IMPROVING ASYLUM PROCEDURES
COMPARATIVE ANALYSIS AND RECOMMENDATIONS FOR LAW AND PRACTICE

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

March 2010

UNHCR
The UN
Refugee Agency

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Key Findings and Recommendations

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Diana
Princess of Wales Memorial Fund
The Work Continues

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Translations: all English translations of national legislation, decisions and reports are unofficial translations by the researchers unless otherwise indicated. References to *acquis* instruments, where in English in quotation mark are quoted from the English language official versions of those instruments.

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United Nations High Commissioner for Refugees, Brussels, March 2010

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SECTION I:

AIMS AND METHODOLOGY

Background and Aims of the Project
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KEY FINDINGS AND RECOMMENDATIONS

1. AIMS AND METHODOLOGY

1.1 Background and aims of the research project

UNHCR welcomed the adoption of the Asylum Procedures Directive (APD)[1] in 2005 as an important step in the first phase of the asylum harmonization process under Article 63 of the Amsterdam Treaty. The APD is a key element of the Common European Asylum System (CEAS), to which European Union (EU) Member States remain committed under the terms of Article 68 of the Treaty on the Functioning of the European Union. However, UNHCR expressed concern at the time of the APD's adoption that some of its provisions may lead to breaches of international refugee law if implemented at the level permitted by the Directive's minimum standards. The wide margin for discretion, as well as the extensive exceptions and qualifications to the APD's basic safeguards, led to questions among observers about the level of harmonization that the instrument would achieve in practice.[2] Concerns were also expressed about the scope for divergence in national approaches to the application of the APD's provisions, and in some cases, about the lack of clarity with respect to their interpretation.

In the exercise of its supervisory role under Article 35 of the 1951 Convention relating to the Status of Refugees (1951 Convention), and with generous support from the European Refugee Fund, and with a financial contribution from the Diana, Princess of Wales Memorial Fund, UNHCR has undertaken a wide-ranging comparative analysis of the transposition of key provisions of the APD into national law by selected EU Member States, and the practical application of those provisions.[3]

Based on that analysis, UNHCR has produced recommendations set out in this document, which aim to assist Member State authorities in the interpretation and application of the Directive, as well as to inform discussions and work towards strengthening and improving asylum procedures across the European Union.

Purpose of analysis and recommendations

This research represents the most comprehensive publicly-available comparative analysis of asylum procedure law and practice undertaken since the APD's adoption. As such, UNHCR hopes that it will assist Member States, EU institutions, civil society and other stakeholders in working toward a Common European Asylum System with improved protection standards, implemented in practice across the Union.

The research and recommendations also aim to inform negotiations in the Council and the European Parliament on possible amendments to the APD, as put forward by the Commission in October 2009.[4] They also seek to

1 Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on minimum standards and procedures for granting and withdrawing refugee status, OJ L 326/13 (Asylum Procedures Directive or APD).

2 The EC acknowledged that "differences in decisions to recognise or reject asylum requests from applicants from the same countries of origin point to a critical flaw in the current CEAS: even after some legislative harmonisation at EU level… a lack of common practice, different traditions and diverse country of origin information sources are, among other reasons, producing divergent results." European Commission, Communication from the Commission to the European Parliament, the Council, the ECOSOC and Committee of the Regions: Policy Plan on asylum – An integrated approach to protection across the EU, 17 June 2008, COM(2008) 360 final.

3 For further information about the scope and methodology of the research, see section 1.2.

4 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).

provide constructive input to preparations for the work of the European Asylum Support Office (EASO).[5] The EASO has a mandate to facilitate practical cooperation on asylum among Member States,[6] and Member States have underlined their interest in prioritizing the promotion of quality asylum decision-making among its tasks. In that context, this report will provide helpful material.

The research addressed 18 articles of the APD, as they are transposed in law and implemented in practice in the twelve participating states: Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Slovenia, Spain and the United Kingdom. As such, the research and recommendations do not address all provisions in the APD, nor the law and practice in every Member State bound by the Directive. This project does not seek to focus scrutiny on any particular Member State. Where gaps or problematic practices have been observed, UNHCR hopes that this research provides an opportunity to discuss and address them, and to draw on the numerous good practices which have also been observed.

UNHCR is deeply appreciative of the cooperation, time and expertise offered by asylum authorities, as well as many other stakeholders who contributed to this research. It is hoped that the project will be of concrete benefit to them and their work, by providing an opportunity for exchange of views among states and other parties interested in asylum systems, at national and EU levels.

Structure of report and general observations

This document summarizes the key findings emerging from the research and analysis at national level, under a heading dedicated to each subject covered in the project. It also contains the full list of recommendations on each issue and relevant article of the APD.

The CD-ROM appended to this document contains the full set of research findings, organized by each of the eighteen APD articles addressed in the project.[7] The recommendations are repeated there, under each subject heading. The chapters contain a comparative analysis describing the law and practice, with full references to official texts, information and other relevant sources, as well as the findings from UNHCR's field and desk research.

A number of overarching observations emerge from the research. These are set out briefly below, before proceeding to the subject-specific findings.

- The APD has not, based on UNHCR's observations, achieved the harmonization of legal standards or practice across the EU. This is partially due to the wide scope of many provisions, which explicitly permit divergent practice and exceptions and derogations. It is also due, however, to differing interpretations of many articles (including mandatory provisions), and different approaches to their application.
- Member States have differing strengths and weaknesses in respect of various elements of the asylum procedure. Some appear to have particular systemic weaknesses or problematic areas. It would be in the

5 Council of the European Union, Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, 16 February 2010, 16626/09, 2009/0027 (COD).

6 Ibid, article 1.

7 The issues of inadmissible and unfounded applications, as well as border procedures, are addressed in the sections relating to accelerated procedures (section 9), opportunity for a personal interview (section 5), the different safe country concepts (sections 11, 12 and 13) and effective remedies (section 16). Consequently, section 10 relating to inadmissible or unfounded applications, and section 15 on border procedures, contain a table setting out the respective national application of these concepts, while the detailed analysis and recommendations are included in the other sections.

interest not only of those states and of asylum seekers seeking protection there, but also of other Member States and the system as a whole, for these weaknesses to be addressed.

- In some areas the minimum requirements of the APD appear not be fully met, whether in law or practice. Given the limited scope of this research, it is possible that non-compliance also exists on other issues and in other states not included in this project.
- In order to address some of the gaps identified in this research, amendments to the APD are required in regard to a number of key provisions. These include, among others, those relating to exceptions to the right to a personal interview, requirements for personal interviews, accelerated procedures, and effective remedies. Further detail is provided in the full recommendations below.
- Some key areas also require measures to strengthen and improve practice. In the recommendations below, UNHCR proposes *inter alia* the development of guidelines and other written tools, wider application and exchange of good practices; and reinforced training arrangements. In this field, UNHCR sees a clear role for the EASO, and hopes the findings of this research will be helpful for the EASO's work on improving quality.

1.2 Research methodology and scope

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, which take into account their different procedures and circumstances. One of the major strengths of this research project is its comparative nature, based on national research findings.

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 chosen for inclusion in this comparative research project: Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Slovenia, Spain and the United Kingdom.[8]

With regard to the temporal scope of the project, the national research and analysis primarily took place over a six month period between November 2008 and April 2009.[9] 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.[10] This report was drafted in the period August 2009 to March 2010.

8 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.

9 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.

10 However, two significant pieces of asylum legislation entered into force in Greece and Spain in July and November 2009 respectively and these are included in the analysis of legislation in this report.

The thematic scope of this research entailed an overview and analysis reflecting the transposition in national legislation and implementation of the following specific provisions of the Asylum Procedures Directive:

- Requirements for a decision by the determining authority (Articles 9 and 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 (Article 19 and 20)
- Prioritized and accelerated procedures (Article 23)
- Inadmissible and unfounded applications (Article 25 and 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)

The issues of guarantees for unaccompanied children and a gender sensitive approach 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 gender and applications by unaccompanied children is set out in brief in this report where relevant.[11]

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[12] ('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

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, 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 organisation and conduct of asylum systems, and national differences in the numbers and profiles 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

11 This derives primarily from desk research undertaken by the National Project Officers, and from information provided by national stakeholders.

12 European Council, 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, OJ L 50, p. 1–10 (hereafter 'Dublin II Regulation').

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 summarized below. Comprehensive details of the research methodology can be found in Part 2 (on the attached CD-Rom), in the Annex.

a. 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;[13]
- any relevant and available procedural or administrative regulations, provisions, and instructions;
- any manuals and guidelines made available by the authorities or publicly available defining the way in which various relevant aspects of the asylum procedure should be conducted;
- annual reports of the determining authority;[14]
- official statistics pertaining to asylum procedures;
- any relevant precedent-setting case-law[15]; and
- information regarding training provision and any available training materials used for the purpose of training officials involved in interviewing, examining, assessing and taking a decision on applications for international protection.

Researchers also reviewed relevant secondary documentary resources, such as reports, commentaries, articles and country of origin information from reliable sources.

b. Selection and audit of case files and decisions

A distinctive and key feature of this comparative research project was its focus on assessing the impact of 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 files[16] and 1,155 decisions[17] were audited for this research.

13 It should be noted that at the time of UNHCR's research, there was significant draft legislation under consideration in Belgium and Finland.
14 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.
15 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.
16 See table below for a breakdown by Member State of the number of case files audited. Note that case files were not audited in Slovenia.
17 1,090 decisions relating to the 1,090 case files audited in 11 Member States plus 65 decisions audited in Slovenia.

Case files were randomly selected according to the following criteria:

a. 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.[18]

b. 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.[19]

c. 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.

d. The case files selected related to applications concerning the following six countries of origin: Afghanistan, Iraq, Pakistan, Russian Federation, Somalia, and Turkey. These were amongst the 10 main countries of origin of applicants in the EU (as a whole) for 2007. 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);[20]
- Different locations where applications may be lodged (if applicable);[21]
- Different language sections within the Member State (if applicable);[22] and
- A range of examining or interviewing officers.

18 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.

19 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.

20 For example, case files were audited from the following regional centres. Bulgaria: Sofia and Banya, Nova Zagora; 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.

21 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.

22 In Belgium, UNHCR sought to audit a proportionate number of case files from the Flemish and French speaking sections of the CGRA.

c. Observation of personal interviews

UNHCR observed 185 personal interviews across the 12 Member States[23] and listened to the audio recording of a further two interviews in Spain.

d. Interviews and consultation with national stakeholders

UNHCR interviewed or consulted 199 national stakeholders in the course of this research.[24]

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, advisers and NGOs;
- appeal judges; and
- interpreters.

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 Republic	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[25]	0	2	4
Netherlands	90	90	9	6	1	5	2
Slovenia		65	8	1[26]	1	5	0
Spain	124	124	17	9	0	10	0
UK	60	60	10	6	0	4	0
TOTAL	1090	1155	185	199			

23 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.

24 The actual numbers of stakeholders interviewed are listed per Member State below.

25 Five of the interviews included UNHCR staff in their capacity as members of the CNDA (IT) or CTRPI.

26 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.

SECTION II:

KEY FINDINGS AND RECOMMENDATIONS ON SURVEYED PROVISIONS OF THE ASYLUM PROCEDURES DIRECTIVE

Requirements for a Decision and Guarantees for Applicants
Opportunity for a Personal Interview
Requirements for a Personal Interview
Status of the Report of the Personal Interview
Withdrawal or Abandonment of Applications
Collection of Information on Individual Cases
Prioritized and Accelerated Procedures
First Country of Asylum
Safe Third Country
Safe Country of Origin
Subsequent Applications
Effective Remedies

2. KEY FINDINGS AND RECOMMENDATIONS ON SURVEYED PROVISIONS OF THE ASYLUM PROCEDURES DIRECTIVE

2.1 ARTICLES 9 and 10 - REQUIREMENTS FOR A DECISION BY THE DETERMINING AUTHORITY and GUARANTEES FOR APPLICANTS

Good quality asylum decisions in the first instance lend greater credibility to the fairness and efficiency of the asylum system overall, including the appeal system. When the outcome is negative, 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. A well-reasoned decision will inform the grounds upon which any eventual appeal should be based.

With regard to positive decisions, a reasoned decision can also be helpful at a later stage, for instance concerning any application to renew the validity of a residence permit or the 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. They also support efforts to monitor and improve quality and consistency both nationally and across the European Union. This is crucial as the EU strives to establish a Common European Asylum System.

Provision of decisions in writing

A majority of the Member States surveyed have legislative or other provisions that transpose or reflect the APD's requirement to state reasons in fact and law in, at least, negative decisions. However, the examination of over 1,000 individual decisions and case files across the participating states led UNHCR to question whether in some, the requirements of Article 9 (2) APD, in conjunction with Article 8 (2) (a) APD, to provide individualized reasons in fact and law following the refusal of an asylum application have been effectively implemented in practice.

The research revealed wide divergence in the extent to which decisions set out the material facts of the claim; referred to the evidence assessed and the standard of proof applied; assessed the credibility of the material facts; and applied the criteria for international protection under the Qualification Directive to accepted facts.

The structure and content of decisions varied markedly. UNHCR observed decisions that did not set out any summary of the material facts; did not reference any relevant country of origin information or other evidence considered; did not specify which 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. Moreover, this information was not necessarily contained in the case files either. The decisions consisted of very brief generic and standard legal paragraphs. As such there was no evidence that these applications were examined and these decisions taken individually, objectively and impartially. In some Member States, the reasons for the decision may be stated only very briefly in the decision notified to applicants, but greater detail on the reasons for the decision may be contained in the case file, which may be available to the applicant on request. 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 several states, the quality of decisions varied depending on the type of procedure in which the application was examined. Decisions in the general procedure often evidenced good practice, fulfilling the requirements to set out reasons in fact and law. Decisions in accelerated, border and admissibility procedures, by contrast, in many cases did not necessarily exhibit sufficient reasoning. This is despite the fact that the APD does not exempt such procedures from the obligation to provide written reasons in fact and law for negative decisions.

While the decisions surveyed represented a limited sample, the information obtained provides useful indications of Member States' practice. Furthermore, the fact that in some states, practically all decisions exhibited the same deficiencies, gives cause for concern.

It was also ascertained that there were different or, in some cases, a lack of systems in place to monitor the quality of the written decisions.

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, which were considered to be insufficient or not accepted, and why the evidence was rejected; and the reasons 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: application of legal criteria to the facts and standard of proof

A common trend identified through the audit of decisions in several states was that negative decisions were often made on credibility grounds, and did not apply the criteria of the Qualification Directive to facts. However, in a number of surveyed cases, it was not possible to ascertain from the decision which parts of the facts were not established or credible, and which aspects of the refugee definition or subsidiary protection criteria were considered fulfilled or not fulfilled. Where another provision of the Qualification Directive might have been cited as a basis for rejection (e.g. internal flight alternative, non-state actors of persecution or serious harm), the reasoning that led to such conclusions was not always clearly set out.

In some of the decisions examined, there was no application of the criteria for qualification for refugee status and subsidiary protection status to the applicant's individual circumstances.

In only two of the Member States surveyed, decisions referred explicitly to the standard of proof applied. In some Member States, it could be deduced from the decision that a high standard of proof had been applied. Generally, however, 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 enable an assessment of whether this had been applied appropriately or consistently.

Country of origin information

It is of serious concern to UNHCR that the determining authorities in some Member States surveyed systematically failed to refer to any country of origin information (COI) which was used in decisions to refuse protection status. In other Member States, country of origin information was frequently referred to or cited in general terms, but without specific indications of the sources or how this was applied to the assessment of the claim. Some of the surveyed states exhibited good practice in providing detailed references to and pertinent analyses of country of origin information. It is of concern to note that in some states, decision-makers seemed to rely on a limited number of COI sources, usually state-sponsored ones.

Use of templates and guidelines

The majority of determining authorities surveyed in this research make at least some use of templates, standard wording and/or guidelines to assist decision-makers in structuring their decisions.

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. UNHCR's audit revealed that in some Member States, there is extensive reliance on standard legal and/or country-specific paragraphs in the drafting of decisions. A check-list is a useful tool to aid decision-makers in drafting decisions. The check-list should require the decision-maker to set out the facts of the claim before applying the relevant criteria and legal principles to those facts, and to support the findings with clear reasons, including reference to country information and other evidence.

UNHCR recommends that:

An EU-wide decision check-list be 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.[27] 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. UNHCR considers that the grounds for refusal of refugee status should be stated in the decision, regardless of whether another form of status is conferred bringing equivalent rights and benefits.

The audit of decisions revealed that the structure of decisions in the majority of states surveyed addressed the question of eligibility for refugee status before subsidiary protection status. However, this was not necessarily the case in some states when applications were rejected as manifestly unfounded.

Where subsidiary protection status (which does not offer the same rights and benefits as refugee status) is granted, the reasons for not granting refugee status were set out in decisions in several states. However, in some states which formally fulfilled this requirement, the reasoning provided was inadequate. For example, UNHCR audited some decisions in which only brief generic reasons for the refusal of refugee status were provided.

In one state, where a subsidiary protection status is granted which offers the same rights and benefits as refugee status, the reasons for the refusal of refugee status are made available to the applicant only if and when the subsidiary protection status is withdrawn. In UNHCR's view, such reasons should be given at the time of the decision, thus enabling the applicant to respond immediately to a refusal of refugee status or subsidiary protection.

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.[28]

Motivation of positive decisions

Motivation of positive decisions to grant refugee status or subsidiary protection status is not required under Article 9 (2) APD. It is therefore not surprising that it is provided only in a small proportion of the Member States surveyed.

UNHCR considers that the motivation of positive decisions would nonetheless represent good practice, particularly where this information is in any case retained in a different format on the file. This would contribute to the transparency of decision-making and efforts to monitor and improve quality and consistency. It would also

27 Council of the European Union, 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, p 12 – 23, (hereafter Qualification Directive or QD), 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 …".

28 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.

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.

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

Regular monitoring or auditing of decisions 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, regardless of whether the procedure is centralized or decentralized. Such monitoring also assists in identifying training and operational policy guidance needs. Objective oversight is important to ensure that the system of quality control functions appropriately, and to verify adherence to quality standards.

Only two of the states surveyed have a dedicated quality audit function as part of their asylum system. Most of the Member States in this research have some form of clearance or second-line check system which aims to safeguard the accuracy of first instance decisions. However, these are often of a relatively informal nature, involving the supervisor or another staff member. UNHCR is not persuaded that decisions are being subjected to adequate scrutiny in all Member States.

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 decisions for dependants

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 research found a number of divergences in both legislation and practice with respect to the APD's guarantees regarding notice to the applicant of a decision in a reasonable time, and in a manner which ensures that s/he understands the decision and its consequences. 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 in

the Directive. 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 negative decision, an applicant is able to understand the decision and to instigate an effective legal remedy.

Timeframes for notification of a decision

It would not appear that there are widespread problems concerning delays between the taking and the service of negative decisions, although in some Member States delays of up to two months were reported.

It is particularly important that states ensure that a negative decision is served with a sufficient time before corresponding removal action is taken, in order to ensure that the applicant has adequate advance notice and is effectively able to exercise any right of appeal.

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 timeframe between the taking of the decision and notification of the decision can be monitored.

Manner of notification

The APD does not prescribe the means to notify the decision. The research found that Member States employ different methods, depending on the procedure, the place of residence of the applicant, and/or whether the decision is to be notified to the applicant and/or his/her legal representative.

Some of the Member States in this research have legislation which permits notification to the legal representative instead of the applicant in prescribed circumstances. Most of the Member States surveyed notify the applicant directly. A number of states have adopted good practice by serving the decision both on the applicant and his/her legal representative, if any.

Some states ensure that the notification is delivered in a way that guarantees receipt, either through personal service or registered mail with acknowledgement of receipt. UNHCR notes good practice in some Member States, whereby an interview is arranged by the case manager with the assistance of an interpreter to notify the applicant of the decision, explain the reasons and provide information on how to appeal in the event of a negative decision.

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 decision on their application in a language that "they may reasonably be supposed to understand," unless they are represented by a legal adviser or free legal assistance is available, in which case this requirement may be waived.

UNHCR has 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 actually understand, not one which they may reasonably be supposed to understand.

Almost all Member States in this research have transposed or reflected the minimum requirement of the APD in national legislation, regulations or administrative provisions.

In most states surveyed, UNHCR found that the decision is provided only in the host state's language, and translation 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 while others provide accompanying generic information leaflets in a variety of languages. A number of Member States have adopted higher legislative or practical standards than those required by the APD, providing translation or interpretation in a language the applicant understands.

UNHCR is particularly concerned with regard to one observed practice, where the authorities informed the researchers that police officers responsible for delivering decisions to applicants do so with the assistance of interpreters, thereby informing the applicants orally and free of charge. However, the research indicated that this was usually not the case, and that in fact, applicants had to rely on severely under-resourced NGOs to translate and explain the decision, when they could in fact reach such organisations.

The research suggests 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 is questionable, and difficult to verify, whether the requirements of Article 10 (1) (e) APD are met (namely, to notify the decision in a language the applicant can reasonably be expected to understand). 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. 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 at least one Member State.

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 appeal

The research found that a majority of Member States surveyed have transposed the requirement of Article 9 (2) APD, to provide information in writing on how to challenge a negative decision. However, questions remain about implementation and enjoyment of this right in practice in some states. 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. However, UNHCR's research revealed that in some Member States only brief generic information is provided that does not specify the relevant appellate body, the applicable time limits or the practical steps that should be taken; or where this practical information is set out, it is only provided in the language of the Member State without translation or the services of an interpreter. 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 in specific and practical terms.

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 noted positively that none of the Member States surveyed in this research appear to make exclusive reliance on this derogation.

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.

2.2 ARTICLE 12 - OPPORTUNITY FOR A PERSONAL INTERVIEW

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. The research found that, in practice, Member States may conduct the personal interview in the context of an admissibility procedure, an accelerated procedure, a border procedure or a regular procedure.

Some Member States conduct a preliminary interview. The principal purpose of preliminary interviews is the registration of the application and the gathering of information and evidence relating to the profile of the applicant. This preliminary interview is conducted by the determining authority in some, but not all, of the Member States surveyed. 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 many cases, these preliminary interviews already begin to broach the substance and grounds of the applicant's claim. Moreover, in some Member States, 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. This means that in practice, these preliminary interviews may have an important bearing on the examination of the application for international protection. Even if they are later followed by a more extensive personal interview, UNHCR considers that all of the APD's guarantees with respect to the conduct of interviews (see sections on Articles 13-14) should also apply at this preliminary stage.

With regard to subsequent applications, some Member States conduct an interview with the applicant in the framework of a preliminary examination. 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 also apply to any such interview.

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.[29] 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.

Who conducts the personal interview?

In the overwhelming majority of Member States surveyed, the determining authority conducts the personal interview. In most of these Member States, the personal interview is conducted by an employee of the determining authority. In general, this person is responsible for the examination of the application, including not only the conduct of the personal interview, but also obtaining and assessing relevant country of origin information and other evidence, and the drafting of the decision subject to approval.

Exceptionally, at the time of the research, one of these Member State provided for interviews to be conducted, not by an individual, but by a panel of several members. In another Member State, at the time of the research, interviews were conducted by individual police officers (however, at the time of writing, following the entry into

29 It is noted that the EC has proposed a change to the APD in this respect: see proposed recast article 13 (1) and (2): APD Recast Proposal 2009.

force of legislation in July 2009, this arrangement has been changed and interviews are now conducted by a three person committee composed of two police officers and a civil servant representing the Aliens and Immigration Directorate).

The conduct of an 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 applicants may find it intimidating to be interviewed by a panel, and this may run counter to the aim of 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 difficult to ensure a coherent line of questioning.

Exceptionally, in only one of the 12 Member States surveyed for this research, are some personal interviews conducted by designated competent authorities other than the determining authority. It is UNHCR's view that all personal interviews should be conducted by qualified and trained personnel of the determining authority.

UNHCR does not consider that the police is 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 lack trust in the police as a result of their experiences in their country of origin and 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 independent authority is assigned this responsibility and role.

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 i.e. the staff member/committee is 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

Article 12 (1) APD provides that *"Member States may also give the opportunity of a personal interview to each dependant adult referred to in Article 6 (3)" APD"*. This is a permissive clause.

UNHCR considers that the determining authority should meet with each dependant adult in private, to ensure they understand their rights to make an independent application for international protection if they believe they have independent grounds to qualify. In addition, if at any stage of the asylum procedure, any information provided by the applicant or a dependant suggests that an adult dependant may have independent grounds for international protection, this should be further examined in a separate personal interview.

The research revealed that, in law, there is an opportunity for adult dependants to have a personal interview in almost all of the Member States of focus. In fact, half of the states examined in this research do not permit an application to be made on behalf of a dependant adult. Therefore, each adult is treated as an applicant with the opportunity of a personal interview, subject to any relevant exceptions.

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.[30]

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

All the states surveyed in this research are party to the UN Convention on the Rights of the Child (CRC). Their legislation must therefore ensure that the best interests of the child are a primary consideration in all actions concerning the child. This is also re-stated in the Charter of Fundamental Rights of the European Union, and has been repeatedly endorsed and reiterated by UNHCR.[31] 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, level of maturity, the presence or absence of parents and family, the child's experiences, his/her physical and psychological well-being etc.[32]

The research 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 in some cases absent.

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

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

32 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.

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. [33]

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

The audit of case files and interviews included only a very small number involving family members. Given the size of the sample, the 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 verify whether the case involves any particular relevant circumstances relating to the dependants. In some cases it appeared that interviewers used the interview of family members primarily as a means to establish contradictions and inconsistencies in the principal applicant's claim.

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 useful or necessary to gather additional information, for example, where real or perceived inconsistencies, contradictions and improbabilities arise in the context of an applicant's personal interview, or following the gathering of COI or other evidence.

Of the Member States surveyed in this research, several have provisions which explicitly foresee the possibility of a second personal interview, and none have legislation precluding it. There was some evidence that the determining authorities in some Member States call applicants for a further interview(s), but this was not a common practice.

33 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.

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

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.

UNHCR regrets that Article 12 (2) APD sets out extended 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 considers 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.

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 raises 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 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 to omit the personal interview in cases where the applicant is considered to be from a safe country of origin or where it is considered that there is a safe third country. However, the provisions of the APD imply that applicants must be given the opportunity to submit any grounds for considering that the country is not a safe country in his/her particular circumstances. An 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.

National legislation of the Member States in this research is in general compatible with Article 12 (2) APD. However, one state applies a provision permitting the omission of an interview if the application is considered to be manifestly unfounded. As the relevant legislation does not define 'manifestly unfounded', and internal guidance suggests a broad scope, individual officials have a wide margin of discretion in deciding whether to omit a personal interview.

In another Member State, the only ground for omitting a personal interview is that there is no available interpreter. This legislative provision would appear to be incompatible with the APD requirements. While UNHCR was informed this is rarely applied in practice, it is suggested that, in practice, where no interpreter is available, other arrangements could be made, using telephone or video technology.

In an example of good practice, UNHCR noted that the legislation of several Member States does not permit

omission of the interview on grounds that the applicant has made irrelevant, inconsistent, contradictory, improbable, insufficient statements, or is seeking merely to delay or frustrate removal. One authority underlined to UNHCR in this connection the indispensable nature of the interview for the assessment of the reasons for the application and their relevance. Similarly, most of the states surveyed do not provide for omission of an interview in cases where the applicant originates from a country considered to be a "safe country of origin", as the interview is seen as essential to provide the applicant with an opportunity to rebut the presumption of safety.

The research confirmed that regardless of national legislative provisions, a number of Member States offer a personal interview to all first-time adult applicants. The research demonstrated that the omission of the personal interview may have denied the applicant the opportunity to provide detailed or further evidence to support the application. This means that important information of potential relevance to the assessment was not available to the decision-maker. Given the inevitable impact that this must have on the quality of decisions, UNHCR considers it is not in the interests of authorities nor of applicants to omit the personal interview.

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.[34]

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.

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

Under Article 12 (6) APD, when deciding on the application for asylum, Member States may take into account the fact that the applicant failed to appear for the personal interview, unless s/he had good reasons for such failure. The 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. States recorded in some decisions that the failure to appear showed a "lack of cooperation" or disinterest in the procedure which was not compatible with a genuine fear of persecution or serious harm. Views amongst practitioners in the participating states varied, with some considering non-appearance to be a relevant factor in assessing the claim, while others did not. In UNHCR's view, if failure to appear is taken

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

into account, it must also be acknowledged that 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.

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.

2.3. ARTICLE 13 - REQUIREMENTS FOR A PERSONAL INTERVIEW

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 in a comprehensive manner in a personal interview with a qualified interviewer and, where necessary, a qualified interpreter.[35] In order to be effective, the personal interview must be conducted in a manner and in conditions which are conducive to the most complete and accurate disclosure by the applicant of the reasons for the application for international protection.

Some Member States conduct a preliminary or screening interview. 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. 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. 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. With regard to subsequent (repeat) applications, some Member States conduct an interview or hearing with the applicant in the framework of a preliminary examination of the application. The purpose 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 purpose and significance of the preliminary interview, including any hearing in the context of the preliminary examination of subsequent applications, UNHCR believes that such interviews should be subject to all of the guarantees set out in Article 13 APD.

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

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"*. Only around half of the Member States in this research have transposed or reflected this provision in national law.

35 UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate, 1 September 2005. See section of this report on the right to the opportunity for a personal interview for dependants and unaccompanied and separated children.

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, and indeed of all procedures, is essential to creating an environment of security and trust for applicants. Article 13 (2) APD requires that interviews "take place under conditions which ensure appropriate confidentiality". This should be interpreted as applying both to the spaces and physical conditions in which personal interviews take place as well as to the persons who participate in or are present during the interview.

One quarter of the Member States in this research have transposed Article 13 (2) APD in national provisions. Half have legislation requiring non-disclosure of information, but this legislation does not address the physical conditions in which interviews take place. Observation of interviews revealed that six of the Member States surveyed ensured, in practice, that personal interviews were conducted under physical conditions which ensured confidentiality. In several others, however, interviews did not take place in privacy or without interruptions. In three states, UNHCR observed interviews which took place simultaneously in one space with numerous people unconnected to the interview being present, raising serious questions about confidentiality, among other things.

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.

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: competence of interviewers

Several surveyed Member States have transposed Article 13 (3) (a) APD, requiring 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 .. possible.."*. Several have done so partially, and others have not.

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

The recruitment and retention of highly qualified and skilled interviewers is essential for an effective procedure.

Most Member States 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. Some Member States require a university degree in any discipline, while others have no minimum educational requirement whatsoever.

Given the role of the interviewer and the requirement that interviewers be knowledgeable with regard to a highly specialized area of law and are competent to conduct interviews, UNHCR notes with concern that three Member States surveyed provide no compulsory training for interviewers upon recruitment.

Only five Member States surveyed provide compulsory and formal training for newly recruited interviewers. In these states, newly recruited interviewers only become independently operational after a period of initial formal training followed 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 as well. By further contrast, a number of determining authorities have not established formal training programmes for newly recruited interviewers and instead organize "training" on a more ad hoc basis, often relying on mentoring by supervisors and on the job observation. The content and quality of such training will clearly vary.

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 states appears insufficient to ensure that interviewers acquire the necessary skills and knowledge to fulfil this hugely challenging and complicated role. Good quality initial and continuous training is crucial to enhancing the quality of procedures.

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.

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 should be conducted in an age-appropriate manner taking into account the maturity and emotional development of the child and any other special needs. States therefore must ensure that the authorities conducting personal interviews have this specialized staffing capacity.

During UNHCR's research, only some determining authorities reported that they ensure that the personal interview of children is conducted by specially trained interviewers. In one state, good practice is exemplified by a unit of personnel specifically trained to deal with applications of unaccompanied children. It is of concern that in the other Member States in this research, UNHCR was informed that interviewers are not specifically trained to interview children. In order to ensure compliance with Article 13 (3) (a) and Article 17 (4) (a) APD, the determining authority must ensure that all interviews of children are conducted by personnel with specialist knowledge and training.

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 to identify and assist, at the earliest possible stage of the asylum procedure, applicants who are vulnerable or have special needs. Moreover, the determining authority should designate 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.

UNHCR was informed by the determining authorities in seven Member States that specific training is provided for interviewers on identifying and interviewing applicants who may be vulnerable or have special needs. However, in the remainder of states surveyed, there is no such compulsory training.

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.

Specialist knowledge of countries of origin and cultural factors

Article 13 (3) (a) APD requires Member States to ensure that the interviewer is sufficiently competent to take account of the applicant's cultural origin. 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, his/her demeanour and communication in the interview.

The research revealed that in some Member States, personnel of the determining authorities specialize in particular countries and regions of origin. As such, they receive specific training on and gain an in-depth knowledge of the relevant countries. UNHCR would encourage further use of this good practice.

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

The research identified good practice in five Member States which have a code of conduct, or charter of values or guidance manual for interviewers.

It is recommended that the EU develop a code of conduct by which interviewers in all Member States should abide.

Competence of interpreters

UNHCR supports the requirement in Article 13 (3) (b) APD that applicants receive the services of an interpreter, whenever necessary, during the personal interview, as well as the requirement that the interpreter must be able *"to ensure appropriate communication between the applicant and the person who conducts the interview"*. 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 a 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.

Seven Member States of focus in this research have transposed or reflected this Article in national law, while four have not. In one state, an interpreter is required for an interview to be conducted, but if no interpreter is available, the claim may be determined nevertheless; a practice which does not appear to fulfil the requirements of Article 10 (1) (b) APD.

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

Competent authorities need to have access to a sufficient number of interpreters covering the main languages spoken and understood by applicants for protection. According to the research, in some Member States, the determining authority employs interpreters, while others use independent service-providers or agencies. Several Member States face shortages of interpreters in particular languages or locations. Some states have addressed this challenge by using interpreters via video conference, which appears to have yielded positive results.

States should seek to ensure that they have sufficient qualified interpreters of both genders 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

36 The 6th GDISC conference on 28 October 2009 noted that the Interpreters' Pool Project should be transferred to the European Asylum Support Office.

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.[36]

Qualifications and training of interpreters

In two of the Member States surveyed, national legislation requires that interpreters have prior experience of interpreting or have received relevant training, whereas in a number of other Members States, the qualifications and skills required of interpreters are stipulated as part of the contract with the service provider or agency. However, in a number of Member States, it was reported that no specific professional qualifications are required for interpreters and UNHCR was concerned to note that in at least one Member State, there is no official procedure for the recruitment of interpreters, nor job description setting out minimum qualifications.

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.

Across the Member States in this research, the provision of training for interpreters is, at best, limited, and in many cases non-existent. Over half of the surveyed authorities do not organize any training for interpreters. However, a small number of Member States have taken steps to offer voluntary training sessions for interpreters. Exceptionally, one authority requires interpreters who attend personal interviews with unaccompanied children to receive the same training as the case managers. This represents a good practice which should be replicated.

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;
- 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

The research revealed widespread misconduct involving interpreters in personal interviews, as well as serious shortcomings in the ability of interviewers to work effectively with or manage the conduct of interpreters. UNHCR researchers witnessed cases in which interpreters omitted to interpret some of the applicants' statements; and in which interpreters extensively modified the statements of the applicants by paraphrazing statements made by the applicants. UNHCR also observed interpreters who added their own comments or personal observations, and who responded to questions for the applicant on behalf of the applicant. In a number of cases, the interpreter took over the role of the interviewer and asked the applicant questions, or explained aspects of the procedure. On one occasion, UNHCR witnessed an interpreter tell an applicant what reasons to state for the application when filling out the application form ('for a better life').

The determining authorities in only four Member States of focus in this research have a code of conduct for interpreters involved in procedures for international protection. Not surprisingly, most of the instances of misconduct by interpreters which were witnessed by UNHCR took place in Member States which do not have a code of conduct for interpreters.

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

It goes without saying that interpreters engaged to provide interpretation in personal interviews should possess competent language skills. Before commencing the personal interview, the interviewer should confirm that the applicant and the interpreter understand each other. 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. However, UNHCR did observe a few interviews in which the interpreters did not possess an adequate command of either the language of the Member State or that of the applicant.

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.

Preparing for the personal interview

In some Member States, the research found the existence of guidelines regarding the importance of the interviewer preparing well for the interview, to ensure its effectiveness. However, in some Member States, UNHCR noted that preparation is not emphasized, and insufficient information is made available to or gathered by the interviewer prior to the personal interview. Time constraints also hindered preparation in several states.

Interviewers must receive adequate information sufficiently in advance of the interview to enable them to conduct a thorough review of the case file and consult relevant country of origin information. UNHCR is concerned by evidence showing that a significant number of personal interviews are either poorly prepared or not prepared at all, and that interviewers in some determining authorities fail to familiarize themselves with information on the country of origin prior to the interview.

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.

Regarding preparation of the applicant, UNHCR has noted with approval that all Member States surveyed have developed an information brochure for applicants including information on the personal interview. Most indicated they provide this at the time of application, or at reception centres, although some problems in distribution were noted.

Most states provide written information in brochures available in between five and 19 languages; although one state, exceptionally and impressively, offers material in 58 languages. Nevertheless, there are clearly other inherent constraints with the use of written brochures to convey information about the asylum procedure, for example, due to applicants' varying literacy or educational levels. To ensure, as far as possible, that applicants understand the purpose and significance of the personal interview, its conduct, and their rights and obligations, it is, therefore, essential that Member States supplement written brochures with oral information as early as possible and, at least, before the interview.

At the interview itself, some authorities reported to UNHCR that the interviewer should inform the applicant of the purpose of the interview. However, based on UNHCR's observation of personal interviews and based on interviews with stakeholders, the research found that this was not always done. In some cases, lawyers were able to provide further information, but time and resource constraints often prevented such advice. In the course of the observation of interviews, there was evidence to suggest that some applicants did not understand the purpose of the interview.

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.

Interviewing children

Article 17 (1) (b) APD requires Member States to ensure that the appointed representative of an unaccompanied child has an opportunity to inform the child of the meaning and possible consequences of the personal interview and, where appropriate, how to prepare him/herself. While the scope of UNHCR's research did not permit detailed examination of this provision's application, several stakeholders highlighted problems.

In some Member States, delays in the appointment of a representative may preclude any sufficient opportunity for the representative to explain the purpose and conduct of the interview to the child. Moreover, the appointed representative may not always be appropriate for the role. UNHCR was also informed of concerns that unaccompanied children may not always be identified as children and, therefore, would not benefit from procedural guarantees in place for children.

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.

The environment, tone, language and conduct of the personal interview with children should be age-appropriate and sensitive to their special needs. Only a few of the Member States in this research have specific guidelines or tools for interviewing children. For instance, one determining authority has developed a cartoon to explain the asylum procedure to children. In four states, interviews were reported to be conducted by specially trained staff. One state makes audio and video recordings of all interviews with children, and another has developed specific question templates for children of different ages. In six Member States, however, apart from inviting a representative, no specific measures were taken for the personal interview of children.

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

The determining authorities of only a few Member States surveyed have guidance in place regarding the treatment of persons with special needs, including in interviews. UNHCR did observe some interviews where applicants with special needs were treated sensitively. In over half of the states surveyed, UNHCR was informed that there are no specific guidelines regarding the treatment of persons with special needs in the asylum procedure.

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.

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 through a male interpreter. This may especially be the case where these experiences relate to, for example, sexual violence.

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. This is so even for applications which raise the issue of sexual violence. In some Member States, the competent authorities formally ask applicants whether they have a preference with regard to the gender of the interviewer and interpreter at the personal interview, and seek to satisfy any such request as far as possible.

UNHCR observed a significant number of interviews in which the interviewer and/or interpreter were not gender-appropriate. This included cases where female applicants cited experience of sexual violence; as well as inappropriate questioning and tone used by a male interviewer regarding claims of sexual violence.

UNHCR recognises 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 to enable applicants to present the grounds for their claims comprehensively. This will vary, which makes it difficult to recommend an average duration of a personal interview. However, scheduling should be based on a realistic assessment of interviewing capacity, and should give interviewers and applicants reasonable time to prepare.

UNHCR's audit of interview records in case files and observation of interviews confirmed that the duration of personal interviews varies widely. However, in one state, the majority of interviews observed lasted five minutes each, and the longest by far was 35 minutes. This situation gives rise to serious concern.

Where interviews continue for extended periods, breaks are needed to ensure continued concentration and effectiveness. Based on UNHCR's observation of interviews, in some Member States, breaks were rarely offered by the interviewer or were *ad hoc*. It is not surprising, therefore, that either due to the duration of the interview (often without breaks) and/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.

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 with 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.

Interview environment

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.

EU-wide guidelines should set out the conditions in which personal interviews should be conducted.

Rapport between interviewer and applicant

Many factors contribute to creating an atmosphere of trust, including the tone adopted by the interviewer, body language and other forms of non-verbal communication. These should always remain neutral and professional throughout the personal interview. UNHCR observed that in some interviews, the conduct of the interviewer was not appropriate, including aggressive questioning; body language demonstrating disbelief in the applicant's story; interviewer or interpreter conducting other tasks during interview; and rare eye contact with the applicant.

Establishing the facts in the personal interview

In this research, personal interviews were observed and transcripts audited to assess whether the interviews were conducted in a way which allowed all the facts relevant to the criteria for international protection to emerge. A mixed picture surfaced.

Generally, UNHCR found that the interviews observed in one in three states surveyed were structured and conducted so as to allow facts relevant to the protection criteria to emerge. However, personal interviews observed elsewhere revealed notable shortcomings. UNHCR found that personal interviews were often more effective in Member States which conduct a separate interview to gather bio-data and information regarding the travel route. The personal interview could therefore focus principally on the reasons for applying for international protection and an assessment of credibility. In other Member States, UNHCR noted that 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. UNHCR was 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 facts which are relevant to qualification for international protection. 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 dominated by credibility assessment, and applicants appeared to be questioned or tested at length regarding their origin and/or travel route. In interviews observed in six Member States, interviewers did not refer to any country of origin information.

There was also evidence to suggest that interviewers do not always give applicants the opportunity to clarify apparent or perceived contradictions or inconsistencies which emerge during interviews.

The shortcomings observed in the personal interviews in one Member State were severe - the overwhelming majority of interviews observed lasted only 5 – 10 minutes and when the applicant claimed to have left his/her country of origin for fear of persecution, no follow-up questions were asked. As such, the applicants were not given the opportunity to present the grounds for their applications in a comprehensive manner.

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.

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. UNHCR found that monitoring of the conduct of personal interviews is, at best, limited in some Member States, and that there is no systematic monitoring of personal interviews in a number of Member States.

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.

Complaints

UNHCR's own 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.

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 emphasize 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.

2.4. ARTICLE 14 - STATUS OF THE REPORT OF THE PERSONAL INTERVIEW

In the examination of a claim for international protection, the oral testimony of the applicant is crucial. A failure to accurately and fully record the applicant's testimony may result in an erroneous decision. This is not in the interest 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 (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"*.

Most of the Member States surveyed have transposed Article 14 (1) APD and all produce a written record of the interview. However, some Member States produce a verbatim transcript of each personal interview, while others produce a summary report.

The APD requires that the written report contain *"at least the essential information regarding the application"* under Article 4 (2) of the Qualification Directive. UNHCR considers this should be interpreted as requiring Member States to transcribe in detail all the questions and statements of the interviewer and applicant regarding these essential elements, which include *inter alia* the applicant's age, background, nationality, identity and the reasons for applying for protection. UNHCR notes positively that seven of the Member States of focus in this research require that the interviewer make a *verbatim* written transcript of the personal interview, including everything said by the applicant and interviewer. However, doubts were raised by stakeholders and by UNHCR's audit of interview reports as to whether verbatim transcripts are actually written in practice in some cases.

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 report is only a summary of the oral evidence. This may result in relevant oral evidence not being recorded, and/or the meaning and accuracy of statements being unwittingly altered. In one state, observation of interviews and auditing of records revealed that the written summary report did not reflect the oral evidence given by the applicant at all. Written records of interviews examined in 171 case files contained precisely the same questions and answers, despite the fact that they related to applicants of different nationality, gender and social status; and the interviews had been conducted by nine different interviewers and the case files examined by six different examining officers.

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.[37]

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.

37 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.

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.

Audio and video-recording of personal interviews

Some authorities have begun to use audio and/or video recording of the personal interview for at least some interviews. One surveyed state supplements the written report with an audio-recording of all interviews. In UNHCR's view, audio-recording is an effective means to ensure that an accurate record of the personal interview is made, which does not place demands on the interviewer during the interview, and which can help to eliminate any questions regarding the accuracy of the written report.

UNHCR strongly encourages Member States to make an audio recording of the personal interview of each applicant.

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." Given the optional nature of this provision, it is therefore not surprising that UNHCR found that practice is divergent amongst the Member States of focus. Moreover, the Directive does not contain the guarantee that the applicant may check the accuracy of the report and rectify its content, as necessary, before approving 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.

UNHCR 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. In several states, applicants receive a written copy of the interview report, which the applicant is permitted to read (or which is read or translated to him/her), and corrections or amendments may be made to the report at that time, before it is approved.

UNHCR notes with concern that it has observed in some Member States that applicants are required to approve the written report without being given the opportunity to check the content of the report. In others, approval of the content of the report is not sought, and applicants do not have an opportunity to check and rectify the contents of the written report at all. This would appear at variance with Article 8 of the Charter of Fundamental Rights of the European Union.[38]

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.

38 European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), Article 8 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."

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.[39]

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

In most of the surveyed Member States that require approval of the contents of the interview report, 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.

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.[40]

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 welcomes 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 observed in a number of Member States demonstrates that this is and can be done.

UNHCR notes positively that five of the surveyed Member States ensure that the applicant is given a copy of the report of the interview at the conclusion of the interview or soon after. In some Member States, the applicant may access the report of the personal interview upon request at any point in the procedure. However, UNHCR regrets that in others, the applicant is only granted access to the report after a decision has been taken by the determining authority. And in three of these Member States, this means that an applicant for international protection does not have the content of the report of the personal interview read back to them him/her order to check its accuracy and does not receive a copy of the report before a decision is taken by the determining authority.

All applicants should receive a copy of the report of the personal interview before a decision is taken by the determining authority.[41]

39 The EC has proposed that recast Article 16 contain the following new requirements: 'Member States shall request the applicant's approval of 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.

40 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.

41 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.

2.5. ARTICLES 19-20 - WITHDRAWAL OR ABANDONMENT OF APPLICATIONS

Explicit withdrawal

The APD does not require Member States to include provisions in national law permitting applicants to withdraw their applications for international protection. Nevertheless, most of the Member States surveyed have national law in place which provides the possibility for the explicit withdrawal of an application. In some states, 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 that s/he is fully aware of the consequences of this action. In the other Member States surveyed, there is no standard form but the applicant is required to request withdrawal in writing.

For UNHCR, it is essential that the written record clearly conveys the applicant's intention to withdraw the application and testifies that the applicant is fully aware of the consequences. It is therefore problematic that two Member States do not consider it necessary to explain to an applicant who wishes to withdraw the application the consequences of his/her action, but rely on the fact that the applicant has the right to consult a legal adviser.

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.

Decision following explicit withdrawal

Article 19 APD provides for three options after explicit withdrawal of a claim:

(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.

The APD does not stipulate the legal consequences of a "decision to discontinue" or the "discontinuation of the examination without a decision". However, as identified in the research, if an applicant changes his/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 decision to reject 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 in need of international protection. A decision to reject the application should not be issued when there has been no examination of the merits of the application because the applicant has explicitly withdrawn the application, either before s/he has substantiated the application in accordance with Article 4 of the Qualification Directive,[42] 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.

In case of withdrawal, UNHCR recommends that Member States take a decision to discontinue the examination, or discontinue the examination of the application without taking a decision, and enter a corresponding notice in the applicant's file. The overwhelming majority of the Member States surveyed use one of these two options. However, one state takes a decision to reject the application.

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.[43]

Applicants who decide to pursue an application previously explicitly withdrawn

Where a decision has been taken to discontinue the examination, or the determining authority discontinued the examination without a decision, Article 19 APD does not instruct Member States on what should occur if the applicant who withdrew the application changes his/her mind, and requests the opportunity to pursue the original application.

However, it is implicit in Article 39 (1) (b) APD on the right to an effective remedy that the applicant should be able to request the re-opening of the examination of the application.[44] An alternative, set out in Article 32 (2) (a) APD, is that the applicant submits a subsequent application. This may be problematic. Firstly, the APD allows Member States which operate a specific procedure for the preliminary examination of subsequent applications 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. 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. A restrictive interpretation of "new elements or findings" could curtail access to a new procedure.

42 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.

43 This would also require an amendment of Article 28 (1) APD.

44 Article 39 (1) (b) APD 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." Article 20, on implicit withdrawal, contains a provision explicitly stating that Member States shall ensure that an applicant who reports again to the competent authority after a decision to discontinue is entitled to request that his/her case be re-opened, unless the request is dealt with as a subsequent application. No such provision is contained in Article 19 on explicit withdrawal.

UNHCR notes that an applicant may explicitly withdraw an application for international protection for reasons unrelated to his/her protection needs, for instance 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 request to pursue the original application. UNHCR considers that an applicant who explicitly withdraws an application, before proceeding to substantiate it and without the determining authority assessing relevant facts and circumstances, 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.

In some states, a request to re-open an examination after an explicit withdrawal will be treated as a subsequent application within the terms of Article 32. In such cases, UNHCR considers positive the practice in several surveyed Member States, which impose no requirement that the applicant must submit a new application raising new elements or findings. However, UNHCR notes that in five of the states surveyed, following an explicit withdrawal, if an applicant changes his/her mind, and decides to pursue the original application, s/he must submit a subsequent application raising new elements or findings.

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

Article 20 defines the circumstances in which the determining authority may assume, in the absence of an explicit statement by the applicant, that s/he no longer wishes to proceed with the examination of the application for international protection.

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.

It must 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. The provisions on implicit withdrawal should not be used to deny claimants, who wish to reactivate their applications, a complete and appropriate examination of their applications. Member States remain bound by the international legal obligation not to remove any person contrary to the principle of *non-refoulement*.

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. UNHCR has already stated its view that when an asy-

lum 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.[45]

UNHCR's research has found that the majority of the Member States surveyed have legislation, pending draft legislation, or administrative provisions which set out the circumstances in which an application will be considered to be implicitly withdrawn or abandoned, and which stipulates the consequences and actions to be taken by the determining authority. Of the two Member States which have not transposed the provision, one applies the concept in practice while in the others, applications can only be withdrawn explicitly.

Grounds for implicit withdrawal

Article 20 (1) 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. They permit Member States to assume that an applicant has implicitly withdrawn or abandoned his/her application, in particular, when the applicant; (1) has failed to respond to requests to provide information essential to his/her application (unless the applicant demonstrates within reasonable time that the failure to appear was due to circumstances beyond his/her control); (2) has not appeared for a personal interview (unless s/he demonstrates in a reasonable time that this failure to appear was due to circumstances beyond his or her control); (3) 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; or (4) has failed, within a reasonable time, to comply with reporting duties or related obligations.

Based on these four grounds in Article 20 (1), the research showed that the following circumstances are considered, by at least some of the determining authorities, to indicate implicit withdrawal or abandonment: 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 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; refusal to co-operate in clarifying circumstances pertaining to the application, including age assessment examinations ; and failure to notify the competent authority of a change of address.

Additional grounds to consider an application as implicitly withdrawn were also observed in some states surveyed, which are not explicitly stated in the APD. These include that the applicant made an unauthorized entry or an attempt to enter the territory of another country during the course of the proceedings; s/he received another form of protection granting the same rights; the applicant is authorized to remain for unlimited time on other grounds; the applicant travelled to his/her country of origin during the asylum procedure; and others. A table and lists setting out the grounds on which the surveyed Member States may treat a claim as implicitly withdrawn is set out in Part 2, section 7, on the CD-ROM accompanying this report.

As such, UNHCR has found that while legislation and practice are very divergent amongst the states surveyed, the concept is broadly used.

45 UNHCR, Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation", 15 April 2008.

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.

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.[46]

Reasonable time limits and reasonable cause

Article 20 APD 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. However, what constitutes a "reasonable time" is left to the discretion of authorities, as Article 20 (1) simply provides that "Member States may lay down time limits or guidelines". UNHCR is concerned that the lack of guidance creates legal uncertainty for the determining authority, as well as applicants, regarding whether circumstances have given reasonable cause to consider an application implicitly withdrawn.

The research found that some Member States do provide time limits and/or guidelines, which vary from one Member State to another, also 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 one state, 2.5 months in another, and after 30 and five days respectively in others. Vast divergences 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. It is not always acknowledged that failure to make contact with an applicant may be due to shortcomings in the authority's own administrative and communication systems or procedures for notifying claimants of interview dates or other procedural steps.

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.

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.

46 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.

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 an entitlement to refugee status.

UNHCR has expressed its concern about the provision in Article 20 APD permitting Member States to reject an application because of non-compliance with procedural obligations. This is permitted "on the basis that the applicant has not established an entitlement to refugee status". In UNHCR's view, an applicant for international protection may fail to comply with reporting or other requirements for a variety of reasons, which do not necessarily indicate a lack of protection needs. 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 it is determined that the applicant is not a refugee or does not qualify for subsidiary protection status.

All but two of the Member States surveyed have national law stating the action to be taken if an application is considered to be implicitly withdrawn. Several tables listing the decisions which may be taken following failure to comply with different procedural requirements are set out in Part 2, section 7, on the CD-ROM accompanying this report.

UNHCR notes with concern that some determining authorities take a decision based on the available evidence, even if the applicant has not, for example, attended the personal interview and therefore has not submitted evidence essential to assessment of the application. 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. However, failure to comply with procedural obligations is not necessarily indicative of a lack of credibility, and an applicant who is a refugee or qualifies for subsidiary protection may fail to comply with procedural steps for a variety of reasons.

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 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 to reject the application will depend on the consequences, should the applicant express a wish to pursue the application. An applicant should have the possibility to pursue the original application, with the assurance that it will be examined in substance and that

the applicant will not be removed pending such examination.

UNHCR's research found that practice in this respect varies. Some noteworthy good practices emerged. Some Member States may take a decision to "discontinue the examination" in certain circumstances, and if the applicant then expresses the wish to pursue the application, the determining authority either re-opens the original application, or invites the applicant to submit a new application which may be on the same grounds, with no need for new elements or findings. No time limit applies. In this way, the determining authority ensures that the decision either to grant international protection or to reject the application is based on an assessment of all the facts and evidence submitted and available. Three states require an applicant, whose application was previously discontinued, and who wishes to pursue the original application, to submit a subsequent application, citing new elements.

In some Member States, notwithstanding a decision to reject the previous application following implicit withdrawal, an applicant, who did not substantiate the previous application in accordance with Article 4 of the Qualification Directive and expresses the wish to pursue the previous application, may submit a new application without the need to state new grounds. However, in other Member States, a request to pursue a previous application, following a decision to reject it, is treated as a subsequent application. In those states, it is subject to national interpretation of the requirement to submit new elements or findings.

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.

2.6. ARTICLE 22 - COLLECTION OF INFORMATION ON INDIVIDUAL CASES

Member States must observe and comply with general international legal standards on data protection, including EU law on the processing of personal data, in the conduct of their asylum procedures. Confidentiality in asylum procedures is critically important, as unauthorized disclosure of information regarding an individual application for international protection - or the fact that an application has been made - to third parties in the country of origin or elsewhere could endanger family members or associates of the applicant; endanger the applicant in the event of return to the country of origin; endanger him/her in the host State; or result in the applicant becoming a refugee *sur place*.

Article 22 APD provides that Member States shall not "directly" disclose information about the applicant, nor seek information, in a way that could result in the alleged actor of persecution being informed "directly" of the application.

The efficacy of this provision as a safeguard appears undermined by the use of the word "directly". The research showed that most of the Member States surveyed have transposed Article 22, and have offered a higher standard of protection in most cases, by omitting the word "directly" from their national law.

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".[47]

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. It is therefore of the utmost importance that the applicant be informed, at the very outset of the procedure, and in a language s/he understands, that the Member State will not disclose information in this way.

In several states, UNHCR observed that the applicant is informed of the confidentiality of proceedings in writing or verbally at the outset of interviews.

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

In addition to general COI, 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. This may be through case-specific queries to their embassies or consular services in countries of origin, and/or through fact-finding missions. 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. 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.

Good practice was observed in one Member State's information-gathering procedures, under which researchers are required never to reveal the names of applicants, using only descriptions of the person concerned. Case workers are trained on how to pose questions to researchers to protect confidentiality.

In most states surveyed, the research revealed no concerns about the gathering of information. However, in one state, the fact that queries could indirectly lead to information reaching the authorities of the country of origin raised a potential concern. Questions were also posed by stakeholders as to whether sufficient safeguards were in place to ensure that any case-related research during fact-finding missions is conducted so as to ensure complete confidentiality for applicants. And in one case file audited, a Member State authority other than the determining authority had indirectly disclosed information regarding the application to the state authorities of the country of origin, with the consequence that the Member State authorities decided to recognize the applicant as a refugee.

47 Proposed recast Article 26(a) would address this need: APD Recast Proposal 2009.

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 representatives of the country of origin in Member States

During the research, UNHCR was informed that some stakeholders have concerns that, particularly when asylum applicants are held in detention, steps might be taken towards removal (of the applicants or others not in need of protection housed in the same centres), which could involve contact with consular authorities of the countries of origin. This was reported to have occurred while the examination of applications for international protection was ongoing.

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 appeal bodies are made anonymous by courts, but this is not assured in all states.

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.

2.7. ARTICLE 23 – PRIORITIZED AND ACCELERATED PROCEDURES

Article 23 (3) APD permits Member States to prioritize or accelerate any examination.

In UNHCR's view, with regard to the acceleration of examinations, the first step towards reducing the length of the asylum procedure is to ensure the quality of the first instance procedure. UNHCR strongly believes that Member States should invest in the first instance examination in order to produce reliable, good quality decisions. This requires that the first instance examination procedure is implemented by sufficient numbers of trained specialist personnel, supported by qualified interpreters and good quality, up-to-date country of origin information; and that the procedure encompasses all necessary procedural safeguards. Sufficient time must also be allowed to enable authorities to fulfil their obligations and examine all relevant elements needed to reach a correct decision. Applicants also require adequate time to exercise their rights and fulfil their obligations in an effective manner.

UNHCR recognizes and supports the need for efficient asylum procedures, 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.

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 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. Moreover, excessively short time frames for the examination of an application may nullify and render illusory 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 their applications.

The research 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. 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 applying, 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 a complete examination by the determining authority, extremely difficult. In others, the average duration of and safeguards applicable to the accelerated examination are comparable to the regular procedures of other Member States.

In some Member States surveyed, the acceleration of the examination appeared to be the norm, or to risk becoming the norm rather than the exception.

At the time of the research, all the surveyed Member States prioritized and/or accelerated the examination of some applications in certain circumstances. In all but one of the Member States surveyed, a decision to prioritize and/or accelerate the examination of an application is taken by the determining authority.

UNHCR recommends that only the determining authority decide whether to prioritise and/or accelerate the examination of an application.

Procedural standards and safeguards in accelerated procedures

In all the Member States surveyed, national legislation complies with the basic principles and guarantees of Chapter II of the APD, as required by Article 23 (3) and (4). However, UNHCR is concerned, firstly, 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, it is critical that the speed with which the procedure is conducted does not nullify or adversely hinder the exercise of rights and guarantees.

In terms of legislative provisions, UNHCR notes positively that in several Member States surveyed, the same procedural guarantees apply in law to all first-time applications, including those examined in accelerated procedures. In particular, UNHCR notes with approval that national legislation in six surveyed states provides that applicants, whose applications are examined in an accelerated manner, are given the opportunity of a personal interview. In other states, however, national law permits wide scope for the omission of personal interviews in accelerated procedures. It is welcome that in some Member States this is not widely implemented in practice.

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.

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.[48] 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.

The overwhelming majority of the Member States surveyed have time limits within which the accelerated examination or procedures should be conducted. However, there are great variations in their extent and consequences. Time limits run from different points in time, depending on the Member State, and sometimes depending on the procedure. Time limits are also varyingly expressed in procedural hours, working days or calendar days. In some Member States, there is one overall time limit for the conduct of the accelerated examination. In others, in addition to the overall time limit, there are shorter limits for specific procedural steps. In some states,

48 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": Unibet vs Justitiekanslern, 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, C-33/76, European Union: European Court of Justice, 16 December 1976, paragraph 5.

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 timeframes of the regular procedure. Moreover, in some Member States, if the time limit is exceeded when the applicant is detained at the border, s/he is allowed to enter the territory. Exceeding the time limit may in some states also mean that a certain decision may no longer be issued; for example, the application cannot be rejected as manifestly unfounded. By contrast, in other Member States, the time limits for the determining authority are merely indicative and not binding.

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 from three calendar months to 2 days.

Some time-frames for the examination of applications are extremely short. In three states, accelerated procedures applied to applicants at the airport or in detention are two or three days respectively. One state has a time-frame of 48 procedural hours (equating to approximately five working days) for an accelerated procedure. In other states, the accelerated procedure can last for between four and ten days.

UNHCR recognizes that with regard to applicants who are detained, it is not in their interest that the examination of the application is prolonged if this extends the duration of their detention. However, such applicants also must have an effective opportunity to pursue their claims, including through sufficient time to seek legal advice, gather information and prepare for interviews.

The following adverse factors resulting from extremely short time frames in accelerated procedures were identified in the course of the research:

- less time to submit an application form to the determining authority;
- less time to prepare for the interview;
- less time within which to contact and consult a legal adviser;
- more difficulty in conducting a gender-appropriate interview;
- less time for the applicant to gather and submit additional evidence;
- difficulty in ensuring an effective opportunity to disclose traumatic experiences;
- less time for the determining authority to gather and assess the evidence; and
- less time for the determining authority to draft the decision.

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.

Impact of detention on procedural guarantees in accelerated procedures

Applicants' enjoyment of the procedural guarantees and rights conferred by the APD and national legislation may be further impeded when the applicant is detained. Interviewees highlighted in particular that access to NGOs and legal advisers may be severely curtailed, and that detainees experience severe constraints on their ability to gather elements in support of their application.

UNHCR did, however, identify a good practice in one Member State, whereby social services at an airport detention centre, in cooperation with the local bureau for legal assistance, has in place arrangements for the prompt appointment of pro bono legal advisers. This avoids the extensive delays observed in other Member States in provision of legal advice to detainees in arrangements.

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.

Right of appeal following a decision taken in the accelerated procedure

The research found that under national legislation of the Member States of focus, following negative decisions taken in the accelerated procedure, appellants may not enjoy the same safeguards or procedural standards on appeal as other appellants. They may also have significantly shorter timeframes for lodging their appeals. UNHCR's research 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.

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 may be prioritized or accelerated. Any examination may be prioritized or accelerated according to Article 23 (3) APD. In the light of the wording of Article 23 (3) APD, the expansive list of 16 optional grounds for prioritization or acceleration set out in Article 23 (4) APD appears only illustrative. Some or most of these grounds are applied in a number of the states surveyed. A table listing the various grounds from Article 23(4) on which Member States, under national law, may accelerate examination of a claim is set out in Part 2, section 9, on the CD-ROM accompanying this report.

Rather than utilizing the Article 23 (4) grounds, two states take a different approach in law and practice, applying a single criterion under which any claim may be accelerated, if with regards to one Member State (1) it is deemed possible to take a decision in the requisite time limit; and with regard to the other Member State (2) it can be subject of a "quick decision".

In some Member States, some of the grounds are more broadly defined in national legislation than in the APD. For example, in one Member State, amongst other grounds, the examination of an application may be accelerated if it is considered to "constitute an abuse" of the asylum procedure. The term is not defined in national law.

As regards the permitted grounds for acceleration stated explicitly under Article 23 (4), the research revealed that Member States take widely varying, and often extremely broad, approaches. For example, it was noted that one state determined that an applicant had "failed without reasonable cause to make his/her application earlier, having had the opportunity to do so" when s/he applied one day after arrival. Applications were also rejected in the accelerated procedure on this ground, where it was considered that an applicant could have applied for protection in a third country. UNHCR also reviewed a number of case files in which the application had been examined in an accelerated manner on the grounds that it was "manifestly unfounded" - and concluded that this was evidently not the case, based on the evidence provided.

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. [49] 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 exclusion clauses

The research found that applications raising potential exclusion questions are not exempt from accelerated examination by law in several Member States. Indeed, the law in one state establishes that this is a ground for the accelerated examination of an application. However, in some Member States, determining authorities stated that in practice, the prescribed time limits for the examination of an application would be exceeded, if all relevant questions relating to excludability were to be examined thoroughly.

UNHCR considers it is essential that rigorous procedural safeguards be built into the procedures for dealing with any claim that raises exclusion issues.

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

Several of the states surveyed have legislative provisions for the determination of claims which are well-founded in prioritized or accelerated procedures, as permitted under Article 23 (3).

49 In this regard, it is noted that the European Commission, in its proposal for a recast of the APD, has proposed deletion of 11 of the 16 grounds for acceleration under the present Article 23(4): see proposed recast Article 27 (6): APD Recast Proposal 2009.

UNHCR welcomes provision for prioritised 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

The prioritization of applications by persons with special needs may ensure that their applications 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 some applicants, provided that the examination includes all of the necessary guarantees to ensure 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.

Article 23 (3) APD is 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 only a minority of the states surveyed. However, some authorities informed UNHCR that, even with no legal provision, some applications may be prioritized in practice, in an examination with no reduced safeguards. This occurs, for example, in relation to applications by separated children in some states; and in others it is the case where "humanitarian considerations" apply.

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 unaccompanied children. UNHCR believes that it should be possible for such particularly vulnerable persons to have their applications exempted from accelerated procedures where this is appropriate. 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.

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.

2.8. ARTICLE 26 – FIRST COUNTRY OF ASYLUM

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. 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 is not a Member State is considered as a first country of asylum for the applicant pursuant to Article 26. In other words, the Member State may consider such applications as inadmissible.

A country can only be considered to be a first country of asylum for a particular applicant if, according to Article 26 (a) the applicant either was recognized in that country as a refugee and can still avail him/herself of that protection; or according to Article 26 (b) "otherwise enjoys sufficient protection in that country", including protection from *refoulement*. Both criteria are subject to the proviso that the designated first country of asylum will re-admit the applicant.

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 regard-

ing Article 26 (b) 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. 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".[50] 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 neither the capacity to conduct status determination nor to provide effective protection. Generally, resettlement of persons recognized as being in need of international protection is required. The return of persons in need of international protection to such countries should therefore not be envisaged.

Although all but two of the Member States surveyed have transposed Article 26 in national law, half of those states do not apply the concept in practice. The others, according to the research, do so only rarely.

Some Member States in this study have not transposed or do not reflect elements of the Article 26 APD criteria in their legislation. Three have set a higher standard of protection, by reflecting only Article 26 (a), and not the alternative possibility contained in Article 26 (b). However, two Member States have apparently lowered the standard, by omitting the requirement that the applicant "can still avail him/herself of that [refugee] protection" as required by Article 26 (a). In at least one state, the requirement that the applicant will be readmitted to the country is not reflected in the law. Instead, the legislation demands "clear evidence of admissibility" - but specifies that there is no obligation to contact the other country's authorities before removal. Given that the APD sets minimum standards, including in its permissive provisions, such transposition may not be compatible with the APD.

The research found that a definition of the term "sufficient protection" appears in the national law of only one of the surveyed Member States. That definition includes some, but not all, of the indicia for a safe third country under Article 27 APD (which Member States may, but are not bound to, take into account in applying Article 26). This underlines the lack of clarity and certainty about how "sufficient protection" - and, accordingly, Article 26 – should be interpreted.

The wording "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."

By law, several Member States in this research may apply the notion of first country of asylum as a ground for inadmissibility. However, unlike the APD provision on the safe third country concept which is also a permissible ground for inadmissibility, Article 26 does not include an explicit provision requiring the applicant to have the opportunity to challenge the application of the first country of asylum concept. In the absence of any such requirement in the APD, it is not clear that applicants have an opportunity to rebut the presumption of safety in their cases, in law or practice.

50 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.

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

In one Member State, law and practice confirm that the 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 states, it is difficult to ascertain which criteria the surveyed Member States apply or would apply to ensure that applicants will indeed be readmitted before removing them or attempting to remove them to the first country of asylum. This is due in part to the fact that this concept has not been extensively used in practice, but also to an absence of details in national law and administrative provisions regarding the implementation of this provision. According to some surveyed states, their authorities try to contact the authorities of the first country of asylum, directly or otherwise, although it is not clear what the consequences are, if contact does not result in agreement to readmit.

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.

2.9. ARTICLE 27 – SAFE THIRD COUNTRY

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. Article 27 APD is a permissive provision, allowing but not obliging Member States to apply the concept.

Given the accession of 12 new EU Member States since 2004 and the inclusion of three other non-EU states in the Dublin II Regulation regime, the safe third country notion appears far less relevant than in the past for EU Member States. Indeed, of the 12 Member States surveyed for this research, only two reportedly apply the safe third country concept in law and in practice. In one of these Member States, administrative instructions refer to the USA and Canada as examples of countries to which transfer of applicants has taken place under this concept. With regards to the other Member State, UNHCR was informed that the concept is applied to some Latin American and African states.

Half of the states surveyed reflect the concept in national law, but reported not to use the concept and/or were not observed by UNHCR to apply it in practice. In the remainder, the concept of safe third country under the APD is not reflected in national legislation, nor is it applied in practice. Moreover, in a brief survey conducted outside the scope of this research, UNHCR ascertained that the concept is very rarely applied in the 15 other Member States not of focus in this research. Considering that Member States do not apply the safe third country concept extensively in practice, Article 27 APD appears largely superfluous.

A map showing the practice of the surveyed states with respect to the application of Article 27 appears in Part 2, section 12, on the CD-ROM accompanying this report.

Criteria for designating safe third countries

For the safe third country concept to be applied, Article 27 (1) APD sets out four criteria regarding the situation in the third country which must be fulfilled:

(a) there must not be persecution in terms of the 1951 Convention;
(b) the third country respects the principle of non-refoulement;
(c) the third country respects prohibition of removal on grounds stated in Article 3 ECHR; and
(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the 1951 Convention.

Of the eight Member States which have national legislation on the safe third country concept, only three have criteria which correspond to those stated above. In the others, the criteria do not correspond precisely. Some refer to different international instruments, use different wording, or omit reference to one criterion, with the result that the concept may be more or less strictly applied in different states compared to Article 27 (1) APD.

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; and (b) the possibility to request a complementary form of protection against a risk of serious harm.[51]

The methodology for applying the safe third country concept

Article 27 (2) (b) APD requires that the application of the third country concept is subject to the establishment of rules – in national legislation - on the methodology by which competent authorities satisfy themselves that the safe third country concept may be applied to a particular country, or to 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."* [Emphasis added]. Although Article 27 (2) (b) 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.

The question of whether a particular third country is safe for the purpose of sending an asylum seeker to a third country 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.

As mentioned, only two Member States, of those surveyed, apply the concept in practice and it appears that this is done on a case-by-case consideration of the safety of the country for the particular applicant. Statistics on the countries considered safe under this concept in 2008 were not available. In one of these Member States, however, there are no national legislative provisions stipulating this methodology. Some, but not all, of the surveyed Member States which have the concept in national law have, or have provision for, nationally designated

51 This is suggested in proposed recast Article 32 (1): APD Recast Proposal 2009.

lists of safe third countries. Of these, only two Member States have actually drawn up a list of safe third countries, but neither was applied in practice at the time of this research. In one Member State, there is just one country on the list – the Republic of Croatia. In the other Member State, the list is not public but was reported not to have been applied since 2006. UNHCR found no evidence in its audit of case files of the application of the concept.

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 determining authorities to obtain and provide to decision-makers *"precise up-to-date information sources"* on countries of origin and transit.

UNHCR's review of the legislation and administrative provisions of the eight Member States which have reflected Article 27 in domestic law found that only a few have a legal provision requiring third country information to be consulted in the assessment of the applicability of the concept. Given the apparent scarce application of the safe third country concept, UNHCR was not able to verify practice with regards to the use of third country information. However, with regard to two of the three Member States of focus in this research that apply the concept, there appears to be no explicit obligation in national law or administrative provisions to obtain and consult third country information in considering the application of the concept. UNHCR notes positively that in one Member State that applies the concept, personnel are required by regulation to consult relevant third country information before applying the concept.

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 meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit through a particular country is often the result of fortuitous circumstances, and does not necessarily imply the existence of any meaningful link. 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.

The domestic legislation of only one state surveyed has elaborated criteria relating to the nature of the "connection" and reasonableness. Other Member States require previous residence, stay or presence, or "an opportunity to make contact with the authorities in order to seek protection."

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

Designation of a third country as a safe third country raises a rebuttable presumption. Therefore, the applicant 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, particularly in view of the challenges faced by applicants in accessing an effective remedy in some Member States. These are elaborated in detail in Part 2, section 16, on the CD-ROM accompanying this report.

In some of the states surveyed, national law provides explicitly for an opportunity to rebut the presumption of safety, or there is a strong implication that this is required.

With respect to practice, however, concerns arise. In one Member State, where the concept is applied, applicants are not informed prior to the issue of the decision that the concept is to be applied, and in another Member State, where the concept is in use, stakeholders considered that applicants do not have an effective opportunity to challenge the application of the concept. Some interviewers in other Member States indicated that, if the concept were applied in practice, they would not inform the applicant prior to the decision that they considered a certain country a safe third country for the applicant. This dramatically limits the applicant's possibilities in practice to rebut the presumption at an early stage, or at all. Moreover, of the Member States surveyed which have national legislative provisions reflecting Article 27, three also have national legislation permitting the omission of the personal interview in safe third country cases.

Only one Member State surveyed ensured that, in law and in practice, the applicant has an effective opportunity to challenge the application of the safe third country concept.

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 coun-

try. S/he must have a reasonable time to challenge the presumption of safety of that country in his/her particular circumstances.

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.[52]

Grounds to challenge the application of the safe third country concept

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. In two of the countries of focus in this research, the applicant may rebut the presumption of safety on any grounds.

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.[53]

In the Member States of focus in this research, there are no specific legal provisions exempting unaccompanied children from the application of the safe third country concept. However, two Member States have general legislative provisions which stipulate that the "best interests of the child" is a primary consideration, and in some Member States surveyed, the applications of separated children are automatically exempted from accelerated procedures. In other states, however, by law, children may be subject to the application of safe third country rules.

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.

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. According to national legislation, some states may designate such claims as one or both. 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.

52 This is suggested in the proposed recast Article 13(2), read together with recast Article 27(6): APD Recast Proposal 2009.
53 If adopted, the proposed recast Article 32(2) would address this concern: APD Recast Proposal 2009.

Where applications to which the safe third country concept is applied are to be declared inadmissible, the decision should indicate clearly that the application was not examined in substance and should be examined by the third country.

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.

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. 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.

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.

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.

2.10. ARTICLE 30 – SAFE COUNTRY OF ORIGIN

The safe country of origin concept is a presumption that certain countries may be designated as generally safe for their nationals insofar as, according to Annex II of the APD, *"it can be shown that there is generally and consistently no persecution, 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"*. The presumption, therefore, is that an application for international protection by a national of such a country 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 carefully circumscribed situations. It is critical that each application is examined fully on its merits in accordance with procedural safeguards; each applicant has an effec-

tive opportunity to rebut the presumption of safety of the country of origin in his/her individual circumstances; the burden of proof on the applicant is not increased, and applicants have the right to an effective remedy against a negative decision.

UNHCR recognizes the inherent difficulties in making a general assessment of safety, in light of the volatility of situations in many countries and the fact that an assessment may be susceptible to political, economic and foreign policy considerations. At the time of UNHCR's research, Article 29 APD, which foresees a common EU list of safe countries of origin, was not in effect, following a 2008 ECJ judgment which annulled the procedure for composing the list.[54] Thus the only mode for designation of third countries as safe countries of origin under the APD was that provided for in Article 30. UNHCR's research thus focused on Article 30.

Article 30 APD is an optional provision, permitting the national designation of third countries as safe countries of origin, or the designation of part of a country as safe. It sets out three conditions which must be met for any national designation: (1) Member States must have in force national legislation which permits the designation of third countries as safe countries of origin; (2) designation must be in compliance with the criteria set out in Article 30 and Annex II of the APD; and (3) Member States must notify the Commission of the countries that are designated as safe countries of origin.

Under Article 31 (1) and Recitals 17 and 21 APD, it is clear that an application by an asylum seeker from a country designated as a safe country of origin by national law or administrative act must nevertheless be subject to an individual and complete examination in which the presumption of safety may be rebutted. Article 31 (1) provides that a country may be considered safe for a particular applicant only if, among other things, s/he has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances". This implies that applicants have a right to an effective opportunity to submit such "serious grounds". It is noteworthy in this connection that Article 12 (2) (c) APD permits states to omit a personal interview in such cases – although such an interview would appear to provide an opportunity for applicants to present, and authorities to consider, any relevant "counter-indications" (as foreseen in Recital 17) for the application of the safe country of origin concept.

National designation of third countries as safe countries of origin

The use of the term "national designation," and the requirement to notify the Commission of countries which have been designated under Article 30, suggests a formal act of designation, which takes place before the concept is applied in the examination of any particular individual application. However, UNHCR's research found that there are a number of Member States with national legislation in place permitting 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 required by Article 30 APD.

Moreover, by derogation from Article 30 (1), the APD allows Member States to retain legislation which was 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. This means that states, which adopted legislation regarding the safe country of origin concept before December 2005, remain free to use criteria which do not meet the minimum standards of Annex II.

54 European Parliament v. Council of the European Union, C-133/06, European Union: European Court of Justice, 6 May 2008.

In addition, again by derogation from Article 30 (1) APD, Member States 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. Under Article 30 (3), this designation is permitted based on a lower threshold than the Annex II criteria.

UNHCR notes that, in principle, a country cannot be considered "safe" if it is so only in part of its territory. Furthermore, designating a safe part of a country does not necessarily mean that such an area could represent a relevant or reasonable internal flight alternative[55]. The complex questions which arise in the application of the internal flight alternative require careful examination, and should not be dealt with in an accelerated procedure.

UNHCR regrets that the APD permits Member States to derogate from Article 30 (1) in these ways, 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.

The research revealed that among the Member States surveyed that apply the safe country of origin concept, there is considerable divergence regarding the countries which have been assessed to be safe countries of origin.

Six of the 12 Member States in this research have legislation permitting the national designation of third countries as safe countries of origin. Of these six, only three actually have operational national lists of designated safe countries of origin. In addition, four Member States surveyed do not have legislation providing for national designation of safe countries of origin, but do have legislation which permits use of the safe country of origin concept in the examination of individual applications. In one of these states, the determining authority has nevertheless drawn up a list of safe countries of origin last updated in May 2007. This list is not public. Reportedly, there have been no applications by nationals of the listed countries since 1 December 2007.

Of the ten states with legislation permitting use of the safe country of origin concept – whether through national designation or in individual claim assessment – six have retained legislation that existed before December 2005, which allows them to continue to designate or apply it to countries which do not meet the Annex II APD minimum criteria.

Only two surveyed states permit designation of part of a country as safe, or of part or all of a country as safe for a specified group of persons.

Of the ten Member states with legislation permitting use of the safe country of origin concept, only seven were found to apply the concept in practice, although stakeholders in one of these Member States reported that it is rarely applied at all in practice. A further two Member States neither have national legislation reflecting the concept, nor implement the concept in practice. A reference map showing the law and application of the safe country of origin concept among the surveyed Member States appears in Part 2, section 13, on the CD-ROM accompanying this report.

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.

55 The terminology used in Article 8 of the Qualification Directive is "internal protection" alternativ.

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.[56]

Applicable criteria for designating countries as safe countries of origin

Designation under Article 30 (1) is subject to Annex II APD, which provides: *"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 [the 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."*

Article II obliges Member States to take account 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 [ECHR, ICCPR and CAT], in particular the rights from which derogation cannot be made under Article 15 (2) [ECHR]; (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 retain alternative designation criteria under national legislation (using laws in force on 1 December 2005), they must nonetheless ensure that persons in the country of origin concerned are generally neither subject to: (a) persecution as defined in the Qualification Directive; nor (b) torture or inhuman or degrading treatment or punishment.

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 regretted in the context of efforts to develop a Common European Asylum System. 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.

Some states appear to fall short of the requirements of Annex II, omitting or modifying part of the wording in a way which lowers the standards. Of concern is the failure of two of the surveyed states 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"*. One state requires the absence of "political persecution" (apparently not encompassing that perpetrated by non-state agents), rather than persecution in the sense of the Qualification Directive and 1951 Convention. In a further state, mere ratification (and not observance) of the 1951 Convention is required.

Among the six states surveyed which retain pre-December 2005 national legislation, one exhibits good practice by maintaining criteria, which in part go beyond the standards of Annex II – requiring that a country have an independent and impartial judicial system, and requiring an examination of *"whether serious violations of human rights have taken place."*

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.[57]

56 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.

57 This is suggested in proposed recast Article 33: APD Recast Proposal 2009

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

The research revealed significant differences in the type of information used to designate a country as safe. Furthermore, there are variations with regard to which authority is responsible for making designations, and whether this is done through the establishment of safe country of origin lists, or exclusively on a case-by-case basis. Furthermore, inconsistent state practice was observed in relation to regular review of the safety of designated countries. Finally, significantly different procedural consequences follow from designation 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"*.

Most of the Member States that have transposed the concept in national legislation have reflected Article 30 (5) APD in domestic law and reportedly implement it when the concept is applied. However, there are a couple of notable exceptions where neither Article 30 (5) APD is reflected in domestic law, nor is it clear which information sources are relied upon in designating third countries as safe countries of origin, as these have not been made public. 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 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 of the three states which currently have in place a public national list. At the time of UNHCR's research, only one country – Ghana – appeared on the list of all three states, and in one of these, Ghana is designated as a safe country of origin only for male applicants. The need exists for more clarity and consistency of approach, if the safe country of origin concept is to be reconcilable with the aims of a Common European Asylum System.

In one state, which maintained a list featuring 15 safe countries of origin at the beginning of 2008, applications from nationals of countries designated as safe countries of origin doubled between 2007 and 2008. In the latter year, the first instance recognition rate for applicants from those countries was close to 35%. This appears to call into question the application of the designation criteria, and highlight the need for consistent and transparent reviews of safe country of origin lists.

Those countries designated at national level by Member States which utilise national lists of safe country of origin are available in Part 2, section 13, on the CD-ROM accompanying this report.

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 which criteria would trigger a decision to add or remove a

country from the list. Only two states have in place detailed legislative provisions concerning the process for adopting a list. One of those has a requirement for annual review. The law of another 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 Parliament must adopt a law if the withdrawal is to remain in force. However, there is no mechanism for regular review of the lists. In one Member State with an operational list, there is no legal provision for the revision of the list, and in two Member States with operational lists, there is no public criteria to determine what would trigger a review of the safety of the designated countries. In both these Member States, recent removals from the list have resulted from a legal challenge rather than a review by the 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.

In some states surveyed, the safe country of origin notion is used as a procedural tool, to channel the application into an accelerated procedure. In some Member States, this may result in the detention of the claimant, lower standards of reception conditions, and/or loss of in-country rights of appaeal. In some Member States, the application of the concept may result in the application being declared manifestly unfounded.

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 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."

Some states surveyed do not address the issue of an individual examination for safe country of origin cases in their national legislation. By contrast, exemplifying good practice, others clearly prescribe the need for an individual examination. In one Member State, explicit guidance instructs decision makers to carry out an individual assessment of the merits of the claim, since designation will result in loss of in-country rights of appeal. 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.

The majority of states that apply the safe country of origin concept have legislation which increases the burden of proof on the applicant. However, in only one of those surveyed was the entire burden shifted to the applicant. In others, the responsibility in law to establish the facts continued to be shared between the applicant and the authority, in accordance with the Qualification Directive. UNHCR is concerned that in practice, however, some 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.

As recognised by the APD, it is essential that the applicant is given an effective opportunity to rebut any presumption of safety, both in law and practice. As well as requiring an individual examination, this should also involve a shared duty of investigation, prior notification of the intention to designate a country as safe, and other necessary procedural safeguards. The research revealed divergence among Member States with regard to the opportunity given to applicants to rebut a presumption of safety. A common problem identified in several states 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.

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 potentially to 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.

Notwithstanding the possibility under the APD to omit personal interviews in safe country of origin cases, the possibility to do so is contained in the law of just two of the surveyed Member States. No provision to omit the personal interview on the grounds that the applicant is deemed to be from a safe country of origin exists in the majority of states examined. UNHCR considers that this reflects the essential nature of an interview as part of a full, fair and individual examination.

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.

2.11. ARTICLE 32 - SUBSEQUENT APPLICATIONS

Article 32 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".

The rationale behind the special rules for this category of claims 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."*

Article 32 (2) and (3) APD provides that a subsequent application, submitted after 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. 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. 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"*. If it is determined that relevant "new elements or findings" have arisen or have been presented by the applicant, Article 32 (4) requires that the determining authority examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

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.

There are many reasons why an applicant may wish to submit further evidence or raise new issues following the examination of a previous application. Among other things, these may relate to a change in the situation in the country of origin; fear of persecution or serious harm based on activities engaged in, or convictions held, by the applicant since leaving the country of origin; a fear based on direct or indirect breach of the principle of confi-

dentiality during or since the previous procedure; deficiencies or flaws in the previous procedure which may have prevented an adequate examination and assessment of relevant facts and evidence; trauma, shame, or other inhibitions may have prevented full oral testimony by the applicant in the previous examination procedure; or further relevant evidence may have been obtained by the applicant or arisen after the previous examination. A more extensive list of possible reasons is set out in Part 2, section 14, on the CD-ROM accompanying this report.

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 number of subsequent applications is significant. In 2008, in two surveyed states, approximately 17% of all applications in 2008 were subsequent applications; in another, the proportion was over 27%, and in a third, 36%. In one of these states, subsequent applications have become especially significant following an increase in the number of cessation decisions.

UNHCR is not aware of any qualitative research or data which analyses the reasons for subsequent applications. However, to the extent that subsequent applications may be due to deficiencies in first instance procedures or restrictions on appeal, UNHCR's recommendations are aimed at reducing these as causes for subsequent applications.

The right to submit a subsequent application

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. Such a procedure may be applied in the event of the previous application having been withdrawn or abandoned under Articles 19 and 20 APD, and/or after a decision or a final decision has been taken on the previous application.

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 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.

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. However, bearing in mind that Article 32 APD is a permissive provision, the research revealed that practice among these states varies significantly regarding conduct of the preliminary examination of subsequent applications, including the opportunity for a personal interview, information provided to applicants and other procedural guarantees.

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 or of an appeal

Of the 12 Member States surveyed, there is only one state which might be considered to examine further representations in the framework of the examination of the previous application. The relevant rules will only be applied following withdrawal of the previous application or a final negative decision on the previous application (when all appeal remedies have been exhausted), unless the applicant only has an out-of-country appeal right. In another state, an applicant may request the re-opening of a procedure, or the determining authority may decide to do so, for example, in the case of Dublin returnees.

In half of the Member States surveyed, further representations or new elements may be submitted to and be examined at the appeal level. However, in some other states, conditions or restrictions which are placed on the admissibility of new elements or evidence on appeal may mean that this is not an option for the applicant. Moreover, in some states, at appeal level, applicants may only be able to request judicial review on questions of law, and not a full review of the facts. In practice, it must also be borne in mind that short time limits within which to lodge an appeal may preclude the introduction of new elements or findings in this framework.

Art 32 (6) provides 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. Nevertheless, some states have incorporated such provisions in national law.

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 context of a specific procedure for the preliminary examination of subsequent applications

Article 32 (2) APD permits the application of a specific procedure for the preliminary examination of subsequent applications where an applicant applies after his/her previous application has been withdrawn or abandoned; 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.

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, there are new elements or findings relating to the examination of whether the applicant qualifies for international protection.

The research has found that half of the 12 Member States surveyed conduct a specific procedure for the preliminary examination of subsequent applications, as permitted by Article 24 (1) (a) APD. By contrast, six states do not have a specific procedure; instead, the preliminary examination is conducted by the determining authority as an initial phase of examining the claim in a (new) normal procedure. In two of these Member States, the preliminary examination is conducted within the assessment of admissibility which applies to all applications. In another Member State, the preliminary examination is conducted within the accelerated 'filter' procedure which applies to all applications for international protection. In three others, it is part of the substantive examination in either the accelerated or regular procedures.

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) and (3) 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."*

Eleven of the 12 Member States surveyed have not derogated from the requirement that the determining authority examine subsequent applications. There is only one exception. In the twelfth state, the decision to allocate responsibility for examining subsequent claims to another body has been criticised by NGOs and lawyers, who argue that, in the light of legislation and case law, the competent authority is not competent to assess new elements in the framework of the 1951 Convention or legal provisions on subsidiary protection; nor to evaluate the credibility of purported new elements; and that the determining authority, which conducted the first examination, is better equipped to assess whether there are "new elements" and if so, whether they constitute significant indications of persecution or serious harm.

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.[58]

Procedural and other safeguards accorded to the preliminary examination of subsequent applications

Where Member States conduct the preliminary examination of subsequent applications within the normal first instance asylum procedures, the procedural safeguards accorded to these procedures apply. These should include the basic principles and guarantees set out in Chapter II of the APD and, as such, applicants should enjoy greater procedural safeguards than the minimum standards for preliminary examination of subsequent applications set out under Article 34 APD. However, 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.

Where Member States operate a specific procedure for the preliminary examination of subsequent applications, 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.

The minimum procedural rules for such specific procedures are outlined in Article 34. 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. 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"*.

58 Such deletion is suggested by the European Commission in proposed recast Article 4(3): APD Recast Proposal 2009

Member States are expressly permitted to lay down time limits within which this information must be provided and to conduct the examination on the sole basis of written submissions without a personal interview.

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.

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.[59]

Provision of information on the right to submit a subsequent application and the procedure for the preliminary examination of subsequent applications

In some Member States, notwithstanding the APD's requirements in Articles 10 and 34, applicants are not informed of the possibility to submit a subsequent application or of the procedure for the preliminary examination of subsequent applications. In some states, such information may be contained in general information brochures on the asylum procedure, or on the internet in a limited number of languages. However, the information on subsequent applications contained in such brochures is sometimes very limited. In some states, it is also provided only after a subsequent application has been filed. In others, it would appear that such information is not provided at all.

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.

59 UNHCR notes in this connection that its deletion is proposed by the European Commission in its proposed recast article 36: APD Recast Proposal 2009

Services of an interpreter

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. 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.

In some Member States, according to legislation and/or practice, interpreter services should be available for the submission of the subsequent application. However, in other surveyed countries, the state does not provide the services of an interpreter for the submission of the application.

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, and which insist that any documentary evidence submitted is in or translated into the language of the Member State.

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.

Opportunity of a personal interview

The APD does not guarantee applicants of subsequent applications a personal interview during the preliminary examination.

Article 12 (2) (c) APD in conjunction with Article 23 (4) (h) APD permits the determining authority, on the basis of a complete examination of information provided by the applicant, to 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 just over half of the Member States surveyed.

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

Within a specific procedure for the preliminary examination of subsequent applications, Article 34 (2) (b) APD states that Member States may lay down 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. In one of these, however, applicants are warned that a delay in submitting further submissions could impact upon their appeal rights.

The remaining Member State obliges applicants to submit a subsequent application within three months of learning of the new grounds on which the application could be made.

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.[60]

The decision

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."* However, there is no requirement that the decision be given in writing.[61]

Member States should ensure that decisions on all applications for international protection, including subsequent applications, are given in writing.

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. This means that the applicant should have the right to remain in the Member State pending a decision after the preliminary examination of the subsequent application.

60 This is proposed in recast Article 36(2): APD Recast Proposal 2009

61 Detailed findings on decisions, including in the context of subsequent applications is set out in Part 2 (on the attached CD-Rom), section 3 of this report.

The APD, as currently drafted, is not as clear as it could be with regard to the right to remain in such situations, due to the interaction of various different Articles. In most of the Member States surveyed, applicants submitting subsequent applications have the right to remain pending a decision on the preliminary examination. However, in one Member State, the legal status of a person remains unclear, as the law does not set explicit rules. In practice, such applicants are tolerated, rather than receiving permission to reside, as in the regular procedure.

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

The Reception Directive permits Member States to reduce or withdraw reception conditions where an asylum seeker has already lodged an application in the same Member State. This provision was introduced to deter applicants from abusing the asylum procedure and the reception system by lodging subsequent applications. However, it must be underlined that an applicant who makes a subsequent application may be a refugee or may qualify for subsidiary protection status.

In some Member States, applicants submitting subsequent applications lose their rights to receive shelter, food and financial allowances, and/or receive lesser entitlements than applicants in the regular procedure.

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.

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.

Treatment of subsequent applications after withdrawal or abandonment of the previous application

In some cases, an applicant may wish to submit further representations or a second application 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.

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, including in particular, a personal interview. Moreover, the application may be examined to determine if the application presents "new elements or findings". However, this approach is problematic in cases where defects occurred in the first procedure, because it is likely that the previous application was not examined and assessed on the basis of all the relevant facts and evidence. 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'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 or invites the applicant to submit a new application which may be on the same grounds as the previous application. No new elements or findings need to be raised. UNHCR's research 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.

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 not provided 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.

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.[62] 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. [63]

Interpretation of "new elements or findings"

There is no explicit guidance in the APD on the interpretation of what constitutes *"new elements or findings"*, and the research revealed 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. Significant divergence between Member States emerged from the research as to if, or how, they interpret whether new elements *"significantly add to the likelihood of qualifying as a refugee"* under Article 32 (4) APD.

The research highlights that some of the Member States which 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. In three of these states, a restrictive approach has been

62 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.

63 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.

adopted. For example, in one state, 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. In another, legislation stipulates that new elements must relate to facts or circumstances that have taken place after the appeal body took a final decision on the previous application. That state also requires such information to contain significant indications of a well-founded fear of persecution or a real risk of serious harm. This is problematic, as it requires the body responsible for conducting the preliminary examination (which is not the determining authority) to consider questions beyond its jurisdiction.

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

Of the states examined in this research, none have adopted explicit legislative provisions permitting use of the discretion granted by Article 34 (5) APD to further examine a subsequent application where there are *"other reasons why a procedure has to be re-opened."* 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.

UNHCR favours use of 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.

The treatment of *sur place* claims

Of those states surveyed, only two have explicitly transposed Article 5 (3) of the Qualification Directive in national legislation, permitting 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. UNHCR has criticised this provision of the Qualification Directive, which does not accord with international refugee law.

Of those Member States surveyed which have not transposed this provision in national legislation, some do apply a "continuity" test requiring that the grounds be a follow-up of activities performed or convictions held in the country of origin; or a "purpose" test which looks at whether the applicant's activities were "purposeful", in the assessment of the claim. This may limit the grant of refugee status in practice.

UNHCR notes good practice in one Member State, where the legislator when implementing the Qualification Directive 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 national legislation or practice. A subsequent application based on activities since leaving the country of origin will be examined in the regular procedure with full procedural guarantees.

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.

Limitations on the right to submit a subsequent application

UNHCR acknowledges that some Member States are concerned by the need 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 EU 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.

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.

Eight of the states examined in this research provide for a right of appeal against a decision not to examine further a subsequent application. However, most of these do not provide for automatic suspensive effect, as permitted by Article 39. In two Member States, 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. A right of appeal is afforded against a negative decision.

In two states, there is a non-suspensive right to seek judicial review only.

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 right need 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.

2.12. ARTICLE 39 – EFFECTIVE REMEDIES

The provision of a right to appeal

European Community law provides that individuals are entitled to an effective remedy if a right guaranteed by Community law is affected. In reflection of this, Article 39 (1) APD obliges Member States to provide an effective remedy before a court or tribunal against a decision on an application for asylum.

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.[64] 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,[65] and it must have automatic suspensive effect.[66]

Eleven of the 12 Member States of focus in this research have transposed Article 39 (1) APD in national law, providing for a right of appeal or judicial review against decisions relating to an application for international protection. Some Member States limit the appeal rights in respect of certain categories of cases. One Member State has partially reflected Article 39 (1) in national law. Appeal rights are available in practice for most categories of asylum decisions in that Member State, except for refusals to re-open an application following discontinuation after an explicit withdrawal (which can nevertheless be pursued through submission of a new application without the need for new elements). National legislation should however provide explicitly for an effective remedy, under Article 39.

Another Member State does not provide for an in-country right of appeal for numerous categories of refusal decisions, which are together likely to apply to a significant proportion of claimants. However, that Member State maintains that Article 39 is transposed through the provision of a right for applicants to seek judicial review, and challenge the decision based on an error of law. In at least one other Member State, the only remedy presently available against negative asylum decisions is judicial review on questions of law.

The appeal authority

All of the Member States surveyed provide for an appeal against a decision from the determining authority to an administrative court or tribunal. Four states have specialist or quasi-specialist asylum/immigration tribunals. At the time of the research, one Member State utilised an appeals body which was not fully independent of the first instance authority; but new legislation has abolished that body and provides for a remedy before a court with power to review decisions on issues of law only.

In some Member States, different courts are charged with responsibility for appeals, depending on the type of decision taken by the determining authority. 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.

64 Jabari v. Turkey, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000.
65 Conka v. Belgium, 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002.
66 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".

Access to the appeal right in practice

The notion of effectiveness implies that a person should be able to access the remedy in not only legal terms, but also in practice. The research indicated that, in practice, various and numerous impediments face prospective appellants in some Member States, relating among other things to 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; 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.

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 generally apply.

Information on how to appeal

The APD, in Articles 9 and 10, requires all Member States to ensure that, where an application is rejected, information on how to challenge a negative decision is given in writing, in a language the applicant may reasonably be supposed to understand. However, the research revealed deficiencies in the provision of information provided to applicants in some Member States. In some, this occurred when information was generic and/or provided only in the language of the host state, with applicants expected to resort to NGOs or other sources of assistance for translation. In one state, the information provided with the negative decision sometimes failed to specify the relevant court to which appeals should be filed, and/or the applicable deadlines. Good practice has been observed in at least three Member States, where all decisions are accompanied by detailed information on how to file an appeal, which is available in multiple languages.

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.

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 one Member State where, at the time of UNHCR's research, appellants were required to lodge their applications for appeal in per-

son. Interviewed stakeholders indicated that the determining authority's premises in the capital was severely understaffed, which in practice led to applicants failing to submit an appeal on time, because they were refused entrance to the building.

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 which enable appellants to lodge their appeal. 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

In some Member States of focus, timely access to the case file stood as one of the main obstacles faced by appellants in trying to secure an effective remedy. This is due in one state to the fact that all appeal case files are centralised in one location, while appellants may reside throughout the country. In other states, short time-frames for appeal steps combined with slow provision of access significantly impeded the pursuit of effective remedies.

The designated authority must ensure that the applicant is, upon notification of the negative decision, 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

While some Member States have multiple, decentralised hearing locations for appeals, one state has its appeal body in one location only, in the capital city. This creates difficulties for applicants living in remote areas, in the absence of any provision for state-funded travel to appeal hearings.

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. Short time limits for lodging appeals may render a remedy ineffective in practice.

Time limits for filing an appeal in the Member States surveyed overall varied from between two and 60 days. UNHCR is concerned that in some Member States, the time limits imposed may be too short, given the procedural steps to be taken and the general circumstances of applicants. These time limits 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. In some Member States, deadlines for removal can expire before the period for lodging an appeal concludes – which effectively requires applicants to lodge requests for suspensive effect, in order to be able to pursue their appeals in the country.

Some of the time limits imposed by Member States may impede the right to an effective remedy. These include the 48 hour period for submitting appeals which apply to applicants in two Member States under specific procedures, operating at borders and in detention. In one of these states, this is exacerbated by the obligation to submit the appeal in the host state's national language, with no translation assistance. Another state sets a 72-hour deadline for lodging appeals – which causes particular hardship for applicants who receive decisions on a Friday and must file by Monday, given that the deadline refers to calendar and not working hours.

In some states, limits on practical access to legal advisors – including notably for applicants in detention – can mean that short appeal deadlines may impede or prevent effective preparation of a legal challenge.

UNHCR highlights, as good practice, the approach in two states, where a single time limit of 30 and 60 days respectively is set for filing an appeal in all cases, regardless of the type of decision made by the determining authority.

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 provide a reasonable time within which the applicant may exercise his or her right and other concomitant rights under the APD.[67]

Where applicants have to apply for legal aid in order to exercise their right to free legal assistance in accordance with the APD, any time limits should take into account the time required to apply for legal aid in the Member State.

Availability of interpretation

National legislation in some Member States of focus provides for entitlement to an interpreter only for a hearing before the court or tribunal, as necessary. This means that interpretation may be not available for the crucial process of preparing and submitting an appeal. In four Member States, in practice, applicants may access linguistic assistance for the submission of an appeal through a legal advisor.

Good practice exists in two states, where there is a right to free and unlimited interpretation services as well as free translation services (although limited in time or words/length) for all necessary assistance throughout the entire asylum procedure, including on appeal.

UNHCR regrets that the APD does not require that applicants receive the services of an interpreter whenever necessary for submitting their appeal to the appeal authority.

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

67 This is suggested in proposed recast Article 41(4): APD Recast Proposal 2009

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 following a negative decision. However, Member States may derogate, and limit the grant of free legal assistance in accordance with Article 15 (3) to appeals against first-instance decisions only (i.e. no further onward appeal/review). They may also limit assistance based on the applicants' means; the prospects of success; and to certain designated legal advisors.

The research showed that in some Member States, lengthy processes for approving the grant of legal assistance could negate the usefulness of legal aid schemes in appeal processes with short deadlines. In some contexts, applicants faced procedures or requirements that were difficult or impossible to fulfil in practice.

In some states, 'merits tests' were seen to be applied in ways that could lead to the arbitrary restriction of access for appellants to legal assistance, contrary to the APD.

A general concern observed in many of the states surveyed is the lack of available lawyers specialized and competent in refugee law. For example, in one Member State, at the time of UNHCR's research, only six legal advisers on asylum were actually operating in practice. Access to specialized lawyers is also problematic in the remote areas of at least one Member State where reception centres for asylum applicants are increasingly being built. In some countries, specific instances of lack of competence, training or specialist expertise among legal assistance providers were also reported. NGOs and lawyers who have traditionally provided legal assistance face resource shortages and low remuneration levels in some Member States that can significantly impede their work.

In a number of Member States, it was reported that effective opportunities to obtain legal assistance for an appeal is limited for appellants in the accelerated procedure or in detention. By contrast, good practice was seen in one Member State where all appellants benefit from free legal assistance, irrespective of whether the appeal was examined in a regular or accelerated procedure. The availability of legal assistance during the whole asylum procedure means that one lawyer can provide continuous assistance throughout. This arrangement has the potential to improve demonstrably the efficacy of the appeals process.

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 pay special attention to ensuring 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. In some of the Member States surveyed, around 20% of the total number of people granted international protection in 2007 initially received a negative decision, which was subsequently overturned at the appeal or review stage. Given the potentially serious 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 APD does not guarantee "suspensive effect" of appeals, which would permit the applicant to remain in the Member State pending the outcome of his/her appeal or review. However, the APD requires Member States to provide for rules *"in accordance with their international obligations"*. These have been established at regional level by the European Court of Human Rights, which has held that in order for a remedy to be effective, Member States must provide for the possibility of suspending removal in cases where it might lead to *refoulement*.

The simplest way of satisfying this requirement is for Member States to ensure by law that deportation orders may not be executed within the time limit to lodge an appeal; and to give automatic suspensive effect to all appeals. UNHCR notes positively that at least one Member State affords such automatic suspensive effect to all appeals against negative first-instance decisions. Furthermore, two-thirds of the Member States of focus in this research provide for automatic suspensive effect of appeals against certain negative decisions. However, the 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. In two Member States, automatic suspensive effect is not afforded in any appeals.

In the absence of automatic suspensive effect of appeals, as a minimum requirement, in accordance with international law, an applicant must be allowed to remain in the Member State in order to request 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.[68]

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 does not comply with Article 39 (3) (a) APD.

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. This applies in some Member States which require applicants to request suspensive effect within 24 or 72 hours after receiving a decision.

UNHCR emphasises also that any request for suspensive effect must be subjected to rigorous and detailed scrutiny. This is particularly important given that a significant number of Member States deny automatic suspensive

68 Gebremedhin [Gaberamadhien] c. France, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007; see also Abdolkhani and Karimnia v. Turkey, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009.

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. This means that applicants with strong claims for international protection may be removed from the EU while their appeals are pending against first-instance decisions made in procedures with few basic safeguards.

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.[69]

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.[70] 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.[71]

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, a position that is reinforced by the jurisprudence of the European Court of Human Rights.

In a majority of the Member States surveyed, the competent appeals body which reviews negative decisions on asylum claims has power to review questions of both fact and law. However, in at least two Member States, reviews at the appellate level are limited to questions of law. This may be at variance with European law and jurisprudence on the scope of an effective remedy.

69 In 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.

70 "... those which are clearly fraudulent nor 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.

70 UNHCR APD comments 2005

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

UNHCR recommends that the appeal body should have fact-finding competence, in order to fulfil the requirement of rigorous scrutiny established in international human rights law. UNHCR notes positively that the courts or tribunals in almost half of the states surveyed conduct independent fact-finding when necessary. In contrast, notwithstanding the position taken by the European Court of Human Rights, the appellate bodies in at least three states do not undertake their own investigation into the facts, but instead rely on the evidence submitted by the appellant and the determining authority. UNHCR is concerned that such an approach relies heavily upon legal advisers – where present – to raise relevant legal arguments and present relevant evidence, in a context in which access to competent legal assistance may be limited (see above).

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 an asylum claim may not be raised in the course of the first instance administrative procedure. These include factors which may lie beyond the control of the applicant, including omission of a personal interview; limited scope of questioning by interviewers at first instance; failure by the applicant to understand the significance of certain facts to his/her claim, or the need to provide them, in cases where information about the procedure was inadequate. Furthermore, there are many reasons why documentary evidence may not have been available before a first instance decision, particularly when taken in an accelerated procedure and/or border procedure, and/or the applicant was detained.

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, to provide an effective remedy.[72]

UNHCR noted positively that in half of the Member States surveyed, there are no restrictions on the right to submit new elements and evidence on appeal. In one case, it is at the discretion of the court. However, UNHCR noted that in some other Member States, conditions or restrictions are placed on the submission of new elements or evidence on appeal. In some cases, this allows appellants only to submit new material which could not have been submitted in the first instance procedure. The scope of exceptions to this rule is applied extremely strictly in some cases. This could in some cases render the remedy ineffective.

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.

72 This is required by Article 4 (3) (a) of the Qualification Directive and the caselaw of the ECtHR: Salah Sheekh v. The Netherlands, Council of Europe: European Court of Human Rights, 11 January 2007; paragraph 136.

Right to a hearing

UNHCR notes that appellants in half of the states surveyed are given the opportunity of 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.

Remedies

At the national and EU levels a status other than refugee status may offer the same rights and benefits. However, refugee status is an internationally recognised status, which other states should acknowledge. On this basis appellants should be permitted to challenge a decision to refuse refugee status. UNHCR has noted that, with the exception of one state, none of the Member States surveyed generally implement Article 39 (5) APD, permitting curtailment of appeal rights against refusal of refugee status if another status is granted with equivalent rights.

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.

Conclusion

UNHCR appreciates the political sensitivities and wider public policy issues at stake in discussions around the APD, and the rights of asylum seekers in general, in the EU today. In seeking to harmonise minimum standards for procedures, the APD addresses issues that go to the fundamental operation of legal systems. The obligations it creates can also carry major resource implications. Member States' reservations about significantly increasing the scope of procedural safeguards, or limiting their own flexibility to adjust the system, are understandable in this context.

At the same time, the APD is an instrument which is intended to be at the heart of a Common European Asylum System, but it has not yet brought about consistent approaches and does not always ensure fair and accurate outcomes. UNHCR maintained at the time of its adoption that in allowing extensive scope for exceptions, derogations and wide discretion, the APD created "protection gaps" which could create the risk of breaches of international and European law. The research carried out under this project has confirmed this to be the case. There are many areas in which individual's rights are not respected, not only because of non-observance of the APD, but also in the context of the application of its provisions, in line with the low minimum standards it sets. As such, this research highlights the need for reform both of law and practice, to ensure that the gaps are filled.

UNHCR is ready and willing to work with Member States, European institutions, civil society and other stakeholders to find ways to strengthen the operation of asylum procedures across the Union, and improve their quality and consistency overall. This will require concerted efforts in a number of areas. The European Asylum Support Office will have a crucial role to play in bringing Member States together and supporting their common interest in such endeavours.

However, improvement also requires strengthening the legal framework for asylum procedures. Courts can assist in this area by interpreting and providing guidance to Member States on the correct application of the APD and related instruments. Beyond interpretation, however, further legislative reform will be needed, both at national

and EU level, to ensure that the necessary safeguards are in place. This research has sought to highlight some of the main areas of need. It also seeks to provide constructive recommendations to support all parties involved to work towards completion of a Common European Asylum System which will be based, in law and practice, on the "full and inclusive application of the [1951] Convention" and other relevant treaties.

SECTION III:

APPENDIX

Text of the Asylum Procedures Directive
Definitions and list of abbreviations

COUNCIL DIRECTIVE 2005/85/EC

of 1 December 2005

on minimum standards on procedures in Member States for granting and withdrawing refugee status

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(d) of the first paragraph of Article 63 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the European Economic and Social Committee [3],

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967 (Geneva Convention), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures in the Member States and, in the longer term, Community rules leading to a common asylum procedure in the European Community.

(4) The minimum standards laid down in this Directive on procedures in Member States for granting or withdrawing refugee status are therefore a first measure on asylum procedures.

(5) The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.

(6) The approximation of rules on the procedures for granting and withdrawing refugee status should help to limit the secondary movements of applicants for asylum between Member States, where such movement would be caused by differences in legal frameworks.

(7) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention.

(8) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(9) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(10) It is essential that decisions on all applications for asylum be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or receives the necessary training in the field of asylum and refugee matters.

(11) It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive.

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[1] OJ C 62, 27.2.2001, p. 231 and OJ C 291, 26.11.2002, p. 143.
[2] OJ C 77, 28.3.2002, p. 94.
[3] OJ C 193, 10.7.2001, p. 77. Opinion delivered following non-compulsory consultation.

(12) The notion of public order may cover a conviction for committing a serious crime.

(13) In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, every applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure. Moreover, the procedure in which an application for asylum is examined should normally provide an applicant at least with the right to stay pending a decision by the determining authority, access to the services of an interpreter for submitting his/her case if interviewed by the authorities, the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) or with any organisation working on its behalf, the right to appropriate notification of a decision, a motivation of that decision in fact and in law, the opportunity to consult a legal adviser or other counsellor, and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.

(14) In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States.

(15) 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.

(16) Many asylum applications are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to keep existing procedures adapted to the specific situation of these applicants at the border. Common rules should be defined on possible exceptions made in these circumstances to the guarantees normally enjoyed by applicants. Border procedures should mainly apply to those applicants who do not meet the conditions for entry into the territory of the Member States.

(17) 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.

(18) Given the level of harmonisation achieved on the qualification of third country nationals and stateless persons as refugees, common criteria for designating third countries as safe countries of origin should be established.

(19) Where the Council has satisfied itself that those criteria are met in relation to a particular country of origin, and has consequently included it in the minimum common list of safe countries of origin to be adopted pursuant to this Directive, Member States should be obliged to consider applications of persons with the nationality of that country, or of stateless persons formerly habitually resident in that country, on the basis of the rebuttable presumption of the safety of that country. 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 take any decisions on the establishment or amendment of the list, after consultation of the European Parliament.

(20) It results from the status of Bulgaria and Romania as candidate countries for accession to the European Union and the progress made by these countries towards membership that they should be regarded as constituting safe countries of origin for the purposes of this Directive until the date of their accession to the European Union.

(21) The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation 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. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her.

(22) Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies as a refugee in accordance with 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 [1], except where the present Directive provides otherwise, in particular where it can be reasonably assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an asylum application where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country.

(23) 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. Member States should only proceed on this basis where this particular applicant would be safe in the third country concerned. In order to avoid secondary movements of applicants, common principles for the consideration or designation by Member States of third countries as safe should be established.

(24) Furthermore, with respect to certain European third countries, which observe particularly high human rights and refugee protection standards, Member States should be allowed to not carry out, or not to carry out full examination of asylum applications regarding applicants who enter their territory from such European third countries. Given the potential consequences for the applicant of a restricted or omitted examination, this application of the safe third country concept should be restricted to cases involving third countries with respect to which the Council has satisfied itself that the high standards for the safety of the third country concerned, as set out in this Directive, are fulfilled. The Council should take decisions in this matter after consultation of the European Parliament.

(25) It follows from the nature of the common standards concerning both safe third country concepts as set out in this Directive, that the practical effect of the concepts depends on whether the third country in question permits the applicant in question to enter its territory.

(26) With respect to the withdrawal of refugee status, Member States should ensure that persons benefiting from refugee status are duly informed of a possible reconsideration of their status and have the opportunity to submit their point of view before the authorities can take a motivated decision to withdraw their status. However, dispensing with these guarantees should be allowed where the reasons for the cessation of the refugee status is not related to a change of the conditions on which the recognition was based.

(27) 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. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.

(28) In accordance with Article 64 of the Treaty, this Directive does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

(29) This Directive 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 [2].

(30) The implementation of this Directive should be evaluated at regular intervals not exceeding two years.

(31) Since the objective of this Directive, namely to establish minimum standards on procedures in Member States for granting and withdrawing refugee status cannot be sufficiently attained by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective.

(32) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 24 January 2001, its wish to take part in the adoption and application of this Directive.

[1] OJ L 304, 30.9.2004, p. 12.

[2] OJ L 50, 25.2.2003, p. 1.

(33) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified, by letter of 14 February 2001, its wish to take part in the adoption and application of this Directive.

(34) 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 does not take part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

Article 2

Definitions

For the purposes of this Directive:

(a) 'Geneva Convention' means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

(b) 'application' or 'application for asylum' means an application made by a third country national or stateless person which can be understood as a request for international protection from a Member State under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

(c) 'applicant' or 'applicant for asylum' means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

(d) '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;

(e) 'determining authority' means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I;

(f) 'refugee' means a third country national or a stateless person who fulfils the requirements of Article 1 of the Geneva Convention as set out in Directive 2004/83/EC;

(g) 'refugee status' means the recognition by a Member State of a third country national or stateless person as a refugee;

(h) 'unaccompanied minor' means a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States;

(i) 'representative' means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests;

(j) 'withdrawal of refugee status' means the decision by a competent authority to revoke, end or refuse to renew the refugee status of a person in accordance with Directive 2004/83/EC;

(k) 'remain in the Member State' means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for asylum has been made or is being examined.

Article 3

Scope

1. This Directive shall apply to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status.

2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.

3. Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given under the circumstances defined by Article 15 of Directive 2004/83/EC, they shall apply this Directive throughout their procedure.

4. Moreover, Member States may decide to apply this Directive in procedures for deciding on applications for any kind of international protection.

Article 4

Responsible authorities

1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive, in particular Articles 8(2) and 9.

In accordance with Article 4(4) of Regulation (EC) No 343/2003, applications for asylum made in a Member State to the authorities of another Member State carrying out immigration controls there shall be dealt with by the Member State in whose territory the application is made.

2. However, Member States may provide that another authority is responsible for the purposes of:

(a) processing cases in which it is considered to transfer the applicant to another State according to the rules establishing criteria and mechanisms for determining which State is responsible for considering an application for asylum, until the transfer takes place or the requested State has refused to take charge of or take back the applicant;

(b) taking a decision on the application in the light of national security provisions, provided the determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee by virtue of Directive 2004/83/EC;

(c) conducting a preliminary examination pursuant to Article 32, provided this authority has access to the applicant's file regarding the previous application;

(d) processing cases in the framework of the procedures provided for in Article 35(1);

(e) refusing permission to enter in the framework of the procedure provided for in Article 35(2) to (5), subject to the conditions and as set out therein;

(f) establishing that an applicant is seeking to enter or has entered into the Member State from a safe third country pursuant to Article 36, subject to the conditions and as set out in that Article.

3. Where authorities are designated in accordance with paragraph 2, Member States shall ensure that the personnel of such authorities have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive.

Article 5

More favourable provisions

Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive.

CHAPTER II

BASIC PRINCIPLES AND GUARANTEES

Article 6

Access to the procedure

1. Member States may require that applications for asylum be made in person and/or at a designated place.

2. Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.

3. Member States may provide that an application may be made by an applicant on behalf of his/her dependants. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependant adult is conducted.

4. Member States may determine in national legislation:

(a) the cases in which a minor can make an application on his/her own behalf;

(b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 17(1)(a);

(c) the cases in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor.

5. Member States shall ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority.

Article 7

Right to remain in the Member State pending the examination of the application

1. 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. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant [1] or otherwise, or to a third country, or to international criminal courts or tribunals.

Article 8

Requirements for the examination of applications

1. Without prejudice to Article 23(4)(i), Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially;

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum 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;

(c) the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

3. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 2(b), necessary for the fulfilment of their task.

4. Member States may provide for rules concerning the translation of documents relevant for the examination of applications.

Article 9

Requirements for a decision by the determining authority

1. Member States shall ensure that decisions on applications for asylum are given in writing.

2. Member States shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

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.

Moreover, 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.

3. 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.

[1] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

Article 10

Guarantees for applicants for asylum

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

(a) they shall be informed in a language which they may reasonably be supposed to 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. They shall be informed of the time-frame, as well as the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2004/83/EC. This information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 11;

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to give these services at least 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. In this case and in other cases where the competent authorities call upon the applicant, these services shall be paid for out of public funds;

(c) they shall not be denied the opportunity to communicate with the UNHCR or with any other organisation working on behalf of the UNHCR in the territory of the Member State pursuant to an agreement with that Member State;

(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 counsellor 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).

2. With respect to the procedures provided for in Chapter V, 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.

Article 11

Obligations of the applicants for asylum

1. Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application.

2. In particular, Member States may provide that:

(a) applicants for asylum are required to report to the competent authorities or to appear before them in person, either without delay or at a specified time;

(b) applicants for asylum have to hand over documents in their possession relevant to the examination of the application, such as their passports;

(c) applicants for asylum are required to inform the competent authorities of their current place of residence or address and of any changes thereof as soon as possible. Member States may provide that the applicant shall have to accept any communication at the most recent place of residence or address which he/she indicated accordingly;

(d) the competent authorities may search the applicant and the items he/she carries with him/her;

(e) the competent authorities may take a photograph of the applicant; and

(f) the competent authorities may record the applicant's oral statements, provided he/she has previously been informed thereof.

Article 12

Personal interview

1. 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.

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

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

2. The personal interview may be omitted where:

(a) the determining authority is able to take a positive decision on the basis of evidence available; or

(b) 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; or

(c) the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded in cases where the circumstances mentioned in Article 23(4)(a), (c), (g), (h) and (j) apply.

3. The personal interview may also be omitted where it is not 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. When in doubt, Member States may require a medical or psychological certificate.

Where the Member State does not provide the applicant with the opportunity for a personal interview pursuant to this paragraph, or where applicable, to the dependant, reasonable efforts shall be made to allow the applicant or the dependant to submit further information.

4. The absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for asylum.

5. The absence of a personal interview pursuant to paragraph 2(b) and (c) and paragraph 3 shall not adversely affect the decision of the determining authority.

6. 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 he/she had good reasons for the failure to appear.

Article 13

Requirements for a personal interview

1. 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.

2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

3. 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. To that end, Member States shall:

(a) 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; and

(b) 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.

4. Member States may provide for rules concerning the presence of third parties at a personal interview.

5. This Article is also applicable to the meeting referred to in Article 12(2)(b).

Article 14

Status of the report of a personal interview in the procedure

1. 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.

2. 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.

3. Member States may request the applicant's approval of the contents of the report of the personal interview.

Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant's file.

The refusal of an applicant to approve the contents of the report shall not prevent the determining authority from taking a decision on his/her application.

4. This Article is also applicable to the meeting referred to in Article 12(2)(b).

Article 15

Right to legal assistance and representation

1. Member States shall allow applicants for asylum the opportunity, at their own cost, to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications.

2. 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.

3. Member States may provide in their national legislation that free legal assistance and/or representation is granted:

(a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or

(b) only to those who lack sufficient resources; and/or

(c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or

(d) only if the appeal or review is likely to succeed.

Member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted.

4. Rules concerning the modalities for filing and processing requests for legal assistance and/or representation may be provided by Member States.

5. Member States may also:

(a) impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

6. Member States may demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.

Article 16

Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, and who assists or represents an applicant for asylum under the terms of national law, shall enjoy access to such information in the applicant's file as is liable to be examined by the authorities referred to in Chapter V, insofar as the information is relevant to the examination of the application.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question shall be available to the authorities referred to in Chapter V, except where such access is precluded in cases of national security.

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant. Member States may only limit the possibility of visiting applicants in closed areas where such limitation is, by virtue of national legislation, objectively necessary for the security, public order or administrative management of the area, or in order to ensure an efficient examination of the application, provided that access by the legal adviser or other counsellor is not thereby severely limited or rendered impossible.

3. Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure, without prejudice to this Article or to Article 17(1)(b).

4. Member States may provide that the applicant is allowed to bring with him/her to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.

Member States may require the presence of the applicant at the personal interview, even if he/she is represented under the terms of national law by such a legal adviser or counsellor, and may require the applicant to respond in person to the questions asked.

The absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting the personal interview with the applicant.

Article 17

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:

(a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [1];

(b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview.

Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor:

(a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or

(b) can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above to the representative; or

(c) is married or has been married.

3. Member States may, in accordance with the laws and regulations in force on 1 December 2005, also refrain from appointing a representative where the unaccompanied minor is 16 years old or older, unless he/she is unable to pursue his/her application without a representative.

4. Member States shall ensure that:

(a) if an unaccompanied minor has a personal interview on his/her application for asylum as referred to in Articles 12, 13 and 14, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;

(b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum.

In cases where medical examinations are used, Member States shall ensure that:

(a) unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

(b) unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned; and

(c) the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.

[1] OJ L 31, 6.2.2003, p. 18.

6. The best interests of the child shall be a primary consideration for Member States when implementing this Article.

Article 18

Detention

1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.

Article 19

Procedure in case of withdrawal of the application

1. 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.

2. 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.

Article 20

Procedure in the case of implicit withdrawal or abandonment of the application

1. 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.

Member States may assume that the applicant has implicitly withdrawn or abandoned his/her application for asylum in particular when it is ascertained that:

(a) he/she has failed to respond to requests to provide information essential to his/her application in terms of Article 4 of Directive 2004/83/EC or has not appeared for a personal interview as provided for in Articles 12, 13 and 14, unless the applicant demonstrates within a reasonable time that his/her failure was due to circumstances beyond his control;

(b) he/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time, or he/she has not within a reasonable time complied with reporting duties or other obligations to communicate.

For the purposes of implementing these provisions, Member States may lay down time-limits or guidelines.

2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34.

Member States may provide for a time-limit after which the applicant's case can no longer be re-opened.

Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage where it was discontinued.

Article 21

The role of UNHCR

1. Member States shall allow the UNHCR:

(a) to have access to applicants for asylum, including those in detention and in airport or port transit zones;

(b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto;

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

2. Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State concerned on behalf of the UNHCR pursuant to an agreement with that Member State.

Article 22

Collection of information on individual cases

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.

CHAPTER III

PROCEDURES AT FIRST INSTANCE

SECTION I

Article 23

Examination procedure

1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

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. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

3. 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. 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:

(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; or

(b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83/EC; or

(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); or

(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; or

(e) the applicant has filed another application for asylum stating other personal data; or

(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; or

(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; or

(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; or

(i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or

(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; or

(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 Articles11(2)(a) and (b) and 20(1) of this Directive; or

(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; or

(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; or

(n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or

(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.

Article 24

Specific procedures

1. Member States may provide for the following specific procedures derogating from the basic principles and guarantees of Chapter II:

(a) a preliminary examination for the purposes of processing cases considered within the framework set out in Section IV;

(b) procedures for the purposes of processing cases considered within the framework set out in Section V.

2. Member States may also provide a derogation in respect of Section VI.

SECTION II

Article 25

Inadmissible applications

1. In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for asylum as inadmissible pursuant to this Article 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 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.

Article 26

The concept of first country of asylum

A country can be considered to be a first country of asylum for a particular applicant for asylum if:

(a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or

(b) he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement;

provided that he/she 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).

Article 27

The safe third country concept

1. 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.

2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

(a) rules requiring 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;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to 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;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

3. When implementing a decision solely based on this Article, 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.

4. 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.

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

SECTION III

Article 28

Unfounded applications

1. 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.

2. In the cases mentioned in Article 23(4)(b) and in cases of unfounded applications for asylum in which any of the circumstances listed in Article 23(4)(a) and (c) to (o) apply, Member States may also consider an application as manifestly unfounded, where it is defined as such in the national legislation.

Article 29

Minimum common list of third countries regarded as safe countries of origin

1. The Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries which shall be regarded by Member States as safe countries of origin in accordance with Annex II.

2. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with Annex II. The Commission shall examine any request made by the Council or by a Member State to submit a proposal to amend the minimum common list.

3. When making its proposal under paragraphs 1 or 2, the Commission shall make use of information from the Member States, its own information and, where necessary, information from UNHCR, the Council of Europe and other relevant international organisations.

4. Where the Council requests the Commission to submit a proposal for removing a third country from the minimum common list, the obligation of Member States pursuant to Article 31(2) shall be suspended with regard to this third country as of the day following the Council decision requesting such a submission.

5. Where a Member State requests the Commission to submit a proposal to the Council for removing a third country from the minimum common list, that Member State shall notify the Council in writing of the request made to the Commission. The obligation of this Member State pursuant to Article 31(2) shall be suspended with regard to the third country as of the day following the notification to the Council.

6. The European Parliament shall be informed of the suspensions under paragraphs 4 and 5.

7. The suspensions under paragraphs 4 and 5 shall end after three months, unless the Commission makes a proposal before the end of this period, to withdraw the third country from the minimum common list. The suspensions shall in any case end where the Council rejects a proposal by the Commission to withdraw the third country from the list.

8. Upon request by the Council, the Commission shall report to the European Parliament and the Council on whether the situation of a country on the minimum common list is still in conformity with Annex II. When presenting its report, the Commission may make such recommendations or proposals as it deems appropriate.

Article 30

National designation of third countries as safe countries of origin

1. Without prejudice to Article 29, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum. This may include designation of part of a country as safe where the conditions in Annex II are fulfilled in relation to that part.

2. By derogation from paragraph 1, Member States may retain legislation in force on 1 December 2005 that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum where they are satisfied that persons in the third countries 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.

3. Member States may also 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, where the conditions in paragraph 2 are fulfilled in relation to that part or group.

4. In assessing whether a country is a safe country of origin in accordance with paragraphs 2 and 3, Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned.

5. 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 organisations.

6. Member States shall notify to the Commission the countries that are designated as safe countries of origin in accordance with this Article.

Article 31

The safe country of origin concept

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.

2. Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Article 29.

3. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.

SECTION IV

Article 32

Subsequent application

1. 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 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.

2. Moreover, Member States may apply a specific procedure as referred to in paragraph 3, 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;

(b) 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.

3. 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 of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.

4. 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.

5. 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.

6. 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 set forth in paragraphs 3, 4 and 5 of this Article in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39.

7. The procedure referred to in this Article may also be applicable in the case of a dependant who 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. In this case the preliminary examination referred to in paragraph 3 of this Article will consist of examining whether there are facts relating to the dependant's situation which justify a separate application.

Article 33

Failure to appear

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.

Article 34

Procedural rules

1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 32 enjoy the guarantees provided for in Article 10(1).

2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, *inter alia*:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;

(b) require submission of the new information by the applicant concerned within a time-limit after he/she obtained such information;

(c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

The conditions shall 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.

3. Member States shall ensure that:

(a) 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;

(b) if one of the situations referred to in Article 32(2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

SECTION V

Article 35

Border procedures

1. 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 made at such locations.

2. However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article 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.

3. The procedures referred to in paragraph 2 shall ensure in particular that the persons concerned:

(a) are allowed to remain at the border or transit zones of the Member State, without prejudice to Article 7;

(b) are be 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, in relation to their application for asylum 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;

(e) can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 15(1); and

(f) have a representative appointed in the case of unaccompanied minors, as described in Article 17(1), unless Article 17(2) or (3) applies.

Moreover, 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.

4. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall 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 this Directive.

5. 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 paragraph 1 or the specific procedure set out in paragraphs 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.

SECTION VI

Article 36

The European safe third countries concept

1. Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.

2. A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law;

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and

(d) it has been so designated by the Council in accordance with paragraph 3.

3. The Council shall, acting by qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt or amend a common list of third countries that shall be regarded as safe third countries for the purposes of paragraph 1.

4. The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-refoulement under the Geneva Convention, including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law.

5. When implementing a decision solely based on this Article, the Member States concerned 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.

6. Where the safe third country does not re-admit the applicant for asylum, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

7. Member States which have designated third countries as safe countries in accordance with national legislation in force on 1 December 2005 and on the basis of the criteria in paragraph 2(a), (b) and (c), may apply paragraph 1 to these third countries until the Council has adopted the common list pursuant to paragraph 3.

CHAPTER IV

PROCEDURES FOR THE WITHDRAWAL OF REFUGEE STATUS

Article 37

Withdrawal of refugee status

Member States shall ensure that an examination to withdraw the refugee status of a particular person may commence when new elements or findings arise indicating that there are reasons to reconsider the validity of his/her refugee status.

Article 38

Procedural rules

1. Member States shall ensure that, where the competent authority is considering withdrawing the refugee status of a third country national or stateless person in accordance with Article 14 of Directive 2004/83/EC, the person concerned shall enjoy the following guarantees:

(a) to be informed in writing that the competent authority is reconsidering his or her qualification for refugee status and the reasons for such a reconsideration; and

(b) to be given the opportunity to submit, in a personal interview in accordance with Article 10(1)(b) and Articles 12, 13 and 14 or in a written statement, reasons as to why his/her refugee status should not be withdrawn.

In addition, Member States shall ensure that within the framework of such a procedure:

(c) the competent authority is able to obtain precise and up-to-date information from various sources, such as, where appropriate, from the UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned; and

(d) where information on an individual case is collected for the purposes of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee whose status is under reconsideration, nor jeopardise the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

2. Member States shall ensure that the decision of the competent authority to withdraw the refugee status is given in writing. The reasons in fact and in law shall be stated in the decision and information on how to challenge the decision shall be given in writing.

3. Once the competent authority has taken the decision to withdraw the refugee status, Article 15, paragraph 2, Article 16, paragraph 1 and Article 21 are equally applicable.

4. By derogation to paragraphs 1, 2 and 3 of this Article, Member States may decide that the refugee status shall lapse by law in case of cessation in accordance with Article 11(1)(a) to (d) of Directive 2004/83/EC or if the refugee has unequivocally renounced his/her recognition as a refugee.

CHAPTER V

APPEALS PROCEDURES

Article 39

The right to an effective remedy

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:

(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),

(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.

2. 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.

3. 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;

(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and

(c) the grounds for challenging a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).

4. Member States may lay down time-limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

5. 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, 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.

6. 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.

CHAPTER VI

GENERAL AND FINAL PROVISIONS

Article 40

Challenge by public authorities

This Directive does not affect the possibility for public authorities of challenging the administrative and/or judicial decisions as provided for in national legislation.

Article 41

Confidentiality

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.

Article 42

Report

No later than 1 December 2009, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. Member States shall send the Commission all the information that is appropriate for drawing up this report. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every two years.

Article 43

Transposition

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 December 2007. Concerning Article 15, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 December 2008. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 44

Transition

Member States shall apply the laws, regulations and administrative provisions set out in Article 43 to applications for asylum lodged after 1 December 2007 and to procedures for the withdrawal of refugee status started after 1 December 2007.

Article 45

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 46

Addressees

This Directive is addressed to the Member States in conformity with the Treaty establishing the European Community.

Done at Brussels, 1 December 2005.

For the Council

The President

Ashton of UPHOLLAND

ANNEX I

Definition of 'determining authority'

When implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17(1) of the *Refugee Act 1996* (as amended) continue to apply, consider that:

— 'determining authority' provided for in Article 2(e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, mean the *Office of the Refugee Applications Commissioner*; and

— 'decisions at first instance' provided for in Article 2(e) of this Directive shall include recommendations of the *Refugee Applications Commissioner* as to whether an applicant should or, as the case may be, should not be declared to be a refugee.

Ireland will notify the Commission of any amendments to the provisions of section 17(1) of the *Refugee Act* 1996 (as amended).

ANNEX II

Designation of safe countries of origin for the purposes of Articles 29 and 30(1)

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.

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.

ANNEX III

Definition of 'applicant' or 'applicant for asylum'

When implementing the provisions of this Directive Spain may, insofar as the provisions of *'Ley 30/1992 de Régimen jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común'* of 26 November 1992 and *'Ley 29/1998 reguladora de la Jurisdicción Contencioso-Administrativa'* of 13 July 1998 continue to apply, consider that, for the purposes of Chapter V, the definition of 'applicant' or 'applicant for asylum' in Article 2(c) of this Directive shall include '*recurrente*' as established in the abovementioned Acts.

A '*recurrente*' shall be entitled to the same guarantees as an 'applicant' or an 'applicant for asylum' as set out in this Directive for the purposes of exercising his/her right to an effective remedy in Chapter V.

Spain will notify the Commission of any relevant amendments to the abovementioned Act.

Definitions and list of abbreviations

1951 Convention	UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
1967 Protocol	UN General Assembly, Protocol Relating to the Status of Refugees, 30 January 1967, United Nations, Treaty Series, vol. 606, p. 267
A2	Act No. 2/2002 Coll., amending 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 several other Acts; published in Issue 2/2002 of the Collection of Laws of the Czech Republic (pp. 66-82) on January 7, 2002, and entered into force on February 1, 2002
A379	Act No. 379/1997 Coll., amending Act No. 325/1999 Coll. on Asylum Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act), and Amendment to several other Acts; published in Issue 116/2007 of the Collection of Laws of the Czech Republic (pp. 5438-5473) on December 21, 2007, and entered into force on December 21, 2007 (some provisions of the Act entered into force later)
AAD	Act on Administrative Dispute
AB	Appeals Board
ABA	Athens Bar Association
ABRvS	Afdeling bestuursrechtspraak van de Raad van State (Administrative Adjudication Section of the Council of State)
AC	Administrative Court
ACCEM	Asociación Comisión Católica Española de Migraciones (Spanish Catholic Commission for Migration)
ACET	Assistance Centre for Torture Survivors
ACSAR	Associació Catalana de Solidaritat i Ajuda als Refugiat, Catalan (Association for Solidarity and Help to Refugees)
ADA	Aliens' Directorate of Athens
ADGPH	Aliens' Directorate of the Greek Police Headquarters
ADGPH	Aliens' Directorate of the Greek Police Headquarters
AGAP	Act on General Administrative Procedure
AH	Asylum Home
AI	Amnesty International
AL	Asylum Law / LEY 5/1984, de 26 de marzo, reguladora del Derecho de Asilo y de la Condición de Refugiado (BOE 74/1984, de 27 de marzo), modificada por la Ley 9/1994 de 19 de mayo (BOE núm. 122, de 23 de mayo) y por la Ley Orgánica 3/2007, de 22 de marzo – Disposición Adicional vigésima novena- (BOE 71/ 2007 de 23 de marzo). – LEY DE ASILO / LAW 5/1984, of 26 of March, regulating the Right to Asylum and the Refugee Status (BOE 74/1984, of 27 of March), amended by Law 9/1994 of 19 of May (BOE 122, of 23 of May) and by Organic Law 3/ 2007, of 22 of March – 29th Additional Disposition – (BOE 71/ 2007of 23 of March)
ALA	Act No. 326/1999 Coll. on Residence of Aliens on the Territory of the Czech Republic and Amendment to Some Acts; Issue No. 106/1999 of the Collection of Laws of the Czech Republic (pp. 7406-7447) on December 23, 1999, and

	entered into force on January 1, 2000
ALR	Asylum Law Regulation / REAL DECRETO 203/1995, de 10 de febrero, por el que se aprueba el Reglamento de aplicación de la Ley 5/1984, de 26 de marzo, reguladora del Derecho de Asilo y de la Condición de Refugiado, modificada por la Ley 9/1994 de 19 de mayo (BOE 52/1995, de 2 de marzo), en su redacción dada por el Real Decreto 864/2001, de 20 de julio (BOE 174/ 2001, de 21 de julio), por el Real Decreto 865/2001, de 20 de julio (BOE 174/2001, de 21 de julio) , por el Real Decreto 1325/2003, de 24 de octubre (BOE 256/ 2003, de 25 de octubre) y por el Real Decreto 2393/2004, de 30 de diciembre (BOE 6/ 2005, de 7 de enero). – REGLAMENTO DE LA LEY DE ASILO / Royal Decree 203/1995, of 10 of February, approving the Regulation that implements the Law 5/1984, of 26 of March, regulating the Right to Asylum and the Refugee Status, amended by Law 9/1994 of 19 of May(BOE 52/1995, of 2 March), in its drafting given by Royal Decree 864/2001, of 20 of July (BOE 174, of 21 of July), by Royal Decree 865/2001, of 20 of July (BOE 174, of 21 of July), by Royal Decree 1325/2003, of 24 of October (BOE 256, of 25 of October) and by Royal Decree 2393/2004, of 30 of December(BOE 6/ 2005, of 7 January)
ANAFE	Association nationale d'assistance aux frontières pour les étrangers (National association for assistance for foreigners at the borders)
AO	Aliens' Office (Dienst Vreemdelingenzaken)
APA	Asylum Procedure Act
APB	Admissibility Procedure at Borders (Procedimiento de Admisión en Frontera)
APC	Administrative Procedures Code
APC	Admissibility Procedure in Country (Procedimiento de Admisión en Territorio)
APD Recast Proposal 2009	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	Asylum Procedures Directive: Council of the European Union, Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal L 326, 13.12.2005, p. 13–34)
API	Asylum Police Instructions
APL	Administrative Procedure Law / LEY 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento administrativo Común (BOE 285/ 1992, de 27 de noviembre). – LEY DE PROCEDIMIENTO ADMINISTRATIVO / Law 30/1992 of 26 November, on the Legal System of the Public Administrations and the Common Administrative Procedure (BOE 285/ 1992, of 27 of November)
APS	Autorisation Provisoire de Séjour (Temporary Residence Permit)
ARD	Asylum and Refugees Department (part of the ADGPH)
ASA	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 January 1, 2000
ASGI	Associazione per gli Studi Giuridici sull'Immigrazione (Association for law studies on immigration)
ASQAEM Project	UNHCR's Asylum Systems Quality Assurance and Evaluation Mechanisms for the Central and Eastern Europe sub-region Project
ASQAEM Training	Training Conference under the ASQAEM Project, 11 – 12 June 2009, Sofia, Bulgaria
BAMF	Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees)
BHC	Bulgarian Helsinki Committee
BOE	Boletín Oficial del Estado (Official State Journal)
BRC	Bulgarian Red Cross
BS	Belgisch Staatsblad (Official Gazette)
CADA	Centre d'accueil pour demandeurs d'asile (Centre for the reception of asylum seekers)
CAJ	Act No. 150/2002 Coll., Code of Administrative Justice; Issue No. 61/2002 of the Collection of Laws of the Czech Republic (pp. 3306-3330) on April 17, 2002, and entered into force on January 1, 2003
CALL	Council for Aliens Law Litigation (Raad voor Vreemdelingenbetwistingen / Conseil Contentieux des Etrangers)
CAP	Code of Administrative Procedure, as amended: Act No. 500/2004 Coll., published in Issue No. 174/2004 of the Collection of Laws of the Czech Republic (pp. 9782 -9827) on September 24, 2004, and entered into force on January 1, 2006
CARA	Centro di accoglienza per richiedenti asilo (Reception centre for refugees and asylum seekers)
Cass.	Corte di cassazione (Court of cassation)
CC	City Court or Constitutional Court
CEAR	Comisión Española de Ayuda al Refugiado (Spanish Commission of Aid to Refugees)
CEAS	Common European Asylum System
CESEDA	Code de l'entrée et du séjour des étrangers et du droit d'asile (Code of entry and residence of foreigners and asylum)
CF	Centre for Foreigners
CFDA	Coordination française pour le droit d'asile (French coordination for the right to asylum)
CGRA	Commissariaat-generaal voor de Vluchtelingen en de Staatlozen / Commissariat Général aux Réfugiés et aux Apatrides (Office of the Commissioner-General for Refugees and Stateless Persons)
CIAR	Comisión Interministerial de Asilo y Refugio (Inter-ministerial Commission for Asylum and Refuge)
CIE	Centro di identificazione e di espulsione (Identification and expulsion center)
CIR	Consiglio Italiano per i Rifugiati (Italian Council for Refugees)
CNDA (FR)	Cour Nationale du Droit d'Asile (National Court for the Right to Asylum)
CNDA (IT)	Commissione nazionale per il diritto di asilo (National Commission for the recognition of the right to asylum)

CoE	Council of Europe
CoG	Constitution of Greece
COI	Country of Origin Information
COI Unit	Unit responsible for country of origin information
CoS	Council of State
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3
CTRPI	Commissione territoriale per il riconoscimento della protezione internazionale (Territorial Commission for the recognition of international protection)
d.l.	decreto-legge (law decree)
d.lgs.	decreto legislativo (legislative decree)
d.P.R.	decreto del Presidente della Repubblica (decree of the President of the Republic)
DAF	Division asile aux frontières (within OFPRA) (Border Division of Asylum)
DAMP	Department of Asylum and Migration Policy of the Ministry of the Interior
DMI	Deputy Minister of Interior
Dublin II Regulation or Dublin II	Council of the European Union, 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, OJ L 50, p. 1–10
EASO	European Asylum Support Office: See Council of the European Union, Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, 16 February 2010, 16626/09, 2009/0027 (COD).
EC	European Commmission/Communities
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIN	Electronic Immigration Network
ERF	European Refugee Fund
EU Charter of Fundamental Rights	European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, OJ C 364/01 of 18 December 2000
EU	European Union
ExCom	Executive Committee of the High Commissioner's programme (UNHCR)
GAAS	Geautomatiseerde Agenda
GALA / AWB	General Administrative Law Act
GASAI	Groupe d'analyse et de suivi des affaires d'immigration (Police aux frontières) (Group for the analysis and follow-up of immigration issues (border police))
GCR	Greek Council for Refugees
GOC	Gesloten Opvang Centrum (Closed border centre)
GSPO	General Secretariat of Public Order
GWH	Grondwettelijk Hof (Constitutional Court)
HC	House of Commons
IARLJ	International Association of Refugee Law Judges

IFA	Internal Flight Alternative
IND	Immigration and Nationality Department
INDIAC	Immigration and Nationality Department Information and Analysis Centre
INEP	Training Institute of the National Centre for Public Administration and Local Government
Instructions (the)	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
IPA	International Protection Act
IPD	International Protection Division
IRR	Internal Rules for Conducting Procedures on Granting Protection in the State Agency for Refugees within the Council of Ministers (Internal Rules and Regulations)
JLD	Juge des libertés et de la détention (Judge for freedom and detention)
JV	Jurisprudentie Vreemdelingenrecht (Aliens' Law Jurisprudence)
KLC	Kennis en Leer Centrum (National Knowledge and Learning Centre)
l.	legge (law)
LAR	Law on Asylum and Refugees
LJCA / LAJ	Ley de la Jurisdicción Contencioso – Administrativa: LEY 29/ 1998, de 13 de Julio, reguladora de la Jurisdicción Contencioso – administrativa (BOE nº 167/ 1998, de 14 de julio) / Law on the Administrative Jurisdiction: Law 29/1998, of 13 July, on the Jurisdiction for Judicial Procedures under Administrative Law (BOE 167/ 1998, of 14 July)
LLA	Law on Legal Aid
LPDP	Law on Personal Data Protection
LPF	Law on Persons and Family
Methodology Directorate	Methodology of Proceedings and Procedural Representation Directorate, SAR
MFA	Ministry of Foreign Affairs
MIIINDS	Ministère de l'Immigration, de l'Intégration, de l'Identité nationales et du développement solidaire (Ministry for Immigration, Integration, National Identity, and Cooperative Development)
MOI	Ministry of Interior
MPO	Ministry of Public Order
NAM	New Asylum Model
NAV	Nieuwsbrief Asiel- en Vluchtelingenrecht (Newsletter on Asylum and Refugee Law)
New Asylum Law or Law 12/2009	NUEVA LEY DE ASILO o LEY 12/2009: LEY 12/2009, de 30 de octubre, reguladora del derecho de Asilo y de la protección subsidiaria (BOE 263/2009, de 31 de octubre) / LAW 12/2009, of 30 of October, regulating the right to asylum and the subsidiary protection (BOE 263/2009, of 31 of october)
NGO	Non-Governmental Organisation
NPM	UNHCR National Project Manager
NPO	UNHCR National Project Officer
OAR	Oficina de Asilo y Refugio (Office for Asylum and Refugees)
OFPRA	Office français de protection des réfugiés et des apatrides (French Office for the protection of refugees and stateless persons)

OPU	Organizace pro Pom oc Uprchlíkům (Organization for Aid to Refugees)
PAF	Police aux frontières (Border Police)
PD	Presidential Decree
QD	Qualification Directive: Council of the European Union, 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, Official Journal L 304 , 30/09/2004 P. 0012 – 0023
QI	Quality Initiative
RC	Regional Court
RFA	Refugee Facilities Administration
RRC	Registration and Reception Centre
RSD	Refugee Status Determination
RV	Rechtspraak Vreemdelingenrecht / Case Law on Aliens' Law
RvS	Raad van State (Council of State)
RvV	Raad voor Vreemdelingenbetwistingen (Council for Aliens Law Litigation)
SAC	Supreme Administrative Court
SAN	Sentencia de la Audiencia Nacional (High Court Sentence)
SAR	State Agency for Refugees within the Council of Ministers of the Republic of Bulgaria
SC	Supreme Court
SDAA	Security Department of Athens Airport
SDS	Security Department of Samos Island
Separated child/ren	Child/ren separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. Such children may, therefore, include children accompanied by other adult family members. Note: for the purposes of this report, the term "unaccompanied minor" was used when referring to national or European legislation and practice, as this is the predominant term in many Member States (see UAM/UMA).
sez	sezione (section)
sez. un.	sezioni unite (united sections)
SG	State Gazette
SOZE	Society of Citizens Assisting Migrants
SPRAR	Servizio protezione richiedenti asilo e rifugiati (Protection service for asylum seekers and refugees)
SPTAA	Special Place for Temporary Accommodation of Aliens in Busmantsi, Sofia
SRA	Stichting rechtsbijstand asiel (Foundation for legal representation on asylum)
Statute (the)	Statute of the State Agency for Refugees within the Council of Ministers, Adopted with a Council of Ministers Decree No. 59 of 21 March 2008, Promulgated in the State Gazette No 34 of 1 April 2008, amended SG No.42/05.06.2009
STC	Sentencia del Tribunal Constitucional (Constitutional Court Sentence)
TA	Tribunal administratif (Administrative Court)
TAR	Tribunale amministrativo regionale (Regional administrative court)
TCU	Third Country Unit
TNV	Tijdelijke Nood Voorziening (Temporary Emergency Facility)

UAM / UMA / AMA	Unaccompanied Minor/ Unaccompanied minor asylum-seeker/ (alleenstaande minderjarige asielzoeker). UNHCR's preferred terminology is "unaccompanied or separated child/ren," defined as child/ren 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 (UNHCR, Guidelines on Determining the Best Interests of the Child, May 2008). However, for the purposes of this report, the term "unaccompanied minor" was used when referring to national or European legislation and practice, as this is the predominant term in many Member States and at EU level.
UK	United Kingdom
UKBA	United Kingdom Border Agency
UN	United Nations
UNHCR APD Comments 2005	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
UNHCR Handbook	UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, 1992
UNHCR UK APD Comments 2007	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, October 2007
UNHCR	United Nations High Commissioner for Refugees
US DOS	United States Department Country Report on Human Rights Practices
VVN	VluchtelingenWerk Nederland (Dutch Council for Refugees)
ZAPI	Zone d'attente pour personnes en instance (Holding area for persons awaiting decision)

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