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Section 7
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Introduction

Insofar as Member States provide in national law that an applicant can withdraw his/her application for international protection, Article 19 of the APD sets out the options for the procedure in case of withdrawal which must be adopted by Member States. This is referred to as 'explicit withdrawal' in the APD. Article 20 of the APD, by contrast, sets out non-exhaustive grounds upon which Member States may assume that an applicant has abandoned his or her application and the options for the consequent procedure to be followed. This is referred to as 'implicit withdrawal' or abandonment of the application in the APD.

Due to the fact that an application for international protection may be explicitly or implicitly withdrawn or abandoned for a variety of reasons which are not necessarily related to an applicant's lack of protection needs, UNHCR's fundamental concern is that the APD and Member States' national legislation and practice should ensure, as far as possible, that the provisions on implicit withdrawal and abandonment are not applied to applicants who have no intention of withdrawing or abandoning their applications. Moreover, following (explicit or implicit) withdrawal or abandonment of an application, if an applicant wishes to re-open the application and pursue the examination, s/he should have access to a fair and effective asylum procedure and the application should be subject to an appropriate and complete examination of its merits.[1] This is essential to ensure compliance with the international legal obligation of *non-refoulement* and the relevant provisions of the European Convention on Human Rights and the UN Convention against Torture.

Explicit withdrawal

The APD does not require Member States to make provision in national law for applicants to be able to withdraw their application for international protection. Nevertheless, most of the Member States surveyed for this research have national law in place which provides the possibility for the explicit withdrawal of an application for international protection. This is the case in Belgium[2], Bulgaria[3], the Czech Republic[4],

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[1] Article 14 of the Universal Declaration of Human Rights and Article 18 of the EU Charter on Fundamental Rights. See also UNHCR ExCom Conclusion No. 65 XLII, 1991, paragraph (o); ExCom Conclusion No. 82 (XLVIII) on safeguarding asylum, 1997, paragraph (d) (ii); ExCom Conclusion No. 85 (XLIX) on international protection, 1998, paragraph (q), which reiterate that asylum seekers should have access to fair and effective procedures for determining their status and protection needs.

[2] Article 33 Royal Decree of 11 July 2003 concerning the procedure to be followed by the CGRA. Moreover, if a period of time has elapsed since the application was submitted, the CGRA can, by law, ask the applicant in writing whether s/he wants to continue to pursue the application or explicitly withdraw the application: Article 11 of the Royal Decree of 11 July 2003.

Germany[5], Greece[6], Italy[7], the Netherlands[8], Slovenia[9], Spain[10] and the UK[11]. And, at the time of writing, it was provided for in pending draft law in Finland.[12]

In Germany, an asylum application is defined as an application for constitutional asylum and for recognition of refugee status only.[13] It does not encompass the various forms of subsidiary protection status.[14] However, following an examination of the asylum application, if the applicant is not deemed to qualify for constitutional asylum and is not recognised as a refugee, the determining authority *ex officio* examines qualification for subsidiary protection status. Before a decision is taken on any of these forms of protection, an applicant may explicitly withdraw the asylum application.[15] This will halt the examination of the asylum application with regard to constitutional asylum and

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[3] Article 15 (1), item 6, LAR.

[4] Section 25 (a) ASA.

[5] Section 32 APA with regard to the asylum application only and not subsidiary protection.

[6] Article 14 (1) PD 90/2008.

[7] Article 23 d/lgs 25/2008. Note that an application can only be explicitly withdrawn before the personal interview.

[8] Article 3:47 Aliens Regulation and C11/3.5 of the Aliens Circular.

[9] Article 50 (1) of the IPA.

[10] Article 90 APL and Article 27 of the New Asylum Law.

[11] Immigration Rule 333C.

[12] The Government Bill 86/2008 implementing the APD lays down new legislation on the matter. Section 95 b will read: "*The applicant can withdraw his or her application by notice to the Immigration Service, the police or the border guards. The notice must be made in person and must be in writing, and it must without doubt convey the intention of the applicant to withdraw the application. The applicant shall in the notice give the date for the withdrawal. The notice must be signed*."

[13] Section 13 APA states that: *"(1) An asylum application shall be deemed to have been made if it is clear from the foreigner's written, oral or otherwise expressed desire that he is seeking protection in the Federal territory from political persecution or that he wishes protection from deportation or other return to a country where he would be subject to the threats defined in Section 60 (1) of the Residence Act.*
(2) Every application for asylum is an application for recognition of refugee status as well as for recognition of entitlement to asylum, unless the foreigner expressly objects."

[14] If no application for asylum is filed, but a request is made only for subsidiary protection, this is decided upon by the aliens' authorities and not the determining authority. According to Section 72 (2) Residence Act, the determining authority (BAMF) needs to be consulted all the same by the aliens' authority before taking a decision.

[15] The possibility of an explicit withdrawal of the application for asylum can be deduced from Section 32 1st Sentence APA: "*If the asylum application is **withdrawn** or abandoned in the meaning of Section 14a (3), the Federal Office shall indicate in its decision that the asylum procedure has been discontinued and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7) Residence Act* [i.e. national and European forms of subsidiary protection]*."* The consequences of abandonment in the meaning of Section 14a (3) are not further examined in the framework of this study, as they refer to a special form of abandonment: While Section 14a (1) APA states that "*application[s] also includes each unmarried child under age 16 residing in the Federal territory[…], if the child has not already filed an application for asylum*," Section 14a (3) APA offers the possibility to "*[t]he child's representative […] [to] waive the processing of an asylum application for the child at any time by stating that the child faces no threat of political persecution*."

recognition of refugee status. However, by law, the determining authority will nevertheless be required to take a decision with regard to subsidiary protection.[16]

In Belgium and the UK, there is a specific form which needs to be completed and signed by the applicant to confirm that the applicant is voluntarily withdrawing the application and s/he is fully aware of the consequences of this action.[17] A specific form also exists in the Netherlands, although only for those applicants who are in detention.[18]

In the other Member States surveyed, there is no standard form but the applicant is required to put the request for withdrawal of the application in writing. This is the case in Bulgaria,[19] Czech Republic, Finland, Greece[20], Italy, the Netherlands[21] and Spain[22]. In Slovenia, "*an applicant may make an oral or written statement in order to withdraw the application*". [23] However, where an applicant asks orally to withdraw the application, the determining authority is required to record the request in writing.[24]

In Germany, the mode for requesting the explicit withdrawal of the asylum application is not stipulated in law. In practice, according to the determining authority (BAMF), a request for explicit withdrawal may be made orally or in writing directly to the BAMF or to the aliens' authorities which would forward the request to the BAMF. Where an applicant asks orally to withdraw the asylum application at the BAMF's office, the BAMF informed UNHCR that it records the request in writing and the applicant is asked to sign the statement.

It is essential that the written statement or record clearly conveys the applicant's intention to withdraw the application and testifies that the applicant is fully aware of the consequences of this action. For instance, an applicant in the Czech Republic, who was informed that the Czech Republic was responsible for the examination of her application under the Dublin II Regulation, stated in writing that she wanted Germany to continue the examination of her application. The determining authority in the Czech

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[16] Section 32 APA: *"If the asylum application is withdrawn […] the Federal Office shall indicate in its decision that the asylum procedure has been discontinued and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7). […]"* .

[17] In 2008, there were 99 cases of voluntary withdrawal in Belgium.

[18] Model M53 requires the applicant to name the legal adviser s/he has consulted with about the withdrawal.

[19] This is the practice in Bulgaria (interviews with stakeholders in the Methodology Directorate).

[20] Article 14 (1) PD 90/2008.

[21] C11/3.5 Aliens Circular. In 2008, according to statistical information provided by the determining authority (IND), 670 applications were explicitly withdrawn. According to the IND Section on Policy Development, this number was influenced by the so-called Dutch '*Pardonregeling* (Rules on acquiring an amnesty)' which required applicants for international protection to withdraw their application in order to qualify for a residence permit in accordance with other strict conditions.

[22] Article 91 APL. UNHCR audited three decisions in which the application had been explicitly withdrawn: Cases Nr. 0709018, 0209119, 0209120. In all three cases, there was a written statement by the applicant.

[23] Article 50 (1) of the IPA.

[24] Article 65 of the AGAP.

Republic interpreted this statement as a request for withdrawal. The appeal court annulled the decision on the grounds that it was not explicit that the applicant intended to withdraw the application.[25] As such, the determining authority is obliged to verify both the applicant's intent and ensure that s/he is fully aware of the consequences.

It is, therefore, problematic that the determining authority in the Netherlands does not consider it its responsibility to explain to an applicant who wishes to withdraw the application the consequences of his or her action. The determining authority instead relies on the fact that the applicant has the right to consult a legal adviser,[26] but with regard to those applicants who are not in detention, there is no formal written record of whether the applicant in fact consulted with a legal adviser and is aware of the consequences.

Similarly, in Germany, the determining authority (BAMF) has reported to UNHCR that providing applicants with specific information on the legal consequences of explicit withdrawal is not required.[27] BAMF noted that most requests for explicit withdrawal are made in writing by the applicants' lawyers and it, therefore, assumes that the applicants are aware of the legal consequences of this action. However, the lawyers consulted by UNHCR confirmed that applicants are not always informed of the legal consequences of the withdrawal[28], and in fact are (often) not aware of the consequences[29], especially when withdrawal is declared at the aliens' authorities.[30]

The only Member State, of those surveyed, that has no national legislation regarding explicit withdrawal is France. In practice, if an applicant wishes to withdraw his or her application for international protection, this must be done in writing, although there is no specific form for this.[31]

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[25] Judgment No. 4 Azs 34/2008 – 58 of 31 October 2008, available at www.nssoud.cz. Unofficial translation.
[26] For at most two hours in the accelerated procedure.
[27] The legal expert R. Marx is of the opinion that both the BAMF and the aliens' authorities have the duty to fully inform the applicant of the consequences of withdrawal, especially the fact that any further application will be treated as a subsequent application, and refers in this regard to Section 25 Administrative Procedure Act (R. Marx, Commentary on the Asylum Procedure Act, 7th edition (2009), Section 32, paragraph 8.) Section 25 (1) 2nd Sentence states inter alia: *"It [the authority] shall, where necessary, give information regarding the rights and duties of participants in the administrative proceedings."*
[28] Lawyer X3 states that unfortunately, applicants also consult lawyers only after they have withdrawn their application.
[29] Lawyers X1, X2, X3.
[30] Lawyer X1.
[31] Based on information provided in an interview with the Legal Department of OFPRA. In 2008, according to OFPRA figures, there were 152 explicit withdrawals.

Recommendation

UNHCR recommends, for the purposes of legal certainty, that Member States have in place legislation, regulations or administrative provisions, which clarify the procedure in the case of explicit withdrawal of the application.

As a matter of good practice, UNHCR recommends that the determining authority explicitly informs the applicant of the consequences of withdrawal.

It is essential that a request by an applicant to withdraw an application be recorded in writing and clearly testifies both to the intent of the applicant to withdraw the application and to the applicant's awareness of the consequences of this action. As a matter of good practice, UNHCR would recommend that any request by an applicant to withdraw an application is recorded in writing, signed by the applicant and the legal representative (if appointed) as confirmation of the fact that the applicant was informed of the consequences of the explicit withdrawal.

Decision following explicit withdrawal

The APD directs Member States on what action should be taken if an applicant explicitly withdraws his or her application. Article 19 (1) APD, on the procedure in case of withdrawal of the application, states that:

"*Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law, when an applicant for asylum explicitly withdraws his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application.*" Article 19 (2) APD adds, "*Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority enters a notice in the applicant's file.*"

The Directive, therefore, provides for three options:

(a) a decision to discontinue the examination;
(b) a decision to reject the application;
(c) no decision is taken, but the examination is discontinued and a notice is placed in the applicant's file.

It should be highlighted that the APD does not stipulate the legal consequences of a "decision to discontinue" or the "discontinuation of the examination without a decision". However, as will be seen below, if an applicant changes his or her mind about

the withdrawal and decides to pursue the original application, the legal consequences of a decision to discontinue the examination or to discontinue the examination without a decision in one Member State may be the same as a decision to reject the application in another Member State.

UNHCR is concerned that the APD permits Member States to reject an application simply because it has been explicitly withdrawn. It is UNHCR's view that a negative decision on an application for international protection should only be issued when there has been a complete examination of an application and it has been determined that the applicant is not a refugee and does not qualify for subsidiary protection status. UNHCR is of the opinion that a negative decision should not be issued when there has been no examination of the merits of the application because the applicant has withdrawn the application, either before s/he has substantiated the application in accordance with Article 4 of the Qualification Directive, and/or before the determining authority has assessed all the relevant facts and circumstances and completed the examination in accordance with Article 4 of the Qualification Directive.[32] In such situations, UNHCR recommends that Member States either take a decision to discontinue the examination or Member States discontinue the examination of the application without taking a decision, and enter a notice in the applicant's file.

UNHCR notes that the overwhelming majority of the Member States surveyed either take a decision to discontinue the examination or they discontinue the procedure without taking a decision. A decision to discontinue the examination is taken in Belgium[33], Bulgaria[34], the Czech Republic[35], Finland[36], Germany[37] and Slovenia[38]. As mentioned above, however, in Germany the determining authority will continue its examination on the merits with regard to subsidiary protection, notwithstanding a decision to discontinue the examination of the asylum claim regarding constitutional

[32] Article 4 of the Qualification Directive, entitled "Assessment of facts and circumstances", among other things, provides that "*Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application*". Article 4 also provides that "*the assessment of an application for international protection is to be carried out on an individual basis*", and sets out elements to be taken into account in that assessment.

[33] Article 33 of the Royal Decree of 11 July 2003 concerning the procedure to be followed by the CGRA.

[34] Article 15 (1) item 6 LAR. Article 77 (3) LAR states that a decision to discontinue will be taken by the Chairperson of SAR. During the accelerated procedure, the interviewer may also take a decision to discontinue the proceedings based on explicit withdrawal, as stipulated in Article 70 (1), item 2 LAR.

[35] Section 25 ASA.

[36] This is referred to as a "decision on annulment of the application" in the Government Bill 86/2008.

[37] Section 32 1st Sentence APA: "*If the asylum application is **withdrawn** […] the Federal Office shall indicate in its **decision** that the asylum procedure has been **discontinued** […].*"

[38] Article 50 (3) of the IPA.

asylum and refugee status.[39] In Italy, a decision to discontinue the examination will be taken if the application is explicitly withdrawn before the personal interview.[40]

In France,[41] the Netherlands[42], Spain[43]and the UK[44], the determining authority discontinues the examination without taking a decision and enters a note in the applicant's file.

Of the Member States surveyed, Greece represents an exception. The legislative provision in Greece is unclear as national legislation gives the determining authority the option to either reject the application or discontinue its examination without taking a decision.[45] However, the legislation does not determine in which circumstances the application should be rejected or in which circumstances the examination should be discontinued. The Greek Council of State has ruled that the national legislation is not compatible with the APD on this ground[46] and in an interview with UNHCR, the determining authority concurred that this provision of the law is flawed and should be revised. However, the determining authority informed UNHCR that, in practice, a decision to reject the application is taken. As such, Greece is the only Member State of those surveyed to reject an application when it has been explicitly withdrawn. UNHCR is concerned that an application may be rejected notwithstanding the fact that the

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[39] Section 32 1st Sentence APA: *"[…] [T]he Federal Office shall indicate in its decision that the asylum procedure has been discontinued and* ***whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7)****."*

[40] Article 23 of the d.lgs. 25/2008 states "*in the case that the applicant decides to withdraw the application before the interview with the competent Territorial Commission, the withdrawal is formalized in writing and communicated to the Territorial Commission that declares the extinction of the procedure*."

[41] Note that there is no national legislation in France. Information is based on information received in an interview with the Legal Department of OFPRA during the research period.

[42] Article 3:47 Aliens Regulation.

[43] Article 91 (2) of the APL. Note that the procedure is declared "terminated" rather than "discontinued". This means that the procedure cannot be continued after the ten day time limit. (The ten day time limit only operates if there is an interested third party. If not, the termination is immediate). Article 91 (2) APL establishes that a formal decision of termination of the procedure should be adopted, which is never done in practice.

[44] Immigration Rules 333C contains a permissive clause which states that if "*an application for asylum is withdrawn either explicitly or implicitly, consideration of it may be discontinued."* The Asylum Policy Instruction (API) on withdrawal of asylum applications states that "*When a decision is made to treat the application withdrawn, consideration of the asylum application will be discontinued and a decision* ***will not*** *be made on the claim*." API on *Withdrawal of Asylum Claims* dated 04.04.08.

[45] Article 14 (1) of PD 90/2008 states that "when an applicant for asylum withdraws his/her application in writing, the determining authority shall have the option to either reject the application or discontinue its examination without taking a decision and attach a relevant notice to that effect to the applicant's file.

[46] Council of State, 2008. *99/2008 Praktika synedriaseos ke gnomodotisi tou Symvouliou tis Epikratias Tmima E': Epeksergasia shediou proedrikou diatagmatos gia tin Prosarmogi tis ellinikis nomothesia pros tis diataksis tis Odigias 2005/85/EC. [99/2008 Records and re-script of E' Department's session: On the forthcoming Presidential Decree for the Adaptation of Greek legislation to the provisions of Council Directive 2005/85/EC].* Athens: Council of the State.

applicant may have withdrawn the application before proceeding to substantiate it, or regardless of its merits.

Recommendation

UNHCR recommends that, where the applicant has withdrawn an application before having substantiated it, and the determining authority has not assessed the application in accordance with Article 4 of the Qualification Directive, a decision to discontinue the examination should be taken, or the procedure should be discontinued without taking a decision. UNHCR recommends that the APD be amended to this effect.[47]

Applicants who decide to pursue an application previously explicitly withdrawn

Where a decision has been taken to discontinue the examination of the previous application, or the determining authority discontinued the examination of the previous application without taking a decision, Article 19 does not provide an instruction to Member States on what action should be taken in a particular situation, namely if an applicant who previously explicitly withdrew the application for international protection changes his or her mind and requests to pursue the original application.

However, it is implicit in Article 39 APD which deals with the right to an effective remedy that the applicant should be able to request the re-opening of the examination of the application. Article 39 (1) (b) states that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against "*a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20*." However, Article 39 (2) APD stipulates that Member States shall provide for time limits within which an applicant must exercise his/her right to an effective remedy pursuant to paragraph 1. An applicant who wishes to pursue a previous application may find that the relevant time limit has expired. UNHCR notes that the automatic and mechanical insistence on the application of time limits may be at variance with the prohibition of *refoulement* and the protection of fundamental human rights embodied in Article 3 of the European Convention on Human Rights.[48]

The only other explicit reference to a previous application which has been explicitly withdrawn is made in Article 32 (2) (a) APD, on subsequent applications, which states that "*Member States **may** apply a specific procedure …* [preliminary examination procedure] *where a person makes a subsequent application for asylum after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20*". However, the application of this provision, when the previous application was explicitly

[47] This would also require an amendment of Article 28 (1) APD.
[48] Jabari v. Turkey, Application No. 40035/98, judgment of 11 July 2000.

withdrawn, without a complete examination of the merits of the application, may be problematic. Firstly, the APD allows Member States which operate such a specific procedure to derogate from some of the basic principles and guarantees which might otherwise apply to the first instance procedure, including permitting the omission of the personal interview.[49] Secondly, the APD provides that the subsequent application shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application, new elements or findings have arisen or have been presented by the applicant.[50] This may be wholly inappropriate where an applicant expresses the wish to pursue a previous application which was not previously substantiated and/or examined fully and completely on its merits, and the term 'new elements or findings' is interpreted as requiring the submission of new reasons for an application (i.e. reasons other than those stated in the previous application) or new evidence in support of the application.[51]

UNHCR wishes to stress that an applicant may explicitly withdraw an application for international protection for reasons unrelated to his or her protection needs. For example, an applicant may withdraw his or her application in the belief that s/he may be allowed to remain in the Member State on some other ground(s). If this assumption turns out to be mistaken or incorrect, the applicant may report again to the determining authority and request to pursue the original application.

UNHCR is of the opinion that an applicant who explicitly withdraws an application, without having proceeded to substantiate the application under Article 4 of the Qualification Directive, or without the determining authority having assessed all the relevant facts and circumstances under Article 4 of the Qualification Directive – but then changes his/her mind and decides to pursue the application - should be able to request that the file is re-opened and the examination is continued (without the requirement to raise new elements or findings). This would enable the gathering of all the evidence, and the assessment of the merits of the application, in accordance with Article 4 of the Qualification Directive. A re-opening of the application should be possible without the imposition of time limits. This is necessary in order to prevent the risk of *refoulement* in contravention of the 1951 Refugee Convention and to prevent the risk of return in violation of the European Convention of Human Rights and the UN Convention against Torture.

UNHCR considers positive the situation in a number of the Member States surveyed, which impose no requirement that the applicant must submit a new application raising

[49] Article 24 (1) (a) and Article 34 (2) (b) APD. See Section 15 of this report on subsequent applications for further information.
[50] Article 32 (3) APD. See Section 14 of this report on subsequent applications for further information.
[51] Note that Article 32 (4) APD stipulates that the application shall be further examined if new elements or findings have arisen or been presented by the applicant which "*significantly add to the likelihood of the applicant qualifying as a refugee*".

new elements or findings: Belgium,[52] the Czech Republic,[53] France,[54] Italy,[55] the Netherlands[56] and Spain.[57]

The situation in Finland with regard to explicit withdrawal was still unclear at the time of writing. During UNHCR's research, the draft law, preparatory works and administrative guidelines did not provide guidance on the action that would be taken if an applicant decided to pursue an application that s/he had previously withdrawn.

However, UNHCR notes with some concern that in five of the Member States surveyed, following an explicit withdrawal, if an applicant changes his or her mind and decides to pursue the original application, s/he must submit a subsequent application raising new elements or findings.[58]

In Greece, following explicit withdrawal, a decision to reject the application is taken. An applicant who changes his or her mind and decides to pursue the application can apply for judicial review of the negative decision to the Council of State on a point of law, if the time limit has not expired; or alternatively can submit a subsequent application, but the applicant must submit new elements. UNHCR is concerned that neither of these options guarantees that the application will receive a complete examination of the facts and circumstances.

In the remaining four of these Member States, notwithstanding a decision to discontinue examination following explicit withdrawal, if an applicant changes his or her mind and decides to pursue the original application, s/he must still submit a subsequent application which contains new elements or findings (Bulgaria[59], Germany[60], Slovenia[61] and the UK[62]).

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[52] The examination will be continued if the request to re-open is made within 15 days of the application being withdrawn. Otherwise a new application can be made and there is no requirement that new elements or findings are raised.
[53] A new application can be made on the same grounds as the previous application.
[54] According to information received in an interview with the Legal Department of OPFRA, in practice, the applicant can submit a subsequent application without raising new elements or findings when the first application was not considered on its merits.
[55] The applicant should have the right to re-open the procedure at a later stage when the application was explicitly withdrawn before the personal interview, but UNHCR is not aware of any such request made since 2005, when the decentralized procedure was established.
[56] A new application must be filed. According to the determining authority (IND), the applicant does not have to apply on new grounds and Article 4:6 GALA on subsequent applications is not applicable.
[57] The applicant can submit a new application on the same grounds as the original application, although in practice credibility doubts might arise.
[58] Bulgaria, Germany, Greece, Slovenia and the UK. See Section 14 of this report (on subsequent applications) concerning the procedures that are applied.
[59] Paragraph 1, item 6 of the Additional Provisions of LAR in relation to Article 13 (1), item 5 LAR.
[60] Section 71 (1) 1st Sentence APA: *"If, after the **withdrawal** or non-appealable rejection of a previous asylum application, the foreigner files a new asylum application (follow-up application), a new asylum*

In Bulgaria, the subsequent application will be considered manifestly unfounded unless it includes "*new circumstances of significant importance regarding his/her [the applicant's] personal situation or the situation in his/her country of origin*."[63]

In Germany, "*[i]f after the withdrawal or non-appealable rejection of a previous asylum application, the foreigner files a new asylum application (follow-up application), a new asylum procedure shall be conducted only if the conditions of Section 51 (1) through (3) of the Administrative Procedure Act are met; […].*"[64] Thus, no distinction is made between withdrawal and a non-appealable rejection, and the full range of requirements set by law for the conduct of follow-up procedures must be fulfilled, including new evidence or a change of the legal situation in favour of the applicant.[65] The time limit of three months beginning "*with the day the person affected learnt of the grounds for resumption of proceedings"* also applies.[66]

In Slovenia, an applicant who "*has explicitly withdrawn the application may file a new one, only if s/he submits new evidence proving that s/he meets the conditions for acquiring international protection under this Act*."[67]

In the UK, if the applicant decides to pursue the original application and procedure after withdrawal, s/he must make a new application. This is treated as a subsequent application, which must meet the two-limbed test for a "fresh claim". The application must be significantly different from previous material in that, firstly, it has not already been considered; and secondly, taken together with previous material, it has a realistic

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procedure shall be conducted only if the conditions of Section 51 (1) through (3) of the Administrative Procedure Act are met; this shall be examined by the Federal Office."

[61] Article 56 of the IPA.

[62] Immigration Rule 353.

[63] Article 13 (1), item 5 LAR.

[64] Section 71(1) 1st Sentence (first part) APA.

[65] Section 51 (1) APA: "*The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when: 1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected; 2. new evidence is produced which would have meant a more favourable decision for the person affected; 3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure."*

[66] Section 51 (1) APA: "*The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings."*

The referral to Section 51 (2) Administrative Procedure Act remains unclear in cases of explicit withdrawal: *"An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy."*

[67] Article 56 of the IPA. Note that the draft Act on changes and amendments to the Act on International Protection, which was pending before the National Assembly at the time of writing, proposes a change to this provision requiring that "*circumstances after submission of the previous application have changed significantly*".

prospect of success (i.e. the claim is not clearly unfounded).[68] Cases are normally explicitly withdrawn before the personal interview, so that the previous material gathered has not been considered, and the first criterion is therefore usually considered fulfilled. However, the second criterion still applies.

Section 14 of this report, on subsequent applications, provides further information regarding the interpretation given to the above-mentioned national legal provisions and the procedures in which subsequent applications are examined. This section addresses the extent to which this approach may hinder access to a fair and effective procedure for the determination of protection needs and status.

In UNHCR's view, it is not appropriate to treat a request to pursue an original application as a subsequent application in terms of the APD, where the application is made following explicit withdrawal of the earlier application and that earlier application was not substantiated by the applicant and/or assessed by the determining authority in accordance with Article 4 of the Qualification Directive. UNHCR considers that a requirement that the applicant submit a subsequent application raising new elements or findings which is examined in a procedure which may derogate from the basic principles and guarantees of Chapter II of the APD may place applicants at risk of *refoulement*. Rather, UNHCR would urge Member States to provide in national legislation for the re-opening of the asylum procedure.[69]

Recommendations

UNHCR recommends that an applicant should be entitled to request that the examination of his/her original application is re-opened following explicit withdrawal.

If Member States treat requests for re-opening of an examination after explicit withdrawal of a claim, and Article 32 (2) (a) is applied, Member States should interpret "new findings and elements" in a protection-oriented manner, in line with the object and purpose of the 1951 Convention. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements.

[68] Following the recent House of Lords decision in *ZT Kosovo,* it appears that the threshold of having a realistic prospect of success at appeal is the same as showing that the claim is not clearly unfounded. *ZT (Kosovo) v SSHD [2009] UKHL 6*.

[69] UNHCR Comments on the UK implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing status, UNHCR, London, 24 October 2007.

Implicit withdrawal or abandonment of applications

"Implicit withdrawal or abandonment of the application" refers to the circumstances in which the determining authority can assume that, in the absence of an explicit statement by the applicant, an applicant no longer wishes that the determining authority proceed with the examination of the application for international protection. The Directive sets out a non-exhaustive list of indicators which relate to failures by the applicant to comply with procedural obligations.

It is crucial that any 'indicators' of implicit withdrawal or abandonment do not encompass, nor are applied to, applicants who have no intention of abandoning the procedure, but who may have failed to comply with procedural obligations for other reasons.

In this regard, it is essential that Member States adhere to their obligation of informing applicants, in a language which they understand, of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities.[70] This information must be provided to all applicants systematically, and at the earliest possible point in the procedure. Moreover, all relevant authorities must ensure that they have appropriate administrative and communication systems and procedures in place to manage and monitor procedural obligations efficiently.

It must also be recognised 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 recognise their protection needs; they may be coerced or advised by others to abandon the procedure; they may wish to submit an application for international protection in another Member State where they believe they have better prospects of recognition or integration, and others.

The provisions on implicit withdrawal should not be used to deny claimants, who wish to reactivate their application, a complete and appropriate examination of their application.[71] Member States remain bound by the international legal obligation not to

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[70] Article 10 (1) (a) APD. However, note that UNHCR urges Member States to ensure that this is done in a language which the applicant understands rather than in a language which the applicant "may reasonably be supposed to understand" as stated in the APD. Stakeholders in Greece expressed concerns that applicants were not informed of the possible consequences of not complying with their obligations, and they received no written information regarding the consequences of non-compliance with procedural obligations.

[71] Article 14 of the Universal Declaration of Human Rights and Article 18 of the EU Charter on Fundamental Rights. See also UNHCR ExCom Conclusion No. 65 XLII, 1991, paragraph (o); ExCom Conclusion No. 82 (XLVIII) on safeguarding asylum, 1997, paragraph (d) (ii); ExCom Conclusion No. 85

remove any person contrary to the principle of *non-refoulement* and the provisions of the European Convention on Human Rights and the UN Convention against Torture.

In this regard, it should also be recalled that provisions on implicit withdrawal in the APD must be coherent and consistent with the provisions of the Dublin II Regulation.[72] UNHCR has already stated its view that when an asylum applicant is returned to a Member State pursuant to Article 3 (1) of the Dublin II Regulation, s/he should enjoy effective access to national asylum procedures and his/her application should be examined substantively.[73]

There may be cases in which an applicant may lodge an application for international protection in one Member State, and then abandon the application before substantiating the application in order to apply for international protection in another Member State. If s/he is later returned to the first Member State in accordance with the Dublin II Regulation, s/he may find that the original application in the responsible Member State has been rejected or discontinued in his/her absence, on the ground that it was considered implicitly withdrawn. An applicant who wishes to pursue his or her original application may find that the determining authority cannot re-open the application, or the time limit for re-opening the application has expired.[74] Time limits for lodging an appeal may also have expired.[75] This problem has been widely discussed and documented by UNHCR and others.[76] It is, therefore, crucial that Member States have in place the necessary safeguards to ensure that a person, whose application has been implicitly withdrawn in the responsible Member State, but who expresses the wish to pursue the previous application, is able to reactivate the examination of the previous application, or submit an application which is examined fully and properly on its merits and the applicant is given the opportunity to provide evidence in a personal interview.

(XLIX) on international protection, 1998, paragraph (q), which reiterate that asylum seekers have access to fair and effective procedures for determining their status and protection needs.

[72] At the time of writing, the Dublin II Regulation is being considered for revision and UNHCR has expressed its views in *UNHCR Comments on the European Commission's Proposal for a recast of the Dublin II Regulation and Eurodac*, 18 March 2009.

[73] *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, 15 April 2008, available at: http://www.unhcr.org/refworld/docid/4805bde42.html.

[74] Article 20 (2) APD states that "*Member States may provide for a time limit after which the applicant's case can no longer be re-opened*."

[75] This concern was highlighted by the European Parliament in its Report on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Committee on Civil Liberties, Justice and Home Affairs, A6-0222/2005, pg. 46, amendment 100.

[76] *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, 15 April 2008, available at: http://www.unhcr.org/refworld/docid/4805bde42.html.

Transposition

UNHCR's research has found that the majority of the Member States surveyed have legislation or pending draft legislation which sets out the circumstances in which an application will be considered to be implicitly withdrawn or abandoned, and which stipulates the action which should be taken by the determining authority. This is the case in Belgium[77], Bulgaria[78], the Czech Republic[79], Finland[80], Germany[81], Greece[82], the Netherlands, Slovenia[83], Spain[84] and the UK[85]. The Government of the Netherlands claims that Article 20 APD is reflected in national legislation, but this is considered arguable.[86] Nevertheless, the Netherlands does have policy guidance on implicit withdrawal.[87]

The notable exceptions are France and Italy, where there is no national legislation and no administrative provisions on implicit withdrawal. In France, the determining authority does in practice, in certain circumstances, consider applications to be implicitly withdrawn.[88] However, in Italy, an application can only be withdrawn explicitly. In other circumstances, the determining authority simply proceeds with the procedure and takes a decision on the basis of the information and evidence which has been submitted by the applicant.

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[77] Article 52 of the Aliens Act and Article 57/10 of the Aliens Act.
[78] Article 14 and Article 15 LAR.
[79] Section 25 (d), (e), (f), (h) ASA.
[80] Section 95 (c) *Ulkomaalaislaki* (Aliens' Act, 301/2004) is amended by the the Hallituksen esitys 86/2008 (Government Bill 86/2008).
[81] Section 33 APA: *"(1) An asylum application shall be deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the Federal Office. The request by the Federal Office shall inform the foreigner of the consequences resulting from the preceding sentence.*
(2) The asylum application shall furthermore be deemed to have been withdrawn if the foreigner has traveled to his country of origin during the asylum procedure.
(3) The foreigner shall be turned back at the border if upon entry into the country it is determined that he traveled to his country of origin during the asylum procedure and the asylum application is therefore deemed to have been withdrawn pursuant to (2). A decision of the Federal Office pursuant to Section 32 shall not be required. Section 60 (1) through (3) and (5) and Section 62 of the Residence Act shall be applied mutatis mutandis." The provisions concerning implicit withdrawal existed before the entry into force of the APD, and remain unchanged. Moreover, Section 32a (2) APA allows for the presumption of implicit withdrawal, however, this applies only to cases dealt with in Section 32a (1) APA referring to temporary protection within the meaning of Council Directive 2001/55/EC. Furthermore, this provision has not been applied so far.
[82] Article 14 (2) PD 90/2008.
[83] Article 50 (2) of the IPA.
[84] Article 92 APL, and Article 27 of the New Asylum Law.
[85] Immigration Rule 333C.
[86] According to the Government of the Netherlands' table of correspondence, Article 20 APD is reflected in Article 31 (1) of the Aliens Act which states that an application should be rejected if the alien has not made a plausible case that his/her application is based on circumstances which, either in themselves or in connection with other facts, constitute a legal ground for the issue of a permit.
[87] Aliens Circular C14/7.
[88] Information received in an interview with the Legal Department of OFPRA during the research period.

UNHCR has found that legislation and practice is very divergent amongst the States surveyed. As a result, the consequences of a failure to comply with procedural obligations differ greatly for applicants, depending on the Member State where the application has been lodged.

Grounds for implicit withdrawal

In Article 20 (1), the APD sets out a non-exhaustive list of the circumstances in which Member States may assume that an applicant has implicitly withdrawn or abandoned his/her application. These circumstances are all related to a failure to comply with obligations to cooperate with the competent authorities.[89] According to Article 20 (1) APD, Member States may assume that an applicant has implicitly withdrawn or abandoned his/her application, *in particular*, when it is ascertained that the applicant:

- has failed to respond to requests to provide information essential to his/her application in terms of Article 4 of the Qualification Directive, unless the applicant demonstrates within reasonable time that the failure to appear was due to circumstances beyond his or her control;
- has not appeared for a personal interview, unless the applicant demonstrates within reasonable time that the failure to appear was due to circumstances beyond his or her control;
- has left or absconded from his or her place of residence or detention without authorisation, and without contacting the competent authority within a reasonable time;
- has not complied, within a reasonable time, with reporting duties or other obligations to communicate.

Some Member States have legislation or administrative provisions which stipulate specific grounds for implicit withdrawal.[90] Germany has a broader legislative provision which states that an asylum application is *"deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the [BAMF]."*[91] Similarly, legislation in Spain permits the determining authority to

[89] In this regard, Article 11 APD sets out a non-exhaustive list of the obligations that Member States may impose upon applicants to cooperate with the competent authorities, insofar as these obligations are necessary for the processing of the application. These include reporting requirements, the obligation to hand over all documents in their possession, to inform the competent authorities of their address and notify of any change of address, and to allow the competent authority to photograph the applicant and record their statements. Article 7 (6) of Directive 2003/9/EC states that "*Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible*".

[90] Although note that the national legislation in Greece, Article 14 (2) PD 90/2008, closely mirrors the language of the APD and uses the term 'in particular', so that the stated grounds are non-exhaustive.

[91] Section 33 (1) APA: *"An asylum application shall be deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the Federal Office. The request*

declare the procedure terminated because of a "*lack of action on the side of the applicant*", referring to failure to take procedural steps which are needed to adopt a decision on the case.[92] However, the New Asylum Law, which entered into force after the period of UNHCR's research, has now added the following provision: *"In any case, it might be assumed that the applicant has withdrawn the application if , after 30 days, s/he has failed to respond to requests to provide essential information to his/her application, s/he did not present him/herself to a scheduled interview or s/he did not present him/herself for the renewal of the documentation s/he had been provided with."*[93]

And as mentioned above, there are no legislative grounds for implicit withdrawal in France or Italy.

The table below shows whether the grounds for implicit withdrawal expressly stated in the APD are also reflected as grounds, or potentially encompassed as grounds, in Member States' national legislation and administrative provisions. UNHCR has found that the grounds for implicit withdrawal differ across the Member States.

Member State	**Failure to provide essential information**	**Failure to attend personal interview**	**Absconded from residence**	**Failure to report or communicate**
Belgium	√	√	√	√
Bulgaria	√[94]	√	√[95]	√[96]
Czech Republic	√	√		
Finland			√[97]	√[98]

by the Federal Office shall inform the foreigner of the consequences resulting from the preceding sentence." In theory, this rule covers each failure of applicants to fulfil their obligations, provided that no specific rule applies and that the formal asylum application has already been filed. Obligations arising before this point in time do not fall under this provision (as the applicant has not yet applied for asylum, there is nothing that could be withdrawn). The legal consequence of the failure to pursue the claim comes into effect by act of law. The statement of the BAMF, that the proceedings (with regard to refugee protection) are terminated, is of a declaratory nature. Nonetheless, the BAMF must take a decision on the merits with regard to subsidiary protection "on the basis of the record as it stands". (Section 32 2nd Sentence APA. Section 32 APA: "*If the asylum application is withdrawn or abandoned in the meaning of Section 14a (3), the Federal Office shall indicate in its decision that the asylum procedure has been discontinued, and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7). In the cases listed in Section 33, the Federal Office shall decide on the basis of the record as it stands.")*

[92] Article 92 APL and Art. 24 (5) ALR.

[93] Article 27 of the New Asylum Law.

[94] This is expressed as a failure to cooperate with officials of the determining authority in accordance with Article 14, item 3 LAR.

[95] This situation would be covered by the provision relating to the failure to notify the determining authority or reception centre of a change of address in accordance with Article 14, item 2 LAR.

[96] Specifically, this is a failure to notify the determining authority or reception centre of a change of address in accordance with Article 14, item 2 LAR.

[97] According to the draft law, Government Bill 86/2008, Section 95 (c) will be amended, so that an application is considered implicitly withdrawn if the location of the applicant, according to the reception

Member State	Failure to provide essential information	Failure to attend personal interview	Absconded from residence	Failure to report or communicate
France[99]	N/A	N/A	N/A	N/A
Germany	√[100]			√[101]
Greece	√	√	√	√
Italy[102]	N/A	N/A	N/A	N/A
Netherlands		√	√	
Slovenia		√	√	√[103]
Spain	√	√		√[104]
UK		√		

UNHCR's research has found that, in accordance with the four grounds stated in the table above, the following circumstances are considered by at least some of the determining authorities in the surveyed States, to indicate the implicit withdrawal or abandonment of an application:

- Failure to report at a designated place to be fingerprinted
- Failure to return the application form or other asylum questionnaire
- Failure to attend a screening interview, without reasonable explanation
- Failure to address a gap in the file details, for example, a failure to provide name, date of birth, place of residence or mailing address
- Leaving an interview, without reasonable explanation, prior to its completion
- Failure to report to the determining authority for examination
- Failure to respond to question(s) sent in writing as to whether the applicant wishes to pursue application for international protection
- Refusal to co-operate in clarifying circumstances pertaining to the application, including age assessment examinations

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centre, has been unknown for at least two months. In this situation, the applicant is assumed to have left Finland.

[98] According to the draft law, Government Bill 86/2008, Section 95 (c) will be amended so that an application is considered implicitly withdrawn if it has been impossible to contact the applicant at the last address notified for at least two months. In this situation, the applicant has failed to notify an address and is assumed to have left Finland.

[99] National law does not provide for implicit withdrawal and there are no procedural instructions.

[100] This may fall within the legal provision for implicit withdrawal which provides that "*[a]n asylum application is deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the [BAMF]*": Section 33 (1) APA. However, if the failure to provide essential information is related to a failure to appear for the personal interview, the provision on implicit withdrawal may not be applied. Section 25 (4) or (5) APA may be applied instead, which allows the BAMF to take a decision on the application on the basis of the record as it stands.

[101] Ibid.

[102] National law does not provide for implicit withdrawal, and there are no procedural instructions.

[103] Specifically, this is a failure to notify the competent authority of a change of address which results in unsuccessful deliveries of requests for attendance or any other mail, despite several attempts.

[104] Specifically, this is a failure to renew documentation in accordance with Article 27 of the New Asylum Law.

- Failure to notify the competent authority of a change of address

UNHCR's research also found that national legislation or administrative provisions provide the determining authorities in some Member States with additional grounds to consider an application as implicitly withdrawn, which are not explicitly stated in the APD[105]:

- Applicant has made an unauthorised entry or an attempt at unauthorised entry into the territory of another country during the course of the proceedings (Czech Republic[106])
- Applicant has acquired nationality of a Member State (Belgium[107], Bulgaria[108], Czech Republic[109])
- Applicant has received another form of protection granting the same rights (Bulgaria[110])
- Applicant authorised to remain for unlimited time on other grounds (Belgium[111])
- Applicant has definitively and voluntarily returned to country of origin (Belgium[112], Bulgaria[113])
- Applicant has voluntarily reacquired the nationality of his/her country of origin or acquired another country's nationality (Bulgaria[114])
- Death of the applicant (Bulgaria[115], Czech Republic[116], Finland[117])
- Applicant has travelled to her/his country of origin during the asylum procedure (Germany[118])

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[105] Some of these grounds mirror grounds for cessation of refugee status under the Qualification Directive. See Article 11 of the Qualification Directive.
[106] Section 25 (h) ASA.
[107] Article 35 of the Royal Decree of 11 July 2003 states that the application becomes void. In 2008, there were 20 cases.
[108] Article 15 (1), item 4 LAR.
[109] Section 25 (g) ASA: "*the applicant for international protection has been granted citizenship of the Czech Republic in the course of the proceedings*."
[110] Asylum granted by the President of the Republic of Bulgaria: Article 15 (1), item 9 LAR.
[111] In 2008, there were 39 cases. The applicant has a period of 60 days within which to request by registered mail that the asylum procedure continue.
[112] Article 34 of the Royal Decree of 11 July 2003. In 2008, there were 59 cases, all of applicants returning with IOM.
[113] Article 15 (1), item 5 LAR.
[114] Art. 15 (1), item 3 LAR.
[115] Art. 15 (1), item 8 LAR.
[116] Section 25 (c) ASA.
[117] Section 95 (c) *Ulkomaalaislaki* (Aliens' Act, 301/2004) as amended by the *Hallituksen esitys* 86/2008 (Government Bill 86/2008).
[118] Section 33 (2) and (3) APA. The relevance and frequency of application of these provisions in practice remains unclear. None of the asylum lawyers consulted by UNHCR had ever been confronted with a case falling under Section 33 (2) or (3) APA.). It is not explicitly required that the applicant has travelled **voluntarily** to the country of origin, however, the BAMF has reported to UNHCR that this is a precondition for the application of this provision. Section 33 (2) APA: "*"The asylum application shall furthermore be deemed to have been withdrawn if the foreigner has travelled to his country of origin during the asylum*

Furthermore, as mentioned above, it must be borne in mind that the legislative provisions in some of the Member States are broad or non-exhaustive and therefore may encompass further grounds for implicit withdrawal.[119]

Recommendation

Criteria used by Member States as grounds for implicit withdrawal or abandonment should not encompass, nor be applied to, applicants who have no intention of abandoning the procedure, but who may have failed to comply with procedural obligations for other reasons.

Failure to comply with procedural requirements should not be treated as grounds for implicit withdrawal or abandonment, where the failure is due to circumstances beyond the applicant's control, or where there is a reasonable explanation.

The particular situation of some asylum seekers, which may render it difficult or impossible for them to comply with requirements, should be given particular attention in considering whether applications may be considered implicitly withdrawn or abandoned.[120]

Reasonable time limits and reasonable cause

There are a variety of reasons, unrelated to the credibility of the applicant or the merits of his or her application, why an applicant may fail to respond to a request for information, to attend a personal interview, to report as obliged or may fail to advise the competent authority that s/he is leaving the place of residence. Article 20 APD recognises this to the extent that it provides that a reasonable time should elapse before the determining authority has reasonable cause to consider that an application has been implicitly withdrawn or abandoned. This time may be used by the authorities to take reasonable steps to try and contact the applicant and his/her legal representative, if appointed, and if contact is made, the applicant should be given an opportunity to explain the reasons for the failure to comply. It is crucial that Member States have in place the necessary safeguards to ensure that a person who expresses

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procedure." Section 33 (3) APA: *"The foreigner shall be turned back at the border if upon entry into the country it is determined that he travelled to his country of origin during the asylum procedure and the asylum application is therefore deemed to have been withdrawn pursuant to (2). A decision of the Federal Office pursuant to Section 32 shall not be required. Section 60 (1) through (3) and (5) and Section 62 of the Residence Act shall be applied mutatis mutandis."*

[119] For example, Germany, Greece and Spain.

[120] For example, the claims of asylum seekers who are ill or suffer from limits on their physical movement should not be dismissed as withdrawn or abandoned in cases where they might be unable to meet reporting requirements or attend appointments.

the wish to pursue the application is able to reactivate the examination or submit an application which is examined fully and properly on its merits.

However, what constitutes a "reasonable time" is left to the discretion of Member States and the APD in Article 20 (1) simply states that "*Member States may lay down time-limits or guidelines*". This is a permissive clause. However, UNHCR believes that a lack of guidelines creates legal uncertainty for personnel of the determining authority, as well as applicants, regarding whether circumstances have given reasonable cause to consider an application implicitly withdrawn.

UNHCR's research found that some Member States do provide time limits and/or guidelines which vary from one Member State to another, and also vary depending on the nature of the non-compliance.

By way of example, if an applicant fails to appear for a personal interview, a decision will be taken on implicit withdrawal after approximately four months in Bulgaria,[121] 2.5 months in Belgium,[122] after 30 days in Greece[123] and Spain,[124] and after five days in the UK.

The UK applies a significantly lesser period than in other Member States, and UNHCR is concerned that the applicable time limit is too short to reliably indicate an intention to abandon the application. In the UK, a letter is sent to any applicant who does not appear for an interview, allowing him/her five days to provide an explanation. The case owner checks if s/he is at the address and if not, the application is considered withdrawn and the examination is discontinued.[125] In the context of a reception system which disperses applicants throughout the UK, information held by the determining authority on the address of the applicant can be out of date, and it is considered that the five day time limit is too short.

[121] In Bulgaria, if the applicant fails to appear for an interview, s/he is invited to appear for a re-scheduled interview. If the applicant does not appear for the re-scheduled interview, the procedure is suspended for 10 days after which, if the applicant does not make contact, a decision is taken to suspend examination for three months. If the period of three months expires and the applicant has not made contact to explain the failure to appear, a decision is taken to discontinue the procedure.

[122] In Belgium, an applicant has 15 days from the date of the interview within which to explain the failure to appear; otherwise a decision may be taken within two months (Article 52, Aliens Act).

[123] 30 days from the date of the scheduled interview, according to information obtained during an interview with S1.

[124] Article 27 of the New Asylum Law. In relation to the instruction to attend a scheduled interview, the rules laid down for the common administrative procedure must be followed, which require that the invitation for the interview is first sent by post; and if the applicant does not appear for the interview, the interview will be re-scheduled and notification will be made by public notice to be posted at the city council (of the last known address) and in the Official State Journal.

[125] Explanatory Memorandum to Statement of Change in Immigration Rules laid on 17 March 2008 (HC 420) accessed via EIN website.

In Slovenia, in law, the applicant is expected to provide prior notification of non-attendance at an interview, and thus does not receive any subsequent time period within which to explain his or her absence. The law states that "*the application shall be considered withdrawn: if the applicant fails to attend the interview or an oral hearing* ***without any prior reason***."[126] This is not in compliance with the APD, which provides that the applicant should have a reasonable time within which to explain his/her failure to attend the interview.

Two other Member States have not laid down time limits with regard to explanations for non-appearance at the personal interview, namely the Czech Republic[127] and the Netherlands. In the regular procedure in the Netherlands, no time limit applies and instead, the applicant is summoned to a re-scheduled interview. If s/he fails to attend the re-scheduled interview, the application is considered withdrawn. UNHCR's audit of case files in the Czech Republic found that the case files included information regarding non-compliance and the audit indicated that in practice, decisions are taken at least one month after the non-compliance.[128] However, in one case, a decision to discontinue the examination was taken two days after the applicant absconded from the asylum centre, and on the day that the applicant failed to appear for interview.[129] UNHCR considers that two days is too short to be indicative of an intention to abandon the application. The determining authority sought to reassure UNHCR that efforts are always made to trace the applicant.

In Italy, there is no national legislation with regard to implicit withdrawal. In practice, if an applicant fails to appear for the personal interview, the applicant is summoned to a re-scheduled interview. If s/he fails to attend the re-scheduled interview, the determining authority takes a decision on the basis of the available evidence.

Vast divergence can also be seen in the approach taken to applicants who are considered to have left their place of residence without authorisation, or who have changed their address without notifying the determining authority.

In Finland, the location of an applicant must be unknown for at least two months before the application can be considered withdrawn.[130] In Germany, in order to apply the legal provision on implicit withdrawal, administrative guidelines require that the determining authority first issues a request to the applicant to pursue the asylum application. This request can only be issued on the basis of factual grounds suggesting that the applicant

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[126] Article 50 (2) IPA.

[127] According to Section 25 of ASA, the proceedings shall be discontinued if: "d) *the applicant for international protection failed to appear for an interview without any serious reason or …*"

[128] X032 and X060: 1 month and 1 week; X016 and X040: 1.5 months; X014: 6.5 months.

[129] X059.

[130] Section 95 (c) *Ulkomaalaislaki* (Aliens' Act, 301/2004) as amended by the *Hallituksen esitys* 86/2008 (Government Bill 86/2008).

has actually lost interest in the continued conduct of the procedure.[131] The request which is sent to the applicant has to be formulated in a way that informs the person concerned of the concrete action which needs to be taken in order to pursue the application.[132] Moreover, the request must contain information about the legal consequences of further inactivity.[133] The legal provision on implicit withdrawal comes into effect if the applicant does not provide reasons for failing to pursue the application within the stipulated time-limit of one month.[134]

In stark contrast, in the Netherlands, if the applicant leaves his/her place of residence without authorisation, a decision can be taken on the application immediately. The determining authority is not required to try to trace or contact the applicant. Similarly, in Belgium, where an applicant has attempted to enter the country illegally and then absconds from the detention centre at the border, a decision can also be taken immediately.[135] UNHCR considers the immediate issuance of a decision to be incompatible with the APD, which requires that applicants be given a reasonable time to contact the competent authority. In Greece, if the applicant absconds from the place where s/he was detained, or leaves without authorisation the place where s/he lived without requesting permission or informing the competent authorities, a decision to reject the application can also be taken immediately by law.[136] However, the determining authority informed UNHCR that the police make efforts to trace the applicant, and a negative decision is only taken upon the lapse of 30 days.[137]

In Slovenia, the application is considered withdrawn when the applicant has left the asylum centre or private address and has not returned within three days. In the past, this has presented problems where an applicant, for example, left his or her residence on a Friday and returned on a Monday to find that the application was considered withdrawn. This is indicative of the fact that the time limit is too short, and is not a reliable indicator of intention to abandon the application.

It should also be considered that a failure to make contact with an applicant may be due to shortcomings in the determining authority's own administrative and communication systems or procedures. UNHCR's audit of case files in Spain revealed three cases in which it was assumed that the applicant had abandoned the application because s/he failed to attend the personal interview.[138] In each case, the determining authority had

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[131] Information provided by the BAMF as well as contained in the Internal Guidelines for the Asylum Procedure, under: "deemed withdrawal" (1/1).

[132] Information provided by the BAMF as well as contained in the Internal Guidelines for the Asylum Procedure, under: "deemed withdrawal" (1/1).

[133] Section 33 (1) 2nd Sentence APA.

[134] Section 33 (1) APA.

[135] Article 52 of the Aliens Act.

[136] Article 14 (2) (c) and (d) PD 90/2008.

[137] Interview with S1.

[138] Cases numbers. 0508112, 1008113, and 1006090.

followed the legally established procedure for notification. This requires that the notification of an interview date is sent by post to the last known address of the applicant. If the applicant fails to attend the interview, a second interview is scheduled and notification is made through a public notice in the official State Journal and at the city council of the last known address. After this second unsuccessful effort to notify the applicant of the scheduled interview, the application is considered as implicitly withdrawn and the examination is discontinued.[139] This was done in each of the three cases audited, but the applicants failed to appear for their scheduled interviews. In all three cases, the applicants continued to report to the authorities to renew their documentation. These opportunities were not taken, however, to inform the applicants of the scheduled interview dates. Instead, in two of the cases, the determining authority concluded that the applicants were abusing the asylum system because they had not attended the scheduled interviews but had continued to report to renew their documentation in order to maintain a legal status.[140] It had not been taken into account that the notification might not have reached the applicant for one reason or another.[141]

Recommendation

Member States are urged to ensure that national legislation or administrative provisions give guidance on the steps to be taken to ensure that applicants have the opportunity and a reasonable time to explain any failure to comply with a procedural obligation.

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 authorisation, or have not notified the competent authority of a change of address, are given a reasonable time within which to inform the competent authority.

Decision following implicit withdrawal or abandonment of an application

Article 20 (1) APD states that:

"When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or

[139] The case is declared terminated.
[140] Cases numbers 1008113, 1006090.
[141] The postal notice indicating *"recipient unknown"* or *"recipient absent"* is included in the file but no further information was available.

reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC."

Unlike the three options for a decision granted to Member States under Article 19 relating to explicit withdrawal, Article 20 (1) APD directs Member States to either take a decision to discontinue the examination of an application, or reject an application on the basis of a failure to establish entitlement to refugee status.

UNHCR is of the opinion that the APD is flawed in directing Member States to reject the application for non-compliance with procedural obligations on the basis that the applicant has not established an entitlement to refugee status. The wording of the APD can be interpreted as permitting Member States to reject an application on purely formal grounds. Such an interpretation would appear to be reinforced by Article 28 (1) APD which states "***Without prejudice to Articles 19 and 20****, Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to Directive 2004/83/EC* [Qualification Directive]".

In UNHCR's view, an applicant for international protection may fail to comply with reporting or communication requirements for a variety of reasons which are not necessarily related to a lack of protection needs. A failure to comply with a procedural obligation does not necessarily mean that an applicant is not a refugee or does not qualify for subsidiary protection status. It should also be stressed that it is possible for an applicant to establish an entitlement to refugee status or subsidiary protection status, notwithstanding a failure to comply with procedural obligations. The APD is, therefore, flawed in stating that "*Member States shall ensure that the determining authority takes a decision* ***to … reject*** *the application on the basis that the applicant has not established an entitlement to refugee status."*

UNHCR considers that a negative decision on an application for international protection should only be issued when there has been an appropriate examination of all the relevant facts and circumstances in accordance with Article 4 of the Qualification Directive, and it has been determined that the applicant is not a refugee or does not qualify for subsidiary protection status.

UNHCR is of the opinion that a negative decision should not be issued when there has been no examination of the substance and merits of the application in accordance with Article 4 of the Qualification Directive, because the applicant has not complied with relevant procedural obligations. In such situations, UNHCR recommends that Member States either take a decision to discontinue the examination, or discontinue the examination of the application without taking a decision.

With the exception of France and Italy, all the Member States surveyed have or have pending legislation, regulations or administrative provisions determining what action

will be taken if an application is considered to be implicitly withdrawn. However, it should be noted that the legislation in Greece grants the determining authority the option either to discontinue the examination or reject the application. However, the legislation does not determine in which circumstances the application should be rejected, or in which circumstances the examination should be discontinued. This has been held to be incompatible with the APD by the Council of State.[142] UNHCR was informed by the determining authority that, in practice, the determining authority in Greece has decided to reject such applications.

The following tables attempt to provide an overview of practice in the Member States surveyed, with regard to the circumstances highlighted as potential grounds for implicit withdrawal in the APD. However, it should be borne in mind that these grounds are not necessarily reflected as grounds for implicit withdrawal in each Member State (see table above setting out the grounds for implicit withdrawal). Moreover, in practice, in the case of the abandonment of the procedure, a number of the grounds may be applicable. For example, an applicant who disappears before a personal interview may be considered to have 'failed to provide essential information', 'failed to attend a personal interview', 'absconded or left his or her place of residence without authorisation' and/or 'failed to comply with the obligation to report or communicate'. Moreover, the decision which is taken by the determining authority may depend on the stage at which the procedure was deemed to be abandoned by the applicant, or the procedure in which the application was being examined.

Failure to provide essential information

	Suspension of examination	**Decision to discontinue**	**Decision to reject**	**Decision taken on basis of available evidence**
Belgium				√
Bulgaria	√ (For 3 months)[143]	√ (3 months after suspension)[144]	√[145]	√[146]
Czech Republic		√ [147]		√[148]

[142] The Council of State in Greece has ruled in 2008 that the Greek legislation is not compatible with the APD because it does not rule which cases should be treated as discontinued or rejected. It is expected that an amendment will be made to the legislation following this ruling.

[143] This is on the ground of a refusal to cooperate in accordance with Article 14, item 3 LAR – e.g. a refusal to be subjected to an age assessment under Article 118 (1) IRR.

[144] Ibid.

[145] Article 13 (1), item 3 LAR: An application shall be rejected in the accelerated procedure as manifestly unfounded if there are no grounds for refugee or humanitarian status, and the facts stated by the applicant do not include a detailed description of the circumstances and personal details to clarify the case.

[146] This may occur if a personal interview has taken place.

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on basis of available evidence
Finland[149]				√
France[150]				√
Germany		√[151]		√[152]
Greece			√	
Italy[153]				√
Netherlands				√
Slovenia[154]				√
Spain		√		
UK				√

Failure to attend personal interview

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on the basis of available evidence
Belgium				√
Bulgaria	√ (For 3 months)[155]	√ (3 months after suspension)		
Czech Republic		√[156]		√[157]
Finland[158]				√
France[159]				√

[147] Section 25 (d) ASA: "*The proceedings shall be discontinued if … the applicant for international protection … fails to provide information required for the reliable establishment of the actual state of the matter and a decision cannot be made on the basis of the facts established so far*."
[148] Section 25 (d) ASA, *a contrario,* i.e. if a personal interview has been conducted and there is sufficient information upon which to take a decision.
[149] This is not a stated ground for implicit withdrawal in the Government Bill 86/2008.
[150] Note that there is no legislation or administrative instructions in France relating to implicit withdrawal. This information refers to practice and is based on information received in an interview with the Legal Department of OFPRA.
[151] A failure to provide essential information may fall within Section 33 (1) APA, which stipulates that an asylum application shall be deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the BAMF, and therefore, a decision to discontinue may be taken in accordance with Section 32 APA.
[152] A decision will be taken on the basis of the available evidence if the failure to provide essential information results from a failure to appear for the personal interview in accordance with Section 25 (4) and (5) APA.
[153] There is no legislative provision for implicit withdrawal in Italy.
[154] This is not a ground for implicit withdrawal under Article 50 (2) of the IPA.
[155] This period starts to run once 10 days have expired from the date of the re-scheduled interview.
[156] If insufficient facts.
[157] If facts established sufficiently.
[158] This is not a stated ground for implicit withdrawal in the Government Bill 86/2008.

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on the basis of available evidence
Germany				√[160]
Greece			√	
Italy[161]				√
Netherlands		√[162]	√ [163]	√[164]
Slovenia		√		
Spain		√		
UK	√			

Absconded or left residence without authorisation

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on the basis of available evidence
Belgium				√
Bulgaria	√ (For 3 months)[165]	√ (3 months after suspension)[166]		√[167]
Czech Republic		√[168]		√[169]
Finland		√		
France[170]		√		

[159] Note that there is no legislation or administrative instructions in France relating to implicit withdrawal. This information is based on information received in an interview with the Legal Department of OFPRA.
[160] Section 25 (4) and (5) APA.
[161] In accordance with Article 12 (4) d.lgs. 25/2008 which states that a decision is taken on the basis of available documentation.
[162] In the regular procedure and whereabouts unknown: C14/7 Aliens Circular.
[163] In the accelerated procedure: C 12/2 Aliens Circular. If the asylum seeker fails to attend the detailed personal interview in the accelerated procedure, the determining authority will nevertheless formulate an intended decision. If the asylum seeker appears after the intended decision was issued, but before the decision was issued, the asylum seeker will be interviewed. In the regular procedure, if the whereabouts of the applicant are known but the applicant fails to attend the personal interview after being summoned twice, the application will be rejected.
[164] In the regular procedure, if the applicant disappears after the 'intended decision' has been taken; a decision will be taken in conformity with the 'intended decision'.
[165] The provision of Article 14, item 2 LAR is explicit about failure to inform the authorities about a change in address. However, in practice, it includes absconding or leaving the residence without authorization.
[166] Following suspension under Article 14, item 2 LAR.
[167] This may occur if a personal interview has taken place.
[168] If is considered that insufficient facts have been gathered. Section 25 (d) ASA: "*The proceedings shall be discontinued if … the applicant for international protection … fails to provide information required for the reliable establishment of the actual state of the matter and a decision cannot be made on the basis of the facts established so far*."
[169] If it is considered that there are sufficient facts already gathered: Section 25 (d) ASA *a contrario*.

	Suspension of examination	**Decision to discontinue**	**Decision to reject**	**Decision taken on the basis of available evidence**
Germany[171]				
Greece			√	
Italy[172]				√
Netherlands		√ [173]		√[174]
Slovenia		√		
Spain[175]				
UK				√

Failure to comply with obligation to report or communicate

	Suspension of examination	**Decision to discontinue**	**Decision to reject**	**Decision taken on the basis of available evidence**
Belgium				√
Bulgaria[176]	√ (For 3 months)[177]	√ (3 months after suspension)		√[178]
Czech Republic[179]				√
Finland		√ (After 2 months)		

[170] Note that there is no legislation or administrative instructions in France relating to implicit withdrawal. In practice, the claim is "struck out" which is interpreted by UNHCR as a decision to discontinue. This information is based on information received in an interview with the Legal Department of OFPRA.

[171] This is not a stipulated ground for implicit withdrawal and is not expressly stated as a procedural obligation under Section 15 (1) and (2) APA, although this sets out a non-exhaustive list of procedural obligations. However, if abandonment of the place of residence results in failure to comply with an obligation to report or communicate, this situation may fall within Section 33 (1) APA, allowing the application to be treated as withdrawn if the applicant fails to pursue the claim for one month.

[172] There is no legislative provision for implicit withdrawal in Italy.

[173] If the applicant absconds before intended decision taken in the regular procedure, C14/7 Aliens Circular.

[174] If the intended decision has been taken in the regular procedure, the decision is taken on basis of the intended decision. In the accelerated procedure, the intended decision is taken on the basis of available evidence. C12/2.1.2. Aliens Circular.

[175] There is no obligation to seek authorisation to leave or change the place of residence, although all changes of address must be notified. Failure to notify of a change of address has no direct legal consequences, but it might indirectly lead to the application being discontinued if notifications related to invitations for interviews, or requests to provide essential information, do not reach the applicant because s/he did not notify a change of address.

[176] There are no such reporting duties or other obligations to communicate under Bulgarian legislation other than the obligation to notify of a change of address.

[177] The date runs from the day it becomes known that the applicant changed his/her address without notifying the determining authority.

[178] This may occur if a personal interview has taken place.

[179] This is not a ground for discontinuation of proceedings under Section 25 ASA.

	Suspension of examination	Decision to discontinue	Decision to reject	Decision taken on the basis of available evidence
France[180]		√[181]		
Germany		√[182]		
Greece			√	
Italy[183]				√
Netherlands				√
Slovenia		√		
Spain[184]		√[185]		
UK				√

In Bulgaria, Finland, France, Slovenia, and Spain a decision is taken to discontinue the examination when it is considered implicitly withdrawn. In Bulgaria, however, if the personal interview has taken place and sufficient evidence has been gathered, a decision on the merits may be taken.

In the Czech Republic, the determining authority may take a decision to discontinue the examination, but if the determining authority considers that it has gathered sufficient evidence to take a decision, for example, if the applicant disappears having submitted the essential elements and provided oral evidence in a personal interview; then the determining authority will issue either a positive or negative decision on the merits.[186]

[180] There is no national legislation on this issue in France. In practice, the claim is "struck out" which is interpreted by UNHCR as a decision to discontinue. This information is based on information received during an interview with the Legal Department of OFPRA.
[181] This relates to the obligation to inform the determining authority of a change of address.
[182] Section 15 (1) APA states that "*foreigners shall be personally required to cooperate in establishing the facts of the case*." And subsection (2) states that the applicant shall be, in particular, required to "*3. comply with statutory and official orders which require him to report to specific authorities or institutions or to personally appear there*". Section 10 (1), (2) APA states that:"(1) *During the asylum procedure, the foreigner shall ensure that communications of the Federal Office, the responsible foreigners authority and any court he has resorted to can reach him at all times; in particular, he shall inform the aforementioned agencies of any change of address without delay*." A failure to comply with an obligation to report or communicate may, therefore, fall within Section 33 (1) APA and the application may be deemed withdrawn if "*the foreigner has failed to pursue it for a period exceeding one month, despite a request by the Federal Office*."
[183] There is no legislative provision for implicit withdrawal in Italy.
[184] Although the determining authority should be notified of all changes of address, a failure to notify of a change of address has no direct legal consequence but it might indirectly lead to the application being discontinued if notifications related to invitations for interviews or requests to provide essential information do not reach the applicant because s/he did not notify a change of address.
[185] This relates to the obligation to report in order to renew documentation under the New Asylum Law.
[186] Section 25 ASA and observed in audited case X058.

In Germany, the legal provision for implicit withdrawal expresses in broad terms that an asylum application is *“deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the [BAMF].”*[187] In theory, this provision encompasses, *inter alia*, a failure to comply with any of the procedural obligations stipulated in law,[188] including obligations to *“cooperate in establishing the facts”*, to *“provide the necessary information*”, “*to report to specific authorities or institutions or to personally appear there”* and to provide relevant agencies with contact details and inform those “*agencies of any change of address without delay*”.[189] Application of this law regarding withdrawal will result in the examination being discontinued with respect to constitutional asylum and refugee status but the determining authority must take a decision on the merits with regard to subsidiary protection “*on the basis of the record as it stands”*.[190]

However, an exception is made if an applicant fails to appear for a personal interview without an adequate reason. The determining authority may instead take a decision on the merits of the asylum application (including subsidiary protection) “*on the basis of the record as it stands*”.[191] The decision is most likely to be negative, given that the

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[187] Section 33 (1) APA: *An asylum application shall be deemed to have been withdrawn if the foreigner has failed to pursue it for a period exceeding one month, despite a request by the Federal Office. The request by the Federal Office shall inform the foreigner of the consequences resulting from the preceding sentence.”*

[188] Provided that no specific rule applies and that the formal asylum application has already been filed.

[189] Section 15 (1), (2) APA: “*(1) Foreigners shall be personally required to cooperate in establishing the facts of the case. This shall apply also to foreigners represented by a legal adviser.*

(2) The foreigner shall be required in particular to:

1. provide the necessary information orally, and on request also in writing, to the authorities responsible for implementing this Act;

2. inform the Federal Office without delay if he has been granted a residence title;

3. comply with statutory and official orders which require him to report to specific authorities or institutions or to personally appear there;

4. present, hand over and surrender his passport or passport substitute to the authorities responsible for implementing this Act;

5. present, hand over and surrender all necessary certificates and any other documents in his possession to the authorities responsible for implementing this Act;

6. cooperate, if he does not have a valid passport or passport substitute, in obtaining an identity document;

7. undergo the required identification measures.”

Section 10 (1), (2) APA further provides*:“(1) During the asylum procedure, the foreigner shall ensure that communications of the Federal Office, the responsible foreigners authority and any court he has resorted to can reach him at all times; in particular, he shall inform the aforementioned agencies of any change of address without delay.”*

[190] Section 32, 2nd Sentence APA*: “If the asylum application is withdrawn or abandoned in the meaning of Section 14a (3), the Federal Office shall indicate in its decision that the asylum procedure has been discontinued and whether there are any obstacles to deportation pursuant to Section 60 (2) through (5) or (7). In the cases listed in Section 33, the Federal Office shall decide on the basis of the record as it stands.”*

[191] Section 25 (4) APA: *“For a foreigner required to reside in a reception centre, the interview should be arranged to coincide with the filing of the asylum application. It shall not be necessary to issue special summons requiring the foreigner and his legal adviser to appear. This provision shall apply mutatis*

personal interview has not been conducted and the non-appearance of the applicant is taken into account.[192] Furthermore, if a person intentionally or by gross negligence does not comply in time with a referral to the designated reception centre before lodging his/her asylum application at the respective BAMF office, this circumstance is not governed by the provisions for implicit withdrawal. Nevertheless, if the application is lodged at a later date, it is treated as a subsequent application and follow-up procedures will be applied in accordance with law.[193] It should be noted that also no decision on subsidiary protection can be taken, as the applicant has formally not yet applied for asylum.

The provisions in the Netherlands regarding which decision is taken are even more complicated. In the Netherlands, in the regular procedure, if the whereabouts of the applicant are known but the applicant fails to attend the personal interview after being summoned twice, then the application will be rejected. If, on the other hand, the whereabouts of the applicant are unknown, a decision to discontinue is taken. However, if the applicant disappears after the 'intended decision' has been taken, a decision will be taken in conformity with the 'intended decision'. On the other hand, if the application is being examined in the accelerated procedure, an 'intended decision' to reject will be formulated even if the applicant disappeared before the detailed personal interview and the failure to cooperate will likely be included as one of the grounds upon which the application is rejected.

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mutandis if the foreigner is informed of the interview date at the time he files his application or within one week thereafter. If the interview cannot take place on the same day, the foreigner and his legal adviser shall be informed without delay of the date of the interview. If the foreigner fails to appear at the interview without an adequate excuse, the Federal Office shall decide, on the basis of the record as it stands, taking into account the foreigner's failure to cooperate." Section 25 (5) APA: *"In the case of foreigners who are not required to reside in a reception centre, a personal interview may be dispensed with if the foreigner fails to comply with a summons for a personal interview without an adequate excuse. In this case, the foreigner shall be given opportunity to state his case in writing within a period of one month. If the foreigner fails to state his case within this period, the Federal Office shall decide on the basis of the record as it stands, taking into account the foreigner's failure to cooperate. Section 33 shall remain unaffected."*

[192] However, it should be kept in mind in this regard that in both cases, the decision to discontinue the procedure as well as the decision to reject the claim, a new asylum application will only be considered if the requirements for a follow-up procedure are fulfilled. Thus, in case of negative decisions, the difference between a decision to discontinue the procedure and a rejection is not a decisive factor.

[193] Section 22 (3) APA, Section 20 (2) APA: *"If after filing an asylum application* [Explanatory remark: The term is misleading in so far as it refers to the request of asylum, e.g. at a police office and not the formal asylum application.], *the foreigner fails to comply with (1) purposely or due to gross negligence, Section 71 shall apply to any later application for asylum mutatis mutandis. In derogation from Section 71 (3) third sentence, a hearing shall be held. The authority to which the foreigner has applied for asylum shall inform him in writing of these legal consequences, and the foreigner shall acknowledge receipt of this information. If it is impossible to inform the foreigner pursuant to the third sentence, the foreigner shall be escorted to the reception centre."*

In the UK, failure to appear for a personal interview will result in the examination being discontinued and a note will be placed in the file.[194] However, if an applicant fails to disclose fully the material facts or assist in establishing the facts, including a failure to report for fingerprinting, a failure to complete the questionnaire or a failure to report as required, this is not considered as implicit withdrawal, and the application can be rejected if there is insufficient evidence to substantiate the application.

In France and Italy, where there is no national legislation providing for implicit withdrawal, when the applicant fails to provide information essential to his or her application or fails to appear for a personal interview, a decision is taken on the basis of the evidence submitted, even if scarcely any information has been submitted. In practice, this is likely to be a negative decision as the information gathered will be scant. For example, in Italy, if the applicant does not attend the personal interview, the application is decided on the basis of the completed *Modello C3*,[195] a registration document completed by the police which in principle should contain, in addition to basic bio-data, a brief statement of the reasons for the application, but which often contains only basic and brief information which does not provide sufficient evidence for the determining authority to grant status.[196] A decision to reject is normally taken.[197]

Similarly, in Belgium, where the applicant, for example, has not attended a personal interview or has not submitted evidence to support the application, the application is likely to be rejected on the basis that the applicant has not substantiated his/her application and established an entitlement to refugee status or subsidiary protection.[198] In Belgium, a negative decision called a 'technical refusal' is taken.[199] In 2008, 341 technical refusals were made by the determining authority.[200] UNHCR's audit of case files[201] found that 'technical refusal' decisions were explained with the following standard paragraphs:

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[194] See rule 333C. The Explanatory Memorandum to HC 420 of 17 March 2008 amending rule 333C states that treating such claims as withdrawn represents a change from the previous policy of rejecting such claims, because the Government believes that treating the claim as withdrawn reflects the fact the applicant never intended to make a legitimate application for asylum.

[195] This is the registration of the application for international protection.

[196] UNHCR audited three decisions that were taken in this manner. The decision in each was negative: D/55/FERI/N, D/62/M/BAN/N, D/63/M/PAK/N).

[197] Note that in Italy the determining authority appears to have the power to re-examine applications and schedule an interview if the applicant wishes to pursue the application. This is the power of '*autotutela*' which means that the authority can correct a matter without legal process.

[198] The Constitutional Court has held that the determining authority cannot refuse protected status on purely formal grounds and all applications must be examined fully on their merits. *Cour constitutionnelle*, 26 June 2008, no. 95/2008, B.77, available at www.arbitrage.be

[199] When based on Article 57/10 of the Aliens Act. A negative decision can also be taken on the basis of Article 52 of the Aliens Act.

[200] Asylum statistics, 2008, CGRA, published on 8 January 2009.

[201] Case file nrs. 47, 51, 56, 62, 81, 82, 86 and 88.

"*As authorized by article 57/10 of the Aliens Act, I refuse the recognition of refugee status and the granting of subsidiary protection status. You were not present at the personal hearing on (date), which was notified to you through ( ) and you have not provided me with a valid reason within 15 days after notification.*

Consequently, you have made it impossible for me to judge whether, in your circumstances, there is a well-founded fear of persecution as defined in the Geneva Convention or a real risk of serious harm warranting subsidiary protection. "[202]

UNHCR is concerned by the practice whereby some determining authorities take a decision on the available evidence, even if the applicant has not, for example, attended the personal interview and, therefore, has not submitted evidence essential to the assessment of the application. In such situations, UNHCR recommends that Member States either take a decision to discontinue the examination, or discontinue the examination of the application without taking a decision.

UNHCR's audit of decisions in Greece suggests that decisions to reject were taken on the grounds of non-compliance with procedural obligations alone. Of the decisions audited, 17 were rejected as implicitly withdrawn because the authorities could not find the applicant at his/her declared address. The decision made no reference to whether the applicant had established an entitlement to refugee status or subsidiary protection status. Each decision had the following standard phraseology:

"*S/he left without authorisation the place where s/he lived without informing the competent authorities; his or her place of residence is unknown and therefore s/he is considered to have implicitly withdrawn his/her application*."

UNHCR emphasises that a negative decision should not be issued on solely formal grounds. This is not in compliance with the 1951 Convention.

UNHCR has also noted that a failure to comply with procedural obligations may be deemed indicative of a lack of credibility by some determining authorities.[203] UNHCR's audit of decisions in Belgium found that the following was stated in some decisions:

[202] Audit of case files numbers. 47, 51, 56, 62, 81, 82, 86 and 88. The reasons of the applicants for not appearing at the interview were not clear. In three case files, the applicants did not appear for their second hearing. In the other three case files, the applicants did not present themselves for their first hearing. In this last instance, the fact that the interviews only took place 4 or 5 months after the application was made might be a relevant factor. The case files of some applicants mentioned that they had left the country. Other applicants simply disappeared, without even informing their lawyer for instance. In one case, the implementation of Article 57/10 Aliens Act was contested: the legal representative of the applicant claimed that the National Post had made a mistake in delivering the summoning to the applicant and stated that reasonableness had to prevail, as well as granting the applicant the benefit of the doubt, by revoking the technical refusal and summoning the applicant again for a personal hearing.

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

The determining authority in Greece expressed the same view that "*those who have serious reasons to apply for asylum do not disappear and follow up their case*".[204]

UNHCR recalls that a failure to comply with procedural obligations is not necessarily indicative of a lack of credibility. An applicant who is a refugee or qualifies for subsidiary protection status may fail to comply with procedural obligations.

Recommendation

UNHCR recommends that when an applicant does not report within a reasonable time for an essential procedural step related to the assessment of facts and circumstances under Article 4 of the Qualification Directive, Member States either take a decision to discontinue the examination, or discontinue the examination without taking a decision and enter a notice in the applicant's file.

Consequences of a decision to discontinue the examination or a decision to reject the application

The significance of a decision either to discontinue the examination or reject the application really depends on the consequences should the applicant express a wish to pursue the application. UNHCR's main concern is that an applicant should have the possibility to pursue the original application, with the necessary guarantee that the application will be examined in substance, and an assurance that the applicant is not removed contrary to the principle of *non-refoulement*.

The difference between "discontinue the examination" and "reject the application", in terms of the consequences of the decision, is not explained and is not stated in the definitions set out in Article 2 of the APD. However, it appears from UNHCR's research that if an applicant expresses the wish to pursue an application which is previously considered to have been withdrawn, the consequences of a decision to discontinue the examination may be the same, in some Member States, as the consequences of

[203] It should be noted that Article 12 (6) of the APD provides that "irrespective of Article 20 (1), Member States, when deciding on the application for asylum, may take into account the fact that the applicant failed to appear for the personal interview, unless s/he had good reasons for the failure to appear."
[204] Interview with S1.

rejection of the application in other Member States.[205] Indeed, notwithstanding a decision to reject an application in one Member State, the applicant in that Member State may have a more effective opportunity to pursue his or her previous application, than an applicant in another Member State where a decision was taken to discontinue the examination of the previous application.[206]

Under the APD, regardless of whether the determining authority takes a decision to discontinue examination, should the applicant report again to the determining authority and express the wish to continue the procedure, there is no guarantee for the applicant that the original application will be re-opened, nor any obligation for the State to re-open it.[207]

Article 39 (1) (b) APD does stipulate that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20. However, in practice, this may not constitute a remedy if the time limit within which to lodge an appeal has expired.

Similarly, where an application has been rejected on the ground of implicit withdrawal, there may be no right of appeal against this decision if the time limit within which to lodge an appeal has expired, before the applicant resumed contact with the determining authority.

[205] In Germany as well as in the UK, if the applicant wishes to pursue his/her application following a decision to discontinue, a new application must be submitted which needs to fulfil the criteria of a subsequent application or "fresh claim". Similarly, in Bulgaria, following the expiry of the three-month period during which proceedings are suspended, a decision to discontinue the examination is taken and the application cannot be re-opened. The applicant may submit a subsequent application, but the application cannot be based on the same grounds as the original application if these grounds have already been considered. Also, in Spain, if the applicant wishes to pursue his/her application following a decision to discontinue, a new application must be presented which may be declared inadmissible if identical to previous application. In Greece, following a decision to reject an application, a subsequent application must be submitted which raises new elements or findings.

[206] In Belgium, following a decision to reject the application as withdrawn, an applicant may submit a new application on the same grounds without raising new elements or findings.

[207] Article 20 (2) APD provides that the applicant is only entitled to **request** that his/her case is re-opened, and it permits Member States to provide for a time limit after which the applicant's case can no longer be re-opened.

The APD instead offers the framework of a subsequent application.[208] This may be problematic because, in the case of implicit withdrawal, the original application may not have been examined and assessed on the basis of all the relevant facts. A subsequent application, in accordance with the APD, may be subjected to a preliminary examination which does not offer the basic principles and guarantees of the APD.[209] In particular, a personal interview may be omitted.[210] Moreover, the application may be subjected to a test to determine whether new elements or findings relating to the examination of whether s/he qualifies as a refugee have arisen or have been presented by the applicant.[211] Depending on the interpretation given by Member States to the phrase "new elements or findings", this may act as a bar to the applicant accessing the asylum procedure and may carry a risk of *refoulement*.[212]

UNHCR's research has found that practice amongst Member States varies, and some noteworthy good practices emerged. Some Member States may take a decision to "discontinue the examination" in certain circumstances (Finland, France, Czech Republic[213], the Netherlands and Slovenia).[214] If the applicant then expresses the wish to pursue the application, the determining authority either re-opens the original application (Finland[215]and France[216]) or invites the applicant to submit a new application which may be on the same grounds as the previous application, and no new elements or findings need to be raised (Finland[217], Czech Republic[218], the Netherlands[219], and Slovenia[220]). No time limit applies. In this way, the determining authority ensures that the decision to either grant international protection or to reject the application is based on an assessment of all the facts and evidence submitted and available.

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[208] Article 32 (2) APD states that "*Member States may apply a specific procedure [preliminary examination] where a person makes a subsequent application for asylum: (a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20*". Moreover, Article 33 states that "*Member States may retain or adopt the procedure provided for in Article 32 (subsequent applications) in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time.*"

[209] Article 24 (1) (a) APD.

[210] Article 34 (2) (c) APD.

[211] Article 32 (3) APD.

[212] See section 14 on subsequent applications for further information.

[213] Unless there is sufficient evidence upon which to take a decision to reject, e.g. if the applicant absconds having submitted information and attended a personal interview.

[214] See tables above.

[215] *Hallituksen esitys* 86/2008 (Government Bill 86/2008).

[216] There is no relevant legal provision in France. This information was received in an interview with the Legal Department of OFPRA.

[217] *Hallituksen esitys* 86/2008 (Government Bill 86/2008).

[218] Section 10 ASA contains an exemption from the requirement to submit new elements or findings.

[219] Article 4:6 General Administrative Law and Aliens Circular C14/5.1.

[220] The procedure in these cases is not explicitly defined in the IPA, but it derives from general regulations of the administrative procedure as defined in the AGAP and was observed in case no. 7-2009.

Exceptionally, while the determining authority in Belgium may reject an application in cases of non-compliance, the law compensates against the risks of such a decision by making an exception to the normal requirements of a subsequent application. This means that when a previous application has been rejected on grounds of non-compliance, the applicant who submits a subsequent application does not have to present new elements, and the application will be considered by the determining authority in accordance with all the basic guarantees, including the right to remain.[221]

In Bulgaria, a time limit is imposed within which an application may be re-opened and also certain conditions need to be fulfilled. An initial decision is taken to suspend proceedings for three months. Within this period, an applicant may ask to resume proceedings and the original application may be re-opened if "*the alien seeking protection produces evidence that objective obstacles have made him or her change address or have prevented him or her from appearing or cooperating with the officials*."[222] However, following the expiry of the three month period, a decision to discontinue the examination is taken and the application cannot be re-opened. The applicant may submit a subsequent application, but this cannot be based on the same grounds as the original application. The subsequent application must raise new circumstances of significant importance for the personal situation of the applicant, or regarding the situation in the country of origin. If it does not, it will be rejected as manifestly unfounded. However, if the applicant abandoned the initial procedure before the personal interview, then it is considered that the applicant had not presented elements relating to the reasons for the application for international protection, and the merits of the application have not been considered. Any reasons submitted as part of the subsequent application will be considered to constitute new circumstances.[223] UNHCR audited one case which exemplifies the issues, as follows:

In Decision 60, the applicant who was a national of Afghanistan left, without authorisation, the reception centre where he had been accommodated and did not notify the determining authority of a new address. The applicant had had an interview with the determining authority. The interview record stated that the purpose of the interview was to gather information about his identity, nationality and travel route but not to consider the reasons for the application. Nevertheless, the applicant was asked at the end of the interview to state his reasons for requesting protection in the Republic of Bulgaria and the applicant had briefly stated his reasons. The proceedings were suspended, and after the expiry of three months, during which the applicant failed to make contact with the determining authority, a decision was taken to discontinue the examination. One month later, following the submission of an application for international protection in Belgium and in accordance with the Dublin II Regulation, Bulgaria accepted responsibility for the examination of the application and the applicant

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[221] Article 51/8 of the Aliens Act.
[222] Article 77(2) (Supplemented, SG No. 52/2007).
[223] See Decision 60.

was returned from Belgium. The applicant submitted a subsequent application in Bulgaria. The decision to grant humanitarian status did not refer to any need to establish new significant circumstances.

UNHCR's research has found that three States require an applicant, whose application was previously discontinued and who wishes to pursue the original application, to submit a subsequent application.[224]

In Germany, following withdrawal of the application the determining authority takes the decision to discontinue the procedure. However, if the applicant wishes to pursue the original application, the original application is not re-opened, but the standards for subsequent applications apply, including new evidence or a change of the legal situation in favour of the applicant ,[225] and the three-month time limit beginning "*with the day the person affected learnt of the grounds for resumption of proceedings"*.[226] Moreover, despite the discontinuation of the procedure with regard to refugee protection, a decision on the merits is taken concerning subsidiary protection.

In the UK, the examination of an application may be discontinued if an applicant fails to attend the personal interview without reasonable cause. However, if the applicant then expresses the wish to pursue the application, the original application is not re-opened, and instead s/he must submit a subsequent application. The subsequent application must fulfil the criteria of a "fresh claim" (subsequent application), i.e. the content of the submission must be significantly different from the previous application, in that (i) the content has not already been considered and (ii) taken together with the previously considered material, it creates a realistic prospect of success. In practice, a new application will normally fulfil the first criterion when the previous application was discontinued and the merits of the application were not considered. However, the second criterion still applies.

Similarly, in Spain, a decision to discontinue the examination may be taken in certain circumstances, but if the applicant then expresses the wish to pursue the application, the original application is not re-opened, and instead s/he must submit a new application. However, the new application must not be on exactly the same grounds as

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[224] Germany, UK and Spain.

[225] Section 51 (1) Administrative Procedure Act: "*The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:*
1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected;
2. new evidence is produced which would have meant a more favourable decision for the person affected;
3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure."

[226] Section 51 (1) Administrative Procedure Act: "*The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings."* The referral to Section 51 (2) A remains unclear in cases of explicit withdrawal: *"An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy."*

the previous application. In Spain, an application which is considered identical to a previous application submitted by the applicant will be declared inadmissible unless there are particular extenuating circumstances. However, this latter point is a matter of discretion for the determining authority.

As has been noted above, notwithstanding a failure to comply with a procedural obligation, some Member States may take a decision on the basis of the available evidence. This is likely to be a decision to reject the application when the applicant has not attended a scheduled personal interview or has failed to provide essential information. In these Member States, if the applicant wishes to pursue the original application, and a final decision was taken on the application, s/he must submit a subsequent application raising new elements or findings: France,[227] Greece,[228] Italy,[229] the Netherlands[230] and the UK.[231]

With respect to returns under the Dublin II Regulation, Greek national legislation states that "*in the case that a foreign national is transferred to Greece, in application of Council Regulation 343/2003 [Dublin Regulation], any decision of the determining authority* ***to discontinue the examination*** *of such application shall be automatically revoked*."[232] [Emphasis added]. However, according to the determining authority, in practice, the determining authority does not take decisions to discontinue the examination of applications and therefore this legislative provision does not apply. Instead, as mentioned above, the determining authority takes a decision to reject the application on non-compliance grounds which is served on the applicant when transferred back to Greece. This decision cannot be revoked and the original application cannot, therefore, be re-opened. The only remedy which remains is a right of appeal on a point of law to the Council of State if the time limit has not expired, or the submission of a subsequent application which must raise new elements or findings.[233]

In the UK, a failure to report or communicate may result in the application being rejected for "non-compliance".[234] As a permissive provision, the decision-maker has discretion not to reject the application. The decision must be based on the available material, and policy instructions stress that the application cannot be rejected on the basis of non-compliance alone.[235] If the application is rejected and the applicant wishes to pursue the application, a subsequent application must be submitted which must fulfil

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[227] Article R.723-3 *Ceseda.*
[228] Article 18 PD 90/2008.
[229] Article 29 (b) of the d.lgs. 25/2008.
[230] Article 4:6 General Administrative Law Act.
[231] Immigration Rule 353.
[232] Article 14 (3) PD 90/2008.
[233] According to the determining authority in Greece, no subsequent application has been submitted since the entry into force of PD 90/2008.
[234] Immigration Rule 339M.
[235] The API *Non-compliance refusals*.

the criteria of a fresh claim as stated above. Since the non-compliance provisions require the decision-maker to consider the claim based on the available material,[236] an application on the same ground may not pass the first limb of the test (that the material has not been considered before). This puts the applicant in a worse position than if the claim was simply treated as "discontinued". The claim must also satisfy the second limb of the test and have a reasonable prospect of success at appeal, as discussed above. However, if the application has been rejected for non-compliance and it comes to the attention of the decision-maker that the decision was flawed, the API on *Non-Compliance* includes guidance for the decision-maker on how to take corrective action, including re-opening the normal asylum procedure. This depends, however, on the discretion and initiative of the decision-maker, and is not a right of the applicant.

A discretionary power also exists in Italy. Where a decision to reject the application has been taken because the applicant did not appear for the personal interview, the negative decision may contain a statement which indicates that the determining authority may be prepared to re-examine the application and schedule a new personal interview, if the applicant wishes to pursue the application and can provide serious and justified reasons for his/her non-appearance.[237] The determining authority has the power to take a new decision '*in via di autotutela*' which legally means to put the matter right without legal process. This is a discretionary power of the public administration. This positive practice should, however, be reinforced by a clear provision of law.

In the Czech Republic, an application may also be rejected on non-appearance grounds. However, the practice can be differentiated from the situations noted above, in that a decision to reject will only be taken if it is considered that sufficient facts have been gathered, for example, where the personal interview was conducted with the applicant. As such, a subsequent application should then state new facts which could not have been raised in the earlier procedure.

Recommendation

In UNHCR's view, in cases of implicit withdrawal where the applicant did not proceed to substantiate the previous application in accordance with Article 4 of the Qualification Directive, the examination of the application should be discontinued. Member States should ensure that an applicant who reports to the competent

[236] A non compliance refusal must deal with any substantive information held about the claim, and not just the non-compliance: *Ali Haddad* (HX/74078/97 (STARRED) [00/HX/00928]. See the API *Non-compliance refusals.*

[237] UNHCR audited negative decisions which stated "*considering that the applicant did not appear for the personal interview having been legally summoned; considering that the statements made to the police are not sufficient to ground the alleged fear of persecution; considering that the Commission [determining authority] could not acquire the information necessary to support the written declarations by means of a personal interview; considering the [Commission's] faculty to proceed with a new summons if the person concerned gives serious and justified reasons for their absence; decides to reject the application."*

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.