Bulgaria,³⁶⁶ the Czech Republic,³⁶⁷ Germany,³⁶⁸ Italy,³⁶⁹ the Netherlands,³⁷⁰ Slovenia³⁷¹ and Spain.³⁷²

However, in Italy³⁷³ and the Czech Republic,³⁷⁴ an appeal against a decision that a subsequent application is inadmissible has no automatic suspensive effect.

Similarly, in Belgium, Germany, the Netherlands, Slovenia and Spain, an appeal against a negative decision in the preliminary examination does not have automatic suspensive effect.³⁷⁵ In Belgium, only a request to annul, on grounds of law, the negative decision of the AO on a subsequent application can be lodged. This does not have suspensive effect. In principle, a suspensive appeal cannot be lodged. If a request for suspensive effect is made, it will be declared inadmissible unless the AO has applied Article 51/8 of the Aliens' Act incorrectly, and failed to

³⁶⁵ This is an appeal for annulment of the decision of the AO not to examine the subsequent application which by virtue of Article 51/8 of the Aliens Act does not have suspensive effect.

³⁶⁶ Negative decisions on the grounds of Article 13 (1) item 5 LAR may be taken in the accelerated and in the general procedure. If taken in the accelerated procedure by the interviewer, they are to be appealed before the Administrative Court of current registered address of the appellant as in his/her registration card (Article 84 (2) LAR). The appeal procedures have suspensive effect (Article 84 (4) LAR). The court starts the proceedings within 3 days of receipt of the appeal (Article 84 (5) LAR) and should take a decision in a period of one month (Article 85 (1) LAR). If the Court revokes the decision of the interviewer, the case is returned with mandatory instructions (usually to admit the application to general procedure). A negative court decision on the appeal is final. But there is no limitation as to filing a new subsequent application and, therefore, no limit on appeals. If the decision on a subsequent application is taken by the Chairperson in the general procedure, it is appealed before the Supreme Administrative Court – panels of three judges – and the proceedings have suspensive effect. A negative SAC decision may be appealed before a five judge panel within SAC as a court of cassation. The term for submitting an appeal is 14 days. A decision not to examine a subsequent application may be appealed as any other decision not to examine an application before an administrative body under the Administrative Procedures Code (Article 120 (2) of the Constitution of the Republic of Bulgaria). The appeal is to be heard by the Administrative Court of headquarters of the administrative body (Article 128 Administrative Procedures Code) – Administrative Court of Sofia City. The term for submitting an appeal is 14 days (Article 84, Administrative Procedures Code).

³⁶⁷ Section 32 ASA.

³⁶⁸ Sections 42 Code of Administrative Court Procedure, 74 APA, and 71 (4) and (5) APA. Section 80 (5) Code of Administrative Court Procedure: *“On application the court may order suspensive effect, either wholly or in part, in respect of the main cause of action in cases described under paragraph 2, Nos. 1 to 3, or may reinstitute suspensive effect, either wholly or in part, in cases described under paragraph 2, No. 4. Applications may be lodged prior to an action of voidance being brought. Where at the time at which the decision is made the administrative act has already been executed, the court may order the cancellation of execution. Restitution of suspensive effect may be made contingent upon lodging of a provision of security or some other condition being met. Time-limits may be set for the restitution of suspensive effect.”* Section 123 (1) Code of Administrative Court Procedure: *“On application the court may issue a temporary injunction in respect of the object at issue, even before an action has been lodged, where a change to the existing situation could reasonably be expected to frustrate or seriously impair the applicant in the realization of a right. Temporary measures are also permissible as a means of regulating a temporary state of affairs in respect of a disputed legal relationship where such regulation, in particular in the case of permanent relationships, appears to be necessary in order to ward off serious disadvantage or to prevent the threat of force or for other reasons.”* (Unofficial translations concerning the Code of Administrative Court Procedure provided by UNHCR).

³⁶⁹ Article 35 (1) d.lgs. 25/2008

³⁷⁰ Article 8:1 General Administrative Law Act and Articles 79 and 80 Aliens Act. The court conducts a so-called *ne bis in idem* examination. The court is firstly obliged to examine whether or not an applicant has indeed submitted new facts or circumstances that have led to the review. If the court concludes that no new facts or circumstances have been submitted, then it must reject the appeal.

³⁷¹ According to Article 74 (3) IPA an appeal can be lodged with the Administrative Court within three days of service of the decision.

³⁷² In the case of a new (subsequent) application, the same appeal rights as in any other asylum application may be exercised. If a request for re-examination of the application is not admitted, Article 38 ALR provides for the possibility to lodge an administrative appeal to the State Secretariat of the Interior.

³⁷³ A decision to treat a subsequent application as inadmissible under Article 29 (b) of the d.lgs. 25/2008 can be appealed under Article 35 (1) of the d.lgs. 25/2008. However, Article 35 (7) of the d.lgs. 25/2008 stipulates that the appeal has no automatic suspensive effect although when lodging the appeal the appellant can ask the court to suspend removal if valid justification can be provided. The court has five days in which to rule on the question of suspensive effect and there is no further right of appeal in the event of refusal. If the appeal is successful then the applicant is granted a permit and entitled to reception support.

³⁷⁴ Section 32 (3) ASA: *“The filing of an action pursuant to Subsection (1) and (2) has suspensive effect, except for an action against discontinuation of the proceedings pursuant to Section 25 and an action against a decision pursuant to Section 16(1)(d) and (e).”* Section 25: *“The proceedings shall be discontinued if (...) i) the application for international protection is inadmissible.”* Section 10a (e): *“The application for international protection shall be inadmissible e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien..”*

³⁷⁵ With regard to Belgium, see *GWH* 14 July 1994, nr. 61/94, B. 5.8-B.5.8.3 and *GWH* 27 May 2008, nr. 81/2008, B.77-B.83.

take into account new elements presented.³⁷⁶ However, lawyers and NGOs consider that, notwithstanding this exception, the current arrangements do not constitute an adequate safeguard. In the Netherlands, the applicant has to apply for an interim measure to grant suspensive effect but this request for an interim measure does not have suspensive effect either.³⁷⁷ In Slovenia, the applicant has to file for an interim measure.³⁷⁸ In Germany, different forms of provisional legal remedy need to be taken, depending on whether the asylum authority issues a notification announcing deportation, together with the negative decision on the subsequent application.³⁷⁹

There is no right of appeal against a decision not to further examine a subsequent application in Greece. The right of appeal to the Appeals' Board was abolished by the recent Presidential Decree (PD 81/2009).³⁸⁰ The only legal remedy is to seek judicial review.

In the UK, following an examination of the further submissions, the decision-maker decides whether to grant leave or whether to reject the further submissions. A decision to reject the further submissions and uphold the previous negative decision can only be appealed to the Asylum and Immigration Tribunal if the decision-maker determines that the further submissions constituted a "fresh claim" in accordance with the criteria stipulated in rule 353.³⁸¹ However, even if the further submissions are treated as a fresh claim, the existence of an appeal right will depend on whether it is considered that the new elements or findings could have been raised in an earlier appeal.³⁸² If so, then there is no right of appeal against the refusal of the fresh claim. This can have serious consequences in

³⁷⁶ Article 51/8 of the Aliens Act, stipulates: "*The minister or his authorized representative can decide not to take an asylum application into consideration when the foreigner, who has entered the country without fulfilling the necessary entry requirements, has already made the same application and he does not produce new elements containing significant indications for a well-founded fear of persecution as defined in the Refugee Convention, or containing significant indications of a real risk of serious harm warranting subsidiary protection. These new elements must relate to facts or situations that have taken place after the last phase in the procedure where the applicant could have produced them. The minister or his authorized representative must however take the asylum application into consideration when applicant has been notified earlier on a refusal decision which was taken based on article 52, § 2, 3°, 4° and 5°, § 3, 3°, § 4, 3° or article 57/10. Only an appeal for annulment at the CALL is lodged against a decision to not consider an application. A request for suspension of this decision cannot be lodged.*"

³⁷⁷ Article 62 lid 3c Aliens Act.

³⁷⁸ Article 74 (4) IPA and Art. 32 AAD.

³⁷⁹ In case the refusal to conduct a further asylum procedure is issued together with a notification announcing deportation (section 71 (4) APA in connection with section 36 APA), the time limit for filing an action against the refusal as well as for the application for an interim measure (according to section 80 (5) Code of Administrative Court Procedure) is one week. If after the rejection of the initial asylum application, a notification announcing deportation or a deportation order became enforceable, and the applicant filed a subsequent application which did not lead to a new asylum procedure, a new notification announcing deportation or a deportation order is not required in order to enforce deportation (section 71 (5) APA). Therefore, the person concerned has to apply for a temporary injunction pursuant to section 123 Code of Administrative Court Procedure. No time limit applies with regard to the temporary injunction, however, the main action has to be filed within two weeks. Different rules apply in case the person concerned shall be deported to a safe third country (section 71 (4) APA in connection with section 34a APA). Cf. also: R. Marx, *Residence, asylum and refugee law for practicing lawyers*, 3rd edition (2007), in particular p. 1341.

³⁸⁰ Article 10 PD 81/09.

³⁸¹ A refusal of a fresh claim is considered to constitute an 'immigration decision' which confers a right of appeal. Section 82(2) of the Nationality, Immigration and Asylum Act 2002 lists those decisions which are defined as 'immigration decisions'. There is no automatic right of appeal against a decision to refuse an asylum claim. Instead, appeal rights relate to the relevant 'immigration decision' which may accompany the decision to refuse asylum.

³⁸² NIAA 2002 Section 96(1) and (2) is as follows: "*96 (1) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies- (a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined), (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision. (2) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies (a) that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision, (b) that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice...."*

some individual cases.³⁸³ Where an appeal is not available, the only recourse is judicial review. A judicial review application may be affected by the determining authority's policy announced in January 2009 that they will not automatically suspend removal where the claimant has raised a second judicial review application based on:

- the same or virtually identical grounds; or
- grounds that could reasonably have been raised previously at the earlier judicial review.

In these circumstances, the determining authority is unlikely to suspend removal on receipt of a judicial review challenge.³⁸⁴

The reader is referred to section 16 of this report which addresses the issue of the extent to which judicial review may be considered to represent an effective remedy in the sense of the APD.

In Finland and France, there is no specific preliminary examination in which a formal decision can be taken not to further examine the application. Instead, subsequent applications are examined in either the accelerated or regular procedures, and a decision is taken on the application as such.

It is worth noting here that in France, applicants whose subsequent applications are rejected by the OFPRA have a right of appeal before the CNDA, as does any other applicant. However, if the subsequent application has been examined in the accelerated procedure (as is the case for 82.6% of subsequent applications), the appeal has no automatic suspensive effect.³⁸⁵ Moreover, it is important to note that according to recent reports,³⁸⁶ the rate of positive decisions taken by the CNDA on subsequent applications rejected by the OFPRA is relatively high (14.2% against 19.9% for the overall rate of positive decisions). On the other hand, subsequent applications are also subject to a higher rate of '*ordonnances*' by the CNDA than other applications.³⁸⁷

In Finland, a negative decision on a subsequent application, taken in the accelerated procedure, is immediately enforceable, unless otherwise ordered by the competent court.³⁸⁸

UNHCR notes that in Bulgaria an appeal against a decision not to further examine a subsequent application has suspensive effect.³⁸⁹

Recommendation

In line with Article 39 APD, applicants are entitled to an effective remedy following a negative decision on a subsequent application. This should include the right to seek a remedy against a decision rejecting the subsequent application on the grounds that no new elements have been submitted. UNHCR considers that while such an appeal might not have automatic suspensive effect, it should, as a minimum, allow the applicant to request an interim measure to prevent removal, based on his or her particular circumstances, and that suspensive effect should apply while that request is being considered.

³⁸³ The audit of case files included a case (DAF 31) involving an Iranian woman whose application was certified under NIAA 2002 Section 96 on the basis that she had received a one stop notice as her husband's dependant, and could have appealed earlier. The result was that no appeal could be brought against refusal of her asylum claim. Although an attempt was made to initiate judicial review proceedings to challenge the certificate, the court papers were not complete and the removal went ahead. There was a note on the file from a contact of the family which stated that the family had been detained on return to Iran.

³⁸⁴ Accessed via UKBA website 19 January 2009.

³⁸⁵ See detailed analysis under section 16 on the right to an effective remedy.

³⁸⁶ At the time of writing the national report (April 2009), the 2008 Activity Report for the CNDA was not yet published.

³⁸⁷ A negative decision taken by a single judge without a hearing.

³⁸⁸ Section 201 (2) and (3) Aliens Act 301/2004.

³⁸⁹ Article 84 (4) LAR.

SECTION XV: BORDER PROCEDURES

Article 35 (1) of the APD states that Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on applications for asylum made at such locations.

According to Article 35 (2) APD, when procedures as set out in Article 35 (1) do not exist, Member States may maintain, subject to the provisions of Article 35 APD and in accordance with the laws or regulations in force on 1 December 2005, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide at the border or in transit zones as to whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter their territory. These procedures shall ensure in particular that persons wanting to apply for asylum:¹

- (a) are allowed to remain at the border or transit zones of the Member State, without prejudice to Article 7;
- (b) are immediately informed of their rights and obligations, as described in Article 10 (1) (a);
- (c) have access, if necessary, to the services of an interpreter, as described in Article 10 (1) (b);
- (d) are interviewed, before the competent authority takes a decision in such procedures, by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 12, 13 and 14 APD;
- (e) can consult a legal adviser or counselor, admitted or permitted as such under national law, as described in Article 15 (1) APD; and
- (f) have a representative appointed, in the case of unaccompanied minors, as described in Article 17 (1) APD, unless Article 17 (2) or (3) APD applies.

In case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why the application for asylum is considered as unfounded or as inadmissible.

The APD requires Member States to ensure, in the framework of the procedures derogating from the basic principles and guarantees described in Chapter II, that a decision is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum must be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of the APD.

The final provision of this Article states that in the event of particular types of arrivals, or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, which makes it practically impossible to apply there the provisions of Article 35 (1) or of Article 35 (2) and (3), those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.²

In UNHCR's view, there is no reason for the requirements of due process of law in asylum cases submitted at the border, to be less than for those submitted within the territory. UNHCR acknowledges that Article 35 (1) APD requires Member States to adhere to the basic principles and guarantees of Chapter II in procedures undertaken at the border or in transit zones. However, UNHCR regrets that Article 35 (2) permits Member States to maintain

¹ Article 35 (3) APD.

² Article 35 (5) APD.

border procedures which do not comply with these standards. UNHCR strongly recommends that the states concerned adjust their procedures, with a view to bringing them at least into line with the agreed standards, outlined in Chapter II of the Directive.³

UNHCR further notes with concern that, according to Article 35 (4) APD, confinement of asylum seekers at borders is possible for up to four weeks. UNHCR considers confinement at the border to be equivalent to detention, in line with the jurisprudence of the ECHR. While UNHCR welcomes the introduction of a time limit, UNHCR recalls that asylum seekers should not, in principle, be detained. Given that detention is not an environment conducive for refugee status determination, the stay of an asylum seeker at the border should be as short as possible.⁴

Table 1 below sets out, with reference to Article 35 APD, whether the Member States of focus in this research have border procedures, the categories of applicants to which these procedures apply and the purposes of the procedures. Table 2 sets out the authority which takes decisions in the border procedures; whether the border procedures fulfil basic procedural requirements and guarantees of Chapter II APD; the maximum period for which an applicant may be detained in the border zone; the maximum period for taking a decision in a border procedure; if there is a right of appeal against a negative decision taken in the border procedure; and if such an appeal has automatic suspensive effect.

³ See UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, available at: <http://www.unhcr.org/refworld/docid/42492b302.htm>

⁴ *Ibid.*

Table 1: Application and purpose of border procedures, Article 35 APD												
Does the country have a border procedure?	Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Categories of applicants to which border procedures apply	√		√	√ ⁵ No entry docs; safe country of origin ⁹	√ All applications at the border ¹⁰		√ No entry docs ¹¹	√		√ No entry docs	√ ⁶	
Purpose of the border procedure	No entry docs ⁷		Identity not established ⁸									
Determine Member State responsibility for examination of application under Dublin II Regulation	√ ¹²				√					√ ¹³		
Determine if application is admissible under Article 25 of the APD				√ ¹⁴	√						√	
Check whether the application is a subsequent application												
Examine whether an application is manifestly unfounded, simply unfounded or well-founded	√		√ ¹⁶	√ ¹⁷	√ ¹⁸		√ ¹⁹	√		√	√	

- 5 The German Asylum Procedure Act (APA) contains two provisions dealing with the procedures applicable to foreigners who request asylum at the border (Sections 18 and 18a APA). At the land borders, due to the fact that Germany is surrounded by States participating in the Dublin system, as a rule, the review of Dublin criteria prevail over the provisions on entry. Therefore and for reasons of clarity, this table only contains basic information concerning the airport procedure (Section 18a APA).
- 6 While border procedures are established by national law, they are **not applied in practice**.
- 7 Foreigners who attempt to enter without the required entry documents, including families with children.
- 8 Aliens whose identity was not established in a reliable manner, or who produced falsified or altered identity documents, unless they are vulnerable applicants [S. 73 (4) and 73 (7) ASA].
- 9 Section 18a sentence 1 APA (foreigners coming from a safe country of origin **and** requesting asylum upon entry); Section 18a sentence 2 APA (foreigners who are unable to prove their identity with a valid passport or other means of identification requesting asylum upon entry). An additional requirement is that the person concerned can be accommodated on the airport premises during the procedure.
- 10 Applications lodged at the border will be declared inadmissible or rejected if manifestly unfounded. If conditions for inadmissibility or for declaring them manifestly unfounded are not met, the applications will be channelled to the regular procedure and the applicant will be admitted to Spanish territory.
- 11 Foreigners applying for asylum at the border.
- 12 If after an examination by the AO, the claim is considered admissible according to Dublin II Regulation, it is **sent to the CGRA** which must take a decision within 15 days.
- 13 The purpose of the border procedures, is defined in A. 58(i) of the IPA: "(1) If an alien expresses his/her intention to file an application while he/she is in an airport transit zone or on board a ship in port, the competent authority shall accept the application and take a decision as soon as possible. Pending the issuance of a final decision in an accelerated procedure, or a final decision within the Dublin procedures, the procedure of a national and European safe third country and the country of the first asylum, such person shall be present in such area. If the application is subject to regular procedure he/she shall be, after the performed sanitary-disinfection and preventive medical examination, accommodated in the asylum home."
- 14 This aspect will be checked in the framework of the analysis of the claim.
- 15 German asylum law does not contain rules in this regard, however, in practice, Section 18a APA is also applied to subsequent applications. This means that in case the criteria for the conduct of a further asylum procedure are not fulfilled, the applicant is refused entry. This practice is explained with the argument that someone whose application for a further asylum procedure is rejected, shall not be in a more favourable position with regard to entry to the territory than someone whose application is rejected as manifestly unfounded after applying for asylum for the first time. (Information provided by the determining authority (BAMF).
- 16 Explanatory memorandum to A379 states that in border procedures "it shall be also examined whether it is possible to allow their entry into the territory in relation to the procedure on international protection". The memorandum also states the need to consider, with regard to Article 31 of GC, whether the alien has come directly from a country where s/he was threatened, and with regard to the relevance of reasons stated by the alien in his/her application from the point of view of international protection procedure. It is also mentioned that the presence of the alien in detention is necessary in order to eliminate the danger of illegal crossing of state borders of the Czech Republic during the procedure, and in order to safeguard the departure of the alien after a final decision in the procedure.
- 17 Section 18a APA does not limit the examination to a decision of whether the application is well-founded or manifestly unfounded, but would also allow a decision that the application is simply unfounded. However, in practice, such a decision is not taken, since a simple rejection does not provide a reason for denying entry. In 2008, in the majority of cases (454 out of 649), the persons concerned were admitted to the territory, since the determining authority (BAMF) informed the border authority that a decision could not be taken within the short time frame set by law for the airport procedure (Section 18a (6) No. 1 APA). In all 174 cases in which the airport procedure was carried out, a decision was taken that the application was manifestly unfounded. (BAMF brochure "Asyl in Zählern", published: 13 July 2009, table on p. 53).
- 18 The determination of whether applications are well founded is not foreseen as one of the purposes of the border procedure.
- 19 Article L.221-1 of the *Ceseda*: "an alien who arrives in France by rail, sea or air and who (a) is refused leave to enter French territory or (b) applies for asylum may be held in a waiting zone [...] for the time strictly necessary to arrange his departure and, if he is an asylum seeker, to investigate whether his application is manifestly unfounded".

Table 2: Operation of border procedures, Article 35 APD

	Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Which authority takes decisions in the border procedure?	√ ²⁰		√ ²¹	√ ²²	√			√ ²³		√ ²⁴	√	
Do border procedures fulfil basic requirements of Chapter II APD? Do they ensure the applicant:							√ ²⁵					
is allowed to remain at the border/in transit zone during the procedure?	√ ²⁶		√	√	√		√	√		√	√	
is immediately informed of his/her rights and obligations?	√ ²⁷		√ ²⁸	√ ²⁹	√		√ ³⁰	√ ³¹		√	√	
has access to an interpreter?	√		√	√ ³²	√		√ ³³	√ ³⁴		√	√	
is given a personal interview?	√		√ ³⁵	√ ³⁶	√		√ ³⁷	√ ³⁸		√	√	

- 20 The authority taking decisions in the border procedure is CGRA, the determining authority.
- 21 The authority taking decisions in the border procedure is DAMP, the determining authority.
- 22 In the framework of the decision to grant /refuse entry to the territory, the border police decide whether the statement made by the person concerned is a **request** for asylum. Subsequently, the determining authority (BAMF) is responsible for taking the decisions with regard to the formal asylum application.
- 23 The Head of ARD in ADGPH is the determining authority. After the entry into force of the PD 84/09, the “determining authority” or “competent authority” to decide is the Director of the Police Directorates where the application has been lodged.
- 24 The authority taking decisions in the border procedure is the Immigration and Naturalisation Service (IND) (in mandate of the State Secretary of Justice). This is the determining authority.
- 25 The Ministry of Immigration (i.e. another authority under Article 4 (2) APD) takes the decision to grant or refuse leave to enter the territory relying on a written recommendation from OFPRA (the determining authority).
- 26 If the asylum seeker is not admitted to the territory, s/he will be issued an order of “*refoulement*” (Article 52/3 § 2 of the Aliens’ Act). In practice, however, the asylum seeker will remain at the border during the procedure.
- 27 After registration.
- 28 The applicant is informed of some rights immediately (S. 73 ASA), of others within 15 days from declaring intent to apply for international protection (S. 10/3 ASA).
- 29 The border police inform those persons whose statements have been qualified as a request for asylum of their rights and obligations during the procedure, and provides information in the form of a leaflet on the asylum procedure (including the personal interview and legal remedies). The determining authority (BAMF) informs applicants upon filing the formal asylum application of their rights and obligations and also provides information at the outset of the personal interview. (Information provided by the BAMF).
- 30 After receiving the asylum application report prepared by a border police officer (“*officier de quart*”) in the waiting zone.
- 31 In law, the border procedure fulfils the basic guarantees of Chapter II of APD. However, in practice, the border procedure presents **significant problems and deficiencies**, as does the in-territory asylum procedure. According to interviewees, the information received by asylum seekers is inadequate mainly because of a lack of interpreters.) In many occasions, there is no provision of any information whatsoever.
- 32 Both the questioning by the border police and the personal interview conducted by the BAMF take place in the presence of an interpreter.
- 33 If necessary, to read the content of the asylum application report, or during the interview. Interpretation is provided by phone or in person..
- 34 In practice, there are significant deficiencies in interpretation at border zones, in the absence of interpretation personnel.
- 35 Unless his/her claim can be decided as inadmissible under S. 10a ASA.
- 36 Section 18a (1) sentence 4 APA: “*The Federal Office shall interview the foreigner in person without delay.*”
- 37 The interview is carried out by OFPRA. However the report of the interview is not automatically transmitted to the asylum seeker. However, it is transmitted upon request by his/her lawyer, if the decision is challenged in the administrative tribunal.
- 38 According to interviewees, the personal interview is extremely problematic due to inadequate and untrained staff.

Table 2: Operation of border procedures, Article 35 APD		Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Maximum period for which an applicant can be detained in border zone?	may consult a lawyer or legal adviser?	✓		✓ ³⁹	✓ ⁴⁰	✓		✓ ⁴¹	✓ ⁴²		✓ ⁴³	✓ ⁴⁴	
	has a representative appointed under Article 17, if s/he is a separated child?	✓ ⁴⁵		✓ ⁴⁶	✓ ⁴⁷	48		✓	✓ ⁴⁹		✓	✓	
		2 mo ⁵⁰		120 d ⁵¹	30 d ⁵²	72 hrs ⁵³		20d	4 wks		No limit ⁵⁴	4mo ⁵⁵	

39 Although this possibility is given by law, at the airport the lawyer or legal adviser may experience difficulties in 1) being present during the interview, 2) accessing the case file of the applicant and 3) being granted power of attorney.

40 Section 18a (1) sentence 5 APA: “The foreigner shall immediately thereafter [i.e. after the personal interview] be given the opportunity to contact a legal adviser of his choice, unless he has already secured legal counsel.” According to the Federal Constitutional Court, the German Basic Law (Constitution) does not require that applicants have the possibility to contact a lawyer before the personal interview, since the legislator attaches great importance to a spontaneous and uninfluenced statement of the reasons for applying for asylum (Federal Constitutional Court, official collection, 94, 166, (2004)). In practice, applicants are informed by the border police, that they may contact a lawyer at any time during the asylum procedure. (Cf. No. 4 of the information sheet of the border police.) If an application is rejected as manifestly unfounded, legal counselling (independent of the determining authority) needs to be provided free of charge.

41 Article L.221-4. Cesead: “The foreigner who is held in a waiting zone is informed as soon as possible that he/she may request the assistance of an interpreter and of a doctor, communicate with a legal adviser or with any person of their choice and leave at any time the waiting zone for a destination outside France. This information is given in a language he/she understands”.

42 However, usually asylum seekers do not consult a legal adviser before the interview with OFPRA. No legal adviser is admitted to the interview.

43 The consultation is at the applicant's own cost since there is no free legal assistance available at the borders.

44 After the first interview.

45 At his/her own cost.

46 This is not the case for separated children originating from EU Member States.

47 Separated minors may not be detained at the airport under Section 73(7) ASA. However, if they arrive by plane, a guardian may sometimes be appointed at the airport.

48 A foreigner who is at least 16 years of age is capable of performing procedural acts within the asylum procedure (Section 12 (1) APA). Children under the age of 16 need representation to perform such acts (e.g. filing an asylum application).

49 At the border, the minor will automatically be given entry to Spain and put under the care of the juvenile authorities, who will appoint a guardian.

50 Interviewees report that the practice is inconsistent and a representative is rarely appointed.

51 From the time the applicant lodges the application and is detained. This time limit is suspended during the 15 day period foreseen to lodge an appeal before the CALL. In the case of unaccompanied children, an alternative to detention exists. Unaccompanied children are accommodated for a maximum of 30 days in a special observation and orientation centre.

52 From the moment the asylum seeker is detained.

53 If, after the airport procedure has been conducted, entry to the territory is refused and immediate return is not possible, the person shall be accommodated in the transit zone. Without a judicial order, this stay shall not exceed 30 days. However, it may be prolonged by judicial order. Such an order is only admissible, if it can be expected that return will be possible within the period of time indicated in the order. (Section 18a (6) No. 4 APA in conjunction with Section 15 (6) Residence Act).

54 This refers to the time limit for dealing with the asylum application, which is 72 hours (while the old implementing decree is in force) + 2 working days + 2 working days. Exceptionally the 72 hours may be extended to 10 working days, if the authorities are considering whether one of the exclusion clauses applies + 2 working days (while the old implementing decree is in force) + 2 working days.

55 The procedure to decide on the application will last a maximum of six weeks, with a prolongation up to a maximum of a further two weeks. If the outcome of the application is a negative decision, detention in order to deport may last six months and even up to 18 months, as allowed under the Return Directive.

56 This is not defined in the law. However, an analogy could be drawn with the general provisions on detention which set a time limit of three months and the possibility of an additional month. It is problematic that the provision on detention does not provide grounds for detention in the case of border procedures. Since the right to free movement is a constitutional right, any derogation should explicitly be defined in the law. The only possibility would be in the case of the accelerated procedure on certain grounds as defined in the A. 51 (4) indent 2 of the IPA (detention of applicants).

Table 2: Operation of border procedures, Article 35 APD

	Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Maximum period for taking a decision in the border procedure (if any)?	15 days		4 wks	2 days ⁵⁶	4 days			4 wks		6 wks	ASAP ⁵⁷	
Is there a right of appeal against a negative decision in the border procedure?	√	na	√	√ ⁵⁸	√ ⁵⁹	na	√ ⁶⁰	√ ⁶¹	na	√	√	na
If yes, does it have automatic suspensive effect?	√		√ ⁶²		√ ⁶³		√			64	65	

⁵⁶ The two-day period of the airport procedure begins with the formal application for asylum with the branch office of the BAMF assigned to the respective airport (Section 18a (6) No.2 APA.) Neither the arrival at the airport, nor the request for asylum expressed to the border police is the decisive point in time in this regard. In case the appeal court is not able to decide on the application for a temporary legal remedy within 14 days, the applicant has to be admitted to the territory (Section 18a (6) No. 3 APA).

⁵⁷ Article 58(1) of the IPA only establishes that in the border procedure, an application should be lodged and decided upon as soon as possible/in the shortest time possible.

⁵⁸ In case of rejection as manifestly unfounded, there is a deadline of three days for an application for an interim measure (Section 18a (4) APA). The deadline for the submission of the main application for appeal is disputed (see Marx, Commentary on the Asylum Procedure, 7th edition, 2009, section 18a, paragraph 177); in practice, it is advisable to submit the main application together with the application for an interim measure. The reasoning of the appeal may be submitted within another four days if such an extension of the deadline is applied for (see Federal Constitutional Court, official collection, vol. 94, 166, (207)). Theoretically, a rejection as simply “unfounded” may also be taken in the airport procedure within the deadline of two days, which would not lead to a denial of entry. However, as mentioned before, this situation is not relevant in practice.

⁵⁹ A re-examination of the decision by the same authority who took it can be requested in two days. An administrative review can be requested within one month while a judicial review can be requested within 2 months from the negative decision.

⁶⁰ The decision to refuse leave to enter the country as an asylum seeker may be challenged before the Administrative Court (« *Tribunal administratif* ») within 48 hours after notification.

⁶¹ A request for judicial review on a point of law may be submitted to the Council of State. See section 16 of this report on the extent to which this may constitute an effective remedy.

⁶² Appeal to the first instance court (Regional Court, RC) has suspensive effect. If the judgment of the RC enters into force while the applicant is still held in the reception centre in the transit zone of the international airport, an appeal against that judgment does not have suspensive effect. In practice those are cases when judgment is (1) delivered within 120 days from the date of declaration of intent to apply for international protection, and at the same time (2) the applicant is still residing at the airport, as a) according to DAMP reasons for not allowing entry into the territory still apply, or b) decision on not allowing entry has not been annulled by CC Prague by that time.

⁶³ While the re-examination has automatic suspensive effect, an interim measure should be requested in case of an administrative review and judicial appeal.

⁶⁴ The right to appeal has no automatic suspensive effect. The applicant has to request an interim measure within 24 hours of the rejection.

⁶⁵ The right to appeal has no automatic suspensive effect. The applicant has to request an interim measure.

SECTION XVI:

THE RIGHT TO AN EFFECTIVE REMEDY

Introduction

The provision of a right to appeal

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Introduction

It is a general principle of European Union law, reiterated in Article 47 of the Charter of Fundamental Rights of the European Union, that individuals are entitled to an effective remedy if a right guaranteed by Community law is affected.¹ The case law of the European Court of Justice has established that Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the application of provisions of Community law.²

The APD reflects this general principle of Community law insofar as it provides that “*Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal*”.³

The term ‘effective remedy’ appears in numerous international human rights treaties and, therefore, monitoring and supervisory bodies have elaborated the standards required of an ‘effective remedy’.⁴ As Contracting States to the European Convention on Human Rights, EU Member States must abide by these international legal standards and reflect them in their national legislation and procedures. The notion of an effective remedy in relation to a claim for international protection requires, according to the European Court of Human Rights, rigorous scrutiny of an arguable claim because of the irreversible nature of the harm that might occur.⁵ The remedy must be effective in practice as well as in law. It must take the form of a guarantee and not of a mere statement of intent or a practical arrangement,⁶ and it must have automatic suspensive effect.⁷

Some expert commentators consider that the obligations laid down in Article 6 ECHR, which enshrines the right to a “*fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”, apply to all Community rights, including administrative proceedings such as asylum procedures.⁸ A further basis

1 Article 47 of the Charter of Fundamental Rights of the European Union states that “*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.*” Recital 8 of the APD states that “*This Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union.*”

2 Case C-327/02, decision of 16 November 2004, paragraph 27; C-50/00, *Union de Pequeños Agricultores*, 2002.

3 Article 39 (1) APD. Recital 27 of the APD states that “*It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty.*”

4 Article 13 of the European Convention on Human Rights (ECHR) and Article 2 of the UN International Covenant on Civil and Political Rights. Article 13 of the ECHR states: “*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.*”

5 *Jabari v Turkey*, no. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000.

6 *Conka v. Belgium*, no. 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002.

7 *Gebremedhin [Gaberamadhien] c. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007. See below for the Court’s interpretation of the term “automatic suspensive effect”.

8 See ‘A Manual for Refugee Law Judges relating to European Council Qualification Directive 2004/83/EC and European Council Procedures Directive 2005/85/EC’, John Barnes, 2007 at p. 54 which states that “[i]t is important also to emphasize that the ECJ has not accepted the limitation which the ECtHR placed upon the extent of its jurisdiction by classifying asylum and immigration claims as claims to which Article 6 ECHR did not apply. The effect of bringing the issue of effective protection onto a Community law base is, therefore, to increase the scope of the protection offered to claimants to include Article 6 ECHR rights” and at pg. 52 cites paragraph 420 of ‘European Asylum Law and International Law’, Hemme Battjes, Martinus Nijhoff Publishers, Leiden, Boston, 2006 which states “[i]nternational law has served as a source of inspiration for the general principles of Community law concerning appeal proceedings, as well as for Article 47 Charter. But these principles, and this Charter provision offer in several respects more extensive protection. To begin with, they require an effective remedy if the right guaranteed by Community law is affected (the ‘arguable claim’ requirement does not apply). Moreover, the obligations laid down in article 6 ECHR apply to all Community rights (thus not only to ‘civil rights and obligations or criminal charges’) – including administrative proceedings, such as asylum procedures.”

for the right to an effective remedy in asylum cases under international law is found in the ICCPR,⁹ which provides safeguards against expulsion¹⁰ and an appeal right against decisions which could lead to forced removal.¹¹

This research did not intend to and, therefore, did not carry out a systematic audit of appeal decisions.¹² Instead, the findings set out in this section are based primarily on interviews with stakeholders, including appeal judges, the staff of appeal authorities, lawyers and NGOs; and on an overview of the relevant national laws, regulations and administrative provisions.

The provision of a right to appeal

Given that it is a general principle of European Community law that individuals are entitled to an effective remedy if a right guaranteed by Community law is affected; Article 39 (1) APD sets out the circumstances in which Member States are obliged to provide an effective remedy before a court or tribunal against a decision on an application for asylum:

“1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

- (a) a decision taken on their application for asylum, **including** a decision: [emphasis added]*
 - (i) to consider an application inadmissible pursuant to Article 25(2);*
 - (ii) taken at the border or in the transit zones of a Member State as described in Article 35(1); and*
 - (iii) not to conduct an examination pursuant to Article 36.*
- (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;*
- (c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;*
- (d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);*
- (e) a decision to withdraw[of] refugee status pursuant to Article 38.”*

It should be noted that Article 39 (1) (a) APD is non-exhaustive. UNHCR interprets Article 39 (1) APD to require that any negative decision in connection with an application for international protection is subject to the right of the claimant to an effective remedy from a court or tribunal.¹³ This is regardless of whether the decision is taken by the determining authority or another designated competent authority in accordance with Article 4 (2) APD.

⁹ UN General Assembly, International Covenant on Civil and Political Rights, Articles 2(3), 13 and 14, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.unhcr.org/refworld/docid/3ae6b3aao.html>.

¹⁰ Articles 13, 14 ICCPR.

¹¹ Article 2(3) ICCPR. For detailed analysis, see Wouters, *International standards for the Protection from Refoulement*, 2009, pp 412-3 and 419.

¹² Although the judgments of two courts in the Czech Republic which were available to UNHCR were examined, and some appeal decisions were reviewed in Slovenia.

¹³ The wording used is ‘a decision taken on their application for asylum’ which is then followed by a list of three examples which is clearly non-exhaustive because of the use of the word ‘including’. There does not appear to be any decision in connection with an asylum application which will not be subject to the right of the claimant to seek an effective remedy from a court or tribunal subject to the exception stated in Article 39 (5) APD, where an applicant has been granted a status which offers the same rights and benefits under national and Community law as refugee status by virtue of the Qualification Directive.

The following Member States of focus in this research have transposed or reflected Article 39 (1) APD in national legislation, regulations or administrative provisions, by providing for a right of appeal or judicial review against all decisions relating to an application for international protection: Belgium,¹⁴ Bulgaria,¹⁵ the Czech Republic,¹⁶ France,¹⁷ Germany,¹⁸ Greece,¹⁹ Slovenia,²⁰ Italy,²¹ the Netherlands,²² Spain²³ and the UK.²⁴

In Finland, there is a general right of appeal against a refusal of an asylum application,²⁵ but an exception to this is that decisions on discontinuing the assessment of certain applications are not afforded a right of appeal.²⁶ This stems from the fact that it is the decision on expulsion, included in asylum decisions, which may be appealed. However, decisions on implicit withdrawal, which result in the discontinuation of the examination, do not include a decision on expulsion. UNHCR notes that this fails fully to comply with Article 39 (1) (b) APD, which requires an effective remedy to be provided against refusals to re-open an application after its discontinuation.

¹⁴ Article 39/2 of the Aliens Act.

¹⁵ Article 120 of the Constitution of the Republic of Bulgaria. Decisions relating to the Law of Asylum and Refugees (LAR) are subject to a right of appeal before a court in accordance with the provisions of Chapter Seven LAR. These appeal rights can be divided into three groups: 1) appeal against decisions under the Dublin procedure which are heard before the Administrative Court of Sofia City (Articles 84 (1, 3 & 5) and 85 (1, 3 & 4) LAR); 2) appeal against decisions taken in transit or at regional reception centres relating to applicants' rights during proceedings and negative decisions taken in the accelerated procedure which are heard before the Administrative Court of the place of registered residence (Article 84 (2-5) and Article 85 LAR); 3) appeal against decisions by the determining authority (SAR) concerning status determination, discontinuation or revocation of status, revocation of temporary protection and family reunification which are heard before the Supreme Administrative Court of the Republic of Bulgaria (SAC) (Articles 87-90 LAR). All other decisions taken under LAR are subject to a right of appeal in accordance with the general procedural rules of the Administrative Procedures Code and the Civil Procedures Code as stipulated in Article 91 LAR. (*Amended, SG No. 30/2006, SG No. 52/2007*). "The provisions of the Administrative Procedures Code and the Civil Procedures Code shall apply to all matters not regulated by this Chapter". Thus all decisions are subject to a right of appeal in accordance with Article 39 (1) APD.

¹⁶ Section 65 CAJ and Section 32 ASA.

¹⁷ Article 39 (1) APD is transposed by Article L.731-2 *Ceseda* and Article R.733-6 *Ceseda*. However, Articles 39 (1) (a) (i), (ii) and (iii) are not transposed as they refer to provisions of the APD which are not transposed and are not applicable in France. Article 39 (1) (c) APD is transposed by Article R.733-6 *Ceseda*; Article 39 (1) (d) APD is transposed by Article L.213-9 *Ceseda* and Article 39 (1) (e) is transposed by Article R.733-6 *Ceseda*. Article R.733-6 *Ceseda*: The CNDA examines :
^{1°} Appeals filed against decisions of the OFPRA granting or refusing asylum status.
^{2°} Appeals filed against decisions of the OFPRA withdrawing asylum status.
^{3°} Appeals filed to review a case if it is alleged that the decision of the CNDA was based on fraudulent information.
^{4°} Appeals filed against decisions rejecting a subsequent application. (Unofficial translation).

¹⁸ Section 42 Code of Administrative Court Procedure; and Section 74 APA. There is a right of appeal to the administrative court against a negative decision on an application for international protection, including a refusal to re-open the examination of an application after its withdrawal or discontinuation, a decision not to further examine a subsequent application, a decision to deny entry at the border or in the transit zones, and a decision to withdraw refugee status. In Germany, the concept of inadmissibility, in terms of Article 25 APD, is not applied.

¹⁹ During the period of this research, according to Article 25 of PD 90/2008, applicants had the right to appeal against a decision rejecting their asylum application, against a decision rejecting a subsequent application as unfounded or against a decision withdrawing their refugee status. They also had the right to appeal against a decision ruling their asylum application as inadmissible. Article 25 of PD 90/2008 has been repealed by Presidential Decree 81/2009. Only Article 29 of PD 90/2008 applies which provides applicants with the right apply to the Council of State for an annulment of a negative decision issued by the competent authorities.

²⁰ A. 74 -77 IPA – Judicial Protection Procedure.

²¹ According to Article 35 (1) of the d.lgs. 25/2008, a judicial appeal may be lodged against any decision of a CTRPI to the *Tribunale* (Civil Court).

²² Article 8:1 General Administrative Law Act.

²³ Articles 21 and 39 ALR. And Article 29 of the New Asylum Law.

²⁴ Section 82 and 83 of the Nationality Immigration and Asylum Act 2002 normally provides a right of appeal but there are exceptions when there is no statutory right of an in-country or out of country appeal and applicants must seek judicial review of the decision.

²⁵ The Finnish *Ulkomaalaislaki* (Aliens' Act 301/2004), section 190, states that a decision by the Finnish Immigration Service may be appealed to the competent administrative court.

²⁶ Section 191 (1) of the Finnish *Ulkomaalaislaki* (Aliens' Act 301/2004).

France has not transposed Article 39 (1) (b) APD in its legislation and does not provide the right to an effective remedy before a court or tribunal, against a refusal to re-open the examination of an application after its discontinuation following explicit withdrawal (*désistement*). France has not transposed Articles 19 or 20 APD on explicit and implicit withdrawal in its national legislation, but in practice, the examination of an application is discontinued following explicit withdrawal. However, an applicant who wishes to pursue an application, which was previously withdrawn or considered withdrawn, cannot have the examination re-opened. S/he may, however, submit a new application without having to raise new elements. This constitutes a remedy tantamount to the re-opening of the examination. In practice, applications which are implicitly withdrawn may be struck off (“*radiation*”) but examination would be re-opened if requested by the applicant.²⁷ Nevertheless, UNHCR considers that national legislation should provide for an effective remedy in order to ensure compliance with Article 39 (1) (b) APD.

In the United Kingdom, there is no statutory in-country right of appeal for an applicant whose asylum or human rights-based claim is certified as ‘clearly unfounded’ on the basis that it is without substance, or the applicant is entitled to reside in a safe country of origin.²⁸ There is only an out-of-country right of appeal. There is no statutory right of appeal for applicants removed on safe third country grounds, save that an in-country right of appeal is available where the applicant claims that removal to a state, not subject to the Dublin II Regulation, would breach human rights and this claim has not been certified as unfounded.²⁹ There is also no right of statutory appeal where there is a refusal to re-open a claim treated as implicitly withdrawn or abandoned, where further submissions are not considered to amount to a “fresh claim” (subsequent application)³⁰ or where it is deemed that a claim could have been raised in a previous appeal or made earlier.³¹ In addition, there is no in-country right of appeal against a negative decision on an asylum claim where the applicant is to be deported on national security grounds, save in cases which raise human rights issues.³² The UK authorities claim to have transposed the requirements of Article 39 (1) APD on the basis that where there is no in-country statutory right of appeal, the applicant may still seek judicial review of the decision to the higher courts.³³

Similarly, it should be noted that the scope of review by the appeal authority (the Council of State) in Greece is also restricted to a review of the lawfulness of the decision at first instance and not the facts, i.e. judicial review.

The issue of whether judicial review can provide an effective remedy in the asylum and immigration context is a contested one which is discussed further below.

²⁷ Information provided by the Head of the Legal Department of the determining authority OFPRA.

²⁸ Nationality Immigration and Asylum Act 2002 s94.

²⁹ Section 33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

³⁰ As defined in Immigration Rule 353.

³¹ Section 96 of the Nationality Immigration and Asylum Act 2002.

³² Nationality, Immigration and Asylum Act 2002 s 97A (2) & (3). In national security cases, appeals are heard by the Special Immigration Appeals Commission; see Special Immigration Appeals Commission Act 1997.

³³ Annex A of the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007. Judicial review is an application to the supervisory jurisdiction of the higher courts.

The appeal authority

Article 39 (1) APD requires an effective remedy before a “*court or tribunal*” but does not explicitly define either term. However, UNHCR considers that this can be understood to mean a review body which is independent of the first instance determining authority, and which has power in most cases to consider questions of fact and law.³⁴

All of the Member States surveyed provide for an appeal against a decision by the determining authority to an independent administrative court or tribunal, namely: Belgium,³⁵ Bulgaria,³⁶ the Czech Republic,³⁷ Finland,³⁸ France,³⁹ Germany,⁴⁰ Greece,⁴¹ Italy,⁴² the Netherlands,⁴³ Slovenia,⁴⁴ Spain⁴⁵ and the United Kingdom.⁴⁶

Member States	First tier appeal authorities
Belgium	Council for Aliens Law Litigation
Bulgaria	Supreme Administrative Court Administrative Court (of place of residence) Administrative Court of Sofia
Czech Republic	Regional Court
Finland	Helsinki District Administrative Court
France	National Court of the Right of Asylum Administrative Court

³⁴ See UNHCR, APD comments 2005; see also UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paragraphs 5 41 and 43, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>

³⁵ Since its modification in 2006, the Aliens Act now allows for the possibility of an appeal to an independent and impartial administrative tribunal, specifically the Council for Aliens Law Litigation (CALL) against any decision taken on an asylum application. The CALL was established under the Law of 15 September 2006 reforming the Council of State and establishing the Council for Aliens Law Litigation.

³⁶ Decisions of the determining authority may be appealed before the administrative courts, according to the system of territoriality in existence since March 2007, and the Supreme Administrative Court of the Republic of Bulgaria.

³⁷ Regional Administrative Court in the location in which the applicant resides – normally an asylum centre. Appeals against a decision to refuse entry are made to the City Court of Prague.

³⁸ Asylum appeals are lodged with the Helsinki District Administrative Court (*Helsingin Hallinto-Oikeus*), holding six chambers of which two deal with asylum proceedings.

³⁹ All negative decisions of OFPRA can be appealed to the National Court of the Right of Asylum (*Cour Nationale du Droit d’Asile* or CNDA) except for a refusal to allow entry to the territory from the border procedure which is appealable to the Administrative Court.

⁴⁰ Section 42 Code of Administrative Court Procedure; and Section 74 APA.

⁴¹ Article 29 of PD 90/2008 applies which provides applicants with the right to apply to the Council of State for an annulment of a negative decision issued by the competent authorities.

⁴² Under 35 (1) of the d.lgs. 25/2008, the “*Tribunale in composizione monocratica*” is the competent authority. This is the ordinary civil court but consists of only one judge, rather than three, which is generally the case under the Italian legal system. It is a full judicial authority.

⁴³ District Courts are responsible for reviewing the decision of the determining authority.

⁴⁴ The first judicial instance is the Administrative Court based in Ljubljana.

⁴⁵ An appeal against a final administrative decision on the inadmissibility of a claim is reviewed by the administrative judges of the National High Court (*Juzgados Centrales de lo Contencioso-Administrativo*). The judge’s decision can be appealed to the Administrative Chamber of the National High Court (*Sala de lo Contencioso-Administrativo de la Audiencia Nacional*). A negative decision in the regular RSD procedure will be reviewed directly by the Administrative Chamber of the National High Court. Cassation recourse can be lodged at the Supreme Court. In cases of revocation of refugee status, the decision can only be appealed to the Supreme Court as a single instance. This exception is due to the fact that the revocation decision is adopted by the Council of Ministers. In Spain, there is provision for an optional prior administrative appeal against a refusal decision (excluding revocation decisions) but this does not impact on the right to a judicial appeal. This optional administrative review is different from the request for re-examination of inadmissibility decisions at borders which has automatic suspensive effect.

⁴⁶ The Asylum and Immigration Tribunal (AIT) is part of the Tribunals Service which is an executive agency of the Ministry of Justice, providing administrative support to the main UK-wide tribunals. The Ministry of Justice is a separate Department of Government from the Home Office. An exception to this is that the Special Immigration Appeals Commission (SIAC) deals with appeals against decisions made by the determining authority to deport on national security grounds, or for other public interest reasons. SIAC is also part of the Tribunals Service. Procedures for appealing to the AIT are set down in the Asylum and Immigration Tribunal (Procedure) Rules 2005, Statutory Instrument 2005, No. 230.

Member States	First tier appeal authorities
Germany	Administrative Court
Greece	Council of State
Italy	Civil Court
Netherlands	District Court
Slovenia	Administrative Court
Spain	Administrative judges of the National High Court Administrative Chamber of the National High Court
UK	Asylum and Immigration Tribunal

Of the Member States listed above, the following have in place specialist asylum/immigration tribunals: Belgium (Council for Aliens Law Litigation: CALL), France (The National Court of the Right of Asylum: CNDA) and the United Kingdom (The Asylum and Immigration Tribunal: AIT).

The Helsinki District Administrative Court in Finland is a *quasi* specialist body as it is the only administrative court of the many district administrative courts which has competence in matters relating to asylum.

Of the states under focus in this research, only Greece, during the period of this research in early 2009, had in place an appeal body which was not fully independent of the first instance determining authority and, therefore, not in compliance with Article 39 (1) APD. During UNHCR's research, negative decisions were reviewed by the Appeals Board which operated within the Ministry of Interior and was supported administratively by the Greek Police Headquarters – the determining authority.⁴⁷ The Board was composed of: two representatives from the Ministry of Interior (one acted as chairperson), of which one was from the determining authority, and the other from the General Secretariat of Public Order which had responsibility for the determining authority; two representatives from the Ministry of Foreign Affairs; one representative from UNHCR; and one representative from the Athens Bar Association.⁴⁸ An appeal decision was taken by majority vote. In the case of a split vote, the Chairperson's vote was counted twice. Government representatives interviewed claimed that the Board was independent, citing the fact that Board members representing government departments were not party to the first instance decision.⁴⁹ However, given its composition, UNHCR did not consider that the Appeals Board satisfied the necessary requirement of independence.

Since the period of UNHCR's research in Greece, a new law entered into force there on 20 July 2009 which abolished the Appeals Board.⁵⁰ Any appeals which were pending at the time of entry into force of the new law were to be decided by the Deputy Minister of Interior. Since 20 July 2009, the only legal remedy on appeal against a negative decision by the determining authority is an application for judicial review to the Council of State for an annulment of the decision on the grounds of an error of law or procedure. The extent to which this can be considered an 'effective remedy' is further addressed below.

In some Member States, different courts are charged with responsibility for appeals, depending on the type of decision taken by the determining authority. This is the case in Bulgaria where the relevant appeal authority may

⁴⁷ There were three Appeals Boards, all located in Athens.

⁴⁸ Articles 25, 26 and 2 (p) of PD 90/2008.

⁴⁹ Article 26 PD 90/2008 stipulated the constitution of the Appeals Board, and it stated that the person who issued, at first instance, the decision under appeal cannot participate in the Appeals Board as the representative of the Aliens' Directorate. The Aliens' Directorate of the Greece Police Headquarters (ADGPH) claimed that the Board was independent. They referred to the fact that Greek Police Headquarters only provided the Appeals Board with secretarial support and that ADGPH's representative on the Board was a police officer who had not taken part at first instance (interview with S1).

⁵⁰ Presidential Decree 81/2009.

be the Supreme Administrative Court, the Administrative Court in the area of residence or the Administrative Court of Sofia, according to the nature of the decision.⁵¹

In France, negative decisions by the determining authority on applications for international protection are subject to review by the specialised National Court of the Right of Asylum (CNDA), but decisions refusing entry within the framework of the border procedure are reviewed by administrative courts.⁵²

Finally, as mentioned above, in the UK, negative decisions may be appealed in-country to the specialised Asylum and Immigration Tribunal except when the determining authority decides that the claim is clearly unfounded⁵³ or where there is a national security issue.⁵⁴ Furthermore, there is no statutory in-country right of appeal: in most safe third country cases;⁵⁵ where a decision is made not to re-open the asylum procedure following a withdrawal, or not to further examine a subsequent application;⁵⁶ where a subsequent application could have been raised in a previous appeal;⁵⁷ or if a claim could have been made earlier.⁵⁸ In these cases, the applicant must seek judicial review before the High Court in England and Wales, or the Court of Session in Scotland or the High Court of Northern Ireland.

In some Member States, whether an appeal is heard by a single judge or a panel of judges may depend on the nature of the decision taken by the determining authority. For example, in Spain, an appeal against a decision of inadmissibility is reviewed by an administrative judge of the National High Court, whereas an appeal against a decision taken in the regular procedure is reviewed by the Administrative Chamber of the National High Court. In Germany, administrative courts are organized in chambers.⁵⁹ However, as a rule of general administrative law, the chamber shall assign the appeal to one of its members for decision.⁶⁰ Thus, while a chamber is generally composed of three professional and two honorary judges,⁶¹ decisions are mostly taken by a single judge. The same is true for the asylum procedure, as according to Section 76 (1) APA, appeals resulting from the implementation of the Asylum Procedure Act are referred to one of the chamber's members for a decision, unless the case presents

51 Law on Judiciary (Prom. SG No.64/07.08.2007, last amended SG No.42/05.06.2009). This can be categorized as follows: 1) appeals against decisions under the Dublin procedure which are heard before the Administrative Court in Sofia (Articles 84 (1, 3 & 5) and 85 (1, 3 & 4) LAR); 2) appeals against decisions taken in transit or regional reception centres concerning applicants' rights during proceedings and negative decisions taken in the accelerated procedure which are heard before the local Administrative Court (Article 84 (2-5) and Article 85 LAR.); 3) appeals against decisions by the determining authority (SAR) concerning status determination, discontinuation or revocation of status, revocation of temporary protection and family reunification which are heard before the Supreme Administrative Court of the Republic of Bulgaria (SAC) (Articles 87-90 LAR). All other decisions taken under LAR are subject to a right of appeal in accordance with the general procedural rules of the Administrative Procedures Code and the Civil Procedures Code as stipulated in Article 91 LAR.

52 The issue of whether to reform the appeal procedure and give the CNDA the jurisdiction to review all decisions, including entry refusals, is the subject of debate. The Government commissioned a working group in 2008 ("*Commission Mazeaud*") which published a report on this issue. The issue will probably be debated soon by the Senate (« *Proposition de loi relative au transfert du contentieux des décisions de refus d'entrée sur le territoire français au titre de l'asile, Rapport n° 329 (2008-2009) de M. Jean-René LECERF, fait au nom de la commission des lois, déposé le 8 avril 2009* ») which suggests that litigation related to decisions refusing leave to enter the country as asylum seekers (currently falling under the jurisdiction of the administrative court) should be transferred to the CNDA.

53 Nationality, Immigration and Asylum Act 2002 s94.

54 Nationality, Immigration and Asylum Act 2002 s 97A (2)&(3). In national security cases appeals are heard by the Special Immigration Appeals Commission, see Special Immigration Appeals Commission Act 1997.

55 Section 33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

56 When it is deemed that it does not constitute a 'fresh claim' as defined in Immigration Rule 353.

57 Section 96 (1) of the Nationality Immigration and Asylum Act 2002.

58 Section 96 (2) of the Nationality Immigration and Asylum Act 2002.

59 Section 5 (2) Code of Administrative Court Procedure. Several different chambers within each of the courts deal with appeals relating to applications for international protection and claims are often assigned to the chambers by country of origin with most chambers responsible for several countries of origin.

60 Section 6 (1) Code of Administrative Court Procedure.

61 Section 5 (3) Code of Administrative Court Procedure.

particular difficulties of a factual or legal nature or unless the legal matter is of fundamental significance.⁶² In 2007, only 8.2% of all appeals were dealt with by the full chamber.⁶³

Access to the appeal right in practice

The notion of effectiveness implies that a person should have access to the remedy in legal terms, but also in practical terms.⁶⁴ The practicalities which are inherent in exercising a judicial right of appeal are notoriously technical and complex. It is crucial, therefore, that Member States minimize requirements and facilitate access to the right in practice.

Through interviews with various stakeholders in the Member States of focus, UNHCR sought to find out whether the legislative right of appeal was accessible in practical terms. Information received indicated that, in practice, there are varied and numerous impediments for prospective appellants in some Member States. The following constitutes a list of just some of the obstacles cited by interviewees:

- inadequate information provided to applicants on how to appeal, and to which appeal body;
- extremely short time-limits within which to appeal;
- lack of linguistic assistance for applicants with regard to information on how to appeal and with the submission of the appeal;
- a shortage of legal advisers and a lack of competent legal advisers;
- applicants prevented from lodging the appeal in person as required by national procedural rules;
- difficulties in accessing the case file in a timely way, to ascertain the grounds upon which the negative decision is based for preparation of an appropriate appeal;
- physical access for appellants to the court or tribunal is hindered by distance and lack of financial resources to travel.

In some Member States, a number of these impediments may combine to render the right of appeal ineffective in practice. Moreover, the obstacles listed above tend to be exacerbated when the applicant is in detention, and shortened time limits apply.

Examples of how these impediments occur in practice are outlined below.

Information on how to appeal

Article 9 (2) APD requires all Member States to ensure that, where an application is rejected, “*information on how to challenge a negative decision is given in writing*”. Moreover, Article 10 (1) (e) APD imposes a strict requirement that, together with the decision, applicants are given “*information on how to challenge a negative decision in accordance with the provisions of Article 9(2)*” in a language which they may reasonably be supposed to understand.⁶⁵ The aim of these provisions is to guarantee that when the applicant receives a negative decision, s/he also knows, at that point in time and in practical terms, how to appeal the decision, to which specific appellate body, within what time-frame and contact details with regard to legal assistance.⁶⁶ Information which simply states

⁶² Section 76 (1) APA. The same rules apply in general administrative law (Section 6 (1) Code of Administrative Court Procedure. However, it is interesting to note that while the general rules allow judges to sit alone only after their first year of appointment (Section 6 (1) 2 Code of Administrative Court Procedure), the Asylum Procedures Act provides for this possibility already six months after appointment (Section 76 (5) APA).

⁶³ Data of the Federal Statistical Office – “*Rechtspflege Verwaltungsgerichte*” – 2007, published on 13 January 2009.

⁶⁴ See *Gebremedhin [Gaberamadhien] c. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, which reiterates this legal principle established in the case-law of the European Court of Human Rights.

⁶⁵ However, the third paragraph of Article 9 (2) APD sets out an exception when it states “*Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant.*”

⁶⁶ See also section 5 of this report on the requirements for a decision.

the right to appeal, or provides generic or legalistic information rather than practical instructions on how to challenge the decision, does not fulfill this requirement. These practical instructions must be specific to the applicant, and must be communicated, according to the APD, in a language that the applicant may reasonably be supposed to understand, although UNHCR would encourage Member States to provide this information in a language which the applicant actually understands.

As explained in greater detail in section 3 of this report, UNHCR's research has revealed deficiencies in the provision of information provided to applicants in some Member States.

In France, practical information on how to appeal is provided only in French, with the notification of the decision. In Greece, no practical information on how to appeal is provided with the decision, and one interviewee maintained that most of the time, the generic information provided with the decision is not translated, stating "*when applicants receive the decision, they come to the Greek Council for Refugees (GCR) or another NGO, because they do not know what the paper they have been given is about. Almost all of our cases allege that police officers do not inform them, and just tell them in English 'go to GCR'*".⁶⁷

In Italy, the most significant barrier frustrating access to an effective remedy arises from a lack of information on how to appeal following notification of the first instance refusal decision. UNHCR's audit of case files and decisions found that, in some cases, the name of the court competent to hear the appeal in the individual case was not specified,⁶⁸ and the time limits for appeal (either 15 or 30 days) were not always explicitly stated.⁶⁹ UNHCR is concerned about the prejudicial impact upon would-be appellants resulting from these omissions of essential information.

Good practice has been observed in Finland, where all decisions are accompanied by guidelines on how to file an appeal. These guidelines are available in 10 languages and are interpreted or translated if necessary, together with the contact details of the Refugee Advice Centre (an NGO providing legal advice). Similarly, in Germany, each negative decision is accompanied by detailed information on how to appeal.⁷⁰ If the applicant is not represented by a lawyer, this information is available in 22 languages.⁷¹ Moreover, in the UK, information sheets on how to appeal are provided with refusal decisions, and are available in 24 languages.⁷²

Recommendations

Information accompanying a negative decision should specify precisely how to lodge the appeal, name the relevant appeal body, and state any applicable time limits and the consequences of a failure to adhere to the time limits. Such information should also state whether the appeal has automatic suspensive effect and, if not, which steps need to be taken to request that any expulsion order is not enforced. This must be in a language that the applicant understands.

Information should include details on how to obtain free legal assistance. It should also refer to the rules governing submission of subsequent (repeat) applications. This must be in a language that the applicant understands.

⁶⁷ Interview with S8.

⁶⁸ Instead, refusal notices simply state literally and generically the provisions of Article 35 (1) of the d.lgs 25/2008.

⁶⁹ The audit of case files revealed that time limits were not expressly mentioned in a number of the decisions examined: D/52/M/AFG/N, D/53/M/AFG/A, D/54/M/NIG/A, D/55/F/ERI/N, D/59/M/TUR/S, D/60/F/ETI/S, D/63/M/PAK/N, D/64/M/PAK/N, D/65/M/GUI/N.

⁷⁰ A separate page is attached to the decision which states the relevant administrative court responsible and sets out the period within which an action would need to be filed, its form and content, the time limit for submitting the facts and evidence on which the action is based, the consequences of failing to observe the time limit, whether the appeal has suspensive effect and, if not, whether it is possible to suspend deportation.

⁷¹ Information provided by the determining authority, BAMF.

⁷² Amharic, Arabic, Albanian, Chinese, Dari, Farsi, French, Kinyarwanda, Kurmanji, Lingala, Ndebele, Portuguese, Punjabi, Pashto, Romanian, Russian, Spanish, Shona, Swahili, Somali, Tamil, Turkish, Urdu and Vietnamese.

Paragraph three of Article 9 (2) APD, permitting derogation on the basis of earlier provision of information in writing or by electronic means accessible to the applicant, should be deleted, or should not be applied by Member States.

Filing the appeal in person

The most significant problems precluding access to an effective remedy were reported in Greece where, at the time of UNHCR's research, appellants were required to lodge their applications for appeal in person at the Aliens Directorates. However, interviewed stakeholders⁷³ indicated that the Aliens Directorate of Athens (where the overwhelming majority of appeals were lodged) was severely understaffed, which in practice led to applicants failing to submit an appeal on time, because they were refused entrance to the Directorate. NGOs stated that they had received many complaints from asylum applicants who had missed appeal deadlines, even though they had attempted on a daily basis to submit their appeal.⁷⁴ Applicants alleged that every day they received the same response from the authorities: "Come tomorrow, the building is overcrowded". This was clearly not in compliance with Article 39 (1) APD.⁷⁵

Recommendation

Member States must ensure that they organize and resource their appeal systems in such a way that they are able to meet the standards of an effective remedy, and enable appellants to lodge their appeals. Where state practice requires notice of appeal to be lodged in person, sufficient facilities and human resources must be in place to receive all applicants wishing to lodge an appeal, and acknowledgement in writing of the filing of an appeal must be provided in all cases without exception.

Access to the case file

A specific problem was identified in Bulgaria in this area. Although a new legal provision has been introduced granting an appellant a *de jure* right to access his/her file after the decision has been served,⁷⁶ precise rules on access are not elaborated further in the IRR.⁷⁷ One stakeholder reported that problems concerning timely access to the case file are one of the main obstacles faced by appellants in trying to secure an effective remedy.⁷⁸

Problems of access also occur in France, where the applicant's case file is sent by the determining authority to the only appeal court (CNDA), located in Paris. When the appeal is likely to be decided without an oral hearing, the court sends a letter in French to the appellant informing him/her that the case file can be consulted, upon request, at the premises of the CNDA in Paris and after 15 days' advance notice. There is no translation of the letter and, even if the content of the letter is understood, appellants who do not reside in Paris may not have a practical opportunity to consult the case file.⁷⁹

Similarly, in Spain, at the time of UNHCR's research, in the case of a negative decision of inadmissibility, the accelerated appeals procedure was applied and by law, access to the case file was only granted after the appeal had been lodged.⁸⁰ Once the judge received the appeal, s/he instructed the competent authority to send the adminis-

⁷³ Interviews with S7, S8, and S15.

⁷⁴ Interview with S8.

⁷⁵ An application to the Council of State for annulment of a decision can be lodged before any Greek authority: Article 19 (2) PD 18/1989.

⁷⁶ Article 76 (6) LAR; SG No. 52/2007. The decision is served by interpreting its text to the applicant and providing a copy of the decision in Bulgarian.

⁷⁷ Internal Rules for Conducting Procedures on Granting Protection in the State Agency for Refugees with the Council of Ministers (IRR).

⁷⁸ Interview with a lawyer working for a Bulgarian NGO. However, it should be noted that UNHCR has the right to information and access to a case file at any stage of the first instance procedure, as stipulated in Art. 3, paragraph 2 of the LAR.

⁷⁹ Information provided in interviews with the Head of Legal Department of CNDA; the NGO *Forum Réfugiés*; and a lawyer.

⁸⁰ Article 78 (3) LJCA.

trative case file to the appellant at least 15 days in advance of the scheduled hearing. This required the appellant to submit an appeal without having seen the case file. OAR informed UNHCR, and the Madrid Bar Association and NGOs confirmed, that in practice, appointed lawyers were granted earlier access. However, as the European Court of Human Rights has held, a mere practical arrangement is not a substitute for a legally certain, binding provision. The New Asylum Law now provides that the applicant has a right to be granted access to his/her case file at any point in the procedure. At the time of writing, the impact of the New Asylum Law on practice was as yet unclear.

In Belgium, following notification of the first instance negative decision, appellants and their lawyers can rapidly request and receive electronically from the determining authority (the CGRA) the case file and the decision.⁸¹ However, lawyers have reported that it is difficult to obtain the case file from the Aliens Office (AO), which has an important role notably in terms of cases falling within the terms of the Dublin II Regulation, and in the preliminary examination of subsequent applications.⁸²

Recommendation

The designated authority must ensure that an applicant who is notified of a negative decision is entitled to access his/her case file containing relevant information. In cases where disclosure might seriously jeopardize national security, or the security of persons providing information, restrictions on access may be applied, on an exceptional, proportionate basis.

Cost of travel to the court or tribunal

Article 13 of the European Convention on Human Rights imposes on Contracting States the duty to organize their judicial systems in such a way that their courts can meet their international obligations.

In France, notwithstanding the fact that appellants reside throughout France, the competent appeals body to review negative decisions by the determining authority OFPRA, the CNDA, is situated in one location in Paris.⁸³ Appellants who are accommodated in a reception centre (CADA) have travel costs to the Court paid, but this is not the case for those whose applications were examined in an accelerated procedure. This is a significant impediment to appellants appealing against negative decisions in the accelerated procedure who reside outside Paris.

By contrast, the UK's specialized Asylum and Immigration Tribunal has 16 hearing centres located throughout the UK, in recognition of the fact that appellants reside throughout the UK.⁸⁴

In Italy, the competent court to process an appeal against a decision of the determining authority is the civil court located in the area of Court of Appeal of the district in which the Territorial Commission is based, or, for asylum seekers hosted in a CARA or detained in a CIE, the civil court located in the area of the Court of Appeal of the

⁸¹ However, it should be noted that 'confidential' documents may not be communicated.

⁸² See section 14 on subsequent applications, which describes the role of the AO.

⁸³ Missions are organized to the overseas territories to hear appellants; but there are no hearing centres in any other areas of France other than Paris.

⁸⁴ There are 16 hearing centres at Belfast, Birmingham, Bradford, Bromley, London (2 centres), Glasgow, Harmondsworth (by the detention centre), Hatton Cross (by Heathrow Airport), Manchester, Newport, North Shields, Stoke on Trent, Sutton, Walsall, and Yarl's Wood (by the detention centre). In other Member States, administrative courts located throughout the territory are responsible for appeals. For example, in Germany, territorial jurisdiction of courts of first instance lies with one of the 52 administrative courts within whose district the person concerned is obliged to reside under the APA: Section 52 No.2 sentence 3 Code of Administrative Court Procedure. If territorial jurisdiction is not determined by this criterion, the administrative court within the district of which the administrative act was issued is responsible: Section 52 No. 3 Code of Administrative Court Procedure. In the Netherlands, there are 19 district courts throughout the territory.

district where the centre is located.⁸⁵ The Commission for Constitutional Affairs of the Chamber of Deputies, in its advisory opinion of 17 October 2007, suggested that the competent court should rather be that located in the area of the court of appeal of the district where the applicant actually receives the decision of the Territorial Commission, or where the applicant resided when s/he submitted the application for international protection.

Recommendation

Member States should ensure that full travel costs to the court or tribunal are reimbursed to those appellants who lack sufficient financial resources.

Time limits within which to lodge appeal

In practical terms, the applicant must have sufficient time and facilities in order to undertake all the steps required to exercise the right of appeal. This is also in line with the principle of equality of arms.⁸⁶ In this regard, short time limits for lodging appeals may render a remedy ineffective. European Community law has established that:

*“the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by Community law”.*⁸⁷

Article 39 (2) APD requires that *“Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.”* However, it does not prescribe the nature of such rules or the length of these time limits, which is left to the discretion of Member States. It is regrettable that the APD does not reflect Community Law in this regard, and does not explicitly stipulate that any time-limit imposed must be reasonable and allow the applicant sufficient time to exercise his or her rights under the APD. Nevertheless, any such time-limits imposed nationally must be in accordance with general legal principles of Community law and must not render practically impossible or excessively difficult the exercise of the right of appeal under Article 39 (1) APD. Similarly, they must not obstruct the exercise of the right to legal assistance and/or representation under Article 15 (2) APD, or the fulfillment of guarantees under Article 10 (2) APD.

Any time limit set should, therefore, permit a prospective appellant to undertake all the required procedural steps in order to submit the appeal, taking into account the nature of the procedures in each state, the steps required to access legal assistance, and the fact that the prospective appellant is a foreigner who may not understand the language of judicial proceedings. As such, applicants will need time:

- To understand the decision of the determining authority and any information provided on how to challenge the decision; particularly in those states that currently do not provide a written or oral translation of the reasons for the decision, and where the applicant has to seek assistance with translation.
- To secure legal assistance. More time will be required in those Member States where the applicant is required to apply for legal assistance through a legal aid scheme. The time required to do this (bearing in mind that the applicant is likely to require advice and linguistic assistance) and receive a decision should be taken into account.

⁸⁵ Article 35 of d.lgs. 25/2008.

⁸⁶ Article 34 ECHR read in conjunction with Article 13 ECHR.

⁸⁷ *Unibet vs Justitiekanslern*, Case C-432/05, European Union: European Court of Justice, 13 March 2007, paragraph 47; and *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case C-33/76. European Union: European Court of Justice, 16 December 1976, paragraph 5.

- To request and/or be given access to his/her case file. The time limit should take into account the time required by the determining authority to give the applicant access to his/her case file.
- To consult a legal adviser and discuss the grounds for the appeal. This should take into account the time needed to secure the services of an interpreter to facilitate consultation between legal adviser and applicant, when necessary.
- To draft the appeal: the amount of time necessary will be dependent on whether legal argumentation and evidence has to be submitted by the deadline for filing the appeal, or whether separate deadlines apply.
- In addition, in those Member States where there is no automatic suspensive effect of some appeals, time is necessary for the prospective appellant and his/her legal representative to apply for an interim measure to prevent imminent expulsion.

UNHCR is concerned that in some Member States, the time limits imposed may be too short, given the procedural steps that need to be taken and the general circumstances of applicants. These time limits may render excessively difficult the exercise of the right to an effective remedy conferred by the APD. They may result in a failure to exercise the right of appeal, or in incomplete or hastily-completed appeals which run the risk of being dismissed.

In some of the Member States surveyed, the time limit for filing an appeal varies depending on the procedure in which the negative decision was taken, or the type of decision that was taken by the determining authority, as well as whether the applicant is in detention or not. Uniquely, in Italy, variations in time limits depend on the grounds upon which an appellant was sent to an Identification and Expulsion Centre (CIE) or a Reception Centre (CARA).⁸⁸ UNHCR's audit of decisions revealed that some decisions did not state the applicable time limit. UNHCR recommends that the application of time limits should be clarified, and all decisions must state the applicable time limit, to ensure compliance with Article 9 (2) APD.

In contrast, Finland, France⁸⁹ and Spain have one time limit for lodging a judicial appeal, regardless of the procedure in which the negative decision was taken or the type of decision taken. However, it should be noted that in Finland, the time limit for the enforcement of the expulsion order may be considerably shorter with regard to certain decisions than the time limit within which the appeal should be lodged.⁹⁰ As a result, *de facto*, with regard to these decisions, a request for suspensive effect would need to be lodged before the time limit for the enforcement of the expulsion order and, consequently, before the time limit for lodging an appeal.

In some Member States, there may be two relevant and applicable time limits: a time limit within which the appeal must be filed, and the time limit within which the legal argumentation in support of the appeal must be submitted.⁹¹ For example, in Germany, the time limit for submitting an appeal against a decision taken in the regular procedure is two weeks from the service of the decision⁹² or one week, where the law provides that this is the deadline for requesting suspensive effect.⁹³ By contrast, the time limit for the submission of the legal reasoning for the appeal is one month from the date the decision was served, irrespective of the deadline for filing

⁸⁸ Article 35 (1) of the d.lgs. 25/2008.

⁸⁹ This is the case in France with regard to appeals to the CNDA.

⁹⁰ When a negative decision has been taken on a subsequent application on the grounds that there are no new elements (or a decision to transfer the application to another Member State under the Dublin II Regulation), the expulsion order may be executed immediately. As such, there may be no effective opportunity to lodge an appeal against the decision. When the determining authority takes a negative decision on grounds of safe country of asylum or origin, or declares the application manifestly unfounded, an expulsion order is enforceable 8 days after notification, which is considerably shorter than the time limit to lodge an appeal. See subsection below on the suspensive effect of appeals for further information.

⁹¹ Evidence in support of the legal argumentation may need to be submitted with the legal argumentation, or another time limit may apply for the submission of evidence.

⁹² Section 74 (1) APA.

⁹³ Section 74 (1) APA. This applies in cases in which the application is rejected as irrelevant or manifestly unfounded (Section 36 (3) 1 APA), or where a subsequent application was filed and the resumption of proceedings was denied (Section 71 (4) APA refers to Section 36 APA).

the appeal.⁹⁴ Similarly, in the Netherlands, the time limit within which an appeal against a decision taken in the regular procedure must be filed is four weeks from the service of the decision, but one week when the application is rejected in the accelerated 48 hours procedure. In the decision, it is stated that the asylum seeker should, within an hour of notification of the decision, alert the determining authority (IND) that s/he intends to appeal. On the other hand, legal argumentation with supporting evidence can be submitted up until 12.00 the day before the session of the court will take place. Courts sessions normally take place within 10 days of lodging the appeal. In Spain, moreover, following a negative decision on the merits, there is a two month time limit within which the appeal must be lodged. After the appeal has been lodged and the administrative file is handed to the appellant's lawyer, the appellant has 20 days to submit the legal reasoning for the appeal.⁹⁵

In Greece, there is a time limit for filing an application for annulment and for the submission of legal argumentation which is 60 days from the date of service of the decision. However, the appellant can submit further legal argumentation up until 15 days before the hearing of the appeal. There is no specific time limit for the submission of evidence. In Finland, by contrast, there is a time limit for filing an appeal, but no specific time limit for the submission of legal argumentation and evidence.

In other Member States, there is only one applicable time limit within which the appeal must be filed, and the reasons and legal argumentation for the appeal set out. This is the case in Belgium, Bulgaria, the Czech Republic, Italy, Slovenia, Spain,⁹⁶ and the UK.⁹⁷

In all Member States surveyed, time limits range from either the day when notice of the decision is served or the following day. Rules also vary regarding whether the time limit includes or excludes non-business days. Time limits for filing an appeal in the Member States surveyed varied from between 2 days and 60 days, as set out in the following table.

Member States	Regular Appeal Procedure (days)	Accelerated Appeal Procedures (days)
Belgium	30 ⁹⁸	15 ⁹⁹
Bulgaria	14 ¹⁰⁰	7 ¹⁰¹
Czech Republic	15 ¹⁰²	7 ¹⁰³

⁹⁴ Section 74 (2) APA.

⁹⁵ Article 52 of Law 29/1998 on Administrative Jurisdiction.

⁹⁶ With regard to an appeal against an inadmissibility decision, the reasoning has to be submitted when lodging the appeal: Article 78 of Law 29/1998 on the Administrative Jurisdiction.

⁹⁷ In the UK, a notice of appeal must set out the grounds of that appeal (Asylum and Immigration Tribunal (Procedure) Rules 2005, rule 8 (1) (c)).

⁹⁸ The petition for appeal must be lodged within 30 calendar days after notification of the decision (Article 39/57, § 1 of the Aliens Act).

⁹⁹ If an appeal is lodged against a CGRA decision by an applicant who finds him/herself in administrative detention (for instance in the framework of a border procedure), the CALL will then apply an accelerated procedure (Article 39/77 of the Aliens Act). The petition for appeal must still be lodged within 15 calendar days of notification of the decision.

¹⁰⁰ Article 87 LAR. Decisions relating to Articles 34 (3) LAR (family reunification), 39a (2) LAR (family reunification as regards beneficiaries of temporary protection), 75 (1) Items 2 and 4 LAR (refusal to grant refugee and/or humanitarian status), 78 (5) LAR (withdrawal or discontinuation of status) and 82 (2) LAR (discontinuation of temporary protection) may be appealed in a period of 14 days following service of the decision. For any decisions under LAR where time limits are not specified then general administrative rules will apply, which provide for a 14-day time limit (Article 149 (1) of the Administrative Procedures Code). These are not working days, however if the term ends on a non-working day, the first working day following this is considered the final day.

¹⁰¹ Article 84 (1) and (2) LAR. Decisions relating to Article 51 (2) LAR (rights of the alien during proceedings) and Article 70 (1), items 1 and 2 LAR (negative decision or discontinuation in the accelerated procedure) must be appealed within a time limit of 7 days. This also applies to decisions under the Dublin procedure.

¹⁰² Section 32 (1) ASA provides that an appeal against decisions on applications must be lodged within 15 days of delivery of a decision.

¹⁰³ Under Section 32 (2) ASA, a 7-day time limit is an exception to the general 15-day time limit for decisions which: b) were served on an alien in a detention centre; or c) decisions dismissed as inadmissible usually on Dublin grounds or if a subsequent application was not admitted.

Member States	Regular Appeal Procedure (days)	Accelerated Appeal Procedures (days)
Finland ¹⁰⁴	30 ¹⁰⁵	N/A
France	30 ¹⁰⁶	2 ¹⁰⁷
Germany	14 ¹⁰⁸	7 ¹⁰⁹ or 3 ¹¹⁰
Greece	60 ¹¹¹	N/A
Italy	30 ¹¹²	15 ¹¹³
Netherlands	28 ¹¹⁴	7 ¹¹⁵
Slovenia ¹¹⁶	15	3
Spain	60 ¹¹⁷	N/A
United Kingdom ¹¹⁸	10 ¹¹⁹ or 28 ¹²⁰	5 ¹²¹ or 2 ¹²²

104 The time limit for appeal follows the general rule in the *Hallintolainkäyttölaki* (the Act on Administrative Judicial Procedures 586/1996, as in force 29.4.2009), section 22 which states that an appeal must be made within 30 days of notice of the decision. The time limit is the same for all decisions made by the determining body.

105 However, note that a decision taken in the accelerated procedure may be enforceable immediately or after 8 days' notice. The time within which an appeal may be lodged is nevertheless 30 days for all decisions.

106 Under Article L.731-2 *Ceseda* as far as decisions taken on the application for asylum by OFPRA are concerned, applicants have one calendar month to lodge an appeal before the CNDA from the notice of decision. This applies for all OFPRA decisions whatever the procedure applied. There is no accelerated procedure at CNDA level.

107 In the border procedure, the appeal against a decision refusing leave to enter the territory must be lodged in French within 48 hours before the administrative court, in accordance with Article L.213-9 *Ceseda*.

108 Section 74 (1) APA.

109 Section 74 (1) in conjunction with Section 36 (3) 1 APA. This relates to decisions that an application is irrelevant or manifestly unfounded, or where a subsequent application was filed and the conduct of further proceedings was denied. The deadline for filing an appeal is one week, as it is provided in law that a request for suspensive effect must be submitted within one week.

110 This applies to decisions that an application is manifestly unfounded taken in the airport procedure. This is the deadline for an application for an interim measure for granting leave to enter and preliminary protection against deportation: Section 18a (4) APA. The deadline for the submission of the main application for appeal is disputed (see Marx, Commentary on the Asylum Procedure Act, 7th edition, 2009, Section 18a, paragraph 177). In practice, it is advisable to submit the main appeal application together with the application for an interim measure since the latter is an accessory to the first. The reasoning of the appeal may be submitted within another four days if such an extension of the deadline is applied for (information provided by lawyer X3). Theoretically, a rejection of an "unfounded" appeal may also be taken in the airport procedure within the deadline of two days, which would not lead to a denial of entry. However, in practice, this situation has not been relevant.

111 After the amendment of PD 90/2008 by PD 81/2009, the appeal procedure has ceased to exist. According to Article 2 of PD 81/2009, the only remedy against any negative decision is an application for annulment that can be lodged before the Council of State. The time limit for such an application is 60 days after the date of service of the decision (Article 46 of PD 18/1989).

112 Article 35 (1) of the d.lgs. 25/2008. This time limit applies if the applicant was not sent to a reception centre (CARA) or Identification and Expulsion Centre (CIE).

113 Article 35 (1) of the d.lgs. 25/2008. This time limit applies if the applicant was sent to a reception centre (CARA) or Identification and Expulsion Centre (CIE) on the grounds stipulated by Art. 20, 2 (a, b and c) d.lgs. 25/2008, i.e. when identification is necessary because the applicant is undocumented, has applied for international protection after s/he was stopped by the police – having evaded or attempted to evade border controls – or was stopped by the police in conditions of irregular stay; or stipulated by Article 21, 1 (a, b and c) d.lgs 25/2008 i.e. when the applicant meets the conditions stated in Art.1F of the 1951 Geneva Convention, the applicant was previously condemned in Italy for a serious crime, or the applicant had been issued with an expulsion order. Clarification regarding the grounds applied should be provided in the forthcoming implementing regulation for legislative decree 25/2008.

114 Article 69 (1) Aliens Act 2000 stipulates that the time limit for filing an appeal is four weeks.

115 Article 69 (2) Aliens Act 2000 states, in derogation from Article 69 (1), that the time limit is one week if the asylum application was rejected within a specific number of hours. The Aliens Circular C10/1.1 clarifies the "specific number of hours" by stating that this is 48 procedural hours, i.e. the maximum duration of the accelerated procedure.

116 Article 74 (2) IPA: "Against the decision issued in a regular procedure, the action may be brought within 15 days after the receipt of the decision. Against the decision issued in an accelerated procedure, the action may be brought within three days after the receipt of the decision."

117 Article 29 of the New Asylum Law and Article 46 of the Law on the Administrative Jurisdiction.

118 These time limits relate to appeals to the Asylum and Immigration Tribunal as set down in the AIT (Procedure) Rules 2005.

119 Section 7 (1) (b) AIT (Procedure) Rules 2005: 10 days for non-detained cases in the regular procedure.

120 Section 7 (2) AIT (Procedure) Rules 2005: 28 days for out of country appeals.

121 Section 7 (1) (a) AIT (Procedure) Rules 2005: 5 days for detained cases in the regular procedure.

122 The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 Rule 8 (1) state that the appeal must be lodged no later than 2 days after the day on which the applicant is served with notice of the immigration decision (Statutory Instrument 2005 No 560).

UNHCR considers that some of the time limits imposed by Member States are too short, and may impede the right to an effective remedy.

For instance, the 48 hour period within which applicants at the border in France, and applicants in the detained fast-track procedure in the UK, must submit an appeal is insufficient. It may not allow the applicant to exercise his/her right to obtain legal assistance, or for the legal representative to adequately prepare relevant argumentation and additional evidence. A further difficulty in France is the fact that all documentation must be submitted in French, and no translation or interpretation is provided. In the UK, women are said to face particular problems in such procedures because the process is too fast for many women to have a realistic chance to disclose gender-related persecution, particularly rape and sexual violence.¹²³ In the UK, particular problems also arise with refusals on safe third country grounds, which are subject to a three-day time limit which in practice affords insufficient time to lodge a judicial review challenge.¹²⁴

Similarly, in Slovenia, the 72 hour time limit for lodging appeals under the accelerated procedure seriously compromises the ability of applicants to submit an appeal. Additional hardship is created when the decision is issued on a Friday and the deadline expires on Monday at midnight, as no exception is made for non-business days. Moreover, it must be borne in mind that applicants do not receive legal assistance during the first instance procedure and, therefore, do not generally have a legal representative. It was reported that the three-day time limit is not adequate for applicants to secure the services of one of only six lawyers practicing at the time of this research.¹²⁵

In Germany, for applications rejected as manifestly unfounded in the airport procedure thus denying the applicant entry to the territory, there is a three-day deadline from the date when the decision is served before which the applicant must apply for an interim measure against deportation. It is disputed in the jurisprudence as well as the literature whether the appeal must also be filed within three days, or whether the one-week deadline applies for appeals against an application declared manifestly unfounded.¹²⁶ However, in practice, it is considered advisable to file the appeal together with the application for an interim measure against deportation, within the three day time limit. Even though there is no explicit deadline for submitting the reasoning for the appeal, this should be submitted together with the application for an interim measure or, upon request, by the deadline specified by the responsible court.¹²⁷ The Federal Constitutional Court has ruled that such short deadlines conform to the Constitution only if it is guaranteed that the applicant has immediate access to qualified and independent legal advice.¹²⁸ At Frankfurt Airport, a lawyer assigned to the case for this purpose receives the full case file on the evening before the decision is served, allowing preparation for the meeting with the applicant.¹²⁹ If the lawyer submits an appeal within the three-day deadline, s/he may at the same time request an extension of the deadline by another four days to provide the reasoning for the appeal. The overall period of seven days is considered sufficient by

¹²³ Cutler, S, *Refusal Factory: Women's experiences of the detained fast track asylum removal process at Yarl's Wood Immigration Removal Centre, Bail for Immigration Detainees*, September 2007. See also Human Rights Watch, *Fast-tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*, 2010.

¹²⁴ UNHCR has expressed the view that Part 5 of Schedule 3 does not allow the applicant to challenge the application of the safe third country concept effectively in accordance with Article 27 (2) of the Directive, the 1951 Convention and other international human rights instruments. See UNHCR Comments on the UK implementation of Council Directive 2005/85/EC page 25.

¹²⁵ Although approximately 10 lawyers have been granted a license under tender by the MOI.

¹²⁶ See Marx, *Commentary on the Asylum Procedure Act*, Section 18a, paragraph 174 et seq. with numerous citations of jurisprudence.

¹²⁷ See Marx, *Commentary on the Asylum Procedure Act*, 7th edition, Section 18a, paragraph 181. According to information provided by lawyer X3 this is usually an extension of four days.

¹²⁸ See Marx, *Commentary on the Asylum Procedure Act*, 7th edition, Section 18a, paragraph 171; BVerfGE 94, 166; the ruling concerned the constitutionality of a one-week deadline in the accelerated procedure (rejection as manifestly unfounded in the airport procedure).

¹²⁹ UNHCR did not obtain significant information regarding the practice at other airports.

one lawyer interviewed by UNHCR.¹³⁰ However, it is evident that these time limits can place lawyers under serious constraints when they have concurrent commitments to several clients.

In the Czech Republic, the seven-day time limit, which applies *inter alia* when an appeal is lodged in a detention centre, is considered by stakeholders to be too short in practice. This is partly because legal advisers are only able to visit those in detention once or twice a week. By the time the applicant has the opportunity to consult with a legal adviser, there may be insufficient time left to access the case file and prepare relevant legal arguments. This is exacerbated by the fact that applicants do not receive a copy of their interview record,¹³¹ and no new legal argumentation may be submitted after the seven-day time limit.¹³² The difficulties faced by asylum seekers were recognized by the Constitutional Court, which annulled a similar provision setting a seven day time limit for appeals against a decision that an application is manifestly unfounded.¹³³

Concern has also been expressed by the Italian Commission for Constitutional Affairs of the Chamber of Deputies, in its advisory opinion conveyed on 17 October 2007, which stated that the 15-day time limit did not take into account the circumstances of the appellant or the requirements to be fulfilled in Italy.¹³⁴

UNHCR highlights, as good practice, the approach taken in Spain, where the time limit of 60 days for filing an appeal is the same for all appeals regardless of the type of decision made by the determining authority. In Finland, although there is also one time limit of 30 days for filing an appeal regardless of the type of appeal taken by the determining authority, there are concerns that some decisions may be enforced before the time limit has elapsed.¹³⁵

Recommendations

The APD should be amended to stipulate that Member States shall provide for a reasonable period of time within which the applicant may exercise his or her right to an effective remedy and other concomitant rights under the APD. The time limit should not render excessively difficult the exercise of rights conferred by the APD.

The APD should be amended to stipulate that any time limit imposed within which an applicant must apply for suspensive effect, must also provide the applicant with a reasonable length of time to do so and to exercise his or her concomitant rights under the APD.¹³⁶

Where applicants have to apply for legal aid in order to exercise their right to free legal assistance, in accordance with the APD, any deadline should take into account the time required to apply for legal aid in the Member State.

¹³⁰ X3. This lawyer is frequently involved in airport procedures.

¹³¹ Section 23a ASA.

¹³² Section 71 paragraph 2 of CAJ.

¹³³ Decision Pl. US 12/07 published in Collection of Laws under No. 355/2008 Coll.

¹³⁴ The Commission stated that the 15-day time limit “does not seem to take into consideration some factors that may have a great weight on the effectiveness of the access of a foreigner to judicial protection, such as the lack of mastery of the language, the lack of knowledge of the Italian territory, the potential distance from the competent court, the need to get in touch with a lawyer in a very short period of time, the shortness of time available to evaluate the elements in order to ground the judicial appeal, the request for free legal assistance.”

¹³⁵ See below for concerns regarding the enforcement of expulsion orders.

¹³⁶ This is suggested in proposed recast Article 41(4): APD Recast Proposal 2009.

Availability of interpretation

In order to lodge an appeal, an applicant may be required to complete a myriad of complex forms in the language of the host state. However, many applicants for international protection do not understand the language of the host state and will be unable to complete all the administrative requirements relating to the initiation of judicial proceedings and to the application for legal aid, if required, without linguistic assistance. Without the services of an interpreter or a translator for the submission of the appeal and to exercise the right to legal assistance, the right to an effective remedy may be negated in practice. Therefore, applicants who do not understand or speak the language of the host state should receive the services of an interpreter for submitting their appeal to the court or tribunal and for any hearing, whenever necessary.

Article 10 (2) APD, in conjunction with Article 10 (1) (b) APD, requires that Member States provide appellants with the services of an interpreter (free of charge) “*for submitting their case to the competent authorities [designated court or tribunal] whenever necessary*”, and at least when the appellant is called for a hearing and where appropriate communication cannot be ensured without such services.¹³⁷ UNHCR considers that implementation of this provision in line with its minimum requirements – namely, providing interpretation merely for a hearing, and not, as necessary, for the submission of an appeal and to exercise the right to legal assistance – may result in a violation of the right to an effective remedy under Article 39 (1) APD.

UNHCR is concerned to note that the national legislation of some of the Member States of focus provide for entitlement to an interpreter only for any hearing before the court or tribunal, as necessary.

In France, Articles 10 (2) and 10 (1) (b) of the Directive are transposed in a minimalist way, since the legislation only provides for the services of an interpreter for an appeal hearing and not for submission of an appeal.¹³⁸ It is particularly problematic given that the appeal must be written in French, and must detail all relevant grounds for the appeal. Furthermore, the legal aid system does not reimburse the costs of interpretation and translation.

In some Member States, national legislation provides the right to an interpreter during judicial proceedings, but not explicitly for the purpose of submitting an appeal. This is the case in Bulgaria,¹³⁹ the Czech Republic,¹⁴⁰ Italy¹⁴¹ and Spain.¹⁴² In the Czech Republic, an interpreter is only automatically available for the appeal hearing, but not for the submission of the appeal.¹⁴³ However, to a degree, the prejudicial impact on the appellant is reduced by

¹³⁷ Article 10 (2) APD states that “[w]ith respect to the procedures provided for in Chapter V [appeal procedures], Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones referred to in paragraph 1(b), (c) and (d) of this Article.”

¹³⁸ Although Article L.733-1 *Ceseda* states that “[a]pplicants may present their explanations to the CNDA and be assisted by a lawyer and by an interpreter”, this is interpreted as applying only to the hearing. No provision is made for the translation of documents or interpretation to assist with the preparation of the appeal. Moreover, the report of the Rapporteur, who is responsible for examining the case file and making a non-binding proposal for a decision to the judges, is not fully translated. Translation is limited to the recommendation itself.

¹³⁹ Article 29 (1), item 7 LAR provides that the alien has the right to an interpreter at any point in the proceedings before SAR. Article 14 (2) APC states that the alien has the right to an interpreter in judicial proceedings. The determining authority (SAR) has interpreters on its premises, but it is not stipulated that applicants can use their services for the purpose of lodging an appeal.

¹⁴⁰ Section 18 (1) of Act No. 99/1963 Coll., on Code of Civil Justice in connection with Section 64 of CAJ: “*The court shall appoint an interpreter for participants whose maternal language is other than Czech language, as soon as such need arises in the procedure.*”

¹⁴¹ Article 10 (4) of the d.lgs. 25/2008.

¹⁴² Article 22 of the Aliens Law establishes that aliens are entitled to free legal assistance in all administrative and judicial proceedings related to asylum and s/he is also entitled to an interpreter “*if s/he does not understand or speak the official language used*”. The Draft Amendment to the Aliens Law currently under parliamentary review maintains the same wording. Article 16 (2) of the New Asylum Law indicates that there is a right to an interpreter in the terms established by Article 22 of the Aliens Law. In practice, an interpreter will be available for interviews or hearings before the administrative/judicial authorities, but nothing is foreseen for other aspects of the procedure, such as the submission of appeals.

¹⁴³ Section 18(1) of Act No. 99/1963 Coll., on Code of Civil Justice in connection with Section 64 of CAJ.

the fact that grounds for the appeal may be written in the language of the petitioner, and the court is required to arrange for their translation.¹⁴⁴ Nevertheless, this does give petitioners the right to have judgments or decisions of courts,¹⁴⁵ or other documents relating to the appeal proceedings, translated into their languages.¹⁴⁶

Slovenia has not explicitly transposed the requirements of the APD in relation to appeal proceedings. While national legislation nonetheless provides scope to ensure the provision of interpretation throughout the procedure,¹⁴⁷ in practice, appellants have no access to an interpreter to assist with the submission of an appeal.

According to Article 2 of PD 81/2009, the only remedy against a negative decision in Greece is an application for annulment before the Council of State. By law, appellants should be provided with the services of an interpreter in order to submit their application for annulment, if appropriate communication cannot be ensured without such services. The interpreter's costs shall be paid for out of public funds.¹⁴⁸ However, in practice, appellants reportedly do not have access to an interpreter for this purpose.¹⁴⁹

In a few Member States, applicants may access linguistic assistance for the submission of an appeal through a legal adviser. This is the case in Finland,¹⁵⁰ Germany, Spain (through the assistance of an NGO which provides free translation services) and the UK. In Finland, the costs for interpretation and translation services are covered by the legal aid scheme.¹⁵¹ In Germany, an interpreter is provided by the court for the oral hearing.¹⁵² In general, documents have to be presented to the court in German,¹⁵³ although their translation would be covered by legal aid (*"Prozesskostenhilfe"*)¹⁵⁴ if granted.¹⁵⁵ National legislation in the UK states that the *"appellant is entitled to the services of an interpreter (a) when giving evidence; and (b) in such other circumstances as the Tribunal considers necessary."*¹⁵⁶ In practice, with the exception of the oral hearing, appellants rely on the legal representative arranging interpretation, paid for through legal aid.

Good practice exists in Belgium, where there is a right to free and unlimited interpretation services as well as free (but limited in time) translation services for all necessary assistance relating to the appeal. This automatically accompanies free legal assistance which is provided throughout the entire asylum procedure in Belgium.

¹⁴⁴ See No. 4 Azs 112/2004 of 16 June 2004, No. 342/2004 Sb. NSS, all available at www.nssoud.cz, and decision of SAC No. 5 Azs 107/2008-57 of 11 December 2008.

¹⁴⁵ See for example decision of SAC, No. 4 Azs 89/2008 of 18 February, 2009, available at www.nssoud.cz.

¹⁴⁶ See No. 6 Azs 214/2005 or 5 Azs 2/2009 of 6 March 2009, both available at www.nssoud.cz.

¹⁴⁷ Art. 10 (2) of the IPA: *"The applicant shall be provided with the interpreter upon receipt of the application, at a personal interview, in other justified cases, and by the decision of the competent authority when this would be required for understanding of the procedure by the applicant"*.

¹⁴⁸ Articles 29 and 8 (1b) of PD 90/2008.

¹⁴⁹ Interview with S8.

¹⁵⁰ Interviewed legal representatives state that the vast majority of contacts with clients (except for some ad hoc meetings where English can be used) are handled with the aid of interpreters. Appellants are granted legal aid for appellate proceedings which includes costs for translation etc. Section 203 *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009) provides for interpreters for any hearing before the court.

¹⁵¹ Article 4 of the Act on Legal Aid 257/2002. Whereas the general rule is that only community service attorneys who are funded by the State may benefit from legal aid, an exception is made for lawyers specialized in immigration law by Section 9 of the Aliens Act 301/2004.

¹⁵² Section 185 (1) Law on Court Constitution.

¹⁵³ Section 55 Code of Administrative Court Procedure in conjunction with Section 185 (1) Law on Court Constitution. (The language of the courts is German.)

¹⁵⁴ Section 162 (1) Code of Administrative Court Procedure. Kopp/Ramsauer, Commentary on the Code of Administrative Court Procedure, Section 162, paragraph 7.

¹⁵⁵ Outside court, legal aid under the Law on Legal Aid (*"Beratungshilfe"* according to the *"Beratungshilfegesetz"*) can be applied for under similar conditions as legal aid before the court (*"Prozesskostenhilfe"*), e.g. for deciding whether to submit an appeal. With regard to the practice concerning interpretation and translation services in the framework of these proceedings, insufficient data was gathered in order to make a reliable statement.

¹⁵⁶ Rule 49 (A) of the AIT (Procedure) Rules 2005.

Good practice also exists in the Netherlands, where there is a right to free and unlimited interpretation services as well as free translations (limited to a certain amount of words) for all necessary assistance throughout the entire asylum procedure, including on appeal.

UNHCR regrets that the APD does not require, without derogation, that applicants receive the services of an interpreter for submitting their appeal to the appeal authority whenever necessary. As a result, in law and/or practice, applicants in a number of the Member States surveyed are not guaranteed linguistic assistance with the submission of their appeal. This represents a significant impediment which may render the remedy in law, ineffective in practice.

Recommendation

In order to ensure the enjoyment of an effective remedy in practice, it is necessary that states provide for free interpretation services at all stages of the appeal procedure, including for assistance with the submission of grounds for appeal, and all other necessary preparation prior to the appeal hearing. UNHCR considers that the term “*whenever necessary*” under 10 (1) (b) APD should be interpreted broadly, and without derogation. The APD should be amended to this effect.

Availability of free legal assistance

Article 15 (2) APD requires Member States to provide free legal assistance upon request in the event of a negative decision.¹⁵⁷ However, Member States may derogate, and limit free legal assistance, in accordance with Article 15 (3) APD, to:

- (a) procedures before a court or tribunal following a negative decision by the determining authority only, and not any onward appeals or reviews provided for under national law;
- (b) appellants who lack sufficient [financial] resources;
- (c) legal advisers designated by national law to assist or represent applicants for asylum; and/or
- (d) appeals which are likely to succeed, i.e. pass a merits test. In UNHCR’s view, Member States must ensure that legal assistance is not arbitrarily restricted on this point.

Within the scope of this research, UNHCR has not comprehensively monitored transposition of Article 15 APD in Member States’ national legislation, regulations and administrative provisions. However, UNHCR has enquired, through interviews with stakeholders including legal advisers, into whether there are any concerns regarding appellants’ access to free legal assistance, which may undermine the effectiveness of the legal remedy of appeal.

The most common concerns cited were:

- In some Member States which operate legal aid schemes, such schemes were reported to be unduly complicated, and do not accommodate the particular circumstances and needs of asylum applicants. As a result, they were inaccessible.
- Financial remuneration provided by legal aid may be insufficient to cover legal adviser’s costs when representing applicants for international protection.

¹⁵⁷ Article 15 (2) states that “*In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request, subject to the provisions of paragraph 3.*”

- There is a shortage or lack of legal advisers practising in refugee law generally, or in certain geographic areas within some Member States.
- In some Member States, some lawyers were reported to lack knowledge and competence.
- Access to legal advice or representation is diminished when applicants are in detention, or subjected to accelerated procedures with shortened time limits.

In UNHCR's view, this would suggest a need for a review of current systems to ensure that states in practice meet their obligations under the APD to provide free legal assistance during asylum appeals.

Legal aid schemes

In those Member States where free legal assistance is available through a legal aid scheme, the scheme may not accommodate the particular circumstances of asylum applicants.

Sometimes, as highlighted above, applicants are subjected to time limits as short as 48 hours within which to appeal. If they must apply for free legal assistance through a legal aid scheme, the process must be simple and very quick to be useful. Otherwise, the right to legal assistance is illusory.

In Bulgaria, for example, a refugee-assisting NGO may be able to help with the preparation of an application for legal aid under the Law on Legal Aid. The Law on Legal Aid provides for four forms of assistance: 1) pre-litigation resolution; 2) preparation of documentation for filing a case; 3) litigation; and 4) litigation in the event of detention.¹⁵⁸ However, access to the first two forms of assistance (critical if the appellant is to be able to effectively file an appeal) is not available in practice, because requests for legal aid can take up to 14 days to be decided. This is longer than the seven-day statutory appeal time limit.

Legal aid schemes should not make demands of applicants for international protection which applicants cannot satisfy in practice. For instance in Italy, appellants are required, under national law, to apply for free legal assistance for their appeals through general legal aid provisions.¹⁵⁹ Legal aid is subject to both a means and a merits test which is decided by the Council of the Bar.¹⁶⁰ According to interviewed stakeholders (NGOs), the main obstacles to accessing free legal assistance in practice are caused by formal requirements prescribed by some of the Councils of the Bar in particular regions of Italy. For example, there is a legislative requirement that recipients should be legally residing in Italy,¹⁶¹ which has resulted in some Councils of the Bar denying legal assistance to appellants on the grounds that they have no formal residence permit.¹⁶² Other unduly restrictive practices include requiring appellants to provide identity papers or tax codes (*codice fiscale*).¹⁶³ Member States should ensure that they remove superfluous administrative requirements and practices which impede access to free legal assistance.

¹⁵⁸ Article 21 Law on Legal Aid.

¹⁵⁹ Legal assistance is required under Article 16 (2) of the d.lgs. 25/2008, subject to the conditions provided for by the decree of the President of the Republic of the 30th May 2002, No. 115.

¹⁶⁰ Article 126 of the d.P.R. 115/2002.

¹⁶¹ Article 119 of the d.lgs. 115/2002.

¹⁶² Asylum applicants, since they are legally entitled to stay in Italy because of their application, should be considered as having legal residence in Italy, within the meaning of Article 119 of the d.lgs. 115/2002, regardless of whether they hold a formal residence permit. Moreover, Art.119 of d.lgs 115/2002 refers to legal stay in Italy "at the time when the cause of action arose", i.e. at the time of the decision of the Territorial Commission. The appellant is in any case legally in Italy at least until the deadline to lodge an appeal has expired (Art. 32 (4) of d.lgs 25/2008).

¹⁶³ According to the *Tavolo nazionale asilo*, the new Regulation implementing the d.lgs. 25/2008 should clarify some significant aspects of access to free legal assistance.

In order to ensure compliance with Article 15 APD, UNHCR recommends that all Member States ensure that the bodies competent to regulate legal aid do not impose requirements beyond those stipulated in the APD.

According to the APD, access to legal aid may be means-tested. UNHCR notes that appellants may find it extremely difficult to provide evidence regarding their financial situation. Therefore, it is worth noting as good practice that Finland has simplified the process of applying for legal aid by not requiring applicants to provide documentation regarding their financial position. Similarly, in Italy where legal aid is also means-tested,¹⁶⁴ when the appellant is unable to evidence his/her low income, the appellant can draft a declaration to this effect instead.

In Spain, legal representation is compulsory during all judicial proceedings, and applicants for asylum have a right to free legal assistance if they lack sufficient financial resources.¹⁶⁵ In practice, where an NGO is unable to represent an appellant, it may assist him or her to apply to the aliens' legal assistance service of the bar associations, or the appellant may apply directly. However, in practice, the provision of free legal assistance is often hindered because the application is not submitted correctly, and is therefore deemed invalid. The forms contain very complex parts and require detailed information regarding the economic situation of the appellant. Frequently, difficulties are encountered in contacting the appellant in order to remedy any deficiencies, and it has been estimated that this results in the failure of around 40% of the appeals initiated. This is clearly of major concern.¹⁶⁶

According to Article 15 (3) APD, Member States must not use a merits test to arbitrarily restrict access to free legal assistance. As mentioned above, legal aid in Italy is subject to a merits test¹⁶⁷ which requires the appellant to provide reasons in fact and in law why the application is not manifestly unfounded. The decision on whether to grant legal aid lies with the Council of the Bar. However, UNHCR's review of case law revealed that the Civil Court may revoke the grant of free legal assistance by the Council of the Bar when the application was declared manifestly unfounded by the determining authority (CTRPI).¹⁶⁸ Given that the appeal is against a negative decision, the negative decision itself should not be used to determine that the appeal is unlikely to succeed. UNHCR considers this to be an arbitrary restriction on the right to legal assistance which is not permitted by the APD.

In the United Kingdom, where legal assistance depends upon a merits test, there is concern that access to legal assistance is being severely restricted.¹⁶⁹ Although Scotland has no merits test,¹⁷⁰ in England and Wales, legal aid is only available subject to a merits test. These concerns are particularly acute with regard to applications examined in the accelerated detained procedures. An NGO, Bail for Immigration Detainees (BID), has noted that applicants whose applications have been examined in the accelerated detained procedures struggle to secure publicly funded lawyers to assist with their appeals. The merits test inevitably means that some appellants are unrepresented. On the other hand, the Government is always legally represented.¹⁷¹

¹⁶⁴ Legal aid is granted on condition that the appellant has a low income (approx. 10000 euro of income/year pre-tax). Article 94 of d.P.R. 115/2002 states that, in case the appellant is unable to demonstrate his/her low income (i.e. to contact his/her Consulate to obtain the relevant documents), the appellant can write by himself/herself an equivalent declaration.

¹⁶⁵ Article 22 (1) of the Aliens Law.

¹⁶⁶ Information provided by the Legal Assistance Service for Aliens of the Madrid Bar Association.

¹⁶⁷ Under Article 122 of the d.P.R. 115/2002 and Article 16 (2) of the d.lgs. 25/2008, the applicant is entitled to free legal assistance after lodging an application that must contain "the explanations in fact and in law useful to evaluate that the application is not manifestly unfounded".

¹⁶⁸ Article 136 of the d.P.R. 115/2002. Based on cases observed at one of the CTRPIs.

¹⁶⁹ Note that in the UK there are three legal jurisdictions – England and Wales, Northern Ireland and Scotland. Therefore, there are three statutory bases and three responsible authorities for the provision of legal advice and representation.

¹⁷⁰ In Scotland, the statutory basis is the Legal Aid (General) Act 1986, the Advice and Assistance (Scotland) Regulations 1996 (as amended) and the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003.

¹⁷¹ Bail for Immigration Detainees, *Briefing paper on the detained fast track*, February 2009.

In France, free legal assistance has recently been made available for proceedings before the appeal body (CNDA) by law.¹⁷² However, there remain a number of problems with access in practice.¹⁷³ The current system does not reimburse certain expenditures involved in the representation of asylum applicants, including interpretation and translation costs. The limited fee does not reflect the necessary preparation time or travel costs of lawyers to the CNDA, which is located in Paris. Consequently there is a shortage of lawyers who agree to participate in the free legal assistance scheme, particularly outside Paris.¹⁷⁴ The limited number of lawyers which are available are generally based in Paris, which can impede consultations when the appellant is based elsewhere. Finally, appellants are not systematically informed of this new scheme in the letter from the CNDA acknowledging receipt of their appeal (“*reçu de recours*”), and thus may not be aware of their right to free legal assistance.

In Greece, appellants have the right to free legal assistance to appeal to the Council of State unless, in the opinion of the judge, the application for annulment is manifestly inadmissible or manifestly unfounded. In practice, the appellant must pay the fees for the application for annulment in advance. If the judge considers the application admissible or well-founded, part of the fees, excluding notary and processing fees, are returned to the appellant.¹⁷⁵

Shortage of specialized lawyers

A general concern observed in many of the states surveyed (Bulgaria, the Czech Republic, France, Slovenia and Spain) is the lack of available lawyers specialized and competent in refugee law. For example, in Slovenia, at the time of UNHCR’s research, only six legal advisers were actually practicing.¹⁷⁶ Access to specialized lawyers is also problematic in the remote areas of Finland, where reception centres for asylum applicants are increasingly being built.

Specific instances of incompetence were reported in some countries. For example, in one appeal case audited in Slovenia, the argumentation submitted on behalf of the appellant was only two paragraphs in length, and simply asserted that what was ascertained by the Ministry of Interior “*is not true*”. UNHCR also audited a case in the UK where poor quality legal representation meant that the application for judicial review was not adequate and was not admitted to the court, with the result that the applicant’s removal went ahead unchallenged.¹⁷⁷

In the Czech Republic, appellants may either obtain legal assistance from NGOs¹⁷⁸ or apply for an appointed legal counsellor from the Regional Court.¹⁷⁹ However, access to NGO legal counsellors may be limited as they only attend the asylum centres once or twice a week, and the time they are able to allocate to an applicant may be very limited. Moreover, although it is legally possible for an NGO to represent an appellant before the courts, their costs cannot be covered by the court on the basis of the free legal aid legislation.¹⁸⁰ To apply for an appointed legal counsellor from the Regional Court, three eligibility criteria must be satisfied: (a) lack of sufficient means; (b) an existing patent prospect of success; and (c) that the legal representative is necessary for the protection of

¹⁷² Article L.733-1 *Ceseda*.

¹⁷³ Cf. Me Lagrue, lawyer, in an article published in the *Journal de Forum Réfugiés*, N° 45, January 2009; interview with lawyer, 5 March 2009.

¹⁷⁴ According to Forum Réfugiés, only 40 lawyers have shown an interest in being involved in the scheme and most are from the Paris Bar. There are, therefore, currently very few lawyers outside Paris who participate in the scheme.

¹⁷⁵ Interview with S9.

¹⁷⁶ Although the list of those who applied and were granted a licence was 10 persons. The number of asylum cases before the Administrative Court in 2008 was 171, according to the Annual Report of the Administrative Court of the Republic of Slovenia, 27 January 2009.

¹⁷⁷ DAF31

¹⁷⁸ Section 35 (5) CAJ.

¹⁷⁹ Section 35 (8) CAJ.

¹⁸⁰ Section 35 paragraph 5 CAJ and Section 35 paragraph 2 CAJ as confirmed by a decision of SAC No. 5 Azs 6/2009 – 8 of 29 March 2009, available at www.nssoud.cz.

the petitioner's rights. In practice, the court will usually authorize the appointment of a legal representative; but s/he may not be specialised in refugee and asylum law. This problem is now mitigated by the case-law of the Supreme Administrative Court in cases where the appellant him/herself applies for a specific lawyer (e.g. specialised in refugee and asylum law) to be appointed. In such cases, the Court should generally respect the wish of the appellant, if the proposal is justified by sensible and objectively legitimate reasons.¹⁸¹

Similarly, in Bulgaria, lawyers appointed through the legal aid scheme rarely have any knowledge of refugee law, which is not a distinct legal discipline in any of the university law faculties in Bulgaria.¹⁸²

UNHCR considers that there is an urgent need to address this through means such as increased training, and appropriate financial remuneration through publicly funded legal assistance schemes.

In some states, a lack of specialist lawyers is partially addressed through NGOs that provide legal services.¹⁸³ However, some NGOs reported precarious funding situations. For example, in the Czech Republic, the two main NGOs providing legal services – OPU and SOZE – are funded from national European Refugee Fund resources. However, in 2009, funds were not allocated until April, so the NGOs had to cut their legal services in the first three months of the year. UNHCR in Bulgaria continues to support the legal representation of appellants before the court by lawyers from the BHC. It is imperative that Member States ensure that a structured provision of funding is in place to ensure continued availability of appropriately specialized legal assistance.

Impact of detention and accelerated procedures on access to legal representation

In a number of Member States, it was reported that opportunities to obtain legal assistance for lodging an appeal is limited for appellants in the accelerated procedure or in detention. For example, in the Czech republic, those in detention have limited access to legal assistance because legal advisers visit only once or twice a week. Similarly, UNHCR's implementing partner in Bulgaria, the BHC visits the detention facility just once a week.¹⁸⁴ And due to a shortage of funds, the BHC lawyers are not able to use the services of interpreters which results in misunderstandings. Also, applicants in detention centres in some Member States lack funds, and are not allowed to use mobile phones, thus limiting their access to legal assistance.

Good practice

Good practice exists in Belgium, where all appellants benefit from free legal assistance,¹⁸⁵ irrespective of their appeal being examined in a regular or accelerated procedure. This entitlement applies during the whole of the asylum procedure, so that in principle, representation will be provided by the same lawyer who assisted the applicant during the first instance procedure, unless the applicant is unsatisfied and asks for a different lawyer.¹⁸⁶ Given such continuity in most cases, the assistance of the lawyer is promptly available, which minimizes the risk

¹⁸¹ Decision of the extended bench of the Supreme Administrative Court, No. 7 Azs 24/2008-141 of 21 December 2009, available at www.ns-soud.cz.

¹⁸² Bulgarian Helsinki Committee, Mid-term Sub-project Monitoring Report, Part 2: Narrative Report (01.01.2009 – 30.06.2009), Refugee Legal Aid Sub-project.

¹⁸³ For example, during the first 6 months of 2009, the Bulgarian Helsinki Committee (BHC) drafted 113 appeals (59 on decisions in the accelerated procedure, 54 on decisions in the general procedure) against negative decisions. The staff lawyers of BHC represented 34 appellants before the courts. See Bulgarian Helsinki Committee, Mid-Term Sub-project Monitoring Report, Part 2: Narrative Report (01.01.2009 – 30.06.2009), Refugee Legal Aid Sub-project.

¹⁸⁴ Other independent lawyers have access to the facility twice weekly.

¹⁸⁵ Article 90 of the Aliens Act.

¹⁸⁶ Control of the quality and the continuity of legal assistance is exercised by the Local Bureau of Legal Assistance and the Bar.

of problems with the appellant effectively accessing his/her appeal right. Thus legal aid arrangements in Belgium represent good practice in several respects, which demonstrably improve the efficacy of the appeals process.

However, it should also be acknowledged that the nature and limited scope of jurisdiction of the Council for Aliens Law Litigation (CALL) – particularly the lack of a fact-finding function and the reliance on a largely written procedure – render access to high quality legal assistance particularly essential.¹⁸⁷ Particular problems are thus created when a legal representative does not possess the requisite competence, rendering the remedy ineffective according to some stakeholders (NGOs) consulted. CALL judges interviewed during this research confirmed that problems can be caused by a lack of quality legal representation.

Recommendations

In order to ensure that an effective remedy is available in practice, it is essential that free legal assistance is available to appellants at all stages of the appeal procedure, including for assistance with the submission of grounds for appeal, and all other necessary preparation prior to the appeal hearing.

In order to ensure the provision of sufficient high-quality legal advice and representation for appeal proceedings, it is necessary for states to ensure adequate funding for training and accreditation of lawyers. Appropriate remuneration must also be provided for publicly funded legal assistance schemes, which is commensurate with the work required, as well as that provided in other fields of legal practice.

Where Member States operate general publicly-funded legal assistance schemes, Member States should conduct a review of the schemes to ensure that they adequately cater for the particular needs and circumstances of international protection claimants. Decisions on requests for legal aid must be taken promptly, so as not to exceed or significantly reduce the time period within which the applicant can lodge an appeal.

Member States should especially ensure that free legal assistance is promptly available to appellants in detained and/or accelerated procedures, and in areas removed from major cities.

Suspensive effect

Many refugees in Europe are recognized only following an appeal process. Worldwide, close to 210,000 asylum applicants were recognized as refugees or given a complementary form of protection in the course of 2007. This number includes an estimated 29,500 individuals (around 14% of the total) who initially received a negative decision, which was subsequently overturned at the appeal or review stage.¹⁸⁸ In the UK, this proportion reaches more than 20%, according to a report of the Centre for Social Justice of December 2008.¹⁸⁹ In France in 2007, this proportion was 19.9%, a significant increase compared to 2006 (15.3%).¹⁹⁰

¹⁸⁷ During the research this was identified as requiring in particular:

- a certain knowledge of asylum legislation (international, European and national);
- a knowledge of the workings of the CALL appeal procedure;
- a proactive commitment to look for new elements, to check the COI on which the CGRA decision is based, and to look for additional documents;
- the drafting of a concise and relevant petition;
- a brief but to-the-point oral intervention.

¹⁸⁸ 2007 UNHCR Statistical Yearbook, p. 48.

¹⁸⁹ [http://www.centreforsocialjustice.org.uk/client/downloads/188255%20Final%20Asylum%20Matters%20\(pg%201-112\)-V2_email.pdf](http://www.centreforsocialjustice.org.uk/client/downloads/188255%20Final%20Asylum%20Matters%20(pg%201-112)-V2_email.pdf)

¹⁹⁰ See the 2007 report of the French Appeal Board at http://www.commission-refugies.fr/IMG/pdf/CNDA-Rapport_d_activite_2007.pdf, p. 7.

Given the potentially grave and irreversible consequences of an erroneous determination at first instance, the effectiveness of any remedy depends on its ability to prevent the execution of any expulsion order which would violate the principle of *non-refoulement*. The need for a remedy which can suspend the enforcement of any removal order has been highlighted by the Committee of Ministers and Parliamentary Assembly of the Council of Europe as well as the Commissioner for Human Rights, UN Committee against Torture and NGOs.¹⁹¹

Unlike the first instance administrative procedure, the APD does not regulate the applicant's right to remain in the Member State in order to exercise the right of appeal and pending the outcome of an appeal. In other words, the APD does not regulate the 'suspensive effect' of appeals. Instead, the APD leaves it to Member States, where appropriate, to provide for rules "*in accordance with their international obligations*".¹⁹²

Member States' international legal obligations in this regard have been established by the European Court of Human Rights, which has held that in order for a remedy to be effective, Member States must ensure that legal provision is made for the possibility of suspending the enforcement of any deportation order which might lead to a breach of the State's obligations concerning Article 2 or 3 ECHR.¹⁹³ The Court held that an "effective remedy" under Article 13, in conjunction with Article 3 ECHR, requires "*the possibility of suspending the implementation of the measure impugned*".¹⁹⁴ In accordance with the legal provisions of the European Convention of Human Rights, an appeal body must have the power to suspend expulsion of those who have an arguable claim that expulsion will result in torture, degrading or ill-treatment in violation of the Convention. Therefore, if an alien claims that, if returned, s/he will suffer treatment contrary to Article 3 ECHR, s/he cannot be expelled unless the appeal body has decided beyond reasonable doubt that execution of the deportation order is compatible with the European Convention on Human Rights.¹⁹⁵

With regard, to the APD, therefore, it follows that an appellant should not be expelled unless *an appeal body* has decided beyond reasonable doubt that removal would not contravene the European Convention of Human Rights. The European Court of Human Rights has held:

*"The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible ... Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision".*¹⁹⁶

The simplest way of satisfying this requirement is for Member States to ensure by law that deportation orders are not issued or cannot be executed within the time limit to lodge an appeal; and to give automatic suspensive effect to all appeals. UNHCR notes positively that with regard to decisions taken by the determining authority in the first instance

¹⁹¹ This view is shared by the Committee of Ministers in Recommendation No. R (98) 13 of 18 September 1998 which stated that a remedy is only effective if the execution of the expulsion order is suspended until a decision is taken with regard to compliance with Article 3 ECHR. See also its 'Twenty guidelines on forced return', Guideline 5, 4 May 2005. Furthermore, see Parliamentary Assembly recommendations 1236 (1994) and 1327 (1997) and its resolution 1471 (2005).

¹⁹² Article 39 (3) states that "*Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with: (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome*".

¹⁹³ *Jabari v Turkey*, no. 40035/98, *Ibid*. The European Court of Human Rights has held that an effective remedy requires "*the possibility of suspending the implementation of the measure impugned*".

¹⁹⁴ This was reiterated in *Gebremedhin v. France*, no. 25389/05, 26 April 2007. *Ibid*.

¹⁹⁵ *Conka v. Belgium*, no.51564/99. *Ibid*.

¹⁹⁶ *Conka v. Belgium* no.51564/99. *Ibid*.

procedure, Bulgaria affords such automatic suspensive effect to all appeals.¹⁹⁷ Furthermore, a significant number of the Member States of focus in this research afford automatic suspensive effect to appeals against certain negative decisions (Belgium, the Czech Republic, Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK).

However, UNHCR's research has found that a significant number of the Member States surveyed do not afford automatic suspensive effect to appeals against certain decisions, or decisions taken in certain procedures, or to applicants in certain circumstances.

Indeed, in Greece and Spain, automatic suspensive effect is not afforded to any appeals.

The following table sets out some of the circumstances in which there is no automatic suspensive effect (X).

Member States	All negative decisions	Any negative decision taken in the accelerated procedure	Applications declared manifestly unfounded	Applications declared inadmissible	Border – no entry decisions	Application withdrawn	Negative decision in preliminary examination of subsequent application ¹⁹⁸
Belgium ¹⁹⁹							X
Bulgaria					N/A		
Czech Rep ²⁰⁰			X ²⁰¹	X ²⁰²	X	X	X ²⁰³
Finland ²⁰⁴			X ²⁰⁵	X ²⁰⁶	N/A	N/A	X ²⁰⁷
France ²⁰⁸		X ²⁰⁹					

¹⁹⁷ Although note that this research does not include implementation of the Dublin Regulation within its scope, and in Bulgaria, appeals against decisions taken in the Dublin procedure do not have automatic suspensive effect under Article 84 (1) LAR.

¹⁹⁸ Where the negative decision refers to a decision on inadmissibility, this is explicitly stated.

¹⁹⁹ Article 39/70 of the Aliens Act. All appeals have suspensive effect, except an appeal by an EU national against a decision by the CGRA not to examine his/her application and an appeal against a decision by the AO not to further examine a subsequent application.

²⁰⁰ Section 32 (3) ASA: “The filing of an action pursuant to Subsection (1) and (2) has a suspensive effect, except for an action against discontinuation of the proceedings pursuant to Section 25 and an action against a decision pursuant to Section 16 (1)(d) and (e) i.e. safe country of origin, safe third country and where applicant has multiple nationalities and can avail him or herself of the protection of a state of citizenship.”

²⁰¹ When the application is deemed manifestly unfounded on grounds of safe country of origin [Section 16 (1) 9d)]; safe third country [Section 16 (1) (d)] or the applicant has the nationality of more than one country and they can avail themselves of the protection one of those countries [Section 16 (1) (e)]. Appeals against decisions declaring an application to be manifestly unfounded on other grounds have automatic suspensive effect.

²⁰² On the grounds that the applicant is an EU citizen, safe third country, first country of asylum and applicant has lodged an identical application after a final decision.

²⁰³ Note that in the Czech Republic, this would constitute a decision of inadmissibility. Section 32 (3) ASA: “The filing of an action pursuant to Subsection (1) and (2) has a suspensive effect, except for an action against discontinuation of the proceedings pursuant to Section 25 and an action against a decision pursuant to Section 16(1)(d) and (e).” Section 25: “The proceedings shall be discontinued if (...) i) the application for international protection is inadmissible.” Section 10a (e): “The application for international protection shall be inadmissible e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien.”

²⁰⁴ Section 200 (1) of the Aliens Act 301/2004.

²⁰⁵ On grounds of safe country of asylum or origin.

²⁰⁶ On grounds of safe country of asylum.

²⁰⁷ Note that in Finland, the decision on a subsequent application is not taken in a preliminary examination procedure but rather in the accelerated or regular procedure. Section 210 (2) and (3) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009) stipulates that a negative decision on a subsequent application is immediately enforceable unless otherwise ordered by the competent court.

²⁰⁸ Regarding decisions refusing entry in the framework of the border procedure, the suspensive effect was recently introduced by the Law of 20 November 2007. This resulted from a ruling of the European Court of Human Rights that France was in breach of the European Convention on Human Rights by not providing an appeal procedure with automatic suspensive effect in the asylum procedure at the border (*Gebremedhin v. France*, Application No 25389/05, 26 April 2007). The right to an effective remedy was considered to have been violated.

²⁰⁹ Note that this includes the overwhelming majority of decisions taken on subsequent applications.

Member States	All negative decisions	Any negative decision taken in the accelerated procedure	Applications declared manifestly unfounded	Applications declared inadmissible	Border – no entry decisions	Application withdrawn	Negative decision in preliminary examination of subsequent application ¹⁹⁸
Germany			X ²¹⁰	X ²¹¹	X ²¹²	X ²¹³	X ²¹⁴
Greece	X	N/A ²¹⁵	X	X	X	X	X
Italy ²¹⁶			X	X	N/A	N/A	X ²¹⁷
Netherlands		X			X	X ²¹⁸	X
Slovenia			X ²¹⁹			X	X
Spain	X	X			X ²²⁰	X	X
UK			X	X	N/A		X

Moreover, it should be noted that in Italy, applicants who have been sent to a CARA on the basis of Article 20.2 (b) or 20.2 (c) d.lgs 25/2008 for having been arrested while evading border control, or who have filed an application after they had been apprehended by the police in a position of illegal stay or who were arrested and sent to a CIE for border control evasion must request suspensive effect, as must applicants in detention in the Netherlands.

In the absence of automatic suspensive effect of the appeal, as a minimum requirement, in accordance with international law, an applicant must be allowed to remain in the Member State in order to petition the court or tribunal to grant the right to remain. Any such petition or request should in itself by law have automatic suspensive effect pending the outcome of the request. In other words, the applicant must be allowed to remain in the Member State until the court or tribunal has notified the applicant of its decision on whether execution of the deportation order is in compliance with the European Convention on Human Rights. The European Court of Human Rights held in the case of *Gebrhemedhin v. France* that the “urgent application for stay of execution” (which according to French law at that time did not have automatic suspensive effect, with the effect that the individual concerned could legally be removed before the judge had given a decision) did not constitute an “effective remedy”. In that case, the Court held:

“Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect”.²²¹

210 Section 75 in conjunction with 36 (1), (3) APA.

211 So-called “irrelevant” applications (sections 29, 36 APA) are not examined on the merits and therefore may be equated to “inadmissible” applications. There is no automatic suspensive effect according to Section 75 in conjunction with 36 (1), (3) APA. However, Section 29 APA is only very rarely applied in practice.

212 Section 75 in conjunction with 18a (3), (4) APA, rejection as manifestly unfounded in the airport procedure.

213 Section 75 APA in conjunction with 38 (2) APA which refers to decisions pursuant to Section 32 or 33 APA.

214 Section 75 in conjunction with 71 (4) APA in conjunction with Section 36 or 34a APA.

215 At the time of writing, the accelerated procedure reportedly no longer operates.

216 Article 32 (4) d.lgs. 25/2008 provides that, even in cases where there is no automatic suspensive effect against a first instance negative decision, the asylum seeker is authorized to remain until the time limits for the appeal have elapsed.

217 Note that in Italy this would constitute a decision of inadmissibility. A decision to treat a subsequent application as inadmissible under Article 29 (b) of the d.lgs. 25/2008 can be appealed under Article 35 (1) of the d.lgs. 25/2008. However, Article 35 (7) of the d.lgs. 25/2008 stipulates that the appeal has no automatic suspensive effect.

218 This refers to a negative decision taken in the accelerated procedure following implicit withdrawal.

219 On the ground of safe country of origin.

220 Either suspensive effect has to be applied for or in the case of a negative decision at the border, suspensive effect will be granted if UNHCR has presented a report in favour of admission to the territory.

221 *Gebremedhin [Gaberamadhien] c. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007. The Court concluded that in that case as the applicant did not have access in the “waiting zone” to a remedy with automatic suspensive effect, he did not have an “effective remedy”. See also *K.R.S. v. the United Kingdom*, no. 32733/08, admissibility decision of 2 December 2008. See also *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, paragraph 58, where the Court held that “a remedy will only be effective if it has automatic suspensive effect”.

To satisfy their legal obligations, it is not sufficient for Member States to assert that, in the absence of suspensive effect in law, the authorities should in practice refrain from executing an expulsion order. The rule of law is one of the fundamental principles of a democratic society, and the European Court of Human Rights has stressed that “*the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement.*”²²²

For example, in Spain, Article 29 (2) of the New Asylum Law establishes that when an appellant lodges a judicial appeal against any administrative decision in the asylum procedure, a request for suspensive effect will automatically be dealt with as a request for an urgent precautionary measure (under Article 135 of the Law on Administrative Jurisdiction). This implies automatic provisional suspensive effect until a decision is taken on the urgent precautionary measure within three days.

However, UNHCR is concerned that in some Member States this requirement to give the applicant an effective opportunity to remain in order to apply for suspensive effect, and the requirement to suspend the execution of an expulsion order until a decision is taken on the application for suspensive effect, is not fulfilled in law. Therefore, it constitutes a breach of Article 39 (3) (a) APD.

In Finland, where a negative decision has been taken on a subsequent application on the grounds that there are no new elements, the expulsion order may be executed immediately once the decision is taken. This means that the appellant does not have an effective opportunity to apply to the Helsinki District Court to suspend enforcement.²²³

Furthermore, when the determining authority takes a negative decision on an application, on the ground that a country is a safe country of asylum or origin, or declares an application manifestly unfounded, an expulsion order is enforceable eight days after notification.²²⁴ Applicants in remote areas of Finland, where legal representation and interpreter services are scarce, experience difficulties in applying for the suspension of the expulsion order within the eight days. Moreover, notwithstanding a pending request for suspensive effect, an expulsion order may nevertheless be executed.

Similarly, a request to the President of a District Court in the Netherlands to grant suspensive effect does not in itself have automatic suspensive effect. There is no guarantee in law that an expulsion order will not be executed before the President of the District Court takes a decision on the request for suspensive effect.²²⁵ Moreover, the Aliens Circular is explicit in stating that, notwithstanding a request for suspensive effect, an expulsion order may be executed where:

- the asylum seeker is considered to constitute a danger for public order or national security;
- there is a risk that the opportunity to return the person to the country of origin or a third country will be missed;
- the subsequent application is rejected because no new facts or circumstances were considered as submitted.²²⁶

In the Czech Republic, there is no explicit legal provision which affords automatic suspensive effect when specifically requested. Moreover, there is no specific time limit within which the court should take a decision on a request

²²² *Gebremedhin v France*, no. 25389/05. Ibid.

²²³ Section 201 (2) and (3) *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009). This also applies to decisions to transfer responsibility under the Dublin II Regulation.

²²⁴ Section 201 (2) and (3) *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009).

²²⁵ According to the Aliens Circular, however, an asylum applicant is **in general** allowed to await the decision of the President of the District Court, **provided that the request has been submitted in a timely fashion.**

²²⁶ C22/5.3 Aliens Circular

for suspensive effect.²²⁷ As a result, it is not unusual that an appeal against a negative decision on international protection, and an application for suspensive effect, are dealt with at the same time within one judgment. In the interim period, there is no guarantee in law that an expulsion order will not be executed before the Court decides.

In Greece, automatic suspensive effect is not afforded to any appeals. During the period of UNHCR's research in Greece, all appeals before the Appeals Board had automatic suspensive effect in accordance with Article 25 (2) of PD 90/2008. However, this legal provision has since been repealed, and the only remedy against a negative decision by the determining authority is an application for annulment to the Council of State on a point of law, which does not have automatic suspensive effect. The appellant must request suspensive effect from the Suspensive Committee of the Council of State. This request does not itself have automatic suspensive effect unless, at the discretion of the presiding judge, a provisional suspension order is issued.²²⁸

In the UK, there is no statutory provision allowing for an applicant to request suspensive effect when the right of appeal is non-suspensive. In such cases, the applicant can only challenge the removal or expulsion order by judicial review. There is no automatic right to judicial review: there is a leave, or permission, requirement in England and Wales, which is to be introduced in Scotland. Judicial review would normally suspend removal, but the determining authority issued guidance in January 2009 about the situations in which judicial review would not have suspensive effect unless an injunction is sought.²²⁹

UNHCR also notes that the time limit within which an appellant must apply for suspensive effect should not be so short as to render the remedy ineffective. In this regard, UNHCR is concerned that, for example, the time limit within which applicants must apply for suspensive effect in the Netherlands is 24 hours.²³⁰ UNHCR is also concerned that, in the UK, in safe third country cases, there are only 72 hours between the date when a safe third country certificate is issued and the date for which removal is set. Where the applicant is not admitted to the regular procedure, and may not have access to legal representation, this does not give the applicant a practical opportunity to challenge the decision by judicial review. In Germany, with respect to applications certified as manifestly unfounded in the airport procedure, any request for suspensive effect needs to be submitted within three days of the date the decision was served.²³¹ However, as mentioned before, the Federal Constitutional Court has ruled that such short deadlines may only be in conformity with the Constitution if it is guaranteed that the applicant has immediate access to qualified and independent legal advice.²³²

No applicant should be deported unless the time limit to request suspensive effect has expired and the applicant has not exercised his/her right to request suspensive effect. Applicants must have an effective opportunity to request suspensive effect. To the contrary, UNHCR was informed by stakeholders in the UK that there have been cases where a decision was taken that a subsequent application did not present new elements (i.e. did not amount to

²²⁷ Section 56 CA): "(1) Regardless of the chronological order in which petitions reach it, the court preferentially disposes of petitions for adjudication of suspensive effect, petitions for provisional rulings, petitions for exemption from judicial fees and petitions for the appointment of a representative. (2) The court furthermore preferentially deals with petitions and complaints concerning international protection, decisions on detention of a foreigner and decisions on the termination of special protection of and aid to witnesses and other persons in connection with criminal proceedings as well as in other cases, if provided for by a special law."

²²⁸ Article 52 PD 18/89

²²⁹ This affects persons who make another application for judicial review within three months of a judge refusing permission on a previous judicial review application, particularly where the first claim has been found to be clearly without merit or where a case has been withdrawn or otherwise concluded.

²³⁰ In the Netherlands, the decision itself states that the asylum seeker must formally request an interim measure within 24 hours.

²³¹ Section 18a (4) APA

²³² See Marx, *Commentary on the Asylum Procedure Act*, 7th edition, 2009, Section 18a, paragraph 171; BVerfGE 94, 166; the ruling concerned the constitutionality of a one week deadline in the accelerated procedure (rejection as manifestly unfounded in the airport procedure). The functioning in practice, however, very much depends on the qualifications of the lawyers and legal services available.

a ‘fresh claim’) and the applicant did not have an effective opportunity to challenge the removal order, because the applicant was removed without being given the usual 72 hours notice of removal. Therefore, there was no practical opportunity to raise judicial review proceedings. The Administrative Court held that the removal was unlawful and that the circumstances clearly gave rise to an arguable fresh claim, i.e. subsequent application.²³³

It must also be emphasized that any request for suspensive effect must be subjected to rigorous and detailed scrutiny.²³⁴ This is particularly important because, as the table above shows, a significant number of Member States deny automatic suspensive effect of an appeal simply on the ground that an application has been examined and a decision taken in the accelerated procedure or the decision declares the application manifestly unfounded. However, the current reality is that an application may be examined in an accelerated procedure for reasons completely unrelated to the merits of the application. An applicant who has an arguable claim to refugee status or subsidiary protection, but whose application is determined to be unfounded, may nevertheless have his/her application declared ‘manifestly unfounded’ for reasons completely unrelated to the merits of the application. This may occur, for example, on the grounds that the applicant failed without reasonable cause to make his/her application earlier.

For instance, in France, when a negative decision has been taken by the determining authority in the accelerated procedure, an appeal is not afforded automatic suspensive effect. Applications examined in the accelerated procedure represented 30.7% of all applications in 2008. However, in France, the decision to channel an application into the accelerated procedure is not even taken by the determining authority but by the Prefectures, and without reference to the reasons for the application for international protection. The Prefecture’s decision is not taken on the basis of a preliminary or personal interview with the applicant. Rather, it is taken on the basis of a written form which the applicant must complete in French without any linguistic or legal assistance. The form does not require or request the applicant to state the reasons for applying for international protection. Yet, without knowing the reasons for the application, the Prefecture can decide that the application should be examined in the accelerated procedure because it considers the application to be deliberately fraudulent; or to constitute an abuse of the asylum procedure; or to be lodged solely in order to prevent a removal order which has been issued or is imminent.²³⁵ Moreover, for example, in the Netherlands, the only criterion for channelling an application into the accelerated procedure is whether the determining authority believes it can take a decision within 48 procedural hours.

It is therefore critical – given the irreversible and potentially life-threatening consequences of an erroneous first instance decision – that an appeal body scrutinize rigorously any request for suspensive effect.

This remains essential also in cases where the appeal body has jurisdiction only to review the legality of a decision, and not its merits. In this regard, UNHCR notes that in Belgium, where the competent authority (Aliens Office) decides not to examine a subsequent application, the applicant can only request an annulment. This will not be granted suspensive effect unless Article 51/8 of the Aliens Act has been incorrectly applied. Similarly, in the

²³³ *X v SSHD* (Admin Court) (2009) (unreported 18 February 2009).

²³⁴ *Jabari v Turkey*, no. 40035/98. Ibid.

²³⁵ It should be noted that a decision by the Prefecture to refuse to grant a temporary residence permit and channel the application into the accelerated procedure may be appealed to the administrative court. The administrative court in Lyon (« *tribunal administratif* ») always considers that the emergency procedure should be applied. This tribunal tends to suspend the decision of the prefecture refusing a temporary residence permit for applicants who are deemed to be nationals of safe countries of origin and/or who apply for asylum in the framework of a subsequent application and to instruct the prefecture to deliver a temporary residence permit to these applicants which should be valid until the decision of the CNDA. Therefore this case law creates a suspensive remedy before the CNDA (NB: however this case law comes from a first instance administrative tribunal. It does not rule on the substance of the case, it can be overturned by a higher administrative court and it has no binding effect on other administrative tribunals. Only a ruling from the Council of State (*Conseil d’Etat*) would set a precedent. (Cf. Tribunal administratif de Lyon, M. B.P, Ordonnance du juge des référés, 2 février 2007, N°0700354; Tribunal administratif de Lyon, Mme EC, Ordonnance du juge des référés, 3 avril 2009, N° 0901637; Tribunal administratif de Lyon, Mr. KC, Ordonnance du juge des référés, 3 avril 2009, N° 0901635.)

UK, applicants who wish to have a removal order suspended must apply for judicial review i.e. a review of the legality of the removal order. This would not include a review of the facts.

On a related issue, it is noted that in France, negative decisions taken by the determining authority OFPRA may be appealed, within one month of notification of the decision, to the CNDA (*Cour Nationale du Droit d'Asile*), a specialized administrative court responsible for reviewing the decisions of OFPRA on applications for international protection. However, as mentioned above, when a negative decision is taken by OFPRA following examination of the application in the accelerated procedure, the appeal to the CNDA does not have automatic suspensive effect. In order to prevent removal, the applicant must appeal, not to the CNDA, but to the administrative court to request that the decision of the Prefecture to refuse to deliver a temporary residence permit and to issue an “obligation to leave the French territory” (“OQTF”) be cancelled.²³⁶ This appeal to the administrative court, which must be lodged within one month of notification of the Prefecture’s decision, has automatic suspensive effect.²³⁷ The administrative court must take a decision, regarding whether execution of the removal order would be in compliance with Article 3 of the European Convention on Human Rights, within three months, or 72 hours if the appellant is held in an administrative retention centre. As such, there are two parallel appeal processes: the CNDA reviews whether the appellant is a refugee, or qualifies for subsidiary protection status; and the administrative court considers whether execution of the removal order would be in conformity with the European Convention on Human Rights. If the administrative court determines that execution of the removal order is in compliance with the European Convention on Human Rights, the appellant may be removed before the decision of the CNDA on the claim for international protection.

Recommendations

By law, no expulsion order should be enforced unless the time limit within which to lodge an appeal has expired and the right to appeal has not been exercised.

When the right to appeal has been exercised within the time limit, the appeal in general should have automatic suspensive effect and the expulsion order should not be enforceable until and unless a final negative decision has been taken on the asylum application.²³⁸

Member States should only be able to derogate from the automatic suspensive effect of an appeal on an exceptional basis, when the decision determines that the claim is “clearly abusive” or “manifestly unfounded” as defined in EXCOM Conclusion No. 30(XXXIV) 1983.²³⁹ Additional exceptions could apply with respect to preliminary examinations in the case of subsequent applications, and where there is a formal arrangement between states on responsibility-sharing. In such situations, in accordance with international law, the appellant nevertheless must have the right and the effective opportunity to request a court or tribunal to grant suspensive effect. The review of whether to grant suspensive effect may be simplified and fast, provided both facts and law are considered.²⁴⁰

²³⁶Article L.512-1 *Ceseda* states “[t]he foreigner [who is denied various kinds of residence titles accompanied by an obligation to leave the territory ‘OQTF’ which mentions the country of destination] may, within one month after the notification, request the cancellation of these decisions to the administrative court. S/he may request free legal assistance at the latest when s/he submits his/her request. His/her appeal suspends the enforcement of the OQTF but does not prevent his/her holding in an administrative retention centre under the conditions mentioned in Title V of this chapter.”

²³⁷The Prefecture’s decision to issue ‘an obligation to leave the territory’ (*une obligation de quitter le territoire français (OQTF)*) is, on average, taken three weeks after OFPRA’s negative decision.

²³⁸In this connection, the Commission has proposed amendment of the APD to provide for general automatic suspensive effect, subject to specific exceptions: see proposed recast Article 41: APD Recast Proposal 2009.

²³⁹“... those which are clearly fraudulent or not related to the criteria for the granting of refugee status ... nor to any other criteria justifying the grant of asylum.” This does not equate to a finding of ‘manifestly unfounded’ in terms of Article 28 APD. It equates solely to Article 23 (4) (b) APD, and not to other grounds stated under Article 23 (4) APD.

²⁴⁰UNHCR APD comments 2005.

By law, no expulsion order should be enforced unless the time limit within which to request suspensive effect has expired. The time limit must be reasonable and permit the applicant to exercise his/her right to legal assistance and to request suspensive effect. Any such request should automatically suspend enforcement of any expulsion order until a decision on the request has been taken by the court or tribunal. The APD should be amended accordingly.

Scope of the review

Article 39 APD does not regulate the scope of review by the appellate body. However, the case law of the European Court of Justice has established that the appeal body must have the power to review both facts and issues of law.²⁴¹ Moreover, the case law of the European Court of Human Rights has established that the notion of an effective remedy requires “rigorous scrutiny” of appeals.²⁴² In practice, the European Court of Human Rights gathers and verifies facts, and conducts a full assessment of fact and law in the cases before it.

In a majority of the Member States surveyed, the appellate body, competent to review negative decisions on applications for international protection, has jurisdiction to review questions of both fact and law. This is the case in Belgium,²⁴³ Bulgaria,²⁴⁴ the Czech Republic,²⁴⁵ Finland, France,²⁴⁶ Germany,²⁴⁷ Italy,²⁴⁸ Slovenia,²⁴⁹ Spain²⁵⁰ and the United Kingdom.²⁵¹ However, in relation to Belgium and the UK, this general statement must be qualified with regard to some specific cases.

In Belgium the appeal body (Council for Aliens Law Litigation) has full jurisdiction over all decisions of the first instance determining authority. It does not have full jurisdiction over decisions of the Aliens Office relating to

²⁴¹ ECJ, Judgment *Dörr and Ünal*, Case C-136/03, 2 June 2005, paragraph 57.

²⁴² See, for example, the case of *Salah Sheekh v the Netherlands*, No. 1948/04.

²⁴³ Article 39/2, 1, Aliens Act.

²⁴⁴ Article 146 Administrative Procedures Code (APC).

²⁴⁵ Section 76 CAJ “*Decision-making without an order to hear the matter:*

(1) *The court shall revoke the contested decision for procedural faults without a hearing by means of judgement*

a) *on grounds of non-reviewability consisting in incomprehensibility or for absence of reasons for the decision,*

b) *because the facts of the matter which the administrative authority took as the grounds for the contested decision are contrary to the documents or are not supported by them or require extensive or essential supplementing,*

c) *for substantial breach of the regulations on proceedings before an administrative authority if it could result in an unlawful decision on the matter itself.”*

Section 78 CAJ“(1) If the complaint is justified, the court revokes the contested decision as unlawful or for procedural faults. The court also revokes the contested decision as unlawful if it finds that the administrative authority exceeded the legally defined bounds of discretionary power, or abused it.”

See section 71(1)(d) CAJ concerning the requirement for stating grounds when lodging an appeal: “*Counts of charges from which it must be clear for which factual and legal reasons the complainant considers the statements of the decision illegal or null.*”

²⁴⁶ With regard to the CNDA.

²⁴⁷ Section 86 (1) Code of Administrative Court Procedure.

²⁴⁸ According to Article 35 of Legislative Decree 25/2008, appeals are lodged at a Civil Court. On the basis of the Italian Constitution (Art. 103 and 113 in particular) and as a general rule, the Civil Courts have full jurisdiction on points of law and fact.

²⁴⁹ Article 27 of the Act on Administrative Dispute.

²⁵⁰ Article 67 of the Law on the Administrative Jurisdiction. This is the case for both administrative judges of the National High Court and the Administrative Chamber of the National High Court. In case of revocation of refugee status which can only be appealed to the Supreme Court, the Court reviews both facts and law.

²⁵¹ Sections 84, 85 and 85A of the Nationality, Immigration and Asylum Act 2002, and with regard to appeals before the Asylum and Immigration Tribunal.

the preliminary examination of subsequent applications, or applications from EU citizens.²⁵² Instead, the scope of review is limited to a review of the legality of the decision.²⁵³

In the United Kingdom, negative decisions may be appealed in-country to the specialised Asylum and Immigration Tribunal which has jurisdiction to review questions of both fact and law. However, no in-country right of appeal is available, when the determining authority decides that the claim is clearly unfounded²⁵⁴ or where there is a national security issue.²⁵⁵ Furthermore, there is no right of appeal in most safe third country cases,²⁵⁶ or where a decision is made not to re-open the asylum procedure following withdrawal, or not to further examine a subsequent application.²⁵⁷ It also applies where a subsequent application could have been raised in a previous appeal²⁵⁸ or a claim could have been made earlier.²⁵⁹ The UK authorities claim to have transposed the requirements of Article 39 (1) APD on the basis that where there is no statutory in-country right of appeal, the applicant may still seek judicial review of the decision.²⁶⁰

However, as the scope of judicial review is restricted to a review of the lawfulness of the decision, and not the merits, the issue of whether judicial review can provide an effective remedy in the asylum and immigration context is still a contested one. In the UK, the courts can conduct a more rigorous level of review in human rights cases, including asylum cases.²⁶¹ More intense review can also be invoked where EC/EU law is involved.²⁶² However, the effectiveness of judicial review as a remedy continues to be challenged before the European Court of Human Rights.²⁶³ In English law, judicial review examines only the manner in which the decision was made, and not the merits of the impugned decision. While the European Court of Human Rights has held in a leading decision that judicial review in England can be considered to constitute an effective remedy, two judges dissented, stating that *“it appears to me that a national system ... which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13 [ECHR].”*²⁶⁴

A significant exception in law, among those Member States surveyed, relates to provisions in the Netherlands which limit the scope of review by the first tier appeal body (District Court). In Dutch administrative law, a strict distinction is made between full judicial scrutiny of a decision and marginal scrutiny. Marginal scrutiny means that the court can only review whether a decision is reasonable, and will only annul the decision if it is considered unreasonable. The Administrative Law Division of the Council of State has held that only marginal scrutiny shall

²⁵² Article 57/6, 2° of the Aliens Act.

²⁵³ In relation to applications from EU citizens, the only possibility foreseen is an appeal of annulment. This means that the CALL can only examine the decision on its legality (Article 39/2, § 2 of the Aliens Act). The appeal will not examine the substance of the application, nor will it have automatic suspensive effect (a separate appeal for suspension of the expulsion measures must be lodged). In relation to subsequent applications the only appeal against a decision of the AO not to consider the subsequent application (Article 51/8 of the Aliens Act) is an appeal of annulment, which has no suspensive effect. Article 51/8 of the Aliens Act states that in principle it is not possible to lodge a request for the suspension of the challenged decision, as long as article 51/8 of the Aliens Act has been correctly applied (see binding limitative interpretation of the Constitutional Court given in its judgments of 14 July 1994 and 27 May 2008).

²⁵⁴ Nationality Immigration and Asylum Act 2002 s94.

²⁵⁵ Nationality, Immigration and Asylum Act 2002 s 97A (2)&(3). In national security cases appeals are heard by the Special Immigration Appeals Commission, see Special Immigration Appeals Commission Act 1997.

²⁵⁶ Section 33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

²⁵⁷ When this is considered not to constitute a ‘fresh claim’ as defined by Immigration Rule 353.

²⁵⁸ Section 96 (1) of the Nationality Immigration and Asylum Act 2002.

²⁵⁹ Section 96 (2) of the Nationality Immigration and Asylum Act 2002.

²⁶⁰ Annex A of the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007.

²⁶¹ *R v Secy of State for Home Dept ex p Daly* [2001] UKHL26, *Huang and Kashmiri v Secy of State for Home Dept* [2007] UKHL 11; *Bugdaycay v Secy of State for Home Dept* [1987] AC 514.

²⁶² *R v Chief Constable of Sussex, ex parte ITF* [1999] 2 AC 418.

²⁶³ *KRS v UK ECtHR* 2.12.08 (32733/09). This challenge was unsuccessful.

²⁶⁴ *Vilvarajah v UK* – Applications Nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991. Dissenting opinion by Judge Walsh, supported by Judge Russo.

apply to the facts as established by the determining authority; the evidence that the determining authority relied upon in making its decision; and the credibility assessment made by the determining authority. The District Court is obliged to defer to the fact-finding of the determining authority, and only review the reasonableness of the decision based on the facts as presented by the determining authority.²⁶⁵ Thus, while the determination of uncontested facts is subject to full judicial review, the determining authority's assessment of disputed or contested facts is reviewed only marginally. The Committee against Torture has expressed its concerns that appeal procedures provide for marginal scrutiny only of rejected applications.²⁶⁶

UNHCR recognizes that, in accordance with international human rights law, that the assessment of whether a state provides an effective remedy must consider whether the “aggregate of several remedies” provided by domestic law satisfies the requirements of Article 39 of the APD and Article 13 of the European Convention on Human Rights.²⁶⁷

In the Netherlands, where there is a limited scope of review by the first tier appellate body, there is in law the possibility of an onward appeal, but only on important points of law.²⁶⁸ In the Netherlands, lawyers, judges and academics have argued that given the Dutch 48 hour accelerated procedure, the marginal scrutiny exercised by the District Courts, together with the stringent restrictions on the submission of new evidence,²⁶⁹ this does not comply with the requirements of an effective remedy.²⁷⁰

At the time of UNHCR's research in Greece, the appellate body (the Appeals Board) reviewed both facts and law. However, since UNHCR's research in Greece, the Appeals Board has been abolished by law and the only appellate body is the Council of State which only has jurisdiction to review the legality of the decision by the determining authority and does not review the facts. It must be highlighted that, in Greece, the Council of State is the only appeal instance for an appellant and there is no possibility of an onward appeal. This means that the only authority which examines the facts is the determining authority – the Aliens Directorate of the Greek Police Headquarters (ADGPH). UNHCR's research has revealed that the determining authority's interviews at first instance, as observed by UNHCR, generally lasted five to ten minutes and that questioning did not serve to address the grounds for a potential claim. The information recorded on interview forms was extremely brief and often standard. Decisions were also brief and standard, and no further information was contained in case files. Notwithstanding the creation, at first instance, of an Advisory Refugee Committee composed of two police officers and an official of the Aliens and Immigration Directorate, UNHCR is deeply concerned that applicants for international protection in Greece did not receive an adequate examination of their application, and that the right to seek an annulment of a decision on a point of law only – without any review of the facts – is not an effective remedy.

In Slovenia, the Supreme Court has the power to consider points of law and fact, but like the Administrative Court before it, in practice, only reviews petitions on points of law. As a result, in Slovenia, only the determining authority examines the facts and in practice there is no review of the facts by a court or tribunal.

²⁶⁵ See also J. van Rooij, *Asylum procedure versus human rights*, April 2004, www.rechten.vu.nl/documenten.

²⁶⁶ Paragraph 7 (d), CAT/C/NET/CO/4 August 2007.

²⁶⁷ *Conka v Belgium*, amongst many authorities.

²⁶⁸ Administrative branch of Council of State

²⁶⁹ See below

²⁷⁰ See for example the Commission Scheltema, *Evaluatie Vreemdelingenwet 2000, De Asielprocedure – deel 1* (2006), p. 77, L. Slingenbergh 2006, www.rechten.vu.nl/documenten, p. 95; T.P. Spijkerboer, *Het hoger beroep in vreemdelingenzaken*, Den Haag: Sdu 2002; P. Boeles, E.R. Brouwer, A.J.Th. Woltjer & K. Alfenaar, *Border Control and Movement of persons, towards effective legal remedies for individuals in Europe*, Utrecht: Standing Committee of Experts in International Immigration 2004; VluchtelingenWerk Nederland, *Vreemdelingenwet 2000, een ontspoorde asielwet*, October 2006; T.P. Spijkerboer & B.P. Vermeulen 2005, p. 228.

Recommendation

Effective national remedies must provide for rigorous scrutiny of challenges to negative decisions on asylum claims which should in principle encompass a review both of facts and law.

Evidence and fact-finding

The European Court of Human Rights has interpreted its duty to conduct a rigorous scrutiny as requiring it to conduct its own fact-finding when necessary. It has explicitly held that:²⁷¹

“In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained proprio motu, in particular where the applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government. In respect of materials obtained proprio motu, the Court considers that, given the absolute nature of the protection afforded by Article 3 ECHR, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by material originating from other, reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations. In its supervisory task, it would be too narrow an approach if the Court were only to take into account materials made available by the domestic authorities of the Contracting State concerned without comparing these with materials from other, reliable and objective sources. This further implies that, in assessing an alleged risk of treatment contrary to Article 3 ECHR, a full and ex nunc assessment is called for as the situation in a country of destination may change in the course of time.”

UNHCR recommends that the appeal body should have fact-finding competence, in order to fully satisfy the requirement of rigorous scrutiny established in international human rights law. This is important both when the court or tribunal has power to take a decision regarding the appellant’s qualification for refugee status or subsidiary protection status; and when the court or tribunal has the power to quash the decision of the determining authority and return the application to the determining authority for re-examination.

UNHCR notes positively that the courts or tribunals in Finland, France, Germany,²⁷² Italy and Spain conduct independent fact-finding when necessary. Indeed, the Helsinki District Administrative Court has its own specialist asylum and immigration library at its disposal and can directly access the internet, the information resources of the determining authority or sources abroad. Similarly, the CNDA in France has its own centre of geopolitical information providing COI and the information departments of both OFPRA and CNDA sometimes conduct joint fact-finding missions. In Germany, the administrative courts sometimes request the Federal Ministry of Foreign Affairs, UNHCR or NGOs to provide country of origin information on a specific question by a formal decision on evidence (*Beweisbeschluss*). In addition to the public reports on country of origin information, the courts frequently consult the non-public reports of the Federal Ministry of Foreign Affairs as well as particular information provided upon request to other courts. All information consulted is communicated to the parties to the proceedings by the court

²⁷¹ *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of January 2007.

²⁷² Section 86 (1) Code of Administrative Court Procedure.

in a list (the so called *Erkenntnisliste*).²⁷³ Likewise, in Italy, the Civil Courts can acquire all necessary evidence²⁷⁴ and can conduct independent fact-finding.²⁷⁵

The Regional Courts in the Czech Republic may also conduct fact-finding.²⁷⁶ Some of the Regional Courts in the Czech Republic sometimes refer to UNHCR when limited evidence has been presented by the parties. Any evidence produced through such fact-finding must be shared with both parties and raised as evidence during a court hearing.²⁷⁷ Some Regional Courts do utilize this possibility to seek country of origin information, but this is not practised by all courts.²⁷⁸

In contrast, notwithstanding the position taken by the European Court of Human Rights, the appellate bodies in Belgium, Bulgaria, and the UK do not undertake their own investigation into the facts, but instead rely on the evidence submitted by the appellant and the determining authority. Although the Administrative Court in Slovenia has access to COI via the internet, in practice, the Court rarely conducts its own fact-finding.

UNHCR is concerned that such an approach is heavily reliant upon the competence of the appellant's legal adviser – if the appellant has one – to raise relevant legal argumentation and present relevant evidence. This concern is heightened because, as mentioned above, UNHCR has been informed that in some Member States there is a shortage of competent legal advisers specialised in refugee law. The time limits imposed in some Member States also fail to provide the appellant/legal adviser with sufficient time to access the case file, gather relevant evidence and submit reasoned legal argumentation.

By way of example, the CALL in Belgium has no fact-finding competence and does not conduct COI or other research or verify the authenticity of documentary evidence. In a recent judgement, the Council of State annulled a CALL judgement because it was based on a source the CALL had accessed through the internet.²⁷⁹ The CALL's assessment of an appeal must be based on the case file as forwarded by the determining authority, the petition, the determining authority's reply note, new elements that have been submitted by the parties, and UNHCR's written advice, if any, on the relevant case.²⁸⁰ The only exception is that the judgment can be based on "generally known facts" or "facts which find support in general experience". Obviously, due to the adversarial nature of an appeal, the CALL cannot base its decision on facts which are not known to the parties. To compensate for the lack of fact-finding competence, the CALL can annul the decision of the CGRA if it is considered "contaminated" by a grave irregularity such as the personal interview was omitted, the interpreter was unreliable, the interview report cannot be read etc. This is also possible if the CALL considers that essential elements are lacking, in which case the CGRA can be instructed to undertake further fact-finding.²⁸¹ However, the ability of the CALL to identify the absence of essential elements is heavily reliant on the ability of the appellant's legal representative to cast doubt on the accuracy of the evidence relied upon by the determining authority. In the absence of competent legal representation, it may be argued that the CALL's ability to identify an absence of essential elements or a

²⁷³ See for instance, Higher Administrative Court of Hesse, judgment of 27 February 2006, 11 UE 2252/04.A: "*Den Beteiligten sind die Listen 'Allgemeine politische und gesellschaftliche Lage' und 'Spezielle Erkenntnisse zu Exilorganisationen und zur Rückkehrgefährdung' mit dem Senat zu Iran vorliegenden Erkenntnisquellen (Stand jeweils: 6. Februar 2006) übersandt worden. Die Beteiligten haben Gelegenheit erhalten, zu diesen Erkenntnisquellen Stellung zu nehmen.*"

²⁷⁴ Article 35 (10) d.lgs. 25/2008

²⁷⁵ Article 738 of the Code of Civil Procedures.

²⁷⁶ Section 52 (1) CAJ.

²⁷⁷ Section 77 CAJ.

²⁷⁸ Interview with judge at a Regional Court.

²⁷⁹ RvS 25 January 2008, nr. 178.960, see also RvS 8 April 2008, nr. 181.821.

²⁸⁰ As introduced on the basis of Article 57/23bis of the Aliens Act to the CALL.

²⁸¹ The CGRA is not bound by law to execute an order for additional fact-finding, but a failure to do so, may result in the CALL granting a protection status to the appellant.

reliance on inaccurate evidence is hampered. Some CALL judges try to circumvent this limitation by using Article 39/62 Aliens Act, which allows the judge to order both the petitioning party and defending party to provide him/her with information which the judge deems necessary in order to reach a decision on the case, thus enabling the CALL to base its decision on facts submitted by and known to the parties. According to the First President of the CALL, 6.2% of appeals introduced in 2008 resulted in annulment of the decision by the CGRA (316 decisions out of a total of 5,090 decisions taken).²⁸² The Belgian Constitutional Court has maintained that notwithstanding the lack of fact-finding competence, the CALL provides an effective remedy in terms of the Belgian Constitution, the case-law of the ECHR and the APD.

Likewise, in Bulgaria, the Administrative Court or Supreme Administrative Court relies on the evidence submitted by the parties. Although, *ex officio*, the Court can point out to the parties that they have not presented particular evidence that is significant for the decision. However, the ability of the Court to do so may be hampered if it is not able to conduct its own fact-finding when necessary. This may be particularly problematic given the Court usually receives the determining authority's COI report which does not cite primary sources; and the fact that an 'official document' carries greater weight in judicial proceedings than 'private' documents. As in Belgium, reliance is, therefore, placed on the legal representative of the applicant to submit relevant COI. In practice, the courts may refer to UNHCR for general COI on certain countries of origin. This is also an indication of the need for the courts to conduct some fact-finding when necessary.²⁸³

The Council of State in Greece and the District Courts of the Netherlands do not undertake fact-finding, as they only conduct a judicial review of the manner in which the decision was made by the determining authority. These appeal bodies do not enter into an examination of the merits for the purpose of deciding on the merits. The District Courts in the Netherlands are bound by the facts as found by the State Secretary, especially with regard to the credibility assessment of the applicant and only assess the reasonableness of the decision based on the facts as presented by the Secretary of State.

Recommendation

In order to ensure an effective remedy, appeal authorities should, regardless of whether judicial proceedings are adversarial or inquisitorial, have the power to instigate fact-finding if necessary, in particular where the appellant or a third party intervener provides reasoned grounds which cast doubt on the accuracy or completeness of the information relied on by the determining authority. Any such facts gathered, *proprio motu*, should be shared with the parties.

Submission of new facts or evidence on appeal

There are many reasons why facts relevant to the application for international protection may not be raised in the course of the first instance administrative procedure, including:

- questioning by the determining authority during the personal interview may not have addressed the issue or elicited the particular information;
- the personal interview may have been omitted;
- the applicant may not have understood the relevance of certain facts to the application;

²⁸² Statement made during the parliamentary hearing on the evaluation of the asylum legislation, Senate, 31st March 2009.

²⁸³ Interview with judge on 26 April 2009.

- trauma, shame, or other inhibitions may have prevented full oral testimony by the applicant in the previous examination procedure, particularly in the case of survivors of torture, sexual violence and persecution on the grounds of sexuality;
- the lack of a gender-appropriate interviewer and/or interpreter may have inhibited the applicant; etc.
- the first instance examination may have been discontinued or terminated on grounds of withdrawal or abandonment without a complete examination of all the relevant elements.

There are also many reasons why documentary evidence may not have been available during the time frame of the first instance procedure, particularly when this is an accelerated procedure, and/or border procedure, and/or the applicant has been held in detention.

Moreover, the situation in the country of origin may have changed and a well-founded fear of persecution or a real risk of suffering serious harm may be based on events which have taken place in the country of origin since the first instance examination of the application. A well-founded fear of persecution or a real risk of suffering serious harm may arise if there has been a direct or indirect breach of the principle of confidentiality during or since the first instance examination procedure and the alleged actor of persecution or serious harm has been informed of the applicant's application for international protection in the Member State.

It is, therefore, critical that the appeal body is able to establish all the relevant facts and assess all the relevant evidence, at the time it takes its decision, in order to provide an effective remedy. This is required by Article 4 (3) (a) of the Qualification Directive and the case-law of the ECtHR.²⁸⁴

UNHCR noted positively that in some of the Member States surveyed, there are no restrictions on the right to submit new elements and evidence on appeal: Bulgaria,²⁸⁵ Finland,²⁸⁶ France,²⁸⁷ Germany (with regard to regular rejections),²⁸⁸ Italy²⁸⁹ and the UK.²⁹⁰ In Spain, the admission of evidence is at the discretion of the courts.²⁹¹

However, UNHCR notes that in some Member States conditions or restrictions are placed on the submission of new elements or evidence: Belgium, the Czech Republic,²⁹² Germany (in cases of rejections qualified as irrelevant or manifestly unfounded),²⁹³ the Netherlands and Slovenia.

²⁸⁴ "In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case It is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities." *Salah Sheekh v the Netherlands*, ECHR, 11 January 2007, paragraph 136.

²⁸⁵ Article 171 (2) APC

²⁸⁶ All new evidence and elements must be submitted to all parties.

²⁸⁷ The only restriction is that new evidence has to be submitted at least 3 days before the hearing, if any.

²⁸⁸ However, this must be done within the deadline of one month after the decision of the determining authority was served on the applicant (Section 74 (2) 2 APA); otherwise the court may preclude facts and evidence if: their admission to the procedure would delay the procedure, and there are not sufficient grounds to excuse the delay in submission, and the applicant was informed of the consequences of failing to meet the deadline (Section 74 (2) 2 APA in conjunction with Section 87b (3) Code of Administrative Courts Procedure). However, facts which become known only after the expiry of the one month deadline may be submitted later without specific limitations (Section 74 (2) 4 APA.

²⁸⁹ Article 31 of Legislative Decree 25/2008.

²⁹⁰ Nationality Immigration and Asylum Act 2002 s85. In the UK, the Immigration Judge at the AIT has discretion to consider any matter relating to the decision of the determining authority, including evidence about matters arising after that decision.

²⁹¹ Articles 60 and 61 of Law 29/1998 on Administrative Jurisdiction.

²⁹² Section 71 (2) CAJ: *The complainant shall attach one counterpart of the contested decision to the complaint. The complainant may at any point during the proceedings restrict the counts of charges. The complainant may extend the complaint to statements of the decision not yet contested or to extend it by further counts of charges only within the time limit for filing a complaint.* Also, Section 75 (1) CAJ: *In its review of the decision the court proceeds from the facts of the case and the legal situation existing at the time of decision-making by the administrative authority.*

²⁹³ Section 36 (4) 3 APA: facts and circumstances not presented by the applicant in the course of the proceedings at the BAMF may be ignored by the court if otherwise the court proceedings are protracted by this. Section 25 (3) APA: *"If the foreigner produces such facts only at a later stage [i.e. after the personal interview], they may be ignored if the decision of the Federal Office would otherwise be delayed. The foreigner shall be informed of this provision and of Section 36 (4) third sentence."*

For instance, the CALL in Belgium is required to consider new elements if:

- these elements are part of the petition for appeal for international protection; and
- the appellant demonstrates that s/he was not able to invoke these elements earlier in the administrative procedure.²⁹⁴

Notwithstanding these two conditions, the CALL has discretion to take into account any new element which is brought to its attention by the parties including declarations made during the court session, when the following cumulative conditions are fulfilled:

- the elements are supported in the case file;
- the new elements are such that they firmly establish the founded or unfounded character of the appeal; and
- the party makes a reasonable case that it could not invoke these new elements earlier in the procedure.

The Constitutional Court has attempted to clarify the interpretation to be given to the law. However judges at the CALL, interviewed by UNHCR, have admitted that this remains a grey area and further clarification by the Constitutional Court would be welcome. The Constitutional Court considered that the conditions on the submission of new elements are necessary in order to prevent dilatory proceedings, but held that the CALL must examine any new element submitted by the appellant which clearly demonstrates the well-founded character of the appeal. Only those elements unrelated to qualification for refugee status or subsidiary protection status can be ignored.²⁹⁵ However, in a second judgement on this matter, the Constitutional Court further stipulated that “*the requesting party must give a plausible explanation of why it did not communicate the new element earlier in the procedure*”.²⁹⁶

In the Czech Republic, only new evidence supporting elements raised during the first instance procedure may be submitted. It is at the discretion of the courts whether to consider such evidence. There are two exceptions which are significant for appeals against negative decisions taken in the asylum procedure:

- When ignoring new elements or facts would result in a breach of the principle of *non-refoulement*. The interpretation of this is not settled in law. However, it was applied in the case of an appellant who faced the death penalty in Afghanistan. The application was considered implicitly withdrawn as a result of the strict application of a procedural rule, when the applicant tried to cross the border of the Czech Republic illegally.²⁹⁷
- A procedural flaw in the first instance procedure which could not be raised during the first instance procedure. Note that an appeal on the basis of incompetent interpreting is likely to fail if no objection is raised during the first instance procedure.

²⁹⁴ Article 39/76 of the Aliens Act.

²⁹⁵ *GWH* 27 May 2008, nr. 81/2008, B.29.1-B.30. The CALL now applies this interpretation according to its First President in his report to the Senate: Raad voor Vreemdelingenbetwistingen, *Stand van de Raad na 1,5 jaar werking*, 2009, p. 14.

²⁹⁶ *GWH* 30 October 2008, nr. 148/2008, B.6.5.

²⁹⁷ Judgment of the SAC No. 9 Azs 23/2007 – 64 of 14 July 2007, available at www.nssoud.cz

The Administrative Court in Slovenia places similar restrictions on the submission of new evidence, prohibiting the submission of evidence or new facts which could have been raised in the first instance procedure, unless the appellant has a well-founded reason for not doing so.²⁹⁸

In the Netherlands, there are significant restrictions and strict conditions placed on the submission of additional or new evidence to the District Court. The District Courts do not accept additional oral or documentary evidence which relates to circumstances which occurred before the determining authority took its decision. For instance:

- Documents which existed at the time of the first instance procedure but which could not be obtained because, for example, they were in the country of origin at that time are not considered new facts and are not admitted. In theory, the applicant may rebut this presumption by proving that it was impossible to obtain the documents. However, there is no known jurisprudence where this has succeeded.
- A new fact is not admitted, such as evidence that the applicant was subjected to torture or sexual violence, which was not raised during the first instance procedure due to shame, trauma or otherwise.²⁹⁹

These limitations are applied strictly, even if the evidence could clearly demonstrate that the applicant is a refugee or qualifies for subsidiary protection status.³⁰⁰ The UN Committee against Torture has declared its concern that appeal procedures in the Netherlands only provide for marginal scrutiny of rejected applications and “*that the opportunity to submit additional documentation and information is restricted*”.³⁰¹ UNHCR shares this concern and considers that such stringent and inflexible conditions may render the remedy ineffective.

The notion of ‘new elements’ should be interpreted in a protection-oriented manner in line with the object and the purpose of the 1951 Convention. Facts supporting the essence of the claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. This could include, among others, elements which already existed at the time of the initial decision but were not raised for a variety of valid reasons.

Recommendation

In general, applicants should be permitted to raise new facts and evidence on appeal, to enable the appeal body to examine all relevant facts and assess all relevant evidence, at the time it takes its decision.

²⁹⁸ Arts. 30 (3) and 52 of the AAD.

²⁹⁹ Article 4:6 General Administrative Law Act in conjunction with Article 83 Aliens Act.

³⁰⁰ See, for instance, District Court Amsterdam, AWB 06/36220, 26 April 2007.

³⁰¹ Conclusions and Comments of the Committee against Torture on the Netherlands, May 2007.

Right to a hearing

The right to a hearing is particularly important in those cases where the appellant was denied a personal interview in the first instance procedure, or when the application was rejected or discontinued on the grounds that the applicant failed to appear for a personal interview.

UNHCR notes that appellants in Bulgaria,³⁰² the Czech Republic,³⁰³ Germany,³⁰⁴ Italy,³⁰⁵ Spain³⁰⁶ and the UK³⁰⁷ are given the opportunity of a hearing.

UNHCR also notes that the law in Belgium does allow some possibility for the appellant to be heard by the CALL. The proceedings before the CALL in Belgium are mainly written, but the parties and their lawyers may be invited to intervene orally during the court session, in order to reply to the note of the CGRA, introduce any new elements or to highlight one specific element of the petition. However, NGOs and lawyers have complained that the practice varies widely in this respect and many appellants are not heard by the CALL.

In France, the CNDA normally conducts an oral hearing. However, the President and the Presidents of the Sections of the CNDA have the power to decide on an appeal alone and without an oral hearing on the ground that, for example, the appeal is considered not to present “*serious elements likely to bring into question the reasons for the decision taken by the OFPRA*”.³⁰⁸ This exception to the norm of conducting an oral hearing is used increasingly,³⁰⁹ and is of particular concern given that applicants may have been denied the opportunity of a personal interview during the first instance procedure.

In Spain, the Administrative National High Court always conducts a hearing in appeals against a decision of inadmissibility.³¹⁰ However, the Chamber of the National Administrative High Court, which hears appeals against negative decisions taken in the refugee status determination procedure, has discretion to grant a request for an oral hearing by either of the parties.³¹¹

The procedure before the Helsinki District Administrative Court is normally a written procedure. The court can arrange an oral hearing if it considers it necessary or if a party to the proceedings requests one, but the District

³⁰² Article 85 (1) and 90 (1) LAR state that the court examines the appeal in a public session within one month. The right to an oral hearing is implicit in the Administrative Procedure Code and the Civil Procedure Code where it is formulated as a principle. In practice, the appellant is given the opportunity of an oral hearing, provided an interpreter is available when necessary.

³⁰³ In the Czech Republic, the decision of the determining authority may be annulled by the Regional Court without an oral hearing according to Section 76 (1) CAJ. An oral hearing need not be conducted if both parties agree. There is a rebuttable presumption that they agree not to conduct an oral hearing unless they disagree within two weeks from the date of notice by the court according to Section 51 (1) CAJ.

³⁰⁴ Section 101 (1) Code of Administrative Court Procedure (a hearing is to be carried out unless otherwise foreseen by law). In particular, note that with regard to a request for suspensive effect, the decision of the court is adopted in the form of an order (*Beschluss*, Section 123 (4) Code of Administrative Courts Procedure) and the appellant is not given the opportunity of a hearing (Sections 18a (4) 5 and 36 (3) 4 APA). Exceptionally, an interview may be conducted within temporary legal remedy proceedings if the asylum authorities attached incorrect relevance to the applicant's submissions or if procedural errors occurred. (R. Marx, *Residence, asylum and refugee law for practicing lawyers*, 3rd edition (2007), in particular, p. 1322 and p. 1334; BVerfGE 94, 166, 206.)

³⁰⁵ Article 35, 10 of Legislative Decree N. 25/2008 provides that “*the Court, after hearing the parts and after having obtained all the necessary evidence, decides within three months (...)*”

³⁰⁶ Articles 62 and 78.3 of Law 29/1998 on the Administrative Jurisdiction.

³⁰⁷ Asylum and Immigration Tribunal (Procedure) Rules 2005, rule 15.

³⁰⁸ Article L.733-2 *Ceseda*, Article R.733-5, Article R. 733-16 *Ceseda*: official notices of withdrawals; no matter on which to give a ruling in an appeal; rejection of appeals with obvious grounds for inadmissibility unlikely to be rectified during proceedings and rejection of appeals that present no serious elements likely to bring into question the reasons for the decision taken by the OFPRA. This last ground (called “*ordonnances nouvelles*” or “*new ordinances*” is particularly problematic since the CNDA does not rule on the legality of the OFPRA decision per se, but rather on the merits.

³⁰⁹ In 2005, 7.2% of the decisions, in 2006, around 14%, in 2008 14.2% for all “*ordonnances*”, including 9.6% for the “*new ordinances*”.

³¹⁰ Article 78(19)LJCA

³¹¹ Article 62 LJCA

Administrative Court rarely considers this necessary, even if requested and even if the issue at stake concerns the credibility of the appellant.³¹² Similarly, in Slovenia oral hearings are not normally conducted by the administrative court with the exception of appeals against detention orders.³¹³

In Greece, the appellant may not appear in person before the Council of State but s/he may be represented by a legal counsellor.³¹⁴

Time limit for a decision by the court or tribunal

Article 39 (4) APD contains an optional provision stating that “Member States may lay down time-limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.” As can be seen from the table below, in the absence of a mandatory requirement in the APD, a number of the Member States surveyed have not set time limits for the decision on the appeal.

Timelines are from receipt by the court or tribunal of the petition, unless otherwise specified:

Member States	Appealed from regular procedure	Appealed from accelerated procedure	Appealed from border procedure	Applicant in detention
Belgium	3 months ³¹⁵	2 months ³¹⁶	Approx. 13 days	Approx. 13 days
Bulgaria	1 month ³¹⁷	1 month ³¹⁸	N/A	No special provision
Czech Republic	No time limit	No time limit	No time limit	No time limit
Finland	No time limit	No time limit	No time limit	No time limit
France	No time limit	No time limit	72 hours	No time limit ³¹⁹
Germany	No time limit	N/A	14 days ³²⁰	
Greece ³²¹	No time limit	N/A	No time limit	No time limit
Italy	3 months	3 months	3 months	3 months
Netherlands	6 weeks			
Slovenia	30 days	7 days		
Spain	No time limit	No time limit	No time limit	No time limit
UK	38 days	2 days from date of hearing ³²²	N/A	2 days from date of hearing ³²³

³¹² Sections 37 and 38 *Hallintolainkäyttölaki* (Act of Administrative Judicial Procedure 586/1996, as in force 29.4.2009).

³¹³ Article 80 of the AAD permits the Administrative Court to conduct an oral hearing.

³¹⁴ Article 26 PD 18/1989

³¹⁵ Article 39/76, § 3, 1^o of the Aliens Act.

³¹⁶ Articles 39, 76, § 3, 2^o 52 and 52/2, § 1 or § 2, 3^o and 4^o of the Aliens Act.

³¹⁷ Article 90 (1) LAR.

³¹⁸ Article 85 (1) LAR.

³¹⁹ Note that when the appellant has been detained following the issue of an expulsion order, a request to the administrative court to suspend enforcement must be decided within 72 hours.

³²⁰ This regards the airport procedure. The decision of the determining authority to refuse to grant entry to the territory can only be maintained if the administrative court rejects the application for an interim measure within 14 days of its submission (Section 18a (6) No.3 APA).

³²¹ After the modification of PD 90/2008 the appeal procedure ceased to exist. According to article 2 of PD 81/2009 (PD 81/2009 amended PD 90/2008) the only measure against any negative decision is an application for annulment that can be lodged before Council of State (CoS). There is no time limit for a decision by the Council of State.

³²² In the detained fast track procedures, the hearing takes place four days after the appeal is lodged with the AIT.

³²³ In the detained fast track procedures, the hearing takes place four days after the appeal is lodged with the AIT.

In Italy, decisions on appeal are rarely issued within six months in spite of the three month time limit. In the Czech Republic, although there is no established time limit, the courts must prioritize appeals concerning international protection and appellants held in detention.³²⁴ However, in practice, the appeal process may last more than a year in the courts with the heaviest case loads. The appeal process can also take about a year in Finland.

Remedies

The case law of the European Court of Justice has established that the appeal body must have the power to quash, if necessary, the decision of the administrative authorities.³²⁵

The appeal authorities in a number of the Member States surveyed have the power to either revise or quash the decision of the administrative authorities: CALL in Belgium; Helsinki District Court in Finland; and the National High Court in Spain. The Administrative Court in Slovenia has the power to either revise or quash a decision but in practice it never exercises its power to revise a decision.³²⁶

The CNDA in France, the Civil Courts in Italy and the AIT in the UK all have the power to revise the decision of the determining authority. Similarly, the German administrative courts may order the determining authority to grant a particular form of international protection.

The appeal authorities in Bulgaria,³²⁷ Czech Republic, and the Netherlands have the power to quash the decision of the determining authority and refer it back to the latter for re-examination. This is also so for the High Court in England and Wales, Court of Session in Scotland and High Court of Northern Ireland.

Article 39 (5) APD provides that:

“Where an applicant has been granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC [Qualification Directive], the applicant may be considered as having an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.”

UNHCR recognizes that at the national and EU level a status other than refugee status may offer the same rights and benefits as refugee status. However, refugee status is an internationally recognized status, and on this basis appellants should be seen as having an interest in maintaining the proceedings.

UNHCR has noted that, with the exception of the Netherlands, none of the Member States surveyed generally implement Article 39 (5) APD.³²⁸

³²⁴ Section 56 (2) CAJ: “The court **furthermore preferentially** deals with petitions and complaints concerning **international protection**, decisions on detention of a foreigner and decisions on the termination of special protection of and aid to witnesses and other persons in connection with criminal proceedings as well as in other cases, if provided for by a special law.”

³²⁵ *Commission v. Austria*, C-424/99, 2001; and to grant interim relief (*Unibet*, C-432/05, 2007, paragraph 67)

³²⁶ Article 65 of the AAD stipulates that the Administrative Court has the power to take a final decision.

³²⁷ Article 85 (2) LAR and Article 90 (2) LAR.

³²⁸ A representative on the Appeals Board in Greece recollected one case where a remedy was denied on the ground that the appellant was the spouse of a Greek national.

Recommendation

UNHCR recommends that applicants be permitted to seek an effective remedy against decisions to refuse refugee status, even where another status is given providing the same rights and benefits.

Discontinuation of appeal proceedings

Article 39 (6) APD states that “*Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed*”.

In the Czech Republic, the appeal proceedings may be discontinued if the place of residence of the appellant cannot be established.³²⁹ As a result, where the appeal has no suspensive effect and the appellant is deported, appeal proceedings are discontinued on the grounds that the place of residence of the appellant is unknown and, therefore in practice, there is no legal remedy.

³²⁹Section 33 ASA.

ANNEX: COMPREHENSIVE DESCRIPTION OF METHODOLOGY

Scope of the research

Research methods

Desk-based research

Selection and audit of case files and decisions

Observation of personal interviews

Interviews and consultation with national stakeholders

Research in figures

Scope of the research

Exchange of information on procedural challenges and possible good practice solutions requires an assessment and recommendations that span a range of Member States, and takes into account their different procedures and circumstances. One of the major strengths of this research project was its comparative nature. By comparing and contrasting different approaches to practice and their outcomes in different Member States, the project has enabled conclusions to be drawn, and recommendations and guidance provided at EU level.

Given the limited resources and time available for this research, it was decided to examine the impact of certain key provisions of the APD in selected Member States. Therefore, in agreement with the state authorities, 12 Member States were selected for inclusion in this comparative research project: Belgium, Bulgaria, the Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Slovenia, Spain and the United Kingdom.

These States were selected for inclusion in the research based on a number of aims: achieving a geographical spread of Member States throughout different regions of the EU; addressing Member States with caseloads of varying nature and size (but which cover a significant proportion of the applicant caseload in the EU, with around 50% of all applications in the EU in the first part of 2007); and a range of legal and institutional systems, with resultant differences in procedural approaches.

With regard to the temporal scope of this research project, the national research and analysis primarily took place over a six month period between November 2008 and April 2009.¹ As such, this report provides a snapshot of national legislation and practice during the period of national research; and does not convey any changes which might have taken place in legislation and practice over a longer period of time. However, two significant pieces of asylum legislation entered into force in Greece and Spain in July and November 2009 respectively and these are addressed in the analysis of legislation. This report, which draws together the analysis of state legislation and practice in chapters focussing on the selected themes and APD provisions, was drafted in the period August 2009 to February 2010 on the basis of national research findings.

The thematic scope of this research entailed an overview and analysis of the transposition in national legislation and implementation of the following specific provisions of the APD:

- Requirements for a decision by the determining authority (Articles 9 & 10);
- Opportunity for a personal interview (Article 12);
- Requirements for a personal interview (Article 13);
- Status of the report of a personal interview in the procedure (Article 14);
- Procedure in case of withdrawal or abandonment of the application (Articles 19 & 20);
- Prioritized and accelerated procedures (Article 23);
- Inadmissible and unfounded applications (Articles 25 & 28);
- The concept of first country of asylum (Article 26);
- The safe third country concept (Article 27);
- The safe country of origin concept (Articles 30 & 31);
- Subsequent applications (Articles 32 & 34);
- Border procedures (Article 35);
- The right to an effective remedy (Article 39).

¹ With the exception of the national research in Bulgaria which was completed in May 2009; and the conduct of national research in Germany which extended beyond this period.

UNHCR prepared specific ‘Guiding Questions’ on all the above-mentioned issues and these defined the thematic scope of the research.

The issue of guarantees for unaccompanied children did not fall within the thematic scope of this research. Nevertheless, in the context of researching the above-mentioned themes of focus, some very limited information regarding the treatment of applications by unaccompanied children are set out in brief in this report where relevant.²

The APD does not deal with those procedures governed by Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (henceforth the ‘Dublin II Regulation’). Therefore, this research did not specifically focus on the conduct of Dublin II procedures. However, to the extent that some aspects of Dublin II procedures are not governed by the Dublin II Regulation, some of the issues arising from and recommendations flowing from this research may be relevant.

Research methods

Twelve National Project Officers were commissioned (one in each Member State) to undertake the research under the supervision of a Project Coordinator who ensured a joint methodology and comparable outputs for each Member State.

A common methodology for this research was applied across the 12 Member States of focus in order to facilitate as far as possible the gathering of comparative data. However, as will be seen, within these common terms of reference for the research, some adaptations were made in order to take into account, for example, national variations in the organization and conduct of asylum systems; and national differences in the numbers and profile of applicants for international protection.

In line with the project’s aim to not only provide an overview of the 12 Member States’ transposition of the APD in law, but to give an insight into the implementation in practice of certain aspects of asylum procedures, a mixed methods approach was employed for this project. The four research methods utilized to gather information on the key issues were:

1. Desk-based documentary research and analysis of legislation, administrative provisions and instructions, other existing data and relevant literature;
2. The selection and audit of first instance written decisions and case files;
3. The observation of personal interviews of applicants; and
4. Interviews and consultation with national stakeholders.

The approach taken to each of these research methods is described below.

² This derives primarily from desk research undertaken by UNHCR, and from information provided by national stakeholders.

Desk-based research

UNHCR reviewed relevant primary and secondary resources in all 12 Member States. These included:

- the relevant national legislation (both asylum and administrative as necessary), explanatory memoranda and any pending draft legislation;³
- any relevant and available procedural or administrative regulations, provisions, and instructions;
- any manuals and guidelines made available by the authorities or publicly available which define the way in which various relevant aspects of the asylum procedure should be conducted;
- annual reports of the determining authority;⁴
- official statistics pertaining to asylum procedures;
- any relevant precedent-setting case-law;⁵ and
- information regarding training provision and any available training materials which are used for the purposes of training officials involved in interviewing, examining, assessing and taking a decision on applications for international protection.

This equipped the project's researchers with relevant background information about the status of transposition of the APD in national legislation, regulations and administrative provisions and the extent to which these have exceeded, adhered to or derogated from the minimum and basic principles, guarantees and standards set out in the APD. It should, however, be noted that occasionally sources of information were not accessible.⁶

Researchers also reviewed relevant secondary documentary resources, such as reports, commentaries, articles and critiques from reliable sources. These were used to assist in the identification of any problematic aspects of the asylum procedure, in relation to the issues of focus in this research, and to inform the implementation of the research methodology.

Researchers also familiarized themselves with the most up-to-date country of origin information available from the main reliable and impartial sources with regard to the relevant countries of origin of focus in this research. This was necessary in order to ensure that researchers had the necessary knowledge to assess in general terms whether Member States were utilizing precise and up-to-date information from various sources as required by Article 8 of the APD.

Desk-based research and analysis of existing data was a primary focus of the early stages of the research between November and December 2008, but was conducted throughout the research period as necessary.

³ It should be noted that at the time of UNHCR's research, there was significant draft legislation under consideration in Belgium, Finland and Greece.

⁴ With regard to the implementation of procedures in the UK, UNHCR's Quality Initiative Reports were also reviewed. Since 2004, UNHCR has been working with the UK determining authority to achieve improvement in the overall quality of first instance decision-making in the Quality Initiative Project. The Quality Initiative Reports set out the project's findings and recommendations; and chart progress on the implementation of accepted recommendations. The six reports which have emerged from this project are available at www.ukba.homeoffice.gov.uk.

⁵ Precedent-setting cases or significant cases which pre-dated 1 December 2007 could be used as part of the thematic analysis of an issue, but researchers verified that the precedent remained valid in spite of the entry into force of the APD.

⁶ For example, in the Netherlands, UNHCR requested, via INDIAC, IND work guideline 2009/4, dated 3 March 2009, regarding 'objective sources of information besides the reports of the Ministry of Foreign Affairs' (*Andere objectieve bronnen dan de ambtsberichten van de Minister van Buitenlandse Zaken*). According to INDIAC, these guidelines could not be disclosed to safeguard the processes of IND, international relations and national security.

Selection and audit of case files and decisions

A distinctive and crucial feature of this comparative research project was its focus on assessing the implementation of the APD on the asylum procedure in practice, not just in law. Therefore, a main part of the research involved an audit and analysis of a selected sample of individual case files and decisions in the first instance asylum procedures. In total, 1,090 case files⁷ and 1,155 decisions⁸ were audited for this research.

Purpose

The aim of the audit was to gain an insight into practice in each of the Member States. It was assumed that the case file would contain, at least, an application, records of any personal interviews, reference to the country of origin information referred to or relied upon, and a copy of the written decision.⁹ The purpose of accessing case files was to audit the reports of any preliminary interviews and/or personal interviews, to review what country of origin information was contained therein or referenced, and to audit the content of the written decision.

The examination of this key documentation was to shed light on the implementation in practice of the following particular articles of the APD:

- (a) Article 8 (2) (a): Member States shall ensure that applications are examined and decisions are taken individually, objectively and impartially.
- (b) Article 8 (2) (b): Member States shall ensure that precise and up-to-date information is obtained from various sources, such as UNHCR, and such information is made available to the personnel responsible for examining applications.
- (c) Article 8 (2) (c): Member States shall ensure that the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.
- (d) Article 9: Member States shall ensure that decisions on applications are given in writing, and where rejected, state the reasons in fact and law and how to challenge a negative decision.
- (e) Article 14: Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application.
- (f) Where the Member State makes a verbatim written report or audio recording of personal interviews, this shed some light on the implementation of Article 13 (3) which requires that the person conducting the interview is sufficiently competent.

Access

It was recognized that national asylum systems, their administrative organization, available human resources, technological support systems, and applicable rules differ across the 12 Member States of focus in this research.

⁷ See below for a breakdown by Member State of the number of case files audited. Note that case files were not audited in Slovenia.

⁸ 1,090 decisions relating to the 1,090 case files audited in 11 Member States plus 65 decisions audited in Slovenia.

⁹ However, note that the audit of case files in Greece revealed that no country of origin information or references to country of origin information were contained in any of the 202 case files.

This necessarily meant that, within the agreed broad guidelines for the research methodology, there were some national differences in the way the research was conducted.

At the very outset of this research project, UNHCR requested and obtained the consent of the competent asylum authorities to access the case files of applicants.¹⁰ However, in Slovenia, formal consent to access case files was given on 5 May 2009 which came too late for the purposes of this research.¹¹ Therefore, in Slovenia, UNHCR conducted an audit of first instance decisions only which UNHCR receives on a regular basis in accordance with national legislation and upon the applicant's consent.¹²

Any necessary security checks and clearances were completed by the competent authorities; and the terms and conditions of access, and the means of access were set out and agreed in co-operation with the competent authorities.

In the Czech Republic, under national legislation, UNHCR could only access the case file of an applicant with the prior consent of the applicant unless there was a "*well-founded assumption that the applicant is no longer in the territory*". Some case files accessed by UNHCR concerned applicants who were no longer in the territory. With regard to the other case files accessed by UNHCR, all the respective applicants were contacted in advance at the addresses provided by the Department for Asylum and Migration Policies (DAMP) and the applicants consented to access.¹³

UNHCR selected the case files for audit. Some determining authorities were able to provide UNHCR with spreadsheets listing applications/decisions, the nationality of the applicant(s), and where and when the decision was taken, thus allowing cases to be selected from the list by UNHCR according to the selection criteria. In other Member States, UNHCR submitted the selection criteria to the determining authority which in turn provided a list of the cases which matched the criteria, and UNHCR selected cases from this list. In the UK, the determining authority agreed that UNHCR could access a database containing all the decisions taken in the regular NAM procedures from December 2007 to September 2008. Some case files were, therefore, selected from this database.¹⁴

There were only two exceptions where the state authority selected case files for UNHCR. With regard to the border procedure only in France, the Ministry of Immigration selected and provided UNHCR with 10 case files. This was due to the fact that, at the time of UNHCR's research, the Ministry of Immigration was relocating offices and only a limited number of case files were physically accessible.¹⁵ In Germany, due to legal as well as time constraints, it

¹⁰ This related primarily to the determining authorities, but where relevant also any court of appeal.

¹¹ The audit of case files in the other Member States mainly took place in the period between January and April 2009.

¹² Article 14 of IPA: Role of the High Commissioner. In November 2008, UNHCR received 36 decisions and a further 29 decisions were received by the end of April 2009. These represented all the decisions taken by the determining authority in 2008 with the exception of decisions on the withdrawal or abandonment of applications and decisions taken in accordance with the Dublin II Regulation. Additionally, the researcher was familiar with the decisions of the Administrative Court and some Supreme Court decisions taken in 2008, having assisted in the review of 169 case files of the Administrative Court for UNHCR's Asylum Systems Quality Assurance and Evaluation Mechanism Project. This represented almost the entire asylum caseload of the Administrative Court for 2008.

¹³ National legislation provides that the state authorities shall allow UNHCR to contact applicants. Letters of request were sent to applicants in their language. 28 applicants granted consent to access their case file. A further 15 applicants either did not respond to the letter of request or did not consent to access.

¹⁴ UNHCR did not have direct access to the official electronic case database, 'CID', but where further information on particular case files was required, staff of the regional offices of the determining authority were co-operative and enabled access. Further case files were selected from the detained fast-track procedures in Harmondsworth and Yarl's Wood and from the TCU unit in order to include an insight into the procedures in safe third country cases.

¹⁵ These related to the first quarter of 2009.

was agreed with the determining authority (BAMF) that cases be selected and submitted by the BAMF according to the selection criteria provided by UNHCR.¹⁶

Some Member States operate a de-centralised asylum system with case files held at different locations. In other Member States, case files are held in one location. The requirements for access also occasionally differed depending on the procedure (e.g. border or in-country procedures). Moreover, when a decision has been appealed, the case file may be transferred to and be held by the relevant court or tribunal. Furthermore, in some Member States, reports of interviews and written decisions are available in electronic format. Rules regarding data protection also impacted upon how case files could be accessed. Therefore, the terms of reference for this research did not prescribe the exact means by which access should be granted to case files. As a result, in some Member States, copies were made, under certain terms and conditions, of the key documentation of selected case files. In other Member States, UNHCR accessed the actual case files. In some cases, both actual case files and copies (which were sent to a central location) were accessed to ensure that the audit encompassed case files processed in a variety of regional locations when travel could not be undertaken due to time and budget constraints.

Case files were audited on the premises of the determining authority in some Member States.¹⁷ Some case files were also audited at the premises of appellate bodies.¹⁸ In other Member States, copies of the contents of case files were made and audited on the premises of UNHCR.¹⁹

It should be noted that in Finland, UNHCR was informed and, therefore, aware that the case files accessed by UNHCR had been pre-screened by the determining authority in order to remove confidential documents from, for example, Finnish security police.²⁰

Selection of case files and written decisions

Due to the fact that all national asylum procedures differ in organization, administration, and process; and the approach to compiling information on applications as well as presenting decisions also differs, it was not possible to use definitive criteria for the selection of case-files. Also, given the relatively short period of time available to undertake the audit of case files and, therefore, the limited number of case files that could be audited, the guidelines for selecting case files could not be too prescriptive as this would have hindered rather than facilitated the research.

So, the following represents the general guidelines and considerations which guided the selection of case files for audit.

1. Each researcher was required to select and audit a minimum of 60 case files. The actual number of case files audited in each Member State differed as stated below. This was due to a number of factors, includ-

¹⁶ In Germany, the audit of case files only commenced in mid-April 2009. National legislation stipulates: “*Decisions on asylum applications and other information, in particular the grounds for persecution given, may, unless presented in an anonymous form, be transmitted only if the foreigner himself has applied to the UNHCR or if the foreigner’s consent is otherwise documented*”: Section 9 (3) Asylum Procedure Act (APA).

¹⁷ Belgium, the Czech Republic, Finland, France, Greece, Italy, the Netherlands, Spain and the UK.

¹⁸ Regional Court in Ostrava, City Court in Prague and at Regional Court in Prague in the Czech Republic; Helsinki District Administrative Court in Finland; the CNDA in France, and the Administrative Court in Slovenia.

¹⁹ Bulgaria, the Czech Republic and Germany.

²⁰ For example, in Finland.

ing the fact that the amount of information gathered and recorded in an average case file in each Member State, and the content of written decisions differed from state to state.²¹

2. The information audited from the case file related only to the first instance procedure, i.e. at least, records of any screening and/or personal interviews, country of origin information relied upon or referenced, and the written decision. In some Member States, the case files also included the application, any relevant documentation submitted by the applicant, any forms completed by the applicant, correspondence, medical reports, language analysis reports, EURODAC results, and other documentation (and any translations) relating to the examination procedure.
3. In most of the Member States surveyed, the reasons for a positive decision granting a status are not stated in the decision and the reasons stated in the decision for a negative decision are limited. Instead, fuller reasoning may be provided in a separate document which UNHCR reviewed when available.²²

Case files were randomly selected according to the following criteria:

Only case files relating to applications lodged after 1 December 2007 and upon which a decision had been taken in the first instance were selected.²³ 1 December 2007 is the date by which, in accordance with Articles 43 and 44 APD, Member States were required to transpose and comply with the provisions of the APD which are of focus in this research project.²⁴

- a. The case files selected represented applications examined in all procedures in operation in the Member State, for example, the regular procedure, accelerated procedure and border procedure (to the extent that these existed in the respective Member States) in a ratio which broadly mirrored the overall numbers of applications examined in the respective procedures according to the most recent published statistics.²⁵

21 Note that exceptionally, 202 case files were audited in Greece. This was due to the fact that very limited information was contained in the case files.

22 The determining authority (CGRA) in Belgium gave UNHCR access to the confidential so-called 'yellow folders', with regard to those cases in which a positive decision had been taken. The 'yellow folder' is an evaluation form in which the decision-maker motivates a positive decision for review by his/her superior. Access to the 'yellow folders' permitted UNHCR to make a more informed evaluation of the way decision-making takes place. In Germany, the so-called 'internal note' (comprising of one page), containing the reasoning for a positive decision was provided. In the Netherlands, the so-called minute, which contains the reasoning for the decision, was missing from a number of the case files audited and due to the timeframe for the research and logistical reasons, it was not possible for UNHCR to access the missing minutes.

23 There were a few exceptions. Of the 62 case files audited in Bulgaria, 15 case files concerned applications lodged before 1 December 2007. This was necessary in order to audit case files which fulfilled the other agreed criteria and was considered acceptable due to the fact that there had been no significant amendments to the Law on Asylum and Refugees (LAR) after 29 June 2007. All the 15 case files audited concerned applications which were lodged after 29 June 2007 and decisions were taken in the period between December 2007 and April 2009. In Greece, of the 202 case files audited, 35 case files related to applications lodged before 1 December 2007. This was due to the fact that the examination procedure in Greece can take more than 9 months to complete and many of the applications lodged after 1 December 2007 had not received decisions at the time of UNHCR's research. In Greece, UNHCR did audit 167 case files relating to applications lodged after 1 December 2007 and on which a decision had been taken by the determining authority. In Spain, a total of 124 case files were audited. Of these case files, 120 related to applications lodged after 1 December 2007, but 4 case files related to applications lodged before 1 December 2007. These 4 case files related to cases of implicit withdrawal. No other applications lodged after 1 December 2007 raised issues of implicit withdrawal and could be selected within the timeframe established for the research.

24 In Italy, only case files relating to applications lodged after March 2008 were audited, as this is when the applicable national law transposing the APD entered into force (d.lgs. 25/2008). As mentioned above, UNHCR was not able to access case files in Slovenia. Instead, UNHCR audited decisions which were taken after 4 January 2008 which is the date the International Protection Act (IPA) transposing the APD entered into force.

25 Note that in the Spanish admissibility procedure which operated at the time of UNHCR's research, only formal decisions of inadmissibility were taken. Applications which were deemed admissible were channeled into the regular RSD procedure without a formal decision.

- b. The case files selected represented both decisions to grant status and decisions not to grant status in a ratio which broadly mirrored the most recently published recognition rates.
- c. The case files selected related to applications concerning the following six countries of origin: Afghanistan, Iraq, Pakistan, the Russian Federation, Somalia, and Turkey. These were amongst the 10 main countries of origin of applicants in the EU (as a whole) for 2007.²⁶ In addition, researchers in each Member State selected case files relating to applicants from a further four countries of origin from which a significant number of applicants in their Member State originate.

Within the above selection criteria, the selection of cases was random. However, researchers aimed to ensure that selection methods would not produce misleading results by commission or omission. As such, researchers sought to ensure that case files were sampled from:

- different regional locations within the Member State (if applicable);²⁷
- different locations where applications may be lodged (if applicable);²⁸
- different language sections within the Member State (if applicable);²⁹
- a range of examining or interviewing officers.

Occasionally, case files were specifically and additionally selected because they raised a particular issue of relevance to the research which had not emerged within the random selection, for example, safe third country concept, first country of asylum concept etc. It should be noted that case files concerning unaccompanied children were not audited.³⁰

Confidentiality

The anonymity of applicants for international protection and their applications was maintained at all times during this research. UNHCR ensured the confidentiality of all records, took all reasonable steps to prevent any disclosure and adhered to national legislation on data protection during this research.³¹

Assessment

Auditing of case files was primarily carried out in the period between January and April 2009.³² Analysis was based mainly on a review of, as appropriate, the application, any records of personal interviews (including any screening

²⁶ 2007 was chosen as the reference year as this was the last year for which complete figures were available before commencement of the research. However, it is noted that these countries, with the exception of Turkey, were also among the top ten countries of origin in 2008 and 2009.

²⁷ For example, case files were audited from the following regional centres. Bulgaria: Sofia and Banya, Nova Zagora; the Czech Republic: Zastávka u Brna, Havířov, Vyšní Lhoty, Poštorná, Bělá pod Bezdězem, Kostelec nad Orlicí, and Praha Ruzyně; Italy: Bari, Gorizia, Rome, Turin and Trapani; the Netherlands: Schiphol, Zevenaar, Rijsbergen, Ter Apel and Den Bosch; UK: NAM offices of Glasgow, Liverpool and Leeds; and Harmondsworth, Yarlswood and the TCU unit.

²⁸ This was a relevant criterion for the sampling conducted in Czech Republic (where sampling was first based on whether the application was lodged in Vyšní Lhoty, at the airport, in hospital, in detention or in prison); Germany (covering 21 out of 22 branch offices, Nuremberg (HQ) and the airport at Frankfurt/Main) and Spain.

²⁹ In Belgium, UNHCR sought to audit a proportionate number of case files from the Flemish and French speaking sections of the CGRA.

³⁰ With the exception of the Czech Republic where a few case files audited concerned applications by unaccompanied children.

³¹ For data protection reasons, UNHCR kept a confidential record of the assessment of each case-file, and gave each case-file assessment an assigned case number (not the actual case reference number) which has been used for the purpose of references in this report. In some Member States, UNHCR's researchers signed a confidentiality protocol or letter: for example, in Belgium and the Netherlands.

³² In Bulgaria, this was conducted between March and May 2009 and in Germany, this was primarily carried out between mid April and July 2009.

interview), country of origin information gathered or referenced, and the written decision. A Decision Assessment Form was prepared by UNHCR to assist in the audit of the written decisions and to ensure parity of information gathered across the 12 Member States. Evidence gathered informed responses to the thematic guiding questions which defined the scope of the issues covered by this research.

Researchers in cooperation with the asylum authorities ensured that the selection and audit of case files did not hinder or delay the ability of the applicant to appeal a negative decision.

Caveat

UNHCR recognizes that the sample of case files audited is very small compared to the numbers of applications examined in the period covered by UNHCR's research. Such a relatively small sample does not provide a comprehensive empirical basis upon which to evaluate and compare state practice. However, information obtained through the audit of case files and decisions provided useful indications of an individual Member State's practice. Moreover, UNHCR verified its findings in interviews with a wide range of national stakeholders, including personnel of the determining authorities. Furthermore, in addition to information gathered through the audit of decisions and case files, UNHCR also evaluated other relevant sources such as internal and administrative guidelines.

Due to the size of the sample and the need to fulfill the criteria stated above, it was not possible to include additional criteria with regard to the specific issues that applications raised. This, in any case, would not have been possible in those Member States which do not use such indicators in their archives or databases. In spite of this, researchers assessed that the case files audited covered a wide range of issues and covered the most common issues as verified in interviews with national stakeholders. In some cases, UNHCR did select specific case files which raised particular issues in order to address a gap in data collected.

UNHCR also recognizes that the requirement to audit applications lodged after 1 December 2007 and upon which a decision had been taken by April 2009, may have meant that applications raising complex issues subjected to lengthier investigation may not have fallen within the criteria for selection.

Observation of personal interviews

The third research method employed was the observation of personal interviews of applicants. UNHCR observed 185 personal interviews across the 12 Member States³³ and listened to the audio recording of a further two interviews in Spain.

Purpose

The purpose of observing asylum interviews was to obtain an insight into the implementation of Article 13 of the APD which sets out the minimum requirements for a personal interview. In other words, to observe the conditions in which personal interviews were conducted, particularly with regard to:

- the steps that were taken to ensure appropriate confidentiality,
- the steps that were taken and techniques used to ensure that applicants were able to present the grounds for their application in a comprehensive manner,

³³ Belgium 10, Bulgaria 12, Czech Republic 14, Finland 10, France 17, Germany 16, Greece 42 (52 examination procedures were observed in total, in 10 questioning relating to the reasons for the application was omitted), Italy 20, the Netherlands 9, Slovenia 8, Spain 17, and UK 10.

- whether the person who conducted the interview was sufficiently competent to take account of both the personal and general circumstances relating to the application, and
- whether the interpreter appeared able to ensure appropriate communication between the applicant and the person who conducted the interview.

The purpose was not to criticize or monitor individuals. Instead, the aim was to gain an insight into how interviews were conducted and structured, and assess implementation of Article 13 of the APD.

Access

UNHCR only observed personal interviews with the consent of the applicant. With regards to each interview observed, the applicant (and his/her legal representative, if any) was informed about UNHCR's request to observe the interview, was informed why the researcher would be present, and was given the opportunity to consent to or decline UNHCR's attendance. All researchers ensured that they received the consent of the applicant before observing an interview. Determining authorities provided valuable assistance with this process. Some asylum authorities utilized a standard interview consent form which was signed by the applicant before the interview took place.³⁴

The asylum authorities ensured that the applicant was aware of the purpose of UNHCR's attendance, including that:

- UNHCR was purely an "observer" for the purposes of the research audit;
- UNHCR would not influence the decision-making process in any way or influence the outcome of the application;
- UNHCR would not intervene in any way during the conduct of the interview;
- UNHCR would not advise the interviewer or anyone else present on their conduct or any other matter;
- UNHCR would not sign the report of the interview where signatures are sought regarding the parties involved in the interview;
- UNHCR would abide by the rules of confidentiality; and
- any of the parties involved in the interview had the right to request at any time either before or during the interview that UNHCR did not observe, or cease to observe, the interview for any reason, which need not be shared.

In all interviews observed, UNHCR abided by the above-mentioned conditions of observation. Moreover, in some Member States, the interviewer also had to and did consent to UNHCR's presence during the personal interview.³⁵

On occasions, interviews selected for observation were postponed or aborted after they had begun.³⁶

Selection

In most Member States, UNHCR selected interviews that it wished to observe from schedule lists provided by the determining authorities. Researchers sought to obtain the schedules of interviews as far in advance as possible in

³⁴ For example, in Spain and the UK.

³⁵ Belgium, France and Germany. Furthermore, in Germany the same applied to the interpreter.

³⁶ For example, because the interviewer decided that an interpreter was required (the applicant had not requested one) or because the applicant felt unwell.

order to obtain the necessary consents for observation as soon as possible. In contrast, in France and the Netherlands, the determining authorities, on the basis of the selection criteria made available by UNHCR, proposed dates for the observation of interviews. Sometimes, in some Member States, the selection of interviews observed was dictated by the date on which the researcher visited the relevant location.³⁷ With regard to Slovenia, due to the relatively low numbers of applicants for international protection³⁸ and the fact that formal consent to observe interviews was given by the Ministry of Interior on 5 May 2009, UNHCR observed as many interviews as possible within the limited time frame which remained.³⁹

Researchers sought to observe interviews involving both male and female applicants. If possible, interviews which were selected for observation involved applicants from the the selected countries of origin.⁴⁰ However, the extent to which this was achieved was dependent on the schedules of interviews at the time that the research was carried out.⁴¹

UNHCR also sought to observe interviews conducted in the framework of different procedures i.e. admissibility procedure, regular procedure, border procedure, and accelerated procedure.⁴² Moreover, researchers sought to observe interviews in different locations within some Member States.⁴³ However, the limited travel budget for and time constraints of this research project placed significant constraints on researchers ability to achieve this in all Member States.⁴⁴ In Spain, UNHCR also listened to two previously recorded interviews in the regular procedure.

UNHCR did not seek to observe any screening or preliminary interviews. However, it should be noted that although five interviews conducted in the Dublin II procedure were observed in Bulgaria, the national findings were based on the 12 interviews observed in the status determination procedures.⁴⁵ In the Netherlands, UNHCR also observed two initial interviews⁴⁶ and two “Dublin interviews”.

37 For example, UNHCR did not select the three interviews observed at the Security Department of Athens Airport and the Security Department of Samos Island in Greece. Instead, these were the scheduled interviews which took place on the dates UNHCR visited these locations.

38 According to UNHCR statistics, 240 applications for international protection were lodged in 2008.

39 Field research in 11 Member States was completed at the end of May 2009. As such, in Slovenia, UNHCR observed 8 interviews (6 in the context of the submission of the application and 2 personal interviews) and one information session in which the applicant decided not to lodge an application for international protection.

40 See below.

41 Note that in Greece, at the time of UNHCR’s research, no interviews of applicants from Turkey had been scheduled by the determining authority.

42 Note that in those Member States where the decision to examine an application in the accelerated or regular procedures is taken after the personal interview, it was not possible to select interviews on this basis (for example, in the Czech Republic, Finland, Greece with regard to procedures at the time of UNHCR’s research, and the Republic of Slovenia with regard to interviews conducted in the framework of the submission of the application). In the UK, all the observed interviews took place in the context of the regular NAM procedure.

43 For example: In the Czech Republic, one interview was observed in the transit area of the international airport (border procedure), two were observed in detention centres (Bělá Jezová and Poštorná) and 10 in four different centres (Zastávka u Brna, Vyšní Lhoty, Kostelec n. Orlicí, and Havířov). In Finland, interviews were observed primarily in Helsinki and one interview was observed in Lappeenranta. In France, interviews were observed in Paris and in the waiting zone of Roissy-Charles de Gaulle airport (ZAPI 3). In Greece 49 interviews were observed primarily at the ADA in Athens, one at the Security Department of Athens Airport and two at the Security Department of Samos. In Italy, interviews were observed in Bari, Gorizia, Rome, Turin and Trapani. In the Netherlands, one interview was observed at AC Schiphol and 8 at Zevenaar. In Spain, interviews were observed in Madrid, Melilla, Valencia and Barcelona. In the UK, interviews were observed in Glasgow and Liverpool. Note that in Belgium, interviews were only observed at the CGRA headquarters in Brussels. Due to practical and logistical problems, UNHCR was not able to observe interviews located at the closed centres.

44 In Germany, interviews were only observed at the branch office in Berlin (as well as one interview which took place in police custody). It should also be noted that due to time constraints, UNHCR was unable to observe any interviews conducted by video-link in France.

45 Some Dublin II interviews were observed in the Czech Republic. However it was determined that the Dublin II regulation did not apply and the applicants were thus interviewed in the asylum procedure.

46 One at AC Schiphol and one at AC Zevenaar.

UNHCR did not seek to observe interviews with unaccompanied children. This was due to the fact that the presence of an “outside” observer during the interview of a child must be assessed to be in the best interests of the child. This is a decision which may involve lengthy consultations with the child’s representative, his/her legal representative and possibly social services. Understandably, following such deliberations, a decision can be taken that such observation is not in the best interests of the child. Therefore, given the short time-frame for the research phase of this project, it was decided that UNHCR would not seek to observe interviews involving children.

Assessment

Researchers used a standard Interview Assessment Form devised by UNHCR to help them record all the information required and to ensure parity of information recorded across the 12 Member States of focus. Researchers took full notes of the interviews and their observations. Researchers sought to observe and assess at least 10 interviews in each of the Member States of focus.⁴⁷ As mentioned above, 185 total interviews were observed and two additional audio recordings of interviews were heard.

Caveat

UNHCR recognizes that the total number of interviews observed represents a very small proportion of the interviews that were conducted at the time of UNHCR’s research. As such, UNHCR’s findings based on these observations are indicative only. However, the fact that in some states practically all interviews observed exhibited the same deficiencies, raises cause for concern. In addition, UNHCR verified its findings in interviews with personnel of the determining authority and lawyers, and the review of any guidelines on or checklists for the conduct of interviews.

Interviews and consultation with national stakeholders

The fourth research method employed was the interview of and consultation with national stakeholders. UNHCR interviewed or consulted 199 national stakeholders in the course of this research.⁴⁸

Purpose

The purpose of the interviews was to:

- verify and check the analysis of practice based on desk-research, the audit of case files and the observation of personal interviews;
- fill any gaps in information, analysis or to seek further clarification;
- inform the assessment of good practice and/or any problems or concerns about the implementation of procedures;
- inform the recommendations.

⁴⁷ The actual numbers are stated below. This was not achieved in the Netherlands and the Republic of Slovenia. In the Netherlands, 9 interviews were observed. The final interview could not be observed due to a number of circumstances. In Slovenia, 8 interviews were observed as the Ministry of Interior only granted actual access to interviews as of 14 April 2009. The research project period for the observation of interviews was between January and April 2009 with the exception of Germany, where the interviews were observed in May 2009.

⁴⁸ The actual numbers of stakeholders interviewed are listed per Member State below.

The interviews were semi-structured based on eliciting information relevant to the thematic guiding questions of focus.

Selection

Interviewees included:

- personnel of the determining authorities responsible for examining, assessing and taking a decision on the application for international protection;
- personnel of the competent authorities responsible for interviewing applicants for international protection, or taking decisions related to the asylum procedure, if different from above;
- personnel responsible for providing country of origin and third country information;
- personnel responsible for providing training to the officials of the competent authorities;
- personnel in any quality assurance unit that might exist;
- legal representatives and advisers;
- NGOs;
- appeal judges; and
- interpreters.

All interviewees were fully informed as to the purpose of this research and consented to the interview and the use of information given for the purposes of this research.⁴⁹ The personal identities of interviewees have not been disclosed in this report.

It should be noted here that throughout the report, stakeholders interviewed or consulted in Greece are referred to by a reference number. The table below sets out the positions/organizations to which these refer.

S1	Head of the Asylum and Refugees Department (ARD) in the ADGPH	Greek Police
S2	Police Warrant Officer/Examiner of case files in ARD in the ADGPH	Greek Police
S3	Police Warrant Officer/Supervisor of interviewers in Asylum Department of the ADA	Greek Police
S4	Sergeant/Interviewer in Asylum Department of the ADA	Greek Police
S5	Interpreter in Asylum Department of the ADA	Greek Police
S6	Police Warrant Officer/Head of Asylum Office in SDAA	Greek Police
S7	Lawyer/UNHCR border monitoring	Greek Council for Refugees (GCR)
S8	Legal representative and adviser of asylum seekers	GCR
S9	Co-ordinator of GCR/trainer on asylum issues	GCR
S10	Protection Officer of UNHCR	UNHCR office in Athens
S11	Lecturer/representative of the Athens Bar Association (ABA) in Appeals' Board (AB)	University of Thessaloniki
S12	Associate Councilor in Council of State (CoS)	CoS
S13	Lawyer in Samos island	-
S14	Sergeant / Head of Aliens' Office in SDS	Greek Police
S15	Researcher of Amnesty International (AI)	AI

⁴⁹ Except, in the Czech Republic where some information was requested under freedom of information legislation (Act No. 106/1999 Coll., on Free Access to Information) which does not require declaration of the reason for the request or the use that will be made of the information.

Interviews were primarily conducted face to face but, when this was not possible, they were conducted over the telephone or by e-mail. A record was made of each interview. In addition, in some Member States, questionnaires were prepared and stakeholders provided information or provided additional information in response to these questionnaires.⁵⁰ UNHCR organized two roundtable meetings with NGOs and lawyers respectively in Belgium⁵¹ and occasionally, researchers attended relevant meetings which took place during the period of research.⁵²

This research did not include interviews by UNHCR of asylum applicants or appellants. Given their vulnerable situation, this project did not have the financial resources, human resources nor the time that would be necessary to arrange and conduct such interviews appropriately.

Research in figures

	Number of case files audited	Number of decisions audited	Number of personal interviews observed	Number of national stakeholders consulted			
				Personnel from competent authorities	Judges	NGOs and Lawyers	Other
Belgium	90	90	10	9	4	10	2
Bulgaria	62	62	12	8	4	1	2
Czech Rep.	67	67	14	10	3	3	0
Finland	115	115	10	13	0	4	0
France	70	70	17	17	1	8	1
Germany	120	120	16	6	0	3	1
Greece	202	202	42	7	0	7	1
Italy	90	90	20	18 ⁵³	0	2	4
Netherlands	90	90	9	6	1	5	2
Slovenia		65	8	1 ⁵⁴	1	5	0
Spain	124	124	17	9	0	10	0
UK	60	60	10	6	0	4	0
TOTAL	1090	1155	185	199			

⁵⁰ For example, in Bulgaria, based on arrangements made in meetings or over the telephone, some of the stakeholders agreed to fill in and send back questionnaires. This method applied to appeal judges from the Administrative Court of Sofia City, two interviewers in RRC – Banya, and interpreters. Also in Italy, a questionnaire was sent to all the UNHCR members in the CTRPIs (the determining authority). In Germany, stakeholders were consulted in the form of specific questionnaires which were further discussed via e-mail or over the phone. This method was given preference to ensure that stakeholders throughout the country were able to contribute to the research. Thus, it was aimed at gathering a broader variety of information, resulting in more balanced findings. Moreover, the submission of comprehensive questionnaires to the headquarters of the determining authority as well as the Federal Police provided the opportunity to involve all relevant divisions in a timely manner.

⁵¹ On 25 and 26 March 2009 respectively.

⁵² For example, for the purposes of this research, UNHCR attended as an observer a meeting of the *Tavolo Nazionale Asilo* (a network including the National Association of Italian Municipalities and some NGOs); a training meeting organized by the CNDA in cooperation with UNHCR for the members of the determining authority (CTRPIs) and a presentation of the report by the NGO *Consiglio Italiano per i Rifugiati*: 'Services at Borders: a Practical Co-operation'. UNHCR also attended a meeting of AC-lawyers in Zwolle, the Netherlands.

⁵³ 5 of the interviews included UNHCR staff in their capacity as members of the CNDA or CTRPI.

⁵⁴ Due to the particular time constraints relating to the field research in Slovenia and the fact that there is a relatively low number of state employees working in the determining authority, UNHCR interviewed a representative of the Ministry of Interior who consulted as necessary with appropriate colleagues.