Section 14
Subsequent applications

Section 14
Subsequent applications

Introduction

Article 32 of the Asylum Procedures Directive (APD) addresses the situation where a person who has already applied for asylum in a Member State raises new issues or presents new evidence in the same Member State. These new issues or evidence are referred to in the APD as "further representations" or a "subsequent application".[1] Article 32 APD sets out the situations in which Member States may consider that further submissions by a person represent a subsequent application,[2] and sets out the 'frameworks' within which a subsequent application may be examined. The rationale for these provisions is stated in recital 15 of the APD:

"*Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant.*"

As such, Article 32 (2) and (3) APD provides that a subsequent application, submitted after the (explicit or implicit) withdrawal of the previous application, or after a (final) decision on the previous application has been taken, may be examined in a specific procedure in which it shall first be subject to a preliminary examination to determine whether new facts or evidence have arisen or have been presented by the applicant.[3] The minimum procedural guarantees which are applicable to the preliminary examination are more limited than the basic guarantees set out in Chapter II of the Directive.[4] The APD, moreover, does not guarantee that the preliminary examination is conducted by the determining authority.[5] Furthermore, Member States may lay down in national law rules on the preliminary examination, but these must not "*render*

[1] Article 32 (1) APD.

[2] Note that Article 33 also states that "*Member States may retain or adopt the procedure provided for in Article 32 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time*."

[3] Article 32 (3) APD.

[4] Article 24 (1) (a) APD stipulates that Member States may provide for a preliminary examination of subsequent applications which derogates from the basic principles and guarantees of Chapter II. Article 34 (1) APD limits the procedural guarantees to those set out in Article 10 (1) APD and Article 34 (3) (a) requires Member States to ensure that "*the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in the case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision*". Notably, the APD does not guarantee the applicant the opportunity of a personal interview during the preliminary examination, nor the requirements for the examination of applications set out in Article 8.

[5] Article 4 (2) (c) APD.

impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access".[6] If it is determined that relevant "*new elements or findings*" have arisen or have been presented by the applicant, the determining authority must examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.[7]

UNHCR, in principle, agrees that subsequent applications may be subjected to a preliminary examination of whether new elements have arisen or been presented which would warrant examination of the substance of the claim. Such an approach permits the quick identification of subsequent applications which do not meet these requirements. However, in UNHCR's view, such a preliminary examination is justified only if the previous claim was considered fully on the merits.[8]

There are many reasons why an applicant may wish to submit further evidence or raise new issues following the examination of a previous application for international protection, including:

(i) The situation in the country of origin may have changed and a well-founded fear of persecution or a real risk of suffering serious harm may be based on events which have taken place in the country of origin since the examination of the previous application.

(ii) A well-founded fear of persecution or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant or convictions held by the applicant since s/he left the country of origin.

(iii) A well-founded fear of persecution or a real risk of suffering serious harm may arise if there has been a direct or indirect breach of the principle of confidentiality during or since the previous procedure, and the alleged actor of persecution or serious harm has been informed of the applicant's application for international protection in the Member State.

(iv) Deficiencies or flaws in the previous procedure may have prevented an adequate examination and assessment of all the relevant facts and evidence. For example, a lack of timely and appropriate information to the applicant on the procedure and his/her rights and obligations; lack of access to legal advice; a lack of competent interpretation; the omission of or poor conduct of the personal interview; a failure to provide a gender-appropriate interview; accelerated procedures may have been too quick for the applicant to acquire all the relevant evidence; etc.

(v) Trauma, shame, or other inhibitions may have prevented full oral testimony by the applicant in the previous examination procedure, particularly in the

[6] Article 34 (2) APD.

[7] Article 34 (3) (b) APD.

[8] For further information, see subsection below on subsequent applications following the withdrawal of the previous application, and section 7 of this report on the withdrawal or abandonment of applications.

case of survivors of torture, sexual violence and persecution on the grounds of sexuality.

(vi) There may have been a change in the legislation, policy or case-law of the Member State since the examination of the previous application.

(vii) Further relevant evidence may have been obtained by the applicant or arisen after the previous examination.

(viii) The previous examination may have been discontinued or terminated on grounds of withdrawal or abandonment without a complete examination of all the relevant elements.[9]

(ix) The previous application may have been submitted on behalf of a dependant who later wishes to submit an independent application in his/her own right.

(x) Short time-limits within which to exercise a right of appeal, and/or restrictions on the admissibility of evidence on appeal, may have prevented the use of an appeal to raise new elements or findings.

UNHCR also recognises that some applicants may wish to submit a second application with a view to delaying or frustrating the enforcement of a removal order.

In some Member States, the issue of subsequent applications is significant. For example, in Belgium, in 2008, 27.1% of all applications submitted were subsequent applications; in the Czech Republic, 36% of applications lodged in 2008 were subsequent applications[10] and in France, they represented 17% of all applications in 2008.[11] In Germany, even though the number of subsequent applications filed in 2009 was 16.3 %, which represented the lowest level since 1995,[12] subsequent applications became

[9] Note that in this circumstance, it is UNHCR's view that a request to pursue the original application should not be treated as a subsequent application in the sense that the applicant should not have to raise new grounds or evidence. See subsection below on subsequent applications following the withdrawal of the previous application and section 7 of this report on the withdrawal or abandonment of applications.

[10] A total number of 1,656 applications were submitted in 2008 of which 596 were subsequent applications.

[11] In Bulgaria, the determining authority does not maintain statistics on the number of subsequent applications; however, a significant number of subsequent applications involve applicants from Armenia. In Slovenia, according to statistics of the Ministry of the Interior, in 2007, the percentage of subsequent applications was 8.9%; in 2008, it was 7% of all applications lodged and no change of trend is foreseen for 2009.

[12] 1995: 23.4%; 1996: 22.0%; 1997: 31.2%; 1998: 33.2%; 1999: 31.2 %; 2000: 33.2%; 2001: 25.4%; 2002: 22.2%; 2003: 25.5%; 2004: 29.0%; 2005: 32.6%; 2006: 30.1%; 2007: 36.8%; 2008: 21.2%; 2009: 16.3%. (BAMF supplement to "*Entscheiderbrief*" 2/2010; "*Aus der Geschäftsstatistik des Bundesamtes für das Jahr 2009*"; p. 1; published on 11 February 2010; available on www.bamf.de.) While in 2008, 5,933 subsequent applications were lodged, there was a decrease of 9.3% during the same period in 2009 (Jan. to Dec.) when 5,384 follow-up applications were made. Comparative figures for the months of November and December 2009 show a decline in the number of subsequent applications from 398 to 344, i.e. a decrease of 13.6 %. (BAMF brochure "*Aktuelle Zahlen zu Asyl*", p. 2; published on 21 January 2010; available on www.bamf.de .)

especially significant following cessation decisions.[13] In contrast, according to the determining authority in Greece, no subsequent application has been submitted since the entry into force of PD 90/2008.

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

This section principally addresses the Directive's provisions on the treatment of subsequent applications as set out in Articles 32 and 34. However, other articles of the Directive are also relevant and the reader is referred to other sections of this report as appropriate.

The right to submit a subsequent application

Article 32 APD refers to both 'further representations' and 'subsequent applications'. Neither of the terms is explicitly defined by the APD and, therefore, the definitions applied in Member States depend on national legislation.

Article 32 (1) APD is a permissive clause according to which Member States *may* examine further representations or the elements of a subsequent application submitted by an applicant in the same Member State. This may be either in "*the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework*".

Moreover or alternatively, Member States *may* apply a specific procedure for the preliminary examination of subsequent applications.[14] Such a procedure may be applied in the event of the previous application having been withdrawn or abandoned by virtue of Articles 19 and 20 APD,[15] and/or after a decision or a final decision has been taken on the previous application.[16]

---

[13] This refers to cases in which a final decision has been taken on the withdrawal of international protection. The examination of applications in the procedure for subsequent applications after a previous revocation of refugee status is not actually encompassed by the wording of Section 71 (1) 1 APA (*"withdrawal," "non-appealable rejection"*).

[14] Article 32 (2) APD

[15] Article 32 (2) (a) APD

[16] Article 32 (2) (b) APD states that such a specific procedure may be applied where the subsequent application is submitted "*after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken*." According to Article 2 of the APD a "'*final decision' means a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within*

As such, neither Article 32 (1) nor (2) APD explicitly requires Member States to examine any further representations or a subsequent application submitted by an applicant. Nevertheless, as Member States are obliged under international law to ensure that applicants are not sent to a country in breach of the principle of *non-refoulement* or in breach of their legal obligations under international human rights treaties, Member States should ensure that a requirement to examine further representations and subsequent applications is stipulated in national legislation.

UNHCR's research has found that all the Member States surveyed for this research have legislation which allows an applicant to submit further representations or a subsequent application in particular circumstances. This is the case in Belgium,[17] Bulgaria,[18] the Czech Republic,[19] Finland,[20] France,[21] Germany,[22] Greece,[23] Italy,[24] the Netherlands,[25]

---

the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive". Chapter V of the APD sets out the provisions on appeal procedures and Article 39 of Chapter V stipulates the right to an effective remedy.

[17] Article 51/8 of the Aliens Act stipulates that the minister or his authorized representative can decide not to take an asylum application into consideration when the foreigner, who has entered the country without fulfilling the necessary entry requirements, has already made the same application and he does not produce new elements containing significant indications for a well-founded fear of persecution as defined in the 1951 Convention, or containing significant indications of a real risk of serious harm warranting subsidiary protection. These new elements must relate to facts or situations that have taken place after the last phase in the procedure where the applicant could have produced them. The minister or his authorized representative must however take the asylum application into consideration when applicant has been notified earlier of a refusal decision which was taken based on article 52, § 2, 3°, 4° and 5°, § 3, 3°, § 4, 3° or article 57/10. Only an appeal for annulment at the CALL can be lodged against a decision not to consider a subsequent application. A request for suspension of this decision cannot be lodged.

[18] LAR provides a legal definition of the term 'subsequent application' in its Additional Provisions, Paragraph 1, item 6: "*'Subsequent application' shall mean an application for status in the Republic of Bulgaria which was submitted by an alien whose refugee or humanitarian status has been revoked or discontinued or in case the status determination procedure in the Republic of Bulgaria has ended with an effective decision."* There is no special procedure for subsequent applications and they are usually transferred into the standard accelerated procedure under Article 68 LAR. (Amended, SG No. 52/2007) "(1) *An accelerated procedure shall be launched: … 3. upon the registration of an alien who has submitted a subsequent status application."* The exception is for subsequent applications by unaccompanied minors which are admitted directly to the regular procedure (Article 71(1), Article 72 (2), item 3 LAR), and this is also the case for beneficiaries of temporary protection (Article 71 (2) LAR).

[19] Section 10a (e) ASA according to which "*the application is inadmissible e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien."*

[20] Section 102 of the Aliens' Act states*:"(1) A subsequent application means an application for international protection filed by an alien after his or her previous application was rejected by the Finnish Immigration Service or an administrative court while he or she still resides in the country, or if he or she has left the country for a short time after his or her application was rejected. (2) If a new application is filed while the matter is still being processed, the information given by the applicant is submitted to the*

Slovenia,[26] Spain[27] and the United Kingdom. However, bearing in mind the fact that

authorities processing the matter to be considered as a new statement in the matter. (3) A decision on a subsequent application may be issued without an asylum interview."

[21] Article R.723-3 *Ceseda*, Article R.742-1 *Ceseda* and the Circular of 22 April 2005.

[22] Section 71 (1) APA in conjunction with Section 51 (1) to (3) Administrative Procedure Act.

Section 71 (1) APA: "*If, after the withdrawal or non-appealable rejection of a previous asylum application, the foreigner files a new asylum application (follow-up application), a new asylum procedure shall be conducted only if the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are met; this shall be examined by the Federal Office. The same shall apply to a child's application for asylum if the representative under Section 14a (3) has waived the processing of the asylum application."*

Section 51 (1) to (3) Administrative Procedure Act :*"(1) The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when: 1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected; 2. new evidence is produced which would have meant a more favourable decision for the person affected; 3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure. (2) An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy."*

[23] Article 23 of PD/2008.

[24] Article 29 (b) of the d.lgs 25/2008.

[25] The Netherlands has transposed Article 32 APD in its national law, regulations and administrative provisions by means of Article 4:6 General Administrative Law Act (*Algemene wet bestuursrecht*). The policy regarding subsequent applications is found in C14/5 Aliens Circular and in IND working instruction 2006/27 of 22 November 2006 on the application of Article 4.6 General Administrative Law Act.

[26] Article 56 IPA (filing a new application): "*(1) A third country national or a stateless person whose application in the Republic of Slovenia has already been finally rejected, or has explicitly withdrawn the application, may file a new one only if he/she submits new evidence proving that he/she meets the conditions for acquiring international protection under this Act. (2) The new evidence shall occur after the issue of a preliminary decision, or may have existed already during the first procedure, although the person referred to in the preceding paragraph did not enforce these due to justified reasons."* Article 57 IPA (procedure for filling a new application): *"(1) The persons referred to in the first paragraph of the preceding Article shall file a request with the competent authority for the introduction of a new procedure. In such request, the person shall produce evidence justifying the procedure. Filing of the request shall, mutatis mutandis, be subject to the provisions of Articles 47 and 48 of this Act. The applicants shall enjoy all basic procedural guarantees referred to in Article 8 of this Act. (2) If a legal representative, after issuing a request for the initiation of a new procedure, files the first application for a child born in the Republic of Slovenia, such an application shall be considered as the application referred to in the preceding paragraph. (3) A request for the introduction of a new procedure shall be decided by the competent authority with a decision. Upon the competent authority's establishment that the conditions referred to in the second paragraph of the preceding Article are met, the competent authority shall permit a new application to be submitted and shall act pursuant to Article 43 of this Act. (3) Otherwise, it shall reject the request for the introduction of a new procedure with a decision. (4) If a request for the introduction of a new procedure is filed the person referred to in the first paragraph of the preceding Article, on the basis of a decision by the police issued on the basis of the provisions of the Aliens Act, shall be accommodated by the authority, responsible for deportation. (5) If the person referred to in the first paragraph of the preceding Article withdraws the request for the introduction of a new procedure prior to the decision taken by the competent authority, the procedure shall be closed with a decision. (6) The person referred to in the first paragraph of the preceding Article shall become an applicant under this Act from the day of filing a complete new application*."

[27] There is no restriction on the possibility to present subsequent applications. Articles 9 AL and 38 ALR provided for the possibility to request a re-examination of an application upon which a negative decision

Article 32 APD contains permissive clauses, UNHCR's research revealed that practice among these states varies significantly with regard to the conduct of the preliminary examination of subsequent applications, including the opportunity for a personal interview, the information provided to applicants and other procedural guarantees enjoyed by applicants. The section below provides a snapshot of practice in the different states surveyed and some common themes identified.

Recommendation

The APD should be amended to stipulate that Member States shall examine further representations or the elements of a subsequent application in order to ensure compliance with Member States' legal obligations under international refugee and human rights law.

Examination in the framework of the examination of the previous application

Article 32 (1) APD stipulates:

"*Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application … insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework*."

Of the 12 Member States surveyed for this research, the only state which might be considered to examine further representations in the framework of the examination of the previous application, after a decision has been taken on the previous application, is the UK.

The UK transposition note with regard to the APD states that the UK is not establishing the kind of specific procedure for a preliminary examination of subsequent applications referred to in Articles 32 (2) to (4) and (7) APD,[28] although national legislation and immigration rules appear to contain many of the elements of a specific procedure for subsequent applications.[29] The UK immigration rules speak of "further submissions" rather than "further representations" or "a subsequent application". The rules on

in the regular procedure had already been adopted (this excluded applications that had been considered inadmissible). With the New Asylum Law, this possibility has disappeared and it remains only for those applications that were decided upon before the entry into force of the New Asylum Law.

[28] See Explanatory Memorandum to the Asylum Procedures (Regulations 2007: SI 2007 No. 3187)

[29] Immigration Rules 353 and 353A, together with NIAA 2002 s 96.

further submissions will only be applied following a final negative decision on the previous application (when all appeal remedies have been exhausted)[30] or withdrawal of a previous application. By way of an exception, applicants who have had their previous application certified as clearly unfounded under the Nationality, Immigration and Asylum Act,[31] and therefore, only have an out-of-country right of appeal, may nonetheless make further submissions prior to removal which must be considered in line with the national criteria.[32]

If an applicant makes further submissions in the UK, the material will be considered by the determining authority. The determining authority may, on the basis of an examination, take a decision to grant a protection status or leave to remain on other grounds. On the other hand, if the determining authority considers that the further submissions do not warrant a grant of leave and it upholds its previous negative decision on the previous asylum application, the determining authority will then determine whether the material put forward in the further submissions amount to a "fresh claim".[33] If the determining authority decides that the further submissions amount to a fresh claim, the applicant ordinarily has a right to appeal the decision to refuse the fresh claim.[34] In other words, it is possible that having examined the further submissions, the determining authority upholds its previous negative decision on the application, but then nevertheless determines that the further submissions amount to a fresh claim. If the determining authority determines that the further submissions do not amount to a fresh claim, the applicant does not have a right to appeal to the Asylum and Immigration Tribunal (AIT).[35]

This procedural construct is the opposite of the specific procedure foreseen in the APD, whereby first a preliminary examination is conducted to determine whether the further representations or subsequent application constitute new elements or findings, and if

[30] The API on *Further Submissions* states that if it has not been possible to raise the new material during the course of the appeal for any reason, the case owner of the determining authority should consider it after the conclusion of the appeal and apply Rule 353 on fresh claims (subsequent applications).

[31] S. 94

[32] *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6.

[33] Paragraph 353 and 353A of the UK Immigration Rules: *Fresh Claims* 353. *When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim*. The criteria for a fresh claim are considered below.

[34] This is because the decision to refuse a fresh claim is regarded as an 'immigration decision'. Only 'immigration decisions' ordinarily attract a right of appeal in accordance with the Nationality, Immigration and Asylum Act 2002 s 82 (1). However, if the determining authority certifies that the submissions could have been raised in an earlier appeal, there is no right of appeal against the refusal of the fresh claim in accordance with the Nationality, Immigration and Asylum Act s 96(1) and 2.

[35] This is due to the fact that the further submissions are considered not to constitute a fresh claim and the decision of the determining authority to uphold its previous negative decision on the previous application does not constitute an 'immigration decision' under the Nationality, Immigration and Asylum Act.

so, then the determining authority further examines the subsequent application.[36] In the UK, the determining authority first examines the further submissions and, only if rejected, does the determining authority then determine whether the further submissions constitute a fresh claim for the purpose of determining whether the applicant has a right of appeal. The UK's curious approach appears motivated by a desire to deny a right of appeal to applicants whose further submissions are considered not to constitute a fresh claim. Information on the criteria for a fresh claim and on the right of appeal is further discussed in the sub-sections below.

It is also perhaps worth noting that, in Italy, an applicant may request that the determining authority re-open the previous procedure or the determining authority may itself decide to re-open a previous procedure, by virtue of the power of *autotutela,* in the case of, for example, a returnee under the Dublin II Regulation.[37]

Examination in the framework of an appeal

The APD also provides that Member States may examine further representations or the elements of a subsequent application "*in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework*."[38]

In practice, it must be borne in mind that, as is discussed in section 16 of this report on the right to an effective remedy, short time limits within which to lodge an appeal and general procedural rules governing the admissibility of evidence on appeal may preclude the introduction of new elements or findings in this framework. The above-mentioned provision would not, therefore, be applicable.

In some of the Member States surveyed, such further representations or new elements can be submitted to and examined by the appellate body. This is the case in Bulgaria,[39] Finland,[40] France,[41] Germany,[42] Italy[43] and the UK.[44]

---

[36] Article 32 (3) APD: *A subsequent application for asylum shall be subject **first** to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2 (b) of this Article on this application has been reached, **new elements or findings** relating to the examination … **have arisen or have been presented by the applicant**.*

[37] In *via di autotutela* legally means to "put the matter right without legal process".

[38] Article 32 (1) APD.

[39] Article 171 (2) APC. The judges interviewed by UNHCR were unanimous that such new facts or elements would be taken into consideration as all facts which are submitted up until the oral hearings must be taken into consideration. However, the judicial instance may not decide on the merits of the case and it shall be returned to the determining authority SAR for a review of the decision.

[40] *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009) section 102. If a decision on the first application has been appealed to the Helsinki District Administrative Court or to the Supreme Administrative Court and a subsequent application is filed during the course of the processing of the appeal, the claims in the subsequent application will be treated as new elements in the proceedings

However, in some Member States, conditions or restrictions are placed on the admissibility of new elements or evidence on appeal which may mean that this is not an option for the applicant. This is the case in Belgium,[45] the Netherlands[46] and Slovenia[47]. Moreover, in Greece, the only appellate body is the Council of State which only has jurisdiction to review the legality of the determining authority's decision and not the facts.

---

before the appellate organ. The appellate organs of the Finnish asylum procedure are not restricted in any manner when it comes to the processing of new facts or evidence in the procedure.

[41] The only restriction is that new evidence has to be submitted at least 3 days before the hearing, if any.

[42] New elements and findings established before the decision has become final primarily have to be presented in an appeal. Section 51 (2) Administrative Procedure Act: *"An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings,* ***particularly by means of a legal remedy."*** The internal guidelines of the determining authority (BAMF) contain detailed information on how to proceed with subsequent applications lodged while the appeals procedure is still ongoing. (Different case scenarios are explained, e.g. submission of an application to the BAMF before/after the oral hearing at court; applications in cases in which the BAMF is of the opinion that the appeal is inadmissible.) Section 77 (1) APA: "*In disputes resulting from this Act, the court shall base its decision on the factual and legal situation at the time of the last oral proceedings; if the decision is taken without oral proceedings, it shall be based on the situation at the time the decision is taken. Section 74 (2), second sentence shall remain unaffected."* According to Section 74 (1) APA, as a rule, the appeal can only be filed within two weeks from the day on which the decision was served. The deadline for filing an appeal is only one week, where it is provided in the law that a request for suspensive effect must be submitted within one week. In all cases, the reasoning for the appeal has to be submitted within a deadline of one month from the date on which the decision was served (Section 74 (2) APA). (Modified deadlines apply in case of a rejection as manifestly unfounded and the denial of entry in the airport procedure (Section 18 (4) APA).) However, the court may preclude facts and evidence not presented in the reasoning of the appeal within the one-month deadline if their admission would delay the procedure, and there are not sufficient grounds to excuse the delayed submission, and the applicant was informed of the consequences of failing to meet the deadline (Section 74 (2) 2 APA in conjunction with Section 87b (3) Code of Administrative Courts Procedure). In contrast, facts which become known only after the expiry of this deadline may be submitted later on without specific limitations (Section 74 (2) 4 APA). Section 36 (4) 2, 3 APA, applying in cases of irrelevant and manifestly unfounded applications, stipulates: *"Facts and evidence not stated by the persons involved shall not be considered unless they are obvious or known to the court. The introduction of facts and evidence which were not considered in the administrative procedure pursuant to Section 25 (3) and facts and circumstances within the meaning of Section 25 (2), which the foreigner did not produce in the administrative procedure may be left unconsidered by the court if the decision would otherwise be delayed."* Section 25 (2) and (3) APA: "*(2) The foreigner shall relate all other facts or circumstances which preclude deportation or deportation to a specific country. (3) If the foreigner produces such facts only at a later stage* [i.e. after the personal interview]*, they may be ignored if the decision of the Federal Office would otherwise be delayed. The foreigner shall be informed of this provision and of Section 36 (4) third sentence."* Other possibilities to achieve a modification of the decision pursuant to the general administrative laws will not be further discussed in the framework of this chapter.

[43] Article 35 (10) of the d.lgs. 25/2008.

[44] The Asylum and Immigration Tribunal is able legally to consider new elements or findings that have not been examined by the Secretary of State (Nationality Immigration and Asylum Act 2002 s 85(4)).

[45] This is governed by criteria laid down in Article 39/76 of the Aliens Act.

[46] Article 83 of the Aliens Act 2000.

[47] Article 52 of the Administrative Dispute Act, 1 January 2007.

By way of example, in Belgium, the appellate body (CALL) is required to consider new elements subject to three cumulative conditions: firstly, the new elements must be linked to the original petition for international protection; secondly, the new elements are such that they can establish in a firm manner the founded or unfounded character of the appeal; and thirdly, the applicant was not able to invoke these elements earlier in the administrative procedure.[48] However, these formalistic requirements have been given a less strict interpretation by the Constitutional Court,[49] although this has in turn been brought into question by a further ruling in another case.[50] Moreover, stakeholders interviewed by UNHCR indicated that there is a difference in the treatment of new elements between the French-speaking and the Flemish-speaking sections of the CALL, whereby the French-speaking chambers seem more inclined to put formalistic conditions aside and address the content of the new elements. One unfortunate consequence identified by this research is that this legal uncertainty has prompted some lawyers to advise their clients not to raise new elements at appeal but instead to withhold them for a subsequent application, for fear of otherwise "burning" this evidence. This is clearly not conducive to an efficient streamlining of the procedure.

Similarly, in the Netherlands, there are significant restrictions and strict conditions placed on the submission of additional or new evidence to the District Courts. The District Courts do not accept additional oral or documentary evidence which relates to circumstances which occurred before the determining authority took its decision.[51] The court will take into account facts and circumstances that have arisen subsequent to the first instance decision, unless this violates the principle of due process or unless the completion of the case will be delayed disproportionately.[52] With regard to the question of whether there are such facts and circumstances, the same criteria to establish the

[48] Article 39/76 of the Aliens Act. This further defines "new elements" as follows: "(*1) elements regarding facts or situations which have occurred after the last phase in the administrative procedure during which the applicant could have invoked them, or (2) all new elements or proof supporting facts or reasons which were already brought forth during the administrative procedure. "*

[49] GWH 27 May 2008, nr. 81/2008, B.29.1-B.30. The Court stated that the CALL must examine each new element that the applicant introduces and which is of such nature that it can show, in a firm way, the well-founded character of the appeal.

[50] 30 October 2008, nr. 148/2008, B.6.5. This ruling by the Constitutional Court appeared to re-introduce a requirement that the requesting party must give a plausible explanation of why it did not communicate the new elements earlier in the procedure. CALL judges interviewed by UNHCR, however, indicated that their approach remained flexible where the new element was of significant importance.

[51] See section 16 of this report on the right to an effective remedy for further details.

[52] Article 83 Aliens Act reads: *"1. In assessing an application for judicial review, the District Court may take into account facts and circumstances that have occurred since the disputed order was made, unless this would be contrary to due process of law or the examination of the case would as a result be delayed to an unacceptable extent. 2. The power referred to in subsection 1 shall exist only in so far as the facts and circumstances may be relevant to the decision on the residence permit referred to in Articles 28 and 33. 3. The District Court shall request the Minister to inform the opposing party and the Court in writing as quickly as possible whether the facts and circumstances that have been invoked are grounds for upholding, altering or revising the disputed order."*

'newness' of these elements are used as the criteria under Article 4:6 General Administrative Law Act. This has led to jurisprudence stating that it is up to the applicant to decide whether s/he wants to present any new elements in the framework of an appeal or to file a subsequent application.[53]

The option either to pursue a legal remedy on appeal or to submit a subsequent application does not arise in the UK, as applicants with an exercisable right of appeal must, in accordance with administrative guidelines, raise any new evidence or elements in the framework of the appeal.[54] As mentioned above, no restrictions are imposed on the admissibility of new evidence or elements to the appellate authority. However, applicants who have had their initial application certified as clearly unfounded under the Nationality, Immigration and Asylum Act s94 and have an out-of-country right of appeal may nonetheless make further submissions prior to removal without having to exhaust their appeal remedy.

In this regard, it should be noted that Article 32 (6) APD states that "*Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations … in the previous procedure, in particular by exercising his/her right to an effective remedy*". UNHCR stresses that the implementation of such a procedural bar may lead to a potential breach of the Member State's *non-refoulement* and human rights obligations. It has been stated that it is "*doubtful if it could validly prevent the making of a fresh application even where the claimant ought to have brought forward the material now relied on at an earlier stage*".[55] However, UNHCR's research has found similar clauses in Member States' national legislation, for example, the Czech Republic.[56]

Recommendation

Member States should not automatically refuse to examine a subsequent application on the ground that the new elements or findings could have been raised in the previous procedure or on appeal. Such a procedural bar may lead to a breach of Member State's *non-refoulement* and human rights treaty obligations.

[53] See Council of State, 12 May 2003, 200103069/1.

[54] If the applicant raises new material after his/her asylum application has been refused, but before the appeal is heard, the *API Further Submissions* state that the applicant should raise this material in the context of the appeal and Rule 353 should not be applied. In fact, if further submissions are made and after an initial consideration they are refused but meet the national criteria of a "fresh claim", there will be no right of appeal to the Tribunal if the Secretary of State certifies that the applicant could have raised the evidence or issues in an earlier appeal: Nationality, Immigration and Asylum Act 2002, s96. The only recourse is judicial review.

[55] See 'A Manual for Refugee Law Judges relating to European Council Qualification Directive 2004/83/EC and European Council Procedures Directive 2005/85/EC', John Barnes, 2007 at p.76.

[56] Section 10a ASA states that the non-examination of the new facts or findings in the previous procedure must not be due to the alien.

Examination in the framework of a specific procedure for the preliminary examination of subsequent applications

Article 24 (1) (a) APD states that Member States may provide for a specific procedure for the preliminary examination of subsequent applications.[57] Article 32 (2) APD states that this procedure may be applied where a person makes a subsequent application for asylum:

(a) after his/her previous application has been withdrawn or abandoned;

(b) after a decision has been taken on the previous application or only after a final decision has been taken on the previous application i.e. all legal remedies with regard to the previous application have been exhausted.[58]

The purpose of the preliminary examination is to determine whether, after the withdrawal of the previous application or after the (final) decision on the previous application, new elements or findings relating to the examination of whether the applicant qualifies as a refugee have arisen or have been presented by the applicant.[59] UNHCR notes that in those Member States which operate a single procedure for the determination of both refugee and subsidiary protection status, such a preliminary examination should also assess whether new elements or findings relating to the examination of whether the applicant qualifies for subsidiary protection status have arisen or have been presented by the applicant.

It must be underlined that Article 24 (1) (a) and Article 32 (2) APD are permissive and Member States are not required to establish a specific procedure for the preliminary examination of subsequent applications. However, where a specific procedure is applied, Article 32 (3) APD stipulates that a "*subsequent application for asylum **shall** be subject first to a preliminary examination*" as to whether new elements or findings exist.

UNHCR's research has found that six of the 12 Member States surveyed conduct a specific procedure for the preliminary examination of subsequent applications: Belgium,[60] Germany,[61] Greece,[62] the Netherlands,[63] Slovenia[64] and Spain.[65] In

[57] Article 24 APD deals with specific procedures which may derogate from the basic principles and guarantees of Chapter II APD.

[58] A "final decision" is defined in Article 2 (d) APD as "*a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive [on appeals] irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome*".

[59] Art. 32 (3) APD.

[60] Article 51/8 of the Aliens Act.

[61] In particular Section 71 (3) APA: *"In the follow-up application the foreigner shall give his address as well as the facts and evidence to fulfil the conditions listed in Section 51 (1) to (3) of the Administrative*

Germany[66]and Slovenia,[67] this specific procedure is only applied to subsequent applications made following a final decision on the previous application (when all appeal remedies have been exhausted or expired) or following withdrawal of the application.[68]

In contrast, UNHCR's research has found that in Bulgaria,[69] the Czech Republic,[70] Finland, France[71] and Italy[72], there is no specific procedure. Instead, the preliminary examination is conducted by the determining authority as an initial step or phase of the normal procedures. Also, in Spain, if the applicant has exhausted all his/her legal remedies with regard to the previous application, so that the decision on that previous application is final or if the application was declared inadmissible, a subsequent application will be examined within the normal admissibility procedure which is applied

---

Procedure Act. The foreigner shall provide this information in writing upon request. A hearing may be dispensed with. Section 10 above shall apply mutatis mutandis."

[62] Article 23 of PD 90/2008.

[63] Article 4:6 General Administrative Law Act provides that: "*1. If a new application is made after an administrative decision has been made rejecting the whole or part of an application, the applicant shall state new facts that have emerged or circumstances that have altered; 2. If no new facts or changed circumstances are put forward, the administrative authority may, without applying Article 4:5, reject the application by referring to its administrative decision rejecting the previous application."*

[64] Article 57 IPA (procedure for filing a new application).

[65] At the time of UNHCR's research, Article 9 AL and Article 38 ALR provided for a re-examination procedure. The procedure was applied after a decision had been taken by the determining authority on the previous application, but appeal remedies had not been exhausted. With the entry into force of the New Asylum Law, the re-examination procedure has been abolished and at the time of writing is only applied to applicants who lodged their applications prior to the entry into force of the New Asylum Law on 20/11/2009.

[66] Section 71 (1) 1st sentence APA: "*(1) If, after the withdrawal or non-appealable rejection of a previous asylum application, the foreigner files a new asylum application (follow-up application), a new asylum procedure shall be conducted only if the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are met; this shall be examined by the Federal Office."*

[67] Article 56 IPA states that the previous application must have been "*finally rejected*" or "*explicitly withdrawn*".

[68] Note that with regard to Slovenia, this refers to explicit withdrawal only. German legislation foresees the possibility of submitting a subsequent application only after the (explicit as well as implicit) withdrawal or non-appealable rejection of a previous asylum application.

[69] In Bulgaria, subsequent applications are usually decided upon in the accelerated procedure. However, the interview is based on a specific sample questionnaire which differs from that used for the interview of first-time applicants in the accelerated procedure. This sample is focused entirely on eliciting any new elements.

[70] Section 10a ASA: *"The application for international protection shall be inadmissible (…) e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection on which a final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien"*.

[71] Article R.723-3 *Ceseda*, Article R.742-1 *Ceseda* and the Circular of 22 April 2005.

[72] Article 29 (b) of the d.lgs. 25/2008. A preliminary examination is conducted in the framework of the admissibility procedure. If the determining authority considers that there are new elements or findings, the examination is conducted in the ordinary procedure. If new elements or findings are not established, the application is declared inadmissible without a personal interview of the applicant.

to all applications.[73] Similarly, in Bulgaria,[74] Czech Republic,[75] Finland[76] and France,[77] a subsequent application can only be submitted following a final decision on the previous application.[78] In Italy, by contrast, a subsequent application may be submitted after the decision of the determining authority on the previous application has been issued.[79]

The approaches taken by the Member States surveyed to the preliminary examination of subsequent applications are considered in more detail below.

Preliminary examination as a first stage within the normal procedures

As mentioned above, six of the 12 Member States surveyed, conduct the preliminary examination, as to whether a subsequent application raises new relevant elements or findings, as a first step within the normal asylum procedures. In two of these Member States, the preliminary examination is conducted within the assessment of admissibility which applies to all applications.[80] In Italy, the determining authority will conduct an assessment of admissibility if it is informed that the application is a subsequent application.[81] In Bulgaria, the preliminary examination is conducted within the accelerated 'filter' procedure which applies to applications for international protection.[82] In two Member States, it is conducted as part of the substantive examination in either the accelerated or regular procedures.[83] The various approaches are briefly outlined in the following paragraphs.

In Bulgaria, there are no legislative or administrative provisions explicitly requiring a specific procedure for the preliminary examination of subsequent applications. Upon registration, subsequent applications are admitted to the standard accelerated

[73] This is not an explicit legal provision but the law does not provide for any other alternative.
[74] Additional Provisions, Paragraph 1, item 6 LAR: "'*Subsequent application' shall mean an application for status in the Republic of Bulgaria which was submitted by an alien whose refugee or humanitarian status has been revoked or discontinued or in case the status determination procedure in the Republic of Bulgaria has ended with an effective decision*." The decision becomes effective when it is no longer subject to a remedy on appeal, or after the court has rejected the appeal, or the time limit for appeal has lapsed. In cases of revoked or discontinued protection status, it is not explicit in the text whether the decision of SAR must be final.
[75] Section 10a ASA.
[76] Section 102 (2) of the Aliens Act.
[77] Article R.723-3
[78] Article 2 (d) APD defines a '*final decision'* as one which is no longer subject to a remedy on appeal.
[79] Article 29 (b) d.lgs. 25/2008. A subsequent application may be submitted after a decision has been issued by the determining authority.
[80] Czech Republic and Spain.
[81] It will also conduct such an examination of admissibility if it is informed that the applicant has already been recognised as a refugee by a state party to the 1951 Convention.
[82] See section 9 of this report for further details on the accelerated procedure in Bulgaria.
[83] Finland and France.

procedure in which all applications are examined.[84] The only exceptions being, as with first-time applications, subsequent applications submitted by unaccompanied minors[85] or beneficiaries of temporary protection[86] which are instead admitted directly into the general procedure. However, in practice, a consistent and particular approach is nonetheless taken to subsequent applications. The applicant is interviewed by the determining authority for approximately 15 minutes[87] and five standard questions are asked, which are provided in a sample interview form for subsequent applications.[88] If the applicant does not provide statements or present evidence of new circumstances regarding his/her personal circumstances or the country of origin, the subsequent application is rejected in the accelerated procedure as manifestly unfounded.[89] If, however, new significant circumstances are raised, the subsequent application is admitted to the general procedure for further examination.[90] This, therefore, constitutes a *de facto* preliminary examination.

In the Czech Republic, a subsequent application, like all applications, is firstly assessed by the determining authority with regard to its admissibility. A subsequent application will be considered inadmissible if the applicant "*repeatedly filed an application for granting of international protection without stating any new facts or findings, which were not, for reasons for which the alien is not to be blamed, examined as reasons for granting international protection in previously legally completed proceedings on*

[84] *Article 68 LAR. (Amended, SG No. 52/2007) (1) An accelerated procedure shall be launched: … 3. upon the registration of an alien who has submitted a subsequent status application.* See section 9 of this report for further details.

[85] Article 71 (1), Article 72 (2), item 3 LAR.

[86] Article 71 (2) LAR.

[87] UNHCR observed three interviews involving subsequent applications. The duration was confirmed by stakeholders.

[88] A sample interview form is prepared for interviews following the provision of Article 76 (2) IRR (interview in the accelerated procedure). It includes the following questions: "*1. Do you understand the interpretation by (name of the interpreter)? 2. Are there any impediments of health or psychological character as to the conduct of an interview in this moment? 3. Why do you not want to go back to your country of origin? Are there any new circumstances related to your personal situation or to your country of origin different from those you have already presented? 4. Do you have anything to add to what you have already said?"* There is also one last question 5 on family status – to provide the names, current location and date of birth of spouses and children.

[89] Article 13 (1), item 5 LAR**.** "*Refugee status or humanitarian status shall not be granted with respect to a alien whose application is manifestly unfounded, where conditions under article 8 (1) and (9), respectively article 9 (1), (6) and (8) are not met and the alien:… 5. (new, SG No. 52/2007) he/she has submitted a subsequent application which does not include any new significant circumstances relevant to his/her personal situation or to his/her country if origin*." UNHCR audited 9 subsequent applications in the accelerated procedure which were rejected with reference to Art. 13 (1), item 5 LAR. One audited subsequent application concerned an applicant who was returned from Belgium under the Dublin II Regulation. The issue of the presentation of new elements was not raised and a positive decision was taken.

[90] The application will also be automatically submitted to the general procedure if no decision is taken in the accelerated procedure within the 3 day time limit: Article 70 (2) LAR.

international protection".[91] In such circumstances, the subsequent application is dismissed as inadmissible and the procedure is discontinued.[92] However, if the applicant presents new facts or findings and the failure to do so earlier, within the framework of the previous examination, was not due to the applicant, the application is further examined within the regular procedure. This assessment of admissibility, therefore, in fact constitutes a preliminary examination.

Likewise, in Italy, a subsequent application is firstly assessed by the determining authority with regard to its admissibility. A subsequent application will be considered inadmissible if "*the applicant has reiterated an identical application after a decision has been issued by the Commission itself* [the determining authority] *without alleging new elements concerning his/her personal conditions or the situation in his/her country of origin*."[93] In such circumstances, in practice, instead of proceeding to the personal interview of the applicant, the determining authority issues an immediate decision of inadmissibility. If the applicant raises relevant new elements, the application is further examined in the regular procedure.

As in the Czech Republic, subsequent applications lodged in Spain, following a decision of inadmissibility or a final decision on a previous application examined in Spain,[94] are treated like all first-time applications and firstly assessed by the determining authority as to their admissibility. At the time of UNHCR's research, one of the grounds upon which an application could be deemed inadmissible was that the "*application is identical to a previous one that has already been rejected in Spain, provided that no new circumstances have arisen in the country of origin that may have resulted in a substantial change in the merits of the applic*ation."[95] Thus, the previous application would be taken into account in examining the admissibility of the application.[96] In accordance with the New Asylum Law, an application can be declared inadmissible if *"the applicant presents a new application which is a mere reiteration of a previously rejected application in Spain, or if s/he presents a new application with different personal data, provided that no relevant new elements are raised with to respect to his/ her particular circumstances or to the situation in his/ her country of origin."*[97]

Finnish legislation does not provide for a specific procedure for the preliminary examination of subsequent applications. Within the framework of the procedures which apply to all applications, the determining authority first assesses whether the

[91] Section 10a (e) ASA. This is a translation made by the Ministry of Interior.
[92] Section 25 ASA
[93] Article 29 d.lgs. 25/2008
[94] Or if an applicant decided under the former law (Law 9/1994) to present a new application instead of a request for re-examination.
[95] Article 5 (6) AL
[96] UNHCR audited three case files in which subsequent applications were declared inadmissible under Article 5 (6) c). Cases Nr. 0203029, 0903061 and 0303063.
[97] Article 20 (1) e)

subsequent application includes "*new grounds for staying in the country that would influence the decision*".[98] If it considers that the application does not raise new grounds, the subsequent application is channelled into the accelerated procedure for further examination by the determining authority. A negative decision is issued in the accelerated procedure if no new elements are raised. This may be a decision that the application is manifestly unfounded if one of the grounds set out in national law apply.[99] If new elements are raised, the application is channelled into the regular procedure for further examination by the determining authority. Thus, although the determining authority conducts a preliminary examination, its purpose is to determine in which procedure – accelerated or regular – the application is to be further examined.

In France, if following a final negative decision on a previous application, an applicant wishes to submit new elements in a subsequent application, s/he must, in the same way as first-time applicants, request a (new) temporary residence permit from the Prefecture of his or her domicile. [100] As discussed in greater detail in section 9 of this report, the Prefectures may refuse to issue a temporary residence permit if they consider that an applicant is from a safe country of origin, or the applicant constitutes a serious threat to public order or security, or the asylum application is deliberately fraudulent, or constitutes an abuse of the asylum procedures or is solely lodged to prevent a removal order which has been issued or is imminent.[101] If the Prefecture issues a temporary residence permit, the application for international protection will be examined in the regular procedure by the determining authority. However, if the Prefecture refuses the application for a temporary residence permit on the grounds stated above, the application for international protection is channelled into the accelerated procedure (*procédure prioritaire).*

The Prefectures are not the determining authority and should not consider or examine the substance of any application, including subsequent applications. Guidelines were given to the *préfets* in a circular[102] which recalls that the examination of the substance of the claim falls within the exclusive competence of the determining authority, OFPRA, and the CNDA which is the appeal body. Therefore, the Prefectures should not conduct a "preliminary examination" of the subsequent application to determine whether there are new findings or elements. This is the task of OFPRA. However, in practice,

[98] *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009) section 103.
[99] Section 101 of the Aliens Act 301/2004. For example: no relevant grounds raised; applicant obviously intends to abuse the asylum procedure; deliberately giving false, misleading or deficient information on matters essential to the decision on the application; filing an application after a procedure for removing him or her from the country has begun.
[100] Article L.741-2 and Article R.741-1 *Ceseda*. Since 2007, the delivery of temporary residence permits is conducted on a regional basis (one prefecture does it for several *départements*). This was first experimented in some regions. Since 20 April 2009, it is applicable to the whole territory (except Paris and its region).
[101] Article L.741-4--2° to 4° *Ceseda* (unofficial translation into English)
[102] *Circulaire N° NOR : INT/D/05/00051/C du 22 avril 2005*.

according to NGOs[103], some Prefectures tend to request a new document, if possible official, from the applicant in order to register the new application. Moreover, Prefectures tend to consider that most subsequent applications constitute "*an abuse of the asylum procedures"* or have been "*solely lodged to prevent a removal order*" and therefore refuse to grant a temporary residence permit so that a significant number of subsequent applications are channelled into the accelerated procedure.[104] According to the above-mentioned circular, the assessment by the Prefectures of the abusive nature of an application should solely result from the administrative and procedural context of the application,[105] and should be applied on a case-by-case basis. The text adds that the use of the accelerated procedure should not be systematic and should take into account individual circumstances even in the case of subsequent applications. However, some Prefectures may question how they can assess whether a subsequent application is abusive without considering the new elements submitted.

If the Prefecture issues a temporary residence permit,[106] the applicant must submit his/her subsequent application to the determining authority OFPRA within eight days of receipt of the permit.[107] If the Prefecture does not issue a temporary residence permit, the applicant has 15 days within which to submit the subsequent application to the Prefecture which forwards the application to OFPRA. Applicants whose subsequent applications are to be examined in the regular procedure, therefore, have less time within which to submit their application as compared to applicants who do not receive a temporary residence permit and whose application is to be examined in the accelerated procedure. There is a specific OFPRA form for subsequent applications which explicitly requires the applicant to submit new elements or findings. The preliminary examination, in the terms of the APD, is conducted by OFPRA as a first step within the context of either the accelerated or regular procedure depending on the decision of the Prefecture.

Specific procedures for the preliminary examination of subsequent applications

Six of the Member States surveyed operate a specific procedure for the preliminary examination of subsequent applications.

[103] Cf. Report « *Les demandeurs d'asile sans papiers : les procédures Dublin II et prioritaires* », CFDA, avril 2006.

[104] In 2008, 82.6% of subsequent applications were examined in the accelerated procedure. 57% of all applications examined in the accelerated procedure were subsequent applications: 2008 OFPRA Report.

[105] For example, a short duration between the notification of the subsequent application and receipt of a previous refusal decision, or in the case of repetitive subsequent applications.

[106] According to Article R.742-1 *Ceseda*, its validity is limited to 15 days. This is a shorter period of validity as compared to first-time applicants who receive a permit valid for one month.

[107] Art. R723-3 *Ceseda*. This is a shorter time-frame than for first-time applicants who have 21 days within which to submit the application: Article R723-1 *Ceseda*.

In Belgium, this specific procedure is not conducted by the determining authority (CGRA), but by the Aliens Office (AO).[108] The AO, in accordance with national law, examines whether the subsequent application:

- is not identical to the previous application;
- raises new elements containing significant indications of a well-founded fear of persecution or a real risk of serious harm;

and whether:

- these new elements relate to facts or circumstances which have taken place after the last phase of the procedure in which the applicant could have produced them.[109]

If the AO considers that these conditions are fulfilled, it decides that the application should be further examined by the determining authority, and the latter and the applicant are informed accordingly. However, if the AO considers that the conditions are not fulfilled, it issues a negative decision to the applicant.[110]

In Germany, the decision whether to conduct another asylum procedure following a subsequent application is taken by the determining authority. With regard to the preconditions for further examination, German asylum law[111] refers to the general rules applicable in administrative law. Section 51 (1) Administrative Procedure Act[112] stipulates the criteria which must be fulfilled for the resumption of proceedings:

"The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:

1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected;
2. new evidence is produced which would have meant a more favourable decision for the person affected;
3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure."[113]

---

[108] Also referred to as the Immigration Department (*Office des Etrangers/Dienst Vreemdelingenzaken*). See below for further information regarding the competence of the Aliens Office.
[109] Article 51/8 of the Aliens Act.
[110] A negative decision is given in the form of an annex called an "annex 13 quater".
[111] Article 71 (1) Sentence 1 APA: *"[…] a new asylum procedure shall be conducted only if the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are met […]".*
[112] Translation provided by the MOI on its website: http://www.en.bmi.bund.de.
[113] Section 580 of the Code of Civil Procedure contains several grounds for the resumption of proceedings, *inter alia*, that the party concerned discovers another document or is enabled to use such a document which would have resulted in a more favorable decision for the person affected (No.7 b)).

Section 51 (2) and (3) of the Administrative Procedure Act set further requirements for the resumption of proceedings which relate to the reasons why the elements or findings were not presented at an earlier stage, as well as the time limits for lodging a subsequent application.[114]

Legislation in Greece stipulates that a subsequent application will first be subject to a preliminary examination by the competent authority to determine whether the applicant has provided new substantial elements.[115] The examination is conducted by the police and the decision is taken by the Director of the Police Directorate, which is the determining authority, where the subsequent application was submitted. If, following the preliminary examination, it is considered that new significant elements have been presented; the application is further examined by the determining authority. Otherwise, a negative decision is taken.

In the Netherlands, national legislation, regulations and administrative provisions provide that subsequent applications are subjected to a preliminary examination by the determining authority to determine whether the applicant has raised new facts that have emerged or circumstances that have altered.[116] If the applicant does not raise new facts or circumstances, in accordance with criteria set out in law and regulations, the determining authority may reject the subsequent application by reference to its previous negative administrative decision on the previous application.[117] If the determining authority considers that the applicant has raised new facts or circumstances and the application cannot be examined within 48 procedural hours, the application is submitted to the regular procedure for further examination.

In Slovenia, following a final negative decision or explicit withdrawal, an applicant can file a request with the determining authority asking that a new procedure is initiated. With the request, the applicant must submit new evidence demonstrating that s/he qualifies for international protection and that a new procedure is, therefore, justified.[118] The determining authority will grant the request and permit a new application to be submitted if new evidence, according to stipulated criteria, is submitted. Otherwise, the determining authority will dismiss the request to initiate a new procedure.

---

[114] Section 51 (2) and (3) Administrative Procedure Act read as follows: "*(2) An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of legal remedy.*
(3) The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings."

[115] Article 7 PD 81/09

[116] Article 4:6 General Administrative Law Act, C14/5 Aliens Circular and the IND working instruction 2006/27 of 22 November 2006 on the application of Article 4:6 General Administrative Law Act.

[117] Article 4:4 General Administrative Law Act

[118] Article 57 IPA and Article 56 IPA.

At the time of UNHCR's research in Spain, according to the former law, an applicant, who had received a negative decision on his/her application for international protection in the first instance procedure (including a negative decision with regard to refugee status but a positive decision on subsidiary protection, but excluding a decision of inadmissibility) before appeal remedies had been exhausted, could request that the determining authority re-examine the application on the ground that the applicant could produce new evidence of his/her statements, or considered that the grounds for rejection had disappeared.[119] The re-examination procedure included a preliminary examination by the determining authority to determine whether the information submitted justified re-examination under national law. This preliminary examination was conducted by the same official who examined the original application. It was decided solely on the basis of written submissions, and had to be decided within one month.[120] If a decision was made not to re-examine the application, then this decision had to be reasoned and notified to the applicant along with information on how to appeal.[121] If the request for re-examination was accepted, then the application would be assessed in the same way as the initial application, with the exception of those procedural steps that had already been completed for the original application. No information was provided to applicants concerning the possibility to request a re-examination, and an interpreter would only be provided if the determining officer considered that an interview was required. In practice, this meant that if the applicant did not have a lawyer, then s/he was unlikely to know about this possibility or how to substantiate a request for re-examination. With the entry into force of the New Asylum Law, this procedure no longer exists and is only applied to applications that were lodged prior to the entry into force of the New Asylum Law on 20 November 2009.

Who conducts the preliminary examination?

Article 4 (1) of the APD stipulates that all Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications for international protection. However, in derogation, Article 4 (2) (c) APD states that Member States may provide that another authority is responsible for the purposes of conducting a preliminary examination of subsequent applications, "*provided this authority has access to the applicant's file regarding the previous application*"; and provided that "*the personnel of such authorities have the appropriate knowledge or receive the necessary training to fulfil their obligations*".[122]

Article 4 (2) (c) APD is an optional provision. UNHCR notes that 11 out of the 12 Member States surveyed have not derogated from the requirement that the determining authority examine subsequent applications for international protection. In all these

[119] Article 9 AL and Article 38 ALR
[120] Article 38 (3) ALR
[121] Article 38 (3) ALR
[122] Art. 4 (3) APD

Member States, it is the determining authority which conducts the preliminary examination of subsequent applications.[123]

The exception is Belgium. As mentioned above, it is the Aliens Office (AO) and not the determining authority (CGRA) which conducts the preliminary examination of subsequent applications. The decision to leave the AO with the competency to conduct the preliminary examination of subsequent applications has been very much criticized by NGOs and lawyers.

The AO must apply Article 51/8 of the Aliens Act and assess whether a subsequent application raises new elements which contain significant indications for a well-founded fear of persecution as defined in the 1951 Convention or contain significant indications of a real risk of serious harm warranting subsidiary protection status. This requires the personnel of the AO to compare the subsequent application with the previous application and the decision of the CGRA and, if any, the judgment of the appeal body (CALL). The AO requests the CGRA to forward the case file of the applicant for this purpose. Given the CGRA conducted the examination of the previous application, it is arguable that the determining authority is better placed to carry out this assessment. Moreover, the AO must determine whether any new elements may indeed be considered "new" in accordance with national law and, if so, whether these new elements constitute "significant indications" of persecution or serious harm. However, in light of the case law, the AO is not competent to assess the new elements in the framework of the 1951 Convention or legal provisions on subsidiary protection; nor to evaluate the credibility of purported new elements as the AO has a purely administrative role.[124] According to NGOs and lawyers, this underlines the inappropriateness of the AO as the competent authority to conduct the preliminary examination of subsequent applications. The application of Article 51/8 of the Aliens Act requires that the examining authority is able to assess the new elements in the light of the 1951 Convention and subsidiary protection provisions, which the AO cannot. UNHCR is of the view that the notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object and purpose of the 1951 Convention and provisions on subsidiary protection. The AO must also evaluate up-to-date country of origin information, although it is the determining authority which monitors developments in countries and regions of origin. The AO asylum section informed UNHCR that it has regular briefing meetings (every two weeks) with the CGRA on the situation in certain regions and countries of origin.

[123] Bulgaria, Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Slovenia, Spain and the UK. Note that with regard to the UK, the determining authority examines further submissions and if leave is refused, the determining authority determines whether the further submissions amount to a "fresh claim". See above.

[124] *RvS* 7 March 1997, nr. 65.692; *RvS* 11 July 2000, nr. 88.870, *RvV* 15 May 2008, nr. 11.217.

This arrangement was stongly criticised by NGOs, who subsequently sought annulment of it on the grounds that it breached Article 8 (2) APD,[125] and was in violation of the non-discrimination principle (i.e. the principle of equal treatment presupposes that all protection claims be considered by the same body with sufficient knowledge and expertise to assess their relevance in deciding whether an individual should qualify for a protection status). However, the Constitutional Court has upheld the arrangement whereby the AO conducts the preliminary examination of subsequent applications as non-discriminatory.[126]

UNHCR welcomes the fact that in the overwhelming majority of Member States surveyed, it is the determining authority which is tasked with the conduct of preliminary examinations. The determining authority would appear in most cases to be the body best placed to compare the basis of the subsequent application with the facts of the previous application, and to determine the significance of further representations with regard to the law and country of origin information.

Recommendation

UNHCR recommends that the determining authority should be responsible for conducting preliminary examinations of subsequent applications. Article 4 (2) (c) APD, permitting states to allocate the task to another authority, should be deleted.[127]

Procedural safeguards accorded to the preliminary examination of subsequent applications

As mentioned above, a number of the Member States surveyed conduct the preliminary examination of subsequent applications within the normal first instance asylum procedures. Therefore, the procedural safeguards accorded to these procedures apply. These should include the basic principles and guarantees set out in Chapter II of the APD[128] and, as such, applicants should enjoy greater procedural safeguards than the minimum standards for the preliminary examination of subsequent applications set out under Article 34 APD. However, it is worth highlighting at this point, that Chapter II of the APD contains an optional but significant derogation from the right to the

[125] Article 8 (2) APD sets out the requirements for the examination of applications.
[126] Decision of the Constitutional Court of 26 June 2008, *GWH* 26 June 2008, nr. 95/2008, B.70-B.74.
[127] Such deletion is suggested by the European Commission in proposed recast Article 4(3): APD Recast Proposal 2009.
[128] These relate to access to the procedure (Art. 6), the right to remain (Art. 7), the requirements for the examination of applications (Art. 8), requirements for a decision (Art. 9), guarantees for applicants (Art. 10), obligations of the applicants (Art. 11), the personal interview (Arts. 12, 13 & 14), right to and scope of legal assistance and representation (Arts. 15 & 16), guarantees for unaccompanied minors (Art. 17), detention (Art. 18), withdrawal (Arts. 19 & 20), the role of UNHCR (Art. 21) and the collection of information on individual cases (Art.22).

opportunity of a personal interview when the determining authority considers that a subsequent application does not raise any relevant new elements.[129]

Some of the Member States surveyed conduct a specific procedure for the preliminary examination of subsequent applications and according to Article 24 (1) (a) APD, such specific procedures can derogate from the basic principles and guarantees of Chapter II APD but must be conducted within the framework set out in Section IV APD.

UNHCR has already stated its opposition to the derogation contained in Article 24 (1) (a) and can see no reason why safeguards and guarantees associated with due process should not apply to the preliminary examination of subsequent applications.[130]

The minimum procedural rules for such specific procedures are outlined in Article 34 of Section IV APD. Under Article 34 (1) APD, Member States are required to ensure that an applicant whose subsequent application is subject to a preliminary examination enjoys the guarantees provided for in Article 10 (1) APD.[131] Article 34 (2) APD allows Member States to lay down national rules for the conduct of the preliminary examination which may, amongst other things, *"oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure"*.[132] Member States are expressly permitted to lay down time limits within which this information must be provided[133] and to conduct the examination on the sole basis of written submissions without a personal interview.[134]

UNHCR is concerned that the APD, as currently formulated, expressly allows states to exclude an interview which, in practice, may prevent a proper examination of new reasons justifying protection. It is imperative that new elements submitted are examined fully and individually. Article 34 (2) (b) APD allowing states to lay down time limits is also particularly problematic, and its application would risk putting states in conflict with their *non refoulement* obligations under international law.

[129] Article 12 (2) (c) APD. See subsection below and section 4 of this report for further information.
[130] UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005.
[131] Namely, to be informed about the procedure in a language which they are reasonably supposed to understand (subsection a), to receive the services of an interpreter (subsection b), to communicate with UNHCR (subsection c), to be given reasonable notice of the decision (subsection d) and to be informed of the decision in a language which they are reasonably supposed to understand (subsection e).
[132] Art. 34 (2) (a) APD
[133] Those rules may "*require submission of the new information by the applicant concerned within a time-limit after s/he obtained such information*": Art. 34 (2) (b) APD.
[134] Article 34 (2) (c) APD.

Recommendation

Basic procedural safeguards and guarantees should be available in the case of the preliminary examination of subsequent applications. The derogations permitted by Article 34 (2) could prevent the effective identification and consideration of a subsequent application which is based on new elements. In particular, the imposition of strict time limits for applicants to submit new material is problematic. Accordingly, Article 34 (2) (b) APD should be deleted.[135]

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

Regardless of whether Member States conduct the preliminary examination of subsequent applications within the framework of the previous application, or as a first stage within the normal asylum procedures, or within a specific procedure, Member States must ensure that applicants are informed of the procedure to be followed including their rights, obligations, the time-frame, as well as the means at their disposal to submit all the necessary elements.[136] This information must be given in time to enable the applicant to exercise the rights guaranteed by the Directive and to comply with any obligations.[137] Furthermore, according to the APD, the information must be provided in a language which the applicant may reasonably be supposed to understand.[138] On this point, UNHCR would urge Member States to provide information in a language which *the applicant understands*.

UNHCR's research has found that, in practice in some Member States, information is provided to applicants on the possibility to make a subsequent application, as well as information on the preliminary examination and applicants' rights and duties. The extent of the information provided may however be limited; it may only be provided in writing within a brochure or on a website in a limited number of languages; or it may be provided only after the subsequent application has been filed. However, in other Member States, no information is provided, in apparent non-compliance with Article 34 (1) APD and Article 10 (1) (a) APD.

[135] UNHCR notes in this connection that its deletion is proposed by the European Commission in its proposed recast article 36: European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast),* 21 October 2009, COM(2009) 554 final; 2009/0165 (COD).

[136] When the examination is carried out within the normal procedures, this is required by Article 10 (1) (a) APD. When the examination is conducted within the framework of a specific procedure, this is required by Article 34 (1) in conjunction with Article 10 (1) (a) APD.

[137] Article 10 (1) (a) APD.

[138] Article 10 (1) (a) APD.

UNHCR has noted that some of the Member States surveyed have developed general information brochures for all applicants which include some information on subsequent applications. For example, in Belgium, all asylum seekers receive an information leaflet at the start of the procedure which has a small dedicated section on subsequent applications. Similarly, in France, a new information guide, which has been translated into six languages, has a specific section on subsequent applications describing the grounds upon which a subsequent application may be submitted, with the procedure and the time-frames.

However, in some Member States, the information provided in these brochures is very limited with regard to subsequent applications.

In Bulgaria, the 'Instructions' which applicants should receive immediately before registration only states that if an alien, who does not belong to a vulnerable group, files a subsequent application, s/he will not have the right to shelter, food and social assistance during the procedure.[139] It is only after an applicant files a subsequent application that s/he receives a specific information document.

In Germany, an information leaflet[140] is provided by the BAMF when an applicant actually files the subsequent application.[141] This leaflet, which is available in almost 60 different languages, mainly contains *"Instructions to applicants submitting subsequent applications for asylum concerning their obligations and general notes relating to the asylum procedure."* Information on the criteria for a subsequent application is, however, very limited and generally worded.[142]

The standard information sheet for all applicants in the Czech Republic states that a subsequent application will not be admissible unless it raises new facts which were not known to the applicant during the examination of the previous application. It does not, however, provide any further information and does not advise applicants that they may not be offered the opportunity of a personal interview. Similarly, the information brochure given to all applicants in Finland states, in the negative, that any "renewed" application for asylum will be denied if the applicant's situation has not changed since

[139] This is a rule stipulated in Article 29, para. (5), item 1 LAR.

[140] The beginning of the English version of the leaflet states: "*Sir/ Madam, You have submitted a subsequent application for asylum. […]*".The BAMF flyer, "The German Asylum Procedure", solely mentions "follow-up applications" without any further explanation.

[141] The practice of informing applicants when filing the subsequent application has been confirmed by the BAMF. In case the applicant shows up in person, s/he receives, *inter alia*, the aforementioned information on the procedure in writing; in case of a written application, the respective information is sent to the applicant. Further information on the specifics of this procedure might be given by the counseling services of NGOs.

[142] "*The decision of the Federal Office on your subsequent asylum application may be based on the facts, arguments and evidence already presented by you. […] You must present the facts and evidence which are to justify carrying out a further asylum procedure and which were not submitted during the previous procedure. […]*". The applicant is, however, informed of the fact that an interview may not take place.

the first application.[143] The brochure does not provide further information on the procedure or the applicant's rights and obligations. In Slovenia, some information is provided in the brochure which is given to all applicants on arrival at the Asylum Home. It explains that a request for a repeat procedure must contain evidence proving change in significant circumstances since the previous procedure and explains that an applicant will be accommodated at a facility for the deportation of aliens, with restrictions on movement, pending a decision on the request.

General concerns relating to the translation and distribution of written information leaflets which were highlighted during UNHCR's research are referred to in section 3 of this report. As discussed in that section, it is critical that Member States supplement the distribution of written brochures with the systematic provision of oral information to applicants. Even where a written brochure provides complete information on the examination of subsequent applications, the brochure may not be available in all the languages understood by applicants, some applicants may not understand the information contained therein, and some applicants may be illiterate. In a number of Member States, no information is provided orally.

In this regard, UNHCR welcomes the Finnish draft legislation[144] which explicitly states that the requirement to provide information to asylum seekers is applicable also in situations of subsequent applications.[145] Moreover, in practice, information on subsequent applications is provided orally (with interpretation) at information meetings held at reception centres by the NGO Refugee Advice Centre for all newly arrived asylum seekers in Finland.

In the Netherlands, there is no information about subsequent applications provided to applicants as part of the general information given at the start of the procedure. In practice, the determining authority relies on the appointed legal adviser to provide information on the possibility to submit a subsequent application and the procedures, as appropriate. However, the determining authority has a specific telephone line – the so-called HASA line – for applicants who wish to submit a subsequent application. The applicant is informed over the phone of the procedural actions s/he must take in order to submit a subsequent application.

---

[143] See page 2 of the brochure "Information to asylum seekers" available at http://www.migri.fi/netcomm/content.asp?path=2484&language=EN (visited 15.6.2009). This brochure is available in 10 languages.

[144] *Hallituksen esitys* 86/2008 (Government Bill 86/2008) states explicitly in reference to the transposition of Article 10 of the APD into a new section 95 a of the *Ulkomaalaislaki* (Aliens' Act 301/2004).

[145] *Hallituksen esitys* 86/2008 (Government Bill 86/2008), 52. The new section 95 a reads: The applicant for international protection is informed about the asylum procedure and his rights and obligations in the procedure. The police or the border guards gives information to the applicant when he or she applies for asylum. Information can be given also by the Immigration Service or the reception centre as soon as possible after the application has been made. The information is given either in the mother tongue of the applicant or in a language he or she reasonable can be expected to understand.

In the UK, there is no mechanism to inform applicants of the possibility of making further submissions. Information on how to make further submissions is only provided for applicants on the determining authority's website.[146] Basic information is available on the website in 16 languages.[147] Moreover, since October 2009, applicants are required to make further submissions in person. Concern has been expressed by stakeholders in the UK that applicants may be unable to attend either the Further Submission Unit or their respective regional reporting centre due to either the costs involved or to their vulnerability.

According to stakeholders interviewed on this issue in Greece, Italy, and Spain, applicants are generally not informed of the possibility of submitting a subsequent application, or the grounds upon which such an application may be submitted. In practice this means that if the applicant does not receive legal advice from a lawyer or non-governmental organisation, then s/he is unlikely to know about the possibility to submit a subsequent application.

Recommendations

Member States should inform applicants in a language they understand of the possibility of submitting a subsequent application, stating clearly the circumstances in which and the grounds upon which a subsequent application may be made. This should take place at the time an applicant is notified of a negative first instance decision.

Member States must ensure that a person who wishes to make a subsequent application has an effective opportunity to lodge the application and obtain access to the procedure for the preliminary examination of the subsequent application.

Member States must ensure that applicants submitting subsequent applications are effectively informed in a language which they understand of the procedure to be followed; of their rights and obligations during the procedure; the possible consequences of not complying with their obligations and not cooperating with the authorities; and the time-frame, as well as the means at their disposal for fulfilling the obligation to submit new elements or findings. This information must be given in time to enable the applicant to exercise the rights guaranteed by the APD and to comply with any obligations.

[146] http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccessfulapplications/further-submissions/
[147] As updated 13 October 2009 [Checked on 28 January 2010].

Services of an interpreter

Member States are required to transpose and implement Article 10 (1) (b) APD on the provision of interpreter services during the preliminary examination of subsequent applications.[148] Article 10 (1) (b) APD provides that applicants "*shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary*." However, the second sentence allows Member States to limit the provision of interpreter services to the personal interview when appropriate communication cannot be ensured without such services.[149] The implementation of this limitation could mean that applicants do not have the services of an interpreter in order to submit a subsequent application, and it would nullify the guarantee of the services of an interpreter in those Member States which omit the personal interview during the preliminary examination.

In some Member States, according to legislation and/or practice, interpreter services should be available for the submission of the subsequent application (Belgium,[150] Bulgaria,[151] Czech Republic,[152] Finland,[153] Greece,[154] Italy,[155] the Netherlands,[156] Slovenia[157] and the UK[158]). In Germany, as a rule, written submissions can be made in a foreign language and are translated by the determining authority into German.[159] In case of the conduct of an interview,[160] an interpreter, provided for by the determining authority, will be present.[161]

---

[148] This is required by Article 34 (1) APD with regard to specific procedures for the preliminary examination of subsequent applications.

[149] "*Member States shall consider it necessary to give these services at least when the determining authority calls upon the applicant to be interviewed … and appropriate communication cannot be ensured without such services*."

[150] Article 51/4 Aliens Act and Article 14 of the Royal Decree of 11 July 2003 (asylum procedure at the AO).

[151] Article 29 (1), item 7 LAR

[152] Section 22 (1) ASA

[153] Article 10 of the Aliens Act.

[154] Arts. 23 and 8 of PD 90/2008.

[155] Article 10 (4) of the d.lgs. 25/2008, which states that "*during all steps of the procedure related to the presentation and the examination of the application, if necessary, the applicant is granted the assistance of an interpreter of his/her language or a language he/she knows*"; the same principle is stated in Article 14 (2) of the d.P.R. 303/2004.

[156] C14/5 Aliens Circular

[157] Art. 57 (1) IPA

[158] The determining authority informed UNHCR that applicants are required to submit a 'further submissions' application in person by appointment. An interpreter is available to assist when an applicant attends to submit the application if one is requested.

[159] Information submitted to UNHCR by the BAMF. The law (in particular Section 17 APA concerning interpreters) does not contain any further specification in this regard.

[160] This might be either an exploratory hearing in order to examine whether a further asylum procedure will be conducted or a personal interview in the formal sense.

[161] In the leaflet, applicants are informed: "*The hearing will take place in the presence of an interpreter. You will have the right to call in a competent interpreter of your own choice, at your own expense*."

However, in other surveyed countries, the state does not provide the services of an interpreter for the submission of the application. For example, in France, interpreter services are not provided for the submission of any application, including subsequent applications.

Without the services of an interpreter or a translator for the submission of the subsequent application, an applicant who does not know the language of the Member State, may be unable to make further representations or may be unable to fully substantiate the subsequent application. This is particularly significant in those Member States which may omit the personal interview, as highlighted below, and which insist that any documentary evidence submitted is in or translated into the language of the Member State.

With regard to the provision of interpreter services during personal interviews, it must again be noted that some Member States may omit the personal interview during the preliminary examination of subsequent applications.[162] The reader is referred to section 5 of this report on the requirements for a personal interview which details further information and general concerns regarding the provision of interpreter services during personal interviews. During this research, no specific issues or concerns were raised with regard to interpreter services during the personal interviews of applicants of subsequent applications.

Recommendations

All applicants, including in cases of subsequent applications, should receive the services of an interpreter for submitting their application to the competent authorities whenever necessary. Applicants should be informed accordingly in advance of submitting an application.

UNHCR considers that the term "whenever necessary" used in Article 10 (1) (b) APD should be interpreted and applied broadly, to ensure effective communication in subsequent application cases.

Opportunity of a personal interview[163]

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

When the preliminary examination is conducted within the framework of the normal asylum procedures, the basic principles and guarantees set out in Chapter II of the APD apply. Article 12 (1) of Chapter II APD establishes the guarantee that before a decision is

[162] See below.
[163] Note that this issue is considered more generally in section 4 of this report.

taken by the determining authority, "*the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview*". However, Article 12 (2) (c) APD permits derogation on specific grounds. With regard to subsequent applications, Article 12 (2) (c) APD in conjunction with Article 23 (4) (h) APD provides that the determining authority, on the basis of a complete examination of information provided by the applicant, may omit the personal interview when it considers the application to be unfounded because the applicant has submitted a subsequent application which does not raise any relevant new elements concerning his/her particular circumstances or the situation in his/her country of origin.

Moreover, Article 34 (2) (c) APD, which sets out the procedural rules for a specific procedure for subsequent applications, is explicit in permitting the preliminary examination to be conducted "*on the sole basis of written submissions without a personal interview*".

UNHCR's research shows that national legislation, regulations or administrative provisions provide for the possibility to omit the personal interview during the preliminary examination of subsequent applications in the following Member States surveyed:

	Be	Bg	Cz	De	Es[164]	Fi	Fr	Gr	It	Nl	Si	Uk
Personal interview may be omitted			√	√[165]		√[166]	√[167]	√[168]	√[169]			√

[164] Note that the personal interview is omitted during the preliminary examination in the re-examination procedure. The preliminary examination in the re-examination procedure in Spain is decided solely on the basis of written submissions, and must be decided within one month: Art. 38 (3) ALR. However, following the entry into force of the New Asylum Law, the re-examination procedure has ceased to exist and is only applied to those applications lodged prior to the entry into force of the New Asylum Law on 29 November 2009. A personal interview is not omitted if a subsequent application is submitted as the formalization of the application takes place by means of an interview.

[165] Section 71 (3) 3rd sentence: "*A hearing may be dispensed with.*" However, note that a differentiated approach is taken and an 'exploratory hearing' may be conducted in the context of the preliminary examination.

[166] Section 102 (3) of the Aliens Act states that "*A decision on a subsequent application may be issued without an asylum interview*." Official translation, available at www.migri.fi. This was also observed by UNHCR in case file 81 where the personal interview was omitted.

[167] The personal interview cannot be omitted on the ground that it is a subsequent application which raises no new facts or elements. However, the personal interview may be omitted on the ground that the elements which substantiate the claim are manifestly unfounded: Art. L.723-3 *Ceseda*. This legislative provision is applicable to all applications, including subsequent applications.

[168] Article 10 (2) PD 90/2008 which literally transposes Art. 12 (2) (c) APD.

[169] Article 29 d.lgs 25/2008 provides that an application can be declared inadmissible and the personal interview therefore omitted when the applicant has submitted a subsequent application, after a decision of the CTRPI has already been issued, without raising any new elements as to his/her personal circumstances or the situation in his/her country of origin.

UNHCR notes that in law and in practice, applicants submitting subsequent applications in Belgium, Bulgaria, the Netherlands, Slovenia and Spain[170] are given the opportunity of a personal interview in which to raise the new elements or findings in support of a new procedure.

In Belgium, the Aliens Office conducts the personal interview which focuses on whether there are any new elements and drafts a report of the interview to which it attaches any relevant documents. This report is read back to the applicant to check and sign.[171] The applicant receives the services of an interpreter during the personal interview, if this was requested in advance.[172] In Bulgaria, the determining authority conducts a brief personal interview which is based on a standard form of five questions.[173] Similarly, in the Netherlands the personal interview, which is conducted by the determining authority, is based on a specific interview template for subsequent applications which focuses on establishing any new elements or findings. In Slovenia, the personal interview is conducted by the determining authority but there is no specific template or guidance for the interview in the case of subsequent applications. In Spain, the formalization of the subsequent application is done by means of a personal interview.

However, in a significant number of Member States surveyed, the applicant of a subsequent application may not be given the opportunity of a personal interview in which s/he can explain the facts, circumstances or evidence which s/he believes justify a new procedure. This is of particular concern to UNHCR in cases where, as noted above, some Member States may not provide the services of an interpreter or translator to assist with the written submission of the subsequent application. This service may only be available in the context of a personal interview.

---

[170] Note that, as an exception, with regard to the re-examination procedure which only applies to those applications lodged prior to the entry into force of the New Asylum Law, there is no interview during the preliminary examination; and if it is decided that the application should be further examined, the eligibility official will conduct an interview at his/her discretion if it is deemed necessary. All applicants who lodge an application after the entry into force of the New Asylum Law are given the opportunity of a personal interview.

[171] Articles 15, 16 and 17 of the Royal Decree of 11 July 2003 on the asylum procedure at the AO.

[172] Article 51/4 of the Aliens Act and Article 14 of the Royal Decree of 11 July 2003 on the asylum procedure at the AO. In practice, it appears that the need for an interpreter is determined at the time the request for asylum is made i.e. in advance of the personal interview.

[173] It includes the following questions: "*1. Do you understand the interpretation by (name of the interpreter)? 2. Are there any impediments of health or psychological character as to the conduct of an interview in this moment? 3. Why do you not want to go back to your country of origin? Are there any new circumstances related to your personal situation or to your country of origin different from those you have already presented? 4. Do you have anything to add to what you have already told?"* There is also one last question 5 on family status – to provide the names, current location and date of birth of spouses and children. UNHCR observed three such interviews which took approximately 15 minutes each. Stakeholders confirmed that this is the approximate duration of an interview in the case of a subsequent application.

In France, for example, the personal interview may be omitted when the determining authority considers that the subsequent application is manifestly unfounded.[174] According to the determining authority, OFPRA, 22% of applicants of subsequent applications were offered a personal interview and 17% of applicants of subsequent applications were actually interviewed in 2008.[175] In the course of this research, UNHCR audited eight case files in France which involved subsequent applications. All these subsequent applications were examined in the accelerated procedure and none of the applicants were invited to a personal interview. The legal ground upon which the personal interview was omitted was not stated in any of the case files. Furthermore, three of the eight applicants had not been given the opportunity of a personal interview during the examination of their initial application because the determining authority considered that the previous applications were manifestly unfounded.[176] As such, these three applicants were never given the opportunity of a personal interview.

In Germany, the relevant legal provision on subsequent applications provides that *"[a]hearing may be dispensed with"*[177] and the specific information leaflet for applicants informs that: "[*A]sylum procedures relating to subsequent applications do not necessarily require personal hearings of applicants by the Federal Office."* With regard to its practice, the determining authority (BAMF) reported that if an interview is deemed necessary for the assessment of the preconditions for opening the procedure,[178] a so-called "exploratory hearing" is carried out.[179] This is an informal hearing, not a personal interview in the sense of the regular procedure.[180] Beforehand, the applicant is informed of the fact that this exploratory hearing is carried out to determine whether a follow-up procedure will be initiated at all.[181] The BAMF assumes, in its internal guidelines, that if a decision has been taken to carry out a follow-up asylum procedure, a personal interview in the formal sense has to take place.[182] For this purpose, the exploratory hearing may be turned into a personal interview in the formal

[174] Article L.723-3 *Ceseda* . The term 'manifestly unfounded' is not further defined in national law. See section 4 of this report for further details.
[175] 2008 OFPRA Report.
[176] Case File 58R (DRC); Case File 50R (PAK); Case File 48R (TR).
[177] Section 71 (3) 3rd sentence APA.
[178] Section 51 Administrative Procedure Act.
[179] According to the guidelines, this is, for example, the case when the applicant has been back in his country of origin and now brings forward individual grounds for being persecuted. (Internal Guidelines for the Asylum Procedure, under: "follow-up applications", 5.4, (7/14).)
[180] Section 25 APA.
[181] The legal expert, in his commentary, states that the BAMF intentionally avoids the term "hearing" in the formal sense of Section 25 APA (and replaces it with the term "exploratory hearing") in order to circumvent the procedural safeguards applying to the personal interview. (R. Marx, *Commentary on the Asylum Procedure Act,* 7th edition (2009), Section 71, para 174.)
[182] Internal Guidelines for the Asylum Procedure, under: "follow-up applications", 5.5, (8/14). The guidelines refer to the common rule of Section 24 (1) APA: "*The Federal Office shall clarify the facts of the case and compile the necessary evidence."*

sense.[183] A corresponding entry has to be made in the hearing report.[184] The audited case files in Germany contained only four cases of subsequent applications.[185] In three of these,[186] only exploratory hearings took place before a positive decision on subsidiary protection was taken. In one of the cases[187], according to the submitted protocol, the hearing had been a formal one, however, in the internal note[188] the same hearing is referred to as an "exploratory hearing". According to a legal expert, the conduct of a personal interview in the formal sense constitutes the exception rather than the rule in cases of subsequent applications.[189]

In Greece, by law the personal interview may be omitted if it is considered that the subsequent application raises no new elements or findings.[190] The Head of ARD informed UNHCR that there is the possibility of a personal interview. However, NGO stakeholders interviewed declared that, in practice, the preliminary examination is conducted on the sole basis of written submissions.[191]

In Italy, the preliminary examination is generally conducted on the sole basis of written submissions.[192] This includes the completed 'Modello C3' forms for the first application and the subsequent application, as well as the interview report and decision by the determining authority for the first application. However, if the determining authority issued a negative decision on the previous application, without having conducted a personal interview, the applicant is generally re-summoned for a personal interview in the context of the preliminary examination.

---

[183] The legal expert Marx states in his commentary that in case the BAMF decides during the exploratory hearing that the application has been made for legitimate reasons, a positive decision is issued without carrying out the formal personal interview. Thus, the admissibility decision would be merged with the decision on the merits. (R. Marx, *Commentary on the Asylum Procedure Act,* 7th edition (2009), Section 71, para 174.)

[184] Internal Guidelines for the Asylum Procedure, under: *Follow-up applications*, 5.5, (8/14). Furthermore, it is stated in the guidelines that in cases in which it cannot be clarified during the exploratory hearing whether the grounds for opening follow-up proceedings are given (e.g. the genuineness of a evidence has to be examined) it should be noted in the report of the personal interview (reference to Section 25 APA is made) that the hearing has only been conducted as a precautionary measure.

[185] 11IRQ01, 00TUR04, 00NIG05, 01RUS08.

[186] 00TUR04, 00NIG05, 11IRQ01.

[187] 01RUS08.

[188] Positive decisions are issued without reasons in fact. These reasons are contained in an internal note which forms part of the record.

[189] R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 71, para 168.

[190] Article 10 (2) PD 90/2008 which literally transposes Article 12 (2) (c) APD.

[191] S8 and S9

[192] The *Modello C3* form is used for all applications i.e. first and second applications. There is no specific procedure or form at the level of the *Questura* (police department). Article 29 d.lgs 25/2008 provides that an application can be declared inadmissible and the personal interview, therefore, omitted when the applicant has submitted a subsequent application, after a decision of the CTRPI has already been issued, without raising any new elements as to his/her personal circumstances or the situation in his/her country of origin.

Likewise, in the UK, the examination is normally conducted on the basis of written submissions. There is a specific form for this purpose which applicants are expected, although not obliged, to use and to which any relevant documentation must be attached. However, the case-owner has discretion as to whether to conduct a personal interview when dealing with further submissions. If the case-owner deems that a decision can be reached based on the written information provided, an interview will not be conducted. However, if further information is required, an interview may be conducted.[193]

Recommendation

UNHCR encourages Member States, as a matter of good practice, to conduct an interview in which the applicant is able to present the new elements or findings which are claimed to justify a new procedure.

Submission of facts and evidence

With regard to the specific procedure for the preliminary examination of subsequent applications, Article 34 (2) (a) APD stipulates that Member States may lay down in national law rules which "*oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure*". In this regard, UNHCR has noted that the obligation to indicate facts and evidence rests not only on the applicant but also on the examiner.[194]

In the Netherlands, if an applicant wishes to make a subsequent application, s/he is required to make a prior appointment by telephone (the so-called *HASA-lijn)*.[195] During this telephone call, the applicant is advised by the IND that s/he needs to hand in new documents. These need to be original documents and translated into Dutch. The applicant has to substantiate that with regard to his/her case there are new facts or changed circumstances (also referred to as '*nova*'). Similarly, in the UK, the applicant is expected to complete a specific form in writing and attach all documentation in support of the claim. If documents are submitted in a language other than English, an English translation of the document must be submitted; otherwise the document will not be considered. The form requires the applicant to set out in writing, as relevant, the events and/or personal circumstances that have changed, and/or the new evidence which was not previously available. It is not compulsory for applicants to use the specific form, but nonetheless further submissions must be made in writing, including all required information and submitted in person.

[193] API Further Submissions

[194] UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005.

[195] Aliens Circular 2000, C9.

In France, Prefectures should only register the subsequent application without assessing whether the elements produced are new or not. In practice, according to NGOs[196], most of the Prefectures tend to request evidence in the form of a new document, if possible an official document, in order to register the new application.

In Germany, the applicant "*shall give […]the facts and evidence to fulfil the conditions listed in Section 51 (1) to (3) of the Administrative Procedure Act" and "[…] shall provide this information in writing upon request.*" [197] In case the new evidence concerns a document, this has to be presented. An announcement that these documents will be presented is not sufficient.[198] With reference to the principle of investigation[199], the internal guidelines of the determining authority (BAMF) state that, following a subsequent application, further investigation by the BAMF might be necessary, for example, in the form of requests for additional written information from the applicant, expert opinions or the conduct of an exploratory hearing.[200]

Time-limits for the submission of new information

With regard to the specific procedure for the preliminary examination of subsequent applications, Article 34 (2) (b) APD states that Member States may lay down in national law rules which require submission of the new information by the applicant concerned within a certain time after s/he obtained such information. UNHCR considers this clause to be problematic as its application would risk putting states in conflict with their *non-refoulement* obligations under international law.

Eleven of the 12 surveyed Member States have no such rule in their national legislation, regulations or administrative provisions. However, in the UK, applicants are warned that a delay in submitting further submissions could impact upon their appeal rights. The information provided to applicants warns that further submissions that could have been raised sooner may be treated with circumspect and consequently affect the assessment of whether the material amounts to a "fresh claim" and therefore whether

[196] Cf. Report « *Les demandeurs d'asile sans papiers : les procédures Dublin II et prioritaires* », CFDA, avril 2006.
[197] Section 71 (1) 1st Sentence APA.
[198] However, this does not mean that the submission of documents is a precondition for every case.
[199] Section 24 (1) 1st Sentence: *"The Federal Office shall clarify the facts of the case and compile the necessary evidence."* Section 24 Administrative Procedure Act: Principle of investigation:
"(1) The authority shall determine the facts of the case ex officio. It shall determine the type and scope of investigation and shall not be bound by the participants' submissions and motions to admit evidence.
(2) The authority shall take account of all circumstances of importance in an individual case, including those favourable to the participants.
(3) The authority shall not refuse to accept statements or applications falling within its sphere of competence on the ground that it considers the statement or application inadmissible or unjustified."
[200] Internal Guidelines for the Asylum Procedure, under: "*Follow-up applications*", 5.4; (7/14).

there is a right of appeal.[201] In this regard, the UK appears to be imposing a *de facto* time limit.

The exception is Germany. In Germany, the relevant legal provision with regard to the filing of subsequent applications refers to rules applying in general administrative law. Section 51 (3) Administrative Procedure Act stipulates that *"[t]he application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings."* The three-month period begins with the actual knowledge of the new ground, irrespective of whether the person concerned could or should have known it before.[202] Nevertheless, the determination of this point in time can be a disputed issue.[203] Moreover, it needs to be taken into account that Section 51 (2) Administrative Procedure Act establishes further criteria with regard to the reasons, why the information was not brought forward earlier: "*An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy."*

Recommendation

Member States should not require the submission of new information within a short time-limit commencing from the time when the applicant obtained such information. UNHCR accordingly supports the deletion of Article 34 (2) (b) APD.[204]

The decision

When the preliminary examination is conducted within the framework of the normal asylum procedure, the basic principles and guarantees set out in Chapter II of the APD apply. This includes Article 9 (1) and (2) APD which require Member States to ensure that decisions are given in writing and state the reasons in fact and in law. Section 3 of this report provides a general overview of States' compliance with these provisions.

[201] UKBA Guidance on further submissions and the specific form for further submissions [accessed 29 January 2010].

[202] Kopp/Ramsauer; *Commentary on the Administrative Procedure Act*, 8th edition, Section 51, para. 47. See also R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition, Section 71, para. 316. It should be noted, that if the applicant is represented by a lawyer and wants to base the claim on the change of the German law, the time-limit begins with the date the respective law was published in the Federal Law Gazette. (Cf. also the relevant remark in: H. Heinhold, "*Handbook for Refugees*" (German version), 6th edition (2007), p.85).

[203] For instance, whether the time-limit applies to persons being abroad, or whether the three-month-period only begins with re-entry to the German territory. (Cf. R. Marx, *Commentary on the Asylum Procedure Act,* 7th edition, Section 71, para. 325 and 326). Marx, moreover, assumes with reference to administrative court decisions that the period does not begin, if it was not legally possible for the applicant to bring forward the elements and findings (para. 318).

[204] This is proposed in recast Article 36(2): APD Recast Proposal 2009.

However, it should be pointed out here that specific concerns regarding decisions on subsequent applications were raised during UNHCR's audit of case files in France, where subsequent applications are examined in the normal asylum procedures.[205] Most written decisions regarding subsequent applications were poorly reasoned and the motivation usually stereotyped.[206] From these cases, it appeared that the examination of subsequent applications by the determining authority (OFPRA) was considerably less thorough and individualised than for other applications.

With regard to specific procedures for the preliminary examination of subsequent applications, Article 34 (3) (a) APD requires Member States to ensure that "*the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision"*. There is no requirement that the decision be given in writing.

It is interesting to note that the decisions on subsequent applications in Germany might contain both a part on admissibility and a part on the merits. The decision in three of the four audited cases concerning subsequent applications read as follows[207]:
"1. The application for conducting another asylum procedure is dismissed.
2. The decision from [date] is to be modified. The preconditions for the prohibition of deportation according to [respective paragraph of Section 60 (2) to (7) APA, i.e. subsidiary protection] are fulfilled."

These decisions, at first sight contradictory, can be explained by the fact that when an application for asylum is filed, the examination by the determining authority also includes subsidiary protection forms, which – in such a procedure – cannot be applied for, but are instead assessed *ex officio*. Thus, point one of the decision refers to the denial of the conduct of a further asylum procedure with regard to both forms of refugee protection (constitutional asylum under national law and 1951 Convention refugee status), while point two contains the decision to grant a form of subsidiary protection (national statuses and subsidiary protection status in terms of the

[205] Case File 52R (AFG); Case File 58R (DRC); Case File 59R (SLK); Case File 49R (SLK); Case File 50R (PAK); Case File 51R (RUS); Case File 57R (TR); Case File 48R (TR). These were all examined in the accelerated procedure on the basis of Article L.741-4-4° ("*fraudulent application or abuse of the asylum procedures or solely lodged in order to prevent a removal order which has been issued or is imminent*").
[206] Decisions typically assessed whether the new elements are admissible (sometimes making a distinction between new elements and elements which are not new) and then whether the facts are established. Most of the decisions concluded that the allegations of the applicant (sometimes supported by documents, the authenticity of which was often automatically challenged by OFPRA) did not suffice to establish the reality "*of the facts*" or "*of the fear of persecution or serious threats*" or that the "*new elements cannot be considered as founded*".
[207] 00TUR04, 00NIG05, 01RUS08. A positive decision with regard to refugee protection had been taken in the fourth case (11IRQ01).

Qualification Directive). Different rules apply if the applicant only seeks a positive decision regarding subsidiary protection, but not with regard to refugee protection.[208]

Recommendation

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

Notification of the decision

Regardless of whether Member States conduct the preliminary examination of subsequent applications as a first stage within the normal asylum procedures, within the framework of the previous examination or within a specific procedure, Articles 10 (1) (d) and (e) APD apply with regard to the notification of the decision. The applicant must be "*given notice in a reasonable time of the decision by the determining authority*". Moreover, *"[i]f a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant*".[209] Furthermore, the applicant must be "*informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available*."[210] The information provided must include information on how to challenge a negative decision.[211]

Moreover, Article 34 (3) (a) APD provides that when a subsequent application is subject to a preliminary examination, the applicant must be "*informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision*".

[208] If, after the conduct of a first asylum procedure, the applicant lodges an application for resumption of proceedings solely with regard to subsidiary protection, the BAMF (and not the aliens authority) is responsible for the assessment. In this case Section 71 APA does not apply, but Section 51 Administrative Procedure Act is directly applicable. Therefore, in contrast to the reference contained in Section 71 APA, also Section 51 (5) Administrative Procedure Act applies: *"The provisions of section 48, paragraph 1, first sentence and of section 49, paragraph 1 shall remain unaffected."*, thus foreseeing the possibility to change the decisions, even though the preconditions mentioned in Section 51 (1) to (3) are not met. Section 48 (1) 1 Administrative Procedure Act: "*An unlawful administrative act may, even after it has become non-appealable, be withdrawn wholly or in part either retrospectively or with effect for the future."* Section 49 (1) Administrative Procedure Act: "*A lawful, non-beneficial administrative act may, even after it has become non-appealable, be revoked wholly or in part with effect for the future, except when an administrative act of like content would have to be issued or when revocation is not allowable for other reasons."*

[209] Art. 10 (1) (d) APD

[210] Art. 10 (1) (e) APD

[211] Art. 10 (1) (e) APD

The issue of the notification of the decision is the subject of detailed commentary in section 3 of this report. However, specifically with regard to subsequent applications, it is worth noting here that in the UK, whilst the pertinent Rule 353 and 353A does not require the determining authority to issue a decision to the applicant following the preliminary examination, administrative guidelines instruct decision-makers to follow the practice of issuing a negative decision to the applicant in person or by recorded delivery post. While there is guidance to decision makers about this, the failure to expressly require it in administrative provisions has been criticized by NGOs.[212] Case-owners follow the practice of issuing negative decisions to the applicant which, where relevant, would provide information on the right to appeal. In the case of a decision to further examine an application, following consideration of the further submissions, an applicant would be informed of this decision.

The right to remain

When an applicant claims that new elements or findings have arisen or s/he wishes to present new facts or evidence which relate to his/her qualification for refugee status or subsidiary protection status, international law requires that the applicant is not removed to his/her country of origin until and unless it is established, following rigorous scrutiny of the new elements or findings together with the previous application, that there is no real risk of persecution or serious harm to the applicant if returned.[213] As such, the applicant should have the right to remain in the Member State pending a decision following the preliminary examination of the subsequent application.

The APD, as currently drafted, is not as clear as it could be with regard to the right to remain during the preliminary examination of a subsequent application. Article 7 (1) APD provides that "*applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until* ***the determining authority*** *has made a decision in accordance with the procedures at first instance set out in* ***Chapter III.***" Article 7 (2) APD states that "*Member States can make an exception only where, in accordance with Article 32 and 34, a subsequent application will not be further examined*".

The lack of clarity relates to the fact that specific procedures for the preliminary examination of subsequent applications are not set out in Chapter III, but in Chapter IV APD. Furthermore, according to Article 4 (2) (c) APD, a preliminary examination may be conducted by an authority other than the determining authority.[214] Moreover, Article 24 (1) (a) APD expressly permits Member States to provide for specific procedures for

[212] While the API *Further Submissions* instructs decision-makers to follow the practice of issuing any rejection of the further submissions to the applicant in person or by recorded delivery post, this is not reflected in the Rules. Stakeholders have criticized this gap in the rules: see ILPA response to APD consultation, 2007, page 17.

[213] 1951 Convention, European Convention on Human Rights and Article 2 of the UN International Covenant on Civil and Political Rights.

[214] This is the case in Belgium. See above.

the examination of subsequent applications which derogate from the basic principles and guarantees of Chapter II which would include Article 7. Article 34 in Chapter IV of the APD, which sets out the minimum procedural rules for the preliminary examination of subsequent applications, does not explicitly provide the applicant with a right to remain on the territory until a decision is notified to the applicant regarding the preliminary examination. It is, however, implicit in Article 7 (2) APD that the applicant should have the right to remain during the preliminary examination.

In most of the Member States surveyed, applicants submitting subsequent applications have the right to remain pending a decision on the preliminary examination: Belgium,[215] Bulgaria,[216] Czech Republic,[217] France,[218] Germany,[219] Greece,[220] Italy,[221] Slovenia,[222] Spain[223] and the UK.[224] This is considered to be implicit in the legislative provisions in Finland.[225]

However, in Germany, during the preliminary examination of a subsequent application, the legal status of a person remains unclear, since the law does not set explicit rules in this regard. In practice, in contrast to the regular procedure, the applicant is not issued a 'permission to reside' *("Aufenthaltsgestattung")*, but only a toleration permit ("*Duldung*").[226] As "[*d*]*eportation may only be enforced after notification by the Federal*

[215] Respectively Articles 72bis, 73, 74, 75 and 81 of the Royal Decree of 8 October 1981
[216] Article 4 (3) LAR and Article 67(1) LAR.
[217] Articles 2(5), 72, 73 of ASA ; and Article 119 (5) of the Aliens Act.
[218] Article L.742-6 *Ceseda*
[219] In particular Section 71 (5) 2nd Sentence APA: "*Deportation may be enforced only after notification by the Federal Office that the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are not met, unless the foreigner is to be deported to the safe third country."*
[220] Article 23 (4) PD 90/2008.
[221] Article 7 of legislative decree 25/2008. When a new *Modello C3* form is filled in, a residence permit is issued. If the applicant had been issued with an expulsion order following a first instance negative decision, s/he may be detained in a CIE (Identification and Expulsion Centre), on the basis of Article 21, comma 1 (c) of Legislative Decree N. 25/2008.
[222] Article 57/4 IPA
[223] With regard to subsequent applications, the applicant is allowed to remain and is documented according to Article 11(1) ALR and Articles 18(1) and 19 of the New Asylum Law. With regard to the re-examination procedure (under the former asylum law but which is applied to applications lodged before the entry into force of the New Asylum Law) – once the re-examination request has been admitted, the applicant will be documented according to Article 40 ALR. During the preliminary examination, the applicant is not documented. However there is an implicit right to remain, as an administrative decision on the asylum application is pending. At the time of writing, re-examination requests were being automatically admitted and the applicant immediately documented.
[224] Immigration Rule 353 and 353A.
[225] *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009) section 201 (2).
[226] Information submitted to UNHCR by the determining authority. In the information leaflet, the applicant is informed on this matter as follows: *"No temporary residence permit (Aufenthaltsgestattung) shall be given to you as the Federal Office […] first has to examine the facts allowing it to establish the admissibility of your subsequent application. The geographic limits applicable of the specific area indicated to you in your previous asylum application procedure still apply. You will receive a certificate from the*

Office that the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are not met, unless the foreigner is to be deported to the safe third country"[227], applicants can remain in Germany during the preliminary examination. After a decision has been taken to actually conduct a further asylum procedure, the person concerned can obtain a 'permission to reside' in the Federal territory for the purpose of the examination of the asylum application.

In the Netherlands, the Aliens Decree states that an application for a residence permit impedes expulsion, except in the case of a subsequent application.[228] In practice, an applicant can await the outcome of the decision. However, the authorities may communicate that the subsequent application will not stay the expulsion.[229] In that case, the applicant will have to file a request for an interim measure with the court.

Recommendation

UNHCR recommends that both the APD and Member States' national legislation make clear provision for the applicant's right to remain during the preliminary examination of subsequent applications.

Reduction or withdrawal of reception conditions

Article 16 (1) (a) of Council Directive 2003/9/EC[230] (henceforth Reception Directive) states that Member States may reduce or withdraw reception conditions where an asylum seeker has already lodged an application in the same Member State.[231] This legal provision was introduced to deter applicants from abusing the asylum procedure and the reception system by lodging a subsequent application. However, as stated in the introduction to this section, there are numerous valid reasons why an applicant may wish to make a subsequent application. An applicant who makes a subsequent

---

Federal Office confirming the presentation of your subsequent application for asylum. You must always have this certificate with you.

[227] Section 71 (5) 2nd sentence APA. With reference to an incompatibility with Article 32 APD, in cases of "manifestly inconclusive" applications, the possibility to enforce deportations without a further examination of the grounds has been deleted from the law. (Bundestag printed papers 16/5065 p.219. Section 71 (5) 2nd sentence APA formerly stipulated that *"[d]eportation may be enforced only after notification by the Federal Office that the conditions of Section 51 (1) to (3) of the Administrative Procedure Act are not met, unless the application is manifestly inconclusive […]."* The term used was not "manifestly unfounded". Section 71 (5) 1st sentence APA: *"If after a notification announcing deportation or a deportation order issued pursuant to this Act has become enforceable following the filing of the previous asylum application, the foreigner files a follow-up application which does not lead to a new asylum procedure, a new time-limit and a new notification announcing deportation or a deportation order shall not be required in order to enforce deportation."*

[228] Article 3 indent 1 Aliens Decree.

[229] Aliens Circular C14/5.1.

[230] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

[231] Article 16 (1) (4) Reception Directive only guarantees access to emergency health care.

application may be a refugee or may qualify for subsidiary protection status. The withdrawal or reduction of reception conditions may render applicants destitute, and adversely impact upon their ability to exercise their procedural rights. Therefore, UNHCR opposes the withdrawal of reception conditions from applicants submitting subsequent applications.

The European Commission's proposal for a recast of the Reception Directive[232] proposes an amendment to Article 16 (1) (a) of the Reception Directive which would delete the possibility to withdraw reception conditions on the grounds that the applicant has already lodged an application in the same Member State. However, it proposes that Member States retain the right to reduce the material reception conditions of applicants of subsequent applications, but that Member States must under all circumstances ensure subsistence, access to emergency health care and essential treatment of illness or mental disorder.[233] In general terms, UNHCR has welcomed these proposed amendments which should help to prevent destitution among asylum seekers.[234] However, UNHCR reiterates that adequate reception conditions are a necessary component of fair asylum procedures. Asylum seekers who find themselves in situations of poverty or destitution tend not to be in the physical or psychological condition needed to pursue adequately their asylum applications. Overall, UNHCR considers that if a reduction in the level of reception conditions has to be made, this should take place only in situations of emergency or *force majeure* and for a short time period.[235]

UNHCR notes that in Bulgaria, applicants of subsequent applications, who do not fall within the categories of vulnerable groups, lose their right to receive shelter and food; and to receive social welfare allowance, according to the procedure and in the amount applicable to Bulgarian nationals. [236] Also, in France, applicants who do not receive a temporary residence permit do not receive the same reception benefits as applicants who receive a permit.[237] There is evidence to suggest that some Prefectures routinely consider subsequent applications to be abusive and, therefore, do not issue applicants a temporary residence permit with the consequence that significant numbers of

[232] European Commission: *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast),* 3 December 2008, COM(2008) 815 final, available at: http://www.unhcr.org/refworld/docid/493e8ba62.html

[233] Article 20 (1) and (4), *ibid*.

[234] UNHCR*: Comments on the European Commission's proposal for a recast of the Directive laying down minimum standards for the reception of asylum seekers,* COM(2008) 815 final of 3 December 2008, 1 March 2009.

[235] UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, 1 July 2003.

[236] Article 29 (5), item 1 LAR.

[237] Their applications are also channeled into the accelerated procedure. See section 9 on accelerated procedures.

applicants of subsequent applications do not have access to specific social benefits[238] (financial benefits[239] and accommodation centres[240]) and to the regular social security scheme.[241] This may have an adverse impact upon their procedural rights.[242]

In Slovenia, a person who files a request for a repeat procedure is considered to be an alien and is accommodated by the authority responsible for deportation.[243] This means that until a decision is issued on the request, the applicant's freedom of movement is limited. However, if the request is granted, the person may file a subsequent application with the consequence that s/he becomes an applicant entitled to the reception conditions of other applicants.[244]

In the Netherlands, there is no entitlement to reception conditions during the appeal proceedings in the event of a negative decision on the subsequent application. Furthermore, a new Circular means that applicants making subsequent applications may now be detained more easily, possibly as part of a policy of deterrence.[245]

Recommendation

UNHCR encourages states to continue to make available reception conditions to applicants pursuing subsequent applications. At the minimum, these should be at a standard adequate to ensure subsistence, access to emergency health care and essential treatment of physical or mental illness. Amendments to the Reception Conditions Directive should guarantee these.

Summary findings regarding procedural guarantees

UNHCR, in principle, agrees that subsequent applications can be subjected to a preliminary examination to determine whether new elements or findings have arisen or have been presented by the applicant. However, the procedure must provide an effective opportunity for the applicant to raise and/or present such findings or elements, and should provide all the necessary safeguards and guarantees. UNHCR is concerned that in some Member States, notwithstanding legal requirements, applicants

[238] However according to a recent decision from the Council of State (*Conseil d'Etat, Décision du 16 juin 2008, n°300636*), all asylum seekers, regardless of the procedure (regular or accelerated) applied to their application should benefit from the ATA (*Allocation Temporaire d'Attente*), until the OFPRA decision. (The relevant case concerned a national of a safe country of origin but the legal reasoning is the same for all grounds upon which applications are processed under French accelerated procedure).
[239] ATA (*Allocation Temporaire d'Attente*).
[240] In a CADA (*Centre d'Accueil pour Demandeurs d'Asile*).
[241] CMU (*Couverture Maladie Universelle*).
[242] See section 9 on accelerated procedures for further information.
[243] Article 57/4 of the IPA
[244] Art. 57/6 IPA
[245] Change to the Aliens Circular of 23 January 2009, WBV 2009/2, A6/5.3.3.9, *Staatscourant* 2009, nr. 1813, 5 February 2009; also Parliament 2007-2008, 19 637, nr. 1207, p. 24.

are not informed of the possibility to submit a subsequent application or informed of the procedure for the preliminary examination of subsequent applications. Moreover, in some Member States, applicants may not receive interpretation services for the submission of the subsequent application. Furthermore, they may not be given the opportunity of a personal interview in which they can present the new elements or findings. Only five of the Member States surveyed guarantee to offer the opportunity of a personal interview to applicants of subsequent applications.[246] UNHCR is particularly concerned that applicants do not have an effective opportunity to submit and substantiate a subsequent application when all or some of the above shortcomings co-exist.

In Greece, notwithstanding the existence of legislative guarantees, it is disputed whether these are systematically respected in practice. While some stakeholders interviewed by UNHCR suggested that there is an effective opportunity for an applicant to raise new elements and to substantiate a subsequent application,[247] others indicated that procedural guarantees are often not respected in practice.[248] There is evidence that severe deficiencies in the provision of information to applicants generally, together with limited or poor interpreter services, mean that applicants may be unaware of the possibility to submit a subsequent application.[249] UNHCR's research additionally identified another significant problem in practice. Applicants wishing to submit a subsequent application must do so before the competent authorities in person - but applicants are often in fear of being arrested, and therefore reluctant to submit a subsequent application in person.[250]

In some Member States, concerns about whether the applicant has a realistic opportunity to raise new elements relate less to the procedural arrangements and more to restrictive criteria concerning the interpretation of the requirement for new elements and findings. These are discussed below.

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

As stated at the beginning of this section, one of the reasons why an applicant may wish to submit further representations or a second application may be because the examination of the previous application was not completed. This may occur in cases where the application was considered by the determining authority to be withdrawn, and a decision was taken to discontinue the examination; or the determining authority

[246] Belgium, Bulgaria, the Netherlands, Slovenia and Spain.
[247] Interviews with S1, S2.
[248] Interviews with S7, S8, S13, S15.
[249] No information on subsequent applications is provided in the leaflet 'Basic information for asylum seekers'. During none of the interviews observed by UNHCR was there any mention of the possibility of making a subsequent application. None of the 202 case files audited included a subsequent application.
[250] Article 9 (1) (a) of PD 90/2008.

took a negative decision on the basis of the available evidence.[251] In accordance with Articles 19 and 20 APD, the determining authority may consider an application to be withdrawn if the applicant fails to comply with certain procedural obligations. The explicit and implicit withdrawal of applications is the subject of detailed commentary in section 7 of this report. It is worth reiterating here, however, that a failure by the applicant to comply with procedural obligations during a previous examination does not necessarily indicate that an applicant does not qualify for refugee or subsidiary protection status. The failure to comply may be due, for example, to weaknesses in the determining authorities' administrative or communication systems, or events in the applicant's life. Moreover, a person with protection needs may abandon the application for a variety of reasons unrelated to the merits of his/her application.[252]

UNHCR is concerned that an applicant, who explicitly withdrew his/her application or whose application has been discontinued or rejected following non-compliance with a procedural obligation, and who wishes to pursue the original application, may be required to submit a subsequent application which is subject to a preliminary examination. UNHCR notes that Article 20 (2)[253] and Article 32 (2) (a)[254] APD explicitly permit Member States to apply a preliminary examination procedure for subsequent applications where an applicant reports again to the competent authorities and requests that his/her case is re-opened following the withdrawal of the previous application.

This is problematic because it is likely that the previous application was not examined and assessed on the basis of all the relevant facts and evidence. As discussed above, a subsequent application, in accordance with the APD, may be subjected to a preliminary examination which does not offer the basic principles and guarantees of the APD.[255] In particular, a personal interview may be omitted.[256] Moreover, the application may be subjected to a test to determine whether the application presents 'new elements or findings' relating to the examination of whether the applicant qualifies as a refugee have arisen or have been presented by the applicant.[257] Depending on the interpretation given by Member States to the term 'new elements or findings', this may act as a bar to the applicant accessing the asylum procedure, and may consequently carry a risk of *refoulement*.

[251] See section 7 for further information on these practices and UNHCR's position.
[252] See section 7 of this report for further information.
[253] Article 20 (2) APD states that "*Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue … is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34*".
[254] Article 32 (2) (a) states that "*Member States may apply a specific procedure … where a person makes a subsequent application for asylum: (a) after his/her previous application has been withdrawn or abandoned*".
[255] Article 24 (1) (a) APD.
[256] Article 12 (2) (c).
[257] Article 32 (3) APD.

UNHCR, in principle, agrees that subsequent applications can be subjected to a preliminary examination to examine whether new elements have arisen which would warrant examination of the substance of the claim. However, in UNHCR's view, such a limited preliminary examination is justified only if the previous claim was considered fully on the merits.

UNHCR's main concern is that, following the withdrawal of a previous application which was not examined fully on its merits in accordance with Article 4 of the Qualification Directive, an applicant has the possibility to pursue and substantiate the original application. This requires the essential guarantee that the application will be examined in substance, and an assurance that the applicant is not removed contrary to the principle of *non-refoulement*.

UNHCR highlights some notable good state practice in this regard. In some Member States, the determining authority either re-opens the original application (Finland[258]and France[259]) or invites the applicant to submit a new application which may be on the same grounds as the previous application. No new elements or findings need to be raised (Belgium,[260] Finland,[261] Czech Republic[262] and, with regard to implicit withdrawal, Slovenia[263]).

In Bulgaria, an applicant may request to resume proceedings and the original application may be re-opened if the request is made within three months of the decision to suspend proceedings and "*the alien seeking protection produces evidence that objective obstacles have made him or her change address or have prevented him or her from appearing or cooperating with the officials*."[264] However, following the expiry of the three month period, a decision to discontinue the examination is taken and the application cannot be re-opened. The applicant may submit a subsequent application

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

[259] Following a decision to discontinue the examination. There is no relevant legal provision in France. This information was received in an interview with the Legal Department of OFPRA.

[260] Article 51/8 of the Aliens Act.

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

[262] Section 10 (4) ASA contains an exemption from the requirement to submit new elements or findings where the examination of the previous application did not assess all the relevant facts and circumstances. This is applied to Dublin cases which are transferred to the Czech Republic as the responsible state for the examination of the application that was previously not examined on its merits. The previous proceeding is thus "completed" in line with Article 101 CAP through the opening of a new procedure.

[263] This relates to cases of implicit withdrawal and not explicit withdrawal. In both cases, the procedure is discontinued. In the case of an application following implicit withdrawal, the procedure in these cases is not explicitly defined in the IPA, but it derives from general regulations of the administrative procedure as defined in the AGAP. This was observed in case no. 7-2009. However, according to Article 56/1 IPA, in the case of explicit withdrawal, the applicant needs to submit new evidence proving that his/her situation in the country of origin has significantly changed after the filing of the initial application.

[264] Article 77 (2) LAR (Supplemented, SG No. 52/2007).

but this must raise new circumstances of significant importance for the personal situation of the applicant or regarding the situation in the country of origin. If it does not, it will be rejected as manifestly unfounded. However, if the applicant abandoned the previous procedure before the personal interview, then it is considered that the applicant had not presented elements relating to the reasons for the application for international protection, and the merits of the application have not been considered. Any reasons submitted as part of the subsequent application will be considered to constitute new circumstances.[265] This interpretation reduces the risk of prejudice to a fair examination.

UNHCR's research has found that three States require an applicant, whose application was previously **discontinued** and who wishes to pursue the original application, to submit a subsequent application.[266]

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

Similarly, in Spain, a decision to discontinue the examination may be taken in certain circumstances but if the applicant then expresses the wish to pursue the application, the original application is not re-opened and instead s/he must submit a new application. However, the new application may not be on exactly the same grounds as the previous application. In Spain, an application which is considered identical to a previous application will be declared inadmissible unless there are particularly extenuating circumstances. However, this latter point is a matter of discretion for the determining authority.

In Germany, no distinction is made with regard to the procedure and criteria applied to a subsequent application, following either a final decision (non-appealable rejection) on an application, or the (explicit and implicit) withdrawal of an application. Thus, even though in case of withdrawal, a decision to discontinue the original procedure has been taken, the applicant must file a subsequent application. No exception is made with regard to the fulfilment of the relevant criteria. This applies, for example, also in cases in

[265] See Decision 60.
[266] UK, Spain and Germany.

which the original application is deemed to have been withdrawn because the applicant travelled to the country of origin during the first asylum procedure.[267]

As has been noted in section 7 of this report, when an applicant fails to comply with a procedural obligation, some Member States may take a decision on the basis of the available evidence. This is likely to be a decision to reject the application after the applicant has not attended a scheduled personal interview, or has failed to provide essential information. In these Member States, if the applicant wishes to pursue the original application, and a final decision was taken on the application, s/he must submit a subsequent application raising new elements or findings: France,[268] Germany,[269] Greece,[270] Italy,[271] the Netherlands[272] and the UK.[273]

In the UK, a failure to report or communicate may result in the application being rejected for "non-compliance."[274] As a permissive provision, this gives the decision-maker discretion not to reject the application. The decision must be based on the available material, and policy instructions stress that the application cannot be rejected on the basis of non-compliance alone.[275] If the application is rejected and the applicant wishes to pursue the application, a subsequent application must be submitted which must fulfil the criteria of a fresh claim. Since the non-compliance provisions require the decision-maker to consider the claim based on the available material,[276] an application on the same ground may not pass the first limb of the test (that the material has not been considered before). The claim must also satisfy the second limb of the test and have a reasonable prospect of success at appeal, as discussed above. However, if the application has been rejected for non-compliance and it comes to the attention of the decision-maker that the decision is flawed, the API on *Non-Compliance* includes guidance for the decision maker on how to take corrective action, including reopening the normal asylum procedure. However, this depends on the discretion and initiative of the decision-maker, and is not a right of the applicant.

---

[267] Section 33 (2) APA: *"The asylum application shall furthermore be deemed to have been withdrawn if the foreigner has travelled to his country of origin during the asylum procedure."* In this context, it is noteworthy that the threshold for applying the implicit withdrawal is considerably lower than the requirements for cessation of refugee status under Art. 1C (1) of the 1951 Convention.

[268] Article R.723-3 *Ceseda*

[269] Section 25 (4) 5th sentence APA, Section 25 (5) APA.

[270] Article 18 PD 90/2008.

[271] Article 29 (b) of the d.lgs. 25/2008.

[272] Article 4:6 General Administrative Law Act.

[273] Immigration Rule 353.

[274] Immigration Rule 339M.

[275] The API on non-compliance.

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

A discretionary power also exists in Italy. Where a decision to reject the application has been taken because the applicant did not appear for the personal interview, the negative decision may contain a statement which indicates that the determining authority may be prepared to re-examine the application and schedule a new personal interview, if the applicant wishes to pursue the application and can provide serious and justified reasons for their non-appearance.[277] The determining authority has the power to take a new decision '*in via di autotutela*' which legally means to put the matter right without legal process. This is a discretionary power of the public administration. This positive practice should, however, be reinforced by a clear provision of law.

It is also perhaps worth noting here that Article 33 APD, under the heading 'failure to appear', states that "*Member States may retain or adopt the procedure provided for in Article 32 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time*." A special problem in this regard pertains to the legal situation in Germany. The applications of persons who, intentionally or due to gross negligence, fail to comply[278] with a referral to a reception centre, or the respective BAMF branch office, fall under the rules for subsequent applications.[279] However, at this point in time, these applicants have not even formally filed their first asylum application.[280] According to the determining authority, in applying the criteria for a subsequent application, new elements or findings are only those which occurred after the point in time the person concerned should have filed the original application.

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

[278] Compliance must be within the deadline specified by the relevant authority. However, it should not go unmentioned that the authorities are obliged to inform the persons concerned on the negative consequences resulting from a delay (Section 20 (2) 2 APA). Furthermore, *"[i]f it is impossible to inform the foreigner [...] the foreigner shall be escorted to the reception centre."* (Section 20 (2) 3 APA.) The information leaflet, provided by the German police, comprehensively informs the applicant about the negative consequences.

[279] Sections 20 (2), 22 (3) APA ; (Section 23 APA).

[280] The referral to a reception centre or BAMF branch office is made following a request for asylum to an authority, e.g. the police. At this point, however, the application has not yet been formally lodged with the BAMF as determining authority.

Recommendations

In UNHCR's view, it is inappropriate to treat further representations or a new application as a subsequent application, in cases where the previous application was rejected or discontinued on the grounds of explicit or implicit withdrawal, without an examination of all the relevant facts and circumstances.[281] National legislation should provide for the right to request the re-opening of the case file and the resumption of the substantive examination, including the opportunity of a personal interview.

Applications should not be treated as subsequent applications following an applicant's failure to go to a reception centre or appear before the authorities. [282]

Interpretation of "new elements or findings"

Article 34 (4) APD provides that "*if, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II".*

However, there is no explicit guidance in the Directive on the interpretation of what constitutes *"new elements or findings",* and the research findings reveal a wide divergence in interpretation in practice. It appears that this phrase is subject to differing interpretations across Member States and within Member States. In some instances there is a very strict interpretation whereas in others there is a lack of interpretation, guidelines, or criteria. This means that *de facto* interpretation is left to the discretion of decision-makers, resulting in legal uncertainty and diverse practice. There is also significant divergence between Member States as to if or how they interpret whether new elements *"significantly add to the likelihood qualifying as a refugee"* under Article 32 (4) APD. This compounds the inherent problem with the formulation of this provision in failing to additionally reference beneficiaries of subsidiary protection.

From the research, it is apparent that some of those Member States (Belgium, France, the Netherlands and the UK) that typically receive greater numbers of subsequent applications have developed more extensive interpretation and jurisprudence concerning application of the criteria governing what constitutes new elements and

[281] The APD recast proposes limiting the application of the procedure for subsequent applications to the situation when the previous application was explicitly withdrawn only: see proposed recast Article 35 (2) (a): APD Recast Proposal 2009.

[282] This would entail deleting current Article 33 APD, a proposal which is contained in the European Commission's proposed recast: See proposed recast Articles 35-6: APD Recast Proposal 2009.

findings. Three of these states (Belgium, the Netherlands and the UK) have adopted a restrictive interpretation, whereas France allows decision-makers a greater margin of appreciation. In Germany,[283] the criteria for subsequent applications are not specific to the asylum procedure, but stem from general administrative law. Many issues that do not necessarily concern matters specific to asylum law are disputed in the legal literature and by the courts. Practice in these five states is considered in more detail below, before examining the situation in other states surveyed.

UK administrative provisions contain relatively explicit criteria governing the assessment of new elements and findings.[284] These provide that "*submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered*." Submissions are considered significantly different if the content (i) had not already been considered by the determining authority or appellate body,[285] and (ii) taken together with the previously considered material; create a realistic prospect of success. UK case law has interpreted "realistic prospect of success" to equate to "is not clearly unfounded".[286] The material must be relevant to the applicant and should not have been available prior to the most recent decision on the applicant's case, unless there is a satisfactory reason why the material was not submitted earlier.[287] UK criteria as currently applied would consider the fact of a subsequent worsening of conditions in the country of origin (or a new COI report published even if relating to conditions at the time of the initial procedure) as usually constituting 'new' elements. However, this

[283] Percentage of subsequent applications: 1995: 23.4%; 1996: 22.0%; 1997: 31.2%; 1998: 33.2%; 1999: 31.2 %; 2000: 33.2%; 2001: 25.4%; 2002: 22.2%; 2003: 25.5%; 2004: 29.0%; 2005: 32.6%; 2006: 30.1%; 2007: 36.8%; 2008: 21.2%; 2009: 16.3%. (BAMF supplement to "*Entscheiderbrief*" 2/2010; "*Aus der Geschäftsstatistik des Bundesamtes für das Jahr 2009*"; p. 1; published on 11 February 2010; available on www.bamf.de.)

[284] These are set out in Paragraph 353 and 353A of the UK Immigration Rules: *Fresh Claims: 353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, create a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas. 353A: Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise."*

[285] Unless there has been a change in legislation, in policy or in case-law since the applicant's last submission according to UKBA Guidance on Further Submissions, accessed 28 January 2010.

[286] *WM (DRC) v SSHD* and *SSHD v AR (Afghanistan*) [2006] EWCA Civ 1495. This case law clarified that the rule imposes a somewhat 'modest test' that the application has to meet before it becomes a "fresh claim" (para 7). It further found that the question is not whether the Secretary of State himself thinks that a new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return (para 11).

[287] This may be the initial decision on the application, an appellate decision on the case or a decision on previous further submissions; *UKBA Guidance on Further Submissions*, accessed 28 January 2010.

would not normally be the case for facts known at the time of the initial application (e.g. sexual violence suffered, homosexuality etc.), or even not necessarily for new documentary proof relating to facts previously known or raised.

In the Netherlands, there is a strict interpretation. The subsequent application will be rejected if the applicant "states no new facts and circumstances". According to policy, new facts and circumstances (*nova*) are believed to exist if:

a) they were not known or reasonably could not have been known at the time of the rejection of the first application; and
b) it is not to be *prima facie* excluded beforehand that these new facts or changed circumstances are reasons to review the rejection of the first application and their motivation.

The authorities may consider evidence which existed or was known during the first instance procedure, but had not been obtained by the applicant during the first instance procedure, as not 'new,' on the grounds that it existed before the decision and/or related to issues raised during the first instance procedure.[288] This may be rebutted in theory if the applicant can show it was not possible to obtain the evidence before. In practice, however, this is very difficult. Given that the Netherlands operates a 48-hour accelerated procedure, this may mean that evidence in support of the application is never examined, due to the short time frame of the accelerated procedure and the exclusion of evidence on the grounds that it is not new.

The Administrative Division of the Council of State has taken a restrictive approach with respect to this assessment of '*nova*' in two recent decisions.[289] In its judgment of May 2008, the Court held that "only if and in so far as new facts and circumstances in the administrative phase of the procedure have been provided, or in case there has been a relevant change of law/policy, the given decision, the motivation and the decision-making procedure may be subject to judicial scrutiny". This narrow approach is considered to be so strict,[290] that even if new information could lead to the conclusion that the asylum seeker may be a refugee, a negative decision is nonetheless taken because the facts could have been provided at an earlier stage.[291] In another example of

[288] In the Netherlands, in theory, it is possible to rebut the presumption that the applicant should have obtained the evidence during the first instance procedure, but in practice this is reported to be almost impossible.
[289] Council of State, 28 May 2008, nr. 200802254/1; Council of State, 9 April 2009, nr. 200806071/1. For an overview see the article by M. Reneman & S. Hubel, Een tweede kans?, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2005, p. 376-403.
[290] UNHCR's research and C14/5.1 Aliens Circular.
[291] See for instance District Court Amsterdam AWB 06/36220, 26 April 2007, NAV 2007/40. In this decision the first asylum application had not been dealt with substantively, because the applicant did not appear at the personal interview. In the subsequent application, the fact that his mother had been severely injured when returning to her home, due to a bomb thrown by, according to the applicant, his personal

strict judicial interpretation, a subsequent application based on circumstances already existing at the time of the first application, but at that moment not deemed to be of importance by the applicant, cannot be a reason to further examine a subsequent application even in the event that the situation in the country of origin has deteriorated with regard to that particular element.[292] Moreover, a very heavy burden of proof is placed on the applicant. The determining authority informs the applicant that s/he must hand in new documents, and that these must be original, authentic, dated and translated into Dutch.

Belgian legislation stipulates that new elements must not only relate to facts or circumstances that have taken place after the appeal body (CALL) took a final decision on the previous application, but must also contain significant indications of a well-founded fear of persecution or a real risk of serious harm.[293] The latter component is particularly problematic because it requires the AO – the competent authority to conduct the preliminary examination - to consider questions beyond its jurisdiction.[294] In addition to this formalistic objection, there is concern from a practical perspective whether the AO is adequately placed to assess the existence of new elements, given that it was not involved in assessing the original application.[295] This has contributed to a lack of legal certainty concerning how the criteria for assessing the existence of new elements are applied, and thus whether subsequent applications should be forwarded to the determining authority for further examination. This has been exacerbated by an apparent difference in interpretation between francophone and Flemish officials, due in part to a corresponding divergence in approach between francophone and Flemish appeal chambers.[296] Review of those subsequent applications included in UNHCR's

---

enemies, was not taken into account. There were deemed to be no special circumstances that should impede applying Article 4:6 General Administrative Law Act.

[292] Council of State, 29 May 2009, 200809245/1/V2, on Iranian converts.

[293] Article 51/8 of the Aliens Act.

[294] From case law of the Council of State and the CALL (*RvS* 7 March 1997, nr. 65.692; *RvS* 11 July 2000, nr. 88.870, *RvV* 15 May 2008, nr. 11.217), it appears that the AO may neither judge the credibility of new elements nor assess them in the framework of the 1951 Convention or subsidiary protection. In particular, it may not state that the new elements do not permit a well-founded fear of persecution to be established. In doing so, the AO applies Article 51/8 of the Aliens Act in a way that goes beyond what is legally permitted (in this sense requiring elements to "significantly add to the likelihood of the applicant qualifying for protection").

[295] See above.

[296] When the representative of the asylum section of the AO was asked why there was such a variety in the practice of implementing Article 51/8 of the Aliens Act, s/he responded that the French-speaking officials deciding on subsequent applications have a more flexible approach towards new elements than the Flemish-speaking officials. This difference in practice stems from the difference in case law between the French-speaking and Dutch chambers of the CALL. According to the representative, it was entirely pointless for the French-speaking officials to maintain the same strict interpretation used by their Flemish-speaking colleagues; as such decisions would be annulled by the French-speaking chambers of the CALL. In anticipation of this, French-speaking officials have adopted a broader interpretation of Article 51/8 of the Aliens Act. An illustration of this is that 22 % of the decisions not to take into consideration a subsequent application taken by French-speaking officials are annulled by the CALL, even

audit of case files has not made the position significantly clearer,[297] and there is particular concern that, in one observed case, the AO rejected "new" elements which had been invoked before the appeal body (CALL), but not taken into account at that stage.[298]

The current lack of a consistent and suitably inclusive approach in interpretation of new elements is of concern in Belgium, and may even be contributing to an increased instance of repeat subsequent applications, if there are grounds for the applicant or his/her lawyer to conclude that a previous subsequent application was not fully or fairly examined. In 2008, there was a 10% increase in the number of subsequent applications which now constitute 27.1% of the total number of applications received in Belgium.[299] This significantly increases the workload both of the AO and the CGRA,[300] although the reasons for this appear varied.[301]

---

with a broader interpretation. Only 6 % of the decisions not to take into consideration subsequent applications taken by Flemish-speaking officials are annulled by the CALL.

[297] Audited case files nrs. 1, 3, 4, 5, 6 and 85. From the audit the following examples were accepted as new elements in the decision of the AO:

- oral declarations of a neighbour and convocations of the police
- birth certificate of the applicant and his/her mother
- identity document and proof of cohabitation
- book mentioning the applicant's father as a martyr
- conversion to Christianity
- a video cassette proving the applicant's recent stay in Afghanistan

From these decisions, especially those concerning identity documents, it seems that in some instances, the AO implements quite a broad interpretation of "new elements". On the other hand, in another case, the applicant produced the *taskara* (Afghan identity document) of the woman with whom he had an extramarital relation. In its negative decision the AO stated that the applicant could have shown this document during the previous examination procedure and that it did not in any way support the motives for the application, nor rebut the conclusion of the CGRA.

[298] Moreover, this is in contravention to the decision of the Constitutional Court in *GWH* 30 October 2008, nr. 148/2008, B.6-7. This was so stated also in the Enactment reforming the Council of State and establishing the Council for Aliens Litigation, *Parl.St*. Kamer 2005-06, doc. 51, nr. 2479/001, 97. If the CALL has not accepted to take these elements into account, because they did not fulfil the conditions of Article 39/76 Aliens Act, this does not hinder the applicant in introducing the elements in the framework of a subsequent application.

[299] These numbers are based on the presentation given by the Minister of Migration and Asylum, on 17 March 2009, during the hearing at the Senate on the evaluation of the Belgian asylum procedure. A total number of 3,331 subsequent applications were introduced in 2008. The top 5 countries for subsequent applications are: Russia, Iran, Iraq, Afghanistan and the Republic of Serbia.

[300] In 2008, the CALL heard, in full jurisdiction, 928 appeals against negative decisions taken by the CGRA on a subsequent application. This constitutes 20% of the CALL's workload. In the same period, the CALL heard 421 appeals to annul decisions of the AO not to take a subsequent application into consideration.

[301] According to NGOs, this increase is due to the introduction in Belgian legislation of subsidiary protection, changed circumstances in countries of origin (Russia, Iran, Iraq and Afghanistan), a shift in the CGRA position regarding Afghanistan, the difficulties of introducing new elements at the level of the CALL, the announcement of new regularization criteria, and other factors. The representative of the AO

In France, according to case law, "new elements" are "*facts that happened after the previous final decision or for which it can be proved that the person concerned could only be aware of them after this decision and which can, provided they are established, justify the fears for persecution that he/she claims*".[302] In addition, the new fact must be "*likely to have an influence on the appreciation of the fears of persecution of the applicant."* However, new documentary proof of facts already presented in the framework of the previous application is not usually considered as a new relevant fact, for example, a health certificate.

In discussions between UNHCR and the determining authority (OFPRA), it was confirmed that if the applicant mentions a fact such as sexual violence or homosexuality in the subsequent application, which in theory could have been raised before the final decision on the previous application, this would in principle not be considered a "new element". However, on a case-by-case basis, the determining officer might nonetheless take it into account, depending on the reasons why this fact was raised so late. Similarly, additional evidence which has come into being since the final decision (e.g., recently published COI), would in principle not be considered a "new element" but would rather be considered as new evidence regarding facts already presented in the framework of the previous application. However if this COI shows that the OFPRA made an incorrect assessment of the case in the first instance, this could be taken into consideration on a case-by-case basis, even if this is not strictly speaking a "new element". A worsening of the security situation in the region of origin would be considered a "new element" if this situation would be likely to have an impact on the applicant's personal situation.

In Germany, the criteria for "new elements and findings", as well as the prospect of success, are governed by section 71 (1) APA in connection with section 51 (1) to (3) Administrative Procedure Act. The latter stipulates in this regard:

"The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:
1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected;
2. new evidence is produced which would have meant a more favourable decision for the person affected;
3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure."[303]

---

concurred with this but added that subsequent applications are also sometimes made in order to keep a place in an open reception centre.

[302] *Conseil d'Etat, Décision du 27 janvier 1995, Mlle Gal.* [Unofficial translation].

[303] Section 580 of the Code of Civil Procedure contains several grounds for the resumption of proceedings, *inter alia*, that the party concerned discovers another document, or is able to use such a document, which would have resulted in a more favourable decision for the person affected (No.7 b)).

The decisive point in time to determine the terms "changed" and "new" is generally the day of the original decision by the determining authority, or in case of a decision on appeal, the day of the last oral hearing in court.[304] Sub-paragraph two encompasses new evidence with regard to facts which were raised in earlier proceedings ("*would have meant*"),[305] whereas sub-paragraph one encompasses subsequent applications raising new facts, and evidence relating to new facts. If the subsequent application is based on a change in the situation in the country of origin, it is not sufficient to simply refer to this change in the general situation, but it must be shown that and how the applicant is affected by this change. Whether a change in the "legal situation" also includes a change in the jurisprudence of the courts remains a disputed issue.[306] In addition to the time-limit mentioned above, it is moreover required that *"[…] the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy."*[307] According to the determining authority BAMF, the criterion "grave fault" is fulfilled if the applicant intentionally fails to observe, or is grossly negligent in observing, the duties of reasonable care, in particular, if obligations arising in the framework of the asylum procedure are concerned.[308] The wording of the provision ("changed in favour" and "more favourable decision") seems to suggest a higher degree of a prospect of success than a likelihood of a positive outcome. However, in practice, it is not required to assess whether the new elements or findings would actually lead to a more favourable decision, but only that a positive outcome seems to be possible.[309]

In Bulgaria, there is no explicit guidance in legislative provisions. In practice, however, "new" is interpreted as circumstances which have arisen after the decision has entered into force, or circumstances which were present at the time of previous proceedings, but not known to the applicant.[310] However, the determining authority assured UNHCR that this would cover evidence which has been in existence during the first instance procedure, of which the applicant had knowledge, but which s/he was unable to obtain before the final decision was taken on the initial application.[311] New elements must be significant and related to the personal situation of the applicant or the situation in his/her country of origin. Given the absence of clear

[304] Dealing with the facts of the case.
[305] The same is true for the documents mentioned in Section 580 No.7 b) Code of Civil Procedure in connection with No. 3.
[306] See, for instance, Marx, *Commentary on the Asylum Procedure Act*, 7th edition, Section 71, para 234 et seq; H. Heinhold, "*Handbook for Refugees*" (German version), 6th edition (2007), p.84).
[307] Section 71 (2) APA.
[308] Examples have been provided by the BAMF: applicants who knew the respective grounds already during the appeals procedure, but did not raise them in that procedure, and withdrew their appeal without plausible reasons; and applicants who have filed an application, concealing the fact that they had already filed an asylum application under a different name.
[309] According to information provided by the BAMF.
[310] Interviews with stakeholders, Methodology Directorate.
[311] Interviews with stakeholders, Methodology Directorate.

criteria, the interpretation is effectively entirely at the discretion of the individual decision-maker.

Similarly, in Greece there are no legislative or administrative provisions setting out specific criteria for the interpretation of what constitutes new elements. However, interviews with stakeholders identified that in practice, new elements must be crucial and presented for the first time.[312] According to the Head of ARD, this would cover information in existence and known about by the applicant at the time of the previous procedure, but which could only be substantiated with evidence after a final decision. Moreover, this could cover a worsening of the situation in the country of origin with regard to issues raised in the previous application; new evidence such as recently published COI (provided it relates to the individual situation of the applicant); and in some instances, information known about, but not previously disclosed by, the applicant (depending on the reasons for non-disclosure). Greek legislation requires that new elements or findings should only be further examined if they significantly add to the likelihood of granting refugee status,[313] although it is not clear how strictly this test is applied in practice.[314]

In Finland, the criteria simply refer to the requirement to produce "any new grounds for staying in the country that would influence the decision on the matter," which have not arisen in the previous application.[315] Case-law indicates that the expression refers to situations of changed circumstances either in the country of origin or the host country. There is little guidance available regarding the interpretation of "new grounds". Nevertheless, from the audited cases, it is clear that if the applicant presents "new" evidence relating to issues raised in the previous application, it is not likely that the subsequent application will be examined in the regular procedure. The audited cases show that there is a strong reliance on a requirement for new elements/circumstances, and not only new documentary evidence, in order to have the subsequent application dealt with in the regular procedure. If the applicant obtains new evidence, for example, recently published COI relating to the same issues raised in the previous application, the same limitation applies. However, if new grounds for asylum are raised, even such as facts not mentioned in the previous application but which were known at the time of the previous application (e.g. sexual violence or torture suffered, homosexuality etc.), there is a greater chance of having the application considered substantively on its merits. Moreover, if the situation in the country of origin changes significantly, it is likely that a subsequent application will be examined in the regular procedure. The same applies for subsequent

[312] Interviews with S1, S2.
[313] Article 23 (5) of PD 90/2008.
[314] According to the Head of ARD, no subsequent application has been submitted since the entry into force of PD 90/2008.
[315] Section 103 (3) 2) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009).

applications made after a change in key circumstances of the applicant in the host country.[316]

Legislative provisions in the Czech Republic require that new elements must be connected with the reasons for granting international protection; that they were not presented in the previous procedure; and that their omission was through no fault of the applicant (i.e. that s/he failed to raise facts or evidence that could have been stated at the time).[317] The audit of case files also revealed some evidence to suggest that the submission of wholly new facts may be deemed inadmissible on credibility grounds.[318]

In Spain, the criteria for assessing the existence of new facts or findings would include new evidence that has come into existence since the first procedure, but which relates to issues raised in the first procedure; or changes in the situation in the country of origin, where the new application is based on exactly the same grounds. Such circumstances would be taken into account in the examination of the subsequent application. If they are considered to affect essential elements that could lead to a different decision on the case, then the application would be further examined under the normal procedure.

Italian legislation simply requires that the applicant produce *"new elements concerning his/her personal situation or the situation of his/her country of origin".* There are no further provisions concerning the interpretation of this requirement.[319] There is no requirement that the new elements or findings "significantly add" to the likelihood of the applicant qualifying for international protection.

Slovenian legislation requires new evidence to be submitted, rather than new elements or findings.[320] There is, however, conflicting case-law regarding the interpretation to be given to the legislation. The Supreme Court has stated that it does not suffice for the applicant to allege the existence of new elements or findings, but the applicant has to

[316] See audited case 76, where a woman was granted asylum following a subsequent application, based on changes in her marital status after the decision on the first application.

[317] Section 10 a ASA: *"The application for international protection shall be inadmissible (...) e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien".*

[318] Case XO37.

[319] Only one decision was examined in the audit of case files where refugee status was recognised after a second application (D/57/F/ETI/P). The case file included no reasons but contained a medical report, a psychological report and a letter from a University Professor of sub-Saharan history.

[320] Article 56 (1) IPA: *A third country national or a stateless person whose application in the Republic of Slovenia has already been finally rejected, or has explicitly withdrawn the application, may file a new one only if he/she submits* ***new evidence*** *proving that he/she meets the conditions for acquiring international protection under this Act.*

submit documentary evidence.[321] However, the Administrative Court has held that a statement can be considered as new evidence,[322] and this was subsequently confirmed by the Supreme Court.[323] By contrast, the determining authority has decided that oral evidence is insufficient, and both the Administrative and Supreme Courts have since confirmed this position. Subsequently, however, the Administrative Court again found that oral evidence suffices.[324] Since the period of UNHCR's research, new legislation has replaced the reference to evidence with a requirement that "*circumstances have significantly changed aft*er *lodgement of the previous application"*.[325]

The significant divergences in interpretation revealed by this research suggest a clear need for greater clarity and consistency through the development of more detailed legislative provisions or other guidance to decision-makers. UNHCR encourages the adoption of a broad and inclusive approach, that takes account of the challenges faced by asylum applicants in substantiating their claims (language barriers, lack of legal advice, having to flee their countries of origin without being able to gather supporting evidence, short procedural time frames etc.) as well as reasons for late disclosure of information (trauma, victims of gender-based violence etc). UNHCR is extremely concerned about the existence of very formalistic criteria in some states which risks excluding evidence that would support a claim for international protection. The adoption of such restrictive practices could put States at odds with their *non-refoulement* obligations under international law.

[321] 1 Up 150/2008, 17 April 2008.

[322] U 992/2008, 7 May 2008. This case also confirmed that the new element relied on may have existed at the time of the initial decision in the event of a reasonable justification for not previously disclosing it. The case in question concerned an applicant who did not report she was raped during the initial procedure, because she was afraid to tell her husband. The competent authority did not accept this as new evidence. In its judgment overturning the decision, the Court cited relevant international case-law, arguing that it can not be expected that victims reveal all details and elements of such violence at their first hearing/procedure (*Hilal v. UK, Hatami v Sweden, Haydin v. Switzerland, Tala v. Sweden, Alan v. Switzerland*).

[323] Case 1 Up 360/2008, 24 June 2008.

[324] In case No. 48-2008, the determining authority decided that an oral statement was not considered to be evidence in this procedure (this decision was taken after the Administrative Court decision cited above). The applicant argued that he was not able to submit new evidence in the applicable 8-day time frame, and that he was not able to submit any evidence at all. In Case U 1923/2008, 2 September 2008, the Administrative and Supreme Court confirmed this position of the Ministry of Interior. However, in Case U 2293/2008, 11 November 2008, the Administrative Court explained what fulfils the standard of "evidence" in such procedures. It stressed that this could also be oral statements on new facts, referring to its own decision in Case No. U 992/2008, 7 May 2008, confirmed by the Supreme Court I Up 360/2008, 24.6.2008.

[325] This amendment was adopted on 15 July 2009 and entered into force on 11 August 2009 (Act amending the International Protection Act, published in the Official Gazette No. 58/2009).

Recommendation

UNHCR considers that preliminary examinations should extend both to points of fact and law, and the notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object and purpose of the 1951 Convention. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. Procedural requirements, such as time limits, should not be established in a way that could effectively prevent applicants from pursuing subsequent applications.

Wider category of cases afforded a subsequent application

Article 34 (5) APD provides that "*Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons why a procedure has to be re-opened*." UNHCR has encouraged Member States to interpret such a provision to encompass cases where, for example, trauma, language difficulties, or age-, gender- or culture-related sensitivities may have delayed the substantiation of an earlier claim.

Of the states of focus in this research, none have in place explicit legislative provisions taking advantage of the discretion granted by Article 34 (5) APD. However, there is jurisprudence in some countries supporting such an interpretation, and several states do afford decision-makers discretion to consider wider categories of cases in practice.

In France, there are no legislative provisions requiring decision-makers to examine subsequent applications in wider categories of cases beyond those where new elements/findings arise. However, there is case law[326] on the assessment of the notion of "*new elements/facts*" to support a requirement that the criteria defining new elements in the main precedent-setting decisions remain subject to an important margin of appreciation.[327] As such, decision-makers have a margin of discretion and there is the possibility that their assessment of the "new element" could take into account factors such as trauma, age, language difficulties, gender sensitivities or other reasons and circumstances explaining why some facts or evidence were not produced earlier. However, it was not clear from UNHCR's research whether this margin of appreciation is exercised in this way in practice. It was revealed that a significant number of applicants of subsequent applications are not invited to personal interviews and their applications appeared to be assessed in a rather summary manner.

[326] In another precedent setting decision (*CE, 28 avril 2000, 192701, Thiagarasa*), the Council of State added that if the CRR (now CNDA) considers that the new element is established and relevant, it has to rule on the asylum claim "*in the light of all the facts presented by the applicant in his/her subsequent application, including the facts already examined by the CRR*". This was further reiterated in a precedent setting decision from the CRR (now CNDA) (*CRR, SR, 5 avril 2002, 379929, Keryan*).

[327] See below for rate of positive decisions by the CNDA.

By contrast, there is jurisprudence in the Netherlands to the effect that in principle the authorities are not, according to the Aliens Act, able to examine subsequent applications which do not include new elements/findings in accordance with Article 32(5) and (6) APD.[328] However, there is policy guidance which allows some discretion where (due to trauma), evidence has not been disclosed at the earliest opportunity.[329] This policy translates earlier policy guidance (found in *TBV* 2003/24), in which the Minister indicated when he would not apply Article 4:6 General Administrative Law Act.[330]

In Spain, there are no legislative provisions which explicitly prevent consideration of a subsequent application in relation to wider circumstances such as trauma, age, gender, language or other difficulties which have prevented a full disclosure of facts during the initial procedure. However, discretion remains with the determining official as to whether the application is declared admissible in such circumstances. In practice, officials would usually seek guidance from their supervisors.

SIovenian legislation is not explicit on this question either. Other factors may however justify the earlier non-disclosure of elements, and permit them to be treated as new evidence for the purposes of allowing a subsequent application to be admitted for consideration.[331] There is case law which would suggest this is possible because applicants cannot be expected to raise traumatic or shameful incidences in a first personal interview.[332]

---

[328] See also Council of State, 8 May 2008, 200801379/1.

[329] In the C14/5.1 Aliens Circular, the following policy is formulated: "*It is up to the applicant, in support of his application, to produce all information and documents necessary for the assessment of the application. Also in the case of traumatic experiences, it is expected of the alien to indicate this, even in a very brief, summary manner. In very exceptional circumstances, for example, in cases of traumatic events (as are to be found in the Aliens Circular 2000 under C2/4.2), it is reasonable to expect that the applicant could not have submitted new facts and circumstances in an earlier state because the applicant was hesitant in telling about these circumstances. This is more likely to be the case if the application was rejected within the 48 hours procedure.'*

[330] Reading on TBV 2003/24, M. Reneman & S. Hubel, Een tweede kans?, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2005, p. 386-388, S. Jansen, Op de vlucht voor homohaat, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2006, p. 124146. See also Council of State, 19 May 2004, *JV* 2004/313, Committee Against Torture, view nr. 279/2005 22 January 2007.

[331] Article 56 (2) IPA: *The new evidence shall occur after the issue of a preliminary decision, or may have existed already during the first procedure, although the person referred to in the preceding paragraph did not enforce these due to justified reasons.*

[332] In case U 992/2008, 7 May 2008. The Administrative Court confirmed that the new element relied on may have existed at the time of the initial decision, if there is a reasonable justification for not previously disclosing it. The case in question concerned an applicant who did not report she was raped during the initial procedure, because she was afraid to tell her husband, which the competent authority did not accept as new evidence. In its judgment overturning the decision, the Court cited relevant international case-law, arguing that it can not be expected that victims reveal all details and elements of such violence during the first procedure (*Hilal v. UK, Hatami v Sweden, Haydin v. Switzerland, Tala v. Sweden, Alan v. Switzerland).*

Similarly, German law does not contain an explicit legal provision in this regard. However, according to information submitted to UNHCR by the determining authority (BAMF), it is possible to take into account subsequent applications where, for instance, an applicant was not able to provide the relevant information in the initial asylum procedure, due to trauma. In such a case, the trauma (e.g. proven by a medical certificate) could be interpreted as "new evidence" in the sense of section 51 (1) No. 2 Administrative Procedure Act. The BAMF, as a rule, assumes in such cases of trauma that the person concerned was, "without grave fault on his part",[333] unable to bring forward the relevant grounds in the earlier procedure.

According to the determining authority in Bulgaria, in principle it is possible that other factors (e.g. trauma, age, language difficulties or gender sensitivities) which have prevented an applicant from fully substantiating his/her initial application could justify a subsequent application even in the absence of "new" elements.[334] However, no concrete examples were provided in practice.

In Finland, the examination of subsequent applications purports to take into consideration wider factors beyond those relating to the application for international protection. In practice, the vast majority of applicants filing subsequent applications are represented by legal representatives who will include issues from this wider context in the application itself. Further, the Finnish asylum procedure is in all stages a "one stop" procedure, where all grounds relating to the issuance of a residence permit are taken into account. Thus, the examination of subsequent applications does in practice focus on a broader spectrum of reasons for residence permits – something that also is reflected by the use of the expression "grounds for staying in the country" contained in the criteria under Finnish legislation. [335]

In the United Kingdom, there is no provision requiring the examination of subsequent applications in wider categories of cases beyond those where new elements are presented. UK provisions[336] state that if it has not been possible to raise the new material during the course of the appeal for any reason, the case owner should consider it after the conclusion of the appeal and apply Rule 353. At first sight, this appears to be more generous than the terms of Article 32(6) APD, which allows the Member State to decide to examine the applicant's further submissions only if the applicant's inability to assert the situation earlier arose "through no fault of his/her own". However, the provisions reflect Article 32(6) APD as, if the matters could have been raised in an earlier appeal, then there will be no right of appeal against the refusal of the fresh claim.[337]

[333] Section 51 (2) Administrative Procedure Act.
[334] Interviews with interviewers.
[335] Article 94 of the Aliens Act.
[336] API *Further Submissions.*
[337] NIAA 2002 Section 96.

Recommendation

UNHCR favours use of the possibility for Member States to address exceptional circumstances for considering a subsequent application beyond those cases involving new elements or findings. Discretion to re-open a substantive examination may be required in cases where, for example, trauma, language difficulties or age-, gender- or culture-related sensitivities may have delayed or prevented the substantiation of an earlier claim.

Subsequent applications by previous dependants

Article 32 (7) APD provides that the preliminary examination procedure "*may also be applicable in the case of a dependant who lodges an application after he/she has … consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination … will consist of examining whether there are facts relating to the dependant's situation which justify a separate application*".

UNHCR welcomed this provision and reiterated the importance of ensuring that dependants, who may not have been able to submit a reasoned claim earlier, be given the possibility to have their asylum claims examined. Due consideration should be given in particular to trauma-, culture-, and age- or gender-related sensitivities.[338]

In Bulgaria, an application by a person, who was formerly considered to be a dependant minor, and for whom a final negative decision was taken on the application submitted by a parent, is considered to be a subsequent application. The claim will have to raise significant new circumstances.

In Spain, an application by a former dependant would be assessed in accordance with the normal asylum procedure, although the former application (on behalf of the applicant) will be taken into account.

In the UK, applications by previous dependants are not mentioned in the relevant Rule 353. However, there is guidance which tells decision-makers to treat such claims as 'swapover' claims. The guidance instructs officials to consider and judge swapover claims on their own merits in the same manner as other claims. But consideration of a swapover claim can be cut short by certification[339] under the Nationality Immigration and Asylum Act (NIAA) 2002 s96 (earlier right of appeal). Section 96 can remove appeal rights where a dependant was previously issued with a notice telling them of their right to claim asylum, and they chose not to do so. Rule 353 combined with NIAA 2002 s 96(2) could thus amount to a specific procedure for subsequent applications by previous

[338] UNHCR *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 10 Feburary 2005.
[339] Asylum Process Guidance *Handling Swapover claims* 23.4.07 accessed via UKBA website 4.5.09

dependants, since it means that there is no right of appeal against refusal. In this context, UNHCR has suggested the use of the possibility which Article 32 (5) APD provides for Member States to address exceptional circumstances. Discretion to re-open an examination is required where trauma, language difficulties, or age- or gender-related sensitivities may have delayed the substantiation of an earlier claim.[340] At present, this will depend on the initiative of the individual decision-maker.

In Germany, if the requirements for family refugee protection are fulfilled, the spouse as well as the children of a person entitled to refugee status can also be granted refugee status.[341] According to the determining authority, in case the status of the main applicant is revoked, the family members have the opportunity to bring forward their own specific grounds for status within the revocation procedure. Therefore, the filing of a further application would not be necessary.

The treatment of *sur place* claims

An applicant may submit a subsequent application due to international protection needs arising whilst s/he has been in the Member State, and since the examination of the previous application. There may have been a significant deterioration in the situation in the country of origin since the examination of the previous application; for example, a change in government policy, a change of government, the outbreak or escalation of armed conflict etc. Such elements would demand a careful examination of the subsequent application.

However, protection needs may also arise if the Member State does not adhere to the requirement of confidentiality and discloses information, directly or indirectly, to the alleged actors of persecution or serious harm in the country of origin, which results in identification of the applicant.[342] Subsequent applications which are based on such disclosure should be subject to a thorough examination, to determine whether this disclosure has created a risk which qualifies the applicant for refugee or subsidiary protection status.

Moreover, an applicant may submit a subsequent application which asserts a well-founded fear of being persecuted or a risk of serious harm based on activities in which s/he has engaged in the Member State.[343] Whether such actions are sufficient to justify

[340] UNHCR comments on the implementation in the UK of the APD, page 28.

[341] Section 26 APA. In the case the requirements for family refugee protection are not fulfilled, the individual application of each family member will be examined on its merits in the first instance procedure.

[342] See section 8 of this report, on the collection of information on individual cases, for further information regarding the requirement of confidentiality.

[343] For example, the expression of political views whilst in the Member State, such as participation in demonstrations against government policies in the country of origin, participation in opposition groups in exile, association with refugees or known opponents to the government of the country of origin;

a well-founded fear of being persecuted or a risk of serious harm should be determined by a careful and thorough examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the applicant's country of origin; how they are likely to be viewed by those authorities; and the risk of treatment contrary to the 1951 Convention and the Qualification Directive if the applicant is returned.[344] The applicant should qualify for refugee status when all the relevant criteria of the 1951 Convention are satisfied. This also applies where the applicant does not genuinely hold, for example, the political convictions or religious beliefs s/he has expressed in the Member State, but where the mere fact of their expression gives rise to a serious risk of persecution if returned to the country of origin. An applicant may deliberately engage in activities in the Member State which are designed to bring him/her within the criteria for refugee status. If these are known to or may become known by the alleged actor of persecution, creating a real risk for the applicant if returned, s/he should be granted refugee status. There is no 'good faith' requirement in the 1951 Convention.

Contrary to the 1951 Convention, Article 5 (3) of the Qualification Directive (QD) permits Member States to refuse to recognise an applicant's refugee status if the applicant files a subsequent application based on circumstances which the applicant has *"created by his own decision*" since leaving the country of origin.[345] UNHCR has strongly criticised this provision of the QD which does not accord with international refugee law.[346]

Of those states surveyed, only Germany[347] and Greece[348] have explicitly transposed Article 5 (3) of the Qualification Directive in national legislation. Of those Member

---

conversion to a religion not tolerated by the authorities in the country of origin; unauthorized stay abroad when this is punished by severe sanctions etc.

[344] Paragraphs 94-96, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, re-edited Geneva, January 1992.

[345] Article 5 (3) QD states that "*Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin*." Note that that the European Commission has not proposed an amendment to this clause in its APD Recast Proposal 2009.

[346] See UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004), 28 January 2005.

[347] Section 28 (2) APA stipulates: *"If the foreigner again applies for asylum after withdrawal or non-appealable rejection of an earlier application, and the new application is based on circumstances of his own creation after the withdrawal or non-appealable rejection of the earlier application, he cannot as a rule be granted refugee status in a subsequent procedure."* Cf. also Bundestag printed papers 16/5065, p. 217. Art 5 (2) APD is reflected in Section 28 (1a) APA: *"A threat pursuant to Section 60 (1) of the Residence Act may be based on events that occurred after the foreigner left his country of origin, and in particular on conduct by the foreigner that expresses a continuing conviction or orientation that already existed in the country of origin."*

[348] Article 5 (2) PD 96/2008.

States surveyed who have not transposed this provision in national legislation, some however do apply a "continuity" test (Italy and the Netherlands)[349] requiring that the grounds be a continuation of activities performed or convictions held in the country of origin, or a "purpose" test (Bulgaria[350] and the Czech Republic[351]) which looks at whether the applicant's activities were engaged in with the purpose of obtaining a protection status. This may limit the grant of refugee status in practice. Moreover, in other states such as Spain and the UK, it will typically be used to dispute credibility.

Italy has not transposed Article 5 (3) of the Qualification Directive. It has reflected Article 5 (2) QD insofar as legislation expressly provides that "*the application of international protection can be justified because of events that have taken place after the applicant has left his/her country of origin or of activities carried out by the applicant after he/she has left his/her country of origin, particularly when it is ensured that the alleged activities are the expression and the continuation of beliefs or orientations already expressed in the country of origin"*.[352]

Similarly, in the Netherlands there is in principle no refusal to assess an applicant's refugee claim, if the applicant files a subsequent application based on circumstances which the applicant has created by his own decision since leaving the country of origin. However, as a starting point, the test of whether there are new facts and circumstances will apply, and this is applied very strictly.[353] Moreover, the so-called 'continuity test' – contrary to jurisprudence of the European Court of Human Rights and the Committee Against Torture – is applied.[354] This means that activities will only be taken into account if they can be considered as a follow-up of activities performed or convictions held in the country of origin. If not, even though the fear for persecution due to new activities is plausible and credible, this cannot lead to recognition as a refugee '*sur place*'.[355]

Article 5 (3) QD is reflected in Bulgarian legislation to the extent that applications may be refused if they are based on grounds deemed to result from actions committed with

[349] Article 5 (2) QD states that "*A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin*."

[350] Article 8 (6) and Article 9 (3) LAR.

[351] According to the Head of Asylum Procedure Unit this approach is applied by the determining authority DAMP. This has not been held in the case-law of the courts.

[352] Article 4 of the d.lgs. 251/2007.

[353] See R. Bruin, *Individuele toelatingsgronden*, *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2008, p. 153.

[354] Committee Against Torture 29 May 1997, no. 34/1995 and 22 January 2007, no. 280/2005; European Court of Human Rights 4 December 2008, appl. nr. 20113/07, *NAV* 2009/9, 31 August 2004, appl. nr. 24697/04, 26 July 2005, and appl. nr. 38885/02, *NAV* 2005/184. See also Article 20 (7) Qualification Directive.

[355] See Article 3.37 Aliens Regulation 2000; and C2/6 Aliens Circular 2000.

the sole purpose of obtaining protection. [356] Given the new elements of the application, it would be considered in the regular procedure where the question of sole purpose would be duly examined.

The Czech Republic has not transposed Article 5 (3) QD,and there is no explicit provision or guidance concerning the treatment of *sur place* claims. However, information stated by the determining authority suggests that such applications could be dealt with in the admissibility or regular procedure, and that an assessment would be made as to whether the applicant's activities were 'purposeful'. If so, the application would be deemed unfounded.[357]

In the UK, if the applicant files a subsequent application based on circumstances which s/he has created by his own decision since leaving the country of origin, the UK does not refuse to recognize the applicant's refugee status. However, such actions are likely to damage credibility.[358] Spain has not transposed Article 5 (3) QD, but UNHCR has noted that cases are treated quite strictly. Usually subsidiary protection would be granted where there was considered to be a risk on return.

UNHCR particularly welcomes good practice in Finland, where the legislator when implementing the QD[359] stated explicitly that Article 5 (3) QD is problematic from the viewpoint of the 1951 Convention; and that the Article would not be transposed into Finnish legislation or practice. A subsequent application based on activities since leaving the country of origin will be examined in the regular procedure with the full support of the procedural and administrative norms of the Aliens' Act.[360] Similarly, in France there is jurisprudence accepting the well-foundedness of applications stemming from activities undertaken since the leaving the country of origin, including cases involving high profile hunger strikes by Kurdish applicants from Turkey.[361]

---

[356] Article 8 (6) LAR: *(New, SG No. 52/2007) Fear of persecution may be based on events that occurred after an alien has left his/her country of origin or an act committed by him/her after departure unless it has been committed with the sole purpose of obtaining protection under this law.* Article 9 (3) LAR: *The real threat of serious harm may be based on events that occurred after an alien has left his/her country of origin or an act committed by him/her after departure unless it has been committed with the sole purpose of obtaining protection under this law.*

[357] Interview of 7 April 2009.

[358] *Danian v SSHD* [2000] ImmAR 96.

[359] *Hallituksen esitys* 166/2007 (Government Bill 166/2007).

[360] See audited case 76 where asylum was granted on a subsequent application due to the applicant filing for a divorce from her husband, who lived in their country of origin, after the first decision had been made.

[361] These cases concerned a number of Kurdish applicants from Turkey whose applications had been previously rejected by a final decision, and who filed a subsequent applicant after a hunger strike on French territory. The regular procedure for subsequent applications was applied to them. In a series of CRR decisions, the hunger strike was considered as a "new fact". On the substance of the claims, in order to recognize refugee status, the CNDA looked at the objective of the hunger strike (i.e. the denunciation of the attitude of the Turkish authorities towards the Kurds), the fact that this event was publicized and known by the Turkish authorities. It therefore concluded that it created a well-founded fear of

UNHCR cautions that refugee status should never automatically be refused simply due to the fact that the fear of persecution or serious harm relates to actions taken by the applicant since leaving the country of origin. UNHCR therefore welcomes the fact that most Member States have not taken the opportunity to transpose Article 5 (3) QD and recommends that this provision be amended accordingly as part of proposed revisions to the Qualification Directive.

Recommendation

All subsequent applications alleging that international protection needs have arisen *sur place* should be subject to a careful and thorough examination in Member States' regular procedures, with reference to both the criteria for refugee status and subsidiary protection status.

Limitations on the right to submit a subsequent application

UNHCR is aware and acknowledges that some Member States are concerned to prevent abuse of asylum procedures by applicants who submit multiple subsequent applications. The European Commission has identified this as a problem in some Member States, and has proposed an amendment of the current Article 32 APD. This change would provide an exception to the right to remain, when an applicant submits a second subsequent application following a final rejection of a previous subsequent application - provided the determining authority is satisfied that return will not lead to direct or indirect *refoulement* in violation of international and Community legal obligations. The Commission's proposal also suggests that second subsequent applications may be examined in admissibility or accelerated procedures.

UNHCR's research has found that none of the Member States surveyed have legislation, regulations or administrative provisions which explicitly limit the number of subsequent applications which can be made.

However, as mentioned above, a small number of the surveyed Member States reduce reception conditions or restrict the movement of applicants of subsequent applications as a deterrent.[362] At the time of writing, Belgium had also recently introduced

---

persecution for the applicants in case of return to their country of origin (for example, *CRR Case No 389232, M.D, 24 May 2002*; *CRR Case No389376, M.Y, 24 May 2002*; *CRR Case No 393449, MB, 24 May 2002*). However, in general, the cases of recognition of refugee status to refugees *sur place* are quite rare.

[362] Bulgaria (reception conditions are reduced) and Slovenia (applicants' freedom of movement is restricted up until a decision is taken on the request for a repeat procedure). In the Netherlands, detention is used as a measure of deterrence following the rejection of a subsequent application. Change of the Aliens Circular of 23 January 2009, WBV 2009/2, A6/5.3.3.9, *Staatscourant* 2009, nr. 1813, 5 February 2009; also Parliament 2007-2008, 19 637, nr. 1207, p. 24. In Germany, "*[i]f the foreigner's right of residence during the previous asylum procedure was geographically restricted, the last geographical*

legislation which permits reception benefits (except urgent medical assistance) to be cut when an applicant has lodged three or more asylum applications.[363] Reception benefits would be re-granted in the event of a positive decision by the Aliens' Office on the subsequent application's admissibility.[364]

Furthermore, at the time of writing, some Member States were considering restrictions to appeal rights. For example, in the Netherlands, on 7 December 2009, a motion was filed to restrict the right of appeal, following a negative decision on a subsequent application, to the Council of State only.

Right of appeal against a negative decision following the preliminary examination

Article 39 (1) (c) APD explicitly stipulates that Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal against a decision not to further examine a subsequent application pursuant to a preliminary examination.

The following states provide for a right of appeal against a decision not to further examine a subsequent application: Belgium,[365] Bulgaria,[366] the Czech Republic,[367] Germany,[368] Italy,[369] the Netherlands,[370] Slovenia[371] and Spain.[372]

---

restrictions shall continue to apply unless otherwise decided." (Section 71 (7) 1 APA.). Moreover, *[a] follow-up application shall not preclude an order to take the foreigner into custody awaiting deportation unless a further asylum procedure is carried out."* (Section 71 (8) APA).

[363] Law of 30 December 2009 (*Loi du 30 décembre 2009 portent des dispositions diverses, Titre 11, Chapitre 4, M.B.,31 décembre 2009, p. 82925*).

[364] UNHCR wrote on 24 September 2009 to the authorities. In the letter UNHCR acknowledged the need to combat abuse but highlighted the fact that the majority of repeat applicants at present originate from countries or areas of conflict, or where there are breaches of human rights (e.g. Iran, Iraq, Afghanistan, North Caucasus). Besides abuse, shortcomings in the present asylum procedure were mentioned as one of the potential causes of multiple applications. UNHCR has asked for a case-by-case assessment and exceptions for children and vulnerable persons.

[365] This is an appeal for annulment of the decision of the AO not to examine the subsequent application which by virtue of Article 51/8 of the Aliens Act does not have suspensive effect.

[366] Negative decisions on the grounds of Article 13 (1) item 5 LAR may be taken in the accelerated and in the general procedure. If taken in the accelerated procedure by the interviewer, they are to be appealed before the Administrative Court of current registered address of the appellant as in his/her registration card (Article 84 (2) LAR). The appeal procedures have suspensive effect (Article 84 (4) LAR). The court starts the proceedings within 3 days of receipt of the appeal (Article 84 (5) LAR) and should take a decision in a period of one month (Article 85 (1) LAR). If the Court revokes the decision of the interviewer, the case is returned with mandatory instructions (usually to admit the application to general procedure). A negative court decision on the appeal is final. But there is no limitation as to filing a new subsequent application and, therefore, no limit on appeals. If the decision on a subsequent application is taken by the Chairperson in the general procedure, it is appealed before the Supreme Administrative Court – a panel of three judges - and the proceedings have suspensive effect. A negative SAC decision may be appealed before a five judge panel within SAC as a court of cassation. The term for submitting an appeal is 14 days. A decision not to examine a subsequent application may be appealed as any other decision not to examine an application before an administrative body under the Administrative Procedures Code (Article

However, in Italy[373] and the Czech Republic,[374] an appeal against a decision that a subsequent application is inadmissible has no automatic suspensive effect.

---

120 (2) of the Constitution of the Republic of Bulgaria). The appeal is to be heard by the Administrative Court of headquarters of the administrative body (Article 128 Administrative Procedures Code) – Administrative Court of Sofia City. The term for submitting an appeal is 14 days (Article 84, Administrative Procedures Code).

[367] Section 32 ASA.

[368] Sections 42 Code of Administrative Court Procedure, 74 APA, and 71 (4) and (5) APA. Section 80 (5) Code of Administrative Court Procedure: *"On application the court may order suspensive effect, either wholly or in part, in respect of the main cause of action in cases described under paragraph 2, Nos. 1to 3, or may reinstitute suspensive effect, either wholly or in part, in cases described under paragraph 2, No. 4. Applications may be lodged prior to an action of voidance being brought. Where at the time at which the decision is made the administrative act has already been executed, the court may order the cancellation of execution. Restitution of suspensive effect may be made contingent upon lodging of a provision of security or some other condition being met. Time-limits may be set for the restitution of suspensive effect."* Section 123 (1) Code of Administrative Court Procedure: *"On application the court may issue a temporary injunction in respect of the object at issue, even before an action has been lodged, where a change to the existing situation could reasonably be expected to frustrate or seriously impair the applicant in the realization of a right. Temporary measures are also permissible as a means of regulating a temporary state of affairs in respect of a disputed legal relationship where such regulation, in particular in the case of permanent relationships, appears to be necessary in order to ward off serious disadvantage or to prevent the threat of force or for other reasons."* (Unofficial translations concerning the Code of Administrative Court Procedure provided by UNHCR).

[369] Article 35 (1) d.lgs. 25/2008

[370] Article 8:1 General Administrative Law Act and Articles 79 and 80 Aliens Act. The court conducts a so-called *ne bis in idem* examination. The court is firstly obliged to examine whether or not an applicant has indeed submitted new facts or circumstances that have led to the review. If the court concludes that no new facts or circumstances have been submitted, then it must reject the appeal.

[371] According to Article 74 (3) IPA an appeal can be lodged with the Administrative Court within three days of service of the decision.

[372] In the case of a new (subsequent) application, the same appeal rights as in any other asylum application may be exercised. If a request for re-examination of the application is not admitted, Article 38 ALR provides for the possibility to lodge an administrative appeal to the State Secretariat of the Interior.

[373] A decision to treat a subsequent application as inadmissible under Article 29 (b) of the d.lgs. 25/2008 can be appealed under Article 35 (1) of the d.lgs. 25/2008. However, Article 35 (7) of the d.lgs. 25/2008 stipulates that the appeal has no automatic suspensive effect although when lodging the appeal the appellant can ask the court to suspend removal if valid justification can be provided. The court has five days in which to rule on the question of suspensive effect and there is no further right of appeal in the event of refusal. If the appeal is successful then the applicant is granted a permit and entitled to reception support.

[374] Section 32 (3) ASA: *"The filing of an action pursuant to Subsection (1) and (2) has suspensive effect, except for an action against discontinuation of the proceedings pursuant to Section 25 and an action against a decision pursuant to Section 16(1)(d) and (e)."* Section 25: *"The proceedings shall be discontinued if (…) i) the application for international protection is inadmissible."* Section 10a (e): *"The application for international protection shall be inadmissible e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien.."*

Similarly, in Belgium, Germany, the Netherlands, Slovenia and Spain, an appeal against a negative decision in the preliminary examination does not have automatic suspensive effect.[375] In Belgium, only a request to annul, on grounds of law, the negative decision of the AO on a subsequent application can be lodged. This does not have suspensive effect. In principle, a suspensive appeal cannot be lodged. If a request for suspensive effect is made, it will be declared inadmissible unless the AO has applied Article 51/8 of the Aliens' Act incorrectly, and failed to take into account new elements presented.[376] However, lawyers and NGOs consider that, notwithstanding this exception, the current arrangements do not constitute an adequate safeguard. In the Netherlands, the applicant has to apply for an interim measure to grant suspensive effect but this request for an interim measure does not have suspensive effect either.[377] In Slovenia, the applicant has to file for an interim measure.[378] In Germany, different forms of provisional legal remedy need to be taken, depending on whether the asylum authority issues a notification announcing deportation, together with the negative decision on the subsequent application.[379]

There is no right of appeal against a decision not to further examine a subsequent application in Greece. The right of appeal to the Appeals' Board was abolished by the

[375] With regard to Belgium, see *GWH* 14 July 1994, nr. 61/94, B. 5.8-B.5.8.3 and *GWH* 27 May 2008, nr. 81/2008, B.77-B.83.

[376] Article 51/8 of the Aliens Act, stipulates: "*The minister or his authorized representative can decide not to take an asylum application into consideration when the foreigner, who has entered the country without fulfilling the necessary entry requirements, has already made the same application and he does not produce new elements containing significant indications for a well-founded fear of persecution as defined in the Refugee Convention, or containing significant indications of a real risk of serious harm warranting subsidiary protection. These new elements must relate to facts or situations that have taken place after the last phase in the procedure where the applicant could have produced them. The minister or his authorized representative must however take the asylum application into consideration when applicant has been notified earlier on a refusal decision which was taken based on article 52, § 2, 3°, 4° and 5°, § 3, 3°, § 4, 3° or article 57/10. Only an appeal for annulment at the CALL is lodged against a decision to not consider an application. A request for suspension of this decision cannot be lodged*."

[377] Article 62 lid 3c Aliens Act.

[378] Art. 74 (4) IPA and Art. 32 AAD.

[379] In case the refusal to conduct a further asylum procedure is issued together with a notification announcing deportation (section 71 (4) APA in connection with section 36 APA), the time limit for filing an action against the refusal as well as for the application for an interim measure (according to section 80 (5) Code of Administrative Court Procedure) is one week. If after the rejection of the initial asylum application, a notification announcing deportation or a deportation order became enforceable, and the applicant filed a subsequent application which did not lead to a new asylum procedure, a new notification announcing deportation or a deportation order is not required in order to enforce deportation (section 71 (5) APA). Therefore, the person concerned has to apply for a temporary injunction pursuant to section 123 Code of Administrative Court Procedure. No time limit applies with regard to the temporary injunction, however, the main action has to be filed within two weeks. Different rules apply in case the person concerned shall be deported to a safe third country (section 71 (4) APA in connection with section 34a APA). Cf. also: R. Marx, *Residence, asylum and refugee law for practicing lawyers*, 3rd edition (2007), in particular p. 1341.

recent Presidential Decree (PD 81/2009).[380] The only legal remedy is to seek judicial review.

In the UK, following an examination of the further submissions, the decision-maker decides whether to grant leave or whether to reject the further submissions. A decision to reject the further submissions and uphold the previous negative decision can only be appealed to the Asylum and Immigration Tribunal if the decision-maker determines that the further submissions constituted a "fresh claim" in accordance with the criteria stipulated in rule 353.[381] However, even if the further submissions are treated as a fresh claim, the existence of an appeal right will depend on whether it is considered that the new elements or findings could have been raised in an earlier appeal.[382] If so, then there is no right of appeal against the refusal of the fresh claim. This can have serious consequences in some individual cases.[383] Where an appeal is not available, the only recourse is judicial review. A judicial review application may be affected by the determining authority's policy announced in January 2009 that they will not automatically suspend removal where the claimant has raised a second judicial review application based on:

[380] Article 10 PD 81/09.

[381] A refusal of a fresh claim is considered to constitute an 'immigration decision' which confers a right of appeal. Section 82(2) of the Nationality, Immigration and Asylum Act 2002 lists those decisions which are defined as 'immigration decisions'. There is no automatic right of appeal against a decision to refuse an asylum claim. Instead, appeal rights relate to the relevant 'immigration decision' which may accompany the decision to refuse asylum.

[382] NIAA 2002 Section 96(1) and (2) is as follows: "*96 (1) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies- (a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined), (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision. (2) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies (a) that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision, (b) that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice…."*

[383] The audit of case files included a case (DAF 31) involving an Iranian woman whose application was certified under NIAA 2002 Section 96 on the basis that she had received a one stop notice as her husband's dependant, and could have appealed earlier. The result was that no appeal could be brought against refusal of her asylum claim. Although an attempt was made to initiate judicial review proceedings to challenge the certificate, the court papers were not complete and the removal went ahead. There was a note on the file from a contact of the family which stated that the family had been detained on return to Iran.

- the same or virtually identical grounds; or
- grounds that could reasonably have been raised previously at the earlier judicial review.

In these circumstances, the determining authority is unlikely to suspend removal on receipt of a judicial review challenge.[384]

The reader is referred to section 16 of this report which addresses the issue of the extent to which judicial review may be considered to represent an effective remedy in the sense of the APD.

In Finland and France, there is no specific preliminary examination in which a formal decision can be taken not to further examine the application. Instead, subsequent applications are examined in either the accelerated or regular procedures, and a decision is taken on the application as such.

It is worth noting here that in France, applicants whose subsequent applications are rejected by the OFPRA have a right of appeal before the CNDA, as does any other applicant. However, if the subsequent application has been examined in the accelerated procedure (as is the case for 82.6% of subsequent applications), the appeal has no automatic suspensive effect.[385] Moreover, it is important to note that according to recent reports,[386] the rate of positive decisions taken by the CNDA on subsequent applications rejected by the OFPRA is relatively high (14.2% against 19.9% for the overall rate of positive decisions). On the other hand, subsequent applications are also subject to a higher rate of '*ordonnances*' by the CNDA than other applications.[387]

In Finland, a negative decision on a subsequent application, taken in the accelerated procedure, is immediately enforceable, unless otherwise ordered by the competent court.[388]

UNHCR notes that in Bulgaria an appeal against a decision not to further examine a subsequent application has suspensive effect.[389]

[384] Accessed via UKBA website 19 January 2009.
[385] See detailed analysis under section 16 on the right to an effective remedy.
[386] At the time of writing the national report (April 2009), the 2008 Activity Report for the CNDA was not yet published.
[387] A negative decision taken by a single judge without a hearing.
[388] Section 201 (2) and (3) Aliens Act 301/2004.
[389] Article 84 (4) LAR.

Recommendation

In line with Article 39 APD, applicants are entitled to an effective remedy following a negative decision on a subsequent application. This should include the right to seek a remedy against a decision rejecting the subsequent application on the grounds that no new elements have been submitted. UNHCR considers that while such an appeal right need not have automatic suspensive effect, it should, as a minimum, allow the applicant to request an interim measure to prevent removal, based on his or her particular circumstances, and that suspensive effect should apply while that request is being considered.