

## **Section 16**

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## Section 16

### The right to an effective remedy

#### Introduction

It is a general principle of European Union law, reiterated in Article 47 of the Charter of Fundamental Rights of the European Union, that individuals are entitled to an effective remedy if a right guaranteed by Community law is affected.<sup>1</sup> The case law of the European Court of Justice has established that Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the application of provisions of Community law.<sup>2</sup>

The APD reflects this general principle of Community law insofar as it provides that *“Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal”*.<sup>3</sup>

The term ‘effective remedy’ appears in numerous international human rights treaties and, therefore, monitoring and supervisory bodies have elaborated the standards required of an ‘effective remedy’.<sup>4</sup> As Contracting States to the European Convention on Human Rights, EU Member States must abide by these international legal standards and reflect them in their national legislation and procedures. The notion of an effective remedy in relation to a claim for international protection requires, according to the European Court of Human Rights, rigorous scrutiny of an arguable claim because of the irreversible nature of the harm that might occur.<sup>5</sup> The remedy must be effective in practice as well as in law. It must take the form of a guarantee and not of a mere

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<sup>1</sup> Article 47 of the Charter of Fundamental Rights of the European Union states that *“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”* Recital 8 of the APD states that *“This Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union.”*

<sup>2</sup> Case C-327/02, decision of 16 November 2004, paragraph 27; C-50/00, *Union de Pequenos Agricultores*, 2002.

<sup>3</sup> Article 39 (1) APD. Recital 27 of the APD states that *“It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty.”*

<sup>4</sup> Article 13 of the European Convention on Human Rights (ECHR) and Article 2 of the UN International Covenant on Civil and Political Rights. Article 13 of the ECHR states: *“Everyone whose rights and freedoms as set forth in [this] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”*

<sup>5</sup> *Jabari v Turkey*, no. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000.

statement of intent or a practical arrangement<sup>6</sup>, and it must have automatic suspensive effect.<sup>7</sup>

Some expert commentators consider that the obligations laid down in Article 6 ECHR, which enshrines the right to a “*fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”, apply to all Community rights, including administrative proceedings such as asylum procedures.<sup>8</sup> A further basis for the right to an effective remedy in asylum cases under international law is found in the ICCPR,<sup>9</sup> which provides safeguards against expulsion<sup>10</sup> and an appeal right against decisions which could lead to forced removal.<sup>11</sup>

This research did not intend to and, therefore, did not carry out a systematic audit of appeal decisions.<sup>12</sup> Instead, the findings set out in this section are based primarily on interviews with stakeholders, including appeal judges, the staff of appeal authorities, lawyers and NGOs; and on an overview of the relevant national laws, regulations and administrative provisions.

### **The provision of a right to appeal**

Given that it is a general principle of European Community law that individuals are entitled to an effective remedy if a right guaranteed by Community law is affected; Article 39 (1) APD sets out the circumstances in which Member States are obliged to

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<sup>6</sup> *Conka v. Belgium*, no. 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002.

<sup>7</sup> *Gebremedhin [Gaberamadhien] c. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007. See below for the Court’s interpretation of the term “automatic suspensive effect”.

<sup>8</sup> See ‘A Manual for Refugee Law Judges relating to European Council Qualification Directive 2004/83/EC and European Council Procedures Directive 2005/85/EC’, John Barnes, 2007 at p. 54 which states that “[i]t is important also to emphasise that the ECJ has not accepted the limitation which the ECtHR placed upon the extent of its jurisdiction by classifying asylum and immigration claims as claims to which Article 6 ECHR did not apply. The effect of bringing the issue of effective protection onto a Community law base is, therefore, to increase the scope of the protection offered to claimants to include Article 6 ECHR rights” and at pg. 52 cites paragraph 420 of ‘European Asylum Law and International Law’, Hemme Battjes, Martinus Nijhoff Publishers, Leiden, Boston, 2006 which states “[i]nternational law has served as a source of inspiration for the general principles of Community law concerning appeal proceedings, as well as for Article 47 Charter. But these principles, and this Charter provision offer in several respects more extensive protection. To begin with, they require an effective remedy if the right guaranteed by Community law is affected (the ‘arguable claim’ requirement does not apply). Moreover, the obligations laid down in article 6 ECHR apply to all Community rights (thus not only to ‘civil rights and obligations or criminal charges’) – including administrative proceedings, such as asylum procedures.”

<sup>9</sup> UN General Assembly, International Covenant on Civil and Political Rights, Articles 2(3), 13 and 14, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>.

<sup>10</sup> Articles 13, 14 ICCPR.

<sup>11</sup> Article 2(3) ICCPR. For detailed analysis, see Wouters, *International standards for the Protection from Refoulement*, 2009, pp 412-3 and 419.

<sup>12</sup> Although the judgments of two courts in the Czech Republic which were available to UNHCR were examined, and some appeal decisions were reviewed in Slovenia.

provide an effective remedy before a court or tribunal against a decision on an application for asylum:

*1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:*

*(a) a decision taken on their application for asylum, **including** a decision: [emphasis added]*

*(i) to consider an application inadmissible pursuant to Article 25(2);*

*(ii) taken at the border or in the transit zones of a Member State as described in Article 35(1);*

*(iii) not to conduct an examination pursuant to Article 36;*

*(b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;*

*(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;*

*(d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);*

*(e) a decision to withdraw[of] refugee status pursuant to Article 38.*

It should be noted that Article 39 (1) (a) APD is non-exhaustive. UNHCR interprets Article 39 (1) APD to require that any negative decision in connection with an application for international protection is subject to the right of the claimant to an effective remedy from a court or tribunal.<sup>13</sup> This is regardless of whether the decision is taken by the determining authority or another designated competent authority in accordance with Article 4 (2) APD.

The following Member States of focus in this research have transposed or reflected Article 39 (1) APD in national legislation, regulations or administrative provisions, by providing for a right of appeal or judicial review against all decisions relating to an application for international protection: Belgium,<sup>14</sup> Bulgaria,<sup>15</sup> the Czech Republic,<sup>16</sup>

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<sup>13</sup> The wording used is 'a decision taken on their application for asylum' which is then followed by a list of three examples which is clearly non-exhaustive because of the use of the word 'including'. There does not appear to be any decision in connection with an asylum application which will not be subject to the right of the claimant to seek an effective remedy from a court or tribunal subject to the exception stated in Article 39 (5) APD, where an applicant has been granted a status which offers the same rights and benefits under national and Community law as refugee status by virtue of the Qualification Directive.

<sup>14</sup> Article 39/2 of the Aliens Act.

<sup>15</sup> Article 120 of the Constitution of the Republic of Bulgaria. Decisions relating to the Law of Asylum and Refugees (LAR) are subject to a right of appeal before a court in accordance with the provisions of Chapter Seven LAR. These appeal rights can be divided into three groups: 1) appeal against decisions under the Dublin procedure which are heard before the Administrative Court of Sofia City (Articles 84 (1, 3 & 5) and

France,<sup>17</sup> Germany,<sup>18</sup> Greece,<sup>19</sup> Slovenia,<sup>20</sup> Italy,<sup>21</sup> the Netherlands,<sup>22</sup> Spain<sup>23</sup> and the UK.<sup>24</sup>

In Finland, there is a general right of appeal against a refusal of an asylum application,<sup>25</sup> but an exception to this is that decisions on discontinuing the assessment of certain

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85 (1, 3 & 4) LAR); 2) appeal against decisions taken in transit or regional reception centres concerning applicants' rights during proceedings and negative decisions taken in the accelerated procedure which are heard before the Administrative Court of the place of registered residence (Article 84 (2-5) and Article 85 LAR); 3) appeal against decisions by the determining authority (SAR) concerning status determination, discontinuation or revocation of status, revocation of temporary protection and family reunification which are heard before the Supreme Administrative Court of the Republic of Bulgaria (SAC) (Articles 87-90 LAR). All other decisions taken under LAR are subject to a right of appeal in accordance with the general procedural rules of the Administrative Procedures Code and the Civil Procedures Code as stipulated in Article 91 LAR. (Amended, SG No. 30/2006, SG No. 52/2007). "The provisions of the Administrative Procedures Code and the Civil Procedures Code shall apply to all matters not regulated by this Chapter". Thus all decisions are subject to a right of appeal in accordance with Article 39 (1) APD.

<sup>16</sup> Section 65 CAJ and Section 32 ASA.

<sup>17</sup> Article 39 (1) APD is transposed by Article L.731-2 *Ceseda* and Article R.733-6 *Ceseda*. However, Articles 39 (1) (a) (i), (ii) and (iii) are not transposed as they refer to provisions of the APD which are not transposed and are not applicable in France. Article 39 (1) (c) APD is transposed by Article R.733-6 *Ceseda*; Article 39 (1) (d) APD is transposed by Article L.213-9 *Ceseda* and Article 39 (1) (e) is transposed by Article R.733-6 *Ceseda*. Article R.733-6 *Ceseda*: The CNDA examines :

1° Appeals filed against decisions of the OFPRA granting or refusing asylum status.

2° Appeals filed against decisions of the OFPRA withdrawing asylum status.

3° Appeals filed to review a case if it is alleged that the decision of the CNDA was based on fraudulent information.

4° Appeals filed against decisions rejecting a subsequent application. (Unofficial translation).

<sup>18</sup> Section 42 Code of Administrative Court Procedure; and Section 74 APA. There is a right of appeal to the administrative court against a negative decision on an application for international protection, including a refusal to re-open the examination of an application after its withdrawal or discontinuation, a decision not to further examine a subsequent application, a decision to deny entry at the border or in the transit zones, and a decision to withdraw refugee status. In Germany, the concept of inadmissibility, in terms of Article 25 APD, is not applied.

<sup>19</sup> During the period of this research, according to Article 25 of PD 90/2008, applicants had the right to appeal against a decision rejecting their asylum application or against a decision rejecting a subsequent application as unfounded or against a decision withdrawing their refugee status. They also had the right to appeal against a decision ruling their asylum application as inadmissible. Article 25 of PD 90/2008 has been repealed by Presidential Decree 81/2009. Only Article 29 of PD 90/2008 applies which provides applicants with the right to apply to the Council of State for an annulment of a negative decision issued by the competent authorities.

<sup>20</sup> A. 74 -77 IPA – Judicial Protection Procedure.

<sup>21</sup> According to Article 35 (1) of the d.lgs. 25/2008, a judicial appeal may be lodged against any decision of a CTRPI to the *Tribunale* (Civil Court).

<sup>22</sup> Article 8:1 General Administrative Law Act.

<sup>23</sup> Articles 21 and 39 ALR. And Article 29 of the New Asylum Law.

<sup>24</sup> Section 82 and 83 of the Nationality Immigration and Asylum Act 2002 normally provides a right of appeal but there are exceptions when there is no statutory right of an in-country or out of country appeal and applicants must seek judicial review of the decision.

<sup>25</sup> The Finnish *Ulkomaalaislaki* (Aliens' Act 301/2004), section 190, states that a decision by the Finnish Immigration Service may be appealed to the competent administrative court.

applications are not afforded a right of appeal.<sup>26</sup> This stems from the fact that it is the decision on expulsion, which is included in asylum decisions, which is appealable whereas decisions on implicit withdrawal, which result in the discontinuation of the examination, do not include a decision on expulsion. UNHCR notes that this fails fully to comply with Article 39 (1) (b) APD, which requires an effective remedy to be provided against refusals to re-open an application after its discontinuation.

France has not transposed Article 39 (1) (b) APD in its legislation and does not provide the right to an effective remedy before a court or tribunal against a refusal to re-open the examination of an application, after its discontinuation following explicit withdrawal (*désistement*). France has not transposed Articles 19 and 20 APD on explicit and implicit withdrawal in its national legislation, but in practice, the examination of an application is discontinued following explicit withdrawal. However, an applicant who wishes to pursue an application, which was previously withdrawn or considered withdrawn, cannot have the examination re-opened. S/he can however submit a new application without having to raise new elements. This constitutes a remedy tantamount to the re-opening of the examination. In practice, applications which are implicitly withdrawn may be struck off ("*radiation*") but examination would be re-opened if requested by the applicant.<sup>27</sup> Nevertheless, UNHCR considers that national legislation should provide for an effective remedy in order to ensure compliance with Article 39 (1) (b) APD.

In the United Kingdom, there is no statutory in-country right of appeal for an applicant whose asylum or human rights-based claim is certified as 'clearly unfounded' on the basis that it is without substance, or the applicant is entitled to reside in a safe country of origin.<sup>28</sup> There is only an out-of-country right of appeal. There is no statutory right of appeal for applicants removed on safe third country grounds, save that an in-country right of appeal is available where the applicant claims that removal to a state, not subject to the Dublin II Regulation, would breach human rights and this claim has not been certified as unfounded.<sup>29</sup> There is also no right of statutory appeal where there is a refusal to re-open a claim treated as implicitly withdrawn or abandoned, or where further submissions are not considered to amount to a "fresh claim" (subsequent application),<sup>30</sup> or where it is deemed that a claim could have been raised in a previous appeal or made earlier.<sup>31</sup> In addition, there is no in-country right of appeal against a negative decision on an asylum claim, where the applicant is to be deported on national security grounds, save in cases which raise human rights issues.<sup>32</sup> The UK authorities

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<sup>26</sup> Section 191 (1) of the Finnish *Ulkomaalaislaki* (Aliens' Act 301/2004).

<sup>27</sup> Information provided by the Head of the Legal Department of the determining authority OFPRA.

<sup>28</sup> Nationality Immigration and Asylum Act 2002 s94.

<sup>29</sup> Section 33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

<sup>30</sup> As defined in Immigration Rule 353.

<sup>31</sup> Section 96 of the Nationality Immigration and Asylum Act 2002.

<sup>32</sup> Nationality, Immigration and Asylum Act 2002 s 97A (2) & (3). In national security cases, appeals are heard by the Special Immigration Appeals Commission; see Special Immigration Appeals Commission Act 1997.

claim to have transposed the requirements of Article 39 (1) APD on the basis that where there is no in-country statutory right of appeal, the applicant may still seek judicial review of the decision to the higher courts.<sup>33</sup>

Similarly, it should be noted that the scope of review by the appeal authority (the Council of State) in Greece is also restricted to a review of the lawfulness of the decision at first instance and not the facts, i.e. judicial review.

The issue of whether judicial review can provide an effective remedy in the asylum and immigration context is a contested one which is discussed further below.

### **The appeal authority**

Article 39 (1) APD requires an effective remedy before a “*court or tribunal*” but does not explicitly define either term. However, UNHCR considers that this can be understood to mean a review body which is independent of the first instance determining authority, and which has power in most cases to consider questions of fact and law.<sup>34</sup>

All of the Member States surveyed provide for an appeal against a decision by the determining authority to an independent administrative court or tribunal, namely:

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<sup>33</sup> Annex A of the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007. Judicial review is an application to the supervisory jurisdiction of the higher courts.

<sup>34</sup> See UNHCR, APD comments 2005; see also UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paragraphs s 41 and 43, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>

Belgium,<sup>35</sup> Bulgaria,<sup>36</sup> the Czech Republic,<sup>37</sup> Finland,<sup>38</sup> France,<sup>39</sup> Germany,<sup>40</sup> Greece,<sup>41</sup> Italy,<sup>42</sup> the Netherlands,<sup>43</sup> Slovenia,<sup>44</sup> Spain<sup>45</sup> and the United Kingdom.<sup>46</sup>

Member States	First tier appeal authorities
Belgium	Council for Aliens Law Litigation
Bulgaria	Supreme Administrative Court Administrative Court (of place of residence) Administrative Court of Sofia
Czech Republic	Regional Court
Finland	Helsinki District Administrative Court
France	National Court of the Right of Asylum

<sup>35</sup> Since its modification in 2006, the Aliens Act now allows for the possibility of an appeal to an independent and impartial administrative tribunal, specifically the Council for Aliens Law Litigation (CALL) against any decision taken on an asylum application. The CALL was established under the Law of 15 September 2006 reforming the Council of State and establishing the Council for Aliens Law Litigation.

<sup>36</sup> Decisions of the determining authority may be appealed before the administrative courts, according to the system of territoriality in existence since March 2007, and the Supreme Administrative Court of the Republic of Bulgaria.

<sup>37</sup> Regional Administrative Court in the location in which the applicant resides – normally an asylum centre. Appeals against a decision to refuse entry are made to the City Court of Prague.

<sup>38</sup> Asylum appeals are lodged with the Helsinki District Administrative Court (*Helsingin Hallinto-Oikeus*), holding six chambers of which two deal with asylum proceedings.

<sup>39</sup> All negative decisions of OFPRA can be appealed to the National Court of the Right of Asylum (*Cour Nationale du Droit d'Asile* or CNDA) except for a refusal to allow entry to the territory from the border procedure which is appealable to the Administrative Court.

<sup>40</sup> Section 42 Code of Administrative Court Procedure; and Section 74 APA.

<sup>41</sup> Article 29 of PD 90/2008 applies which provides applicants with the right to apply to the Council of State for an annulment of a negative decision issued by the competent authorities.

<sup>42</sup> Under 35 (1) of the d.lgs. 25/2008, the "*Tribunale in composizione monocratica*" is the competent authority. This is the ordinary civil court but consists of only one rather than three judges which is generally the case under the Italian legal system. It is a full judicial authority.

<sup>43</sup> District Courts are responsible for reviewing the decision of the determining authority.

<sup>44</sup> The first judicial instance is the Administrative Court based in Ljubljana.

<sup>45</sup> An appeal against a final administrative decision on the inadmissibility of a claim is reviewed by the administrative judges of the National High Court (*Juzgados Centrales de lo Contencioso-Administrativo*). The judge's decision can be appealed to the Administrative Chamber of the National High Court (*Sala de lo Contencioso-Administrativo de la Audiencia Nacional*). A negative decision in the regular RSD procedure will be reviewed directly by the Administrative Chamber of the National High Court. Cassation recourse can be lodged at the Supreme Court. In cases of revocation of refugee status, the decision can only be appealed to the Supreme Court as a single instance. This exception is due to the fact that the revocation decision is adopted by the Council of Ministers. In Spain, there is provision for an optional prior administrative appeal against a refusal decision (excluding revocation decisions) but this does not impact on the right to a judicial appeal. This optional administrative review is different from the request for re-examination of inadmissibility decisions at borders which has automatic suspensive effect.

<sup>46</sup> The Asylum and Immigration Tribunal (AIT) is part of the Tribunals Service which is an executive agency of the Ministry of Justice, providing administrative support to the main UK-wide tribunals. The Ministry of Justice is a separate Department of Government from the Home Office. An exception to this is that the Special Immigration Appeals Commission (SIAC) deals with appeals against decisions made by the determining authority to deport on national security grounds, or for other public interest reasons. SIAC is also part of the Tribunals Service. Procedures for appealing to the AIT are set down in the Asylum and Immigration Tribunal (Procedure) Rules 2005, Statutory Instrument 2005, No. 230.



Member States	First tier appeal authorities
	Administrative Court
Germany	Administrative Court
Greece	Council of State
Italy	Civil Court
Netherlands	District Court
Slovenia	Administrative Court
Spain	Administrative judges of the National High Court Administrative Chamber of the National High Court
UK	Asylum and Immigration Tribunal

Of the Member States listed above, the following have in place specialist asylum/immigration tribunals: Belgium (Council for Aliens Law Litigation: CALL), France (The National Court of the Right of Asylum: CNDA) and the United Kingdom (The Asylum and Immigration Tribunal: AIT).

The Helsinki District Administrative Court in Finland is a *quasi* specialist body as it is the only administrative court of the many district administrative courts which has competence in matters relating to asylum.

Of the states under focus in this research, only Greece, during the period of this research in early 2009, had in place an appeal body which was not fully independent of the first instance determining authority and, therefore, not in compliance with Article 39 (1) APD. At the time of UNHCR's research, negative decisions were reviewed by the Appeals Board which operated within the Ministry of Interior and was supported administratively by the Greek Police Headquarters – the determining authority.<sup>47</sup> The Board was composed of two representatives from the Ministry of Interior (one acting as chairperson) of which one from the determining authority and the other from the General Secretariat of Public Order which had responsibility for the determining authority; two representatives from the Ministry of Foreign Affairs; one representative from UNHCR; and one representative from the Athens Bar Association.<sup>48</sup> The decision on the appeal was taken by majority vote. In the case of a split vote, the Chairperson's vote was counted twice. Government representatives interviewed claimed that the Board was independent, citing the fact that Board members representing government departments were not party to the first instance decision.<sup>49</sup> However, given its composition, UNHCR did not consider that the Appeals Board satisfied the necessary requirement of independence.

<sup>47</sup> There were three Appeals Boards, all located in Athens.

<sup>48</sup> Articles 25, 26 and 2 (p) of PD 90/2008.

<sup>49</sup> Article 26 PD 90/2008 stipulated the constitution of the Appeals Board, and it stated that the person who issued, at first instance, the decision under appeal cannot participate in the Appeals Board as the representative of the Aliens' Directorate. The Aliens' Directorate of the Greece Police Headquarters (ADGPH) claimed that the Board was independent. They referred to the fact that Greek Police Headquarters only provided the Appeals Board with secretarial support and that ADGPH's representative on the Board was a police officer who had not taken part at first instance (interview with S1).

Since the period of UNHCR's research in Greece, a new law entered into force in Greece on 20 July 2009 which abolished the Appeals Board.<sup>50</sup> Any appeals which were pending at the time of entry into force of the new law were to be decided by the Deputy Minister of Interior. Therefore, as of 20 July 2009, the only legal remedy on appeal against a negative decision by the determining authority is an application for judicial review to the Council of State for an annulment of the decision on the grounds of an error of law or procedure. The extent to which this can be considered an 'effective remedy' is further addressed below.

In some Member States, different courts are charged with responsibility for appeals, depending on the type of decision taken by the determining authority. This is the case in Bulgaria where the relevant appeal authority may be the Supreme Administrative Court or the Administrative Court in the area of residence or the Administrative Court of Sofia, according to the nature of the decision.<sup>51</sup>

In France, negative decisions by the determining authority on applications for international protection are subject to review by the specialised National Court of the Right of Asylum (CNDA), but decisions refusing entry within the framework of the border procedure are reviewed by administrative courts.<sup>52</sup>

Finally, as mentioned above, in the UK, negative decisions may be appealed in-country to the specialised Asylum and Immigration Tribunal except when the determining authority decides that the claim is clearly unfounded<sup>53</sup> or where there is a national

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<sup>50</sup> Presidential Decree 81/2009.

<sup>51</sup> Law on Judiciary (Prom. SG No.64/07.08.2007, last amended SG No.42/05.06.2009). This can be categorized as follows: 1) appeals against decisions under the Dublin procedure which are heard before the Administrative Court in Sofia (Articles 84 (1, 3 & 5) and 85 (1, 3 & 4) LAR); 2) appeals against decisions taken in transit or regional reception centres concerning applicants' rights during proceedings and negative decisions taken in the accelerated procedure which are heard before the local Administrative Court (Article 84 (2-5) and Article 85 LAR.); 3) appeals against decisions by the determining authority (SAR) concerning status determination, discontinuation or revocation of status, revocation of temporary protection and family reunification which are heard before the Supreme Administrative Court of the Republic of Bulgaria (SAC) (Articles 87-90 LAR). All other decisions taken under LAR are subject to a right of appeal in accordance with the general procedural rules of the Administrative Procedures Code and the Civil Procedures Code as stipulated in Article 91 LAR.

<sup>52</sup> The issue of whether to reform the appeal procedure and give the CNDA the jurisdiction to review all decisions, including entry refusals, is the subject of debate. The Government commissioned a working group in 2008 ("*Commission Mazeaud*") which published a report on this issue. The issue will probably be debated soon by the Senate in the framework of a proposal submitted by a member of the Senate (« *Proposition de loi relative au transfert du contentieux des décisions de refus d'entrée sur le territoire français au titre de l'asile, Rapport n° 329 (2008-2009) de M. Jean-René LECERF, fait au nom de la commission des lois, déposé le 8 avril 2009* ») which suggests that litigation related to decisions refusing leave to enter the country as asylum seekers (currently falling under the jurisdiction of the administrative court) should be transferred to the CNDA.

<sup>53</sup> Nationality, Immigration and Asylum Act 2002 s94.

security issue.<sup>54</sup> Furthermore, there is no statutory in-country right of appeal in most safe third country cases<sup>55</sup>, or where a decision is made not to re-open the asylum procedure following withdrawal, or not to further examine a subsequent application,<sup>56</sup> or where a subsequent application could have been raised in a previous appeal<sup>57</sup> or a claim could have been made earlier.<sup>58</sup> In these cases, the applicant must seek judicial review before the High Court in England and Wales, or the Court of Session in Scotland or the High Court of Northern Ireland.

In some Member States, whether an appeal is heard by a single judge or a panel of judges may depend on the nature of the decision taken by the determining authority. For example, in Spain, an appeal against a decision of inadmissibility is reviewed by an administrative judge of the National High Court, whereas an appeal against a decision taken in the regular procedure is reviewed by the Administrative Chamber of the National High Court. In Germany, administrative courts are organised in chambers.<sup>59</sup> However, as a rule of general administrative law, the chamber shall assign the appeal to one of its members for decision.<sup>60</sup> Thus, while a chamber is generally composed of three professional judges and two honorary judges,<sup>61</sup> decisions are mostly taken by a single judge. The same is true for the asylum procedure, as according to Section 76 (1) APA, appeals resulting from the implementation of the Asylum Procedure Act are referred to one of the chamber's members for a decision as an individual judge, unless the case presents particular difficulties of a factual or legal nature or unless the legal matter is of fundamental significance.<sup>62</sup> In 2007, only 8.2% of all appeals were dealt with by the full chamber.<sup>63</sup>

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<sup>54</sup> Nationality, Immigration and Asylum Act 2002 s 97A (2)&(3). In national security cases appeals are heard by the Special Immigration Appeals Commission, see Special Immigration Appeals Commission Act 1997.

<sup>55</sup> Section 33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

<sup>56</sup> When it is deemed that it does not constitute a 'fresh claim' as defined in Immigration Rule 353.

<sup>57</sup> Section 96 (1) of the Nationality Immigration and Asylum Act 2002.

<sup>58</sup> Section 96 (2) of the Nationality Immigration and Asylum Act 2002.

<sup>59</sup> Section 5 (2) Code of Administrative Court Procedure. Several different chambers within each of the courts deal with appeals relating to applications for international protection and claims are often assigned to the chambers by country of origin with most chambers responsible for several countries of origin.

<sup>60</sup> Section 6 (1) Code of Administrative Court Procedure.

<sup>61</sup> Section 5 (3) Code of Administrative Court Procedure.

<sup>62</sup> Section 76 (1) APA. The same rules apply in general administrative law (Section 6 (1) Code of Administrative Court Procedure. However, it is interesting to note that while the general rules allow judges to sit alone only after their first year of appointment (Section 6 (1) 2 Code of Administrative Court Procedure), the Asylum Procedures Act provides for this possibility already six months after appointment (Section 76 (5) APA).

<sup>63</sup> Data of the Federal Statistical Office – "*Rechtspflege Verwaltungsgerichte*" – 2007, published on 13 January 2009.

## Access to the appeal right in practice

The notion of effectiveness implies that a person should be able to access the remedy in not only legal terms, but also practical terms.<sup>64</sup> The practicalities which are inherent in exercising a judicial right of appeal are notoriously technical and complex. It is crucial, therefore, that Member States minimise requirements and facilitate access to the right in practice.

Through interviews with various stakeholders in the Member States of focus, UNHCR sought to find out whether the legislative right of appeal was accessible in practical terms. Information received indicated that, in practice, there are various and numerous impediments for prospective appellants in some Member States. The following constitutes a list of just some of the obstacles cited by interviewees:

- Inadequate information provided to applicants on how to appeal, and to which appeal body.
- Extremely short time-limits within which to appeal.
- Lack of linguistic assistance for applicants with regard to information on how to appeal and with the submission of the appeal.
- A shortage of legal advisers and a lack of competent legal advisers.
- Applicants prevented from lodging the appeal in person as required by national procedural rules.
- Difficulties in accessing the case file in a timely way, in order to know the grounds upon which the negative decision is based and prepare the appeal accordingly.
- The appellants' physical access to the court or tribunal is hindered by distance and lack of financial resources to travel.

In some Member States, a number of these impediments may combine to render the right of appeal ineffective in practice. Moreover, the obstacles listed above tend to be exacerbated when the applicant is in detention, and shortened time limits generally apply.

Examples of how these impediments occur in practice are outlined below.

### *Information on how to appeal*

Article 9 (2) APD requires all Member States to ensure that, where an application is rejected, "*information on how to challenge a negative decision is given in writing*". Moreover, Article 10 (1) (e) APD imposes a strict requirement that, together with the

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<sup>64</sup> See *Gebremedhin [Gaberamadhien] c. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, which reiterates this legal principle established in the case-law of the European Court of Human Rights.

decision, applicants are given “*information on how to challenge a negative decision in accordance with the provisions of Article 9(2)*” in a language which they may reasonably be supposed to understand.<sup>65</sup> The aim of these provisions is to guarantee that when the applicant receives a negative decision, s/he also knows, at that point in time and in practical terms, how to appeal the decision, to which specific appellate body, within what time-frame and contact details with regard to legal assistance.<sup>66</sup> Information which simply states the right to appeal, or provides generic or legalistic information rather than practical instructions on how to challenge the decision, does not fulfill this requirement. These practical instructions must be specific to the applicant, and must be communicated, according to the APD, in a language that the applicant may reasonably be supposed to understand, although UNHCR would encourage Member States to provide this information in a language which the applicant actually understands, for it to fulfill its purpose.

As explained in greater detail in section 3 of this report, UNHCR’s research has revealed deficiencies in the provision of information provided to applicants in some Member States.

In France, practical information on how to appeal is provided only in French, with the notification of the decision. In Greece, no practical information on how to appeal is provided with the decision, and one interviewee maintained that most of the time, the generic information provided with the decision is not translated, stating “*when applicants receive the decision, they come to the Greek Council for Refugees (GCR) or another NGO, because they do not know what the paper they have been given is about. Almost all of our cases allege that police officers do not inform them, and just tell them in English ‘go to GCR’*”.<sup>67</sup>

In Italy, the most significant barrier frustrating access to an effective remedy arises from deficiencies concerning the provision of information on how to appeal, with the notification of the first instance refusal decision. UNHCR’s audit of case files and decisions found that, in some cases, there was a failure to specify the name of the court competent to hear the appeal in the individual case,<sup>68</sup> and that the time limits for appeal (either 15 or 30 days) were not always explicitly stated.<sup>69</sup> UNHCR is concerned about

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<sup>65</sup> However, the third paragraph of Article 9 (2) APD sets out an exception when it states “*Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant.*”

<sup>66</sup> See also section 5 of this report on the requirements for a decision.

<sup>67</sup> Interview with S8.

<sup>68</sup> Instead, refusal notices simply state literally and generically the provisions of Article 35 (1) of the d.lgs 25/2008.

<sup>69</sup> The audit of case files revealed that time limits were not expressly mentioned in a number of the decisions examined: D/52/M/AFG/N, D/53/M/AFG/A, D/54/M/NIG/A, D/55/F/ERI/N, D/59/M/TUR/S, D/60/F/ETI/S, D/63/M/PAK/N, D/64/M/PAK/N, D/65/M/GUI/N.

the prejudicial impact upon would-be appellants resulting from these omissions of essential information.

Good practice has been observed in Finland, where all decisions are accompanied by guidelines on how to file an appeal. These guidelines are available in 10 languages and are interpreted or translated if necessary, together with the contact details of the Refugee Advice Centre (an NGO providing legal advice). Similarly, in Germany, each negative decision is accompanied by detailed information on how to appeal.<sup>70</sup> If the applicant is not represented by a lawyer, this information is available in 22 languages.<sup>71</sup> Moreover, in the UK, information sheets on how to appeal are provided with refusal decisions, and are available in 24 languages.<sup>72</sup>

### **Recommendations**

**Information accompanying a negative decision should specify precisely how to lodge the appeal, name the relevant appeal body, and state any applicable time limits and the consequences of a failure to adhere to the time limits. Such information should also state whether the appeal has automatic suspensive effect and, if not, which steps need to be taken to request that any expulsion order is not enforced. This must be in a language that the applicant understands.**

**Information should include details on how to obtain free legal assistance. It should also refer to the rules governing submission of subsequent (repeat) applications. This must be in a language that the applicant understands.**

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

### *Filing the appeal in person*

The most significant problems precluding access to an effective remedy were reported in Greece where, at the time of UNHCR's research, appellants were required to lodge their applications for appeal in person at the Aliens Directorates. However, interviewed

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<sup>70</sup> A separate page is attached to the decision which states the relevant administrative court responsible and sets out the period within which an action would need to be filed, its form and content, the time limit for submitting the facts and evidence on which the action is based, the consequences of failing to observe the time limit, whether the appeal has suspensive effect and, if not, whether it is possible to suspend deportation.

<sup>71</sup> Information provided by the determining authority, BAMF.

<sup>72</sup> Amharic, Arabic, Albanian, Chinese, Dari, Farsi, French, Kinyarwanda, Kurmanji, Lingala, Ndebele, Portuguese, Punjabi, Pashto, Romanian, Russian, Spanish, Shona, Swahili, Somali, Tamil, Turkish, Urdu and Vietnamese.

stakeholders<sup>73</sup> indicated that the Aliens Directorate of Athens (where the overwhelming majority of appeals were lodged) was severely understaffed, which in practice led to applicants failing to submit an appeal on time, because they were refused entrance to the Directorate. NGOs stated that they had received many complaints from asylum applicants who had missed appeal deadlines, even though they had attempted on a daily basis to submit their appeal.<sup>74</sup> Applicants alleged that every day they received the same response from the authorities: “Come tomorrow, the building is overcrowded”. This was clearly not in compliance with Article 39 (1) APD.<sup>75</sup>

### **Recommendation**

**Member States must ensure that they organize and resource their appeal systems in such a way that they are able to meet the standards of an effective remedy, and which enable appellants to lodge their appeal. Where state practice requires notice of appeal to be lodged in person, sufficient facilities and human resources must be in place to receive all applicants wishing to lodge an appeal, and acknowledgement in writing of the filing of an appeal must be provided in all cases without exception.**

### *Access to the case file*

A specific problem was identified in Bulgaria in this area. Although a new legal provision has been introduced granting an appellant a *de jure* right to access his/her file after the decision has been served,<sup>76</sup> precise rules on access are not elaborated further in the IRR.<sup>77</sup> One stakeholder reported that problems concerning timely access to the case file are one of the main obstacles faced by appellants in trying to secure an effective remedy.<sup>78</sup>

Problems of access also occur in France, where the applicant’s case file is sent by the determining authority to the only appeal court (CNDA), located in Paris. When the appeal is likely to be decided without an oral hearing, the court sends a letter in French to the appellant informing him/her that the case file can be consulted, upon request, at the premises of the CNDA in Paris and after 15 days’ advance notice. There is no translation of the letter and, even if the content of the letter is understood, appellants

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<sup>73</sup> Interviews with S7, S8, and S15.

<sup>74</sup> Interview with S8.

<sup>75</sup> An application to the Council of State for annulment of a decision can be lodged before any Greek authority: Article 19 (2) PD 18/1989.

<sup>76</sup> Article 76 (6) LAR; SG No. 52/2007. The decision is served by interpreting its text to the applicant and providing a copy of the decision in Bulgarian.

<sup>77</sup> Internal Rules for Conducting Procedures on Granting Protection in the State Agency for Refugees with the Council of Ministers (IRR).

<sup>78</sup> Interview with a lawyer working for a Bulgarian NGO. However, it should be noted that UNHCR has the right to information and access to a case file at any stage of the first instance procedure, as stipulated in Art. 3, paragraph 2 of the LAR.

who do not reside in Paris may not have a practical opportunity to consult the case file.<sup>79</sup>

Similarly, in Spain, at the time of UNHCR's research, in the case of a negative decision of inadmissibility, the accelerated appeals procedure was applied and by law, access to the case file was only granted after the appeal had been lodged.<sup>80</sup> Once the judge received the appeal, s/he instructed the competent authority to send the administrative case file to the appellant at least 15 days in advance of the scheduled hearing. This required the appellant to submit an appeal without having seen the case file. OAR informed UNHCR, and the Madrid Bar Association and NGOs confirmed, that in practice, appointed lawyers were granted earlier access. However, as the European Court of Human Rights has held, a mere practical arrangement is not a substitute for a legally certain, binding provision. The New Asylum Law now provides that the applicant has a right to be granted access to his/her case file at any point in the procedure. At the time of writing, the impact of the New Asylum Law on practice was as yet unclear.

In Belgium, following notification of the first instance negative decision, appellants and their lawyers can rapidly request and receive electronically from the determining authority (the CGRA) the case file and the decision.<sup>81</sup> However, lawyers have reported that it is difficult to obtain the case file from the Aliens Office (AO), which has an important role notably in terms of cases falling within the terms of the Dublin II Regulation, and in the preliminary examination of subsequent applications.<sup>82</sup>

#### **Recommendation**

**The designated authority must ensure that the applicant is, upon notification of the negative decision, entitled to access his/her case file containing relevant information. In cases where disclosure might seriously jeopardize national security, or the security of persons providing information, restrictions on access may be applied, on an exceptional, proportionate basis.**

#### *Cost of travel to the court or tribunal*

Article 13 of the European Convention on Human Rights imposes on Contracting States the duty to organize their judicial systems in such a way that their courts can meet their international obligations.

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<sup>79</sup> Information provided in interviews with the Head of Legal Department of CNDA; the NGO Forum Réfugiés; and a lawyer.

<sup>80</sup> Article 78 (3) LJCA.

<sup>81</sup> However, it should be noted that 'confidential' documents may not be communicated.

<sup>82</sup> See section 14 on subsequent applications, which describes the role of the AO.



In France, notwithstanding the fact that appellants reside throughout France, the competent appeals body to review negative decisions by the determining authority OFPRA, the CNDA, is situated in one location in Paris.<sup>83</sup> Appellants who are accommodated in a reception centre (CADA) have travel costs to the Court paid, but this is not the case for those whose applications were examined in an accelerated procedure. This is a significant impediment to appellants appealing against negative decisions in the accelerated procedure who reside outside Paris.

By contrast, the UK's specialized Asylum and Immigration Tribunal has 16 hearing centres located throughout the UK, in recognition of the fact that appellants reside throughout the UK.<sup>84</sup>

In Italy, the competent court to which an appeal should be lodged against a decision of the determining authority is the civil court located in the area of the Court of Appeal of the district in which the Territorial Commission is based, or, for asylum seekers hosted in a CARA or detained in a CIE, the competent court is the civil court located in the area of the Court of Appeal of the district where the centre is located.<sup>85</sup> The Commission for Constitutional Affairs of the Chamber of Deputies, in its advisory opinion of 17 October 2007, suggested that the competent court should rather be that located in the area of the court of appeal of the district where the applicant actually receives the decision of the Territorial Commission, or where the applicant resided when s/he submitted the application for international protection.

### **Recommendation**

**Member States should ensure that full travel costs to the court or tribunal are reimbursed to those appellants who lack sufficient financial resources.**

#### *Time limits within which to lodge appeal*

In practical terms, the applicant must have sufficient time and facilities in order to undertake all the steps required to exercise the right of appeal. This is also in line

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<sup>83</sup> Missions are organized to the overseas territories to hear appellants; but there are no hearing centres in any other areas of France other than Paris.

<sup>84</sup> There are 16 hearing centres at Belfast, Birmingham, Bradford, Bromley, London ( 2 centres), Glasgow, Harmondsworth ( by the detention centre) , Hatton Cross ( by Heathrow Airport), Manchester, Newport, North Shields, Stoke on Trent, Sutton, Walsall, and Yarl's Wood ( by the detention centre). In other Member States, administrative courts located throughout the territory are responsible for appeals. For example, in Germany, territorial jurisdiction of courts of first instance lies with one of the 52 administrative courts within whose district the person concerned is obliged to reside under the APA: Section 52 No.2 sentence 3 Code of Administrative Court Procedure. If territorial jurisdiction is not determined by this criterion, the administrative court within the district of which the administrative act was issued is responsible: Section 52 No. 3 Code of Administrative Court Procedure. In the Netherlands, there are 19 district courts throughout the territory.

<sup>85</sup> Article 35 of d.lgs. 25/2008.

with the principle of equality of arms.<sup>86</sup> In this regard, short time limits for lodging appeals may render a remedy ineffective. European Community law has established that:

*“the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by Community law”*.<sup>87</sup>

Article 39 (2) APD requires that *“Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.”* However, it does not prescribe the nature of such rules or the length of these time limits which is therefore left to the discretion of Member States. It is regrettable that the APD does not reflect Community Law in this regard, and does not explicitly stipulate that any time-limit imposed must be reasonable and allow the applicant sufficient time to exercise his or her rights under the APD. Nevertheless, any such time-limits imposed nationally must be in accordance with general legal principles of Community law and must not render practically impossible or excessively difficult the exercise of the right of appeal under Article 39 (1) APD. Similarly, they must not obstruct the exercise of the right to legal assistance and/or representation under Article 15 (2) APD, or the fulfillment of guarantees under Article 10 (2) APD.

Any time limit set should, therefore, permit a prospective appellant to undertake all the required procedural steps in order to submit the appeal, taking into account the nature of the procedures in each state, the steps required to access legal assistance, and the fact that the prospective appellant is a foreigner who may not understand the language of judicial proceedings. As such, applicants will need time:

- To understand the decision of the determining authority and any information provided on how to challenge the decision; particularly in those states that currently do not provide a written or oral translation of the reasons for the decision, and where the applicant has to seek assistance with translation.
- To secure legal assistance. More time will be required in those Member States where the applicant is required to apply for legal assistance through a legal aid scheme. The time required to do this (bearing in mind that the applicant is likely to require advice and linguistic assistance) and receive a decision should be taken into account.

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<sup>86</sup> Article 34 ECHR read in conjunction with Article 13 ECHR.

<sup>87</sup> *Unibet vs Justitiekanslern*, Case C-432/05, European Union: European Court of Justice, 13 March 2007, paragraph 47; and *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case C-33/76. European Union: European Court of Justice, 16 December 1976, paragraph 5.

- To request and/or be given access to his/her case file. The time limit should take into account the time required by the determining authority to give the applicant access to his/her case file.
- To consult a legal adviser and discuss the grounds for the appeal. This should take into account the time needed to secure the services of an interpreter to facilitate consultation between legal adviser and applicant, when necessary.
- To draft the appeal: the amount of time necessary will be dependent on whether legal argumentation and evidence has to be submitted by the deadline for filing the appeal, or whether separate deadlines apply.
- In addition, in those Member States where there is no automatic suspensive effect of some appeals, time is necessary for the prospective appellant and his/her legal representative to apply for an interim measure to prevent imminent expulsion.

UNHCR is concerned that in some Member States, the time limits imposed may be too short, given the procedural steps that need to be taken and the general circumstances of applicants. These time limits may render excessively difficult the exercise of the right to an effective remedy conferred by the APD. They may result in a failure to exercise the right of appeal, or in incomplete or hastily-completed appeals which run the risk of being dismissed.

In some of the Member States surveyed, the time limit for filing an appeal varies depending on the procedure in which the negative decision was taken, or the type of decision that was taken by the determining authority; as well as whether the applicant is in detention or not. Uniquely, in Italy, variations in time limits depend on the grounds upon which an appellant was sent to an Identification and Expulsion Centre (CIE) or a Reception Centre (CARA).<sup>88</sup> UNHCR's audit of decisions revealed that some decisions did not state the applicable time limit. UNHCR recommends that the application of time limits should be clarified, and all decisions must state the applicable time limit, to ensure compliance with Article 9 (2) APD.

In contrast, Finland, France<sup>89</sup> and Spain have one time limit for lodging a judicial appeal, regardless of the procedure in which the negative decision was taken or the type of decision taken. However, it should be noted that in Finland, the time limit for the enforcement of the expulsion order may be considerably shorter with regard to certain

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<sup>88</sup> Article 35 (1) of the d.lgs. 25/2008.

<sup>89</sup> This is the case in France with regard to appeals to the CNDA.

decisions than the time limit within which the appeal should be lodged.<sup>90</sup> As a result, *de facto*, with regard to these decisions, a request for suspensive effect would need to be lodged before the time limit for the enforcement of the expulsion order and, consequently, before the time limit for lodging an appeal.

In some Member States, there may be two relevant and applicable time limits: a time limit within which the appeal must be filed, and the time limit within which the legal argumentation in support of the appeal must be submitted.<sup>91</sup> For example, in Germany, the time limit for submitting an appeal against a decision taken in the regular procedure is two weeks from the service of the decision<sup>92</sup> or one week, where the law provides that this is the deadline for requesting suspensive effect.<sup>93</sup> By contrast, the time limit for the submission of the legal reasoning for the appeal is one month from the date the decision was served, irrespective of the deadline for filing the appeal.<sup>94</sup> Similarly, in the Netherlands, the time limit within which an appeal against a decision taken in the regular procedure must be filed is four weeks from the service of the decision, but one week when the application is rejected in the accelerated 48 hours procedure. In the decision, it is stated that the asylum seeker should, within an hour of notification of the decision, alert the determining authority (IND) that s/he intends to appeal. On the other hand, legal argumentation with supporting evidence can be submitted up until 12.00 the day before the session of the court will take place. Courts sessions normally take place within 10 days of lodging the appeal. In Spain, moreover, following a negative decision on the merits, there is a two month time limit within which the appeal must be lodged. After the appeal has been lodged and the administrative file is handed to the appellant's lawyer, the appellant has 20 days to submit the legal reasoning for the appeal.<sup>95</sup>

In Greece, there is a time limit for filing an application for annulment and for the submission of legal argumentation which is 60 days from the date of service of the decision. However, the appellant can submit further legal argumentation up until 15

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<sup>90</sup> When a negative decision has been taken on a subsequent application on the grounds that there are no new elements (or a decision to transfer the application to another Member State under the Dublin II Regulation), the expulsion order may be executed immediately upon the decision being taken. As such, there may be no effective opportunity to lodge an appeal against the decision. When the determining authority takes a negative decision on grounds of safe country of asylum or origin, or declares the application manifestly unfounded, an expulsion order is enforceable 8 days after notification, which is considerably shorter than the time limit to lodge an appeal. See subsection below on the suspensive effect of appeals for further information.

<sup>91</sup> Evidence in support of the legal argumentation may need to be submitted with the legal argumentation, or another time limit may apply for the submission of evidence.

<sup>92</sup> Section 74 (1) APA.

<sup>93</sup> Section 74 (1) APA. This applies in cases in which the application is rejected as irrelevant or manifestly unfounded (Section 36 (3) 1 APA), or where a subsequent application was filed and the resumption of proceedings was denied (Section 71 (4) APA refers to Section 36 APA).

<sup>94</sup> Section 74 (2) APA.

<sup>95</sup> Article 52 of Law 29/1998 on Administrative Jurisdiction.

days before the hearing of the appeal. There is no specific time limit for the submission of evidence. In Finland, by contrast, there is a time limit for filing an appeal, but no specific time limit for the submission of legal argumentation and evidence.

In other Member States, there is only one applicable time limit within which the appeal must be filed, and the reasons and legal argumentation for the appeal set out. This is so in, for example, Belgium, Bulgaria, the Czech Republic, Italy, Slovenia, Spain<sup>96</sup>, and the UK.<sup>97</sup>

In all Member States surveyed, time limits run from either the date of service of notice of the decision or the following day. Rules also vary regarding whether the time limit includes or excludes non-business days. Time limits for filing an appeal in the Member States surveyed varied from between 2 days and 60 days, as set out in the following table.

Member States	Regular Appeal Procedure (days)	Accelerated Appeal Procedures (days)
Belgium	30 <sup>98</sup>	15 <sup>99</sup>
Bulgaria	14 <sup>100</sup>	7 <sup>101</sup>
Czech Republic	15 <sup>102</sup>	7 <sup>103</sup>

<sup>96</sup> With regard to an appeal against an inadmissibility decision, the reasoning has to be submitted when lodging the appeal: Article 78 of Law 29/1998 on the Administrative Jurisdiction.

<sup>97</sup> In the UK, a notice of appeal must set out the grounds of that appeal (Asylum and Immigration Tribunal (Procedure) Rules 2005, rule 8 (1) (c).

<sup>98</sup> The petition for appeal must be lodged within 30 calendar days after notification of the decision (Article 39/57, § 1 of the Aliens Act).

<sup>99</sup> If an appeal is lodged against a CGRA decision by an applicant who finds him/herself in administrative detention (for instance in the framework of a border procedure), the CALL will then apply an accelerated procedure (Article 39/77 of the Aliens Act). The petition for appeal must still be lodged within 15 calendar days of notification of the decision.

<sup>100</sup> Article 87 LAR. Decisions relating to Articles 34 (3) LAR (family reunification), 39a (2) LAR (family reunification as regards beneficiaries of temporary protection), 75 (1) Items 2 and 4 LAR (refusal to grant refugee and/or humanitarian status), 78 (5) LAR (withdrawal or discontinuation of status) and 82 (2) LAR (discontinuation of temporary protection) may be appealed in a period of 14 days following service of the decision. For any decisions under LAR where time limits are not specified then general administrative rules will apply, which provide for a 14-day time limit (Article 149 (1) of the Administrative Procedures Code). These are not working days, however if the term ends on a non-working day, the first working day following this is considered the end day.

<sup>101</sup> Article 84 (1) and (2) LAR. Decisions relating to Article 51 (2) LAR (rights of the alien during proceedings) and Article 70 (1), items 1 and 2 LAR (negative decision or discontinuation in the accelerated procedure) must be appealed within a time limit of 7 days. This also applies to decisions under the Dublin procedure.

<sup>102</sup> Section 32 (1) ASA provides that an appeal against decisions on applications must be lodged within 15 days of delivery of a decision.

<sup>103</sup> Under Section 32 (2) ASA, a 7 day time limit is an exception to the general 15 day time limit for decisions which: b) were served on an alien in a detention centre; or c) decisions dismissed as inadmissible usually on Dublin grounds or if a subsequent application was not admitted.

Member States	Regular Appeal Procedure (days)	Accelerated Appeal Procedures (days)
Finland <sup>104</sup>	30 <sup>105</sup>	N/A
France	30 <sup>106</sup>	2 <sup>107</sup>
Germany	14 <sup>108</sup>	7 <sup>109</sup> or 3 <sup>110</sup>
Greece	60 <sup>111</sup>	N/A
Italy	30 <sup>112</sup>	15 <sup>113</sup>

<sup>104</sup> The time limit for appeal follows the general rule in the *Hallintolainkäyttölaki* (the Act on Administrative Judicial Procedures 586/1996, as in force 29.4.2009), section 22 which states that an appeal must be made within 30 days of notice of the decision. The time limit is the same for all decisions made by the determining body.

<sup>105</sup> However, note that a decision taken in the accelerated procedure may be enforceable immediately or after 8 days' notice. The time within which an appeal may be lodged is nevertheless 30 days for all decisions.

<sup>106</sup> Under Article L.731-2 *Ceseda* as far as decisions taken on the application for asylum by OFPRA are concerned, applicants have one calendar month to lodge an appeal before the CNDA from the notice of decision. This applies for all OFPRA decisions whatever the procedure applied. There is no accelerated procedure at CNDA level.

<sup>107</sup> In the border procedure, the appeal against a decision refusing leave to enter the territory must be lodged in French within 48 hours before the administrative court, in accordance with Article L.213-9 *Ceseda*.

<sup>108</sup> Section 74 (1) APA.

<sup>109</sup> Section 74 (1) in conjunction with Section 36 (3) 1 APA. This relates to decisions that an application is irrelevant or manifestly unfounded, or where a subsequent application was filed and the conduct of further proceedings was denied. The deadline for filing an appeal is one week, as it is provided in law that a request for suspensive effect must be submitted within one week.

<sup>110</sup> This applies to decisions that an application is manifestly unfounded taken in the airport procedure. This is the deadline for an application for an interim measure for granting leave to enter and preliminary protection against deportation: Section 18a (4) APA. The deadline for the submission of the main application for appeal is disputed (see Marx, Commentary on the Asylum Procedure Act, 7<sup>th</sup> edition, 2009, Section 18a, paragraph 177). In practice, it is advisable to submit the main appeal application together with the application for an interim measure since the latter is an accessory to the first. The reasoning of the appeal may be submitted within another four days if such an extension of the deadline is applied for (information provided by lawyer X3). Theoretically, a rejection 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, in practice, this situation has not been relevant.

<sup>111</sup> After the amendment of PD 90/2008 by PD 81/2009, the appeal procedure has ceased to exist. According to Article 2 of PD 81/2009, the only remedy against any negative decision is an application for annulment that can be lodged before the Council of State. The time limit for such an application is 60 days after the date of service of the decision (Article 46 of PD 18/1989).

<sup>112</sup> Article 35 (1) of the d.lgs. 25/2008. This time limit applies if the applicant was not sent to a reception centre (CARA) or Identification and Expulsion Centre (CIE).

<sup>113</sup> Article 35 (1) of the d.lgs. 25/2008. This time limit applies if the applicant was sent to a reception centre (CARA) or Identification and Expulsion Centre (CIE) on the grounds stipulated by Art. 20, 2 (a, b and c) d.lgs. 25/2008, i.e. when identification is necessary because the applicant is undocumented, when the applicant has applied for international protection after s/he was stopped by the police having evaded or attempted to evade border controls, or having been stopped by the police in conditions of irregular stay; and by Article 21 ,1 (a ,b and c) d.lgs 25/2008 i.e. when the applicant is in the conditions stated in Art.1F of the 1951 Geneva Convention, the applicant was previously condemned in Italy for a serious crime, or the applicant had been issued with an expulsion order. Clarification regarding the application of the grounds should be provided in the forthcoming implementing regulation for legislative decree 25/2008.

Member States	Regular Appeal Procedure (days)	Accelerated Appeal Procedures (days)
Netherlands	28 <sup>114</sup>	7 <sup>115</sup>
Slovenia <sup>116</sup>	15	3
Spain	60 <sup>117</sup>	N/A
United Kingdom <sup>118</sup>	10 <sup>119</sup> or 28 <sup>120</sup>	5 <sup>121</sup> or 2 <sup>122</sup>

UNHCR considers that some of the time limits imposed by Member States are too short, and may impede the right to an effective remedy.

For instance, the 48 hour period within which applicants at the border in France, and applicants in the detained fast-track procedure in the UK, must submit an appeal is insufficient. It may not allow the applicant to exercise his/her right to obtain legal assistance, nor for the legal representative to adequately prepare relevant argumentation and additional evidence. This is exacerbated in France by the fact that all documentation must be submitted in French, and no translation or interpretation is provided. In the UK, women are said to face particular problems in such procedures because the processes are too fast for many women to have a realistic chance to disclose gender-related persecution, particularly rape and sexual violence.<sup>123</sup> In the UK, particular problems also arise with refusals on safe third country grounds, which are subject to a three-day time limit which in practice affords insufficient time to lodge a judicial review challenge.<sup>124</sup>

<sup>114</sup> Article 69 (1) Aliens Act 2000 stipulates that the time limit for filing an appeal is four weeks.

<sup>115</sup> Article 69 (2) Aliens Act 2000 states, in derogation from Article 69 (1), that the time limit is one week if the asylum application was rejected within a specific number of hours. The Aliens Circular C10/1.1 clarifies the “specific number of hours” by stating that this is 48 procedural hours, i.e. the maximum duration of the accelerated procedure.

<sup>116</sup> Article 74 (2) IPA: “Against the decision issued in a regular procedure, the action may be brought within 15 days after the receipt of the decision. Against the decision issued in an accelerated procedure, the action may be brought within three days after the receipt of the decision.”

<sup>117</sup> Article 29 of the New Asylum Law and Article 46 of the Law on the Administrative Jurisdiction.

<sup>118</sup> These time limits relate to appeals to the Asylum and Immigration Tribunal as set down in the AIT (Procedure) Rules 2005.

<sup>119</sup> Section 7 (1) (b) AIT (Procedure) Rules 2005: 10 days for non-detained cases in the regular procedure.

<sup>120</sup> Section 7 (2) AIT (Procedure) Rules 2005: 28 days for out of country appeals.

<sup>121</sup> Section 7 (1) (a) AIT (Procedure) Rules 2005: 5 days for detained cases in the regular procedure.

<sup>122</sup> The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 Rule 8 (1) state that the appeal must be lodged no later than 2 days after the day on which the applicant is served with notice of the immigration decision (Statutory Instrument 2005 No 560).

<sup>123</sup> Cutler, S, *Refusal Factory: Women’s experiences of the detained fast track asylum removal process at Yarls Wood Immigration Removal Centre*, Bail for Immigration Detainees, September 2007. See also Human Rights Watch, *Fast-tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*, 2010.

<sup>124</sup> UNHCR has expressed the view that Part 5 of Schedule 3 does not allow the applicant to challenge the application of the safe third country concept effectively in accordance with Article 27 (2) of the Directive, the 1951 Convention and other international human rights instruments. See UNHCR Comments on the UK implementation of Council Directive 2005/85/EC page 25.

Similarly, in Slovenia, the 72 hour time limit for lodging appeals under the accelerated procedure seriously compromises the ability of applicants to submit an appeal. This is further exacerbated when the decision is issued on a Friday and the deadline expires on Monday at midnight, as no exception is made for non-business days. Moreover, it must be borne in mind that applicants do not receive legal assistance during the first instance procedure and, therefore, do not generally have a legal representative. It was reported that the three-day time limit does not provide sufficient time for applicants to secure one of the six lawyers only which were operating in practice at the time of this research.<sup>125</sup>

In Germany, for applications rejected as manifestly unfounded in the airport procedure and the applicant denied entry to the territory, there is a three-day deadline from the date when the decision is served within which the applicant can apply for an interim measure against deportation. It is disputed in the jurisprudence as well as the literature whether the appeal must also be filed within three days, or whether the one-week deadline applies which is relevant for appeals against a decision that the application is manifestly unfounded.<sup>126</sup> However, in practice, it is considered advisable to file the appeal together with the application for an interim measure against deportation within the three day deadline. Even though there is no explicit deadline for submitting the reasoning for the appeal, this should be submitted together with the application for an interim measure or, upon request, by the specific deadline agreed to by the responsible court.<sup>127</sup> The Federal Constitutional Court has ruled that such short deadlines may only be in conformity with the Constitution if it is guaranteed that the applicant immediately has access to qualified and independent legal advice.<sup>128</sup> At Frankfurt Airport, a lawyer assigned to the case for this purpose receives the full case file on the evening before the decision is served, in order to allow for a preparation of the meeting with the applicant.<sup>129</sup> If the lawyer submits an appeal within the three day deadline, s/he may at the same time request an extension of the deadline by another four days to provide the reasoning for the appeal. The overall period of seven days is considered sufficient by one lawyer interviewed by UNHCR.<sup>130</sup> However, it is evident that these time limits can place lawyers under serious constraints when they have concurrent commitments to several clients.

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<sup>125</sup> Although approximately 10 lawyers have been granted a license under tender by the MOI.

<sup>126</sup> See Marx, *Commentary on the Asylum Procedure Act*, Section 18a, paragraph 174 et seq. with numerous citations of jurisprudence.

<sup>127</sup> See Marx, *Commentary on the Asylum Procedure Act*, 7<sup>th</sup> edition, Section 18a, paragraph 181. According to information provided by lawyer X3 this is usually an extension of four days.

<sup>128</sup> See Marx, *Commentary on the Asylum Procedure Act*, 7<sup>th</sup> edition, Section 18a, paragraph 171; BVerfGE 94, 166; the ruling concerned the constitutionality of a one week deadline in the accelerated procedure (rejection as manifestly unfounded in the airport procedure).

<sup>129</sup> UNHCR did not obtain significant information regarding the practice at other airports.

<sup>130</sup> X3. This lawyer is frequently involved in airport procedures.



In the Czech Republic, the seven day time limit, which applies *inter alia* when an appeal is lodged in a detention centre, is considered by stakeholders to be too short in practice. This is at least partly because legal advisers are only able to visit those in detention once or twice a week. By the time the applicant has the opportunity to consult with a legal adviser, there may be insufficient time left to access the case file and prepare relevant legal arguments. This is exacerbated by the fact that applicants do not receive a copy of their interview record,<sup>131</sup> and no new legal argumentation may be submitted after the seven day time limit.<sup>132</sup> The difficulties faced by asylum seekers were recognized by the Constitutional Court, which annulled a similar provision setting a seven day time limit for appeals against a decision that an application is manifestly unfounded.<sup>133</sup>

Concern has also been expressed by the Italian Commission for Constitutional Affairs of the Chamber of Deputies, in its advisory opinion conveyed on 17 October 2007, which stated that the 15 day time limit did not take into account the circumstances of the appellant or the requirements to be fulfilled in Italy.<sup>134</sup>

UNHCR highlights, as good practice, the approach taken in Spain, where the time limit of 60 days for filing an appeal is the same for all appeals regardless of the type of decision made by the determining authority. In Finland, although there is also one time limit of 30 days for filing an appeal regardless of the type of appeal taken by the determining authority, there are concerns that some decisions may be enforced before the time limit has elapsed.<sup>135</sup>

### Recommendations

**The APD should be amended to stipulate that Member States shall provide for a reasonable period of time within which the applicant may exercise his or her right to an effective remedy and other concomitant rights under the APD. The time limit should not render excessively difficult the exercise of rights conferred by the APD.**

**The APD should be amended to stipulate that any time limit imposed within which an applicant must apply for suspensive effect must provide a reasonable time within which the applicant may exercise his or her right and other concomitant rights under the APD.<sup>136</sup>**

<sup>131</sup> Section 23a ASA.

<sup>132</sup> Section 71 paragraph 2 of CAJ.

<sup>133</sup> Decision Pl. US 12/07 published in Collection of Laws under No. 355/2008 Coll.

<sup>134</sup> The Commission stated that the 15 day time limit “*does not seem to take into consideration some factors that may have a great weight on the effectiveness of the access of a foreigner to judicial protection, such as the lack of mastery of the language, the lack of knowledge of the Italian territory, the potential distance from the competent court, the need to get in touch with a lawyer in a very short period of time, the shortness of time available to evaluate the elements in order to ground the judicial appeal, the request for free legal assistance.*”

<sup>135</sup> See below for concerns regarding the enforcement of expulsion orders.

<sup>136</sup> This is suggested in proposed recast Article 41(4): APD Recast Proposal 2009.

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

### *Availability of interpretation*

In order to lodge an appeal, an applicant may be required to complete a myriad of complex forms in the language of the host state. However, many applicants for international protection do not understand the language of the host state and will be unable to complete all the administrative requirements relating to the initiation of judicial proceedings and to the application for legal aid, if required, without linguistic assistance. Without the services of an interpreter or a translator for the submission of the appeal and to exercise the right to legal assistance, the right to an effective remedy may be negated in practice. Therefore, applicants who do not understand or speak the language of the host state should receive the services of an interpreter for submitting their appeal to the court or tribunal and for any hearing, whenever necessary.

Article 10 (2) APD, in conjunction with Article 10 (1) (b) APD, requires that Member States provide appellants with the services of an interpreter (free of charge) “*for submitting their case to the competent authorities [designated court or tribunal] whenever necessary*”, and at least when the appellant is called for a hearing and where appropriate communication cannot be ensured without such services.<sup>137</sup> UNHCR considers that implementation of this provision in line with its minimum requirements - namely, providing interpretation merely for a hearing, and not, as necessary, for the submission of an appeal and to exercise the right to legal assistance - may result in a violation of the right to an effective remedy under Article 39 (1) APD.

UNHCR is concerned to note that the national legislation of some of the Member States of focus provide for entitlement to an interpreter only for any hearing before the court or tribunal, as necessary.

In France, Articles 10 (2) and 10 (1) (b) of the Directive are transposed in a minimalist way, since the legislation only provides for the services of an interpreter for an appeal hearing and not for submission of an appeal.<sup>138</sup> It is particularly problematic given that

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<sup>137</sup> Article 10 (2) APD states that “[w]ith respect to the procedures provided for in Chapter V [appeal procedures], Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones referred to in paragraph 1(b), (c) and (d) of this Article.”

<sup>138</sup> Although Article L.733-1 *Ceseda* states that “[a]pplicants may present their explanations to the CNDA and be assisted by a lawyer and by an interpreter”, this is interpreted as applying only to the hearing. No provision is made for the translation of documents or interpretation to assist with the preparation of the appeal. Moreover, the report of the Rapporteur, who is responsible for examining the case file and

the appeal must be written in French, and must specify detailed and all relevant grounds for the appeal. Furthermore, the legal aid system does not reimburse the costs of interpretation and translation.

In some Member States, national legislation provides the right to an interpreter during judicial proceedings, but not explicitly for the purpose of submitting an appeal. This is the case in Bulgaria,<sup>139</sup> Czech Republic,<sup>140</sup> Italy<sup>141</sup> and Spain.<sup>142</sup> In the Czech Republic, an interpreter is only automatically available for the appeal hearing, but not in relation to the submission of the appeal.<sup>143</sup> However, to a degree, the prejudicial impact on the appellant is reduced by the fact that grounds for the appeal may be written in the language of the petitioner, and the court is required to arrange for their translation.<sup>144</sup> Nevertheless, this does not extend to the right of petitioners to have judgments or decisions of courts,<sup>145</sup> or other documents relating to the appeal proceedings, translated into their languages.<sup>146</sup>

Slovenia has not explicitly transposed the requirements of the APD in relation to appeal proceedings. While national legislation nonetheless provides scope to ensure the provision of interpretation throughout the procedure,<sup>147</sup> in practice, appellants have no access to an interpreter to assist with the submission of an appeal.

According to Article 2 of PD 81/2009, the only remedy against a negative decision in Greece is an application for annulment before the Council of State. By law, appellants

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making a non-binding proposal for a decision to the judges, is not fully translated. Translation is limited to the recommendation itself.

<sup>139</sup> Article 29 (1), item 7 LAR provides that the alien has the right to an interpreter at any point of the proceedings before SAR. Article 14 (2) APC states that the alien has the right to an interpreter in judicial proceedings. The determining authority (SAR) has interpreters in its premises, but it is not stipulated that applicants can use their services for the purpose of lodging an appeal.

<sup>140</sup> Section 18 (1) of Act No. 99/1963 Coll., on Code of Civil Justice in connection with Section 64 of CAJ: *“The court shall appoint an interpreter for participants whose maternal language is other than Czech language, as soon as such need arises in the procedure.”*

<sup>141</sup> Article 10 (4) of the d.lgs. 25/2008.

<sup>142</sup> Article 22 of the Aliens Law establishes that aliens are entitled to free legal assistance in all administrative and judicial proceedings related to asylum and s/he is also entitled to an interpreter *“if s/he does not understand or speak the official language used”*. The Draft Amendment to the Aliens Law currently under parliamentary review maintains the same wording. Article 16 (2) of the New Asylum Law indicates that there is a right to an interpreter in the terms established by Article 22 of the Aliens Law. In practice, an interpreter will be available for interviews or hearings before the administrative/judicial authorities, but nothing is foreseen for other aspects of the procedure, such as the submission of appeals.

<sup>143</sup> Section 18(1) of Act No. 99/1963 Coll., on Code of Civil Justice in connection with Section 64 of CAJ.

<sup>144</sup> See No. 4 Azs 112/2004 of 16 June 2004, No. 342/2004 Sb. NSS, all available at [www.nssoud.cz](http://www.nssoud.cz), and decision of SAC No. 5 Azs 107/2008-57 of 11 December 2008.

<sup>145</sup> See for example decision of SAC, No. 4 Azs 89/2008 of 18 February, 2009, available at [www.nssoud.cz](http://www.nssoud.cz).

<sup>146</sup> See No. 6 Azs 214/2005 or 5 Azs 2/2009 of 6 March 2009, both available at [www.nssoud.cz](http://www.nssoud.cz).

<sup>147</sup> Art. 10 (2) of the IPA: *“The applicant shall be provided with the interpreter upon receipt of the application, at a personal interview, in other justified cases, and by the decision of the competent authority when this would be required for understanding of the procedure by the applicant”*.

should be provided with the services of an interpreter in order to submit their application for annulment, if appropriate communication cannot be ensured without such services. The interpreter's costs shall be paid for out of public funds.<sup>148</sup> However, in practice, appellants reportedly do not have access to an interpreter for this purpose.<sup>149</sup>

In a few Member States, in practice, applicants may access linguistic assistance for the submission of an appeal through a legal adviser. This is the case in Finland,<sup>150</sup> Germany, Spain (through the assistance of an NGO which provides free translation services) and the UK. In Finland, the costs arising from interpretation and translation services are covered by the legal aid scheme.<sup>151</sup> In Germany, an interpreter is provided by the court for the oral hearing.<sup>152</sup> In general, documents have to be presented to the court in German,<sup>153</sup> however, their translation would be covered by legal aid ("*Prozesskostenhilfe*")<sup>154</sup> if granted.<sup>155</sup> National legislation in the UK states that the "*appellant is entitled to the services of an interpreter (a) when giving evidence; and (b) in such other circumstances as the Tribunal considers necessary.*"<sup>156</sup> In practice, with the exception of the oral hearing, appellants rely on the legal representative arranging interpretation paid for through legal aid.

Good practice exists in Belgium, where there is a right to free and unlimited interpretation services as well as free (but limited in time) translation services for all necessary assistance relating to the appeal. This automatically accompanies free legal assistance which is provided throughout the entire asylum procedure in Belgium.

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<sup>148</sup> Articles 29 and 8 (1b) of PD 90/2008.

<sup>149</sup> Interview with S8.

<sup>150</sup> Interviewed legal representatives state that the vast majority of contacts with clients (except for some ad hoc meetings where English can be used) are handled with the aid of interpreters. Appellants are granted legal aid for appellate proceedings which includes costs for translation etc. Section 203 *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009) provides for interpreters for any hearing before the court.

<sup>151</sup> Article 4 of the Act on Legal Aid 257/2002. Whereas the general rule is that only community service attorneys who are funded by the State may benefit from legal aid, an exception is made for lawyers specialized in immigration law by Section 9 of the Aliens Act 301/2004.

<sup>152</sup> Section 185 (1) Law on Court Constitution.

<sup>153</sup> Section 55 Code of Administrative Court Procedure in conjunction with Section 185 (1) Law on Court Constitution. (The language of the courts is German.)

<sup>154</sup> Section 162 (1) Code of Administrative Court Procedure. Kopp/Ramsauer, Commentary on the Code of Administrative Court Procedure, Section 162, paragraph 7.

<sup>155</sup> Outside court, legal aid under the Law on Legal Aid ("*Beratungshilfe*" according to the "*Beratungshilfegesetz*") can be applied for under similar conditions as legal aid before the court ("*Prozesskostenhilfe*"), e.g. for deciding whether to submit an appeal. With regard to the practice concerning interpretation and translation services in the framework of these proceedings, insufficient data was gathered in order to make a reliable statement.

<sup>156</sup> Rule 49 (A) of the AIT (Procedure) Rules 2005.

Good practice also exists in the Netherlands, where there is a right to free and unlimited interpretation services as well as free translations (limited to a certain amount of words) for all necessary assistance throughout the entire asylum procedure, including on appeal.

UNHCR regrets that the APD does not require, without derogation, that applicants receive the services of an interpreter for submitting their appeal to the appeal authority whenever necessary. As a result, in law and/or practice, applicants in a number of the Member States surveyed are not guaranteed linguistic assistance with the submission of their appeal. This represents a significant impediment which may render the remedy in law, ineffective in practice.

#### **Recommendation**

**In order to ensure the enjoyment of an effective remedy in practice, it is necessary that states provide for free interpretation services at all stages of the appeal procedure, including for assistance with the submission of grounds for appeal, and all other necessary preparation prior to the appeal hearing. UNHCR considers that the term “whenever necessary” under 10 (1) (b) APD should be interpreted broadly, and without derogation. The APD should be amended to this effect.**

#### *Availability of free legal assistance*

Article 15 (2) APD requires Member States to provide free legal assistance upon request in the event of a negative decision.<sup>157</sup> However, Member States may derogate, and limit the grant of free legal assistance, in accordance with Article 15 (3) APD, to:

- (a) procedures before a court or tribunal following a negative decision by the determining authority only, and not any onward appeals or reviews provided for under national law;
- (b) appellants who lack sufficient [financial] resources;
- (c) legal advisers designated by national law to assist or represent applicants for asylum; and/or
- (d) appeals which are likely to succeed, i.e. pass a merits test. In UNHCR’s view, Member States must ensure that legal assistance is not arbitrarily restricted on this point.

Within the scope of this research, UNHCR has not comprehensively monitored transposition of Article 15 APD in Member States’ national legislation, regulations and

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<sup>157</sup> Article 15 (2) states that “In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request, subject to the provisions of paragraph 3.”

administrative provisions. However, UNHCR has enquired, through interviews with stakeholders including legal advisers, into whether there are any concerns regarding appellants' access to free legal assistance, which may undermine the effectiveness of the legal remedy of appeal.

The most common concerns cited were:

- In some Member States which operate legal aid schemes, such schemes were reported to be unduly complicated, and do not cater for the particular circumstances and needs of asylum applicants. As a result, they were inaccessible.
- Financial remuneration provided by legal aid may be insufficient to cover the legal adviser's costs of representing applicants for international protection.
- There is a shortage or a lack of legal advisers practising in refugee law generally, or in certain geographic areas within some Member States.
- In some Member States, some lawyers were reported to lack knowledge and competence.
- Access to legal advice or representation is diminished when applicants are in detention, or subjected to accelerated procedures with shortened time limits.

In UNHCR's view, this would suggest a need for a review of current systems to ensure that states in practice meet their obligations under the APD to provide free legal assistance during asylum appeals.

#### *Legal aid schemes*

In those Member States where free legal assistance is available through a legal aid scheme, the scheme may not cater for the particular circumstances of asylum applicants.

For instance, as highlighted above, applicants are subjected to time limits within which to appeal which can be as short as 48 hours. If they must apply for free legal assistance through a legal aid scheme, the scheme must be simple and very quick to serve their purpose. Otherwise, the right to legal assistance is illusory.

For example, in Bulgaria, a refugee-assisting NGO may be able to assist with the preparation of an application for legal aid under the Law on Legal Aid. The Law on Legal Aid provides for four forms of assistance: 1) pre-litigation resolution; 2) preparation of documentation for filing a case; 3) litigation; and 4) litigation in the event of detention.<sup>158</sup> However, access to the first two forms of assistance (critical if the appellant is to be able to effectively file an appeal) is not available in practice, because

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<sup>158</sup> Article 21 Law on Legal Aid.

requests for legal aid can take up to 14 days to be decided. This is longer than one seven day statutory appeal time limit.

Legal aid schemes should not make demands of applicants for international protection which applicants cannot satisfy in practice. For instance in Italy, appellants are required to apply for free legal assistance for their appeals through general legal aid provisions under national law.<sup>159</sup> Legal aid is subject to both a means and a merits test which is decided by the Council of the Bar.<sup>160</sup> According to interviewed stakeholders (NGOs), the main obstacles to accessing free legal assistance in practice relate to formal requirements prescribed by some of the Councils of the Bar in particular regions of Italy. For example, there is a legislative requirement that recipients should be legally residing in Italy,<sup>161</sup> which has resulted in some Councils of the Bar denying legal assistance to appellants simply on the basis that they have no formal residence permit.<sup>162</sup> Other unduly restrictive practices include requests that, in some cases, appellants have to provide identity papers or tax codes (*codice fiscale*).<sup>163</sup> Member States should ensure that they remove superfluous administrative requirements and practices which impede access to free legal assistance. In order to ensure compliance with Article 15 APD, UNHCR recommends that all Member States ensure that the bodies competent to regulate legal aid do not impose requirements beyond those stipulated in the APD.

According to the APD, access to legal aid may be means-tested. UNHCR notes that appellants may find it extremely difficult to evidence their financial situation. Therefore, it is worth noting as good practice that Finland has simplified the process of applying for legal aid by not requiring applicants to provide documentation regarding their financial position. Similarly, in Italy where legal aid is also means-tested,<sup>164</sup> when the appellant is unable to evidence his/her low income, the appellant can draft a declaration to this effect instead.

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<sup>159</sup> Legal assistance is required under Article 16 (2) of the d.lgs. 25/2008 subject to the conditions provided for by the decree of the President of the Republic of the 30<sup>th</sup> May 2002, No. 115.

<sup>160</sup> Article 126 of the d.P.R. 115/2002.

<sup>161</sup> Article 119 of the d.lgs. 115/2002.

<sup>162</sup> Asylum applicants, since they are legally entitled to stay in Italy because of their application, should be considered as having legal residence in Italy within the meaning of Article 119 of the d.lgs. 115/2002, regardless of whether they hold a formal residence permit. Moreover, Art.119 of d.lgs 115/2002 refers to legal stay in Italy "at the time when the cause of action arose", i.e. at the time of the decision of the Territorial Commission. The appellant is in any case legally staying in Italy at least until the deadline to lodge an appeal has expired (Art. 32 (4) of d.lgs 25/2008).

<sup>163</sup> According to the *Tavolo nazionale asilo*, the new Regulation implementing the d.lgs. 25/2008 should clarify some significant aspects of access to free legal assistance.

<sup>164</sup> Legal aid is granted on condition that the appellant has a low income (approx. 10000 euro of income/year pre-tax). Article 94 of d.P.R. 115/2002 states that, in case the appellant is unable to demonstrate his/her low income (i.e. to contact his/her Consulate to obtain the relevant documents), the appellant can write by himself/herself an equivalent declaration.

In Spain, legal representation is compulsory during all judicial proceedings, and applicants for asylum have a right to free legal assistance if they lack sufficient financial resources.<sup>165</sup> In practice, where an NGO is unable to represent an appellant, it may assist him or her to apply to the aliens' legal assistance service of the bar associations, or the appellant may apply directly. However, in practice, the provision of free legal assistance is often hindered because the application is not submitted correctly, and is therefore deemed invalid. The forms are in parts very complex and require detailed information regarding the economic situation of the appellant. Frequently, difficulties are encountered in contacting the appellant in order to remedy any deficiencies, and it has been estimated that this results in the failure of around 40% of the appeals initiated. This is clearly of major concern.<sup>166</sup>

According to Article 15 (3) APD, Member States must not use a merits test to arbitrarily restrict access to free legal assistance. As mentioned above, legal aid in Italy is subject to a merits test<sup>167</sup> which requires the appellant to provide reasons in fact and in law why the application is not manifestly unfounded. The decision on whether to grant legal aid lies with the Council of the Bar. However, UNHCR's review of case law revealed that the Civil Court may revoke the grant of free legal assistance by the Council of the Bar when the application was declared manifestly unfounded by the determining authority (CTRPI).<sup>168</sup> Given that the appeal is against a negative decision, the negative decision itself should not be used to determine that the appeal is unlikely to succeed. UNHCR considers this to be an arbitrary restriction on the right to legal assistance which is not permitted by the APD.

In the United Kingdom, where legal assistance is available subject to a merits test, there is concern that access to legal assistance has been severely restricted.<sup>169</sup> In Scotland, there is no merits test.<sup>170</sup> But in England and Wales, legal aid is available subject to a merits test. These concerns are particularly acute with regard to applications examined in the accelerated detained procedures. An NGO, Bail for Immigration Detainees (BID), has noted that applicants whose applications have been examined in the accelerated detained procedures struggle to secure publicly funded lawyers to assist with their

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<sup>165</sup> Article 22 (1) of the Aliens Law.

<sup>166</sup> Information provided by the Legal Assistance Service for Aliens of the Madrid Bar Association.

<sup>167</sup> Under Article 122 of the d.P.R. 115/2002 and Article 16 (2) of the d.lgs. 25/2008, the applicant is entitled to free legal assistance after lodging an application that must contain "the explanations in fact and in law useful to evaluate that the application is not manifestly unfounded".

<sup>168</sup> Article 136 of the d.P.R. 115/2002. Based on cases observed at one of the CTRPIs.

<sup>169</sup> Note that in the UK there are three legal jurisdictions: England and Wales; Northern Ireland; and Scotland. Therefore, there are three statutory bases and three responsible authorities for the provision of legal advice and representation.

<sup>170</sup> In Scotland, the statutory basis is the Legal Aid (General) Act 1986, the Advice and Assistance (Scotland) Regulations 1996 (as amended) and the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003.



appeal. The merits test inevitably means that some appellants are unrepresented. On the other hand, the Government is always legally represented.<sup>171</sup>

In France, free legal assistance has recently been made available for proceedings before the appeal body (CNDA) by law.<sup>172</sup> However, there remain a number of problems with access in practice.<sup>173</sup> The current system does not reimburse certain expenditures involved in the representation of asylum applicants, such as interpretation and translation costs. The limited fee does not reflect the necessary preparation time or travel costs of lawyers to the CNDA, which is located in Paris. Consequently there is a shortage of lawyers who agree to participate in the free legal assistance scheme, particularly outside Paris.<sup>174</sup> The limited number of available lawyers are generally based in Paris, which can impede consultations where the appellant is based elsewhere. Finally, appellants are not systematically informed of this new scheme in the letter from the CNDA acknowledging receipt of their appeal ("*reçu de recours*") and thus may not be aware of their right to free legal assistance.

In Greece, appellants have the right to free legal assistance to appeal to the Council of State unless, in the opinion of the judge, the application for annulment is manifestly inadmissible or manifestly unfounded. In practice, the appellant must pay the fees for the application for annulment in advance. If the judge considers the application admissible or well-founded, part of the fees, excluding notary and process server's fees, are returned to the appellant.<sup>175</sup>

#### *Shortage of specialised lawyers*

A general concern observed in many of the states surveyed (Bulgaria, Czech Republic, France, Slovenia and Spain) is the lack of available lawyers specialized and competent in refugee law. For example, in Slovenia, at the time of UNHCR's research, only six legal advisers were actually operating in practice.<sup>176</sup> Access to specialized lawyers is also problematic in the remote areas of Finland, where reception centres for asylum applicants are increasingly being built.

Specific instances of a lack of competence were also reported in some countries. For example, in one appeal case audited in Slovenia, the argumentation submitted on behalf

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<sup>171</sup> Bail for Immigration Detainees, *Briefing paper on the detained fast track*, February 2009.

<sup>172</sup> Article L.733-1 *Ceseda*.

<sup>173</sup> Cf. Me Lagrue, lawyer, in an article published in the *Journal de Forum Réfugiés*, N° 45, January 2009; interview with lawyer, 5 March 2009.

<sup>174</sup> According to Forum Réfugiés, only 40 lawyers have shown an interest in being involved in the scheme and most are from the Paris Bar. There are, therefore, currently very few lawyers outside Paris who participate in the scheme.

<sup>175</sup> Interview with S9.

<sup>176</sup> Although the list of those who applied and were granted a licence was 10 persons. The number of asylum cases before the Administrative Court in 2008 was 171, according to the Annual Report of the Administrative Court of the Republic of Slovenia, 27 January 2009.

of the appellant was only two paragraphs in length, and simply asserted that what was ascertained by the Ministry of Interior “*is not true*”. UNHCR also audited a case in the UK where poor quality legal representation meant that the application for judicial review was not adequate, and was not admitted to the court, with the result that the applicant’s removal went ahead unchallenged.<sup>177</sup>

In the Czech Republic, appellants may either obtain legal assistance from NGOs<sup>178</sup> or apply for an appointed legal counsellor from the Regional Court.<sup>179</sup> However, access to NGO legal counsellors may be limited as they only attend the asylum centres once or twice a week, and the time they are able to allocate to an applicant may be very limited. Moreover, although it is legally possible for an NGO to represent an appellant before the courts, their costs cannot be covered by the court on the basis of the free legal aid legislation.<sup>180</sup> To apply for an appointed legal counsellor from the Regional Court, three eligibility criteria must be satisfied: (a) lack of sufficient means, (b) that there is a patent prospect of success, and (c) that the legal representative is necessary for the protection of the petitioner’s rights. In practice, the court will usually authorise the appointment of a legal representative; but s/he may not be specialised in refugee and asylum law. This problem is now mitigated by the case-law of the Supreme Administrative Court in cases where the appellant him/herself applies for a specific lawyer (e.g. specialised in refugee and asylum law) to be appointed. In such cases, the Court should generally respect the wish of the appellant, if the proposal is justified by sensible and objectively legitimate reasons.<sup>181</sup>

Similarly, in Bulgaria, lawyers appointed through the legal aid scheme rarely have any knowledge of refugee law, which is not a distinct legal discipline in any of the university law faculties in Bulgaria.<sup>182</sup>

UNHCR considers that there is an urgent need to address this through means such as increased training, and appropriate financial remuneration through publicly funded legal assistance schemes.

In some states, a lack of specialist lawyers is partially addressed through NGOs that provide legal services.<sup>183</sup> However, some NGOs reported precarious funding situations.

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<sup>177</sup> DAF31

<sup>178</sup> Section 35 (5) CAJ.

<sup>179</sup> Section 35 (8) CAJ.

<sup>180</sup> Section 35 paragraph 5 CAJ and Section 35 paragraph 2 CAJ as confirmed by a decision of SAC No. 5 Azs 6/2009 – 8 of 29 March 2009, available at [www.nssoud.cz](http://www.nssoud.cz).

<sup>181</sup> Decision of the extended bench of the Supreme Administrative Court, No. 7 Azs 24/2008-141 of 21 December 2009, available at [www.nssoud.cz](http://www.nssoud.cz).

<sup>182</sup> Bulgarian Helsinki Committee, Mid-term Sub-project Monitoring Report, Part 2: Narrative Report (01.01.2009 – 30.06.2009), Refugee Legal Aid Sub-project.

<sup>183</sup> For example, during the first 6 months of 2009, the Bulgarian Helsinki Committee (BHC) drafted 113 appeals (59 on decisions in the accelerated procedure, 54 on decisions in the general procedure) against negative decisions. The staff lawyers of BHC represented 34 appellants before the courts. See Bulgarian

For example, in the Czech Republic, the two main NGOs providing legal services – OPU and SOZE – are funded from national European Refugee Fund resources. However, in 2009, funds were not allocated until April, so that the NGOs had to cut their legal services in the first three months of the year. UNHCR in Bulgaria continues to support the legal representation of appellants before the court by lawyers from the BHC. It is imperative that Member States ensure that a structured provision of funding is in place to ensure continued availability of appropriately specialized legal assistance.

#### *Impact of detention and accelerated procedures on access to legal representation*

In a number of Member States, it was reported that the effective opportunity to obtain legal assistance for lodging an appeal is limited for appellants in the accelerated procedure or in detention. For example, those in detention have limited access to legal assistance in the Czech Republic as legal advisers visit only once or twice a week. Similarly, UNHCR's implementing partner in Bulgaria, the BHC visits the detention facility once a week.<sup>184</sup> However, due to a shortage of funds, the BHC lawyers are not able to use the services of interpreters which results in misunderstandings. Moreover, applicants in some detention centres in Member States cannot use mobile phones, and often lack funds, which limits their access to legal assistance.

#### *Good practice*

Good practice exists in Belgium, where all appellants benefit from free legal assistance,<sup>185</sup> irrespective of their appeal being examined in a regular or accelerated procedure. This entitlement applies during the whole of the asylum procedure, so that in principle, representation will be provided by the same lawyer who assisted the applicant during the first instance procedure, unless the applicant is unsatisfied and asks for a different lawyer.<sup>186</sup> Given such continuity in most cases, the assistance of the lawyer is promptly available, which minimises the risk of problems with the appellant effectively accessing his/her appeal right. Thus legal aid arrangements in Belgium represent good practice in several respects, which demonstrably improve the efficacy of the appeals process.

However, it should also be acknowledged that the nature and limited scope of jurisdiction of the Council for Aliens Law Litigation (CALL) - particularly the lack of a fact-finding function and the reliance on a largely written procedure - render access to high

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Helsinki Committee, Mid-Term Sub-project Monitoring Report, Part 2: Narrative Report (01.01.2009 – 30.06.2009), Refugee Legal Aid Sub-project.

<sup>184</sup> Other independent lawyers have access to the facility twice weekly.

<sup>185</sup> Article 90 of the Aliens Act.

<sup>186</sup> Control of the quality and the continuity of legal assistance is exercised by the Local Bureau of Legal Assistance and the Bar.

quality legal assistance particularly essential.<sup>187</sup> It can therefore cause particular problems when a legal representative does not possess the requisite competence, rendering the remedy ineffective according to some stakeholders (NGOs) consulted. CALL judges interviewed during this research confirmed that problems can be caused by a lack of quality legal representation.

### **Recommendations**

**In order to ensure that an effective remedy is available in practice, it is essential that free legal assistance is available to appellants at all stages of the appeal procedure, including for assistance with the submission of grounds for appeal, and all other necessary preparation prior to the appeal hearing.**

**In order to ensure the provision of sufficient high-quality legal advice and representation for appeal proceedings, it is necessary for states to ensure adequate funding for training and accreditation of lawyers. Appropriate remuneration must also be provided for publicly funded legal assistance schemes, which is commensurate with the work required, as well as that provided in other fields of legal practice.**

**Where Member States operate general publicly-funded legal assistance schemes, Member States should conduct a review of the schemes to ensure that they adequately cater for the particular needs and circumstances of international protection claimants. Decisions on requests for legal aid must be taken promptly, so as not to exceed or significantly reduce the time period within which the applicant can lodge an appeal.**

**Member States should pay special attention to ensuring that free legal assistance is promptly available to appellants in detained and/or accelerated procedures, and in areas removed from major cities.**

### **Suspensive effect**

Many refugees in Europe are recognized only following an appeal process. Worldwide, close to 210,000 asylum applicants were recognized as refugees or given a complementary form of protection in the course of 2007. This number includes an

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<sup>187</sup> During the research this was identified as requiring in particular:

- a certain knowledge of asylum legislation (international, European and national)
- a knowledge of the workings of the CALL appeal procedure
- a proactive commitment to look for new elements, to check the COI on which the CGRA decision is based, and to look for additional documents,
- the drafting of a concise and relevant petition
- a brief but to-the-point oral intervention.

estimated 29,500 individuals (around 14% of the total) who initially received a negative decision, which was subsequently overturned at the appeal or review stage.<sup>188</sup> In the UK, this proportion reaches more than 20%, according to a report of the Centre for Social Justice of December 2008.<sup>189</sup> In France in 2007, this proportion was 19.9%, a significant increase compared to 2006 (15.3%).<sup>190</sup>

Given the potentially grave and irreversible consequences of an erroneous determination at first instance, the effectiveness of any remedy depends on its ability to prevent the execution of any expulsion order which would violate the principle of *non-refoulement*. The need for a remedy which can suspend the enforcement of any removal order has been highlighted by the Committee of Ministers and Parliamentary Assembly of the Council of Europe as well as the Commissioner for Human Rights, UN Committee against Torture and NGOs.<sup>191</sup>

Unlike the first instance administrative procedure, the APD does not regulate the applicant's right to remain in the Member State in order to exercise the right of appeal and pending the outcome of an appeal. In other words, the APD does not regulate the 'suspensive effect' of appeals. Instead, the APD leaves it to Member States, where appropriate, to provide for rules "*in accordance with their international obligations*".<sup>192</sup>

Member States' international legal obligations in this regard have been established by the European Court of Human Rights, which has held that in order for a remedy to be effective, Member States must ensure that legal provision is made for the possibility of suspending the enforcement of any deportation order which might lead to a breach of the State's obligations concerning Article 2 or 3 ECHR.<sup>193</sup> The Court held that an "effective remedy" under Article 13, in conjunction with Article 3 ECHR, requires "*the possibility of suspending the implementation of the measure impugned*".<sup>194</sup> In accordance with the legal provisions of the European Convention of Human Rights, an

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<sup>188</sup> 2007 UNHCR Statistical Yearbook, p. 48.

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[http://www.centreforsocialjustice.org.uk/client/downloads/188255%20Final%20Asylum%20Matters%20\(pg%201-112\)-V2\\_email.pdf](http://www.centreforsocialjustice.org.uk/client/downloads/188255%20Final%20Asylum%20Matters%20(pg%201-112)-V2_email.pdf)

<sup>190</sup> See the 2007 report of the French Appeal Board at [http://www.commission-refugies.fr/IMG/pdf/CNDA-Rapport\\_d\\_activite\\_2007.pdf](http://www.commission-refugies.fr/IMG/pdf/CNDA-Rapport_d_activite_2007.pdf), p. 7.

<sup>191</sup> This view is shared by the Committee of Ministers in Recommendation No. R (98) 13 of 18 September 1998 which stated that a remedy is only effective if the execution of the expulsion order is suspended until a decision is taken with regard to compliance with Article 3 ECHR. See also its 'Twenty guidelines on forced return', Guideline 5, 4 May 2005. Furthermore, see Parliamentary Assembly recommendations 1236 (1994) and 1327 (1997) and its resolution 1471 (2005).

<sup>192</sup> Article 39 (3) states that "*Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with: (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome*".

<sup>193</sup> *Jabari v Turkey*, no. 40035/98, *ibid*. The European Court of Human Rights has held that an effective remedy requires "*the possibility of suspending the implementation of the measure impugned*".

<sup>194</sup> This was reiterated in *Gebremedhin v. France*, no. 25389/05, 26 April 2007. *Ibid*.

appeal body must have the power to suspend expulsion of those who have an arguable claim that expulsion will result in torture, degrading or ill-treatment in violation of the Convention. Therefore, if an alien claims that, if returned, s/he will suffer treatment contrary to Article 3 ECHR, s/he cannot be expelled unless the appeal body has decided beyond reasonable doubt that execution of the deportation order is compatible with the European Convention on Human Rights.<sup>195</sup>

With regard, to the APD, therefore, it follows that an appellant should not be expelled unless *an appeal body* has decided beyond reasonable doubt that removal would not contravene the European Convention of Human Rights. The European Court of Human Rights has held:

*“The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible ... Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision”.*<sup>196</sup>

The simplest way of satisfying this requirement is for Member States to ensure by law that deportation orders are not issued or cannot be executed within the time limit to lodge an appeal; and to give automatic suspensive effect to all appeals. UNHCR notes positively that with regard to decisions taken by the determining authority in the first instance procedure, Bulgaria affords such automatic suspensive effect to all appeals.<sup>197</sup> Furthermore, a significant number of the Member States of focus in this research afford automatic suspensive effect to appeals against certain negative decisions (Belgium, Czech Republic, Finland, France, Germany, Italy, Netherlands, Slovenia and the UK).

However, UNHCR’s research has found that a significant number of the Member States surveyed do not afford automatic suspensive effect to appeals against certain decisions, or decisions taken in certain procedures, or to applicants in certain circumstances.

Indeed, in Greece and Spain, automatic suspensive effect is not afforded to any appeals.

The following table sets out some of the circumstances in which there is no automatic suspensive effect (X).

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<sup>195</sup> *Conka v. Belgium*, no.51564/99. Ibid.

<sup>196</sup> *Conka v. Belgium* no.51564/99. Ibid.

<sup>197</sup> Although note that this research does not include implementation of the Dublin Regulation within its scope, and in Bulgaria, appeals against decisions taken in the Dublin procedure do not have automatic suspensive effect under Article 84 (1) LAR.

Member States	All negative decisions	Any negative decision taken in the accelerated procedure	Applications declared manifestly unfounded	Applications declared inadmissible	Border – no entry decisions	Application withdrawn	Negative decision in preliminary examination of subsequent application <sup>198</sup>
Belgium <sup>199</sup>							X
Bulgaria					N/A		
Czech Rep <sup>200</sup>			X <sup>201</sup>	X <sup>202</sup>	X	X	X <sup>203</sup>
Finland <sup>204</sup>			X <sup>205</sup>	X <sup>206</sup>	N/A	N/A	X <sup>207</sup>
France <sup>208</sup>		X <sup>209</sup>					

<sup>198</sup> Where the negative decision refers to a decision on inadmissibility, this is explicitly stated.

<sup>199</sup> Article 39/70 of the Aliens Act. All appeals have suspensive effect, except an appeal by an EU national against a decision by the CGRA not to examine his/her application and an appeal against a decision by the AO not to further examine a subsequent application.

<sup>200</sup> Section 32 (3) ASA: “The filing of an action pursuant to Subsection (1) and (2) has a suspensive effect, except for an action against discontinuation of the proceedings pursuant to Section 25 and an action against a decision pursuant to Section 16 (1 )(d) and (e) i.e. safe country of origin, safe third country and where applicant has multiple nationalities and can avail him or herself of the protection of a state of citizenship.”

<sup>201</sup> When the application is deemed manifestly unfounded on grounds of safe country of origin [Section 16 (1) 9d)]; safe third country [Section 16 (1) (d)] or the applicant has the nationality of more than one country and they can avail themselves of the protection one of those countries [Section 16 (1) (e)]. Appeals against decisions declaring an application to be manifestly unfounded on other grounds have automatic suspensive effect.

<sup>202</sup> On the grounds that the applicant is an EU citizen, safe third country, first country of asylum and applicant has lodged an identical application after a final decision.

<sup>203</sup> Note that in the Czech Republic, this would constitute a decision of inadmissibility. Section 32 (3) ASA: “The filing of an action pursuant to Subsection (1) and (2) has a suspensive effect, **except for an action against discontinuation of the proceedings pursuant to Section 25 and an action against a decision pursuant to Section 16(1)(d) and (e).**” Section 25: “The proceedings shall be discontinued if (...) i) the application for international protection is inadmissible.” Section 10a (e): “The application for international protection shall be inadmissible e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien.”

<sup>204</sup> Section 200 (1) of the Aliens Act 301/2004.

<sup>205</sup> On grounds of safe country of asylum or origin.

<sup>206</sup> On grounds of safe country of asylum.

<sup>207</sup> Note that in Finland, the decision on a subsequent application is not taken in a preliminary examination procedure but is instead taken either in the accelerated or regular procedure. Section 210 (2) and (3) of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 29.4.2009) stipulates that a negative decision on a subsequent application is immediately enforceable unless otherwise ordered by the competent court.

<sup>208</sup> Regarding decisions refusing entry in the framework of the border procedure, the suspensive effect was recently introduced by the Law of 20 November 2007. This resulted from a ruling of the European Court of Human Rights that France was in breach of the European Convention on Human Rights by not providing an appeal procedure with automatic suspensive effect in the asylum procedure at the border

Member States	All negative decisions	Any negative decision taken in the accelerated procedure	Applications declared manifestly unfounded	Applications declared inadmissible	Border – no entry decisions	Application withdrawn	Negative decision in preliminary examination of subsequent application <sup>198</sup>
Germany			X <sup>210</sup>	X <sup>211</sup>	X <sup>212</sup>	X <sup>213</sup>	X <sup>214</sup>
Greece	X	N/A <sup>215</sup>	X	X	X	X	X
Italy <sup>216</sup>			X	X	N/A	N/A	X <sup>217</sup>
Netherlands		X			X	X <sup>218</sup>	X
Slovenia			X <sup>219</sup>			X	X
Spain	X	X			X <sup>220</sup>	X	X
UK			X	X	N/A		X

Moreover, it should be noted that in Italy, applicants who have been sent to a CARA on the basis of Article 20.2 (b) or 20.2 (c) d.lgs 25/2008 for having been arrested while evading border control, or who have filed an application after they had been apprehended by the police in a position of illegal stay or who were sent to a CIE having been arrested for border control evasion; and in the Netherlands, applicants in detention must request suspensive effect.

In the absence of automatic suspensive effect of the appeal, as a minimum requirement, in accordance with international law, an applicant must be allowed to remain in the

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(*Gebremedhin v. France*, Application No 25389/05, 26 April 2007). The right to an effective remedy was considered to have been violated.

<sup>209</sup> Note that this includes the overwhelming majority of decisions taken on subsequent applications.

<sup>210</sup> Section 75 in conjunction with 36 (1), (3) APA.

<sup>211</sup> So-called “irrelevant” applications (sections 29, 36 APA) are not examined on the merits and therefore may be equated to “inadmissible” applications. There is no automatic suspensive effect according to Section 75 in conjunction with 36 (1), (3) APA. However, Section 29 APA is only very rarely applied in practice.

<sup>212</sup> Section 75 in conjunction with 18a (3), (4) APA, rejection as manifestly unfounded in the airport procedure.

<sup>213</sup> Section 75 APA in conjunction with 38 (2) APA which refers to decisions pursuant to Section 32 or 33 APA.

<sup>214</sup> Section 75 in conjunction with 71 (4) APA in conjunction with Section 36 or 34a APA.

<sup>215</sup> At the time of writing, the accelerated procedure reportedly no longer operates.

<sup>216</sup> Article 32 (4) d.lgs. 25/2008 provides that, even in cases where there is no automatic suspensive effect against a first instance negative decision, the asylum seeker is authorized to remain until the time limits for the appeal have elapsed.

<sup>217</sup> Note that in Italy this would constitute a decision of inadmissibility. A decision to treat a subsequent application as inadmissible under Article 29 (b) of the d.lgs. 25/2008 can be appealed under Article 35 (1) of the d.lgs. 25/2008. However, Article 35 (7) of the d.lgs. 25/2008 stipulates that the appeal has no automatic suspensive effect.

<sup>218</sup> This refers to a negative decision taken in the accelerated procedure following implicit withdrawal.

<sup>219</sup> On the ground of safe country of origin.

<sup>220</sup> Either suspensive effect has to be applied for or in the case of a negative decision at the border, suspensive effect will be granted if UNHCR has presented a report in favour of admission to the territory.



Member State in order to petition the court or tribunal to grant the right to remain. Any such petition or request should in itself by law have automatic suspensive effect pending the outcome of the request. In other words, the applicant must be allowed to remain in the Member State until the court or tribunal has notified the applicant of its decision on whether execution of the deportation order is in compliance with the European Convention on Human Rights. The European Court of Human Rights held in the case of *Gebremedhin v. France* that the “urgent application for stay of execution” (which according to French law at that time did not have automatic suspensive effect, with the effect that the individual concerned could, quite legally, be removed before the judge had given a decision) did not constitute an “effective remedy”. In that case, the Court held:

*“Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect”*.<sup>221</sup>

To satisfy their legal obligations, it is not sufficient for Member States to assert that, in the absence of suspensive effect in law, the authorities in practice refrain from executing an expulsion order. The rule of law is one of the fundamental principles of a democratic society, and the European Court of Human Rights has stressed that *“the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement.”*<sup>222</sup>

For example, in Spain, Article 29 (2) of the New Asylum Law establishes that when an appellant lodges a judicial appeal against any administrative decision in the asylum procedure, a request for suspensive effect will automatically be dealt with as a request for an urgent precautionary measure (under Article 135 of the Law on Administrative Jurisdiction). This implies automatic provisional suspensive effect until a decision is taken on the urgent precautionary measure within three days.

However, UNHCR is concerned that in some Member States, this requirement to give the applicant an effective opportunity to remain in order to apply for suspensive effect, and the requirement to suspend the execution of an expulsion order until a decision is taken on the application for suspensive effect, is not fulfilled in law. Therefore, it constitutes a breach of Article 39 (3) (a) APD.

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<sup>221</sup> *Gebremedhin [Gaberamadhien] c. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007. The Court concluded that in that case as the applicant did not have access in the “waiting zone” to a remedy with automatic suspensive effect, he did not have an “effective remedy”. See also *K.R.S. v. the United Kingdom*, no. 32733/08, admissibility decision of 2 December 2008. See also *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, paragraph 58, where the Court held that *“a remedy will only be effective if it has automatic suspensive effect”*.

<sup>222</sup> *Gebremedhin v France*, no. 25389/05. Ibid.

In Finland, where a negative decision has been taken on a subsequent application on the grounds that there are no new elements, the expulsion order may be executed immediately upon the decision being taken. This means that the appellant does not have an effective opportunity to apply to the Helsinki District Court to suspend enforcement.<sup>223</sup>

Furthermore, when the determining authority takes a negative decision on an application, on the ground that a country is a safe country of asylum or origin, or declares an application manifestly unfounded, an expulsion order is enforceable eight days after notification.<sup>224</sup> Applicants in remote areas of Finland, where legal representation and interpreter services are scarce, experience difficulties in applying for the suspension of the expulsion order within the eight days. Moreover, notwithstanding a pending request for suspensive effect, an expulsion order may nevertheless be executed.

Similarly, a request to the President of a District Court in the Netherlands to grant suspensive effect does not in itself have automatic suspensive effect. There is therefore no guarantee in law that an expulsion order will not be executed before the President of the District Court takes a decision on the request for suspensive effect.<sup>225</sup> Moreover, the Aliens Circular is explicit in stating that, notwithstanding a request for suspensive effect, an expulsion order may be executed where:

- the asylum seeker is considered to constitute a danger for public order or national security;
- there is a risk that the opportunity to return the person to the country of origin or a third country will be missed;
- the subsequent application is rejected because no new facts or circumstances were considered as submitted.<sup>226</sup>

In the Czech Republic, there is no explicit legal provision which affords automatic suspensive effect to a request for suspensive effect. Moreover, there is no specific time limit within which the court should take a decision on a request for suspensive effect.<sup>227</sup>

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<sup>223</sup> Section 201 (2) and (3) *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009). This also applies to decisions to transfer responsibility under the Dublin II Regulation.

<sup>224</sup> Section 201 (2) and (3) *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009).

<sup>225</sup> According to the Aliens Circular, however, an asylum applicant is **in general** allowed to await the decision of the President of the District Court, **provided that the request has been submitted in a timely fashion.**

<sup>226</sup> C22/5.3 Aliens Circular

<sup>227</sup> Section 56 CAJ: "(1) *Regardless of the chronological order in which petitions reach it, the court preferentially disposes of petitions for adjudication of suspensive effect, petitions for provisional rulings, petitions for exemption from judicial fees and petitions for the appointment of a representative. (2) The court furthermore preferentially deals with petitions and complaints concerning international protection, decisions on detention of a foreigner and decisions on the termination of special protection of and aid to*

As a result, it is not unusual that an appeal against a negative decision on international protection, and an application for suspensive effect, are dealt with at the same time within one judgment. In the interim period, there is no guarantee in law that an expulsion order will not be executed before the Court decides.

In Greece, automatic suspensive effect is not afforded to any appeals. During the period of UNHCR's research in Greece, all appeals before the Appeals Board had automatic suspensive effect in accordance with Article 25 (2) of PD 90/2008. However, this legal provision has since been repealed, and the only remedy against a negative decision by the determining authority is an application for annulment to the Council of State on a point of law, which does not have automatic suspensive effect. The appellant must request suspensive effect from the Suspensive Committee of the Council of State. The request for suspensive effect does not itself have automatic suspensive effect unless, at the discretion of the judge responsible for the decision on the request for suspensive effect, a provisional suspension order is issued.<sup>228</sup>

In the UK, there is no statutory provision allowing for an applicant to request suspensive effect when the right of appeal is non-suspensive. In such cases, the applicant can only challenge the removal or expulsion order by judicial review. There is no automatic right to judicial review: there is a leave, or permission, requirement in England and Wales, which is to be introduced in Scotland. Judicial review would normally suspend removal, but the determining authority issued guidance in January 2009 about the situations in which judicial review would not have suspensive effect unless an injunction is sought.<sup>229</sup>

UNHCR also notes that the time limit within which an appellant must apply for suspensive effect should not be so short as to render the remedy ineffective. In this regard, UNHCR is concerned that, for example, the time limit within which applicants must apply for suspensive effect in the Netherlands is 24 hours.<sup>230</sup> UNHCR is also concerned that, in the UK, in safe third country cases, there are only 72 hours between the date when a safe third country certificate is issued and the date for which removal is set. Where the applicant is not admitted to the regular procedure, and may not have access to legal representation, this does not give the applicant a practical opportunity to challenge the decision by judicial review. In Germany, with respect to applications certified as manifestly unfounded in the airport procedure, any request for suspensive effect needs to be submitted within three days of the date the decision was served.<sup>231</sup>

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*witnesses and other persons in connection with criminal proceedings as well as in other cases, if provided for by a special law."*

<sup>228</sup> Article 52 PD 18/89

<sup>229</sup> This affects persons who make another application for judicial review within three months of a judge refusing permission on a previous judicial review application, particularly where the first claim has been found to be clearly without merit or where a case has been withdrawn or otherwise concluded.

<sup>230</sup> In the Netherlands, the decision itself states that the asylum seeker must formally request an interim measure within 24 hours.

<sup>231</sup> Section 18a (4) APA

However, as mentioned before, the Federal Constitutional Court has ruled that such short deadlines may only be in conformity with the Constitution if it is guaranteed that the applicant has immediate access to qualified and independent legal advice.<sup>232</sup>

No applicant should be deported unless the time limit to request suspensive effect has expired and the applicant has not exercised his/her right to request suspensive effect. Applicants must have an effective opportunity to request suspensive effect. To the contrary, UNHCR was informed by stakeholders in the UK that there have been cases where a decision was taken that a subsequent application did not present new elements (i.e. did not amount to a 'fresh claim') and the applicant did not have an effective opportunity to challenge the removal order, because the applicant was removed without being given the usual 72 hours notice of removal. Therefore, there was no practical opportunity to raise judicial review proceedings. The Administrative Court held that the removal was unlawful and that the circumstances clearly gave rise to an arguable fresh claim i.e. subsequent application.<sup>233</sup>

It must also be emphasised that any request for suspensive effect must be subjected to rigorous and detailed scrutiny.<sup>234</sup> This is particularly important as, as can be seen from the table above, a significant number of Member States deny automatic suspensive effect of an appeal, simply on the ground that an application has been examined and a decision taken in the accelerated procedure or the decision declares the application manifestly unfounded. However, the current reality is that an application may be examined in an accelerated procedure for reasons completely unrelated to the merits of the application. An applicant who has an arguable claim to refugee status or subsidiary protection, but whose application is determined to be unfounded, may nevertheless have his/her application declared 'manifestly unfounded' for reasons completely unrelated to the merits of the application. This may occur, for example, on the ground that the applicant failed without reasonable cause to make his/her application earlier.

For instance, in France, when a negative decision has been taken by the determining authority in the accelerated procedure, an appeal is not afforded automatic suspensive effect. Applications examined in the accelerated procedure represented 30.7% of all applications in 2008. However, in France, the decision to channel an application into the accelerated procedure is not even taken by the determining authority but by the Prefectures, and without reference to the reasons for the application for international protection. The Prefecture's decision is not taken on the basis of a preliminary or personal interview with the applicant. Rather, it is taken on the basis of a written form which the applicant must complete in French without any linguistic or legal assistance.

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<sup>232</sup> See Marx, *Commentary on the Asylum Procedure Act*, 7<sup>th</sup> edition, 2009, Section 18a, paragraph 171; BVerfGE 94, 166; the ruling concerned the constitutionality of a one week deadline in the accelerated procedure (rejection as manifestly unfounded in the airport procedure). The functioning in practice, however, very much depends on the qualifications of the lawyers and legal services available.

<sup>233</sup> *X v SSHD* (Admin Court) (2009) (unreported 18 February 2009).

<sup>234</sup> *Jabari v Turkey*, no. 40035/98. Ibid.

The form does not require or request the applicant to state the reasons for applying for international protection. Yet, without knowing the reasons for the application, the Prefecture can decide that the application should be examined in the accelerated procedure because it considers the application to be deliberately fraudulent; or to constitute an abuse of the asylum procedure; or to be lodged solely in order to prevent a removal order which has been issued or is imminent.<sup>235</sup> Moreover, for example, in the Netherlands, the only criterion for channelling an application into the accelerated procedure is whether the determining authority considers that it can take a decision within 48 procedural hours.

It is therefore critical – given the irreversible and potentially life-threatening consequences of an erroneous first instance decision – that an appeal body scrutinise rigorously any request for suspensive effect.

This remains essential also in cases where the appeal body has jurisdiction only to review the legality of a decision, and not its merits. In this regard, UNHCR notes that in Belgium, where the competent authority (Aliens Office) decides not to examine a subsequent application, the applicant can only request an annulment. This will not be granted suspensive effect unless Article 51/8 of the Aliens Act has been incorrectly applied. Similarly, in the UK, applicants who wish to have a removal order suspended must apply for judicial review i.e. a review of the legality of the removal order. This would not include a review of the facts.

On a related issue, it is noted that in France, negative decisions taken by the determining authority OFPRA may be appealed, within one month of notification of the decision, to the CNDA (*Cour Nationale du Droit d'Asile*), a specialised administrative court responsible for reviewing the decisions of OFPRA on applications for international protection. However, as mentioned above, when a negative decision is taken by OFPRA following examination of the application in the accelerated procedure, the appeal to the CNDA does not have automatic suspensive effect. In order to prevent removal, the applicant must appeal, not to the CNDA, but to the administrative court to request that

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<sup>235</sup> It should be noted that a decision by the Prefecture to refuse to grant a temporary residence permit and channel the application into the accelerated procedure may be appealed to the administrative court. The administrative court in Lyon (« *tribunal administratif* ») always considers that the emergency procedure should be applied. This tribunal tends to suspend the decision of the prefecture refusing a temporary residence permit for applicants who are deemed to be nationals of safe countries of origin and/or who apply for asylum in the framework of a subsequent application and to instruct the prefecture to deliver a temporary residence permit to these applicants which should be valid until the decision of the CNDA. Therefore this case law creates a suspensive remedy before the CNDA (NB: however this case law comes from a first instance administrative tribunal. It does not rule on the substance of the case, it can be overturned by a higher administrative court and it has no binding effect on other administrative tribunals. Only a ruling from the Council of State (*Conseil d'Etat*) would set a precedent. (Cf. Tribunal administratif de Lyon, M. B.P, Ordonnance du juge des référés, 2 février 2007, N°0700354; Tribunal administratif de Lyon, Mme EC, Ordonnance du juge des référés, 3 avril 2009, N° 0901637; Tribunal administratif de Lyon, Mr. KC, Ordonnance du juge des référés, 3 avril 2009, N° 0901635.)

the decision of the Prefecture to refuse to deliver a temporary residence permit and to issue an “obligation to leave the French territory” (“OQTF”) be cancelled.<sup>236</sup> This appeal to the administrative court, which must be lodged within one month of notification of the Prefecture’s decision, has automatic suspensive effect.<sup>237</sup> The administrative court must take a decision, regarding whether execution of the removal order would be in compliance with Article 3 of the European Convention on Human Rights, within three months, or 72 hours if the appellant is held in an administrative retention centre. As such, there are two parallel appeal processes: the CNDA reviews whether the appellant is a refugee or qualifies for subsidiary protection status; and the administrative court considers whether execution of the removal order would be in conformity with the European Convention on Human Rights. If the administrative court determines that execution of the removal order is in compliance with the European Convention on Human Rights, the appellant may be removed before the decision of the CNDA on the claim for international protection.

### **Recommendations**

**By law, no expulsion order should be enforced unless the time limit within which to lodge an appeal has expired and the right to appeal has not been exercised.**

**When the right to appeal has been exercised within the time limit, the appeal in general should have automatic suspensive effect and the expulsion order should not be enforceable until and unless a final negative decision has been taken on the asylum application.<sup>238</sup>**

**Member States should only be able to derogate from the automatic suspensive effect of an appeal on an exceptional basis, when the decision determines that the claim is “clearly abusive” or “manifestly unfounded” as defined in EXCOM Conclusion No. 30(XXXIV) 1983.<sup>239</sup> Additional exceptions could apply with respect to preliminary examinations in the case of subsequent applications, and where there is a formal**

<sup>236</sup> Article L.512-1 *Ceseda* states “[t]he foreigner [who is denied various kinds of residence titles accompanied by an obligation to leave the territory ‘OQTF’ which mentions the country of destination] may, within one month after the notification, request the cancellation of these decisions to the administrative court. S/he may request free legal assistance at the latest when s/he submits his/her request. His/her appeal suspends the enforcement of the OQTF but does not prevent his/her holding in an administrative retention centre under the conditions mentioned in Title V of this chapter.”

<sup>237</sup> The Prefecture’s decision to issue ‘an obligation to leave the territory’ (*une obligation de quitter le territoire français (OQTF)*) is, on average, taken three weeks after OFPRA’s negative decision.

<sup>238</sup> In this connection, the Commission has proposed amendment of the APD to provide for general automatic suspensive effect, subject to specific exceptions: see proposed recast Article 41: APD Recast Proposal 2009.

<sup>239</sup> “... those which are clearly fraudulent nor not related to the criteria for the granting of refugee status ... nor to any other criteria justifying the grant of asylum.” This does not equate to a finding of ‘manifestly unfounded’ in terms of Article 28 APD. It equates solely to Article 23 (4) (b) APD, and not to other grounds stated under Article 23 (4) APD.

arrangement between states on responsibility-sharing. In such situations, in accordance with international law, the appellant nevertheless must have the right and the effective opportunity to request a court or tribunal to grant suspensive effect. The review of whether to grant suspensive effect may be simplified and fast, provided both facts and law are considered.<sup>240</sup>

By law, no expulsion order should be enforced unless the time limit within which to request suspensive effect has expired. The time limit must be reasonable and permit the applicant to exercise his/her right to legal assistance and to request suspensive effect. Any such request should automatically suspend enforcement of any expulsion order until a decision on the request has been taken by the court or tribunal. The APD should be amended accordingly.

### Scope of the review

Article 39 APD does not regulate the scope of review by the appellate body. However, the case law of the European Court of Justice has established that the appeal body must have the power to review both facts and issues of law.<sup>241</sup> Moreover, the case law of the European Court of Human Rights has established that the notion of an effective remedy requires “rigorous scrutiny” of appeals.<sup>242</sup> In practice, the European Court of Human Rights gathers and verifies facts, and conducts a full assessment of fact and law in the cases before it.

In a majority of the Member States surveyed, the appellate body, competent to review negative decisions on applications for international protection, has jurisdiction to review questions of both fact and law. This is the case in Belgium,<sup>243</sup> Bulgaria,<sup>244</sup> the Czech Republic,<sup>245</sup> Finland, France,<sup>246</sup> Germany,<sup>247</sup> Italy,<sup>248</sup> Slovenia,<sup>249</sup> Spain<sup>250</sup> and the United

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<sup>240</sup> UNHCR APD comments 2005.

<sup>241</sup> ECJ, Judgment *Dörr and Ünal*, Case C-136/03, 2 June 2005, paragraph 57.

<sup>242</sup> See, for example, the case of *Salah Sheekh v the Netherlands*, No. 1948/04.

<sup>243</sup> Article 39/2, 1, Aliens Act.

<sup>244</sup> Article 146 Administrative Procedures Code (APC).

<sup>245</sup> Section 76 CAJ “*Decision-making without an order to hear the matter:*

*(1) The court shall revoke the contested decision for procedural faults without a hearing by means of judgement*

*a) on grounds of non-reviewability consisting in incomprehensibility or for absence of reasons for the decision,*

*b) because the facts of the matter which the administrative authority took as the grounds for the contested decision are contrary to the documents or are not supported by them or require extensive or essential supplementing,*

*c) for substantial breach of the regulations on proceedings before an administrative authority if it could result in an unlawful decision on the matter itself.”*

*Section 78 CAJ“(1) If the complaint is justified, the court revokes the contested decision as unlawful or for procedural faults. The court also revokes the contested decision as unlawful if it finds that the administrative authority exceeded the legally defined bounds of discretionary power, or abused it.”*

Kingdom.<sup>251</sup> However, in relation to Belgium and the UK, this general statement must be qualified with regard to some specific cases.

In Belgium the appeal body (Council for Aliens Law Litigation) has full jurisdiction over all decisions of the first instance determining authority. It does not have full jurisdiction over decisions of the Aliens Office relating to the preliminary examination of subsequent applications, or applications from EU citizens.<sup>252</sup> Instead, the scope of review is limited to a review of the legality of the decision.<sup>253</sup>

In the United Kingdom, negative decisions may be appealed in-country to the specialised Asylum and Immigration Tribunal which has jurisdiction to review questions of both fact and law. However, no in-country right of appeal is available, when the determining authority decides that the claim is clearly unfounded<sup>254</sup> or where there is a national security issue.<sup>255</sup> Furthermore, there is no right of appeal in most safe third country cases,<sup>256</sup> or where a decision is made not to re-open the asylum procedure following withdrawal, or not to further examine a subsequent application.<sup>257</sup> It also

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See section 71(1)(d) CAJ concerning the requirement for stating grounds when lodging an appeal: *“Counts of charges from which it must be clear for which factual and legal reasons the complainant considers the statements of the decision illegal or null.”*

<sup>246</sup> With regard to the CNDA.

<sup>247</sup> Section 86 (1) Code of Administrative Court Procedure.

<sup>248</sup> According to Article 35 of Legislative Decree 25/2008, appeals are lodged at a Civil Court. On the basis of the Italian Constitution (Art. 103 and 113 in particular) and as a general rule, the Civil Courts have full jurisdiction on points of law and fact.

<sup>249</sup> Article 27 of the Act on Administrative Dispute.

<sup>250</sup> Article 67 of the Law on the Administrative Jurisdiction. This is the case for both administrative judges of the National High Court and the Administrative Chamber of the National High Court. In case of revocation of refugee status which can only be appealed to the Supreme Court, the Court reviews both facts and law.

<sup>251</sup> Sections 84, 85 and 85A of the Nationality, Immigration and Asylum Act 2002, and with regard to appeals before the Asylum and Immigration Tribunal.

<sup>252</sup> Article 57/6, 2° of the Aliens Act.

<sup>253</sup> In relation to applications from EU citizens, the only possibility foreseen is an appeal of annulment. This means that the CALL can only examine the decision on its legality (Article 39/2, § 2 of the Aliens Act). The appeal will not examine the substance of the application, nor will it have automatic suspensive effect (a separate appeal for suspension of the expulsion measures must be lodged). In relation to subsequent applications the only appeal against a decision of the AO not to consider the subsequent application (Article 51/8 of the Aliens Act) is an appeal of annulment, which has no suspensive effect. Article 51/8 of the Aliens Act states that in principle it is not possible to lodge a request for the suspension of the challenged decision, as long as article 51/8 of the Aliens Act has been correctly applied (see binding limitative interpretation of the Constitutional Court given in its judgments of 14 July 1994 and 27 May 2008).

<sup>254</sup> Nationality Immigration and Asylum Act 2002 s94.

<sup>255</sup> Nationality, Immigration and Asylum Act 2002 s 97A (2)&(3). In national security cases appeals are heard by the Special Immigration Appeals Commission, see Special Immigration Appeals Commission Act 1997.

<sup>256</sup> Section 33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

<sup>257</sup> When this is considered not to constitute a ‘fresh claim’ as defined by Immigration Rule 353.



applies where a subsequent application could have been raised in a previous appeal<sup>258</sup> or a claim could have been made earlier.<sup>259</sup> The UK authorities claim to have transposed the requirements of Article 39 (1) APD on the basis that where there is no statutory in-country right of appeal, the applicant may still seek judicial review of the decision.<sup>260</sup>

However, as the scope of judicial review is restricted to a review of the lawfulness of the decision, and not the merits, the issue of whether judicial review can provide an effective remedy in the asylum and immigration context is still a contested one. In the UK, the courts can conduct a more rigorous level of review in human rights cases, including asylum cases.<sup>261</sup> More intense review can also be invoked where EC/EU law is involved.<sup>262</sup> However, the effectiveness of judicial review as a remedy continues to be challenged before the European Court of Human Rights.<sup>263</sup> In English law, judicial review examines only the manner in which the decision was made, and not the merits of the impugned decision. While the European Court of Human Rights has held in a leading decision that judicial review in England can be considered to constitute an effective remedy, two judges dissented, stating that *“it appears to me that a national system ... which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13 [ECHR].”*<sup>264</sup>

A significant exception in law, among those Member States surveyed, relates to provisions in the Netherlands which limit the scope of review by the first tier appeal body (District Court). In Dutch administrative law, a strict distinction is made between full judicial scrutiny of a decision and marginal scrutiny. Marginal scrutiny means that the court can only review the reasonableness of a decision, and will only annul the decision if it is considered unreasonable. The Administrative Law Division of the Council of State has held that only marginal scrutiny shall apply to the facts as established by the determining authority; the evidence that the determining authority relied upon in making its decision; and the credibility assessment made by the determining authority. The District Court is obliged to defer to the fact-finding of the determining authority, and only review the reasonableness of the decision based on the facts as presented by the determining authority.<sup>265</sup> Thus, while the determination of uncontested facts is subject to full judicial review, the determining authority's assessment of disputed or contested facts is reviewed only marginally. The Committee against Torture has

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<sup>258</sup> Section 96 (1) of the Nationality Immigration and Asylum Act 2002.

<sup>259</sup> Section 96 (2) of the Nationality Immigration and Asylum Act 2002.

<sup>260</sup> Annex A of the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007.

<sup>261</sup> *R v Secy of State for Home Dept ex p Daly* [2001] UKHL26, *Huang and Kashmiri v Secy of State for Home Dept* [2007] UKHL 11; *Bugdaycay v Secy of State for Home Dept* [1987] AC 514.

<sup>262</sup> *R v Chief Constable of Sussex, ex parte ITF* [1999] 2 AC 418.

<sup>263</sup> *KRS v UK* ECtHR 2.12.08 (32733/09). This challenge was unsuccessful.

<sup>264</sup> *Vilvarajah v UK* – Applications Nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991. Dissenting opinion by Judge Walsh, supported by Judge Russo.

<sup>265</sup> See also J. van Rooij, *Asylum procedure versus human rights*, April 2004, [www.rechten.vu.nl/documenten](http://www.rechten.vu.nl/documenten).

expressed its concerns that appeal procedures provide for marginal scrutiny only of rejected applications.<sup>266</sup>

UNHCR recognises that, in accordance with international human rights law, that the assessment of whether a state provides an effective remedy must consider whether the “aggregate of several remedies” provided by domestic law satisfies the requirements of Article 39 of the APD and Article 13 of the European Convention on Human Rights.<sup>267</sup>

In the Netherlands, where there is a limited scope of review by the first tier appellate body, there is in law the possibility of an onward appeal, but only on important points of law.<sup>268</sup> In the Netherlands, lawyers, judges and academics have argued that given the Dutch 48 hour accelerated procedure, the marginal scrutiny exercised by the District Courts, together with the stringent restrictions on the submission of new evidence,<sup>269</sup> this does not comply with the requirements of an effective remedy.<sup>270</sup>

At the time of UNHCR’s research in Greece, the appellate body (the Appeals Board) reviewed both facts and law. However, since UNHCR’s research in Greece, the Appeals Board has been abolished by law and the only appellate body is the Council of State which only has jurisdiction to review the legality of the decision by the determining authority and does not review the facts. It must be highlighted that, in Greece, the Council of State is the only appeal instance for an appellant and there is no possibility of an onward appeal. This means that the only authority which examines the facts is the determining authority - the Aliens’ Directorate of the Greek Police Headquarters (ADGPH). UNHCR’s research has revealed that the determining authority’s interviews at first instance, as observed by UNHCR, generally lasted five to ten minutes and that questioning did not serve to address the grounds for a potential claim. The information recorded on interview forms was extremely brief and often standard. Decisions were also brief and standard, and no further information was contained in case files. Notwithstanding the creation, at first instance, of an Advisory Refugee Committee composed of two police officers and an official of the Aliens and Immigration Directorate, UNHCR is deeply concerned that applicants for international protection in Greece did not receive an adequate examination of their application, and that the right to seek an annulment of a decision on a point of law only – without any review of the facts - is not an effective remedy.

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<sup>266</sup> Paragraph 7 (d), CAT/C/NET/CO/4 August 2007.

<sup>267</sup> *Conka v Belgium*, amongst many authorities.

<sup>268</sup> Administrative branch of Council of State

<sup>269</sup> See below

<sup>270</sup> See for example the Commission Scheltema, *Evaluatie Vreemdelingenwet 2000, De Asielprocedure – deel 1* (2006), p. 77, L. Slingenberg 2006, [www.rechten.vu.nl/documenten](http://www.rechten.vu.nl/documenten), p. 95; T.P. Spijkerboer, *Het hoger beroep in vreemdelingenzaken*, Den Haag: Sdu 2002; P. Boeles, E.R. Brouwer, A.J.Th. Woltjer & K. Alfenaar, *Border Control and Movement of persons, towards effective legal remedies for individuals in Europe*, Utrecht: Standing Committee of Experts in International Immigration 2004; VluchtelingenWerk Nederland, *Vreemdelingenwet 2000, een ontspoorde asielwet*, October 2006; T.P. Spijkerboer & B.P. Vermeulen 2005, p. 228.

In Slovenia, the Supreme Court has the power to consider points of law and fact, but like the Administrative Court before it, in practice, only reviews petitions on points of law. As a result, in Slovenia, only the determining authority examines the facts and, in practice, there is no review of the facts by a court or tribunal.

### **Recommendation**

**Effective national remedies must provide for rigorous scrutiny of challenges to negative decisions on asylum claims which should in principle encompass a review both of facts and law.**

### **Evidence and fact-finding**

The European Court of Human Rights has interpreted its duty to conduct a rigorous scrutiny as requiring it to conduct its own fact-finding when necessary. It has explicitly held that:<sup>271</sup>

*“In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained proprio motu, in particular where the applicant – or a third party within the meaning of Article 36 of the Convention - provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government. In respect of materials obtained proprio motu, the Court considers that, given the absolute nature of the protection afforded by Article 3 ECHR, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by material originating from other, reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations. In its supervisory task, it would be too narrow an approach if the Court were only to take into account materials made available by the domestic authorities of the Contracting State concerned without comparing these with materials from other, reliable and objective sources. This further implies that, in assessing an alleged risk of treatment contrary to Article 3 ECHR, a full and ex nunc assessment is called for as the situation in a country of destination may change in the course of time.”*

UNHCR recommends that the appeal body should have fact-finding competence, in order to fully satisfy the requirement of rigorous scrutiny established in international human rights law. This is important both when the court or tribunal has power to take a decision regarding the appellant’s qualification for refugee status or subsidiary

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<sup>271</sup> *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of January 2007.

protection status; and when the court or tribunal has the power to quash the decision of the determining authority and return the application to the determining authority for re-examination.

UNHCR notes positively that the courts or tribunals in Finland, France, Germany,<sup>272</sup> Italy and Spain conduct independent fact-finding when necessary. Indeed, the Helsinki District Administrative Court has its own specialist asylum and immigration library at its disposal and can directly access the internet, the information resources of the determining authority or sources abroad. Similarly, the CNDA in France has its own centre of geopolitical information providing COI and the information departments of both OFPRA and CNDA sometimes conduct joint fact-finding missions. In Germany, the administrative courts sometimes request the Federal Ministry of Foreign Affairs, UNHCR or NGOs to provide country of origin information on a specific question by a formal decision on evidence (*Beweisbeschluss*). In addition to the public reports on country of origin information, the courts frequently consult the non-public reports of the Federal Ministry of Foreign Affairs as well as particular information provided upon request to other courts. All information consulted is communicated to the parties to the proceedings by the court in a list (the so called *Erkenntnisliste*).<sup>273</sup> Likewise, in Italy, the Civil Courts can acquire all necessary evidence<sup>274</sup> and can conduct independent fact-finding.<sup>275</sup>

The Regional Courts in the Czech Republic may also conduct fact-finding.<sup>276</sup> Some of the Regional Courts in the Czech Republic sometimes refer to UNHCR when limited evidence has been presented by the parties. Any evidence produced through such fact-finding must be shared with both parties and raised as evidence during a court hearing.<sup>277</sup> Some Regional Courts do utilise this possibility to seek country of origin information, but this is not practised by all courts.<sup>278</sup>

In contrast, notwithstanding the position taken by the European Court of Human Rights, the appellate bodies in Belgium, Bulgaria, and the UK do not undertake their own investigation into the facts, but instead rely on the evidence submitted by the appellant and the determining authority. Although the Administrative Court in Slovenia has access to COI via the internet, in practice, the Court rarely conducts its own fact-finding.

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<sup>272</sup> Section 86 (1) Code of Administrative Court Procedure.

<sup>273</sup> See for instance, Higher Administrative Court of Hesse, judgment of 27 February 2006, 11 UE 2252/04.A: “Den Beteiligten sind die Listen ‘Allgemeine politische und gesellschaftliche Lage’ und ‘Spezielle Erkenntnisse zu Exilorganisationen und zur Rückkehrgefährdung’ mit dem Senat zu Iran vorliegenden Erkenntnisquellen (Stand jeweils: 6. Februar 2006) übersandt worden. Die Beteiligten haben Gelegenheit erhalten, zu diesen Erkenntnisquellen Stellung zu nehmen.”

<sup>274</sup> Article 35 (10) d.lgs. 25/2008

<sup>275</sup> Article 738 of the Code of Civil Procedures.

<sup>276</sup> Section 52 (1) CAJ.

<sup>277</sup> Section 77 CAJ.

<sup>278</sup> Interview with judge at a Regional Court.

UNHCR is concerned that such an approach is heavily reliant upon the competence of the appellant's legal adviser – if the appellant has one – to raise relevant legal argumentation and present relevant evidence. This concern is heightened because, as mentioned above, UNHCR has been informed that in some Member States, there is a shortage of competent legal advisers specialised in refugee law. The time limits imposed in some Member States also fail to provide the appellant/legal adviser with sufficient time to access the case file, gather relevant evidence and submit reasoned legal argumentation.

By way of example, the CALL in Belgium has no fact-finding competence and does not conduct COI or other research or verify the authenticity of documentary evidence. In a recent judgement, the Council of State annulled a CALL judgement because it was based on a source the CALL had accessed through the internet.<sup>279</sup> The CALL's assessment of an appeal must be based on the case file as forwarded by the determining authority, the petition, the determining authority's reply note, any new elements that have been submitted by the parties, and UNHCR's written advice, if any, on the relevant case.<sup>280</sup> The only exception is that the judgment can be based on "generally known facts" or "facts which find support in general experience". Obviously, due to the adversarial nature of an appeal, the CALL cannot base its decision on facts which are not known to the parties. To compensate for the lack of fact-finding competence, the CALL can annul the decision of the CGRA if it is considered "contaminated" by a grave irregularity such as the personal interview was omitted, the interpreter was unreliable, the interview report cannot be read etc. This is also possible if the CALL considers that essential elements are lacking, in which case the CGRA can be instructed to undertake further fact-finding.<sup>281</sup> However, the ability of the CALL to identify the absence of essential elements is heavily reliant on the ability of the appellant's legal representative to cast doubt on the accuracy of the evidence relied upon by the determining authority. In the absence of competent legal representation, it may be argued that the CALL's ability to identify an absence of essential elements or a reliance on inaccurate evidence is hampered. Some CALL judges try to circumvent this limitation by using Article 39/62 Aliens Act, which allows the judge to order both the petitioning party and defending party to provide him/her with information which the judge deems necessary in order to reach a decision on the case, thus enabling the CALL to base its decision on facts submitted by and known to the parties. According to the First President of the CALL, 6.2% of appeals introduced in 2008 resulted in annulment of the decision by the CGRA (316 decisions out of a total to 5,090 decisions taken).<sup>282</sup> The Belgian Constitutional Court has maintained that notwithstanding the lack of fact-finding competence, the

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<sup>279</sup> *RvS* 25 January 2008, nr. 178.960, see also *RvS* 8 April 2008, nr. 181.821.

<sup>280</sup> As introduced on the basis of Article 57/23bis of the Aliens Act to the CALL.

<sup>281</sup> The CGRA is not bound by law to execute an order for additional fact-finding, but a failure to do so, may result in the CALL granting a protection status to the appellant.

<sup>282</sup> Statement made during the parliamentary hearing on the evaluation of the asylum legislation, Senate, 31st March 2009.

CALL provides an effective remedy in terms of the Belgian Constitution, the case-law of the ECHR and the APD.

Likewise, in Bulgaria, the Administrative Court or Supreme Administrative Court relies on the evidence submitted by the parties. Although, *ex officio*, the Court can point out to the parties that they have not presented particular evidence that is significant for the decision. However, the ability of the Court to do so may be hampered if it is not able to conduct its own fact-finding when necessary. This may be particularly problematic given the Court usually receives the determining authority's COI report which does not cite primary sources; and the fact that an 'official document' carries greater weight in judicial proceedings than 'private' documents. As in Belgium, reliance is, therefore, placed on the legal representative of the applicant to submit relevant COI. In practice, the courts may refer to UNHCR for general COI on certain countries of origin. This is also an indication of the need for the courts to conduct some fact-finding when necessary.<sup>283</sup>

The Council of State in Greece and the District Courts of the Netherlands do not undertake fact-finding, as they only conduct a judicial review of the manner in which the decision was made by the determining authority. These appeal bodies do not enter into an examination of the merits for the purpose of deciding on the merits. The District Courts in the Netherlands are bound by the facts as found by the State Secretary, especially with regard to the credibility assessment of the applicant and only assess the reasonableness of the decision based on the facts as presented by the Secretary of State.

#### **Recommendation**

**In order to ensure an effective remedy, appeal authorities should, regardless of whether judicial proceedings are adversarial or inquisitorial, have the power to instigate fact-finding if necessary, in particular where the appellant or a third party intervener provides reasoned grounds which cast doubt on the accuracy or completeness of the information relied on by the determining authority. Any such facts gathered, *proprio motu*, should be shared with the parties.**

#### **Submission of new facts or evidence on appeal**

There are many reasons why facts relevant to the application for international protection may not be raised in the course of the first instance administrative procedure, including:

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<sup>283</sup> Interview with judge on 26 April 2009.

- questioning by the determining authority during the personal interview may not have addressed the issue or elicited the particular information;
- the personal interview may have been omitted;
- the applicant may not have understood the relevance of certain facts to the application;
- trauma, shame, or other inhibitions may have prevented full oral testimony by the applicant in the previous examination procedure, particularly in the case of survivors of torture, sexual violence and persecution on the grounds of sexuality;
- a lack of a gender-appropriate interviewer and/or interpreter may have inhibited the applicant; etc.
- the first instance examination may have been discontinued or terminated on grounds of withdrawal or abandonment without a complete examination of all the relevant elements.

There are also many reasons why documentary evidence may not have been available during the time frame of the first instance procedure, particularly when this is an accelerated procedure, and/or border procedure, and/or the applicant has been held in detention.

Moreover, the situation in the country of origin may have changed and a well-founded fear of persecution or a real risk of suffering serious harm may be based on events which have taken place in the country of origin since the first instance examination of the application. A well-founded fear of persecution or a real risk of suffering serious harm may arise if there has been a direct or indirect breach of the principle of confidentiality during or since the first instance examination procedure and the alleged actor of persecution or serious harm has been informed of the applicant's application for international protection in the Member State.

It is, therefore, critical that the appeal body is able to establish all the relevant facts and assess all the relevant evidence, at the time it takes its decision, in order to provide an effective remedy. This is required by Article 4 (3) (a) of the Qualification Directive and the case-law of the ECtHR.<sup>284</sup>

UNHCR noted positively that in some of the Member States surveyed, there are no restrictions on the right to submit new elements and evidence on appeal: Bulgaria,<sup>285</sup> Finland,<sup>286</sup> France,<sup>287</sup> Germany (with regard to regular rejections),<sup>288</sup> Italy<sup>289</sup> and the UK.<sup>290</sup> In Spain, the admission of evidence is at the discretion of the courts.<sup>291</sup>

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<sup>284</sup> "In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case .... It is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities." *Salah Sheekh v the Netherlands*, ECHR, 11 January 2007, paragraph 136.

<sup>285</sup> Article 171 (2) APC

<sup>286</sup> All new evidence and elements must be submitted to all parties.

<sup>287</sup> The only restriction is that new evidence has to be submitted at least 3 days before the hearing, if any.

However, UNHCR notes that in some Member States, conditions or restrictions are placed on the submission of new elements or evidence: Belgium, the Czech Republic,<sup>292</sup> Germany (in cases of rejections qualified as irrelevant or manifestly unfounded),<sup>293</sup> the Netherlands and Slovenia.

For instance, the CALL in Belgium is required to consider new elements if:

- these elements are part of the petition for appeal for international protection, and
- the appellant demonstrates that s/he was not able to invoke these elements earlier in the administrative procedure.<sup>294</sup>

Notwithstanding these two conditions, the CALL has discretion to take into account any new element which is brought to its attention by the parties including declarations made during the court session, when the following cumulative conditions are fulfilled:

- the elements are supported in the case file;
- the new elements are such that they firmly establish the founded or unfounded character of the appeal; and
- the party makes a reasonable case that it could not invoke these new elements earlier in the procedure.

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<sup>288</sup> However, this must be done within the deadline of one month after the decision of the determining authority was served on the applicant (Section 74 (2) 2 APA); otherwise the court may preclude facts and evidence if: their admission to the procedure would delay the procedure, and there are not sufficient grounds to excuse the delay in submission, and the applicant was informed of the consequences of failing to meet the deadline (Section 74 (2) 2 APA in conjunction with Section 87b (3) Code of Administrative Courts Procedure). However, facts which become known only after the expiry of the one month deadline may be submitted later without specific limitations (Section 74 (2) 4 APA).

<sup>289</sup> Article 31 of Legislative Decree 25/2008.

<sup>290</sup> Nationality Immigration and Asylum Act 2002 s85. In the UK, the Immigration Judge at the AIT has discretion to consider any matter relating to the decision of the determining authority, including evidence about matters arising after that decision.

<sup>291</sup> Articles 60 and 61 of Law 29/1998 on Administrative Jurisdiction.

<sup>292</sup> Section 71 (2) CAJ: *The complainant shall attach one counterpart of the contested decision to the complaint. The complainant may at any point during the proceedings restrict the counts of charges. The complainant may extend the complaint to statements of the decision not yet contested or to extend it by further counts of charges only within the time limit for filing a complaint.* Also, Section 75 (1) CAJ: *In its review of the decision the court proceeds from the facts of the case and the legal situation existing at the time of decision-making by the administrative authority.*

<sup>293</sup> Section 36 (4) 3 APA: facts and circumstances not presented by the applicant in the course of the proceedings at the BAMF may be ignored by the court if otherwise the court proceedings are protracted by this. Section 25 (3) APA: *"If the foreigner produces such facts only at a later stage [i.e. after the personal interview], they may be ignored if the decision of the Federal Office would otherwise be delayed. The foreigner shall be informed of this provision and of Section 36 (4) third sentence."*

<sup>294</sup> Article 39/76 of the Aliens Act.



The Constitutional Court has attempted to clarify the interpretation to be given to the law. However judges at the CALL, interviewed by UNHCR, have admitted that this remains a grey area and further clarification by the Constitutional Court would be welcome. The Constitutional Court considered that the conditions on the submission of new elements are necessary in order to prevent dilatory proceedings, but held that the CALL must examine any new element submitted by the appellant which clearly demonstrates the well-founded character of the appeal. Only those elements unrelated to qualification for refugee status or subsidiary protection status can be ignored.<sup>295</sup> However, in a second judgement on this matter, the Constitutional Court further stipulated that “*the requesting party must give a plausible explanation of why it did not communicate the new element earlier in the procedure*”.<sup>296</sup>

In the Czech Republic, only new evidence supporting elements raised during the first instance procedure may be submitted. It is at the discretion of the courts whether to consider such evidence. There are two exceptions which are significant for appeals against negative decisions taken in the asylum procedure:

- when ignoring new elements or facts would result in a breach of the principle of *non-refoulement*. The interpretation of this is not settled in law. However, it was applied in the case of an appellant who faced the death penalty in Afghanistan. The application was considered implicitly withdrawn as a result of the strict application of a procedural rule, when the applicant tried to cross the border of the Czech Republic illegally.<sup>297</sup>
- A procedural flaw in the first instance procedure which could not be raised during the first instance procedure. Note that an appeal on the basis of incompetent interpreting is likely to fail if no objection is raised during the first instance procedure.

The Administrative Court in Slovenia places similar restrictions on the submission of new evidence, prohibiting the submission of evidence or new facts which could have been raised in the first instance procedure, unless the appellant has a well-founded reason for not doing so.<sup>298</sup>

In the Netherlands, there are significant restrictions and strict conditions placed on the submission of additional or new evidence to the District Court. The District Courts do not accept additional oral or documentary evidence which relates to circumstances which occurred before the determining authority took its decision. For instance:

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<sup>295</sup> GWH 27 May 2008, nr. 81/2008, B.29.1-B.30. The CALL now applies this interpretation according to its First President in his report to the Senate: Raad voor Vreemdelingenbetwistingen, *Stand van de Raad na 1,5 jaar werking*, 2009, p. 14.

<sup>296</sup> GWH 30 October 2008, nr. 148/2008, B.6.5.

<sup>297</sup> Judgment of the SAC No. 9 Azs 23/2007 – 64 of 14 July 2007, available at [www.nssoud.cz](http://www.nssoud.cz)

<sup>298</sup> Arts. 30 (3) and 52 of the AAD.

- Documents which existed at the time of the first instance procedure but which could not be obtained because, for example, they were in the country of origin at that time are not considered new facts and are not admitted. In theory, the applicant may rebut this presumption by proving that it was impossible to obtain the documents. However, there is no known jurisprudence where this has succeeded.
- A new fact is not admitted, such as evidence that the applicant was subjected to torture or sexual violence, which was not raised during the first instance procedure due to shame, trauma or otherwise.<sup>299</sup>

These limitations are applied strictly, even if the evidence could clearly demonstrate that the applicant is a refugee or qualifies for subsidiary protection status.<sup>300</sup> The UN Committee against Torture has declared its concern that appeal procedures in the Netherlands only provide for marginal scrutiny of rejected applications and “*that the opportunity to submit additional documentation and information is restricted*”.<sup>301</sup> UNHCR shares this concern and considers that such stringent and inflexible conditions may render the remedy ineffective.

The notion of ‘new elements’ should be interpreted in a protection-oriented manner in line with the object and the purpose of the 1951 Convention. Facts supporting the essence of the claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. This could include, among others, elements which already existed at the time of the initial decision but were not raised for a variety of valid reasons.

### **Recommendation**

**In general, applicants should be permitted to raise new facts and evidence on appeal, to enable the appeal body to examine all relevant facts and assess all relevant evidence, at the time it takes its decision.**

### **Right to a hearing**

The right to a hearing is particularly important in those cases where the appellant was denied a personal interview in the first instance procedure, or when the application was rejected or discontinued on the grounds that the applicant failed to appear for a personal interview.

<sup>299</sup> Article 4:6 General Administrative Law Act in conjunction with Article 83 Aliens Act.

<sup>300</sup> See, for instance, District Court Amsterdam, AWB 06/36220, 26 April 2007.

<sup>301</sup> Conclusions and Comments of the Committee against Torture on the Netherlands, May 2007.

UNHCR notes that appellants in Bulgaria,<sup>302</sup> Czech Republic,<sup>303</sup> Germany,<sup>304</sup> Italy,<sup>305</sup> Spain<sup>306</sup> and the UK<sup>307</sup> are given the opportunity of a hearing.

UNHCR also notes that the law in Belgium does allow some possibility for the appellant to be heard by the CALL. The proceedings before the CALL in Belgium are mainly written, but the parties and their lawyers may be invited to intervene orally during the court session, in order to reply to the note of the CGRA, introduce any new elements or to highlight one specific element of the petition. However, NGOs and lawyers have complained that the practice varies widely in this respect and many appellants are not heard by the CALL.

In France, the CNDA normally conducts an oral hearing. However, the President and the Presidents of the Sections of the CNDA have the power to decide on an appeal alone and without an oral hearing on the ground that, for example, the appeal is considered not to present “*serious elements likely to bring into question the reasons for the decision taken by the OFPRA*”.<sup>308</sup> This exception to the norm of conducting an oral hearing is used increasingly,<sup>309</sup> and is of particular concern given that applicants may have been denied the opportunity of a personal interview during the first instance procedure.

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<sup>302</sup> Article 85 (1) and 90 (1) LAR state that the court examines the appeal in a public session within one month. The right to an oral hearing is implicit in the Administrative Procedure Code and the Civil Procedure Code where it is formulated as a principle. In practice, the appellant is given the opportunity of an oral hearing, provided an interpreter is available when necessary.

<sup>303</sup> In the Czech Republic, the decision of the determining authority may be annulled by the Regional Court without an oral hearing according to Section 76 (1) CAJ. An oral hearing need not be conducted if both parties agree. There is a rebuttable presumption that they agree not to conduct an oral hearing unless they disagree within two weeks from the date of notice by the court according to Section 51 (1) CAJ.

<sup>304</sup> Section 101 (1) Code of Administrative Court Procedure (a hearing is to be carried out unless otherwise foreseen by law). In particular, note that with regard to a request for suspensive effect, the decision of the court is adopted in the form of an order (*Beschluss*, Section 123 (4) Code of Administrative Courts Procedure) and the appellant is not given the opportunity of a hearing (Sections 18a (4) 5 and 36 (3) 4 APA). Exceptionally, an interview may be conducted within temporary legal remedy proceedings if the asylum authorities attached incorrect relevance to the applicant’s submissions or if procedural errors occurred. (R. Marx, *Residence, asylum and refugee law for practicing lawyers*, 3<sup>rd</sup> edition (2007), in particular, p. 1322 and p. 1334; BVerfGE 94, 166, 206.)

<sup>305</sup> Article 35, 10 of Legislative Decree N. 25/2008 provides that “*the Court, after hearing the parts and after having obtained all the necessary evidence, decides within three months (...)*”

<sup>306</sup> Articles 62 and 78.3 of Law 29/1998 on the Administrative Jurisdiction.

<sup>307</sup> Asylum and Immigration Tribunal (Procedure) Rules 2005, rule 15.

<sup>308</sup> Article L.733-2 *Ceseda*, Article R.733-5, Article R. 733-16 *Ceseda*: official notices of withdrawals; no matter on which to give a ruling in an appeal; rejection of appeals with obvious grounds for inadmissibility unlikely to be rectified during proceedings and rejection of appeals that present no serious elements likely to bring into question the reasons for the decision taken by the OFPRA. This last ground (called “*ordonnances nouvelles*” or “*new ordonnances*” is particularly problematic since the CNDA does not rule on the legality of the OFPRA decision per se, but rather on the merits.

<sup>309</sup> In 2005, 7.2% of the decisions, in 2006, around 14%, in 2008 14.2% for all “*ordonnances*”, including 9.6% for the “*new ordonnances*”.

In Spain, the Administrative National High Court always conducts a hearing in appeals against a decision of inadmissibility.<sup>310</sup> However, the Chamber of the National Administrative High Court, which hears appeals against negative decisions taken in the refugee status determination procedure, has discretion to grant a request for an oral hearing by either of the parties.<sup>311</sup>

The procedure before the Helsinki District Administrative Court is normally a written procedure. The court can arrange an oral hearing if it considers it necessary or if a party to the proceedings requests one, but the District Administrative Court rarely considers this necessary, even if requested and even if the issue at stake concerns the credibility of the appellant.<sup>312</sup> Similarly, in Slovenia oral hearings are not normally conducted by the administrative court with the exception of appeals against detention orders.<sup>313</sup>

In Greece, the appellant may not appear in person before the Council of State but s/he may be represented by a legal counsellor.<sup>314</sup>

### Time limit for a decision by the court or tribunal

Article 39 (4) APD contains an optional provision stating that “Member States may lay down time-limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.” As can be seen from the table below, in the absence of a mandatory requirement in the APD, a number of the Member States surveyed have not set time limits for the decision on the appeal.

Timelines are from receipt by the court or tribunal of the petition, unless otherwise specified:

Member States	Appealed from regular procedure	Appealed from accelerated procedure	Appealed from border procedure	Applicant in detention
Belgium	3 months <sup>315</sup>	2 months <sup>316</sup>	Approx. 13 days	Approx. 13 days
Bulgaria	1 month <sup>317</sup>	1 month <sup>318</sup>	N/A	No special provision
Czech Republic	No time limit	No time limit	No time limit	No time limit
Finland	No time limit	No time limit	No time limit	No time limit
France	No time limit	No time limit	72 hours	No time limit <sup>319</sup>

<sup>310</sup> Article 78(19)LJCA

<sup>311</sup> Article 62 LJCA

<sup>312</sup> Sections 37 and 38 *Hallintolainkäyttölaki* (Act of Administrative Judicial Procedure 586/1996, as in force 29.4.2009).

<sup>313</sup> Article 80 of the AAD permits the Administrative Court to conduct an oral hearing.

<sup>314</sup> Article 26 PD 18/1989

<sup>315</sup> Article 39/76, § 3, 1° of the Aliens Act.

<sup>316</sup> Articles 39, 76, § 3, 2° 52 and 52/2, § 1 or § 2, 3° and 4° of the Aliens Act.

<sup>317</sup> Article 90 (1) LAR.

<sup>318</sup> Article 85 (1) LAR.

Member States	Appealed from regular procedure	Appealed from accelerated procedure	Appealed from border procedure	Applicant in detention
Germany	No time limit	N/A	14 days <sup>320</sup>	
Greece <sup>321</sup>	No time limit	N/A	No time limit	No time limit
Italy	3 months	3 months	3 months	3 months
Netherlands	6 weeks			
Slovenia	30 days	7 days		
Spain	No time limit	No time limit	No time limit	No time limit
UK	38 days	2 days from date of hearing <sup>322</sup>	N/A	2 days from date of hearing <sup>323</sup>

In Italy, decisions on appeal are rarely issued within six months in spite of the three month time limit. In the Czech Republic, although there is no established time limit, the courts must prioritise appeals concerning international protection and appellants held in detention.<sup>324</sup> However, in practice, the appeal process may last more than a year in the courts with the heaviest case loads. The appeal process can also take about a year in Finland.

## Remedies

The case law of the European Court of Justice has established that the appeal body must have the power to quash, if necessary, the decision of the administrative authorities.<sup>325</sup>

The appeal authorities in a number of the Member States surveyed have the power to either revise or quash the decision of the administrative authorities: CALL in Belgium; Helsinki District Court in Finland; and the National High Court in Spain. The

<sup>319</sup> Note that when the appellant has been detained following the issue of an expulsion order, a request to the administrative court to suspend enforcement must be decided within 72 hours.

<sup>320</sup> This regards the airport procedure. The decision of the determining authority to refuse to grant entry to the territory can only be maintained if the administrative court rejects the application for an interim measure within 14 days of its submission (Section 18a (6) No.3 APA).

<sup>321</sup> After the modification of PD 90/2008 the appeal procedure ceased to exist. According to article 2 of PD 81/2009 (PD 81/2009 amended PD 90/2008) the only measure against any negative decision is an application for annulment that can be lodged before Council of State (CoS). There is no time limit for a decision by the Council of State.

<sup>322</sup> In the detained fast track procedures, the hearing takes place four days after the appeal is lodged with the AIT.

<sup>323</sup> In the detained fast track procedures, the hearing takes place four days after the appeal is lodged with the AIT.

<sup>324</sup> Section 56 (2) CAJ: “The court **furthermore preferentially** deals with petitions and complaints concerning **international protection**, decisions on detention of a foreigner and decisions on the termination of special protection of and aid to witnesses and other persons in connection with criminal proceedings as well as in other cases, if provided for by a special law.”

<sup>325</sup> *Commission v. Austria*, C-424/99, 2001; and to grant interim relief (*Unibet*, C-432/05, 2007, paragraph 67

Administrative Court in Slovenia has the power to either revise or quash a decision but in practice it never exercises its power to revise a decision.<sup>326</sup>

The CNDA in France, the Civil Courts in Italy and the AIT in the UK all have the power to revise the decision of the determining authority. Similarly, the German administrative courts may order the determining authority to grant a particular form of international protection.

The appeal authorities in Bulgaria,<sup>327</sup> Czech Republic, and the Netherlands have the power to quash the decision of the determining authority and refer it back to the latter for re-examination. This is also so for the High Court in England and Wales, Court of Session in Scotland and High Court of Northern Ireland.

Article 39 (5) APD provides that:

*“Where an applicant has been granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC [Qualification Directive], the applicant may be considered as having an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.”*

UNHCR recognises that at the national and EU level a status other than refugee status may offer the same rights and benefits as refugee status. However, refugee status is an internationally recognised status, and on this basis appellants should be seen as having an interest in maintaining the proceedings.

UNHCR has noted that, with the exception of the Netherlands, none of the Member States surveyed generally implement Article 39 (5) APD.<sup>328</sup>

### **Recommendation**

**UNHCR recommends that applicants be permitted to seek an effective remedy against decisions to refuse refugee status, even where another status is given providing the same rights and benefits.**

<sup>326</sup> Article 65 of the AAD stipulates that the Administrative Court has the power to take a final decision.

<sup>327</sup> Article 85 (2) LAR and Article 90 (2) LAR.

<sup>328</sup> A representative on the Appeals Board in Greece recollected one case where a remedy was denied on the ground that the appellant was the spouse of a Greek national.

## **Discontinuation of appeal proceedings**

Article 39 (6) APD states that *“Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed”*.

In the Czech Republic, the appeal proceedings may be discontinued if the place of residence of the appellant cannot be established.<sup>329</sup> As a result, where the appeal has no suspensive effect and the appellant is deported, appeal proceedings are discontinued on the grounds that the place of residence of the appellant is unknown and, therefore in practice, there is no legal remedy.

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<sup>329</sup> Section 33 ASA.