

Section 15

Border procedures

Article 35 (1) of the APD states that Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on applications made at such locations.

According to Article 35 (2) APD, when procedures, as set out in Article 35 (1), do not exist, Member States may maintain, subject to the provisions of Article 35 APD and in accordance with the laws or regulations in force on 1 December 2005, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide at the border or in transit zones as to whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter their territory. These procedures shall ensure in particular that the persons concerned:¹

- (a) are allowed to remain at the border or transit zones of the Member State, without prejudice to Article 7;
- (b) are immediately informed of their rights and obligations, as described in Article 10 (1) (a);
- (c) have access, if necessary, to the services of an interpreter, as described in Article 10 (1) (b);
- (d) are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 12, 13 and 14 APD;
- (e) can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 15 (1) APD; and
- (f) have a representative appointed in the case of unaccompanied minors, as described in Article 17 (1) APD, unless Article 17 (2) or (3) APD applies.

In case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why the application for asylum is considered as unfounded or as inadmissible.

The APD requires Member States to ensure that, in the framework of the procedures derogating from the basic principles and guarantees described in Chapter II, a decision is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum must be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of the APD.

The final provision of this Article states that in the event of particular types of arrivals, or arrivals involving a large number of third country nationals or stateless

¹ Article 35 (3) APD.

persons lodging applications for asylum at the border or in a transit zone, which makes it “*practically impossible to apply*” the provisions of Article 35 (1) or Article 35 (2) and (3), “*those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone*”.²

In UNHCR’s view, there is no reason for requirements of due process of law in asylum cases submitted at the border to be less than for those submitted within the territory. UNHCR therefore acknowledges that Article 35 (1) APD requires Member States to adhere to the basic principles and guarantees of Chapter II in procedures undertaken at the border or in transit zones. However, UNHCR regrets that Article 35 (2) permits Member States to maintain border procedures which do not comply with these standards. UNHCR strongly recommends that the states concerned adjust their procedures, with a view to bringing them, at least, into line with the agreed standards, outlined in particular in Chapter II of the Directive.³

UNHCR further notes with concern that, according to Article 35 (4) APD, confinement of asylum seekers is possible for up to four weeks. UNHCR considers confinement at the border to be equivalent to detention, in line with the jurisprudence of the ECHR. While UNHCR welcomes the introduction of a time limit, UNHCR recalls that asylum seekers should not, in principle, be detained. Given that detention is not an environment that is conducive for refugee status determination, the stay of an asylum seeker at the border should be as short as possible.⁴

Table 1 below sets out, with reference to Article 35 APD, whether the Member States of focus in this research have a border procedure, the categories of applicant to which border procedures apply and the purpose of the border procedure. Table 2 sets out which authority takes decisions in the border procedure, whether the border procedures fulfil basic procedural requirements and guarantees of Chapter II APD, the maximum period for which an applicant may be detained in the border zone, the maximum period for taking a decision in a border procedure, if there is a right of appeal against a negative decision taken in the border procedure, and if it has automatic suspensive effect.

² Article 35 (5) APD.

³ See UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, available at: <http://www.unhcr.org/refworld/docid/42492b302.htm>

⁴ *Ibid.*

Table 1: Application and purpose of border procedures, Article 35 APD		Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Does the country have a border procedure?		√		√	√ ⁵	√		√	√		√	√ ⁶	
Categories of applicant to which border procedures apply		No entry docs ⁷		Identity not established ⁸	No entry docs; safe country of origin ⁹	All applications at the border ¹⁰		No entry docs ¹¹			No entry docs		
Purpose of the border procedure	Determine Member State responsibility for examination of application under Dublin II Regulation	√ ¹²				√					√	√ ¹³	
	Determine if application is admissible under Article 25 of the APD					√						√	

⁵ The German Asylum Procedure Act (APA) contains two provisions in particular dealing with the procedures applying in case foreigners request asylum at the border (Sections 18 and 18a APA). At the land borders, due to the fact that Germany is surrounded by States participating in the Dublin system, as a rule, the review of Dublin criteria prevail over the provisions on entry. Therefore and for reasons of clarity, this table only contains basic information concerning the airport procedure (Section 18a APA).

⁶ While border procedures are established by national law, they are **not applied in practice**.

⁷ Foreigners who attempt to enter without the required entry documents including families with children.

⁸ Aliens whose identity was not established in a reliable manner, or who produced falsified or altered identity documents, unless they are vulnerable applicants [S. 73 (4) and 73 (7) ASA].

⁹ Section 18a sentence 1 APA (foreigners coming from a safe country of origin **and** requesting asylum upon entry); Section 18a sentence 2 APA (foreigners who are unable to prove their identity with a valid passport or other means of identification requesting asylum upon entry). An additional requirement is that the person concerned can be accommodated on the airport premises during the procedure.

¹⁰ Applications lodged at the border will be declared inadmissible or rejected if manifestly unfounded. If conditions for inadmissibility or for declaring them manifestly unfounded are not met, the applications will be channelled to the regular RSD procedure and the applicant will be admitted to Spanish territory.

¹¹ Foreigners applying for asylum at the border.

¹² If after an examination by the AO, the claim is considered admissible according to Dublin II Regulation, it is **sent to the CGRA** which must take a decision within 15 days.

¹³ The purpose of the border procedures, is defined in A. 58(1) of the IPA: *“(1) If an alien expresses his/her intention to file an application while he/she is in an airport transit zone or on board a ship in port, the competent authority shall accept the application and take a decision as soon as possible. Pending the issue of a final decision in an accelerated procedure, or a final decision within the Dublin procedures, the procedure of a national and European safe third country and the country of the first asylum, such person shall be present in such area. If the application is subject to regular procedure he/she shall be, after the performed sanitary-disinfection and preventive medical examination, accommodated in the asylum home.”*

Table 1: Application and purpose of border procedures, Article 35 APD		Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
	Check whether the application is a subsequent application	√ ¹⁴			√ ¹⁵								
	Examine whether an application is manifestly unfounded, unfounded or well-founded	√		√ ¹⁶	√ ¹⁷	√ ¹⁸		√ ¹⁹	√		√	√	

¹⁴ This aspect will be checked in the framework of the analysis of the claim.

¹⁵ German asylum law does not contain rules in this regard, however, in practice, Section 18a APA is also applied to subsequent applications. This means that in case the criteria for the conduct of a further asylum procedure are not fulfilled, the applicant is refused entry. This practice is explained with the argument that someone whose application to conduct a further asylum procedure is rejected, shall not be in a more favourable position with regard to the entry to the territory than someone whose application is rejected as manifestly unfounded after applying for asylum for the first time. (Information provided by the determining authority (BAMF)).

¹⁶ Explanatory memorandum to A379 states that in border procedures “it shall be also examined whether it is possible to allow their entry into the territory in relation to the procedure on international protection”. The memorandum also states the need to consider with regard to Article 31 of GC, whether the alien has come directly from a country where s/he was threatened, and with regard to the relevance of reasons stated by the alien in his/her application from the point of view of international protection procedure. It is also mentioned that the presence of the alien in detention is necessary in order to eliminate the danger of illegal crossing of state borders of the Czech Republic during the procedure, and in order to safeguard the departure of the alien after a final decision in the procedure.

¹⁷ Section 18a APA does not limit the examination to a decision of whether the application is well-founded or manifestly unfounded, but would also allow a decision that the application is simply unfounded. However, in practice, such a decision is not taken, since a simple rejection does not provide a reason for denying entry. In 2008, in the majority of cases (454 out of 649), the persons concerned were admitted to the territory, since the determining authority (BAMF) informed the border authority that a decision cannot be taken within the short time frame set by law for the airport procedure (Section 18a (6) No. 1 APA). In all 174 cases in which the airport procedure was carried out, a decision was taken that the application was manifestly unfounded. (BAMF brochure “Asyl in Zahlen”, published: 13 July 2009, table on p. 53).

¹⁸ The determination of the well foundedness of applications is not foreseen as one of the purposes of the border procedure.

¹⁹ Article L.221-1 of the *Ceseda*: “an alien who arrives in France by rail, sea or air and who (a) is refused leave to enter French territory or (b) applies for asylum may be held in a waiting zone [...] for the time strictly necessary to arrange his departure and, if he is an asylum seeker, to investigate whether his application is manifestly unfounded”.

Table 2: Operation of border procedures, Article 35 APD		Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Which authority takes decisions in the border procedure?	The determining authority - Art. 4 (1) APD	√ ²⁰		√ ²¹	√ ²²	√			√ ²³		√ ²⁴	√	
	Another authority – Art. 4 (2) APD							√ ²⁵					
Do the border procedures fulfil basic procedural requirements/ guarantees of Chapter	is allowed to remain at the border/in transit zone during the procedure?	√ ²⁶		√	√	√		√	√		√	√	

²⁰ The authority taking decisions in the border procedure is CGRA, the determining authority.

²¹ The authority taking decisions in the border procedure is DAMP, the determining authority.

²² In the framework of the decision to grant /refuse entry to the territory, the border police decides whether the statement made by the person concerned is a **request** for asylum. Subsequently, the determining authority (BAMF) is responsible for taking the decisions with regard to the formal asylum application.

²³ The Head of ARD in ADGPH is the determining authority. After the entry into force of the PD 81/09, the "determining authority" or "competent authority" to decide are the Directors of the Police Directorates where the application has been lodged.

²⁴ The authority taking decisions in the border procedure is the Immigration and Naturalisation Service (IND) (in mandate of the State Secretary of Justice). This is the determining authority.

²⁵ The Ministry of Immigration (i.e. another authority under Article 4 (2) APD) takes the decision to grant or refuse leave to enter the territory relying on a written recommendation from OFPRA (the determining authority).

²⁶ If the asylum seeker is not admitted to the territory, s/he will be issued an order of "*refoulement*" (Article 52/3 § 2 of the Aliens' Act). In practice, however, the asylum-seeker will remain at the border during the procedure.

Table 2: Operation of border procedures, Article 35 APD		Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
II APD? Do they ensure the applicant:	is immediately informed of his/her rights and obligations?	√ ²⁷		√ ²⁸	√ ²⁹	√		√ ³⁰	√ ³¹		√	√	
	has access to an interpreter?	√		√	√ ³²	√		√ ³³	√ ³⁴		√	√	
	is given a personal interview?	√		√ ³⁵	√ ³⁶	√		√ ³⁷	√ ³⁸		√	√	

²⁷ After registration.

²⁸ The applicant is informed of some rights immediately (S. 73 ASA), of others within 15 days from declaring intent to apply for international protection (S. 10/3 ASA).

²⁹ The border police informs those persons whose statements have been qualified as a request for asylum of their rights and obligations during the procedure, and provides information in the form of a leaflet on the asylum procedure (including the personal interview and legal remedies). The determining authority (BAMF) informs applicants upon filing the formal asylum application of their rights and obligations and also provides information at the outset of the personal interview. (Information provided by the BAMF).

³⁰ After receiving the asylum application report prepared by a border police officer ("*officier de quart*") in the waiting zone.

³¹ In law the border procedure fulfils the basic guarantees of Chapter II of APD. However, in practice, the border procedure presents **significant problems and deficiencies**, as does the in-territory asylum procedure. According to interviewees the information received by asylum seekers is inadequate mainly because of a lack of interpreters. Also, on many occasions, there is no provision of any information.

³² Both the questioning by the border police as well as the personal interview conducted by the BAMF take place in the presence of an interpreter.

³³ If necessary to read the content of the asylum application report or during the interview. Interpretation is provided by phone or *sur place*.

³⁴ In practice there are significant deficiencies in interpretation at border zones since there are no permanent personnel of interpreters.

³⁵ Unless his/her claim can be decided as inadmissible under S. 10a ASA.

³⁶ Section 18a (1) sentence 4 APA: "*The Federal Office shall interview the foreigner in person without delay.*"

³⁷ The interview is carried out by OFPRA. However the report of the interview not transmitted to the asylum seeker but upon request by his/her lawyer when the decision is challenged in the administrative tribunal.

³⁸ According to interviewees, the personal interview is extremely problematic due to inadequate and untrained staffing.

Table 2: Operation of border procedures, Article 35 APD		Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
	can consult a lawyer or legal adviser?	√		√ ³⁹	√ ⁴⁰	√		√ ⁴¹	√ ⁴²		√ ⁴³	√ ⁴⁴	
	if a separated child, can s/he have a representative appointed under Art 17?	√ ⁴⁵		√ ⁴⁶	√ ⁴⁷	48		√	√ ⁴⁹		√	√	

³⁹ Although this possibility is given by law, at the airport the lawyer or legal adviser may experience difficulties in 1) being present during the interview, 2) accessing the case file of the applicant and 3) being granted power of attorney.

⁴⁰ Section 18a (1) sentence 5 APA: “*The foreigner shall immediately thereafter [i.e. after the personal interview] be given the opportunity to contact a legal adviser of his choice, unless he has already secured legal counsel.*” According to the Federal Constitutional Court, German Basic law does not require that applicants have the possibility to contact a lawyer before the personal interview, since the legislator attaches great importance to a spontaneous and uninfluenced statement of the reasons for applying for asylum (Federal Constitutional Court, official collection, 94, 166, (204)). In practice, applicants are informed by the border police, that they may contact a lawyer at any time during the asylum procedure. (Cf. No. 4 of the information sheet of the border police.) If an application is rejected as manifestly unfounded, legal counselling (independent of the determining authority) needs to be provided free of charge.

⁴¹ Article L.221-4 *Ceseda*: “*The foreigner who is held in a waiting zone is informed in the best delays that he/she may request the assistance of an interpreter and of a doctor, communicate with a legal adviser or with any person of their choice and leave at any time the waiting zone for a destination outside France. This information is given in a language he/she understands*”. However, usually asylum seekers do not consult a legal adviser before the interview with OFPRA. No legal adviser is admitted to the interview.

⁴² The consultation is at the applicant’s own cost since there is no free legal assistance available at the borders.

⁴³ After the first interview.

⁴⁴ At his/her own cost.

⁴⁵ This is not the case for separated children originating from EU Member States.

⁴⁶ Separated minors may not be detained at the airport under Section 73(7) ASA. However, if they arrive by plane, a guardian may sometimes be appointed at the airport.

⁴⁷ A foreigner who is at least 16 years of age is capable of performing procedural acts within the asylum procedure (Section 12 (1) APA)). Children under the age of 16 need representation to perform such acts (e.g. filing an asylum application).

⁴⁸ At the border , the minor will automatically be given entry to Spain and put under the care of the minors authority who will appoint a guardian.

⁴⁹ As interviewees claim, the practice is inconsistent and only in a few cases is a representative actually appointed.

Table 2: Operation of border procedures, Article 35 APD	Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Maximum period for which an applicant can be detained in border zone?	2 mm ⁵⁰		120 dd ⁵¹	30 dd ⁵²	72 hrs ⁵³		20dd	4 wks		No limit ⁵⁴	4mm ⁵⁵	
Maximum period for taking a decision in the border procedure (if any)?	15 days		4 wks	2 days ⁵⁶	4 days			4 wks		6 wks	ASAP ⁵⁷	

⁵⁰ From the time the applicant lodges the application and is detained. This delay is suspended during the 15 days period foreseen to lodge an appeal before the CALL. In the case of unaccompanied children, when there is no doubt about their age or once their age has been determined, an alternative to detention exists. These unaccompanied children are accommodated for a maximum of 30 days in a special observation and orientation centre.

⁵¹ From the moment the asylum seeker is detained.

⁵² If after the airport procedure has been conducted, entry to the territory is refused and an immediate return is not possible, the person shall be accommodated in the transit zone. Without a judicial order, this stay shall not exceed a period of 30 days. However, it can be prolonged in the case of a judicial order. Such an order is only admissible, if it can be expected that the return will be possible within the period of time indicated in the order. (Section 18a (6) No. 4 APA in conjunction with Section 15 (6) Residence Act).

⁵³ This refers to the period for the asylum application to be dealt with which is 72 hours (while the old implementing decree is in force) +2 working days + 2 working days. Exceptionally the 72 hours can be extended to a maximum 10 working days if the authorities are considering the application of an exclusion clause + 2 working days (while the old implementing decree is in force) + 2 working days.

⁵⁴ The procedure to decide on the application will last a maximum 6weeks, with a prolongation up to a maximum of a further 2 weeks. If the outcome of the application is a negative decision, detention in order to deport can take 6 months and even up to 18 months as allowed under the Return Directive.

⁵⁵ This is not defined in the law. However, an analogy could be drawn with the general provisions on detention which define a time limit of 3 months and the possibility of additional 1 month of prolongation. It is problematic that the provision on detention does not provide a ground for detention in the case of border procedures. Since the right to free movement is a constitutional right, any derogation should explicitly be defined in the law. The only possibility would be in the case of the accelerated procedure on certain grounds as defined in the A. 51 (1) indent 2 of the IPA (detention of applicants).

⁵⁶ The two-day period of the airport procedure begins with the formal application for asylum with the branch office of the BAMF assigned to the respective airport (Section 18a (6) No.2 APA.) Neither the arrival at the airport, nor the request for asylum expressed to the border police is the decisive point in time in this regard. In case the appeal court is not able to decide on the application for a temporary legal remedy within 14 days, the applicant has to be admitted to the territory (Section 18a (6) No. 3 APA).

⁵⁷ Article 58(1) of the IPA only defines that in the border procedure, an application should be lodged and decided upon as soon as possible/in the shortest time possible.

Table 2: Operation of border procedures, Article 35 APD	Be	Bg	Cz	De	Es	Fi	Fr	Gr	It	Nl	Si	UK
Is there a right of appeal against negative decision in border procedure?	v	na	v	v ⁵⁸	v ⁵⁹	na	v ⁶⁰	v ⁶¹	na	v	v	na
If yes, does it have automatic suspensive effect?	v		v ⁶²		v ⁶³		v			⁶⁴	⁶⁵	

⁵⁸ In case of rejection as manifestly unfounded, there is a deadline of three days for an application for an interim measure (Section 18a (4) APA). The deadline for the submission of the main application for appeal is disputed (see Marx, Commentary on the Asylum Procedure, 7th edition, 2009, section 18a, paragraph 177); in practice, it is advisable to submit the main application together with the application for an interim measure. The reasoning of the appeal may be submitted within another four days if such an extension of the deadline is applied for (see Federal Constitutional Court, official collection, vol. 94, 166, (207)). Theoretically, a rejection as simply “unfounded” may also be taken in the airport procedure within the deadline of two days which would not lead to a denial of entry. However, as mentioned before, this situation is not relevant in practice.

⁵⁹ A re-examination of the decision by the same authority who took it can be requested in two days. An administrative review can be requested within one month while a judicial review can be requested within 2 months from the negative decision.

⁶⁰ The decision to refuse leave to enter the country as an asylum seeker can be challenged before the administrative Court (« *Tribunal administratif* ») within 48 hours after its notification.

⁶¹ A request for judicial review on a point of law may be submitted to the Council of State. See section 16 of this report on the extent to which this may constitute an effective remedy.

⁶² Appeal to the 1st instance court (Regional Court, RC) always has suspensive effect. In case the judgment of the RC becomes effective while the applicant is still accommodated in the reception centre in the transit zone of the international airport, the cassation appeal against that judgment has no longer suspensive effect. In practice those are cases when judgment is (1) delivered within 120 days from the date of declaration of intent to apply for international protection, and at the same time (2) the applicant is still residing at the airport, as a) according to DAMP reasons for not allowing entry into the territory still apply, or b) decision on not allowing entry has not been annulled by CC Prague by that time.

⁶³ While the re-examination has automatic suspensive effect, an interim measure should be requested in case of an administrative review and judicial appeal.

⁶⁴ The right to appeal has no automatic suspensive effect. The applicant has to request an interim measure, within 24 hours after the rejection.

⁶⁵ The right to appeal has no automatic suspensive effect. The applicant has to request an interim measure.