IMPROVING ASYLUM PROCEDURES
COMPARATIVE ANALYSIS AND RECOMMENDATIONS
FOR LAW AND PRACTICE

Key Findings and Recommendations on Credibility and Country of Origin Information

UNHCR research project
on the application of key provisions of the
Asylum Procedures Directive in selected Member States
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Translations: all English translations of national legislation, decisions and reports are unofficial translations by the researchers unless otherwise indicated. References to acquis instruments, where in English in quotation mark, are quoted from the English language official versions of those instruments

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Introduction

In the exercise of its supervisory role under Article 35 of the 1951 Convention relating to the Status of Refugees, and with generous support from the European Refugee Fund, UNHCR has undertaken a wide-ranging comparative analysis of the transposition of key provisions of the Asylum Procedure Directive (APD) into national law by selected European Union (EU) Member States, and the practical application of those provisions.[1]

Based on that analysis, UNHCR published its findings and recommendations in March 2010. These aim to assist Member State authorities in the interpretation and application of the Directive, as well as to inform discussions and work towards strengthening and improving asylum procedures across the European Union.

The issues of credibility and evidence assessment did not form a specific topic of focus of the research. Nevertheless, in the context of the research, some limited information emerged regarding the treatment of credibility and the use of Country of Origin Information (COI) in asylum decisions.

Findings and recommendations relating to credibility and evidence assessment set out in brief in the report have been collated in this document. They relate mainly to the following Articles of the APD and the relevant thematic areas of focus for the research:

- Articles 9 & 10 – The requirements for a decision (Section 3)
- Article 12 – The opportunity for a personal interview (Section 4)
- Article 13 – The requirements for a personal interview (Section 5)
- Article 14 – Status of the report of a personal interview in the procedure (section 6)
- Article 22 – The collection of information on individual cases (Section 8)
- Article 23 – Prioritized and accelerated examination of applications (section 9)
- Article 39 – The right to an effective remedy (Section 16)

The sections above refer to the various chapters of the detailed research on key asylum procedures, Part 2 on the CD Rom also available on the internet at http://www.unhcr.org/4ba9d99d9.html.

This document compiles both the detailed findings, which can be found in each of the above sections, and the summary of findings published in the Key Findings and Recommendations.

This document should be read in conjunction with the main report, which provides more details on the findings and more in-depth analysis. The main report also contains in appendix the text of the Council Directive 2005/85/EC of 1 December 2005 on minimum standards and procedures for granting and withdrawing refugee status, OJ L 326/13 (Asylum Procedures Directive or APD), and a list of abbreviations and relevant definitions.

[1] UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Key Findings and Recommendations, March 2010, available at: http://www.unhcr.org/4ba9d99d9.html.

Section 3: The requirements for a decision

Good quality asylum decisions in the first instance lend greater credibility to the fairness and efficiency of the asylum system overall, including the appeal system. When the outcome is negative, the applicant needs to know the reasons in fact and law so that s/he can take an informed decision as to whether to exercise any right of appeal. A well-reasoned decision will inform the grounds upon which any eventual appeal should be based.

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

Provision of decisions in writing

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

The structure and content of decisions varied markedly. UNHCR observed decisions that did not set out any summary of the material facts; did not reference any relevant country of origin information or other evidence considered; did not specify which aspects of any evidence gathered was considered to be credible or lack credibility; and did not apply any legal reasoning with regard to any facts. Moreover, this information was not necessarily contained in the case files either. The decisions consisted of very brief generic and standard legal paragraphs. As such there was no evidence that these applications were examined and these decisions taken individually, objectively and impartially. In some Member States, the reasons for the decision may be stated only very briefly in the decision notified to applicants, but greater detail on the reasons for the decision may be contained in the case file, which may be available to the applicant on request. However, UNHCR remains concerned that if full reasons in fact and law are not included in written decisions or are not attached to the decision, then this can frustrate the fairness and efficiency of the appeal process. It also negatively impacts on the transparency and accountability of decision-making and related efforts to improve this.

In several states, the quality of decisions varied depending on the type of procedure in which the application was examined. Decisions in the general procedure often evidenced good practice, fulfilling the requirements to set out reasons in fact and law. Decisions in accelerated, border and admissibility procedures, by contrast, in many cases did not necessarily exhibit sufficient reasoning. This is despite the fact that the APD does not exempt such procedures from the obligation to provide written reasons in fact and law for negative decisions.

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

Provision of decisions in writing, with reasons in facts and law

Article 9 (2) APD states:

"*Member states shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision …*".

A majority of the Member States surveyed have legislative or other provisions that transpose or reflect the requirement under Article 9 (2) APD to state reasons in fact and law in, at least, negative decisions, namely: Belgium,[2] Bulgaria,[3] the Czech Republic,[4] France,[5] Germany,[6] Greece,[7] Italy,[8] Slovenia,[9] Spain[10] and the United Kingdom.[11] The relevant legislation in

[2] Administrative acts by administrations within the meaning of Article 1 of the Law of 29 July 1991 concerning the formal motivation of administrative acts should be distinctively motivated in accordance with Article 2 of the Law of 29 July 1991. The motivation should state the considerations in fact and law upon which the decision is based and the motivation should to be sufficient (Article 3 of the Law of 29 July 1991). The Aliens Act also specifically refers to the obligation of the CGRA to motivate its decision. According to Article 57/6, § 2, as well as Article 62 of the Aliens Act the decision of the CGRA should be motivated with reference to the individual circumstances of the case.

[3] The general provision of Article 59 of the Administrative Procedure places an obligation on the deciding administrative body to include the grounds for the individual act in fact and in law. This formal requirement is formally satisfied as verified by the case files audit.

[4] Section 68 (3) CAP: "*The reasoning shall contain reasons for a statement or statements in the decision, grounds for the issuance thereof, considerations directing the administrative body in its evaluation and its interpretation of legal regulations, and information on how the administrative body handled the proposals and objections of participants and their response to the grounds for the decision."*

[5] Article L. 723-3-1 *Ceseda* states that "*negative decisions should be reasoned in fact and in law*".

[6] Even though the respective legal provision (Section 31 (1) 2nd Sentence APA) does not distinguish between negative (rejected) and positive decisions, in practice, only rejections are motivated. However, this is not based on the requirements of the Directive, but the general rules of administrative procedure which provide that: *''No statement of grounds is required:[…] when the authority is granting an application or is acting upon a declaration and the administrative act does not infringe upon the rights of another; [….].''* (Section 39 (2) No. 1 Administrative Procedure Act). Since the Federal Commissioner for Asylum Affairs has been abolished, an institution having the power to appeal against decisions granting protection, such an appeal against a positive decision is no longer foreseen by German law. The Internal Guidelines for the Asylum Procedure [under: "Decision" 1.1b) as well as the handbook (Handbook for Adjudicators "Decision", 2.1.2, page 7) explicitly refer to this fact without mentioning the APD. Neither Article 9 (2) Sentence 2 to 4 APD nor Article 9 (3) APD have been transposed into German law.

[7] Article 7 (3) PD 90/2008: ''*Where the application is rejected, the reasons, in fact and in law, shall be stated in the decision.''*

[8] Article 9 of the d.lgs. 25/2008: *"The decisions on applications for international protection are given in writing. The decision which rejects an application contains the reasons in facts and in law and information on how to appeal a negative decision".*

[9] Article 214(1) of the AGAP:

''(1) Reasoning of the decision contains:

1. *Explanation of requests of all parties and their allegations on facts;*
2. *Ascertained actual situation and relevant evidence;*
3. *Reasons crucial for assessment of every evidence;*
4. *Citation of relevant legislation supporting the decision;*
5. *In connection with ascertained actual situation - reasons, which lead to the decision, and*
6. *Reasons for which certain request of the party was not granted''.*

Finland[12] and the Netherlands[13] does not explicitly require that the reasons be stated in fact and in law, but instead more generally requires that reasons be stated.

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

UNHCR considers that in a number of Member States of focus, the requirements of Article 9 (2) APD have not been implemented effectively in practice. There are wide divergences in the extent to which decisions set out the material facts of the claim; reference the evidence assessed and the standard of proof applied; assess the credibility of the material facts; and apply the criteria for international protection under the Qualification Directive to accepted facts. There are also different or, in some cases, a lack of, systems in place to monitor the quality of decisions.

Motivation of negative decisions in practice

Beyond requiring stated reasons in fact and in law for the negative decision, Article 9 (2) APD does not prescribe further requirements regarding the reasoning for the decision. However, Article 8 (2) (a) APD does require that "*decisions are taken individually, objectively and impartially*" and, therefore, the written decision should be a reflection of this requirement and the decision should be reasoned in fact and law with reference to the individual facts and circumstances of the applicant.

With regard to negative decisions, the written decision should permit the applicant to know for what specific reasons, and on what specific grounds, his/her application for international protection has been denied.

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[10] Article 54 (1) APL requires that "*The reasons in fact and law for the adoption of administrative acts shall always be briefly stated*.''. Article 89 (3) states that the "*resolution shall include the decision adopted, stating the reasons in fact and law in the cases foreseen in article 54*." Article 20 (1) (c) ALR regarding the admissibility procedure states that "*The inadmissibility decision shall state the reasons in fact and law and be individualized*.''

[11] Paragraph 336 of the Immigration Rules HC 395 state that "*Where an application for asylum is refused, the reasons in fact and law shall be stated in the decision and information provided in writing on how to challenge the decision*."

[12] Section 44 (3) of the Act on Administrative Conduct 434/2004 requires that a written decision includes information about "*the motivations for the decision and individualised information about what the individuals are entitled or obliged, or how the matter has otherwise been decided ..."* but this generic guiding norm does not explicitly distinguish between reasons in law and fact.

[13] According to Article 3:46 General Administrative Law Act, a decision should be based on proper reasons. According to Article 3:47 General Administrative Law Act, the reasons should be stated when the decision is notified and, if possible, the statutory regulation on which the decision is based shall be stated at that same time. According to the table of correspondence, Article 9(2) APD is transposed in Article 3:48 General Administrative Law Act. According to this Article the reasons do not have to be stated if it can reasonably be assumed that there is no need for this. If, however, an interested party asks within a reasonable period of time to be informed of the reasons, they shall be communicated to him as quickly as possible.

Therefore, with regard to negative decisions on the merits, it is UNHCR's view that the written decision should state the material facts of the application. Moreover, the decision should set out sufficient details to permit the applicant to know the following:

- The evidence which was taken into consideration during the examination of the application and decision-making, including both evidence gathered independently by the determining authority and oral and documentary evidence provided by the applicant;
- Which aspects of the evidence were accepted and which evidence was considered to be insufficient, or was not accepted by the determining authority, and an explanation of why the evidence was rejected; and
- The reason why the accepted evidence does not make the applicant eligible for refugee status/subsidiary protection in accordance with the criteria in the Qualification Directive.

As such, a well-reasoned negative decision will: [14]

- Correctly identify the material facts of the application.
- State all the evidence assessed and demonstrate appropriate consideration of all the evidence adduced in support of the application.
- Demonstrate the application of the correct burden of proof i.e. it does not indicate that unreasonable expectations were placed on the applicant to support his or her claim, and shows an awareness of the shared duty to ascertain and evaluate the facts of the application.[15]
- State and reference the objective country information used in the assessment of the application and apply that information appropriately to support conclusions reached.
- Assess the credibility of the material facts using appropriate methodology, and state clear conclusions as to the credibility of each material fact.
- State the standard of proof applied, and apply the benefit of the doubt appropriately.[16]
- Demonstrate the correct interpretation and application of the relevant legal criteria for qualification for refugee and, if relevant, subsidiary protection status to the accepted facts.
- Demonstrate that if any standard paragraphs or wording are used, these are relevant and appropriately tailored to the individual facts.

A decision which fulfils the above requirements will permit the applicant to take an informed decision as to whether to exercise any right of appeal and will highlight the specific grounds upon which any eventual appeal should be based.

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[14] "*Key criteria for assessing the quality of asylum decisions, jointly agreed UKBA/UNHCR minimum standards for a system of quality assurance in the UK first-instance asylum decision-making process*", December 2008, annexed to UNHCR, *'Quality Initiative Project: Sixth Report to the Minister'* (April 2009) available at: http://ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/

[15] Paragraph 196 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating the Status of Refugees, revised 1992.

[16] Paragraphs 196 to 204 of UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating the Status of Refugees, revised 1992.

In order to seek to evaluate implementation of Article 9 (2) APD, the methodology for this research included a sample audit of decisions made in all the Member States surveyed.[17] UNHCR audited a sample of 788 negative decisions i.e. granted neither refugee nor subsidiary protection status.[18] UNHCR recognises that such a relatively small sample does not provide a comprehensive empirical basis on which to evaluate and compare state practice. However, information obtained through the audit of decisions does provide useful indications of an individual Member State's practice. Furthermore, the fact that in some states, practically all decisions exhibited the same deficiencies, justifiably raises cause for concern. Moreover, in addition to information gathered through the audit of decisions and case files, UNHCR also evaluated other relevant sources such as internal and administrative guidelines, as well as decision templates and checklists where these existed.

The audit consisted of a detailed review of the structure and content of decisions in each country. However, the remit of the audit did not permit an in-depth analysis of whether the law had been interpreted and applied correctly to the facts in all cases.

Overall, information obtained through the audit of decisions causes UNHCR to question whether several states are actually meeting in practice the requirement to provide individualised reasons in fact and law following the refusal of an asylum application. The following paragraphs set out some of the specific concerns identified relating to practice in particular Member States.

An audit of 202 case files and decisions in Greece found that all but one[19] of the first instance decisions reviewed were negative, and contained a standard phraseology (not exceeding three paragraphs). The 201 negative decisions did not set out a summary of the material facts: did not reference any relevant country of origin information or other oral or documentary evidence considered; did not specify what aspects of any evidence gathered was considered to be credible or lack credibility; and did not apply any legal reasoning with regard to any facts. There was no other information in the case files which provided any evidence of the application of legal reasoning to the facts; and the facts, as stated in the application form, were severely limited.[20] The only difference between one decision and another was the name of the applicant, the named country of origin and the stated time limit for lodging an appeal. All 201 audited negative decisions stated:

[17] In those Member States where more detailed reasoning for a decision is set out in a separate document in the case file, these were also reviewed.

[18] Belgium: 56 (included unfounded decisions and technical refusals), Bulgaria: 32 (9 of which taken in the accelerated 'filter' procedure. Excluded decisions to suspend or discontinue the procedure.), the Czech Republic: 60 (included rejected, manifestly unfounded, inadmissible and discontinued), Finland: 52, France: 45; Germany: 60; Greece: 201; Italy: 39 (excluded inadmissibility decisions), Netherlands: 36 (excluding 17 Dublin decisions reviewed), Slovenia: 58 (51 decisions in the accelerated procedure and 7 in the regular procedure), Spain: 107 (excluded 7 explicit and implicit withdrawal decisions which were reviewed), the UK: 42 (3 refused for administrative non-compliance, 6 refused as unfounded and 33 refused after full consideration). Note that, in Spain, 107 negative decisions were audited. Of these, 91 were negative decisions taken in the admissibility procedure. This is due to the fact that at the time of UNHCR's research, an admissibility procedure was conducted in which decisions on the merits of an application were taken in the admissibility procedure as well as decisions on admissibility. The other 16 negative decisions audited were taken in the regular procedure.

[19] The exception being case CF11RQ1.

[20] See UNHCR's concerns regarding interviews conducted in ADA in Greece in section 6 on interviews and interview reports.

"We decide that the application for international protection is rejected as manifestly unfounded and X[21] is not recognised as a refugee nor as eligible for subsidiary protection status because the subjective and objective elements of the well-founded fear of persecution, necessary elements for the recognition of the refugee status according to Article 1 A 2 of the 1951 Geneva Convention, Article 17 of PD 90/2008 in combination with article 15 of PD 96/2008 are not met.

In particular, from the presented elements, it cannot be justified that the applicant suffered or will suffer any individual persecution by the authorities of his country for reasons of tribe, religion, ethnic group, social group or political opinion. The applicant abandoned her/his country in order to find a job and improve his living conditions.[22] The applicant neither showed nor handed in any national passport or any other travel documents that could prove or certify her/his identity.

Against this decision the applicant has the right to appeal before AB within thirty (30)[23] days after the day of serving of the decision. In case of not appealing in the above time frame, the decision shall be final.''.

Decisions audited in other states revealed similar deficiencies to varying degrees, although they can be differentiated from the situation in Greece, as fuller information and reasoning was nonetheless contained in the case file. However, UNHCR remains concerned that if full reasons in fact and law are not included in written decisions or are not attached to the decision, then this can frustrate the fairness and efficiency of the appeal process. It also negatively impacts on the transparency and accountability of decision-making and related efforts to improve this.

In France, on the basis of the decisions sampled, UNHCR observed that the written decisions notified to applicants were generally very short and, on average, only nine lines were dedicated to providing reasoning for the decision. Specific problems observed with regard to the written decisions included that while the decisions contained a summary of facts, these were not always stated in an individual or detailed manner, and often did not refer to the specific harm feared by the applicant upon return but simply stated that the applicant "*fears for his/her security*". It was also noted that sometimes the summary of facts in the decision omitted a specific fear of harm that had been stated by the applicant.[24] Cases were also apparent where decisions failed to mention all the documents provided by the applicant to support his/her claim,[25] and when they did, documents often had their authenticity denied without any accompanying explanation. Moreover, with regard to the reasons given for the negative decision, 33 of the 45 audited negative decisions simply stated that the application was rejected because the "*facts were not established*" ("*faits non établis*"). As such, it was not possible to deduce from the content of the decision which facts were

[21] Name and nationality of the asylum applicant.

[22] In some decisions this phrase is used: "*It appears that the applicant abandoned her/his country in order to find a job and improve his living conditions.''*

[23] Or ten (10) days, depends on the procedure.

[24] E.g., in case file 3A (IRQ), the decision does not mention the fear of kidnapping of his daughter claimed by the applicant. In another case file, the decision mentions the applicant's allegations regarding a property dispute, but not the political threats claimed by the applicant.

[25] E.g., case file 19R (AFG), case file 8R (GEO), case file 44R (GEO), case file 54R (KOS), case file 43R (KOS), case file 35R (KOS), case file 16R (SLK), case file 20R (RUS), case file 60R (RUS). Furthermore, in the case file 35R (KOS), the decision states "*the applicant who claims to be a national from Kosovo*". This wording seems to imply that the protection officer doubts the nationality of the applicant, although an ID is produced and no comment is made about its authenticity.

established and which were not established, and why they were considered not established. For example, it was not clear in some cases whether an adverse inference had been drawn regarding an issue on which the applicant provided evidence; yet the issue was never canvassed in the personal interview, if any. As such, an applicant would not know, from the decision alone, that this issue is relevant, and requires addressing on appeal.

Instead, in France, the legal reasoning was often more developed in parts IX and X of the interview form (which is part of the case file of the determining authority, OFPRA). This part of the interview report is not systematically transmitted to the applicant with the decision.[26] Instead, the applicant has to request access to the whole interview report in order to access this information. Applicants are not informed of their right, which derives from common administrative law, to request the whole interview report. Generally, only lawyers and NGOs providing legal assistance are aware of this right. Moreover, UNHCR's audit of the interview forms revealed that the quality of reasoning was varied. In some cases it was not clear, even from the interview form, which facts were accepted and which were not, and why.

The audited written decisions relating to applications by applicants who are spouses contained very limited reasoning. With regard to the facts, the decisions simply stated "*the applicant's claimed reasons for fleeing are the same as her husband's*", without stating what those reasons were. And the reason for the negative decision was stated as "*her case is indissociable from that of her husband, whose application has been rejected today*.'' The information contained in the interview form was copied and pasted from the interview form of the husband and did not always correspond to the content of the spouse's interview.[27] Most of the written decisions on subsequent applications which were audited were poorly and stereotypically reasoned. Most of the decisions stated that the elements submitted by the applicant did not enable the establishment "*of the facts''*[28] or "*of the fear of persecution or serious threats''*[29] or that the "*new elements cannot be considered as founded.''*[30] No further reasoning was provided.[31]

In Italy, the audit of decisions indicated that decisions were generally very brief and made a short reference, though insufficient, to the individual facts of the application. In some cases, there was no specific reference to the individual facts. One example of an audited decision stated:

"*The applicant does not submit arguments which can confirm the relevance of his/her individual position in the context of the general situation reported. The applicant reports circumstances which give rise to a doubt with regard to the credibility of his/her statements during the personal interview. The circumstances reported by the applicant cannot be considered sufficient to support and justify a fear of persecution under Article 1A of the 1951 Geneva Convention. There is no evidence that the applicant has suffered or that s/he risks*

[26] The whole report is contained in the case file which is transmitted to the CNDA when the decision is challenged before the court.
[27] Case file 38R, case file 45R.
[28] E.g., case file 52R (AFG), case file 49R (SLK).
[29] E.g., case file 58R (DRC), case file 50R (PAK).
[30] case file 59R (SLK).
[31] It is a concern that all eight case files which were audited concerning subsequent applications were examined in the accelerated procedure and the applicants were not invited to a personal interview with no reason for the omission of the personal interview recorded in the case file. For further information see section 14 on subsequent applications.

suffering serious harm if returned to the country of origin." And if subsidiary protection was also denied: "*There is no need for complementary forms of protection with respect to the specific personal situation of the applicant*."

From the written decision alone, it was not possible to ascertain whether the relevant criteria of the Qualification Directive with regard to refugee status and subsidiary protection status had been applied to the facts, and the applicant could not know from the decision on what specific ground(s) the application had been rejected. Where the decision simply made a generic or brief reference to a lack of credibility, it could not be deduced from the decision why or which evidence submitted lacked credibility.[32] All case files contain a form, ''*proposal from the rapporteur*''[33] which indicates the reasons for the decision although these reasons are often not developed adequately. Any dissenting opinion by a member of the interview panel would be recorded and motivated in this form. Some CTRPIs also have a separate record of the minutes of the discussion by the panel or a brief assessment form. The contents of the case file, including the minutes of the panel discussion, are accessible to the applicant's legal representative upon request.

In Spain, none of the 113 negative decisions audited made any reference to the facts presented by the applicant on which the asylum claim was based. The legal reasoning provided in the decision relied almost exclusively on legally-specific standard paragraphs and did not apply the law to any facts.[34] Inadmissibility decisions were limited to indicating the ground(s) for inadmissibility which was/were considered as fulfilled, reproducing almost literally the wording of the Asylum Law or the standard modules on which case reports are based. [35] The decisions made no reference to any country of origin information or third country information which could have been taken into account in reaching the decision. Where subsidiary protection status was also denied, the audited decisions simply stated: "*Moreover, no humanitarian reasons and no reasons of public interest apply in order to allow stay in Spain under Article 17 (2) of the Asylum Law*". The audited case files contained a more detailed report on each case which set out some reasoning for the decision. However, an analysis of these case reports revealed that, particularly with regard to negative decisions in the admissibility procedure, all the requirements for a well-reasoned decision were not satisfied.

In several states (Slovenia, the Czech Republic, Finland, and Spain) the quality of decisions varied depending on the type of procedure in which the application was examined.

Thus, in Slovenia, decisions taken in the regular asylum procedure were found to generally fulfil the requirement to set out reasons in fact and law. However, the vast majority of asylum applications in Slovenia are decided in the accelerated procedure and not the regular procedure.[36] With regard to the accelerated procedure, a serious failure to set out reasons

[32] D/04/M/ALG/N, D/05/M/MAR/N, D/06/M/NIG/N, D/09/M/NIG/N, D/18/M/IRQ/N, D/26/M/NIG/N, D/30/M/NIG/N, D/31/M/NIG/N, D/37/M/NIG/N, D/38/F/NIG/N, D/42/F/NIG/N, D/50/M/SRI/N, D/63/M/PAK/N, D/64/M/PAK/N; D/52/M/AFG/N, D/65/M/GUI/N, D/73/F/NIG/N.

[33] The Rapporteur is the person who conducted the interview or the main interviewer when the interview is conducted by the panel collegially.

[34] 107 (inadmissibility and rejection decisions) and 6 (decisions to grant subsidiary protection which did not include reasons for the denial of refugee status).

[35] Note that at the time of UNHCR's research, an examination of the merits of an application was conducted in the 'admissibility' procedure, and applications could be rejected on their merits, on grounds extending beyond the admissibility grounds as provided for in Article 25 of the APD. See section 9 on prioritized and accelerated procedures for further information.

[36] The audit found that only 7 of the 65 cases reviewed were dealt with under the regular procedure.

in fact and law was observed in cases certified as manifestly unfounded. The Supreme Court of Slovenia has ruled that in the accelerated procedure, the determining authority need only ascertain facts and circumstances proving the existence of reasons for rejecting an application as manifestly unfounded on grounds defined in Article 55 of the IPA.[37] The audit confirmed that where applications were rejected as manifestly unfounded in the accelerated procedure, the determining authority set out limited facts and copy pasted *verbatim* Article 55 (grounds for rejecting application as manifestly unfounded) and Article 23 (assessment of facts and circumstances) of the IPA, and underlined (or sometimes not) those indents which were considered valid for rejecting the application in question. (See Annex I to this section for typical audited decision with regard to the legal grounds for the decision taken in the accelerated procedure in Slovenia). The written decisions, therefore, contained a series of legally-specific paragraphs, with no link made between the facts as briefly set out and the legal provisions applied to deny status.

Similar inconsistency was also observed in the Czech Republic, despite legislation requiring the same standard of reasoning in the regular procedure and other procedures (border etc). Decisions taken in the regular procedure generally provided reasons in fact and law.[38] However, very little information was apparent in inadmissibility decisions (including subsequent applications), making it impossible to determine if an individualised decision had in fact been taken. In particular, a significant number of applications deemed to be manifestly unfounded did not clearly demonstrate that they had been subjected to a proper individual examination.[39]

In recent years Finland has witnessed an improvement in the quality of written decisions, although the audit revealed indications of inconsistency and remaining problematic practices. While some decisions were well reasoned with clear and logical argumentation, other decisions were observed to fall below the threshold of what might be judged as good reasoning. In particular, decisions rejecting applications for international protection on grounds of credibility, 'safe country of asylum' or origin, or which considered the application manifestly unfounded for other reasons, tended to rely rather heavily on standard paragraphs.

In Bulgaria, the audit of decisions indicated that requirements in legislation are to a reasonable degree being satisfied in practice, at least in relation to setting out the individual facts of the application. Although decisions were in general individualised, some problems were indicated with respect to very brief legal reasoning and the use of standard paragraphs, particularly those relating to country of origin information.[40] It was also apparent that most decisions granting subsidiary protection status had very similar, if not identical, reasoning in law and wording in each case.

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[37] Up 106/2008, 17 April 2008.

[38] 20 out of 61 audited decisions provided all relevant facts whereas only two cases provided no individualised facts at all.

[39] 10 out of 16 manifestly unfounded cases were found to be insufficient, including cases XO27, XO12, XO21, XO22, X007, XO17, XO64 and X007.

[40] E.g., 39 out of 62 audited decisions concerned Iraqi applicants which (with few exceptions) included reference to the same COI, quoting a COI Report on Iraq by SAR and the Statement of the MFA on Iraq. This provided the basis of the decision, even though not individually tailored to the facts of the application. Furthermore, the most common ground for granting humanitarian status to Iraqis was the second suggestion of Article 9 (1) – torture or inhuman or degrading treatment or punishment - and the standard paragraph on COI was irrelevant or at least not well reasoned to support this ground.

In Belgium, the audited negative decisions set out both the facts as presented by the applicant and the reasoning for the decision which was specific to the facts. The decisions did not rely heavily on standard paragraphs, which were only used to relate specific issues and were used appropriately and tailored to the facts of the application. Most audited negative decisions cited a lack of credible evidence.[41] The decisions were explicit as to what evidence was not considered to be credible, but the decisions did not state what evidence was accepted as credible. Negative decisions with regard to subsidiary protection status were either based on the ground that the evidence relating to the applicant's country or region of origin was not credible, or that the applicant came from a country or region which was not or no longer experiencing armed conflict within the meaning of the Aliens Act.[42] However, there were some shortcomings in the decisions audited, for example, poor referencing of applied country of origin information and a lack of reasoning as to why certain oral and documentary evidence was considered insufficient to affect the finding of a lack of credibility.

In the Netherlands, the audit indicated that in general, the negative decision does not set out all the grounds for the application as presented by the applicant or the detailed reasons for denying status with regard to the facts. Instead, reference is made to the intended decision which forms part of the decision. In addition, detailed reasoning was contained in the so-called Minute (an internal IND document) which, during the period of this research, was available to the applicant on request, but was not supplied automatically with the decision. However, since 14 July 2009, the IND has changed its policy and no longer grants the applicant access to the Minute. The motive for the change in policy is, according to the policy instruction, based on Article 43 (e) of the Personal Data Protection Act (*Wet Bescherming Persoonsgegevens*), and the desire that the determining authority is not hampered in expressing its views or its reasoning by the knowledge that the applicant will have access to it.[43] Instead, a 'professional summary' should now be given to the legal representative upon request. Practice with regard to the content of the 'professional summary' could not be verified at the time of writing. Given the limited reasoning contained in the decision, UNHCR notes the importance that this 'professional summary' contains full reasons in fact and in law.

In Germany, the required form and structure of the written decision is explicitly set out for adjudicators in the handbook,[44] and specific guidance is given about the required content of decisions. Negative decisions encompass a decision on constitutional asylum,[45] on 1951 Convention refugee status as well as complementary forms of protection, i.e. subsidiary protection in accordance with the Qualification Directive, as well as two other forms of national protection.[46] UNHCR's audit of decisions verified that the reasoning begins with a statement of the facts that have been found relevant by the adjudicator in the individual case and a reference is made to the case file for further details.[47] Subsequently, with regard

[41] Of the 56 negative decisions audited, 38 were based on a lack of credibility.

[42] Article 48/3, §2 (c) of the Aliens Act (Article 15 (c) of the Qualification Directive). The application of the criteria of under Article 15 (a) and/or (b) Qualification Directive (or Article 48/4 of the Aliens Act) is exceptional, and none of the decisions included in the audit made a reference to these criteria, according case managers: interview of 19 & 20 March 2009.

[43] IND-Workinstruction nr. 2009/11 of 14 July 2009.

[44] Handbook for Adjudicators "Decision", especially overview 2.4.5, "Structure of a decision", page 18. This form has been confirmed by the audit of case files.

[45] Not covered by the APD.

[46] Not covered by the APD.

[47] The facts as set out in the decisions had an average length of between half a page and three-quarters of a page. It is stipulated in the handbook that the relevant facts on which the decision is

to each form of protection, the negative decision is stated, followed by the template regarding the respective legal requirements for each form of protection as well as the application of these legal requirements to the facts.[48] However, UNHCR's audit revealed the following findings which are considered problematic:

(i) It was observed that there is a heavy reliance on the use of standard paragraphs.[49] Almost 80 % of the average decisions audited was composed of standard paragraphs,[50] with only about 16 % dedicated to the specific factual reasons concerning refugee protection,[51] and very often only one or two sentences dedicated to the factual assessment regarding complementary protection forms.[52]

(ii) Problems were also observed with regard to the content of the standard paragraphs. Many of the standard paragraphs referred to jurisprudence concerning cases of constitutional asylum. Given that the requirements of constitutional asylum and 1951 Convention refugee status differ in certain aspects, it is not self-evident that a specific aspect judged on under constitutional law would also apply to Convention refugee status. [53] Moreover, some of the decisions referred to were rather old,[54] and it was not clear from the templates themselves whether the interpretation of the courts in those

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based on shall be given briefly and in a chronological order. They shall be designed in a strictly objective manner; undisputed facts shall be given in the indicative mode, disputable facts in the subjunctive form. Contradictions on which the decision is based have to be included, and submitted documents, plus their content, have to be listed. If references are made to cases of other family members or other asylum applicants, the respective reference numbers have to be cited, as well as the current stage of these proceedings. The portrayal of the fact should always end with a referral to the file (Handbook for Adjudicators "Decision", 2.4.2, "Determination of facts", page 13 and 14).

[48] UNHCR's audit, confirmed by the estimates of lawyers X2, revealed that the overall length of the reasoning runs from "four to ten pages" of which approximately two to ten lines of argumentation specifically relate to the individual facts.

[49] The predominant use of ready-made templates for the phrasing of decisions seems to divert attention from the specifics of the case and seems to result in an examination of the facts brought forward by the applicant in light of their 'compatibility' with the given standard paragraphs. One of the stakeholders (X3) stated the following in this regard: "*The templates are not tailored to the case, but the case to the templates*."

[50] The templates either refer to legal requirements and therefore contain very legalistic language, or refer to the general situation in the country of origin.

[51] Constitutional asylum as well as 1951 Convention refugee status.

[52] Please note that the following refers to the assessment of the facts under the respective legal provisions for complementary protection. The decision nevertheless contained a determination of facts that had been found relevant in the specific case. No assessment of facts provided: e.g. 00AFG05; 00AFG06; 01ERT08; 01NIG01; 00NIG03. Length of assessment of facts 1 sentence: e.g. 01ERT09; 00IRN03; 00IRN04; 01IRN05; 00IRQ08; 01IRQ09; 01PAK09; 00RUS01; 00SOM08; 00LKA09; 00TUR01; 01TUR02; 00GHA03; 01GHA05; 01GHA06; 00GHA08; 00GHA10. Length of assessment of facts: two sentences: e.g. 01GHA02; 01GHA04. Length of assessment of facts ¼ page (nine to ten lines): e.g. 00AFG09; 01ERT04; 00IRN01; 01PAK08; 01RUS03; 00GHA01; 01GHA09. Length of assessment of facts ½ page: e.g. 00/1IRN09; 01SOM07; 01LKA10; 01GHA07. Moreover, that this is only an average and divergent practice is, e.g., clearly shown in case 00/1IRN10. More than half of the decision (7.25 of 13 pages) is dedicated to the facts and reasons specific to the case; the reasoning specific to the case with regard to refugee protection amounted to 5 pages.

[53] Only the template with regard to one of the national forms of protection (Section 60 (5) Residence Act) contains the remark "conferrable" after reference has been made to the jurisprudence of the Higher Administrative Court. However, the reason for this conclusion is not given.

[54] E.g. 1977, 1980, 1985, 1989, 1990, 1994.

decisions was still valid. In addition, the wording of some templates showed that the concept of constitutional asylum was used as the starting point for the examination of Convention refugee status.[55]

(iii) The decisions often contained only an account of the facts as presented by the applicant rather than a conclusive analysis of which concrete facts were deemed to fulfill the respective criteria and which not, as well as which facts were considered credible or not, and for what reason.[56] In practice, despite the statement of legal criteria in the templates, a detailed and comprehensive application of the relevant legal criteria to the facts was rarely observed.

(iv) The assessment of the facts with reference to the legal grounds for qualification for subsidiary protection status was very brief. [57] Most strikingly, the German provision transposing Article 15 (c) QD[58] was hardly ever mentioned in the audited decisions and reviewed only very exceptionally.[59] This was the case even in cases where the country of origin was experiencing armed conflict.[60]

In the UK, the negative decisions audited usually related the acts feared by the applicant and the reasons for fearing persecution or serious harm, and if the case failed on grounds of credibility alone, this was stated. Formal refusal paragraphs were used in, for example, "non- compliance" cases. It was apparent from the audit that in general, each case had been examined individually and the reasons given in the decision were specific to the applicant. Applications that were rejected stated why they had not been accepted and provided reasons. The exception to this was where an application was considered inadmissible, for example on safe third country grounds. Decisions included standard paragraphs but in most cases these did not appear to be used inappropriately.

A negative decision on an application for international protection has a significant impact on the rights of the person affected. Full reasons in fact and law should, therefore, be given. From the research undertaken it is clear that there are problems with the content of asylum

[55] E.g., the standard paragraph on the requirements for 1951 Convention refugee status stipulates that "*initially, it has to be determined*" whether the person concerned faces "*political persecution*", thus, explicitly referring to the term used in German Basic Law instead of directly applying the relevant legal provision for Convention refugee status. Only the following statements refer to the differences of the two forms of protection.

[56] See e.g., 00ERT05; 00NIG04; 01LKA05; 01SOM07; 00PAK01;00RUS09; 01IRQ05; 00IRN01.

[57] Positive decisions on subsidiary protection sometimes clearly differentiate between reasons for subsidiary protection under the EC QD and national reasons (e.g. 00ERT05) and sometimes do not differentiate in this way. E.g., see 01IRQ05; 01LKA05; 00TUR04, where protection under 60 (5) Residence Act is granted for reasons of a potential violation of the ECHR in the case of deportation whereas Section 60 (2) Residence Act (transposing the QD) is not reviewed.

[58] Section 60 (7) 2 Residence Act.

[59] See 01SOM07.

[60] Regarding Somalia, see 00SOM08 and 00SOM10; on Sri Lanka, see e.g. 01LKA05; Afghanistan, 00AFG05; 00AFG06; 00AFG08; 00AFG09; Iraq, see e.g. 00IRQ02; 01IRQ04; 00IRQ08. According to information provided by the BAMF, the instructions on particular countries of origin were amended following the ECJ judgment (*Elgafaji*) and subsequent jurisprudence of the Federal Administrative Court, and specific parts of certain countries are now designated as zones of armed conflict with a level of violence justifying the application of Article 15 (c) QD to any person residing in that zone. With regard to other countries, the existence of an armed conflict is denied (which bars the application of Article 15 (c) QD) or an individual assessment of the situation is called for to determine the existence of a risk particularly affecting the individual applicant.

decisions in most of the Member States surveyed, and a systematic failure to properly set out the individual facts and evidence on which the decision is based or set out and apply legal reasoning. Decisions in several states surveyed included little more than references to generic sections of asylum legislation upon which the decision was based.

Recommendations:
Given the findings of this study, which indicate the systematic failure of decisions in some Member States to provide individualized reasoning relating to law or fact, UNHCR recommends that initiatives be developed to further identify problems in particular states, and to provide appropriate remedial training. This should be taken forward as part of improved quality monitoring in all Member States. UNHCR recommends that objective, EU-wide standards for measuring the quality of asylum decisions should be established.

The decision should permit the applicant to know on what specific grounds the decision has been taken. Therefore, the decision should state the material facts of the application and sufficient details to permit the applicant to know the following:

- The evidence which was taken into consideration during the examination of the application and decision-making, including both evidence gathered by the determining authority and oral and documentary evidence provided by the applicant;
- Which aspects of the evidence were accepted, and which were considered to be insufficient or not accepted, and why the evidence was rejected; the reason why the accepted evidence does not render the applicant eligible for refugee status or subsidiary protection status in accordance with the criteria set out in the Qualification Directive.

Decision-makers should be allocated sufficient time to draft well-reasoned decisions.

Content of written reasoning: application of legal criteria to the facts and standard of proof

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

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

In only two of the Member States surveyed, decisions referred explicitly to the standard of proof applied. In some Member States, it could be deduced from the decision that a high standard of proof had been applied. Generally, however, in most states surveyed, the audit of case files and decisions did not indicate what standard of proof was applied by decision-

makers, let alone enable an assessment of whether this had been applied appropriately or consistently.

Application of the criteria under the Qualification Directive to the facts

A common trend identified through the audit of decisions in several states (Belgium,[61] France, Germany, the Netherlands and the UK) was that negative decisions were often made on credibility grounds and did not apply the criteria of the Qualification Directive to facts.

For example, in France, the great majority of negative decisions audited[62] were cases where the application was rejected on credibility grounds ("*faits non établis*"). However, in these instances, it was not possible from the written decision itself to understand what aspects of the facts were not established, and what aspects of the refugee definition or criteria for subsidiary protection status were considered to be fulfilled or not fulfilled.[63] Moreover, negative decisions were generally poorly reasoned with regard to the actors of persecution, the actors of protection, the internal flight alternative,[64] or persecution or harm feared on return.

Likewise, refusal in the Netherlands was often based on the so-called 'positively convincing' test (the POK-test) of credibility.[65] In such decisions, it simply stated that the applicant had not made a plausible case that his/her application was based on circumstances constituting a legal ground for protection.[66]

In the UK, several decisions referred to credibility being undermined as a result of the behaviour of the applicant which, under Section 8 of the Asylum and Immigration (Treatment of Claimants Etc) Act 2004, was considered to damage credibility, such as producing false documents[67] or failing to apply earlier.[68] In some cases, statements deemed to be incorrect resulted in dismissal of the credibility of the entire claim.[69] The written

[61] 38 of the 56 negative decisions audited in Belgium were based on credibility grounds. Nine applications were rejected because the facts did not qualify the applicant for refugee or subsidiary protection status. Eight were 'technical refusals'. The reason for the negative decision in one case was unknown. Information from audit of case files (10 February – 6 March 2009).

[62] 33 decisions out of 45 negative decisions. None of the written rejections sampled were explicitly grounded on the exclusion clauses or on the application of the internal flight alternative.

[63] However, in the case file 46R (AFG), the decision refers to the absence of reasons for persecution and thus to the absence of fear for persecution from the Afghan authorities. In the case file 41 R (BOS), the decision refers to the absence of personal fear for persecution. In the case file 31 R (GEO), the decision refers to the absence of reasons for persecution and to the ability of the authorities to protect.

[64] The terminology used in Article 8 of the Asylum Procedure Directive is 'internal protection'.

[65] The audit revealed that six out of 19 substantive negative decisions were refused on the basis of POK, namely numbers 43, 51, 52, 66, 88 and 90.

[66] Such cases will be rejected according to Article 31 Aliens Act. However, generally, decisions in the Netherlands are not very detailed and there is in general no specific reference to the refugee definition. It is not the negative decision as such that refer to e.g. inconsistencies or contradictions. This kind of information is mainly to be found in the so-called Minute (now an internal IND document).

[67] DAF 31, DAF22, DAF35.

[68] DAF31.

[69] DAF27, DAF40, DAF32, DAF36, DAF42.

decisions audited did not generally in any systematic manner refer to Qualification Directive criteria.

In Germany, in about 75% of the cases where refugee protection was denied, decisions were based on the assessment that the applicant's presentation of facts was not credible.[70] In those cases, the adjudicator explained why the presentations were not credible overall or why certain facts were not believed.[71] However, in about one in six decisions, the rejection was based on the assessment that there was no risk of persecution, i.e. the standard of risk was not satisfied.[72] Even in those cases, the adjudicators frequently stated in their assessment that "*a danger of persecution has not been made credible*." Despite this terminology, the relevant decisions in fact often found the standard of risk was not satisfied, based on the assessment of objective facts.[73] In the remaining cases (about 7 %), the reason for rejection was based on non-fulfillment of one of the other legal criteria for qualification for international protection.[74] Moreover, in some cases, the rejection was based cumulatively on different grounds. For instance, rejections based on credibility of (some of) the applicant's statements were sometimes additionally based on insufficient risk,[75] or on a failure to fulfill other legal criteria,[76] even if the facts as presented by the applicant were presumed to be correct.[77]

UNHCR is particularly concerned that in Greece and Spain, there was no clear application of the criteria for qualification for refugee status and subsidiary protection status to the applicant's individual circumstances and facts in any of the decisions audited. This was also the case for most of the decisions audited in Italy.

Application of the standard of proof

The purpose of UNHCR's research in this project was not to assess the standard of proof applied by the Member States of focus and its compliance with international standards. Instead, the purpose was to examine whether the decision informs the applicant and his/her legal representative, if any, of the standard of proof applied, and whether the evidence submitted and gathered in the course of the procedure satisfied this standard. Where the evidence does not meet the standard, UNHCR considers that the decision should state clearly why.

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[70] In a sample of 42 negative decisions (rejection both of constitutional asylum and refugee status according to Section 60 (1) Residence Act), 32 of the rejections were based on the lack of credibility of the applicants' statements (76.2 %).

[71] This statement refers to the formal fact that an explanation had been given, but does not respond to the question whether the project evaluator has found the given explanation convincing.

[72] This pertains to 7 of the 42 cases sampled (16.7 %).

[73] See e.g., 00IRQ04; 01NIG08 (according to the decision, the applicant "could not make credible" that there is a danger of genital mutilation. However, the adjudicator bases this assessment on the general finding that such mutilation is only carried out on children until an age of three years.); 00LKA08.

[74] This pertains to 3 of the 42 cases sampled, 00NIG04 (danger of criminal prosecution does not constitute an act of persecution; danger emanating from non-state entities does not constitute persecution [sic]); 01NIG10 (being searched for by the police as a witness to a crime does not constitute persecution); 00ERT05 (criminal prosecution for non-compliance with the obligation to serve in the army does not constitute persecution).

[75] See e.g., 00IRN01; 00IRN03; 01SOM07; 01TUR02.

[76] See e.g., 00SOM08.

[77] 01RUS03 the standard of risk is not fulfilled, and the rejection is based additionally on the existence of an internal flight alternative.

In only two of the Member States surveyed, the audit of decisions revealed that decisions did refer explicitly to the standard of proof applied.

In Bulgaria, some audited decisions referred to Article 75 (2) of the LAR which states that "*When the applicant's statements are not supported by evidence, they shall be deemed reliable if the individual has made an effort to justify the application and has given a satisfactory explanation of the lack of evidence.*" These decisions, which concerned Iraqi nationals, stated that the facts as claimed by the applicant were deemed to be established in accordance with Article 75 (2) LAR and humanitarian status was granted.

In Germany, the audited decisions stated, as provided by a template: *"In so far as events outside the country of asylum are stated [by the applicant] for supporting the claim as evidence for the objective existence of a risk, generally the mere furnishing of prima facie evidence is considered sufficient. This is due to the difficulties regarding proof typical for the asylum procedure."*[78] In some cases, the decisions[79] additionally contained the more comprehensive template which comprises, *inter alia*, the following requirements set by the Federal Administrative Court: "*Considering the difficulties for refugees to prove persecution, the personal assertions of the applicant and their analysis are particularly important. The applicant's mere assertions of the facts can lead to the grant of asylum provided that – considering all other circumstances - they are credible in the sense that they lead to the full conviction of the truth - and not just the probability - of the individual circumstances causing the fear of political persecution.''*[80] Although the decisions superficially stated when the standard of proof was met, it was often not clear from the decision how this standard was applied to the evidence gathered; which evidence was considered to have satisfied this standard, which did not, or whether there was an absence of relevant evidence.[81] According to the appraisal of interviewed stakeholders,[82] the application of the standard of proof was seen as being very subjective and arbitrary,[83] or as setting very high standards, or even requirements that could not be satisfied.[84]

On the other hand, UNHCR's audit of decisions in the other Member States of focus revealed that most decisions did not explicitly state the applicable standard of proof. In some Member States, however, it could be deduced from the decision that a high standard of proof had been applied.

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[78] The handbook determines that the template concerning the definition of "to furnish *prima facie* evidence" has to be cited at the beginning of the facts. Furthermore, the following explanations are given: "The assertions must include a detailed and comprehensive demonstration of the grounds for persecution; i.e. they must not contain contradictions, and allow for the grant of political asylum if they were conceded as true. The applicants shall present those events, concerning the persecution and the respective escape they have experienced themselves, in a coherent manner, specifying precise details. If necessary, they must also to link these experiences with the general political situation and occurrences in their country of origin." (Handbook for Adjudicators "Decision", 2.4.3 page 16).

[79] See e.g. most of the decisions taken within the airport procedure: 00AP01; 01AP02; 00AP03; 00AP04 ; 00AP06; 00AP07; 00AP09; 00AP10; not contained in: 00AP05 and 00AP08.

[80] As stated in the judgments of the Federal Administrative Court of 16.04.1985 (BVerwGE 71, 180) and 21.07.1989 (NVwZ 1990, 171).

[81] See e.g., 00ERT05; 00NIG04; 01LKA05; 01SOM07; 00PAK01;00RUS09; 01IRQ05; 00IRN01.

[82] This concerns lawyers with many years of experience with asylum law cases.

[83] X1.

[84] X2, X3.

In Belgium, the audit of the case files, as well as the roundtables UNHCR held with NGOs and lawyers, suggested that some applicants are expected to obtain and submit documentary evidence, such as birth certificates, death certificates and marriage licences, which are likely to be impossible to obtain within the five-day time limit under national legislation for submitting further evidence. In the absence of relevant documentary evidence, it was clear from the case files that applicants must be able to answer correctly questions designed to test their credibility. For example, one case file revealed that the applicant claimed to be a Banjuni from one of the islands south of the coast of Somalia. The decision stated that the applicant was not credible because s/he failed to answer certain questions correctly and did not speak Somali. However, information in the case file showed that the applicant had answered a number of the questions correctly. It was not clear from the decision or the nature of the questions why more weight had been given to the questions answered incorrectly.[85] By contrast, another case file also concerned an applicant who claimed to be a Banjuni from an island south of the coast of Somalia. This applicant also failed to answer some of the questions correctly and did not speak Somali, but he or she was granted refugee status.[86]

In the Netherlands, UNHCR's audit revealed that six out of the 19 substantive negative decisions were rejected on the ground that the application failed the 'positively convincing test' (the POK-test).[87] The test requires the applicant to make a plausible case that his/her application sets out circumstances which fulfill the criteria for the issue of a permit.[88] According to the Aliens Regulations, the applicant should be entitled, in principle, to the benefit of the doubt where: he or she has submitted all elements at his or her disposal; provides a satisfactory explanation for the absence of elements; has applied at the earliest possible time; where his or her evidence is coherent and plausible, and not contrary to country of origin information; and where the credibility of the applicant has been established.[89] However, UNHCR's audit of case files and an interview with a legal adviser revealed that, in practice, if the applicant is undocumented and unable to submit documentary evidence relating to an element, such as the travel route taken, a higher standard of proof applies. Any doubt is deemed reason to reject the application.

In Slovenia, interpretation of the standard of proof is an evolving issue, including through rulings by the Constitutional Court[90] establishing a requirement to apply the 'the benefit of the doubt'. In May 2009, the Ministry of the Interior issued Guidelines on implementation of the IPA. However, the audit of first instance decisions suggested that in practice the 'benefit of the doubt' is rarely applied, and the standard of proof is higher than the 'balance of probability'. Indeed, on the basis of reviewed decisions it appears that in practice the so-

[85] Case files 79 and 80.
[86] Case file 31.
[87] Case files 43, 51, 52, 66, 88 and 90.
[88] Article 31 (1) Aliens Act.
[89] Article 3.35 Aliens Regulations.
[90] In case Up-1525/06, 21 June 2007 and Up-1458/06, 19 October 2006, the Constitutional Court for the first time said that benefit of the doubt has to be applied in asylum cases: *"… in the concrete case, asylum application of asylum seekers has been rejected in the accelerated procedure. In this procedure the MOI can reject the application without even verifying the existence of reasons for protection. Namely, the authority has to verify only existence of circumstances defined in the Asylum Act, proving that the application is manifestly unfounded. Nevertheless, also in the accelerated procedure, the authority must fully ascertain the actual situation. For reasons due to the nature of the asylum procedure and possible consequences for asylum seeker in case of rejected applications, the benefit of the doubt has to be applied."*

called '*intime conviction'* standard is applied (the decision maker must come to a deep conviction that the allegations are truthful).

Generally, in most states surveyed, the audit of case files and decisions did not indicate what standard of proof was applied by decision-makers, let alone whether this had been applied appropriately or consistently. In some respects, the absence of a clear standard of proof was the most striking finding identified on this issue. This was the case in Bulgaria,[91] the Czech Republic, Finland,[92] France,[93] Greece, Italy,[94] Spain and the UK.[95]

Country of origin information (COI)

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

It is of serious concern to UNHCR that the determining authorities in two of the Member States of focus in this research, Greece and Spain, systematically fail to refer at all to any COI used in decisions to refuse protection status. With regard to Spain, reference to COI can be found in the case reports of applications examined in the regular procedure. This is infrequently the case when a decision is taken on the application in the admissibility procedure.[96] The determining authorities in a further two Member States, France[97] and Italy,[98] appeared explicitly to refer to the use of COI in only a small minority of decisions. In

[91] Except in decisions granting humanitarian status, when no documentary evidence has been presented by the applicant.
[92] Finnish legislation does not make any reference to the standard of proof to be used in the asylum procedure. In individual cases, some references can be found, but there is no general standard that can be identified within the limits of the current study.
[93] In France most of the audited decisions did not state the standard of proof applied and negative decisions stated simply that the "*facts are not established.*" However, two positive decisions explicitly applied the 'benefit of the doubt': case file 29 A (AFG) and 30A (AFG).
[94] In Italy none of the audited decisions referred to the standard of proof used.
[95] Although in the UK, the standard of proof is outlined in the Asylum Process Guidance 'Considering the Asylum Claim' (downloaded 20 April 2009), it was not referred to specifically in many cases audited, and it was not clear whether the test stated in the guidance formed part of the decision-maker's assessment.
[96] Note that at the time of UNHCR's research, an examination of the merits of an application was conducted in the 'admissibility' procedure and applications could be rejected on their merits, on grounds extending beyond admissibility grounds in the APD. See also section 9 on prioritized and accelerated examination of applications.
[97] In France, only 5 of the 60 case files audited contained explicit reference to COI used. All 60 applications were decided on the merits.
[98] In Italy, only four decisions audited referred specifically to COI sources: In the decision D/25/M/AFG/S and D/32/M/IRN/S, UNHCR guidelines were briefly quoted; in decision D/49/F//KIR/U, a US State Department report was briefly quoted; and in decision D/49/M/ETI/N an Amnesty International report was briefly quoted.

both countries, however, reference to COI was sometimes apparent from the case file although not included in the decision notified.[99]

Similarly, in Belgium, the decisions audited did not state the information relied on or refer directly to sources. The decisions simply state that "*the information known to the CGRA of which a copy has been added to the administrative case file.*" As such, this information can only be obtained by the applicant requesting the administrative case file. While this reveals what COI has been used, there is no proper analysis of its bearing on various elements of the applicant's claim. The decisions in other states surveyed (Finland and the Czech Republic) typically only made very generalised references to COI, rendering it hard to assess whether COI had been used appropriately with regard to the facts of the individual case under examination.

In the Czech Republic, COI was frequently referred to in general terms (*''according to the information available in the case-file...*''), but without specific reference to the individual reports. This was the case in 16 decisions audited.[100] There were also instances observed of COI referred to in the decision, but not included in the case file.[101] In 19 decisions COI was cited specifically, with reference to the reports in the case file.

While in Finland a trend has been observed towards increasingly detailed references to COI in decisions,[102] practice remains inconsistent. In some audited decisions standard phrases, such as "*according to sources available to the determining authority*" or "*in accordance with information obtained by the determining authority*", rendered it impossible to know whether first or second hand sources were used, which sources were used or how many sources were used. In other decisions, both sources of COI and their contents were quoted directly in the text, making it easier to understand the argumentation.[103]

In general terms, the following can be said about the use of COI in the audited German decisions rejecting applications:

- Negative decisions did not always reference COI.[104]
- If COI was mentioned, this was predominantly done in the form of standard paragraphs which stated the source of information.[105]

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[99] In France in particular it was observed that the contents and the details of the questions asked during interviews generally showed a relatively good knowledge by decision-makers of the situation in the country of origin. However, this was not substantiated by references to COI in the file and/or in the decision. In case file 6R (GEO) and case file 44R (GEO), the decision itself refers to precise and up-to-date country information, and the file contains several COI documents. In case file 16 R (SLK) some precise COI sources are mentioned in the file and used in the credibility assessment but do not appear in the decision itself. In case file 46R (AFG) one article is included in the file but is not mentioned in the decision itself. In case file 7A (GEO) and case file 25 A (TR) one article is included in each file (positive decisions). In case file 17A (SLK) references are made in the case file to "information possessed by the OFPRA" but this information is not included in the case file. In these rare cases, the information and/or references appear to suggest a careful assessment of its relevance to the case in question. However, the cases of explicit use of COI are so limited in the sample (only 5 case files out of 60, i.e. less than 10 %) that it is difficult to say that more than one source of country of origin information was used in order to justify the decision to refuse protection status.

[100] X001, X002, X005, X011, X013, X024, X027, X030, X033, X034, X035, X043, X044, X063, X065, X067.

[101] X003, X007, X063.

[102] E.g., training on COI is increasingly given in certain divisions of the determining authority.

[103] Case 115.

[104] Audited decisions without stating COI, e.g.: 00GHA03; 01GHA05; 01GHA0700GHA10, 01ERT04; 01NIG01; 00NIG03; 00NIG04; 00SOM08; 00SOM10; 00RUS04.

- Reports of the German MFA[106] were the main source of information, although others were also cited. This included, *inter alia*, German court decisions[107] and newspaper articles,[108] but also reports from NGOs[109]. Moreover, information provided by the MFA to courts in individual cases, internet pages,[110] reports from international organisations, European institutions,[111] and other sources were cited.[112]
- Some decisions audited referred to COI without citing the source of the information; this also related to information which was decisive for the determination of refugee status.[113] This might be explained by the fact that information contained in the so-called COI- guidelines ("*HKL-Leitsaetze*") may not be quoted in the decisions.[114]

In some states surveyed (Bulgaria, the Netherlands and the UK), there were indications to suggest reliance by decision-makers on a limited number of usually state-sponsored sources. In Bulgaria, the audited decisions cited SAR COI Reports, but these Reports do not contain references to the primary sources, which were also not cited in the decision.[115] In the Netherlands, from the audit of case files, it appeared that in the large majority of cases, the decision only contained a reference to country reports of the Ministry of Foreign Affairs and country-specific policy in the Aliens Circular. Only occasionally were audited decisions observed to refer to other sources, often where these had been raised by the applicant's

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[105] The length of COI mentioned in the decisions varies widely. COI is contained in the handbooks on specific countries of origin which are issued by the BAMF's IZAM (*Informationszentrum Asyl- und Migration*). The IZAM is assigned to collect comprehensive and up-to-date information on the situation in the countries of origin. For this purpose, publicly-available information, as well as that from restricted sources, is gathered and saved in the information system MILo. IZAM's advisory expert forum, *inter alia*, is composed of judges, lawyers, UNHCR and representatives from non-governmental organizations. Additionally, each adjudicator has internet access and the possibility to address questions to the IZAM, which decides whether it can answer the question alone, or whether external services have to be used.

[106] In more concrete terms: In one of the samples comprising 16 decisions stating COI in form of templates, only one decision did not explicitly refer to the MFA report, and referred only to court decisions: 00NIG08. Two of the decisions stated as sole source the MFA report (01IRN05; 01IRQ09). In 11 decisions several court decisions were additionally cited; and 9 decisions stated more than three different kinds of sources, even up to 11(00AFG05; 00AFG06) or 13 different sources (00LKA08). Even though the MFA reports are for official use only, legal representatives can have access to these reports in individual cases (Information submitted by the BAMF).

[107] These were cited frequently in decisions.

[108] E.g. "*Sueddeutsche Zeitung*"; "*Nuernberger Nachrichten*"; ''*Das Parlament*"; ''*Die Welt*"; ''*FAZ*".

[109] E.g. Annual Report from Amnesty International; Swiss Refugee Council.

[110] E.g. www.defenselink.mil; http://web.krg.org.

[111] E.g. UNHCR, UNAMA ; EU Commission's Status Report.

[112] E.g. foreign news(papers): BBC News, Sunday Observer; specialized institutes: "*Deutsches Orient-Institut*", "*Institut fuer Nahoststudien*"; expert's reports on specific matters provided to courts; COI report of the UK Home Office.

[113] See, e.g., the following decisions in which the belowmentioned facts are stated in the decision without any source: 00IRQ02 (violence in Baghdad has declined, in particular, between Sunni and Shiites groups); 01SOM07 (information on the political situation; situation of women in the society; clan affiliation), 01ERT05 (information on military service in Eritrea).

[114] Handbook for Adjudicators, "Decision", 2.4.8, p. 22. Like other COI relied upon, the *HKL-Leitsaetze* are also not contained in the case file, and are not accessible for the legal representative.

[115] Some decisions referred to Statements of the Ministry of Foreign Affairs (two such Statements on Iraq).

legal representative.[116] The exception to this relates to country information from the UK Home Office or the US State Department. In the UK, many decisions referred only to UK official Country of Origin Information reports, Operational Guidance Notes or Country Guidance cases, although there were other cases where decision makers referred to news reports or websites.

Motivation of positive decisions

Motivation of positive decisions to grant refugee status or subsidiary protection status is not required under Article 9 (2) APD, and of the Member States surveyed by UNHCR, is provided only in Finland,[117] Slovenia[118] and Bulgaria.[119]

While Belgian legislation requires that decisions of the CGRA are motivated, positive decisions are not motivated in practice.[120] The case manager does motivate the decision, but this legal reasoning is contained in an *evaluation fiche* in the administrative case files, which is considered a preparatory document and, therefore, not a public document which can be accessed by the applicant.[121] UNHCR audited the *evaluation fiches* of the positive decisions sampled and found that they were clear with regard to which aspects of evidence were accepted and which were not, as well as issues of doubt. The reasons for finding the evidence credible or giving the applicant the benefit of doubt were stated. However, the legal analysis with regard to qualification for refugee status was limited, and did not apply all the relevant criteria of the Qualification Directive to the facts.

The current research identified that this issue is especially significant in the context of the asylum procedure in the Netherlands which provides for a single uniform status, with the same material rights for all those granted any form of protection.[122] A positive decision states the legal ground on which the permit is granted, but it is not motivated with regard to the reasons in fact and law, and the decision does not include reasons for the rejection of other grounds for protection. Since 14 July 2009, according to a policy instruction, reasons for the grant of the permit should in principle be stated in a 'professional summary' which

[116] This explicit reference to other sources was the case in only three out of the 90 audited case files, namely numbers 22, 47 and 71.

[117] The *Hallintolaki* (Act on Administrative Conduct), sections 43 to 44, requires all decisions to be given in writing, and for the decisions to include also their reasons. These norms apply to all decisions, irrespective of their nature, and are followed in practice. Hence, also positive decisions are given in writing and are reasoned. Reasons are given both in fact, with reference to the individual case at hand, and in law. As with other decisions, the quality of reasoning, length and style of the decision may vary among decision-makers.

[118] This is an obligation under Article 214 of the AGAP.

[119] Article 59 (1) of the Administrative Procedures Code requires that all administrative acts issued in writing set out the grounds in fact and law on which the decision is based. The audited decisions for granting refugee status formally contained reference to the reasons in fact and in law. They followed the standard structure of decisions, but were very brief. The audited decisions for granting refugee status were half a page to a little more than a page. Three of four audited cases files on decisions for granting refugee status did not enclose COI Reports and the decisions made no reference to such.

[120] Article 57/6, § 2, of the Aliens Act.

[121] Interview with Commissioner-General, 27 April 2009.

[122] A residence permit will be granted on different grounds, as enumerated in Article 29 a, b, c, d, e, and f Aliens Act. If e.g. a residence permit is granted under Article 29b Aliens Act, this implies a rejection of a permit under Article 29a Aliens Act.

should be available to the legal representative upon request once the decision has been notified.[123] However, at the time of writing, the practice could not yet be verified.

In Spain, the reasons for granting status are contained in the case report which is contained in the case file, and is accessible to the applicant once the decision has been adopted. However, as mentioned above, UNHCR has found shortcomings in the reasoning in these case reports.

From the UK case file audit, it was observed that where refugee status or humanitarian protection was granted, there was a file note which also gave reasons for this decision. However, these reasons were not issued to the applicant.

Likewise in Germany, while positive decisions on refugee protection are not motivated, the reasons in fact and law are given in brief in an internal note in the applicant's file.[124] This internal note is not automatically accessible to the applicant, but on request by his/her legal representative. According to the internal guidelines, the note shall comprise the statement of facts relevant for the decision as well as the decisive grounds underlying it.[125] The length,[126] composition and content of the internal notes vary,[127] but in all cases reviewed, contained the factual ground(s) on which the recognition was based.[128]

Although states are not legally required to give reasons for positive decisions under the APD, UNHCR considers that this would represent good practice, particularly where this information is in any case retained in a different format on the file. This would contribute towards the transparency of decision-making and efforts to monitor and improve quality and consistency. It would also assist with possible decision-making at a later stage concerning any application to renew the validity of a residence permit, or any potential application of the cessation clauses.

Recommendations

As a matter of good practice, UNHCR encourages Member States to state in writing the reasons for a grant of either refugee status or subsidiary protection status, and to make these available to the applicant at the time of the decision.

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[123] IND-Workinstruction nr. 2009/11 of 14 July 2009.

[124] Different rules apply with regard to subsidiary protection.

[125] Internal Guidelines for the Asylum Procedure, 1.1 b), page (3/5), cf. also Handbook for Adjudicators "Decision", 2.1.2 page 7.

[126] In most audited cases, the internal note is ¼-¾ of a page long, and longer only in exceptional cases.

[127] The reasoning for a positive decision on a particular ground for subsidiary protection is usually limited to a statement that the specific situation of the applicant prompts the application of a certain ground of protection, but this has been sufficient for understanding the reason for granting protection, e.g. 00ERT05; 01IRQ05; 00NIG04; 00RUS09; 00TUR04.

[128] One very good example concerns a case (11NIG02) in which the adjudicator in the internal note comprehensively dealt with all issues that led to the decision. Over two pages, the statement of facts was portrayed, and the following four pages were dedicated to the legal and factual considerations of the particular case, including: the grounds for persecution, agents of persecution (non-state agents), availability of protection, the standard of risk, the specific standard of proof and how it was met. For each piece of COI, the various sources were clearly given. In three cases reviewed, a positive decision was based on factual grounds other than those presented in the interview (11ERT01, 11ERT03, 10ERT10). Nevertheless, the results in these decisions seem to be correct since considerable reasons for a well-founded fear were presented. The reasons brought forward by the applicant were not however those reflected in the internal note.

Section 4: Opportunity for a personal interview

Article 12 APD sets out the general requirement that applicants for asylum, subject to some exceptions, must be given the opportunity of a personal interview on their application for asylum with a person competent under national law.

'Personal interview' is not defined in Article 12 or in Article 2 of the Directive which sets out definitions. In reality, applicants for international protection in EU Member States may be interviewed by different authorities, at different stages, for different purposes and in the framework of a myriad of different procedures. The APD is not explicit as to which of these interviews may be held to constitute a 'personal interview' in the terms of Article 12. However, it appears implicit in Article 13 (3) APD that the personal interview should be one which allows the applicant to present the grounds for his/her application in a comprehensive manner. The research found that, in practice, Member States may conduct the personal interview in the context of an admissibility procedure, an accelerated procedure, a border procedure or a regular procedure.[129]

Some Member States conduct a preliminary interview.[130] The principal purpose of preliminary interviews is the registration of the application and the gathering of information and evidence relating the gathering of information and evidence relating to the profile of the applicant. This preliminary interview is conducted by the determining authority in some, but not all, of the Member States surveyed. This preliminary interview does not allow the applicant to present the grounds for the application in a comprehensive manner and as such, it cannot be considered to constitute a 'personal interview' in the terms of Article 12 (1) APD.

In many cases, these preliminary interviews already begin to broach the substance and grounds of the applicant's claim. In Germany within the framework of the airport procedure, the Federal Border Police conducts preliminary checks which include, *inter alia*, questions with regard to the travel route and the reasons for leaving the country of origin.[131] The applicant is given the opportunity of a personal interview conducted by the determining authority (BAMF). However, discrepancies between the information gathered by the Border Police and statements made during the BAMF interview are sometimes used to cast doubt on the applicant's credibility.

Moreover, in some Member States, decisions on whether to channel an application into an accelerated or regular procedure – where both procedures exist - may be taken on the basis of the information gathered in this preliminary interview. This means that in practice, these

[129] In accordance with Article 12 (2) (b) APD, this may take the form of a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4 (2) of the Qualification Directive.

[130] Belgium, Bulgaria, Czech Republic, Finland, Italy, the Netherlands and the UK.

[131] The determining authority tries to ensure that the same person conducting the interview also takes the decision. This is not always possible. However, remarks on reactions seen as being relevant in the framework of the credibility assessment (for instance, extreme excitement) shall be noted down in the hearing reports, in order to give a better impression also to the decision-maker who has not been present during the interview (see Handbook for Adjudicators "Interview" 2.5.3, p.13). In sensitive cases (for instance gender-related persecution, unaccompanied children, torture, danger of suicide etc.), and in cases in which a positive decision is intended by the adjudicator the internal guidelines determine the duty to present the decision to a superior.

preliminary interviews may have an important bearing on the examination of the application for international protection. Even if they are later followed by a more extensive personal interview, UNHCR considers that all of the APD's guarantees with respect to the conduct of interviews (see sections on Articles 13-14) should also apply at this preliminary stage.

Subsequent applications

With regard to subsequent applications, some Member States conduct an interview with the applicant in the framework of a preliminary examination. The purpose of this interview is to examine whether there are new elements or findings which relate to the applicant's qualification for refugee status or subsidiary protection status. Given the significance of the preliminary examination, UNHCR suggests that the guarantees set out in Articles 13 and 14 APD should also apply to any such interview.

Recommendations

Any interview in which the applicant is given the opportunity to present his/her reasons for applying for international protection should be accorded the safeguards foreseen in the APD for interviews. This should be the case regardless of whether the interview is held in the context of an admissibility, accelerated or preliminary procedure. All such interviews on substance should be conducted by representatives of the determining authority.[132]

Focus of the interview with dependants

Summary of findings:

The audit of case files and interviews included only a very small number involving family members. Given the size of the sample, the findings are not conclusive but may, nevertheless, be indicative. UNHCR found some evidence to indicate that interviews of dependants may focus solely on the issues raised by the main applicant, without adequately seeking to verify whether the case involves any particular relevant circumstances relating to the dependants. In some cases it appeared that interviewers used the interview of family members primarily as a means to establish contradictions and inconsistencies in the principal applicant's claim.

UNHCR's audit of case files and observation of interviews included only a very small number involving family members. Given the size of the sample, findings are not conclusive but may, nevertheless, be indicative. UNHCR found some evidence to indicate that interviews of dependants may focus solely on the issues raised by the main applicant without adequately seeking to identify or check whether there are any particular relevant circumstances relating to the dependants.[133]

For example, in Belgium, the audit of case files, the interviews attended as well as interviews with stakeholders indicated that the personal interview of the dependant applicant may not sufficiently enquire into whether the dependant has reasons for an application in their own right.[134] After addressing issues relating to the personal data of the dependant applicant, documents and travel route, the dependant applicant was asked whether his/her reasons for fleeing are completely linked to that of the main applicant. When the dependant applicant's

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

[133] For example: case file 115 in Belgium and case file to Decision 16 in Bulgaria.

[134] Interview with NGOs 25 March 2009 and interview with lawyers 26 March 2009.

response was affirmative, the interview of the dependant applicant focused solely on the issues raised by the main applicant.[135] At the end of the interview, the dependant applicant was asked whether s/he had ever been arrested or convicted. It might not be clear to the dependant applicant that the arrest or the conviction does not have to be related to the issues raised by the main applicant. The possible importance of his/her own reasons for fleeing were not explained to the applicant and no other questions were asked during the interview to check whether the dependant applicant truly did not have his/her own reasons for an application for international protection. In one case,[136] for example, the dependant applicant was not asked about her job, her daily activities, if she had ever been politically active herself or if she had ever experienced any problems herself (not related to the problems of her husband), even though she, for example, had studied at university and obtained a degree in educational studies. In one case file included in the audit, the dependant applicant requested that her file be separated from that of her husband because she claimed to have had her own reasons for fleeing her country of origin. The issues raised by the dependant applicant were only discussed very briefly (one or two questions) during the interview and the decision simply stated there were no reasons to separate the applicant's file from that of her husband. The dependant applicant did not receive protection, based on the rejection of the application of her husband.[137]

One case file audited in the Netherlands highlighted the need for the determining authority to ensure that it checks whether the dependant may have reasons in his/her own right to request international protection. At the end of the interview, the dependant recounted problems that s/he had faced him/herself. The interviewer asked why s/he had not mentioned these issues before, upon which s/he answered that s/he had not been asked before.[138]

From the interviews that UNHCR observed in Greece,[139] interviewers did not seek to identify any particular issues relating to the dependants. As three police officers[140] confirmed, the focus of the interview is mainly on the issues raised by the main applicant and dependants are asked questions only for reasons of clarification and confirmation.[141]

With regard to the other Member States surveyed, UNHCR's sample of case files did not include a sufficient number of case files relating to applicants with adult dependants or adult family members to provide evidence of the general approach taken in those States on this issue. However, there was some evidence of good practice in specific cases in Germany,[142] the Netherlands, and Slovenia[143].

[135] Case file no. 35, 50 and 115.
[136] Case file number 115.
[137] Case file number 50.
[138] Case file 7.
[139] IO481IRQ1, IO41AFG1.
[140] Personnel responsible for interviewing in ADA and SDS.
[141] Interviews with S3 and S4.
[142] Only one audited protocol 00AFG09 concerned two adult family members who were interviewed separately and both applicants were given the opportunity to raise issues particular to their respective applications. In the 5 audited protocols concerning a parent and his/her child/children, the parent was given the opportunity to raise issues particular to the child/children: 11SOM06, 11NIG02, 10AFG04, 11AFG07, 11AFG10.
[143] Two interviews involving spouses were observed and they were all given the opportunity to present relevant circumstances.

Some cases indicated that interviewers may use the interview of family members as a means to establish contradictions and inconsistencies. For example, in one case, interview questions appeared to be aimed at establishing contradictions.[144] The application for refugee status was rejected on the ground that the determining authority did not believe the family had stayed in Baghdad recently because of contradictions between family members relating to, for example, how many times the family members visited the grave of their murdered daughter, when and where the children went to school, and the time the family had spent at a cousin's house (even though this was only discussed with one daughter). Some important issues were not addressed at all. For example, the father was never clearly asked about threats he claimed to have received.[145]

In Spain, case reports, drafted by admissibility/eligibility officers setting out the reasoning for the proposed decision,[146] indicated that in the case of applications involving large family groups from Colombia, separate interviews with family members are often used to establish contradictions which are difficult for the applicant to rebut in the re-examination procedure, because of the limited or lack of written reasoning given for the initial inadmissibility decision. In Melilla, UNHCR was explicitly informed that interviews of family members are used to establish contradictions.[147] Furthermore, UNHCR's audit of case files revealed some indications that sometimes applicants are not given the opportunity to explain apparent contradictions between members of the same family.[148]

In Germany, the handbook for adjudicators instructs them not to attach too much importance to minor discrepancies in the facts claimed by applicants and dependants. Only major contradictions should be regarded as relevant, and the applicant must be given the opportunity to clarify such contradictions.[149] According to information provided by a lawyer,[150] the extent to which this instruction is applied in practice depends on the adjudicator. Some adjudicators are reportedly determined to conduct the interview in a way that contradictory statements are produced by the applicants, while other adjudicators completely abstain from such a practice. UNHCR observed four interviews concerning family members.[151] There was no indication that the adjudicator in any way focused on contradictions. However, given the fact that these were the only observed cases involving family members, no general conclusion in this regard can be drawn from the audit of personal interviews. Only one of the audited case files concerned spouses who had been interviewed separately. [152] The interviews did not focus on establishing contradictions. Given that only one case could be identified, no general conclusion can be drawn from this observation.

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[144] Case file 35 in Belgium concerning an Iraqi family of five: father, mother, daughter and two sons (one of the sons being under 18). Three daughters and one son were still in Iraq and one daughter was killed in a shooting in Baghdad in 2004. All family members based their application on the application of the father (main applicant) who claimed to be a low-ranking case manager with the Iraqi Special Republican Guard and, therefore, a member of the Baath party.

[145] Subsidiary protection status was granted.

[146] These are held in the case files but are not accessible to applicants until a decision has been adopted.

[147] As informed by police official in charge of interviews.

[148] For example, case file 20R (RUS) in France and case files 0106044, 0206117, 0606116, 0306045, 1006062, 0906052, 0405046 in Spain.

[149] Handbook for Adjudicators "Interview", 2.5.4, page 13.

[150] X1.

[151] HR 8, HR 9, HR 10, HR 11 (father and son // mother and son).

[152] 00AFG09.

It is UNHCR's view that if new evidence or inconsistencies arise during an interview with family members or dependants that are material to the determination of the principal applicant's application, the principal applicant should generally be given the opportunity to clarify these aspects of the evidence in a second interview. However, the determining authority should use the utmost discretion and sensitivity in assessing the reliability of the evidence, and testing the credibility of the principal applicant, and should respect the obligation to preserve the confidentiality of the interview with the family member or dependant.[153]

Recommendations

Where an application may be made on behalf of adult dependants, and the personal interview with the dependant adult is conducted, the Member State shall inquire whether the dependant adult has his/her own reasons to request international protection, and ensure s/he is aware of his/her right to make a separate application for international protection.

Personal interviews of dependants should not be conducted with the aim of establishing contradictions and inconsistencies. If any inconsistencies that are material to the determination of the principal applicant's claim arise during an interview with family members or dependants, the principal applicant should generally be given the opportunity to clarify these in a second interview.

EU guidelines with regard to the personal interview of dependants and family members should be developed, which could be provided to all adjudicators.

Section 5: Requirements for a personal interview

Preparing for the personal interview

Summary of findings:

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

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

In accordance with Article 13 (3) APD, in order to establish the conditions which allow applicants to present the grounds for their applications in a comprehensive manner and to ensure that the interviewer is competent to conduct the interview, the interviewer should prepare the personal interview in advance. This requires the interviewer to be familiar with

[153] UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate, September 2005, Chapter 4.3.13.

the content of the application, including the personal and general circumstances relating to the application, review the information provided in travel and other documents submitted, consult relevant objective country of origin information, including maps of the relevant region and information on the culture of the country, and identify preliminary issues that need to be addressed and any specific questions that might need to be asked, before initiating the personal interview.[154] An interviewer will not be able to ask the right questions and ultimately make a fair assessment of the credibility of the applicant's statements unless s/he is well-prepared and familiar with the application and the relevant objective country information before s/he conducts the personal interview.

In some Member States, UNHCR has found that there are guidelines regarding the importance of the interviewer preparing for the personal interview well and how to prepare for the interview so that it is effective (Belgium,[155] Finland[156] and the UK[157]). In the UK, the guidelines state:

"*Interviewing officers should always prepare for their asylum interviews as thoroughly as time allows. They should identify the key issues specifically focusing on: the reason asylum is being claimed, alleged agents of persecution and any allegations of torture or ill treatment.*

The interviewing officer should consider the likelihood of the applicant having scars. Where there are elements of the claim that require further examination, the interviewing officer should prepare a question plan to take into account these areas….The interviewing officer should be familiar with the country report or other country information relating to where the applicant fears persecution, where available."[158]

In order to prepare the interview, the interviewer will need to have some basic information regarding the profile of the applicant and his/her reasons for applying for international protection. For example, in Belgium, UNHCR has been informed that on registration of the application, the applicant is asked to complete a questionnaire which has been devised to provide background information for the preparation of the interview. In the Czech Republic, the application form is completed by the determining authority in the presence of the applicant and an interpreter whenever necessary. The completed form signed by all persons present is then forwarded to the appointed interviewer. Whereas, in the Netherlands and the UK, the determining authority conducts an initial interview which, *inter alia*, gathers background information.

However, in some Member States, UNHCR was informed that insufficient data is gathered prior to the personal interview to facilitate the preparation of the interview. For example, UNHCR was informed that in Spain[159] and Greece, the only data available to the interviewer is the identity, nationality, gender and family composition of the applicant. Similarly in

[154] See paragraph 4.3.2 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, September 2005.
[155] Internal working document on the preparation and strategy of the personal interview.
[156] An extensive guide which includes planning and scheduling the interview was published following a joint ERF-funded project of the Refugee Advice Centre and the Immigration Services.
[157] Interviewers have guidelines on how to structure and conduct an interview. These are contained in the Asylum Policy Instruction (API) on *Interviewing* November 2006, rebranded December 2008.
[158] API *Interviewing.*
[159] This relates to the interview in Spain, which is conducted in the course of the admissibility procedure in which all applications are examined, and is considered to constitute the personal interview in line with Article 12 (2) (b) and Article 13 (5) APD. Eligibility officials who conduct personal interviews in the course of the regular procedure do have sufficient data in advance of the interview.

Germany, the form[160] available before the interview for the interviewer, contains basic information regarding the profile of the applicant but does not provide information about the reasons for applying for international protection.[161] In some other Member States, the information available to the interviewer is also very limited.[162]

It is evident that the interviewer will need to receive adequate information sufficiently in advance of the interview so that the interviewer can conduct a thorough review of the applicant's case file and consult relevant country of origin information.[163] Interviewers in a number of Member States reported to UNHCR that they receive the case files of applicants sufficiently in advance of the personal interview, and claimed to undertake preparatory research with regard to both personal and general factors, although UNHCR was not able to verify this in the context of this research.[164] By way of example, in Belgium, interviewers informed UNHCR that they receive applicants' case files on average two to three weeks before the personal interview and that preparation for the interview, including relevant COI and other research, may take from 30 minutes to a few days, depending on the case.[165]

In contrast, interviewers at ADA, Athens in Greece reported that they are informed of the interviews that they will conduct on the same day the interview is to be conducted. During UNHCR's period of observation, each interviewer received every day a list of approximately 20 interviews that s/he had to conduct during that day. As such, there was no time to prepare the interview. The interviewer opened a case file for the applicant at the interview.[166] It should be noted that whilst the overwhelming majority of applications for international protection are lodged at ADA in Athens,[167] a small percentage are lodged elsewhere.[168]

Due to the increase in the number of applications lodged in Italy in 2008, the members of the Territorial Commissions (CTRPIs) were also experiencing time constraints on their preparation of interviews. During the period of UNHCR's research, two CTRPIs in particular

[160] So-called "*Niederschrift zu einem Asylantrag (Teil 1)*", which was submitted to UNHCR for all cases in which UNHCR observed the interview.

[161] Even though the electronic file is available, information on the reasons for applying for asylum is only very exceptionally included, e.g. in cases where a written statement by a legal representative has been submitted before the interview takes place. Moreover, a medical opinion is not necessarily contained in the electronic file at this point in time according to information provided by the determining authority to UNHCR. Furthermore, neither the Handbook for Adjudicators on the conduct of the interview, nor the Internal Guidelines on the Asylum Procedure contain explicit advice or instructions on how to prepare for the interview in advance. Also in the information submitted by the determining authority to UNHCR, it is not mentioned that interviewers are instructed to do so and how.

[162] In Slovenia, prior to the application interview, the inspector receives a registration form completed by the police with a statement of the reasons for the application handwritten by the applicant. The *Modello* C3 completed in Italy contains limited information for the members of the Territorial Commissions.

[163] Including the application, any statement, country of origin information, including maps of the region, identify preliminary issues, missing information etc.

[164] Belgium, Bulgaria, the Czech Republic, Finland, and France. However, given the time constraints of the border procedure in France, in practice, there is little time for preparation of the interview.

[165] Information based on interview with case managers, 19 & 20 March 2009.

[166] Interview with S3 and S4.

[167] According to 2008 statistics of the Ministry of the Interior, 90.1% of applications are lodged in Athens.

[168] Interviewers in SDAA and SDS have to conduct personal interviews per week; therefore, they have the opportunity to prepare their interviews.

were conducting 15 – 20 personal interviews per day.[169] Instead of interviews being conducted by the four members as a collective, interviews observed were conducted by one or two members together.[170] UNHCR observed that on the morning of the scheduled interviews, each member had approximately 30 minutes to view the case files of all the applicants to be interviewed that day. Otherwise, the interviewers reviewed the case file of the applicant just before the interview. As a result, in practice, the interviewers rarely had the opportunity to conduct any specific research or to formulate specific questions prior to the personal interview.

In the Netherlands, in the application centres, UNHCR observed that interviewers receive the case file of the next applicant to be interviewed approximately 30 minutes before the detailed personal interview. This provided time for the interviewer to read the information obtained during the initial interview, but not to conduct research or formulate specific questions in preparation for the personal interview. To compensate, interviewers scheduled breaks during the course of the interview in order to conduct relevant research.

In the course of this research, UNHCR did not shadow interviewers in their work and as such did not observe interviewers preparation of interviews in all the Member States of focus. However, UNHCR observed 185 personal interviews and noted whether interviewers referred to COI or other information that had been previously collected, and which they had to hand; or whether questioning was indicative of a specific knowledge of the applicant or the region of origin.

UNHCR did witness instances indicative of prior familiarization with the application and prior research. For example, in all the interviews observed in Finland, the interviewers' questioning indicated that s/he had prepared the interview in advance and undertaken relevant research.[171] In the UK, some interviewers had perused Operational Guidance Notes about countries of origin and had read submissions received from legal representatives.[172] There was a mixed picture in some other Member States, with some indications that some interviewers had undertaken some preparation.[173] In the Netherlands, UNHCR observed that

[169] According to internal UNHCR data, at the time of writing, the average number of personal interviews conducted is 6-8 per CTRPI each day, four days a week. In most CTRPIs, one day per week is dedicated to case discussion, COI research and the drafting of decisions.

[170] Although, in principle, in accordance with Article 12 (1) of the d.lgs. 25/2008, the personal interview may be conducted by only one member of the Commission *"on the basis of a motivated request of the applicant"*. Article 12 (1) also provides that, if possible, the interviewer should be *"of the same sex as the applicant"*.

[171] For example, interview 5, the interviewer had fully researched the family relationships prior to the interview.

[172] LIV int9.3.09 and GLA int4.3.09.

[173] During two interviews observed in the Czech Republic, the interviewers had a detailed map of the country of origin with which they were obviously familiar. This was also noted in France where in one case (Case 6), the protection officer had prepared questions in advance together with his/her head of section (this was a case which could possibly raise the issue of exclusion). In Case 7 and Case 8, the protection officer had a map at hand and some COI documents. In Case 11 and in Case 12, the protection officer had a map at hand. In Greece, in contrast to interviews observed in ADA, from interview observation in SDAA and SDS, it was clear that interviewers in these Departments were prepared for their interviews. They had access to the case file before interview, they had undertaken some country of origin research in advance and they were equipped with a map that they were using during interview. However, other stakeholders suggested that the interviews that UNHCR observed at SDAA and SDS were not representative of the way interviews are normally conducted there. UNHCR was informed that the two interviews at the SDS had been specifically prepared for UNHCR's visit and that in many cases in SDAA, interviews are omitted without any examination of the case or last only a

the interviewers structured the interviews to include short breaks. During these breaks, when the applicant left to go to the waiting area, the interviewer researched relevant information.

However, UNHCR is concerned to note that in most interviews observed, the interviewer did not refer to any information that had been previously gathered and questioning did not indicate any specific knowledge of the circumstances pertaining to the application.[174]

Moreover, UNHCR witnessed a couple of interviews where the interviewer 'stood in' for an absent colleague on the day of the interview and, therefore, did not have sufficient time to prepare the interview.[175] In one interview, the interviewer had been sent questions by another decision-maker. When the applicant addressed some questions to the interviewer, s/he replied that s/he did not know why certain questions had been asked.[176]

UNHCR is concerned that there is evidence that a significant number of personal interviews are either not prepared or poorly prepared, and there is a failure on the part of the interviewers in some determining authorities to ensure familiarisation with country of origin information (COI) prior to or in the context of interviews. Knowledge of the relevant objective COI on the part of the interviewer is a prerequisite if the personal interview is to be used effectively to assess the credibility of evidence. UNHCR believes that as a general principle, unless an applicant has had the opportunity to explain inconsistencies or evidence that are otherwise not believable, the interviewer should not make a negative credibility finding in assessing the facts. Therefore, if the determining authority assesses that there are inconsistencies or discrepancies between the applicant's statements and COI or other information gathered following the personal interview, a second interview should be scheduled in order to the give the applicant an opportunity to explain these inconsistencies.

Recommendations

Pre-interview preparation should be a specific and mandatory step in the interview process. Such preparation should include a thorough review of the applicant's case file and relevant country of origin information.

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few minutes: interviews with S15 and S13. In Spain, eligibility officials appeared to have prepared the personal interviews observed in the regular procedure.

[174] Bulgaria: the interviewer did not refer to the case file in any of the interviews observed, and in only one did the interviewer refer to a map of the country of origin. This was also the case in quite a high number of the interviews observed in France. In Germany, on the basis of the interviews observed by UNHCR for this research, it appeared that interviewers were not specifically prepared for the interview. This was evident in a case in which the adjudicator at the beginning of the interview noticed with surprise that the standard questions which are asked before the questions enquiring into the actual grounds for persecution, had already been dealt with at an earlier date (HR 13). However, a calendar (in interviews involving applicants from countries using a different calendar) was always at hand, and often the adjudicators seemed to know quite well the regions and towns mentioned by the applicant when describing where something happened or which route they had travelled. In ADA in Greece, during the 49 interviews observed, no interviewer asked any specific question which was indicative of prior knowledge of the relevant circumstances relating to the application, and country of origin maps were not referred to. In Slovenia, the inspectors who conduct the meeting to complete the application only asked the standard questions on the form and a few follow-up questions. No research was previously undertaken. In Spain, it appeared that no specific research is undertaken prior to the meeting to complete the application.

[175] E.g. LIVint13.3.09 in the UK.

[176] The Czech Republic, interviewer E.

Member States must ensure that interviewers receive adequate information relating to the application and any special needs of the applicant sufficiently in advance of the scheduled interview. Interviewers should be assured sufficient time to prepare the interview.

Establishing the facts in the personal interview

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

Generally, UNHCR found that the interviews observed in one in three states surveyed were structured and conducted so as to allow facts relevant to the protection criteria to emerge. However, personal interviews observed elsewhere revealed notable shortcomings. UNHCR found that personal interviews were often more effective in Member States which conduct a separate interview to gather bio-data and information regarding the travel route. The personal interview could therefore focus principally on the reasons for applying for international protection and an assessment of credibility. In other Member States, UNHCR noted that approximately two-thirds of the interview time was dedicated to gathering bio-data and information on the travel route, and only one third of the interview time was dedicated to exploring the reasons for the application. UNHCR was concerned to note that in some of the interviews observed in these Member States, questioning with regard to the reasons for the application tended to be superficial, formalistic or insufficient to elicit all the facts which are relevant to qualification for international protection. Questioning was often more extended and more probing with regard to the identity of and travel route taken by the applicant.

Some interviews observed were dominated by credibility assessment, and applicants appeared to be questioned or tested at length regarding their origin and/or travel route. In interviews observed in six Member States, interviewers did not refer to any country of origin information.

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

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

Questioning during the personal interview should facilitate the most complete and accurate disclosure of the facts that are relevant to the application for international protection.[177]

[177] Paragraph 4.3.6 of UNHCR Procedural Standards for RSD under UNHCR's Mandate, September 2005. This requires the use of both open-ended questions which permit the applicant to use his or her own words and describe events they consider relevant, and closed questions.

In UNHCR's experience, the most effective interviews are those that are well-structured and focused on assessing qualification for refugee status or subsidiary protection status. As such, the personal interview should establish all the facts that are relevant for the application of all the elements of the refugee definition and the application of the criteria for qualification for subsidiary protection status. An assessment of the credibility of the applicant's statements is an important part of the fact-finding process and the personal interview provides the interviewer with an opportunity to clarify any incomplete information and/or apparent inconsistencies, to resolve, if possible, any contradictions and to find an explanation for any misrepresentation or concealment of facts. However, the personal interview should not concentrate on establishing discrepancies, inconsistencies and contradictions. Neither should it be focused in the main on establishing the applicant's travel route, the facilitation and means of travel.

In this research, UNHCR observed personal interviews and audited the transcripts of interviews in order to assess whether the interviews were conducted in a way which allowed all the facts relevant to criteria for international protection – both refugee and subsidiary protection status – to emerge.[178]

The picture which emerged was mixed. In general terms, UNHCR found that the interviews observed in the Czech Republic,[179] Finland, Germany[180], the Netherlands and the UK[181] were structured and conducted in such a way that allowed facts relevant to the criteria for international protection to emerge. However, personal interviews observed elsewhere revealed notable shortcomings.

UNHCR has found that, in general terms, the personal interview was more effective in those Member States which conduct a separate interview to gather bio-data and information regarding the travel route. As a result, the personal interview focused principally on the reasons for applying for international protection and an assessment of credibility.

For example, in the Czech Republic, there is a separate process to gather the elements relating to the profile and travel of the applicant. Also, in Finland, the police or border guards conduct a separate investigation, including an oral hearing with the applicant, regarding the applicant's identity, travel route and entry to Finland. As such, the personal interview conducted by the determining authority is focused on the reasons for the application. In the Netherlands, the determining authority conducts an initial interview in

[178] All the Member States of focus operate a single procedure for the determination of both refugee status and subsidiary protection status. Even though in Germany, the examination of subsidiary protection cannot be applied for, but is dealt with by the determining authority *ex-officio*, all forms of international protection are assessed in the same interview.

[179] With the exception of issues related to internal protection and subsidiary protection status, which were not always fully examined.

[180] However, it should not go unmentioned that adjudicators firstly ask (25) standard questions concerning personal data, family, travel route etc., and only subsequently, ask the applicants to state their reasons for applying for asylum.

[181] Based on UNHCR's observation of personal interviews, interviewers did investigate whether the applicant's feared persecution was for a 1951 Convention reason; but in some cases all relevant criteria of the Qualification Directive and the Convention were not explored. For example, although the interview did ask about the position of a Somali woman as a minority clan member, the question of gender-based persecution was not pursued. Where the internal protection alternative was being considered, interviewers did not establish whether internal protection was relevant and reasonable, taking into account the general situation and the personal circumstances of women: LIVint9.3.09; GLAint4.3.09.

which the identity of the applicant and the travel route taken are assessed. Similarly, in the UK, prior to the personal interview, a screening interview is conducted by the determining authority. The screening interview gathers bio-data and detailed information regarding the travel route, as well as brief reasons for applying for international protection.[182] In these four Member States, the observed personal interviews, in general and comparative terms, established all the facts relevant to the application of the criteria for refugee status and subsidiary protection status.

However, in other Member States, the personal interview or application interview[183] has multiple objectives:[184]

- gathering of bio-data regarding the applicant
- gathering of detailed information regarding the travel route
- establishing the reasons for the application for international protection

Moreover, in these Member States, the format of the interview means that it begins with the gathering of bio-data and/or information on the travel route taken by the applicant, and subsequently addresses the reasons for the application. The consequence of this approach is that it was observed that a limited amount of the interview time was dedicated to exploring the reasons for the application. For example, in the application interviews observed in Slovenia and Spain, approximately two-thirds of the interview time was dedicated to gathering bio-data and information on the travel route, and only one third of the interview time was dedicated to exploring the reasons for the application.[185] In this regard, UNHCR was also concerned to note that in some application interviews observed in Spain, questioning on the reasons for the application was omitted and replaced solely by a written statement by the applicant.[186]

UNHCR was also concerned to note that in some of the interviews observed in these Member States, questioning with regard to the reasons for the application tended to be superficial, formalistic or insufficient to elicit all the facts which are relevant to qualification

[182] Note that a report entitled '*The Management of Asylum Applications by the UK Border Agency*', by the UK's National Audit Office found that of the 49,834 asylum applicants over the period January 2007- August 2008, 13,684 (27.5 per cent) had not had a full screening interview within two days of their application. The Comptroller and Auditor General, *The Home Office, Management of Asylum Applications by the UK Border Agency*, Part two, paragraph 2.2-2.3, The National Audit Office; HC 124 Session 2008-2009, 23 January 2009, www.nao.org.uk.

[183] In Slovenia and Spain.

[184] Bulgaria, France, Germany, Italy, Slovenia and Spain. Note that in Bulgaria, information on the travel route is gathered in a separate interview (Dublin II interview).

[185] The ratio was estimated to be 50/50 in the personal interviews observed in Bulgaria (with regard to bio-data and reasons for the application) and France. Also in Germany, the major part of the interview was used for gathering information on bio-data and the travel route, before the reasons for applying for asylum were investigated. This sometimes even meant that only one third of the time was dedicated to the reasons for the application (e.g. HR 4: only the last two hours of six were dedicated to the reasons for the application). Moreover, sometimes directly after the interview took place, applicants were asked by another BAMF officer (especially responsible for gathering information on the travel route), to report again in detail on the travel route. It should not go unmentioned that applicants apparently do not understand that the question posed at the end of the interview, whether the applicant has any other reasons which would form an obstacle for returning to the country of origin, relates to all forms of subsidiary protection. (Lawyer: X2, X3; similarly X1).

[186] Four interviews observed outside Madrid.

for international protection.[187] There was little evidence of clarification being sought regarding salient issues. Questioning was often more extended and more probing with regard to the identity of and travel route taken by the applicant.

Some interviews observed were overly dominated by credibility assessment, and applicants appeared to be questioned or tested at length regarding their origin and/or travel route.[188] Country information or maps were mainly used to test the applicant's knowledge of his/her claimed region of origin or travel route.[189] UNHCR recognizes the importance of establishing the identity of the applicant and travel route, but points out that the credibility assessment may also be made in the framework of exploring the reasons for the application.

Furthermore, UNHCR noted with concern that, with regard to the reasons given for applying for international protection, interviewers did not refer to any country of origin information in the interviews observed in Bulgaria, France, Germany[190], Slovenia,[191] Spain[192] and the UK.

There was also some evidence to suggest that interviewers do not always give applicants the opportunity to clarify apparent or perceived contradictions or inconsistencies which emerge in the course of the interview.[193] For example, the audit of case files in Bulgaria showed that inconsistencies are often used as a ground for finding the testimony of the applicant not credible.[194] The interview records in relation to the respective decisions, however, provided no evidence that the applicant had been alerted to these inconsistencies or given the opportunity to clarify these inconsistencies. In only one of the interviews observed in Bulgaria,[195] did the interviewer address the inconsistency which emerged, and the applicant provided an explanation which was accepted as satisfactory.

The shortcomings observed in the personal interviews conducted at ADA, Athens were so severe that it can only be concluded that the personal interviews were not fit for purpose. Of the 49 interviews observed, the overwhelming majority lasted only five to ten minutes. Inevitably, these applicants were thus not given the opportunity to present the grounds for their applications in a comprehensive manner. In the majority of interviews observed, when the applicant claimed to have left his/her country of origin for fear of persecution, no follow-up questions were asked.[196] For example:

[187] Bulgaria, France, Italy, Slovenia and Spain with regard to OAR in Madrid.
[188] Based on observation of interviews and interview records in Belgium, France (with regard to Sri Lankans), Slovenia, and Spain.
[189] Observed in Belgium and France. The CGRA in Belgium is aware of this criticism and is taking steps to discuss and address this in working groups and documents.
[190] During the attended interviews the interviewer did not explicitly inform the applicant which COI would be used by the interviewer in taking the decision. This finding is confirmed by the consulted lawyers, who all stated that the interviewers do not inform applicants of the relevant COI during the interview (X1. X2, X3).
[191] With regard to the application interviews.
[192] *Ibid*.
[193] Witnessed in some interviews in Bulgaria and confirmed by interviewers; and observed in some interviews in Italy and the UK: LIVint9.3.09; LIVint13.3.09. Also observed in some interviews and the transcripts of interviews in case files in France.
[194] *See* for example Decision 50.
[195] Interview 2.
[196] Of the 52 personal interviews observed in total, in only 6 interviews was a follow-up question asked when the applicant claimed to have left the country of origin for fear of persecution.

- In case IO34ETH1, the applicant claimed that her father had "problems with the army". No related question followed.
- In case IO48IRQ7, the applicant claimed that he was facing problems because of his Kurdish origin. No further question regarding the alleged problems was asked.
- In case IO49GHA3, the applicant claimed fear of persecution for reasons of race. The interviewer did not ask any related questions to clarify the exact reasons.

In contrast, applicants at ADA were questioned on:

- their travel route to Greece;[197]
- the economic conditions in the country of origin and the financial status of the applicant;[198] and
- why Greece was chosen as the country of destination.[199]

By way of example, in interview IO40AFG7 the applicant was asked to answer only the following questions in this order:

1. What were the reasons of your flight?
2. Do you work in Greece?
3. Do you have relatives in Afghanistan?
4. What was the exact itinerary that you followed on your way to Greece?
5. Have you gone to school?
6. When did you leave Afghanistan?
7. Do you have a passport?
8. What was your employment in Afghanistan?
9. How much money have you spent for your itinerary?

Some determining authorities reported that interviewers have guidelines on how to structure the interview (Belgium, Finland,[200] Germany[201], Greece,[202] the Netherlands and the UK. However, in most Member States of focus in this research, the determining authorities

[197] IO40AFG7, IO42IRQ5, IO43IRQ6, IO46SLK1, IO32PAK10, IO31GEO1, IO30PAK9, IO5PAK4, IO2PAK2, IO1PAK1, IO51AFG9, and IO52MAU1.
[198] This was whether or not the applicant had claimed to have left the country of origin for economic reasons: IO5PAK4, IO46SLK1, IO31GEO1, IO30PAK9, IO11AFG1, and IO49GHA3.
[199] IO42IRQ5, IO43IRQ6, IO46SLK1, IO32PAK10, IO31GEO1, IO38GEO2, IO48IRQ7, and IO49GHA3.
[200] Finnish Immigration Service, Pakolaisneuvonta ry, ERF: *Suositukset turvapaikkapuhuttelun kehittämisessä* 2008.
[201] Adjudicators firstly use a catalogue of 25 standard questions concerning personal data, family, travel route etc. Subsequently, applicants are asked to state their reasons for applying for asylum. The catalogue was used in all the case files reviewed by UNHCR as well as in all the attended interviews. Adjudicators are instructed to use this catalogue and to ask also all necessary additional and follow-up questions. They can only deviate from it if it seems more appropriate during a particular interview (Handbook for Adjudicator *"Interview"*, in particular, p. 7; Internal Guidelines for the Asylum Procedure, in particular, under: "Record"; "Interview" (4/5)). Moreover, there is a checklist available concerning the requirements set by the determining authority.
[202] Head of ARD in ADGPH informed UNHCR that interviewers have internal guidelines which are strictly for internal use, so UNHCR was not given permission to see or obtain a copy of the guidelines. At the time of UNHCR's research, according to the Head of ARD in ADGPH, a general circular on the implementation of PD 90/2008 was in preparation which would cover issues related to personal interviews.

informed UNHCR that interviewers use a template with standard questions (Bulgaria,[203] Finland,[204] Germany[205], Italy,[206] the Netherlands, Slovenia, and Spain) or that such a template was being prepared (France). Within the remit of this research, UNHCR has not assessed the content of these guidelines or templates.

Recommendations

An aide memoire to interviewers should be developed to facilitate the structuring of the personal interview, ensuring that all the relevant key elements of the refugee definition and the criteria for qualification for subsidiary protection status are covered during the personal interview. UNHCR would wish to contribute to the development of such an aide memoire. The EASO may also be able to play a facilitating role in developing such a tool.

Establishing the facts relevant to qualification for international protection should be the principal aim and focus of the personal interview, and appropriate lines of questioning should be used to this end. The applicant should be given the opportunity to address any perceived inconsistencies, discrepancies or contradictions during the personal interview.

Sufficient time should be allocated for the personal interview, so that the applicant is able to present the grounds for the application in a comprehensive manner.

Section 6: Status of the report of a personal interview in the procedure

Summary of findings:

In the examination of a claim for international protection, the oral testimony of the applicant is crucial. A failure to accurately and fully record the applicant's testimony may result in an erroneous decision. This is not in the interest of Member States as an inaccurate record of the content of the personal interview is liable to challenge upon appeal. For the applicant, such a procedural failure carries the risk of refoulement *in breach of international law.*

Article 14 (1) APD provides that: "Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of Directive 2004/83/EC".

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[203] The template is not obligatory. Some interviewers do not follow it in the general procedure. The case files audit confirmed that the templates for the accelerated procedure and for interviews on subsequent applications are in all cases followed.

[204] Confirmed by observation of interviewers, although all interviewers asked additional and follow-up questions.

[205] The catalogue does not state questions related to the actual reasons for the asylum application. These are enquired following the general questions. The Handbook for Adjudicator *"Interview"*, does not provide a checklist or practical information on the criteria for qualification for refugee status or subsidiary protection, but contains advice regarding adequate conduct of the interview. The Internal Guidelines for the Asylum Procedure contain a table with explanations with a view to the criteria for qualification for refugee status or subsidiary protection; however this table does not refer to the structuring of the personal interview. Also the explanatory documents available for the adjudicators regarding the assessment of the criteria of Article 15 c QD (in certain countries of origin), do not explicitly relate to the conduct of the interview (Documents submitted by the determining authority to UNHCR).

[206] Some Commissions of the determining authority have a template with some initial questions or general areas to be addressed during the interview. Further questions are developed in the course of the interview.

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

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

UNHCR is concerned that some Member States have interpreted "essential information" as giving the interviewer discretion to determine which parts of the applicant's statements are worthy of recording in the written report, with the result that the report is only a summary of the oral evidence. This may result in relevant oral evidence not being recorded, and/or the meaning and accuracy of statements being unwittingly altered. In one state, observation of interviews and auditing of records revealed that the written summary report did not reflect the oral evidence given by the applicant at all. Written records of interviews examined in 171 case files contained precisely the same questions and answers, despite the fact that they related to applicants of different nationality, gender and social status; and the interviews had been conducted by nine different interviewers and the case files examined by six different examining officers.

In the examination of a claim for international protection, the oral testimony of the applicant is crucial. In many cases, an applicant will be unable to support his/her statements by documentary or other proof and, therefore, it is imperative that his/her oral testimony is recorded accurately and fully.[207] A failure to accurately and fully record the applicant's testimony may result in an erroneous decision and a failure to identify a person with protection needs. This is not in the interests of Member States as an inaccurate record of the content of the personal interview is liable to challenge upon appeal. For the applicant, such a procedural failure carries the risk of *refoulement* in breach of international law.

Article 14 APD sets out the minimum requirements with regard to the report of the personal interview.

Written transcript of personal interview

Article 14 (1) APD provides that:

"*Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of Directive 2004/83/EC*" (the Qualification Directive).

[207] See Paragraph 196, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention, and the 1967 Protocol relating to the Status of Refugees, revised 1992.

In accordance with Article 14 (4) APD, this also applies to meetings with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application.[208] At the time of UNHCR's field research, the determining authorities in both Slovenia and Spain conducted such a meeting and, therefore, this research also focused on the report of the application interview and its compliance with the APD.[209]

Eleven of the 12 Member States under focus in this research have transposed Article 14 (1) APD in national legislation, regulations or administrative provisions: Belgium[210], Bulgaria[211], the Czech Republic[212], Finland[213], France[214], Germany[215], Greece[216], Italy[217], the Netherlands[218], Slovenia[219] and the UK[220].

The only exception is Spain which, at the time of UNHCR's research, had not transposed Article 14 (1) APD in national legislation or administrative provisions, nor has it transposed Article 14 (1) APD in the New Asylum Law. In practice, UNHCR observed that the competent authorities produced a written completed application form following each application interview, and transcripts of interviews in the regular procedure were also made.

The Directive is explicit in requiring that a written report be made. The national legislation and regulations of most Member States reflect this and require that a written record be

[208] Article 14 (4) APD states: "*This Article is also applicable to the meeting referred to in Article 12 (2) (b)*". Article 12 (2) (b) refers to "*a meeting with the applicant for the purpose of assisting him/her with completing his/her application*".

[209] UNHCR also observed interviews in the regular procedure in Spain for the purposes of this research.

[210] Article 16 (1) of the Royal Decree of 11 July 2003 concerning the CGRA. Article 16 (2) of the same Decree requires that an inventory is made of all documentary evidence submitted by the applicant. By law, a record should also be made of the initial interview with the AO (Articles 15-18 of the Royal Decree of 11 July 2003 concerning the AO).

[211] Article 63a (3) of LAR (New, SG No. 52/2007) and Article 91 (5) IRR. There is also explicit legislation requiring a written report of the interviews of accompanied and unaccompanied minors (Articles 102, 119(3) IRR).

[212] Section 23 (1) ASA.

[213] Administrative Guidelines apply (Turvapaikkaohje SM 109/032/2008). However, according to the Government Bill 86/2008, Section 97 a (2) and (3) of the Aliens' Act (301/2004) will be amended to explicitly state that a record must be made of the personal interview and interviews may be audio or video recorded.

[214] Decree of 15 July 2008 (Article R.723-1-1 *Ceseda*).

[215] Section 25 (7) APA: *"A record of the interview containing the essential information produced by the foreigner shall be kept. A copy of this record shall be given to the foreigner or sent to him with the Federal Office's decision."* The practice experienced in the framework of this study complied with this rule; a written record of the interview had been issued in each of the reviewed case files as well as in all the cases in which UNHCR observed the interviews. The adjudicators make use of a standardized template for the issuance of the written record.

[216] Article 10 (9) of PD 90/2008.

[217] Article 14 d.lgs. 25/2008.

[218] Articles 3.110(3) and 3.111(2) Aliens Decree 2000 require a written record be made of both the initial and detailed personal interviews.

[219] Article 48 IPA.

[220] Paragraph 339NC Immigration Rules.

made of the personal interview.[221] The national legislation of Finland is not explicit as to the form of the record, but, in practice, a written record is made.

Notwithstanding the fact that most of the Member States of focus have transposed Article 14 (1) APD and all produce a written record of the interview, practice amongst the Member States is nevertheless varied as some Member States produce a *verbatim* transcript of each personal interview and some Member States produce a summary report of each personal interview.

UNHCR notes that the APD does not explicitly require a *verbatim* transcript of the personal interview. The APD states that the written report should contain "*at least the essential information regarding the application*" in terms of Article 4 (2) of the Qualification Directive. UNHCR is of the opinion that this should be interpreted as requiring Member States to completely transcribe in detail all the questions and statements of the interviewer and applicant regarding the essential elements stated in Article 4 (2) of the Qualification Directive.[222] This includes a complete and detailed transcript of the stated reasons for applying for international protection since this is considered 'essential information' in terms of Article 4 (2) of the Qualification Directive. It should be noted that, when an interpreter is used, the transcript of the applicant's statements is in fact a transcript of the translation of the applicant's statements. In order to ensure an accurate record of the applicant's statements, UNHCR encourages Member States to make an audio-recording of personal interviews.[223]

UNHCR notes positively that according to law or administrative instruction, seven of the Member States of focus in this research require that the interviewer makes a *verbatim* written transcript of the personal interview, including everything said and not said by the applicant and interviewer.[224] For example, UNHCR's observation of interviews and audit of interview reports in the Czech Republic confirmed that a *verbatim* report is made and that some interviewers also described the non-verbal reactions of applicants, for example, "*the applicant is smiling*", and "*the applicant cannot understand the question and it has to be re-formulated*."[225] Similarly, in Italy, some interviewers write a *verbatim* report and also describe the non-verbal reactions of applicants.[226]

However, in a couple of Member States which, by law or administrative instruction, should produce *verbatim* transcripts, doubts were raised by stakeholders[227] or by UNHCR's audit of

[221] Belgium, Bulgaria, the Czech Republic (Section 18 CAP (1) which also states that a visual or audio recording may be taken in addition to the report), France, Germany, Greece, Italy, the Netherlands, Slovenia (Article 48 (4) IPA. Article 48 (7) IPA permits the audio and video recording of the personal interview) and the UK (Para 339NC (i)).

[222] This would include all questions and answers regarding *"the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection*".

[223] See subsection below.

[224] Belgium (Article 17 (1) of the Royal Decree of 11 July 2003 concerning the CGRA), Bulgaria (Article 63a (3) LAR), the Czech Republic (practice), Finland (practice), France (practice), Slovenia (Article 48 (4) IPA), and the UK (Asylum Process Guidance "Conducting the Asylum Interview").

[225] Y005, Y009, Y012, X008 and X013.

[226] Information obtained from UNHCR Italy which participates in the determination procedure in Italy.

[227] In Belgium, the written report is supposed to be a "true account" of the personal interview, but some lawyers have criticized the interview records on the grounds that they are not always a true account and the case managers do not report everything but only what they consider to be relevant

interview reports[228] as to whether full *verbatim* transcripts are actually written in practice. The Council of State in Belgium has stated in a decision that there were no guarantees that the notes taken by case managers during the personal interview were reliable. The Council of State reasoned that if the applicant disputes the content of the report of the personal interview in a precise and credible manner, the recorded statements which are disputed cannot be used against the applicant.[229] The determining authority in Belgium (CGRA) has since produced a working document which provides instructions for case managers on how to take notes during the personal interview.[230] UNHCR welcomes CGRA's acknowledgement of this problem and readiness to take steps to address it. UNHCR suggests that the accuracy of the written reports of personal interviews in all Member States is best achieved if a complete transcript is made.[231]

UNHCR is concerned that some Member States have interpreted 'essential information' as giving the interviewer discretion to determine which parts of the applicant's statements are worthy of recording in the written report with the result that the written report is only a summary of the oral evidence given. This may result in relevant oral evidence not being recorded, and/or the meaning and accuracy of statements being unwittingly altered in the process of summarizing.

In five Member States, the interviewer is not required to make a full *verbatim* record of the personal interview.[232]

German law only requires that the record contains the "essential information", but remains silent with regard to the form in which this information shall be given. According to the interpretation of the determining authority (BAMF), this term means as a rule, that a *verbatim* report is not required but rather a combination of a *verbatim* record and a summary of parts.[233] Questions and answers regarding the core events shall be noted down *verbatim*; and summaries shall be marked as such, for example by use of reported speech.[234] The practice observed by UNHCR during the attended interviews[235] differed from these instructions. While questions and further enquiries by the adjudicator were noted down

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for the application – interview with lawyers on 26 March 2009. The lawyers reported that the failure to record a true account has been a successful ground of appeal. UNHCR was not able to verify the accuracy of interview reports in Belgium as UNHCR was not able to audit the written reports of the interviews it had observed.

[228] In Bulgaria, UNHCR observed that the written reports do not include all the questions which are additional to the standard template questions, and do not include all the statements made by the applicant. Some statements of the applicant were also re-phrased.

[229] *RvS*, 7 August 2007, nr. 173.899. The decision concerned an application dealt with within the asylum procedure before June 2007. In this case the Council of State compared the notes of the CGRA to the notes of the lawyer. The notes of the lawyer were more elaborate and more clear than the notes of the CGRA. Moreover, the notes of the lawyer stated that the case manager had said that "he was not there to note everything" and that he had asked the asylum applicant to be short and concise.

[230] The report should be readable, it should be an accurate and literal account of everything that has been said by applicant and case manager, it should also state what is not being said (questions that are not being answered), the report should clearly state who said what, the report should be objective and only official abbreviations can be used.

[231] See below also for recommendations regarding audio-recording.

[232] Greece, Italy, the Netherlands and Spain (with regard to both the application interview and the personal interview in the regular procedure).

[233] BAMF Handbook "*Interview*", 3.3 "Protocol", p.20.

[234] BAMF Handbook "Interview", 3.3 "Protocol", p.20.

[235] HR 1 to HR 16.

verbatim[236], this was not always the case with regard to the information given by the applicant, notwithstanding the fact that they concerned the core events. Judging only from the hearing reports, one could come to the conclusion that in practice *verbatim* records are made, as the information is clearly divided into questions and answers, and the answers are reported in direct speech ("I", "we", "our"). However, it depends very much on the adjudicator, the interpreter and their interplay, whether this answer is actually the one given by the applicant or rather the version of the answer the adjudicator has dictated in direct speech into the dictaphone after having "filtered" the statement of the applicant for the information seen as relevant. The aforementioned should not be misunderstood as implying that the adjudicators act in bad faith. The approach should be understood as an attempt to state the essential facts as clearly as possible. However, it should not go unmentioned when analysing the actual practice of the conduct of the interviews and the subsequent production of the hearing reports. Non verbal-reactions are also included in the hearing report[237] as well as questions asked by other persons (e.g. by a lawyer).[238]

In Italy, in practice, the level of detail recorded varies between the different Territorial Commissions and/or interviewers. As mentioned above, some write a full *verbatim* report, including recording non-verbal reactions, while others tend to summarize questions and answers.

In the Netherlands, there are empirical studies which have revealed discrepancies between the statements of applicants and the summary contained in the report.[239]

In Spain, the report of the application interview in the admissibility procedure consists of a completed application form. UNHCR was informed that in certain offices, the applicant prepares and submits to the competent authority a written statement setting out the reasons for the application for international protection. UNHCR observed that, in these cases, the application form either contained a summary based on the written statement which was then attached to the form, or the interviewer recorded on the application form "*written statement attached*". In two interviews observed by UNHCR, the interviewer had obviously received a written statement in advance of the application interview and had already filled in the application form so that the interview consisted of the applicant checking the details and confirming that the information was correct.[240]

During UNHCR's observation of personal interviews in ADA, Athens, UNHCR was gravely concerned to discover that the written summary report made of a personal interview did not reflect the oral evidence given by the applicant at all. UNHCR conducted a random check of a completed interview report of an applicant from Sri Lanka who had claimed in the personal

[236] The hearing report of HR 1 does not contain the first 24 questions, however, these questions are those contained in the standard catalogue of questions asked in each interview and thus their wording can be identified.

[237] According to the BAMF Handbook "Interview", remarks with regard to reluctant/evasive answers, emotions or conspicuous behaviour might be informative with regard to the applicant's credibility; especially in cases in which the decision is not taken by the same adjudicator who has conducted the interview (under: 2.5 "Additional Remarks in the Protocol"; 2.5.3 "Reluctant/evasive answers, emotions, conspicuous behaviour", p.13)

[238] HR 7, page 10.

[239] U. Aron & F. Heide, *Bandopnamen van het nader gehoor*, Den Haag 1999, p. 37-39; T.P. Spijkerboer, De asielzoeker, de contactambtenaar, de tolk en de bandrecorder, *Rechtshulp* 2003-3, p. 28-32; N. Doornbos, *De papieren asielzoeker. Institutionele communicatie in de asielprocedure*, Nijmegen: Gerard Noodt Instituut 2003, p. 114, 119, 130, 136-141.

[240] Cases Nr. 1101140 and 1201141.

interview which UNHCR observed that he had left his village in Sri Lanka because of disorderly conditions. The completed interview form contained a dialogue which had not taken place in the personal interview[241]:

Question (Q): Which were the crucial reasons that made you leave the country?
Answer (A): Economic reasons.
Q: Which other reasons made you leave?
A: None.
Q: Why did you choose Greece as your destination?
A: For a better life, because it's a secure country.
Q: Have you tried to move to another part of your country to find work?
A: No.
Q: Why you could not find a job in your country?
A: Because of grave unemployment.
Q: Have you tried to work outside your country?
A: No.
Q: Have you left your country because of family problems?
A: No.
Q: Have you faced any problems related with your job?
A: No, none.
Q: Your exclusive purpose was to come to Greece?
A: Yes.
Q: What other problems have you faced in your country that you will not face in Greece? A: Better conditions of living.
Q: Could you practice your occupation freely in your country?
A: Yes

UNHCR randomly sampled and audited 185 written reports of personal interviews conducted in Greece.[242] The interviews had been conducted by nine different police officers and the case files examined by six different examining officers (three police officers and three civil servants). UNHCR discovered that 171 reports contained the same questions and answers. The 171 reports related to applicants of different nationality, social status and gender and yet the reports recorded exactly the same questions posed and exactly the same responses given. Some of the applicants were members of ethnic groups which, in other States, have been found to have experienced persecution,[243] and other applicants claimed to have come from regions experiencing widespread violence and armed conflict.[244] UNHCR's audit of the case files revealed that in all cases, the police officer who conducted the

[241] IO46SLK1.
[242] UNHCR audited 202 case files in total but in 17 case files, an interview had not been conducted on the ground that the application had been implicitly withdrawn. All case files, with the exception of three, related to applications lodged at ADA in Athens.
[243] CF39AFG15, CF38AFG14, CF45AFG21 (Afghans belonging to the Hazara tribe) and CF84SLK2, CF83SLK1, CF85SLK3, and CF86SLK4 (nationals of Sri-Lanka of Tamil ethnic origin).
[244] Such as Paktia (CF27AFG3 and CF51AFG27), Uruzgan (CF39AFG15 and CF45AFG21), Logar (CF44AFG20 and CF42AFG18), Kapisa (CF29AFG5), Kabul (CF31AFG7), Ghazni (CF36AFG12 and CF38AFG14), Hirat (CF48AFG24), Kirkuk (CF80IRQ28) and Baghdad (CF77IRQ25, CF76IRQ24, CF53IRQ1, CF54IRQ2, CF55IRQ3, CF56IRQ4, CF57IRQ5, CF59IRQ7, CF60IRQ8, CF61IRQ9, CF62IRQ10, CF63IRQ11, CF64IRQ12, CF65IRQ13, CF67IRQ15, CF75IRQ23, CF78IRQ26, CF79IRQ27, and CF81IRQ29).

interview proposed in standard phraseology that the application for international protection should be rejected because the application was deemed manifestly unfounded.[245]

In the face of this evidence, UNHCR can only conclude that the 171 interview reports reviewed do not reflect the actual discourse of the personal interview. With regard to the other reports audited, there was either an extremely brief summary of stated reasons for applying for international protection which provided insufficient information upon which to take a decision or in some reports, the statements of the applicants with regard to the reasons for applying for international protection were not recorded at all.[246]

The following citation is taken from the report of a personal interview of an applicant who was registered as from Pakistan (not one of the 171 reports referred to above)[247]:

> *Question (Q): Which were the crucial reasons that made you leave the country?*
> *Answer (A): I belong to ATI party, which is in conflict with SSP. I received threats by SSP and therefore I was forced to leave.*
> *Q: Why did you choose Greece as your destination?*
> *A: Because it's a secure country.*
> *Q: Have you tried to move to any neighboring country of Pakistan?*
> *A: No.*
> *Q: Your exclusive purpose was to come to Greece?*
> *A: Yes.*
> *Q: What other problems have you faced in your country that you will not face in Greece? A: Better conditions of living.*

No further questions or answers were recorded regarding the reasons for applying for international protection. The interviewer's proposal for a decision states that "*the applicant alleged that he had left his country of origin for political reasons*" and the interviewer recommends "*examination of the application within the accelerated procedure and rejection as manifestly unfounded*" without any further reasoning.

This evidence has led UNHCR to suspect that written reports of personal interviews may be copy-pasted standard templates which do not reflect the actual discourse of the personal interview or summarized to such an extent as to be generic and useless as evidence upon which a decision can be taken.[248] These observations made by UNHCR cast grave doubts as to whether an individual, objective and impartial examination of applications is conducted in Greece, and suggests that in practice, the minimum standards of the Asylum Procedures Directive may be violated in practice.

Recommendations

[245] Of the 202 case files randomly sampled and audited, in only one case file (CF13SSYR4) did the interviewer state that the application is unfounded and proposed rejection following an examination in the regular procedure. The Aliens Directorate of the Greek Police Headquarters (ADGPH) which received the proposal, and examined the interviewer's recommendation before a decision was taken, did not accept this proposal and recommended examination in the accelerated procedure without any recorded reasoning.

[246] CF77IRQ25, CF27AFG3, CF29AFG5, CF31AFG7, CF40AFG16, CF14SYR5, CF147PAK35, CF25AFG1, CF13SYR4, CF16SYR7, CF11IRN1, and CF9IRN9.

[247] CF147PAK35.

[248] However, note UNHCR concerns regarding the brevity and quality of personal interviews observed in ADA in Athens in Section on requirements of the personal interview.

Member States should ensure that the determining authority makes a complete and detailed transcript of every personal interview. Article 14 (1) APD should be amended accordingly.[249]

Pending such amendment, the preparation of a written summary report of the personal interview should be permitted only if there is an audio recording of the entire personal interview, and audio recordings are admissible as evidence on appeal.

Member States are encouraged to consider the use of transcribers to assist interviewers in the task of producing a complete and detailed transcript of the personal interview.

Section 8: The collection of information on individual cases

Obtaining information from the country of origin

Summary of findings:
In addition to general COI, authorities may desire specific information relating to particular issues raised by an individual applicant, or relating to the applicant him/herself. In practice, the determining authorities of some Member States obtain information from sources in the country of origin. This may be through case-specific queries to their embassies or consular services in countries of origin, and/or through fact-finding missions. Recourse to information sources in the country of origin can, in appropriate circumstances, be a useful means of helping to establish the facts of an application for international protection. However, it is critical that any such contacts or requests do not result in the disclosure of information regarding the application for international protection to the alleged actors of persecution or serious harm. It is also essential to ensure the safety of the sources consulted.

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

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

[249] It is noted that the Commission has proposed amendments to this effect, under which the relevant Article would state: "*Member States shall ensure that a transcript is made of every personal interview" and "Member States may make a written report of a personal interview, containing at least the essential information regarding the application, as presented by the applicant. In such cases, Member States shall ensure that the transcript of the personal interview is annexed to the report*": APD Recast Proposal 2009.

Country of origin information is crucial in determining who is in need of international protection. The information needed to assess an application for international protection is both general and case-specific. In other words, in addition to information relating to the general situation prevailing in countries and regions of origin, determining authorities may desire specific information relating to particular issues raised by an individual applicant, or relating to the applicant him/herself.

In practice, the determining authorities of some Member States obtain information from sources in the country of origin. Some Member States address case-specific questions to their embassy or consular services in the country of origin. The embassy or consular services in the country of origin may consult local and national authorities, institutions, NGOs, groups or private individuals in the country of origin in order to gather the relevant information. Some Member States conduct fact-finding missions to countries of origin where they meet with various organizations, groups or private individuals of interest. These fact-finding missions are used to gather information regarding general circumstances in the country of origin and also to address specific questions regarding individual applicants. [250]

Recourse to information sources in the country of origin can, in appropriate circumstances, be a useful means of helping to establish the facts of an application for international protection.[251] However, it is critical that any such contacts or requests do not result in the disclosure of information regarding the application for international protection to the alleged actors of persecution or serious harm. It is also essential to ensure the safety of the sources consulted. As such, Member States are obliged to take all necessary precautions and ensure that national, regional and international standards for the protection of personal data are observed.

In the course of this research, UNHCR was informed by the research department of the determining authority in Belgium (CEDOCA) that researchers never reveal the names of applicants and the person concerned is only described.[252] The case workers are trained on how to pose questions to researchers. If the question is posed in a way that would endanger the asylum applicant and/or family members still in the country of origin, the question is rephrased by the researcher. Sometimes the embassy is told a name, but they are instructed not to use the name when contacting the alleged actor(s) of persecution. CEDOCA noted that when there is a chance that the alleged actor(s) have become aware of the fact that an asylum application has been made by the applicant, the applicant is recognized as a *réfugié sur place*. However, CEDOCA assured UNHCR that this only happens rarely.[253]

UNHCR's audit of case files in Belgium, Bulgaria, Czech Republic, Finland, Greece, the Netherlands, and Spain did not reveal any concerns regarding disclosure of information to

[250] For example, Finland has conducted such fact-finding missions. For indications as to the contacts that are used, see the lists of interviewed organizations and persons annexed to the reports from the fact-finding missions to Afghanistan and Iraq available at: http://www.migri.fi/netcomm/content.asp?path=8,2470,2673,2680.

[251] UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004,.

[252] The determining authority, CGRA, is supported by the Centre for Documentation and Research ("Centrum voor Documentatie en Research", henceforth; CEDOCA).

[253] Interview with the head of the Centre for Documentation and Research (CEDOCA), at the CGRA on 20 January 2009.

the authorities of the countries of origin, or to alleged non-state actors of persecution or serious harm.[254]

However, a few concerns were raised for UNHCR during the research which should be noted.

UNHCR's audit of case files in France did not raise any concerns regarding disclosure of information by the determining authority, OFPRA. However, there is concern regarding the conduct of some of the Prefectures which are responsible for the issue of residence permits and removal orders and their enforcement. One of the case files audited by UNHCR in France revealed that the Prefecture had contacted police officers within the French Embassy in the country of origin, who in turn contacted the authorities of the country of origin.[255] Evidence in the case file revealed that the authorities in the country of origin were informed of the application for asylum, as they gave their views on the manifestly unfounded nature of the claim. The determining authority subsequently recognised the applicant as a refugee. The Ministry of Immigration informed UNHCR that it has repeatedly reminded all actors involved with asylum applicants of the law requiring non-disclosure of information, and that prefectures have been instructed not to directly contact French embassies and consulates abroad.

In Germany, the determining authority (BAMF) reported that in case further clarification of the facts of a case is required, BAMF, through the Ministry of Foreign Affairs, requests the German diplomatic representations abroad to conduct investigations, if necessary with involvement of trusted third parties. Pursuant to the internal guidelines of the BAMF, only certain units have exclusive responsibility for these requests.[256] From the case files audited by UNHCR, no conclusion could be drawn with regard to the actual practice of the BAMF, as in none of the case-files was it evident from the inserted documents that further investigations had been made. However, one of the lawyers consulted by UNHCR in the course of this research reported that requests for information submitted by the BAMF or administrative courts to the Ministry of Foreign Affairs have sometimes been researched in a manner which could put the relatives of the person concerned at risk, or make probable the disclosure of the applicant's name to the authorities of the country of origin.[257] Another lawyer[258] drew attention to the fact that the authorities responsible for repatriation (*Zentrale Rückführungsstellen*) in Bavaria conduct their own hearing even before the BAMF interview has been carried out. The lawyer reported that, in the course of such hearings, applicants are asked to obtain identity documents or other documents through the authorities of the country of origin, or with the help of relatives. He mentioned an incident in which the *Zentrale Rückführungsstelle* called authorities in the country of origin during the hearing in order to verify facts as presented by the applicant.

In June 2006 and February 2007, prior to the entry into force of the APD, the Spanish determining authority OAR undertook two fact-finding missions to Colombia in order to verify with Colombian authorities the authenticity of supporting documentation in asylum applications. The last of these missions related to 1,400 documents from 700 asylum

[254] No audit of relevant case files was conducted in Slovenia.
[255] Case file 26A where the SCTIP '*Service de coopération technique internationale de police*' was contacted.
[256] Internal Guidelines for the Asylum Procedure, under: "Enquiries to the MfA", p. (1/4);
Internal Guidelines for the Asylum Procedure, under: "Data Exchange on the international level", p. (1/1).
[257] Lawyer X1.
[258] Lawyer X2.

applications. The missions consisted in checking if the documents presented by the applicants in support of their applications were registered with the public authorities who had apparently issued them. The OAR asserted that in this process, the applicants' data were not disclosed and that the Colombian government was not the alleged actor of persecution or serious harm. However, UNHCR, NGOs and lawyers assisting applicants expressed serious concerns regarding the potential risk of violating the principle of confidentiality, and thereby placing applicants and/or their family members at risk. Links between the authorities and the actors of persecution in Colombia have frequently been denounced.[259]

Recommendations

Member States must take all necessary steps to ensure that competent authorities do not disclose information regarding individual applications for international protection, nor the fact that an application has been made, to the alleged actors of persecution or serious harm.

Any personnel authorized to seek or obtain information from the country of origin must have received specific training and instructions on data protection and the protection of confidentiality.

Contacting the authorities of the country of origin in Member States

Summary of findings:

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

It is UNHCR's position that the need to ensure confidentiality applies to all stages of the asylum procedure.[260] In accordance with Article 22 of the APD, Member States should not, throughout the procedure, disclose the fact that an application has been made by a specific applicant.

In the course of this research, UNHCR was informed that there is concern that when asylum applicants are held in administrative retention centres in France, some Prefectures continue to organize the removal of applicants while the examination of their applications for international protection by the determining authority is ongoing. The NGO Cimade has reported a number of cases in which asylum applicants have been taken to the consulates of their country of origin to obtain a "consular pass." This is in spite of an instruction from the Ministry of the Interior of 7 August 2006, which recalled that this practice is prohibited as long as the examination of the application by the determining authority OFPRA is ongoing. It has also been reported that the IND Departure and Return Unit in the Netherlands engages with applicants before a negative decision has been issued, which could raise the same problematic practices.

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[259] See among others: http://report2009.amnesty.org/en/regions/americas/colombia and http://www.nrc.no/?did=9401258.

[260] UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004, paragraph 39.

In two of the case files UNHCR audited in the UK, it appeared from correspondence with the embassies of the countries of origin, undertaken prior to the decision on the application, that the determining authority UKBA could have disclosed information regarding the asylum application (including the fact it had been made) to the applicant's country of origin.[261] This was done notwithstanding a Ministerial statement of June 2007 stating that the Home Office would not ask an asylum applicant to meet officials from the embassy of their country of origin until and unless a negative decision was taken in respect of his/her claim for protection.[262]

Concern was also raised in Italy that asylum applicants and illegal immigrants are housed together in Identification and Expulsion Centres (CIEs). Consulate personnel of countries of origin visit the CIEs to verify the nationality of illegal immigrants. This was considered to pose a potential risk for asylum applicants.[263]

Recommendations

Member States must take all necessary steps to ensure that all relevant authorities are informed that they should not contact, nor instruct applicants for international protection to contact, representatives of the country of origin, unless and until a final negative decision has been taken on the application for international protection. Applicants for international protection should not be placed in a position where they can be observed or accessed by the embassy or consular services of the country of origin.

If all legal remedies have been exhausted, and an applicant is finally determined not to be in need of international protection, any disclosure of information to the authorities of the country of origin should be in accordance with law, and necessary and proportionate to the legitimate aim pursued, for example, readmission. Such information should not indicate that the person claimed asylum and was found to have no protection needs.

Section 9: Prioritized and accelerated examination of applications

Procedural standards and safeguards in accelerated procedures

Summary of findings:

In all the Member States surveyed, national legislation complies with the basic principles and guarantees of Chapter II of the APD, as required by Article 23 (3) and (4). However, UNHCR is concerned, firstly, that Chapter II of the APD does not guarantee all the effective safeguards required to ensure that all protection concerns are adequately and appropriately identified and met. Secondly, it is critical that the speed with which the procedure is conducted does not nullify or adversely hinder the exercise of rights and guarantees.

In terms of legislative provisions, UNHCR notes positively that in several Member States surveyed, the same procedural guarantees apply in law to all first-time applications, including those examined in accelerated procedures. In particular, UNHCR notes with

[261] DAF20 and DAF40: in both cases, travel documents were applied for prior to reaching a decision on the asylum application.

[262] Hansard HC Report, 21 June 2007, Col 2073.

[263] This also occurs in Spain. The authorities have assured that consular personnel only visit illegal immigrants and not applicants for international protection. The Dutch Ombudsman has also condemned the presentation of asylum applicants in an asylum seeker centre.

approval that national legislation in six surveyed states provides that applicants, whose applications are examined in an accelerated manner, are given the opportunity of a personal interview. In other states, however, national law permits wide scope for the omission of personal interviews in accelerated procedures. It is welcome that in some Member States this is not widely implemented in practice.

All asylum procedures must be able to identify effectively individuals with international protection needs. Given the inherent challenges in accurately assessing refugee claims within accelerated procedures, effective safeguards are required to ensure that all protection concerns are adequately and appropriately identified and met.

Article 23 (3) and (4) APD provide that any prioritization or acceleration of the examination of an application must be in accordance with the basic principles and guarantees of Chapter II of the APD. And in all the Member States surveyed, national legislation complies with the basic principles and guarantees of Chapter II of the APD.[264]

However, UNHCR's concern is two-fold. Firstly, UNHCR considers that Chapter II of the APD does not guarantee all the effective safeguards required to ensure that all protection concerns are adequately and appropriately identified and met. Secondly, in practice, the context of accelerated procedures, where the timescales are shorter than the regular procedure, it is critical that the speed with which the procedure is conducted does not nullify or adversely hinder the exercise of rights and guarantees.

With regard to the first concern, UNHCR particularly regrets that Article 12 (2) (c) in conjunction with Article 23 (4) of Chapter II of the APD set out five circumstances in which a personal interview may be omitted, and the examination of an application may be accelerated.[265]

UNHCR considers that the personal interview is an essential component of and safeguard in the asylum procedure as it provides the applicant with what should be an effective opportunity to explain comprehensively and directly to the authorities the reasons for the application. It also gives the determining authority the opportunity to establish, as far as possible, all the relevant facts and to assess the credibility of the evidence. The right to the opportunity for a personal interview, in a language which the applicant understands, on the reasons for the application should be granted to all applicants, regardless of whether the examination is accelerated or not, unless the applicant is certified as unfit or unable to attend the interview owing to enduring circumstances beyond his/her control.[266]

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[264] Note that in practice there may be shortcomings in implementation which affect all applicants, but the impact on applicants whose application is examined in the accelerated procedure may be more acute due to the shorter time frame of the procedure. For further information, see other sections of this report generally.

[265] According to Article 12 (2) (c) APD, the following are grounds both to omit the personal interview and accelerate the examination of an application: Article 23 (4) (a) regarding applications which raise issues of minimal or no relevance to international protection; Article 23 (4) (c) regarding applicants considered to come from a safe country of origin or have arrived from a safe third country; Article 23 (4) (g) regarding applicants who are considered to have made inconsistent, contradictory, improbable or insufficient statements; Article 23 (4) (h) regarding subsequent applications which do not raise any relevant new elements, and Article 23 (4) (j), when it is considered that the application is merely in order to delay or frustrate a removal order.

[266] See section 4 for further information. See also UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983 on the problem of manifestly unfounded or abusive applications for refugee status or

UNHCR notes that in some Member States, the procedural guarantees which apply **in law**[267] to the first instance procedure are the same for the examination of all first-time applications, regardless of whether the examination of the application is accelerated or not.[268] This is the case in Belgium, Bulgaria, the Czech Republic, France, Germany,[269] Italy, the Netherlands and Spain.[270] In particular, UNHCR notes with approval that national legislation in Belgium, Bulgaria,[271] Germany, Italy, the Netherlands and Spain provides that applicants whose applications are examined in an accelerated manner are given the opportunity of a personal interview.

In France, national legislation does not differentiate between the accelerated and regular procedures in terms of the procedural guarantees which apply in law. With regard to the personal interview, it may be omitted in law on four grounds which may apply regardless of whether the application is examined in the regular or accelerated procedures.[272] The fact that the application is examined in the accelerated procedure is not a ground, as such, for omitting an interview. However, one of the grounds in law for channelling an application into the accelerated procedure is that a temporary residence permit has been refused on the ground that the applicant is a national of a country to which Article 1 C (5) of the 1951 Convention applies.[273] This is also a ground for the omission of the personal interview.[274] Another ground for refusing a temporary residence permit and channelling an application into the accelerated procedure is that the application is considered to be deliberately fraudulent, or to constitute an abuse of the asylum procedures, or is considered to have been solely lodged to prevent execution of a removal order which has been issued or is imminent.[275] *Préfectures* exercise a wide margin of appreciation in their interpretation of this legal provision. The personal interview may be omitted by the determining authority on

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asylum paragraph (e) (i), available at: www.unhcr.org/41b041534.html. See also Resolution 1471 (2005) of the Parliamentary Assembly of the Council of Europe on Accelerated Procedures in CoE Member States (para 8.10.2) available at: http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/eres1471.htm and "Guidelines on human rights protection in the context of accelerated asylum procedures" of the Council of Europe (adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies) paragraph IV (1) (d) available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec%282009%291062/4.5&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 .

[267] However, note that enjoyment of these procedural guarantees may be hindered in practice by the time constraints of accelerated procedures. See below.

[268] This excludes the preliminary examination of subsequent applications.

[269] The airport procedure provides the same guarantees as the regular procedure, but in an extremely short time frame of two days, which applies with a view to a denial of entry on the ground of a rejection of the application as manifestly unfounded. If the deadline cannot be kept or another decision is envisaged, the application will be channeled into the normal procedure).

[270] Note that, as stated in Article 16 (2) of the New Asylum Law, legal assistance is mandatory for applicants whose applications are lodged at borders and at CIEs.

[271] Although a personal interview is conducted in the accelerated procedure in Bulgaria, it should be noted that the sample questions for the interview are much shorter than the sample questions for an interview in the general procedure.

[272] Article L.723-3 *Ceseda* provides that OFPRA may omit the interview where: a) the OFPRA is able to take a positive decision on the basis of elements available; b) the asylum seeker is a national of a country to which article 1C5 of the 1951 Convention is applied; c) the elements which substantiate the claim are manifestly unfounded; and d) medical reasons prevent the conduct of the interview.

[273] Article L.723-1 *Ceseda* in conjunction with Article L.741-4-2° *Ceseda.*

[274] Article L.723-3 *Ceseda.*

[275] L.741-4-4° *Ceseda.*

a further ground, when the application is considered to be manifestly unfounded.[276] The term 'manifestly unfounded' is not further defined in French legislation or guidelines and, therefore, the determining authority has a wide margin of appreciation in law in deciding whether to omit the personal interview. Sinceapplicants have less time to complete their written application form in French in the accelerated procedure, and they do not receive the services of an interpreter or translator for this purpose, it is perhaps more likely that an application will be considered as manifestly unfounded and thus be examined without a personal interview.

Statistics from the determining authority OFPRA indicate that in the accelerated procedure, 55% of applicants are summoned to an interview, and 46% are actually interviewed.[277] According to the OFPRA Report, in 2008, 43% of the applications examined in the accelerated procedure were initial applications, while 57% were subsequent applications. The report maintains that, due to a change of policy, 100% of first-time applicants are now invited to a personal interview. This would suggest that, in recent practice, personal interviews were omitted when the application was a subsequent application.[278] However, during the period of the research, UNHCR audited three case files in which initial applications to OFPRA were examined without a personal interview because OFPRA considered the applications to be manifestly unfounded. Their subsequent applications were examined in the accelerated procedure, also without a personal interview.[279]

In some of the other Member States surveyed, applicants whose applications are examined in an accelerated first instance procedure may not enjoy all the same procedural guarantees as applicants whose applications are examined in a regular procedure. For example, in Finland, Greece, Slovenia and the UK, the personal interview may be omitted on certain grounds set out in law.[280]

In Finland, the grounds in law upon which a personal interview may be omitted are limited. If an applicant is considered to come from a safe (first) country of asylum or origin, a decision on the application should be made within seven days of the date when the minutes of the interview were completed.[281] However, the personal interview can also be omitted on safe (first) country of asylum grounds.[282] In the absence of a personal interview, and therefore an interview transcript, it is not clear in such cases how the time limits for an accelerated procedure can be applied.

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[276] Article L.723-3 *Ceseda* states that OFPRA may omit the interview where "(c) *the elements which substantiate the claim are manifestly unfounded*".

[277] 2008 OFPRA report.

[278] UNHCR's audit of 60 case files in France revealed eight case files concerning subsequent applications. All the subsequent applications in the sample were examined under the accelerated procedure and none of the applicants were invited to an interview: Case file 52R (AFG); Case file 58R (DRC); Case file 59R (SLK); Case file 49R (SLK); Case file 50R (PAK); Case file 51R (RUS); Case file 57R (TR); and Case file 48R (TR). See section 4 on personal interviews for further details.

[279] This may be due to the fact that the first procedure in these cases pre-dated the new policy to offer all first-time applicants a personal interview.

[280] See section 4 on personal interviews for further information.

[281] Section 104 of the *Ulkomaalaislaki* (Aliens Act 301/2004).

[282] Section 103 (1) of the *Ulkomaalaislaki* (Aliens Act 301/2004). The determining authority informed UNHCR that in practice, the personal interview is omitted on first country of asylum grounds, and not safe third country grounds. This was confirmed by UNHCR's audit of case files. None of the audited cases concerning safe countries of asylum (audited cases 98, 99, 100, 102, 106 and 107) included interviews with applicants. In all of these cases the applicant had been granted protection status elsewhere.

However, in Greece, Slovenia and the UK, national legislation provides wide scope for the omission of the personal interview, although this is not always reflected in practice.

In Greece, national legislation provides that "*applications for asylum shall be examined with the accelerated procedure when they are manifestly unfounded or when the applicant is from a safe country of origin … or from a safe third country*".[283] The grounds set out for considering an application manifestly unfounded mirror the grounds set out in Article 23 (4) APD.[284] However, since new legislation entered into force (PD 81/2009), the above-mentioned legislative provision, whilst still applicable, is reportedly no longer implemented. In accordance with national legislation, the personal interview may be omitted when the determining authority considers the application to be manifestly unfounded.[285] In practice, according to the determining authority, there is oral guidance that the interview is omitted only when an applicant claims to have left the country of origin exclusively for economic reasons, and their country of origin does not have disorderly conditions and/or is among those countries that do not produce refugees.[286]

In Slovenia, national legislation sets out 16 grounds upon which the competent authority "*shall reject an application in an accelerated procedure as unfounded*".[287] In 2008, 79% of all decisions reviewed by UNHCR were taken in the accelerated procedure.[288] By law, the personal interview may be omitted whenever the accelerated procedure is conducted,[289] and in practice, no interviews are held in that procedure. The Administrative and Supreme Courts have held that this does not constitute a breach of Article 12 (2) (c) APD on the ground that prior to the decision to submit the application to the accelerated procedure, the determining authority conducts an application interview with the applicant. This is considered to constitute a meeting in terms of Article 12 (2) (b) APD which permits Slovenia to omit the 'personal interview'.[290]

In the UK, although national rules establish seven grounds upon which the personal interview may be omitted[291], published written policy states that the determining authority normally interviews each applicant before refusing an asylum claim substantively.[292] In practice, in the accelerated detained fast track (DFT) and detained non-suspensive appeals (DNSA) procedures, the applicant is offered the opportunity of a personal interview.

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[283] Article 17 (3) PD 90/2008.

[284] With the exception of Article 23 (4) (c) on safe country of origin and safe third country which are mentioned explicitly in Article 17 (3) PD 90/2008 as grounds for examination in the accelerated procedure.

[285] Article 10 (2) (c) PD 90/2008.

[286] Of the 202 case files that UNHCR audited in Greece, the interview was omitted in ten cases because the applicants, all Pakistani nationals, allegedly declared that they arrived in Greece for economic reasons. In all the other case files, an interview was conducted. However, note that UNHCR has very serious concerns regarding the quality of personal interviews in ADA, Athens. See section 4 for further details.

[287] Article 55 IPA.

[288] Statistics are not publicly available. UNHCR reviewed all decisions taken in 2008. Of the 65 reviewed decisions, 51 were decided in the accelerated procedure and 7 were decided in the regular procedure.

[289] Article 46 (1), indent 1 of the IPA states that "*the personal interview may be omitted: when the competent authority may decide in an accelerated procedure*".

[290] U728/2008, 9 April 2008 and U129/2008, 6 February 2008.

[291] Immigration Rules HC 395, paragraph 339NA. See Section 4 for further details.

[292] API, *Conducting the Asylum Interview.*

In addition to the omission of the personal interview, UNHCR's research also noted the following differentiated standards relating to the accelerated procedure in some Member States:

- The determining authority is only required to refer to country of origin information relating to general circumstances in the country of origin in the accelerated procedure. This is as opposed to more specific, detailed, in-depth and individual country of origin information, which must be taken into account in regular procedure, for example in Slovenia.[293] Moreover, if the general credibility of the applicant is not established, country of origin information does not need to be taken into account at all.[294]

- Decisions are taken by the interviewer in the accelerated procedure, rather than the Chair of the determining authority, in Bulgaria. Decisions taken in the accelerated procedure are not subject to the same quality control as in the general procedure.

Recommendations

All applicants for international protection should enjoy the same procedural safeguards and rights, regardless of whether the examination is prioritised, accelerated or conducted in the regular procedure.

All applicants for international protection should be given the opportunity of a personal interview. The personal interview should only be omitted when the determining authority is able to take a positive decision with regard to refugee status on the basis of the available evidence, or when it is certified that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control.

Article 12 (2) (c) APD should be amended and the references to Articles 23 (4) (a) (irrelevant issues), 23 (4) (c) (safe country of origin), 23 (4) (g) (inconsistent, contradictory, improbable and insufficient representations) and 23 (4) (j) (merely to delay or frustrate removal) should be deleted.

Impact of time limits on procedural standards

Summary of findings:

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

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

[293] Article 23 IPA.
[294] Article 22/4 IPA.

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

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

UNHCR recognizes that with regard to applicants who are detained, it is not in their interests that the examination of their application is prolonged if this extends the duration of their detention.[295] Nevertheless, UNHCR recalls that persons who are detained may be persons in need of international protection. As mentioned below with regards to the grounds for acceleration of the examination, the national legislation of some Member States permits the accelerated examination of an application simply on the ground that the applicant is detained, or when the applicant is detained at the border.[296] These grounds for accelerating the examination are clearly unrelated to the merits of the application itself, which may be strong. Moreover, in France, the applications of persons who are detained in administrative retention centres are routinely considered to be an abuse of the asylum procedure, without reference to the reasons for the application and, therefore subject to a 96 hour accelerated examination.[297]

[295] In the case of border procedures that derogate from Article 35 (1) APD (which requires that border procedures are conducted in accordance with the basic principles and guarantees of Chapter II), a decision must be taken within four weeks; otherwise the applicant must be granted entry to the territory in order for the application to be processed in accordance with the other provisions of the APD: Article 35 (4) APD.

[296] Belgium: Article 52/2 Aliens Act sets a time frame of 15 calendar days for the examination of applications by persons detained at the border or in-territory or detained in prison. The Czech Republic: Section 73 (4) ASA which provides that when an application is submitted by an applicant at the border and s/he is not allowed entry to the territory, the application should be examined within four weeks, otherwise entry to the territory must be granted. This is a transposition of Article 35 (4) APD on border procedures. Italy: Article 28 (1) d.lgs. 25/2008 provides that when the applicant is detained in a CIE, the determining authority must issue a decision on the application within 9 days of receipt of the documentation concerning the applicant (rather than 30 days). In Spain, the New Asylum Law applies the border procedure to applications lodged by applicants held in internment centres. (Note that according to Spanish law, aliens who are placed in internment centres are under so-called 'administrative detention' and not regular detention, and are referred to as 'interned persons' instead of detainees, meaning that they are not under the same legal regime. Under the 'administrative detention' regime, they are only held in the internment centres for expulsion/ return purposes, for a maximum of 60 days, after which they are set free if return cannot take place. People held in regular detention that apply for asylum have their application examined in the in-country asylum procedure). In Germany, only so-called *retention* at the airport triggers a deadline of two days from the submission of a claim for a rejection as manifestly unfounded if entry to the territory is to be denied (Section 18a APA). The examination of applications by applicants otherwise in detention is not accelerated but simply prioritized according to the internal guidelines of the BAMF (cf. Internal Guidelines for Adjudicators: Priority (1/1), Date: 12/08, p. 1.).

[297] This is based on the *Préfectures*' interpretation of Article L.741-4-4 *Ceseda.*

All applicants, including those in detention, must have an effective opportunity to substantiate their application in accordance with Article 4 of the Qualification Directive, to obtain relevant documentary evidence, if any, and to consult effectively with a legal adviser or other counsellor. Moreover, the determining authority requires time to prepare the personal interview, conduct the interview, gather country of origin or other information, assess all the relevant evidence and draft a well-reasoned decision.

The extremely shortened time frame of some accelerated procedures may mean that applicants whose applications are examined in an accelerated manner are significantly disadvantaged, as compared to applicants whose applications are examined within the regular time frames. The following were highlighted as adverse factors by interviewees:

- **Less time to submit application form to determining authority.** For example, in France, according to national law, a person who is detained must complete and submit a written asylum application form in French within five days of being informed of their right to apply for asylum. Otherwise, any application will be considered inadmissible.[298] Those persons in-country who have not been issued a temporary residence permit, whose applications must therefore be examined in the accelerated procedure, must complete and submit the application form in French within 15 calendar days. [299] They must do this without the services of an interpreter being provided by the state. Applicants in-country who have been issued a temporary residence permit (so that the application is to be examined in the regular procedure) have 21 days within which to submit the written application form to the determining authority.

- **Less time to prepare for interview.** For example, in 12 out of 16 audited case files in accelerated procedures in the Czech Republic, the personal interview took place on the same day as the application was lodged.[300] This is particularly the case at the airport where applicants are informed of the interview the same day it takes place. In Germany, in the airport procedure, there is a deadline of two days for a decision on the application if entry is to be denied, so the interview must be carried out before the expiry of this deadline. The law speaks of carrying out the interview "without undue delay".[301] In the Netherlands, applicants have just two hours with a lawyer before the personal interview. In the regular procedure, by contrast, applicants have a six day rest period before the personal interview takes place. In the UK, the personal interview takes place on the day after arrival at the detention centre in the detained fast track procedure.

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[298] *Loi du 26 novembre 2003* and *Décret No 2006-617 du 30 mai 2005 relatif à la rétention et aux zones d'attente.* According to Article L. 551-3 *Ceseda*, when a foreigner arrives at the administrative retention centre, s/he receives the notification of the right to apply for asylum. S/he is informed in particular that his/her asylum application will not be admissible during his/her period in retention if it is not formulated within five days of notification.

[299] 15 calendar days from the date of notification regarding the non-issue of a temporary residence permit. According to the Préfecture of Rhône, if the applicant fails to meet the 15 day deadline either the *Préfecture* would take a decision to oblige the applicant to leave the territory or it would deliver another application form for "humanitarian reasons" to enable the applicant to apply for international protection.

[300] This was observed in practice, despite the fact that under Section 59 of CAP a summons to any action in the proceedings which requires the presence of an applicant (i.e. including a summons to an interview) must be in writing and delivered to the applicant sufficiently in advance, normally not later than five days in advance.

[301] Section 18a (1) 4 APA ("*unverzüglich*").

- **Less time within which to contact and consult a legal adviser.** For example, lawyers interviewed by UNHCR in Belgium stressed that their appointment is often too late to provide legal assistance to applicants in the accelerated border procedure, and that they face practical difficulties finding a suitable interpreter at late notice.[302] Of the 19 audited case files concerning the accelerated border procedure at Brussels airport, in only three instances was a lawyer present at the interview with the applicant.[303] In Germany, access to a lawyer is guaranteed in the airport procedure only after the personal interview.[304] Consequently, there is no organizational support to access a lawyer before the interview[305] which should take place before the deadline of two days has expired. UNHCR was also informed that applicants in detention in France and Italy have little practical opportunity to contact and consult effectively with legal advisers, notwithstanding their right to do so in accordance with Article 15 (1) APD.

- **More difficulty in conducting a gender-appropriate interview.** For example, the short three day time frame for the detained fast track (DFT) procedure in the UK and the 96 hour procedure in France means that the interview date cannot be postponed, if required, in order to satisfy a request for an interviewer and interpreter of the same sex.[306] In the UK DFT procedure, applicants cannot refuse to comply with the interview summons on the ground that the interview is not gender-appropriate.

- **Less time for the applicant to gather and submit additional evidence**. For example, applicants whose applications are examined in the accelerated procedure in the Netherlands only have three hours following receipt of the interview report in which to provide any additional evidence. In the regular procedure, applicants have four weeks. In the UK detained fast track procedure, a decision-maker can extend the timescale on a discretionary basis if it is considered that the further evidence an applicant proposes to provide is central or critical to the issues on which the decision is likely to turn. By contrast, applicants have five days after the interview in the regular procedure within which to submit additional evidence.[307] Applicants in Belgium who are detained have 24 hours within which to submit any further evidence, and other applicants whose applications are examined in an accelerated manner have five days.

[302] This relates to the interpreter services provided by the Local Bureau of Legal Assistance to facilitate communication between lawyers and their clients.
[303] On the basis of the audit, it was not possible to determine why the applicants in the 16 cases did not have a lawyer present, and it was not possible to determine whether they benefited from legal assistance.
[304] Section 18 a (1) 5 APA.
[305] According to an NGO report, for asylum-seekers arriving at Duesseldorf Airport, provision is made for assistance to be provided by an employee of an NGO before the interview; this mechanism is not applied at other airports. Cf. Leidt, Skerutsch, *Erläuterung zum Asylverfahrensgesetz – vorgerichtliches Verfahren*, German Red Cross 2008, p. 18, footnote 19.
[306] In France, such a request is rarely satisfied in any procedure, mainly for practical reasons.
[307] See Operational Instruction on *Flexibility in the Fast Track Process.*

- Some stakeholders in the UK have stated that the accelerated procedures are too quick to allow applicants an effective opportunity to disclose traumatic experiences.[308]

- **Less time for the determining authority to gather and assess the evidence.** For example, UNHCR's audit of case files in the Czech Republic observed that there was less country of origin information in the case files of applications which were examined in the accelerated procedure.[309] In Greece, where most applications were examined in the accelerated procedure at the time of UNHCR's research, there was no evidence from the case files, decisions or observation of interviews that country of origin information was used in the assessment of applications for international protection. In the UK's detained fast track procedure, decision-makers have only one day within which to gather and assess the necessary country of origin or other information.[310] In the course of this research, UNHCR conducted interviews with interviewers and decision-makers of the determining authorities. A number of those interviewees expressed concern about the time limits in which they have to conduct the examination, which, they felt, constrained their ability to investigate thoroughly the issues.

- **Less time for the determining authority to draft the decision.** An emphasis on speed risks compromising the quality of assessment and decisions.[311]

Moreover, stakeholders reported that shortcomings in the asylum process generally, which affect all applicants, tend to be accentuated when the examination of the application is accelerated.[312]

Recommendations

The examination of the application must not be accelerated to such an extent that it renders the exercise of rights, including those afforded by the APD, excessively difficult or impossible. Where Member States set time limits for procedural steps, these should be of a

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[308] Bail for Immigration Detainees, *Briefing Paper on the detained fast track – February 2009*; Independent Asylum Commission, *Deserving Dignity: Third Report of Conclusions and Recommendations, July 2008.*

[309] In five case files, there was no COI in the case file, and UNHCR considered that the application raised issues which required the gathering and assessment of COI: X010, X012, X017, X028, and X064. In two cases, there was only one source of COI and UNHCR considered that the application warranted reference to further sources of COI: X019 and X035.

[310] See Operational Instruction on *Flexibility in the Fast Track Process.*

[311] See section 3 for further information. In the UK, in its fifth Quality Initiative report to the Minister, (March 2008), whilst noting some examples of good practice, UNHCR noted that the findings from the QI audit indicated that Detained Fast Track (DFT) decisions often failed to engage with the individual merits of the claim. Decisions made within the DFT procedure were often based on incorrect application of refugee law concepts and adopted an erroneous structural approach to asylum decision-making. UNHCR expressed concern that the speed of the DFT process may inhibit the ability of case owners to produce quality decisions. In Germany, certain shortcomings in the airport procedure potentially linked to the high time pressure were criticized in a report published by an NGO, see I. Welge, *Hastig, unfair, mangelhaft – Untersuchung zum Flughafenverfahren* gem. § 18a AsylVfG, 2009, p. 220 et seq.

[312] For example, delays in the provision of information, a lack of competent and specialised lawyers, weak communication systems between the determining authority, applicant, legal advisers and reception centres.

reasonable length which permits the applicant to pursue the claim effectively, and the determining authority to conduct an adequate and complete examination of the application.

This recommendation applies also to applicants in detention or in border or transit zones, who must have an effective opportunity to substantiate their application in accordance with Article 4 of the Qualification Directive, obtain relevant evidence, and to consult effectively with a legal adviser.

Section 16: The right to an effective remedy

Evidence and fact finding

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

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:[313]

"*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

[313] *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of January 2007.

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 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,[314] 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*).[315] Likewise, in Italy, the Civil Courts can acquire all necessary evidence[316] and can conduct independent fact-finding.[317]

The Regional Courts in the Czech Republic may also conduct fact-finding.[318] 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.[319] Some Regional Courts do utilise this possibility to seek country of origin information, but this is not practised by all courts.[320]

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.

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

[314] Section 86 (1) Code of Administrative Court Procedure.
[315] 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*."
[316] Article 35 (10) d.lgs. 25/2008
[317] Article 738 of the Code of Civil Procedures.
[318] Section 52 (1) CAJ.
[319] Section 77 CAJ.
[320] Interview with judge at a Regional Court.

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.[321] 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.[322] 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.[323] 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).[324] The Belgian Constitutional Court has maintained that notwithstanding the lack of fact-finding competence, the 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.[325]

[321] *RvS* 25 January 2008, nr. 178.960, see also *RvS* 8 April 2008, nr. 181.821.
[322] As introduced on the basis of Article 57/23bis of the Aliens Act to the CALL.
[323] 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.
[324] Statement made during the parliamentary hearing on the evaluation of the asylum legislation, Senate, 31st March 2009.
[325] Interview with judge on 26 April 2009.

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.

Recommendations

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

Summary of findings:

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

It is, therefore, critical that the appeal body is able to establish all the relevant facts and assess all the relevant evidence, at the time it takes its decision, to provide an effective remedy.[326]

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

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:

- questioning by the determining authority during the personal interview may not have addressed the issue or elicited the particular information;

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

- 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.[327]

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,[328] Finland,[329] France,[330] Germany (with regard to regular rejections),[331] Italy[332] and the UK.[333] In Spain, the admission of evidence is at the discretion of the courts.[334]

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[327] "*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.

[328] Article 171 (2) APC

[329] All new evidence and elements must be submitted to all parties.

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

[331] 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.

[332] Article 31 of Legislative Decree 25/2008.

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,[335] Germany (in cases of rejections qualified as irrelevant or manifestly unfounded),[336] 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.[337]

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.

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.[338] However, in a second judgement on this matter, the Constitutional Court further stipulated that "*the requesting party must give a*

[333] 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.
[334] Articles 60 and 61 of Law 29/1998 on Administrative Jurisdiction.
[335] 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*.
[336] 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."*
[337] Article 39/76 of the Aliens Act.
[338] *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.

plausible explanation of why it did not communicate the new element earlier in the procedure".[339]

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.[340]

- 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.[341]

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:

- 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.[342]

These limitations are applied strictly, even if the evidence could clearly demonstrate that the applicant is a refugee or qualifies for subsidiary protection status.[343] 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*

[339] *GWH* 30 October 2008, nr. 148/2008, B.6.5.
[340] Judgment of the SAC No. 9 Azs 23/2007 – 64 of 14 July 2007, available at www.nssoud.cz
[341] Arts. 30 (3) and 52 of the AAD.
[342] Article 4:6 General Administrative Law Act in conjunction with Article 83 Aliens Act.
[343] See, for instance, District Court Amsterdam, AWB 06/36220, 26 April 2007.

additional documentation and information is restricted".[344] 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.

Recommendations

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.

[344] Conclusions and Comments of the Committee against Torture on the Netherlands, May 2007.