



**UNHCR**  
The UN Refugee Agency



# ACCESS TO LEGAL AID

**For Asylum-Seekers in Estonia**



## ACKNOWLEDGEMENTS

This study has been developed by UNHCR in partnership with the Estonian Human Rights Centre (EHRC)<sup>1</sup> and we wish to acknowledge in particular the very valuable contributions provided by Anni Säär and Liina Laanpere from the EHRC.

In addition to EHRC's expertise, this study has benefitted from collaboration with several officials and experts in the Estonian administration and within the Estonian legal community. Insights, relevant statistics, and suggestions were provided by members of the Estonian Bar Association, and officials in a number of ministries and institutions, including the Ministry of the Interior, Ministry of Justice, Ministry of Social Affairs, Office of Legal Chancellor, and the Police and Border Guard Board (PBGB). Finally, the study has been informed by asylum-seekers and refugees who were consulted during its course and who have shared their personal experiences.

The preliminary findings of the study were discussed at a meeting with concerned officials in the Estonian Bar Association on 21 March 2019 and later also presented together with key recommendations at the regular meeting of the Estonian Ministry of the Interior with social partners on 11 April 2019.

UNHCR is very grateful for all the cooperation extended and for the valuable input, constructive feedback and comments provided by all parties involved throughout the consultative process.

This report on the study was edited and finalized by Esther Araya, J.D. Candidate at Yale Law School, in collaboration with and under the supervision of Andrei Arjupin, Associate Legal Officer at UNHCR Regional Representation for Northern Europe (RRNE), to whom we extend our sincere appreciation for the quality of their work.

© UNHCR, 2019

Cover photo: © UNHCR/Mark Henley

Layout&Design: BakOS DESIGN

---

<sup>1</sup> "SA Eesti Inimõiguste Keskus" in Estonian. See more information about the EHRC at: [www.humanrights.ee](http://www.humanrights.ee).

# TABLE OF CONTENTS

---

<b>GLOSSARY</b> .....	4
<b>PREFACE</b> .....	5
<b>1. INTRODUCTION</b> .....	6
1.1 Purpose of the study.....	6
1.2 Methodology.....	8
1.3 Structure.....	8
<b>2. APPLICABLE INTERNATIONAL AND EU STANDARDS</b> .....	9
<b>3. ESTONIA AS A COUNTRY OF ASYLUM</b> .....	12
3.1 National legal and policy framework.....	12
3.2 Asylum trends.....	13
3.3 The national asylum procedure.....	14
3.4 Provision of state legal aid.....	18
<b>4. ACCESS TO LEGAL AID WHEN DENIED ACCESS TO THE TERRITORY</b> .....	21
<b>5. ACCESS TO LEGAL AID THROUGHOUT THE ASYLUM PROCEDURE</b> .....	24
5.1 Information at the border and in detention facilities.....	24
5.2 Special procedural guarantees for vulnerable applicants.....	29
5.3 Legal assistance at first instance.....	33
<b>6. ACCESS TO LEGAL AID IN APPEALS PROCEDURES</b> .....	45
6.1 At the border.....	45
6.2 In detention.....	49
6.3 In cases of a negative asylum decision.....	52
<b>7. CONCLUSIONS</b> .....	56
7.1 Summary of recommendations.....	56
7.2 Need for further analysis.....	57
<b>SUMMARY OF RECOMMENDATIONS</b> .....	58

# GLOSSARY

---

## **AGIPA**

Act on Granting International Protection to Aliens (2006). AGIPA regulates the legal status of third-country nationals or stateless persons who have applied for or been granted international protection. It also stipulates the grounds for granting international protection and the legal basis for an applicant's temporary stay, residence and employment in Estonia in accordance with international treaties and corresponding EU legislation.

## **Alien**

A third-country national or stateless person.

## **AMIF**

EU Asylum Migration and Integration Fund.

## **APA**

Administrative Procedure Act (6 June 2001)

## **APD**

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). Also known as the Asylum Procedures Directive.

## **APR**

COM(2016)467/F1 Proposal of Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. Also known as the proposed Asylum Procedures Regulation.

## **Asylum-seeker**

A third-country national or a stateless person who has submitted an application for international protection (hereinafter also "application") and is awaiting a final decision. Can also be referred to as "applicant".

## **CACP**

Code of Administrative Court Procedure (2011). CACP codifies the competence of Estonian administrative courts as well as the procedures for recourse and determination in such courts. This Act complements and amplifies regulations set out in other Acts of Parliament, directly applicable international treaties, and EU law.

## **CEAS**

Common European Asylum System.

## **CJEU**

Court of Justice of the European Union.

## **Dublin III Regulation**

Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). Also known as the Dublin III Regulation.

## **ECHR**

Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Also known as the European Convention on Human Rights.

## **ECtHR**

European Court of Human Rights.

## **ECRE**

European Council on Refugees and Exiles.

## **EHRC**

Estonian Human Rights Centre.

## **EMN**

European Migration Network.

## **IOM**

International Organization for Migration

## **OLPEA**

Obligation to Leave and Prohibition on Entry Act (1998). The OLPEA provides the bases and procedure for an alien's obligation to leave, prohibition on entry into, and passage through Estonia.

## **PBGB**

Estonian Police and Border Guard Board.

## **RCD**

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Also known as the Reception Conditions Directive.

## **State legal aid**

Legal services (including legal assistance, advice and representation) offered by a lawyer and provided free of charge by the state.

## **SLAA**

State Legal Aid Act (2004). The SLAA sets out the types of legal aid granted by the state and the conditions of and procedures for obtaining such legal aid.

## **UNHCR RRNE**

UNHCR Regional Representation for Northern Europe.

# PREFACE

---

Estonia acceded to both the 1951 *United Nations Convention relating to the Status of Refugees* and the 1967 *Protocol relating to the Status of Refugees* (collectively referred to in what follows as the 1951 Refugee Convention) in 1997. National asylum institutions were established in 1997 under the Refugee Act. Following the adoption of the first Asylum Acquis by the European Union, this act was replaced in 2006 by the Act on Granting International Protection to Aliens (AGIPA).<sup>2</sup> From 2015–2016, Estonia adopted a number of changes in the legislation to align its asylum system with international standards and the second generation of the EU Asylum Acquis.

One of the areas which underwent reform was the access to state legal aid for asylum-seekers. Since these reforms went into effect in April 2016, there has not been a comprehensive review of the effectiveness, structures, and practical access to this very important procedural safeguard.<sup>3</sup> Asylum-seekers are a particularly vulnerable group due to the persecution and violence they may have experienced prior their flight from their country. When they find themselves in a foreign country they will not be familiar with the national laws, language, or traditions, and thus may not be able to fully understand their rights and obligations in the asylum procedure. Legal aid, then, is the main way an asylum-seeker can be informed on the legal procedures and effective legal remedies.

In the past few years, a number of asylum-seekers have expressed concern regarding their access to state legal aid and the possibilities for an effective remedy in Estonia. UNHCR together with partners in Estonia therefore decided to undertake the present study to assess whether current law and practice regarding the provision of legal aid in Estonia are in line with regional and international standards. This study therefore represents a first review and analysis of the legal framework and practice related to the provision of legal aid to asylum-seekers in Estonia after the transposition of the second generation of the EU Asylum Acquis.

While the main focus of the study was a comparative analysis of national legal provisions *vis-à-vis* relevant international and EU standards concerning access to legal aid, the quality of legal aid available also features in some parts. UNHCR considers that this issue deserves to be further explored in Estonia since the present study could not provide a comprehensive overview. Accordingly, one of its recommendations in the present study is the need for further analysis (see [Section 7](#)). A more systematic and empirical study based on interviews with all relevant stakeholders, such as state officials, judges, counsellors in accommodation and detention centres, lawyers, and asylum-seekers themselves, will help to establish a full picture of the present situation regarding access to and quality of legal aid.

UNHCR RRNE in collaboration with the EHRC has developed this study to support Estonia's continued commitment to developing a fair and efficient asylum system. UNHCR hopes that the study will be a useful contribution to all involved in legal aid, including Estonia's policy and decision-makers, in order to better understand and assess the current state of affairs in relation to access to and quality of legal aid for asylum-seekers.

---

<sup>2</sup> *Välismaalasele rahvusvahelise kaitse andmise seadus*, 14.12.2005, RT I 2006, 2, 3, available at: <https://www.riigiteataja.ee/akt/106042016002>.

<sup>3</sup> The latest assessment of asylum-seekers' access to legal aid was undertaken in 2014 by the EHRC and the Estonian Refugee Council, see (in Estonian): *Varjupaigataotlejate ligipääs õigusabile*, Tallinn, 2014, available at: [http://www.pagulasabi.ee/sites/default/files/ro\\_analuus.pdf](http://www.pagulasabi.ee/sites/default/files/ro_analuus.pdf).

# 1. INTRODUCTION

---

## 1.1 Purpose of the study

---

Although Estonia has provided varying levels of state legal aid to asylum-seekers since 2006,<sup>4</sup> the current system has never been reviewed in terms of how well it is working or whether the rights provided for are realized or accessible in practice. The purpose of this study is therefore, to assess the current state of access to and quality of legal aid for asylum-seekers in Estonia. It aims to map the existing procedural safeguards and entitlements concerning legal aid, assess their efficiency, and identify potential gaps. This study provides a detailed overview of the relevant national legal framework and describes asylum-seekers' access to legal information, advice, and representation as well as state-funded legal aid in practice. Furthermore, the study examined whether the current Estonian legislation and administrative practice meet Estonia's regional and international commitments concerning the access to legal aid and its quality.

The legal framework and procedures for determining who is in need of international protection are generally complex. Many asylum-seekers also experience difficulties articulating the reasons for their asylum application without qualified advice and translation services. This is particularly true for asylum-seekers with special needs, such as survivors of torture and trauma, and those with limited proficiency in English. The availability of independent, state-funded legal aid enhances the overall efficiency of the refugee status determination process. With such aid, asylum-seekers are able to submit well-prepared statements and identify relevant evidence to support their claims, which in turn facilitates and enhances the decision-making process by the competent authorities. An independent report comparing access to early legal advice for asylum-seekers in the UK, Ireland, and Estonia ("the ELA Report") was conducted in 2014. The report's analysis concluded that early legal advice was beneficial overall, "increas[ing] the confidence of all parties in the decision-making process and improv[ing] the quality of decisions."<sup>5</sup>

Providing free legal advice and translation services not only enhances the fairness and efficiency of the national asylum system, but also reduces the financial costs to the State by:

- reducing the burden on decision-makers to work out the material elements of an asylum-seeker's claim;
- strengthening the quality of decisions, resulting in reduced appeal rates; and
- enabling asylum-seekers to understand procedures, so that they engage appropriately in the process and meet relevant time limits.<sup>6</sup>

The asylum application and refugee status determination processes create significant challenges for asylum-seekers who are not assisted or represented. Providing state legal aid not only accords with key principles of procedural fairness, but also significantly decreases the risk of erroneously returning a refugee to a place of persecution. This would be in direct violation of a state's obligations under the 1951 Refugee Convention principle of *non-refoulement*. Thus, providing legal aid to individuals who are in need of international protection is an essential safeguard of a fair and efficient asylum system.

---

<sup>4</sup> UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Estonia*, January 2016, available at: <https://bit.ly/2Ks5YXO>; UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Estonia*, July 2010, available at: <http://www.refworld.org/docid/4c3abc002.html>.

<sup>5</sup> Irish Refugee Council (IRC), *Providing Protection. Access to early legal advice for asylum-seekers*, 2014, at p. 28, available at: <https://bit.ly/2OE2VRD>.

<sup>6</sup> Irish Refugee Council, *A Manual on Providing Early Legal Advice to Persons Seeking Protection*, 2015, available at: <https://bit.ly/2XYv7Pw>; Asylum Aid, *Providing Protection*, 2014; Home Office, *Evaluation of the Early Legal Advice Project: Final Report*, May 2013, available at: <https://bit.ly/2T1T595>.



In recent years Estonia has made significant changes to its national asylum procedure. In 2015, reforms were introduced to restructure, inter alia, the system of providing state legal aid to asylum-seekers.<sup>7</sup> Following that, in 2016, Estonia introduced a number of amendments in the AGIPA, to streamline the existing system and to harmonize national legislation with Directives 2013/32/EU (the Asylum Procedures Directive or APD) and 2013/33/EU (the Reception Conditions Directive or RCD).<sup>8</sup> Among these amendments, applicants in detention or accommodation centres are entitled to receive counselling and legal advice by special counsellors.<sup>9</sup> State legal aid is provided during appeals proceedings in court.<sup>10</sup>

The type and complexity of legal aid guaranteed to applicants varies by stage of the asylum procedure. For example, where the early stages of the asylum procedure most often require providing legal and procedural information, the appeals stage mandates legal representation by a lawyer. The study examined each step in the asylum determination process and the points in time at which access to legal aid is required and to what extent, according to national (Estonian), regional (EU), and international law.

This study is meant to contribute to understanding how well Estonia's current asylum system protects the right of persons in need of international protection to an effective remedy. Any identified challenges will inform the ways in which Estonia's legal framework can be better aligned with relevant international and EU standards. Where gaps have been identified in Estonian law and/or practice, UNHCR suggests recommendations for improvement. Implementation of these recommendations should advance the quality of refugee status determinations by the PBGB and the overall efficiency of the national asylum procedure in Estonia.

<sup>7</sup> UN High Commissioner for Refugees (UNHCR), *Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law Proposal of 05 December 2014 amending the Act on Granting International Protection to Aliens*, January 2015, available at: <http://www.refworld.org/docid/5823348c4.html>.

<sup>8</sup> Ave Lauren, *Annual Policy Report on Migration and Asylum: Estonia 2016*, European Migration Network, 2016, p. 17, available at: <https://bit.ly/2OHeK9D>.

<sup>9</sup> UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under Article 40 of the Covenant: International Covenant on Civil and Political Rights: fourth periodic reports of States parties due in 2017: Estonia*, 4 April 2018, CCPR/C/EST/4, para. 129, available at: <https://bit.ly/2Ux8KyE>; European Migration Network (EMN), *Country Factsheet: Estonia 2016*, p. 1, available at: <https://bit.ly/2T5bkdC>.

<sup>10</sup> EMN, *Country Factsheet: Estonia 2016*, p. 1.

## 1.2 Methodology

The information in this report is the result of qualitative research into Estonian, EU, and international legal frameworks on access to legal aid. Various sources were consulted, including national and EU legislation, relevant case law, UNHCR commentaries, and public information. Data was also collected by UNHCR and the EHRC through monitoring visits to accommodation and detention centres, and information provided by asylum-seekers and refugees. The most relevant Estonian laws referenced are the AGIPA, the State Legal Aid Act (SLAA),<sup>11</sup> and the Code of Administrative Court Procedure (CACP).<sup>12</sup>

The recommendations put forward on changes to the Estonian legal framework have been made based on careful analysis of the current situation. The preliminary findings of the study were shared for comments with a range of stakeholders in Estonia, including the Estonian Bar Association, Ministry of the Interior, Ministry of Justice, Ministry of Social Affairs, Office of Legal Chancellor, and the PBGB – and their feedback and suggestions have been reflected in the final set of recommendations.

For the purposes of the present study, the term “legal aid” includes the provision of legal assistance and representation through government-funded programmes.

## 1.3 Structure

This report is divided into seven sections. The first section introduces the study, its rationale and methodology. The second section provides an overview of the applicable international and regional (EU) standards concerning access to legal aid. The third section describes relevant national legal and policy frameworks in Estonia, as well as current asylum trends, and provides a streamlined overview of the asylum procedure from arrival at the border all the way to appeal. The procedures described are those codified, implemented, and interpreted in Estonian legislation, government practice, and the judiciary. The fourth, fifth and sixth sections examine the entitlements and current implementation practices related to access to legal aid at various stages of the asylum process in Estonia. The fifth section concerns the entirety of the asylum procedure at first (administrative) instance. It highlights the applicable guarantees concerning information at the border and in detention facilities, explores special procedural guarantees for vulnerable applicants, information on rights and obligations during the administrative procedure, as well as legal assistance and advice. The sixth section focuses on the appeals procedures and explores the provision of legal aid at the border, in detention, and after a negative asylum decision. Finally, the seventh section acknowledges the need for further analysis and summarizes the report’s findings and recommendations to improve access to legal aid for asylum-seekers in Estonia.

---

<sup>11</sup> *Riigi õigusabi seadus*, 28.06.2004, RT I 2004, 56, 403, available at: <https://www.riigiteataja.ee/akt/R%C3%95S>.

<sup>12</sup> *Halduskohtumenetluse seadustik*, 27.01.2011, RT I, 23.02.2011, 3, available at: <https://www.riigiteataja.ee/akt/129062012056?leiaKehtiv>.



## 2. APPLICABLE INTERNATIONAL AND EU STANDARDS

---

Under international law, legal aid is seen as vital to the enjoyment of fundamental rights and an essential component of the right to an effective remedy.<sup>13</sup>

Under international law, the *European Convention on Human Rights* (ECHR) informs much of the scope and guarantees for an effective remedy. Article 6, specifically, outlines the right to a fair trial and includes the minimum right “to defend himself...through legal assistance...to be given free [if he does not have the sufficient means to pay and] when the interests of justice so require.”<sup>14</sup> It is important to note that Article 6 does not directly apply to asylum cases. However, that being said, the European Court of Human Rights (ECtHR) has interpreted Article 6 as having informed Article 47 of the *EU Charter of Fundamental Rights* (“the Charter”).<sup>15</sup> Since the Charter does apply directly to asylum matters,<sup>16</sup> and Article 47 established the right to an effective remedy, including the right to legal aid,<sup>17</sup> Article 6 of the ECHR retains its relevancy.

In terms of Article 6’s application, the ECtHR has held that the State may be compelled “to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court.”<sup>18</sup> This is measured under three criteria: (i) the importance of what is at stake for the applicant,<sup>19</sup> (ii) the complexity of the relevant law or procedure,<sup>20</sup> and (iii) the applicant’s capacity to represent him/herself effectively.<sup>21</sup> Asylum-seekers generally satisfy all of these criteria.

First, asylum-seekers have significant rights at stake during the procedure: the rights to life, liberty, and *non-refoulement*. Second, the EU Asylum Acquis and the relevant implementing national legislation are highly complex. Third, asylum-seekers often lack the relevant language proficiency, are in an unfamiliar environment, and may face technical as well as psychological difficulties in representing themselves.

The ECHR introduces its own conditions as well. Namely, States can take an applicant’s financial situation and the likelihood of the application’s success on the merits into account when deciding whether to grant legal aid.<sup>22</sup> As for financial considerations, the ECtHR has held that asylum-seekers are “particularly underprivileged and vulnerable.”<sup>23</sup> The likelihood of success on the merits is, of course, subject to individual circumstances. Thus, in satisfying the criteria under Article 6 of the ECHR, asylum-seekers should be entitled to guarantees under Article 47 of the Charter, including legal aid to challenge asylum decisions.

---

<sup>13</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 47, available at: <http://www.refworld.org/docid/3ae6b3b70.html>.

<sup>14</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 6, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>15</sup> European Union Agency for Fundamental Rights, *EU Charter of Fundamental Rights: Article 47 – Right to an effective remedy and to a fair trial*, Explanations relating to the Charter of Fundamental Rights, available at: <https://bit.ly/2XVEXBL>.

<sup>16</sup> Article 18 of the Charter guarantees the right to asylum and Article 19 establishes the principle of *non-refoulement*. For further detail, see *The Charter*, 2012/C 326/02, Articles 18-19.

<sup>17</sup> *The Charter*, 2012/C 326/02, Article 47.

<sup>18</sup> *Airey v. Ireland*, Application no. 6289/73, Council of Europe: European Court of Human Rights, 9 October 1979, para. 26.

<sup>19</sup> *Steel v. United Kingdom*, Application no. 68416/01, Council of Europe: European Court of Human Rights, 15 February 2005, para. 61, available at: <http://www.srb.com/wp-content/uploads/2013/10/Steel-Morris-v-UK-ECHR-15-Feb-2005.pdf>.

<sup>20</sup> *Airey*, 6289/73, ECtHR, para. 24.

<sup>21</sup> *McVicar v. United Kingdom*, Application no. 46311/99, Council of Europe: European Court of Human Rights, 7 May 2002, paras. 48-62; *Steel*, 68416/01, ECtHR, para. 61.

<sup>22</sup> *Steel*, 68416/01, ECtHR, para. 62.

<sup>23</sup> *M.S.S. v. Belgium*, Application no. 30696/09, Council of Europe: European Court of Human Rights, paras. 232 and 251, 21 January 2011, available at: <http://www.refworld.org/cases,ECHR,4d39bc7f2.html>.

Article 13 of the ECHR (right to an effective remedy) is also applicable in the asylum procedure when in conjunction with Articles 2 (right to life), 3 (prohibition of torture) and 4 of Protocol No.4 (prohibition of collective expulsion of aliens).<sup>24</sup> First, Article 13 of the ECHR provides that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority.”<sup>25</sup> The ECtHR has also established that an effective remedy is one that is realistically possible to access in practice<sup>26</sup> and has automatic suspensive effect.<sup>27</sup> In *M.S.S. v. Belgium and Greece*, the ECtHR found that an inefficient legal aid system in asylum procedures risked *refoulement* and was therefore a violation of Article 13 in conjunction with Article 3.<sup>28</sup> In *Abdolkhani and Karimnia v. Turkey*, denying legal assistance to asylum-seekers, especially when the applicants explicitly requested a lawyer, was a violation of Article 13.<sup>29</sup> The court made specific reference to the need for a remedy to be effective in practice as well as in law in order to fulfil Article 13.<sup>30</sup> Finally, *Hirsi Jamaa v. Italy* demonstrates the ECHR’s applicability to aliens not yet recognized as asylum-seekers.<sup>31</sup> In that case, the ECtHR found that intercepting migrants at sea and summarily returning them to Libya was a violation of Article 13 taken in conjunction with Article 3 and with Article 4 of Protocol No.4.<sup>32</sup> The ECtHR noted that because the migrants faced a real risk of treatment contrary to Article 3, they should have been given an opportunity to apply for asylum in Italy.<sup>33</sup> The court also noted that the right to an effective remedy required “the possibility of suspending the implementation of the measure impugned”.<sup>34</sup> In a concurring opinion, Judge Pinto de Albuquerque explained: “[f]or the refugee status determination procedure to be individual, fair and effective, it must necessarily have at least the following features: [...] (7) free legal advice and representation and, if necessary, free linguistic assistance at both first and second instance, and unrestricted access to the UNHCR or any other organization working on behalf of the UNHCR.”<sup>35</sup>

In EU law, the right to effective remedy comes again under Article 47 of the Charter, which states, “...everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.”<sup>36</sup> This includes “legal aid,” which “shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”<sup>37</sup> As mentioned earlier, Article 47 of the Charter is interpreted in line with the ECtHR case law on Article 6 enumerated above.

Provisions for access to legal aid for asylum-seekers are also found in EU Directives for the Common European Asylum System (CEAS)<sup>38</sup> and proposed Regulations.<sup>39</sup> These are meant to establish common minimum standards for the treatment of all asylum-seekers and applications. For example, the right to legal and procedural information free of charge is guaranteed at first instance under the APD.<sup>40</sup> This is in line with the finding of the Court of Justice of the European Union (CJEU) that “in view of the less advantageous position in which victims find themselves...and

---

<sup>24</sup> *Jamaa v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.refworld.org/cases,ECHR,4f4507942.html>.

<sup>25</sup> Article 13 of the ECHR.

<sup>26</sup> *Conka v. Belgium*, Application no. 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, available at: <http://www.refworld.org/cases,ECHR,3e71fdfb4.html>.

<sup>27</sup> *Hirsi*, 27765/09, ECtHR.

<sup>28</sup> *M.S.S.*, 30696/09, ECtHR, paras. 319-321.

<sup>29</sup> *Abdolkhani v. Turkey*, Application no. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, paras. 113-14.

<sup>30</sup> *Id.* at para. 115.

<sup>31</sup> *Hirsi*, 27765/09, ECtHR.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Id.* at para. 198.

<sup>35</sup> *Id.* at p. 73 (Pinto de Albuquerque, concurring).

<sup>36</sup> Article 47 of the Charter.

<sup>37</sup> *Ibid.*

<sup>38</sup> Including the revised Asylum Procedures Directive, the revised Reception Conditions Directive, the revised Qualification Directive, and the revised Dublin III Regulation. More information on the CEAS available at: [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en).

<sup>39</sup> European Union: European Commission, COM (2016) 467: *Proposal for a Regulation of the European Parliament of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, 13 July 2016, Procedure 2016/0224/COD, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>.

<sup>40</sup> Article 19 (1) of the APD.



© UNHCR/xxxx

the conditions under which such victims are able to submit their comments on matters that may be used against them, it appears reasonable, or indeed necessary, for them to be given legal assistance.”<sup>41</sup> The APD and Regulation 604/2013 (the Dublin III Regulation) both provide for legal aid for asylum-seekers in appeals procedures.<sup>42</sup> Finally, the RCD outlines the rights guaranteed to asylum-seekers concerning detention and reception conditions.<sup>43</sup>

---

<sup>41</sup> Judgment of 4 December 2003, *Evans*, C-63/01, I-14447/03, para. 77.

<sup>42</sup> Article 20 of the APD; European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, Article 27, available at: <http://www.refworld.org/docid/51d298f04.html>.

<sup>43</sup> European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: <http://www.refworld.org/docid/51d29db54.html>.

# 3. ESTONIA AS A COUNTRY OF ASYLUM

---

## 3.1 National legal and policy framework

---

The AGIPA is the main piece of national legislation of relevance to the protection of refugees in Estonia. The law mostly focuses on procedural aspects of granting asylum, but also the legal status “of an alien who has been granted international protection and the legal basis for his or her temporary stay, residence and employment in Estonia on the basis of treaties and the legislation of the European Union”. The AGIPA also contains provisions on the issuance and extension of residence permits, participation in an adaptation (welcoming) programme, language training, provision of the support person service and provisions on the social, educational and employment rights of persons enjoying international protection. The AGIPA was significantly amended in 2016 when Estonia transposed second-generation instruments of the EU Asylum Acquis.

The entry of aliens into Estonia, their temporary stay in the country as well as their residence and employment are regulated by the Aliens Act.<sup>44</sup> The Obligation to Leave and the Prohibition on Entry Act (the OLPEA)<sup>45</sup> provides the basis and procedures regarding obligations to leave, prohibition of entry and the regime for passage through Estonia.

Estonia’s Internal Security Development Plan 2015–2020 is one of the main policy documents outlining the government’s priorities in relation to, inter alia, persons in need of international protection.<sup>46</sup> These priorities are based on the assumption that the increased number of asylum-seekers and beneficiaries of international protection, in addition to Estonia’s participation in the relocation and resettlement processes, pose specific challenges for Estonia and its society. In line with these priorities, in the upcoming years, the government plans to focus on:

- ➔ ensuring the quality of asylum procedures as well as public order and internal security;
- ➔ strengthening its readiness to fulfil its international and EU commitments, as well as to identify the persons who abuse the asylum procedure, and
- ➔ ensuring necessary reception conditions and integration support assistance for beneficiaries of international protection.

Another national policy document, “Integrating Estonia 2020,” contains a separate goal to support the integration of newly or recently arrived immigrants, including beneficiaries of international protection.<sup>47</sup>

In addition to these policy documents, the Estonian government has developed a short-term (four-year) “Action Plan for implementation of the EU emergency relocation and resettlement schemes,” addressing a number of needs for the reception and integration of those resettled or relocated to Estonia.<sup>48</sup> In December 2017, the government announced that Estonia had fulfilled its commitments under the EU’s 2015 emergency schemes.<sup>49</sup> In total, Estonia has relocated and resettled 206 individuals under these schemes. In response to the European Commission’s request to pledge at least 50,000 resettlement places for the period spanning January 2018 to October 2019, the government announced in December 2017 that Estonia will resettle 80 Syrian refugees from Turkey in 2018 and

---

<sup>44</sup> Välismaalaste seadus, 09.12.2009, RT I 2010, 3, 4, available at: <https://www.riigiteataja.ee/akt/VMS>.

<sup>45</sup> Väljasõidukohustuse ja sissesõidukeelu seadus, 21.10.1998, RT I 1998, 98, 1575, available at: <https://www.riigiteataja.ee/akt/121042018006>.

<sup>46</sup> Vabariigi Valitsus, 2016. Täiendatud siseturvalise arengukava 2015-2020. Available in Estonian at: <https://bit.ly/2VPSnh0>.

<sup>47</sup> The Government of Estonia, *Development Plan “Integrating Estonia 2020*. Available in English at: <https://bit.ly/2O0ZRuR>.

<sup>48</sup> The Government of Estonia, “Action Plan for implementation of the EU emergency relocation and resettlement schemes. Available in Estonian at: <https://bit.ly/2O8eZa1>.

<sup>49</sup> *Reinsalu: Eesti loeb 2015. aasta rändekava täidetuks*, ERR, 21 December 2017, available at: <https://bit.ly/2kUs8WE>.

2019, amounting to 40 people per year.<sup>50</sup> According to the former Minister of the Interior, Mr. Andres Anvelt, 40 persons per year was the maximum capacity of Estonia to integrate refugees into Estonian society.

### 3.2 Asylum trends

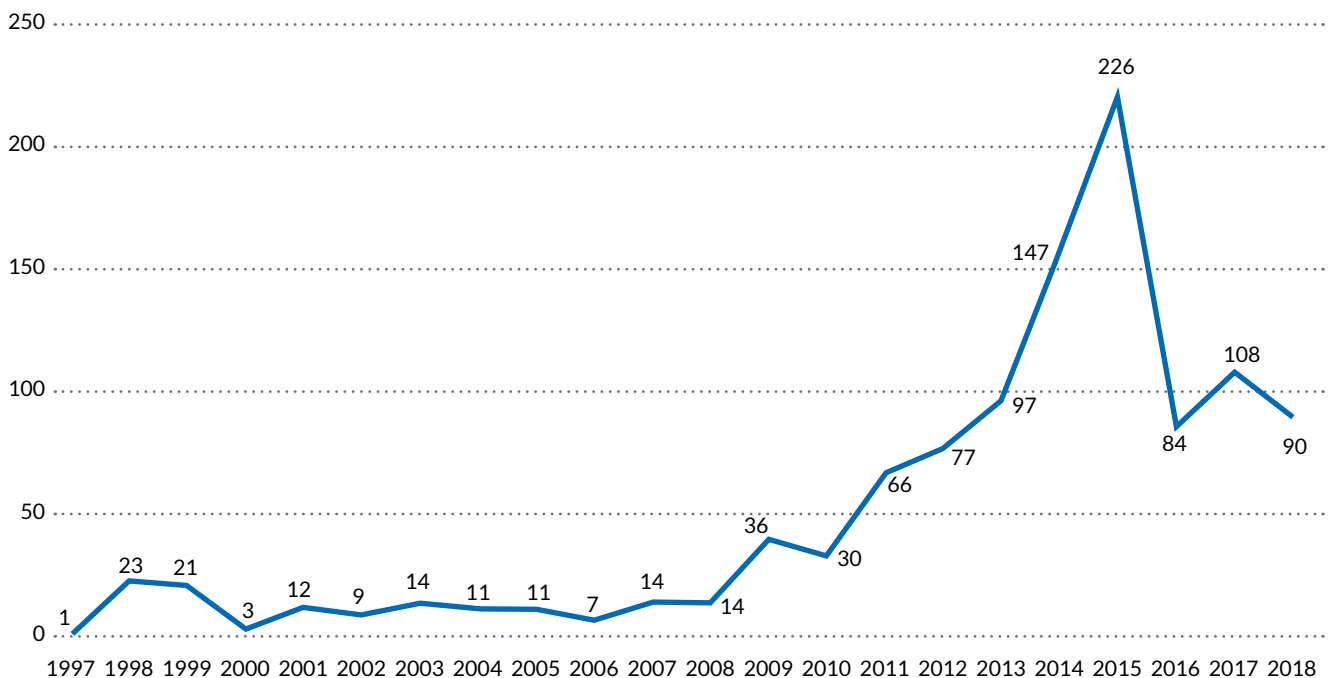
Estonia is host to a small refugee population, with only 481 beneficiaries of international protection recorded at the end of 2018.<sup>51</sup> The available statistical data provides that between 1997 and 31 December 2018 a total of 1,101 individuals applied for asylum in Estonia.<sup>52</sup> Between 1997 and 2008 the number of applications was less than 15 per year. In 2009 the number of applications began to increase annually and reached 97 in 2013. 2014 saw 147 applications and 2015, 226 applications. However, in 2016, the number of spontaneously-arrived applicants decreased considerably to 84.<sup>53</sup> In 2017, the total number of new applicants was 108.<sup>54</sup>

In 2018 Estonia registered 90 new asylum applications. The majority of applicants were from Ukraine, Russia and Egypt. Seventeen spontaneously-arrived individuals were granted refugee status and 18 Syrian nationals were accepted under the EU's emergency relocation and resettlement schemes.<sup>55</sup> The overall recognition rate of spontaneously-arrived applicants was 23 percent in 2018.

Between 2001 and 2013, 10 unaccompanied children applied for asylum in Estonia. From 2014 to the end of 2018, no unaccompanied or separated children sought asylum in Estonia.

Asylum-seekers in Estonia come from a wide range of countries. The largest number of applicants came from Afghanistan, Georgia, the Russian Federation, Syria and Ukraine.

#### New asylum applications in 1997-2018, by year



<sup>50</sup> Valitsus otsustas võtta Türgist vastu 80 põgenikku. Delfi, 15 December 2017, available at: <https://bit.ly/2XWpktR>.

<sup>51</sup> Estonian Ministry of the Interior, *Overview of Estonian Migration Statistics 2014-2018*, available in English at: <https://bit.ly/2ZAeFWm>.

<sup>52</sup> Ibid.

<sup>53</sup> This number does not include the additional 77 beneficiaries of international protection who have been relocated or resettled to Estonia under the EU's emergency schemes.

<sup>54</sup> Additionally, 87 beneficiaries of international protection have arrived under the EU's emergency schemes.

<sup>55</sup> PBGB, response from 21 January 2019.

### 3.3 The national asylum procedure

Asylum decision-making functions and competence are divided between two structural units of the PBGB: the Aliens Division of the Migration Bureau of the Intelligence Management and Investigation Department (the Aliens Division) and the border guard officials of the Territorial Prefectures. The Aliens Division, inter alia, examines asylum applications lodged inside the territory and decides on the extension or revocation of identification documents, residence and work permits for aliens and beneficiaries of international protection. The Territorial Prefectures register asylum applications lodged in border areas or at border crossing points.

#### Applying for international protection

Applications for international protection must be submitted in person<sup>56</sup> to the PBGB immediately at the border checkpoint,<sup>57</sup> after entering Estonia,<sup>58</sup> or when apprehended in an unauthorized entry.<sup>59</sup> Those already inside Estonia can submit their applications to a service point of the PBGB. The Citizenship and International Protection Bureau (International Protection and E-residency Proceedings Unit) of PBGB does not deal with registration of asylum applications; however, it is in charge of examining and taking decisions on such applications.

The first guarantee of legal aid is the provision of legal information. Section 14(31) of the AGIPA stipulates that “[w] here there is a reasoned ground to believe that aliens staying in detention facilities or at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, the Police and Border Guard Board...shall ensure provision of the persons with information on the possibility to do so.”<sup>60</sup> This language is almost identical to Article 8(1) of the APD<sup>61</sup> except for the APD focusing on “indications” that [aliens] may wish to apply rather than the AGIPA’s “reasoned ground to believe.” In general, the obligation of the PBGB is still clear: to provide information on the asylum procedure, the application process, and the alien’s rights and obligations throughout.<sup>62</sup>

A point should be made about terminology and translation of the AGIPA. The term “application for international protection” is defined in the English translation of the AGIPA as “an application submitted by an alien in any way with a view to be recognized as a...person...to be granted international protection.”<sup>63</sup> The original version in Estonian, however, uses the phrase “expression of wish” rather than “application.”<sup>64</sup> Thus, the use of the term “application” in the AGIPA should be interpreted with less procedural formality than a physical application. In addition, the Supreme Court of Estonia has held that a verbal expression of the wish to apply satisfies the AGIPA’s call for an application to be “submitted.”<sup>65</sup> The Estonian Ministry of the Interior also confirmed the same interpretation that the asylum procedure is triggered when an applicant crossing the border asks for international protection verbally, in writing, or in any other understandable manner.<sup>66</sup>

---

<sup>56</sup> Section 14 (4) of the AGIPA.

<sup>57</sup> *Id.* at Section 14 (2).

<sup>58</sup> *Id.* at Section 14 (1).

<sup>59</sup> *Id.* at Section 1 (3).

<sup>60</sup> *Id.* at Section 1 (31).

<sup>61</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, Article 8 (1), available at: <http://www.refworld.org/docid/51d29b224.html>. “Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so.”

<sup>62</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast) COM (2011) 319 final*, January 2012, pp. 10-11, available at: <http://www.refworld.org/docid/4f3281762.html>.

<sup>63</sup> Section 3 (3) of the AGIPA.

<sup>64</sup> *Ibid.* “Rahvusvahelise kaitse taotlus on välismaalase mistahes viisil esitatud sooviavaldus enda pagulasena või täiendava kaitse saajana tunnustamiseks ja rahvusvahelise kaitse saamiseks.”

<sup>65</sup> The Supreme Court of Estonia decision of 12 March 2013 in Mohammed Alhai cassation appeal case No 3-3-1-62-12, p. 15.

<sup>66</sup> Estonian Ministry of the Interior, 05.06.2013 letter No 11-3/459-4.

Once an application for international protection has been submitted, it must be registered immediately and/or no later than three working days after submission.<sup>67</sup>

## Post-application and grounds for detention

After registering the application the PBGB is required to perform several acts to authenticate it, including identifying and examining the applicant along with his or her personal effects, recording the reasons for arriving in Estonia (or at its border), and the basis for which the applicant is seeking international protection.<sup>68</sup> The PBGB is also required to photograph and fingerprint the applicant, take DNA probes and arrange for medical examination if necessary.<sup>69</sup>

Throughout this process and biometrics collection, an applicant “shall be detained” and is required to stay within assigned premises.<sup>70</sup> Section 361 of the AGIPA stipulates that detention is permitted only if “the efficient application of the surveillance measures is impossible” and it is an “unavoidable necessity” for a set of discrete circumstances.<sup>71</sup> If an applicant falls into one of these exceptional categories, he or she may be detained for no longer than 48 hours without the permission of an administrative court.<sup>72</sup> If the PBGB gains permission from an administrative court, the applicant can be detained for up to two months initially,<sup>73</sup> which can be extended to a maximum of four more months.<sup>74</sup>

## Review of applications

Every application for international protection must be reviewed “individually and impartially”, with the PBGB following necessary procedures to verify the evidence provided and the credibility of an applicant’s statements.<sup>75</sup>

In order for applications to be successful, they must pass an evaluation on admissibility and the merits. Admissibility is largely concerned with the technical aspects of an applicant’s journey and prior opportunities to receive international protection. An application can be rejected, for example, if the applicant arrived in Estonia by travelling through what is known as a “safe third country,” has arrived from their first country of asylum, or has another EU Member State in charge of the examination of their application under the Dublin III Regulation.<sup>76</sup> Similarly, a subsequent asylum application, which is submitted after the (explicit or implicit) withdrawal of the previous application, or after a (final) decision on the previous application has been taken, is supposed to be examined on its admissibility.<sup>77</sup> Under this specific procedure, the PBGB will first determine whether new facts have arisen or been presented by the applicant which “significantly add to the likelihood” of qualifying for international protection.<sup>78</sup> If so, the subsequent application shall be further examined on its merits.<sup>79</sup>

---

<sup>67</sup> Section 14 (1) of the AGIPA.

<sup>68</sup> *Id.* at Section 15 (1) Items 2), 4), and 5).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Id.* at Section 15 (6).

<sup>71</sup> *Id.* at Section 36<sup>1</sup> (1-2); The discrete circumstances include “1) identification of the person or verification of the identity; 2) verification or identification of the citizenship of the person; 3) verification of the legal bases of the entry into and the stay in the state of a person; 4) identification of the circumstances relevant to the proceedings of the application for international protection, primarily in the case when there is a risk of escape; 5) there is a reason to believe that the person has submitted an application for international protection to postpone the obligation to leave or prevent expulsion; 6) protection of the security of state or public order; 7) transfer of a person in the procedure provided for in Regulation (EU) No 604/2013 of the European Parliament and of the Council, if there is a risk of escape of a person.”

<sup>72</sup> *Id.* at Section 36<sup>2</sup> (1).

<sup>73</sup> Section 36<sup>2</sup> (2) of the AGIPA.

<sup>74</sup> *Id.* at Section 36<sup>2</sup> (4).

<sup>75</sup> *Id.* at Section 18 (2).

<sup>76</sup> *Id.* at Section 21 (1).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Id.* at Section 24 (2).

<sup>79</sup> *Ibid.*

Alongside admissibility, applications may be reviewed under the so-called “accelerated procedure.” This procedure is meant to examine those claims for asylum that appear either “clearly unfounded”<sup>80</sup> or “submitted with the purpose of abusing the...system”<sup>81</sup> in a more expedited manner. “Clearly abusive’ or ‘manifestly unfounded’” applications are those which are clearly fraudulent or not related to the criteria for granting international protection.<sup>82</sup> Symptoms of an applicant abusing the system include providing incorrect or falsified information, intentionally destroying evidence, or submitting an application solely to avoid being forced to leave the country.<sup>83</sup> Under the accelerated procedure, PBGB border guard officials are authorized to examine and reject asylum applications lodged at the border without transferring the application to the Citizenship and International Protection Bureau.

Applications under the accelerated procedure must be reviewed within 30 days, but this time-limit can be extended where necessary.<sup>84</sup> Applications under the regular procedure must be reviewed no later than six months (barring exceptional circumstances)<sup>85</sup> after receiving the application.<sup>86</sup>

## Interview and preliminary decisions

Regardless of whether an application is being considered under the accelerated or regular procedure, the applicant must be interviewed prior to a final decision.<sup>87</sup> The interview provides the applicant with an opportunity to present facts and provide explanations regarding the essential details and circumstances related to his or her application for international protection. While the PBGB is required to conduct at least one substantive interview,<sup>88</sup> the EHRC has observed that the PBGB will sometimes conduct additional interviews and/or send clarifying questions after an interview when necessary.

## Special needs assessment

Some applicants for international protection may be recognized as requiring special procedural guarantees.<sup>89</sup> The PBGB or other relevant authority is required to identify these applicants, in writing, as soon as possible after an application is made.<sup>90</sup> Once recognized, applicants in need of special procedural guarantees are entitled to support relevant to their specific circumstances.<sup>91</sup> These applications also benefit from two distinct procedural provisions. First, the PBGB may prioritize and expedite examining an application requiring special procedural guarantees.<sup>92</sup> Second, these applicants must be provided with adequate support,<sup>93</sup> elaborated on in the APD as including “sufficient time,”<sup>94</sup> and thus should not be channelled into the accelerated procedure, especially at the border.<sup>95</sup>

---

<sup>80</sup> Section 20 of the AGIPA.

<sup>81</sup> *Id.* at Section 20<sup>1</sup>.

<sup>82</sup> UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) – 1983, available at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

<sup>83</sup> Section 20<sup>1</sup> of the AGIPA.

<sup>84</sup> Section 20<sup>2</sup> (4) of the AGIPA.

<sup>85</sup> *Id.* at Section 18<sup>1</sup> (2-4).

<sup>86</sup> *Id.* at Section 18<sup>1</sup> (1).

<sup>87</sup> *Id.* at Section 18 (4).

<sup>88</sup> *Ibid.*

<sup>89</sup> *Id.* at Section 15<sup>1</sup> (1) defines a special needs applicant as “a vulnerable person, such as a minor, an unaccompanied minor, a disabled person, an elderly person, a pregnant woman, a single parent with minor children, a victim of trafficking, a person with serious illness, a person with mental health problems and a victim of torture or rape or a person who has been subjected to other serious forms of psychological, physical or sexual violence.”

<sup>90</sup> Section 15<sup>1</sup> (2-4) of the AGIPA. According to an administrative agreement between the PBGB and OÜ Hoolekandeteenused (an institution managing accommodation centres for asylum-seekers in Estonia), the latter is also tasked to identify applicants with special needs and report to the PBGB.

<sup>91</sup> *Id.* at Section 15<sup>1</sup> (2).

<sup>92</sup> *Id.* at Section 18 (10).

<sup>93</sup> *Id.* at Section 10 (2).

<sup>94</sup> Recital 29 of the APD.

<sup>95</sup> Section 20<sup>2</sup> (2) of the AGIPA.



Children and unaccompanied children have particular rights under both AGIPA and the Child Protection Act. Both acts stipulate that in making decisions affecting a child, the best interests of the child shall be considered paramount.<sup>96</sup> The AGIPA also lays out procedures for determining who qualifies as a child, addressing doubts, medical examinations, and the PBGB's obligation to inform applicants of the necessary procedures and the consequences of refusal.<sup>97</sup> Importantly, unaccompanied children have the right to have a legal guardian appointed to perform procedural acts as soon as an applicant has been deemed a child.<sup>98</sup> Under the Estonian Family Law Act, the local government is responsible for acting as a representative of an unaccompanied child until a reliable and knowledgeable<sup>99</sup> legal guardian can be appointed.<sup>100</sup> Unaccompanied children are often placed in foster homes<sup>101</sup> or with a non-profit organization specializing in family-based care.<sup>102</sup>

## Appeal

If an application for international protection is denied, the decision may be appealed in an administrative court within 10 days.<sup>103</sup> Persons who were granted international protection can appeal the decision within 30 days. They may wish to do so, for example, if only granted subsidiary protection instead of refugee status.<sup>104</sup> Any action brought in an administrative court is subject to a state fee in addition to any costs essential to proceedings (e.g., interpretation and translation costs).<sup>105</sup> Applicants who cannot afford to pay may submit an application for procedural assistance in addition to their appeal.<sup>106</sup> Where the court deems it necessary, applicants will be appointed a legal representative in accordance with the SLAA.<sup>107</sup>

Once an appeal is submitted, there are three possible outcomes: opening, delaying, or refusing to open appeal proceedings. The first is the most straightforward, representing a case in which there are no grounds for denying the appeal.<sup>108</sup> The second will occur when the appeal contains mistakes, but which the applicant can amend within a court-specified timeline.<sup>109</sup> The third will occur if either the applicant does not fix the mistakes enumerated in the second scenario, or the application does not meet the required grounds for appeal.<sup>110</sup>

Opening appeal proceedings entails preliminary proceedings such as hearings, the ability to provide further explanation, an obligatory response by the PBGB, and an applicant's option to respond to the PBGB in turn.<sup>111</sup> While courts are required to hear matters within a "reasonable time,"<sup>112</sup> international protection matters are to be prioritized.<sup>113</sup>

If the appeal is successful, the administrative court will send the case back to the PBGB with instructions to review the application again and highlight the procedural mistakes made.<sup>114</sup> If the appeal is denied in the administrative

---

<sup>96</sup> *Id.* at Section 17 (1); *Lastekaitseadus*, 19.11.2014, RT I, 2014, 1, Section 21, available at: <https://www.riigiteataja.ee/akt/128112017019>.

<sup>97</sup> Section 17 (4-5) of the AGIPA.

<sup>98</sup> *Id.* at Section 17 (9-10).

<sup>99</sup> *Id.* at Section 17 (10).

<sup>100</sup> *Perekonnaseadus*, 18.11.2009, RT I 2009, 60, 395, Section 176, available at: <https://www.riigiteataja.ee/akt/109052017029>.

<sup>101</sup> Chancellor of Justice, *Unaccompanied Minors Report*, p. 73, available in Estonian at: <https://bit.ly/2NYGq5M>.

<sup>102</sup> SOS Children's Village Association, *Unaccompanied minors*, available at: <https://bit.ly/2HuxaVW>.

<sup>103</sup> Section 25<sup>1</sup> (1) of the AGIPA.

<sup>104</sup> Section 46 (1) of the CACP.

<sup>105</sup> *Id.* at Section 105.

<sup>106</sup> *Id.* at Section 110.

<sup>107</sup> *Id.* at Section 120 (1).

<sup>108</sup> *Id.* at Section 120 (2).

<sup>109</sup> *Id.* at Section 120 (3).

<sup>110</sup> Section 121 (1) of the CACP.

<sup>111</sup> *Id.* at Section 122 (1).

<sup>112</sup> *Id.* at Section 126 (2).

<sup>113</sup> *Id.* at Section 126 (3).

<sup>114</sup> *Id.* at Section 202.

court, applicants have the option to appeal this decision, within 30 days,<sup>115</sup> to the Circuit Court.<sup>116</sup> Following a negative decision from the Circuit Court, applicants may again appeal, within 30 days,<sup>117</sup> to the Supreme Court.<sup>118</sup> A judgment from the Supreme Court is final.<sup>119</sup>

The appeals system and process remains the same irrespective of when and under what proceedings an application is rejected (e.g. at the border, on admissibility grounds, accelerated procedure). Even the Dublin III Regulation sets out rules on the provision of legal aid to those who appeal a decision.<sup>120</sup> The only difference comes concerning an applicant's right to remain in the territory. If a decision is made at the border on admissibility grounds or under the accelerated procedure, the court conducting the proceedings will decide on the applicant's right to stay in Estonia for the duration of the judicial proceedings.<sup>121</sup> In a regular merits-based examination, the applicant has the right to stay in the country until the administrative court has made its decision.<sup>122</sup>

### **3.4 Provision of state legal aid**

All state legal aid, including on behalf of applicants for international protection, is provided under the terms laid out in the SLAA.<sup>123</sup> Subject to an administrative judge's discretion, the Estonian Bar Association may appoint a lawyer to represent applicants who lack sufficient resources.<sup>124</sup> While state legal aid is normally reserved for those "domiciled in Estonia," the SLAA grants exceptions for applicants protected under binding international obligations.<sup>125</sup> In accordance with these obligations, the AGIPA stipulates that applicants are entitled to legal aid when contesting a decision on international protection before an administrative court.<sup>126</sup>

Importantly, according to Item 6 of Section 4 (3) of the SLAA, any individual who is domiciled in Estonia or another EU Member State, or is a citizen of Estonia or another EU Member State, is also entitled to apply for state legal aid in all types of administrative proceedings in Estonia. However, in the proceedings for recognition as a person in need of international protection, AGIPA provides no such possibility to asylum-seekers. This limitation seems to be at variance with the principle of equal treatment and other general principles guaranteeing effective protection of rights. The provision of the right to apply for state legal aid for representation in the administrative proceedings may be particularly justified in situations when an applicant for international protection is vulnerable (for example, a child or an illiterate or mentally-disabled person).

An application form for state legal aid can be found on the Ministry of Justice website<sup>127</sup> and requires the provision of standard information on the applicant and their needs in the particular case.<sup>128</sup> The application must be in either Estonian, English, or Russian; those in other languages will not be reviewed.<sup>129</sup> Legal counsellors provided by the EU

---

<sup>115</sup> *Id.* at Section 181 (1).

<sup>116</sup> Section 180 (1) of the CACP.

<sup>117</sup> *Id.* at Section 212 (1).

<sup>118</sup> *Id.* at Section 211 (1).

<sup>119</sup> *Id.* at Section 232 (2).

<sup>120</sup> Article 27 (6) of the Dublin III Regulation.

<sup>121</sup> Section 25<sup>1</sup> (3) of the AGIPA. Another exception to the right to remain in the territory is Article 24(5) of the AGIPA – an applicant has the right to stay in Estonia for the time of the proceedings of a subsequent application if that subsequent application is submitted for the first time.

<sup>122</sup> *Id.* at Section 25<sup>1</sup> (2).

<sup>123</sup> Section 4 (1) of the SLAA.

<sup>124</sup> Estonian Bar Association, State Legal Aid, available at: <https://www.advokatuur.ee/eng/state-legal-aid>; Section 6 (1-11) of the SLAA.

<sup>125</sup> Section 6 (11) of the SLAA.

<sup>126</sup> Section 10 (2) Item 9) of the AGIPA.

<sup>127</sup> Republic of Estonia Ministry of Justice, State legal assistance, available at: <https://www.just.ee/en/state-legal-assistance-0>.

<sup>128</sup> Section 12 (1) of the SLAA.

<sup>129</sup> *Id.* at Section 12 (5-7).



Asylum Migration and Integration Fund (AMIF),<sup>130</sup> who are available at the Harku (now Soodevahe)<sup>131</sup> immigration detention centre or Vao and Vägeva accommodation centres for asylum-seekers, support asylum-seekers in applying for state legal aid.<sup>132</sup> Once an application for state legal aid is submitted, it undergoes two tests: means and merits. Means testing assesses the applicant and their financial situation, including monthly income, property, assets, etc.<sup>133</sup> Merits testing, in contrast, assesses the application and its likelihood of success. The SLAA requires only limited merits testing, denying an application only if it is “clearly unlikely” that the applicant will be able to protect their rights.<sup>134</sup>

If successful, applicants under normal circumstances are provided with a lawyer under the Bar Association Act.<sup>135</sup> In general, applicants cannot choose their state legal aid provider.<sup>136</sup> In November 2016, the Estonian Bar Association initiated a public procurement process for providers of state legal aid to asylum-seekers appealing detention or negative international protection decisions.<sup>137</sup> Only one law office, Lindeberg Melk Partners (or Law Firm LMP),<sup>138</sup> submitted a bid and thus was awarded the contract to provide state legal aid until 31 December 2017.<sup>139</sup> Since 2018, still only one Law Firm<sup>140</sup> represents all asylum-seekers in their appeals regarding detention and negative asylum decisions.

<sup>130</sup> The AMIF was set up to “promote the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration.” Its funding structure is divided into two phases: phase one lasted from 1 July 2015 until 30 June 2018 and phase two will last from 1 July 2018 until 31 December 2020. See at: European Commission, *Asylum, Migration and Integration Fund*, available at: <https://bit.ly/2kXC4zW>.

<sup>131</sup> In November 2018 the immigration detention centre was moved from Harku to Soodevahe. See more details here: <https://bit.ly/2JjRITo>.

<sup>132</sup> Estonian Ministry of the Interior: List of supported AMIF projects, available at: <https://bit.ly/2TwJb4t>.

<sup>133</sup> *Id.* at Section 7 (1).

<sup>134</sup> *Ibid.*

<sup>135</sup> *Id.* at Section 5 (1).

<sup>136</sup> Estonian Bar Association, State Legal Aid, available at: <https://www.advokatuur.ee/eng/state-legal-aid>.

<sup>137</sup> Estonian Bar Association, Procurement for Finding State Legal Aid Providers for Asylum-seekers, available at: <https://bit.ly/2JaeGwq>.

<sup>138</sup> Website available at: [http://www.lmp.ee/?lang\\_id=en](http://www.lmp.ee/?lang_id=en).

<sup>139</sup> Estonian Ministry of the Interior, List of supported AMIF projects, available at: <https://bit.ly/2TwJb4t>.

<sup>140</sup> Law Firm Lindeberg, website available at: <http://lindeberg.legal/>.

Asylum-seekers who are unsatisfied with their appointed state legal aid lawyer may either seek to replace them or file a complaint against them. Currently, the State Legal Aid Information System<sup>141</sup> has eight active lawyers who are registered to provide state legal aid in administrative court cases.<sup>142</sup> For asylum-seekers who would prefer to replace their lawyer, a tripartite agreement must be reached with the consent of the lawyer currently providing the state legal aid, the asylum-seeker, and the new lawyer.<sup>143</sup> Asylum-seekers also have the right to file complaints regarding any disciplinary offences or Code of Conduct breaches by their state legal aid lawyers. The complaint has to be submitted within six months since the day when an asylum-seeker became aware of the circumstances.<sup>144</sup> Importantly, the law requires that the complaint must be filed in Estonian.<sup>145</sup> This requirement represents a significant obstacle for asylum-seekers who, for obvious reasons, lack sufficient command of the Estonian language.

A complaint can lead to disciplinary sanctions being taken against the lawyer.<sup>146</sup> According to the Estonian Bar Association, since 2015, a total of four complaints have been filed related to asylum cases.<sup>147</sup> None of the complaints resulted in an initiation of proceedings in the Court of Honour, though in 2018 the court did draw attention to the shortcomings raised.<sup>148</sup> The Court of Honour may also remove a lawyer from providing state legal aid, either at the request of an applicant or on its own motion, if the lawyer has demonstrated incompetence or negligence.<sup>149</sup> The court has never removed a lawyer in connection with an international protection case.<sup>150</sup>

While the above provisions contribute to a fair state legal aid procedure, access, particularly for asylum-seekers, remains uncertain. For requesting to replace a current state legal aid lawyer, asylum-seekers face several challenges. Firstly, they need to have access to information about their right to replace a state lawyer and/or a guidance on how to do so. Secondly, insufficient knowledge of Estonian, or other languages (English, German, Russian) which are widely spoken in Estonia, creates a serious barrier for asylum-seekers to find information and get in contact with one of the eight alternative state legal aid lawyers. Beyond these hurdles, it would still remain up to the discretion of both the current and alternative lawyers to consent to transferring the case from one to the other. Similar obstacles exist concerning the complaint and removal procedure. While there seems to have been only a few cases where asylum-seekers have applied to have their legal aid representative replaced, this may not be fully indicative of the actual need as asylum-seekers may simply not know of the option, be incapable of filing the complaint in Estonian on their own, or fear a negative outcome to their case if they raise a complaint.

---

<sup>141</sup> Riigi Õigusabi Infosüsteem (RIS) in Estonian.

<sup>142</sup> Estonian Bar Association, e-mail correspondence with UNHCR, 01.08.2018.

<sup>143</sup> Section 20 (1) of the SLAA.

<sup>144</sup> *Advokatuuriseadus*, 21.03.2001, RT | 2001, 36, 201, Section 16, available at: <https://www.riigiteataja.ee/akt/131052018015>.

<sup>145</sup> Estonian Bar Association, 01.08.2018 e-mail.

<sup>146</sup> Code of Conduct of the Estonian Bar Association, 08.04.1999, Section 2 (4), available at: <https://bit.ly/2OGETp1>.

<sup>147</sup> Estonian Bar Association, 01.08.2018 e-mail.

<sup>148</sup> *Ibid.*

<sup>149</sup> Section 20 (31) of the SLAA.

<sup>150</sup> Estonian Bar Association, 01.08.2018 e-mail.

## 4. ACCESS TO LEGAL AID WHEN DENIED ACCESS TO THE TERRITORY

---

From the moment an alien approaches the border of a country, four scenarios are possible:

- (i) the alien is granted permission to enter the territory on regular immigration grounds (visa, residence permit, etc.);
- (ii) the alien is denied entry and transferred back for readmission by the country from which they arrived;
- (iii) the alien submits an application for asylum, is granted the right to enter and remains in the territory until the conclusion of the asylum procedure; or
- (iv) the alien's asylum application is rejected at the border and they are returned to the country from which they arrived.

This section focuses on access to legal aid in Estonia in situation (ii).

### RELEVANT STANDARDS IN INTERNATIONAL AND EU LAW

Under international law, aliens denied entry to the territory are entitled to an effective remedy against *refoulement*.

As explained in [Section 2](#) above, Article 13 of the ECHR and Article 47 of the Charter create an obligation on the State to protect an individual whose rights are violated and provide a way to redress the harm done through an effective remedy.<sup>151</sup> Again, the ECtHR has established that an effective remedy is one that can realistically be accessed in practice<sup>152</sup> and has automatic suspensive effect.<sup>153</sup>

Aliens summarily denied entry to the territory are of particular concern to UNHCR because they may be persons in need of international protection being denied their right to an effective remedy. It is important to remember that an alien's refugee status is not dependent upon recognition of such status by a national authority; rather, the recognition is a result of being a refugee and seeking protection on those grounds. In addition, the principle of *non-refoulement* applies to aliens whose need for international protection has not yet been determined.<sup>154</sup> As drawn out in *Hirsi Jamaa v. Italy* in [Section 2](#), summarily returned migrants may face a real risk of treatment contrary to Article 3 of the ECHR, and thus should be given an opportunity to apply for asylum.<sup>155</sup>

Directive 2008/115/EC (the EU Returns Directive) provides for common standards and procedures for returning illegally staying non-EU nationals. It, too, highlights that "Member States shall take due account of and respect the principle of *non-refoulement* [when implementing the Directive]."<sup>156</sup> This includes "postpon[ing] removal when it would violate the principle of *non-refoulement*"<sup>157</sup> and "be[ing] afforded an effective remedy to appeal against...

---

<sup>151</sup> Article 13 of the ECHR; Article 47 of the Charter.

<sup>152</sup> *Conka*, 51564/99, ECtHR.

<sup>153</sup> *Jamaa v. Italy*, 27765/09, ECtHR.

<sup>154</sup> UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), available at: <https://bit.ly/2laCJHw>.

<sup>155</sup> *Ibid.*

<sup>156</sup> European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, Article 5, available at: <http://www.refworld.org/docid/496c641098.html>.

<sup>157</sup> *Id.* at Article 9 (1)(a).

decisions related to return.”<sup>158</sup> Finally, relevant authorities are also to “ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid.”<sup>159</sup>

## NATIONAL STANDARDS

Under Estonian law, aliens denied the right to entry may appeal the decision and are entitled to legal aid in order to do so.

The OLPEA stipulates that, “[a]n alien who has not been granted permission to enter Estonia may file an action with the administrative court in the procedure provided for in the CACP”. While the CACP makes provisions for procedural assistance (covering the cost of legal assistance),<sup>160</sup> the SLAA grants state legal aid to natural persons not domiciled in Estonia only if it “arises from an international obligation binding upon Estonia.”<sup>161</sup> These international obligations include the principle of *non-refoulement*,<sup>162</sup> and the fundamental right to an effective remedy, including provision of legal aid discussed above.<sup>163</sup>

The AGIPA does not apply in this context unless an individual expressly and immediately articulates a wish to apply for asylum.<sup>164</sup> In such a case, the individual is referred to the national asylum procedure (discussed in Section 5).

## CURRENT PRACTICE

In a study conducted by the European Migration Network and Tallinn University (the INFORM Report), data was collected from interviews with asylum-seekers, state officials and NGOs on legal and procedural information for asylum-seekers in Estonia. The INFORM Report notes that “[i]ndividuals who are refused admission to Estonia at the border...are generally not informed immediately that they can apply for asylum instead.”<sup>165</sup>

The EHRC has observed that there is a general lack of access to state legal aid at border crossing points. In addition, the EHRC has not been able to provide free legal counselling or information to aliens at Estonian border crossing points or transit zones. Thus, it appears rather difficult for individuals to exercise their right to legal aid when denied entry at the border. These circumstances increase the risk that aliens denied entry at the border lack realistic access to an effective remedy against a refusal of entry to the territory.

State legal aid, though guaranteed for the contestation of refusal of entry, does not appear to be a viable option in practice because of procedural requirements under the SLAA. An alien is required to first apply for state legal aid with an administrative court before receiving such support. In remote locations like the border, it is unlikely that aliens have an effective opportunity to apply for or be granted such aid. In essence, this seems to imply that aliens have little opportunity to invoke their right to seek a full and effective remedy.

<sup>158</sup> *Id.* at Article 13 (1).

<sup>159</sup> *Id.* at Article 13 (4).

<sup>160</sup> Section 110 of the CACP.

<sup>161</sup> Section 6 (11) of the SLAA.

<sup>162</sup> Article 33 of the 1951 Refugee Convention.

<sup>163</sup> Article 47 of the Charter; Article 13 of the ECHR.

<sup>164</sup> Section 3 (3) of the AGIPA. (“An application for international protection is an application submitted by an alien in any way with a view to be recognised as a refugee or a person eligible for subsidiary protection and to be granted international protection.”); Section 14 (1) of the AGIPA. (“An application for international protection shall be submitted to the Police and Border Guard Board immediately after entering Estonia.”)

<sup>165</sup> Raivo Vetik and Ave Lauren, *Legal and Procedural Information For Asylum Seekers in Europe: Estonia Report*, Tallinn University and European Migration Network, p. 10, available at: <https://bit.ly/2EXbVsZ>.



## RECOMMENDATIONS

Legally and procedurally, the Estonian legislation (OLPEA) is in line with Article 13 of the ECHR, Article 47 of the Charter, and protection against *non-refoulement* in the EU Returns Directive. It provides aliens who are denied entry with the right to an effective remedy through appeal. In practice, however, this legal right appears difficult to exercise. Aliens at border crossing points in Estonia do not have access to immediate legal aid through NGOs. In addition, the mechanisms to apply for state legal aid in an administrative court remain complex and removed from the border's context.

**Recommendation 1:** To strengthen the national safeguards by providing a realistic possibility to seek and receive state legal aid for an effective appeal as well as gaining access to NGOs who are willing to provide legal assistance in such cases.

# 5. ACCESS TO LEGAL AID THROUGHOUT THE ASYLUM PROCEDURE

## 5.1 Information at the border and in detention facilities

### RELEVANT STANDARDS IN EU LAW

Under EU law, relevant authorities must proactively identify potential applicants' wish to apply for international protection and provide them with information on the possibility to do so and interpretation services at the border and in detention facilities.

The APD provides that “[w]here there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points...may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so.”<sup>166</sup>

The key language of “indications” and “may wish,” shows that asylum-seekers do not need to explicitly request international protection. Instead, relevant authorities have the obligation to recognize a potential applicant. Indeed, the EU Commission Recommendation establishing a common *Practical Handbook for Border Guards (Schengen Handbook)* provides that the “defining element” of an application for international protection is “the expression of fear of what might happen upon [the individual’s] return.”<sup>167</sup> Following this, persons seeking asylum are entitled to information about the possibility to apply for international protection. Language barriers should not impede access to legal assistance or information. The APD stipulates that “[i]n those detention facilities and crossing points,” arrangements must be made “for interpretation to the extent necessary to facilitate access to the asylum procedure.”<sup>168</sup>

Art 8(2) APD further lays down an obligation on Member States to ensure effective access of organizations and persons providing advice and counselling to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organizations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States.

### PROPOSED ADDITIONAL STANDARDS UNDER EU LAW

Relevant authorities must proactively identify potential applicants' need for international protection and provide them with information on the possibility to apply and with interpretation services at the border and in detention facilities. Applicants must also be informed of the right to free legal assistance and representation at all stages of the procedure, and provided with such.

COM(2016)467/F1 (“proposed Asylum Procedures Regulation” or “proposed APR”) is still in the proposal stage, but represents the future direction of the APD. When promulgated, it will become immediately enforceable as law in all Member States. Regarding information at the border or in detention, the proposed APR states, “[w]

<sup>166</sup> Article 8 (1) of the APD.

<sup>167</sup> The European Commission, *Commission Recommendation establishing a common “Practical Handbook for Border Guards (Schengen Handbook)” to be used by Member States’ competent authorities when carrying out the border control of persons*, C(2006) 5186 final, 7 November 2006, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015010%202006%20INIT>.

<sup>168</sup> Article 8 (1) of the APD.



here there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may need international protection, the responsible authorities shall inform them of the possibility to apply for international protection.”<sup>169</sup> It then goes on to highlight particular groups of people that would need to be informed, including unaccompanied children, those suffering from mental or other disorders, and those arriving from a specific country of origin due to a well-known situation in that country.<sup>170</sup>

Both the obligation of proactivity and informing individuals of the possibility to apply remain the same between the APD and proposed APR. The key difference in language, however, is “may need” in the proposed APR rather than “may wish to make an application” in the APD. Relevant authorities, then, while still proactive, would be required to search for an individual’s *need* for international protection rather than their *intent* to apply for it. Finally, the proposed APR’s focus on persons to be informed further contextualizes those vulnerable persons that are most likely to need information about the asylum procedure.

Completely distinct from the APD, the proposed APR envisions free legal assistance and representation as a right that applicants “shall be informed of...at all stages of the procedure”<sup>171</sup> as well as something that “Member States shall, at the request of the applicant, provide...in the administrative procedure.”<sup>172</sup> Further discussion of how this assistance is defined is provided in [Subsection 5.3.2](#) of this report. The important aspect to highlight for now is the emphasis on “all stages of the procedure,” which, arguably, could include early legal assistance and advice even before an individual requests international protection.

---

## SELECT INTERNATIONAL PRACTICE

The ELA Report discussed in [Section 1.1](#) noted the success of early legal advice for asylum-seekers.<sup>173</sup> Although “early” spanned many stages of the asylum procedure, it did still encompass referral into the asylum process in its definition and analysis.<sup>174</sup> While the impact of legal advice in the pre-application stage was not studied independently, the ELA Report did note that successful early legal advice pilots in the UK included pre-screening advice and representation.<sup>175</sup>

The ECRE/ELENA Legal Note on Access to Legal Aid (ECRE/ELENA Legal Note) also highlighted the success of Portuguese border initiatives. In Portugal, the Immigration Borders Service is required to immediately inform a UNHCR representative and the Portuguese Council for Refugees that an application for asylum has been lodged at the border.<sup>176</sup> This “helps to ensure that asylum applicants at the borders are, at the very least, able to access legal aid provided by the Portuguese Council for Refugees” at the earliest opportunity.<sup>177</sup>

---

<sup>169</sup> Article 30 (1) of the proposed APR.

<sup>170</sup> *Ibid.*

<sup>171</sup> Article 14 (2) of the proposed APR.

<sup>172</sup> *Id.* at Article 15 (1).

<sup>173</sup> Asylum Aid, *Providing Protection*, p. 28.

<sup>174</sup> *Id.* at p. 7.

<sup>175</sup> *Id.* at p. 14.

<sup>176</sup> European Council on Refugees and Exiles, *ECRE/ELENA Legal Note on Access to Legal Aid in Europe*, November 2017, Legal Note #02, p. 7, available at: <http://www.refworld.org/docid/5a128fb14.html>.

<sup>177</sup> *Ibid.*

## NATIONAL STANDARDS

Under Estonian law, the PBGB must proactively identify potential applicants' wish to apply for international protection and provide them with information on the possibility to do so and interpretation services at the border and in detention facilities.

The AGIPA similarly calls for proactivity and provision of information at the border and in detention facilities. "Where there is a reasoned ground to believe that aliens staying in detention facilities or at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, the Police and Border Guard Board...shall ensure provision of...information on the possibility to do so."<sup>178</sup> As with the APD, the AGIPA obliges the PBGB to recognize and inform potential applicants, rather than individuals having to explicitly request protection and/or information.

As for interpretation services, the AGIPA notes that "[t]he Police and Border Guard Board may involve an interpreter in the translation of procedural acts by using means of communication."<sup>179</sup> Here, the use of "may" refers to the means of communication from which the PBGB can select (phone, video, etc.) and not the interpretation service itself.

Under the current law, applicants are not entitled to early legal advice in determining whether they should apply for international protection. The ELA Report's analysis of Estonia noted a "general resistance to the provision of [early legal advice] at the pre-application stage."<sup>180</sup> It found that "[c]ase owners were clear that lawyers should not advise applicants to seek asylum," as it was felt that seeking asylum was a "personal decision."<sup>181</sup> Case owners were also quoted saying "only preliminary procedures [were] done at the border" and that a lawyer's presence at the border "would probably disturb the work of border guards."<sup>182</sup> Asylum-seekers interviewed, however, consistently suggested that legal advice should be available as early as possible.<sup>183</sup>

The AGIPA does not provide any specific regulations concerning effective access to organizations or individuals providing advice and/or counselling to asylum-seekers present at border crossing points. Nor does the AGIPA stipulate any rules governing the presence of such organizations or persons at such crossing points. According to the Estonian Ministry of the Interior, the lack of specific regulation does not mean, however, that the law somehow restricts asylum-seekers' right to be in contact with NGOs or receive assistance from them. Point 7 of section 10(2) AGIPA foresees an unconditional right of applicants to communicate with a number of organizations, including NGOs, irrespective of where an application is registered. To enable this right to be exercised, the PBGB officers are obliged to provide an information leaflet giving contacts of different relevant institutions.<sup>184</sup>

---

<sup>178</sup> Section 14 (3<sup>1</sup>) of the AGIPA.

<sup>179</sup> *Id.* at Section 30 (3).

<sup>180</sup> *Id.* at p. 26.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Id.* at p. 25.

<sup>183</sup> *Ibid.*

<sup>184</sup> Ministry of the Interior, reply to UNHCR, 08 April 2019.

## CURRENT PRACTICE

According to the latest reports submitted by Estonia to the Human Rights Committee pursuant to the International Covenant on Civil and Political Rights (the ICCPR State Reports), PBGB officers working on borders “are trained to notice people who wish to apply for international protection.”<sup>185</sup> It notes that, “any indication by the alien that returning to their homeland is impossible is sufficient for the registration and acceptance of the application.”<sup>186</sup> While the organization of trainings focusing on the rights stipulated in EU law is to be commended, the INFORM Report, referenced earlier in [Section 4](#), found that some interviewees suggested that officials were discouraged from being proactive in informing potential asylum-seekers of the right to seek asylum.<sup>187</sup> Instead, the interviewees felt that an applicant would need to clearly state a desire to seek asylum before officials would initiate proceedings and provide information on the procedure.<sup>188</sup> The ELA Report also made mention of “anecdotal reports of border guards ignoring asylum claims.”<sup>189</sup>

In December 2017, UNHCR was made aware of a case registered by the EHRC involving an asylum-seeker who was initially denied access to the asylum procedure by the PBGB. Though the incident occurred at the PBGB’s headquarters in Tallinn and not at the border, it is still worth examining. An asylum-seeker from Tajikistan arrived in Estonia with a visa and tried to submit an application for international protection on the basis of persecution for his sexual orientation. He was told that Estonia does not accept refugees on sexual orientation grounds and that he would need to be fleeing from a war zone to qualify for protection. Nevertheless, the asylum-seeker was persistent and his application was eventually accepted. He received refugee status in April 2018. While this applicant had the fortune of already possessing a visa and being able to persistently advocate for his rights, not all asylum-seekers are in similar positions. Such initial denials of access to the asylum procedure are made even more problematic in the context of border crossing points and detention, where applicants have even less recourse to be heard.

According to the INFORM Report, once an application has been successfully submitted, the PBGB distributes leaflets (available in 11 languages) which explain the Estonian asylum procedure.<sup>190</sup> These leaflets are provided in all PBGB facilities where an application is made, including at the border, in detention facilities and inside the territory.<sup>191</sup> A step-by-step guide to the asylum procedure is available online in English.<sup>192</sup> Interpreters are also available for individuals who cannot read or are otherwise visually or audio impaired.<sup>193</sup> This includes interpretation into select rare languages.<sup>194</sup> Finally, this information will be repeated later in the process by counsellors at detention or accommodation centres.<sup>195</sup> In practice, it remains unclear how consistently information is provided at first contact. During a monitoring visit to the Harku detention centre by the EHRC in May 2018, one asylum-seeker said “he was not aware of the option to apply for asylum” until he arrived at the detention centre and was told of it by the staff.<sup>196</sup>

---

<sup>185</sup> UNHRC, *Consideration of reports submitted by States parties: Estonia*, 2018, CCPR/C/EST/4, para. 122.

<sup>186</sup> *Ibid.*

<sup>187</sup> Vetik, *Legal and Procedural Information: Estonia Report*, p. 10.

<sup>188</sup> *Id.* at p. 9.

<sup>189</sup> Asylum Aid, *Providing Protection*, p. 24.

<sup>190</sup> Vetik, *Legal and Procedural Information: Estonia Report*, p. 10.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Id.* at p. 11.

<sup>193</sup> *Ibid.*

<sup>194</sup> Estonian Ministry of the Interior, *Asylum, Migration and Integration Fund: Examples of National Projects*, p. 3, available at <https://bit.ly/2TwJb4t>.

<sup>195</sup> Vetik, *Legal and Procedural Information: Estonia Report*, p. 11.

<sup>196</sup> Monitoring visit to Harku detention centre by the EHRC on 23 May 2018.

## RECOMMENDATIONS

In identifying potential applicants for international protection, the AGIPA differs from the APD by calling for “a reasoned ground to believe” rather than “indications.” This language places the PBGB and their subjective impressions as the main frame of reference for identifying potential applicants, rather than the applicant’s own actions and circumstances.

**Recommendation 2:** To revise the wording in Section 14(31) of the AGIPA in order to bring it in line with Article 8(1) APD. Specifically, replacing “where there is a reasoned ground to believe” with “where there are indications.”



In UNHCR’s view, ensuring effective access to organizations and persons providing free legal advice or counselling to asylum-seekers at border crossing points positively contributes to full enjoyment of rights by the applicants as well as the fair and efficient processing of their claims. While information about such organizations is already available in informational materials which are shared with asylum-seekers at the time of registration, still the national asylum legislation in Estonia currently seems to be out of step regarding ensuring effective access to these NGOs.

**Recommendation 3:** To amend the AGIPA with provisions stipulating the requirements and conditions ensuring effective access to non-government organizations and persons providing legal advice and counselling to applicants who are present at border crossing points.



Early legal advice has been shown to increase the confidence of all parties in the decision-making process, improve the quality of decisions, and assist in making the process less adversarial and more collaborative.<sup>197</sup> To take advantage of similar benefits to its national asylum procedure, Estonia may consider offering free legal advice at the earliest stage of the asylum procedure, and also in situations when an individual decides whether or not to seek international protection. This will inevitably also build trust between applicants and legal advisors, leading to more successful collaboration and information down the line.

**Recommendation 4:** To provide free legal advice to individuals at the earliest stage of the asylum procedure, also to those individuals who may consider applying for asylum.

---

<sup>197</sup> Asylum Aid, *Providing Protection*, 2014.

## 5.2 Special procedural guarantees for vulnerable applicants

### RELEVANT STANDARDS IN INTERNATIONAL AND EU LAW

Under international and EU law, applicants in need of special procedural guarantees, including unaccompanied children, are entitled to adequate support and sufficient time for effective access to the asylum procedure. In some cases, they need to be exempted from certain procedures, granted the right to enter the territory, as well as provided with state legal aid when requesting the right to remain in the territory.

The APD recognizes that, due to various circumstances and/or conditions, there are certain applicants that require special procedural guarantees during the asylum procedure.<sup>198</sup> The APD understands applicants in need of these special guarantees to be those “whose ability to benefit from the rights and comply with the obligations provided...is limited due to individual circumstances.”<sup>199</sup> Such applicants “shall [be] assess[ed] within a reasonable period of time after an application for international protection is made whether [they are] in need of special procedural guarantees.”<sup>200</sup>

Applicants in need of special procedural guarantees shall then be “provided with adequate support in order to allow them to benefit from the rights and comply with [their] obligations...throughout the duration of the asylum procedure.”<sup>201</sup> Here, the APD’s language is limited to “adequate support.” The Preamble of the APD elaborates: “applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.”<sup>202</sup>

The consequences of not providing “adequate support” is unclear, but the APD does deliberately carve out a few exceptions.

If an applicant:

- is a person in need of special procedural guarantees,
- as a result of torture, rape or other serious forms of psychological, physical or sexual violence, and
- his/her application is reviewed under accelerated or border procedure, but
- cannot be provided with adequate support,

“Member States shall not apply, or shall cease to apply, Article 31(8) [accelerated procedure] and Article 43 [border procedures].”<sup>203</sup> The consequences of the above scenario still occurring and safeguards against this are discussed in [Section 6.1](#). The key points to take away are that applicants with special procedural guarantees are entitled to “adequate support, including sufficient time,” which in some cases should result in the avoidance or cessation of the accelerated or border procedure.

<sup>198</sup> Recital 29 of the APD. “Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.”

<sup>199</sup> *Id.* at Article 2 (d).

<sup>200</sup> *Id.* at Article 24 (1).

<sup>201</sup> *Id.* at Article 24 (3).

<sup>202</sup> *Id.* at Recital 29.

<sup>203</sup> *Id.* at Article 24 (3).

Unaccompanied children are a vulnerable group subject to specific guarantees in addition to those outlined above. First of all, they must be appointed a legal guardian.<sup>204</sup> This legal guardian must provide the unaccompanied child with legal information about “the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview.”<sup>205</sup> The APD also makes clear that unaccompanied children, through their legal guardians, are entitled to all the same legal and procedural information provided at first instance under Article 19 (discussed in greater detail in [Subsection 5.3.2](#)) as normal applicants. This includes procedures with withdrawal of international protection (discussed further in [Section 6.3](#)).<sup>206</sup> Finally, as is already provided for applicants with special procedural guarantees, an unaccompanied child who must request the right to remain in the territory in court shall be provided interpretation services, legal assistance and at least one week to prepare the request.<sup>207</sup>

The Committee on the Rights of the Child has stated, in relation to unaccompanied asylum-seeking children’s right to legal assistance, that States are under the obligation to take all necessary measures to ensure adequate representation of the child’s best interests.<sup>208</sup> It is important to note that the Committee has explicitly acknowledged that in asylum cases, children should, in addition to the appointment of a guardian, be appointed a legal representative (lawyer).<sup>209</sup>

In UNHCR’s view, the rights to legal assistance and representation are essential safeguards, especially in complex European asylum and migration procedures. Asylum-seeking children are often unable to articulate cogently the elements relevant to an asylum claim without the assistance of a qualified counsellor, as they are not sufficiently familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are identified accurately and early. The efficiency of first instance procedures is thereby improved.<sup>210</sup>

## PROPOSED ADDITIONAL STANDARDS UNDER EU LAW

Unaccompanied children are entitled to legal and procedural information regarding the possibility, how, and where to apply for international protection.

The proposed APR provides for many of the same guarantees as the APD. The only explicit deviation is the proposed APR’s emphasis on information about the possibility, how, and where to apply for international protection. Unaccompanied children are the first enumerated group of specific vulnerable applicants to be informed at border crossing points and in detention facilities (as discussed in greater detail in [Section 5.1](#)).<sup>211</sup> An unaccompanied child’s guardian is also explicitly required by the proposed APR to “assist and properly inform the unaccompanied minor of how and where an application is to be lodged.”<sup>212</sup>

<sup>204</sup> Article 25 (1)(a) of the APD.

<sup>205</sup> *Id.* at Article 25 (1)(b).

<sup>206</sup> *Id.* at Article 25 (4).

<sup>207</sup> *Id.* at Article 46 (7).

<sup>208</sup> See United Nations Committee on the Rights of the Child, *General Comment No. 14 on the right of the Child to have his or her best interests taken as primary consideration* (article 3 para.1), 2013, para. 44.

<sup>209</sup> United Nations Committee on the Rights of the Child, *General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin* [hereinafter CRC General Comment N° 6], 2005, para. 36: “In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.”

<sup>210</sup> UN High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (Council Document 14203/04, *Asile 64*, of 9 November 2004), 10 February 2005, Comment on Article 13. Available at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

<sup>211</sup> Article 30 (1)(a) of the proposed APR.

<sup>212</sup> *Id.* at Article 32 (1).

## SELECT INTERNATIONAL PRACTICE

The ECRE/ELENA Legal Note highlighted specific instances of positive state practice regarding children and individuals with special needs.<sup>213</sup> In Portugal, the Portuguese Refugee Council (acting as a legal aid provider) ensures that asylum-seeking children “are assisted and accompanied by a Legal Protection Officer in the interview before the asylum authorities.”<sup>214</sup> In Finland, though “legal aid does not usually cover a lawyer’s presence at the interviews for adult asylum applicants, it is covered in case[s] of an unaccompanied asylum-seeking child” and “applicants with special needs (for instance, traumatised victims of torture and illiterate individuals).”<sup>215</sup>

## NATIONAL STANDARDS

Under Estonian law, special needs of applicants must be fixed in writing and unaccompanied children shall be appointed a legal guardian for the performance of procedural acts.

The AGIPA carries similar provisions to EU law concerning special procedural guarantees to vulnerable applicants. It defines vulnerable applicants in the same way<sup>216</sup> and unaccompanied children are “appointed a representative for performance of procedural acts.”<sup>217</sup> An extra provision only found in the AGIPA is that “[t]he [PBGB] shall fix the special need of an applicant in writing.”<sup>218</sup> The AGIPA does not, however, make explicit provisions for legal aid, directly or through the representative, nor does it provide for exceptions to the accelerated procedure or border procedures. Although Item 5 of Section 10(2) of the AGIPA notes that applicants are entitled to “get support based on his or her special needs,” the kind and extent of such “support” remains undefined.<sup>219</sup>

Therefore, legal aid is not automatically provided and unaccompanied children are entitled to such aid only in court/criminal proceedings.<sup>220</sup> However, unaccompanied children’s legal guardians do have the opportunity to seek counselling provided by a special advisor available at the Vao accommodation centre. Effective access to the services of such an adviser still remains an issue since it depends very much on a legal guardian’s place of residence.

## CURRENT PRACTICE

The INFORM Report notes that persons in need of special procedural guarantees receive additional support and resources to ensure their well-being.<sup>221</sup> It also cites the PBGB stating that, as with all applicants, the procedure is tailored to address each applicant’s particular circumstances.<sup>222</sup> Because the number of applications is so small, the PBGB is able to offer a more individual-oriented service and specific provisions for different groups have not been necessary.<sup>223</sup>

<sup>213</sup> ECRE, *ECRE/ELENA Legal Note on Access to Legal Aid*.

<sup>214</sup> *Id.* at p. 8.

<sup>215</sup> *Id.* at p. 9.

<sup>216</sup> Section 15<sup>1</sup> (1) of the AGIPA. “An applicant with special needs is, in particular, a vulnerable person, such as a minor, an unaccompanied minor, a disabled person, an elderly person, a pregnant woman, a single parent with minor children, a victim of trafficking, a person with serious illness, a person with mental health problems and a victim of torture or rape or a person who has been subjected to other serious forms of psychological, physical or sexual violence.”

<sup>217</sup> *Id.* at Section 17 (9).

<sup>218</sup> *Id.* at Section 15<sup>1</sup> (4).

<sup>219</sup> *Id.* at Section 10 (2) Item 5).

<sup>220</sup> UNHCR, *Child Protection Workshop*, 2017, p. 4.

<sup>221</sup> Vetik, *Legal and Procedural Information: Estonia Report*, p. 10.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

Assessing those in need of special procedural guarantees can also be a subjective process. The EHRC reported the case of a blind asylum-seeker who submitted a request for state legal aid in proceedings regarding whether he was to be placed in detention. The administrative court dismissed his request. The EHRC assisted the asylum-seeker in his successful appeal against the decision. The Tallinn Circuit Court found that the administrative court had seriously violated procedural requirements and the Circuit Court annulled the decision. The Circuit Court also noted that the PBGB and the court of first instance disregarded the fact that the asylum-seeker had been blind since birth and thus belonged to a group of particularly vulnerable people.<sup>224</sup> In their written arguments during the proceedings however, the PBGB said that they “d[id] not agree that the applicant belong[ed] to a vulnerable group [or had] special needs.”<sup>225</sup>

In another example, an asylum-seeker who was approximately seven to eight months pregnant, submitted a state legal aid application to appeal against being placed in detention for up to two months. The application was rejected by the court, which also authorized the detention of the applicant.<sup>226</sup> The available materials of the case demonstrate that the examination of the asylum claim was not accelerated and the applicant’s vulnerability or special needs were not fixed in writing by the PBGB.

In general, throughout the EHRC’s practice and observation, asylum-seekers who have been pregnant, single parents with minor children, victims of trafficking, torture or rape, and/or persons with serious illnesses or mental health problems have been treated similarly to other applicants.

As for children, the Chancellor of Justice report revealed that, before 2016, the majority of unaccompanied children did not receive legal aid.<sup>227</sup> Their guardians had either never requested legal aid or were unaware of the possibility to do so.<sup>228</sup> Most of the children questioned by the Chancellor of Justice advisers were also not aware of the possibility to apply for legal aid.<sup>229</sup> Between 2014 and 2018, Estonia received no asylum applications from unaccompanied children. It therefore has not been possible to study such access to legal aid after the substantial amendments to the AGIPA made in 2016.

The Committee on the Rights of the Child in its feedback report during the 74th session urged Estonia to ensure that unaccompanied children are assigned a free and qualified lawyer immediately upon their arrival at the border.<sup>230</sup> According to some reports, in some cases the guardians (local municipalities) had not even attempted to utilize the right to state legal aid since they had not been informed about this right during the asylum procedure by the PBGB.<sup>231</sup> Legal aid is provided for victims of trafficking by specialized lawyers. For other children, a lawyer from the municipality may take care of the legal aspects of their case together with a child protection officer who performs the functions of a guardian.<sup>232</sup> Unaccompanied children’s guardians may also use free legal counselling services provided by the EHRC under a project with UNHCR.

---

<sup>224</sup> Tallinn Circuit Court, case 3-17-1361, 18 August 2017.

<sup>225</sup> In the original Estonian: “PPA ei nõustu, et kaebaja kuulub haavatavasse gruppi ning on erivajadustega taotleja, seega ta ei tohiks viibida KPK-s.”

<sup>226</sup> Tartu Administrative Court, case 3-16-892 and 3-16-894, 20 May 2016.

<sup>227</sup> The Chancellor of Justice advisers interviewed a number of unaccompanied children, including migrants and those seeking international protection, from 2012-2015. The report notes that no unaccompanied minors arrived from 2015 until the drafting of the report.

<sup>228</sup> Chancellor of Justice, Unaccompanied Minors Report, p. 28.

<sup>229</sup> *Ibid.*

<sup>230</sup> United Nations High Commissioner for Refugees, Feedback Report, Committee on the Rights of the Child, 74 Session, 16 January – 3 February 2017, p. 3.

<sup>231</sup> Kristiina Albi, *Saatjata sisserändajast alaealise vastuvõtmine* (Reception of unaccompanied migrant child), p. 439.

<sup>232</sup> UNHCR interview with officials from the National Social Insurance Board, 18 June 2018.



## RECOMMENDATIONS

To promote access to legal aid for unaccompanied children asylum-seekers and their guardians, Estonia may wish to make specific reference to their rights through its national legislation. There is also room for improving the practice of PBGB personnel in identifying persons in need of special procedural guarantees and addressing their particular needs. PBGB personnel need to be aware of national referral mechanisms and procedures and that they have at hand the contact information of relevant responsible institutions, including specialized child protection services, UNHCR and other organizations providing legal advice or other counselling services to asylum-seekers.

**Recommendation 5:** To organize comprehensive and standardized training programmes on the identification of vulnerable applicants for the PBGB personnel. Additionally, UNHCR recommends ensuring consistent enforcement of the obligation to record vulnerability and special needs as soon as possible, in accordance with national practice, and communicating this information to relevant stakeholders in order to provide necessary guarantees and support.



The provision of legal advice and counselling at an earlier stage in the asylum procedure will ensure access to necessary information and assist asylum-seeking children in elaborating and supporting their vulnerability claims (e.g., submitting specialized requests, medical records, etc.) as well as challenging possible negative decisions regarding their vulnerability. This will be also in line with the recommendation of the Committee on the Rights of the Child made to Estonia in 2017.

**Recommendation 6:** To amend relevant asylum legislation with provisions guaranteeing that unaccompanied children are assigned a free and qualified lawyer as soon as they are identified.

### 5.3 Legal assistance at first instance

#### 5.3.1 INFORMATION ON RIGHTS AND OBLIGATIONS DURING THE PROCEDURE

##### RELEVANT STANDARDS IN EU LAW

Under EU law, applicants are entitled to legal information regarding their rights and obligations during the asylum procedure as soon as possible after submission of their application, to enable them to exercise the rights guaranteed in the APD. Similarly, but distinct, applicants are entitled to legal information regarding reception conditions within 15 days.

The Asylum Procedures Directive notes that Member States and their relevant authorities are required to notify applicants of “the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities.”<sup>233</sup> They must also be furnished with information regarding “the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in [the QD], as well as of the consequences of an explicit or implicit withdrawal of the application.”<sup>234</sup> All of this means that Member States and their relevant authorities have an obligation to ensure applicants are fully informed of the procedural process from the start. Interpretation services are also guaranteed: applicants “shall be informed in a language which they understand or are reasonably

<sup>233</sup> Article 12 (1)(a) of the APD.

<sup>234</sup> *Ibid.*

supposed to understand.”<sup>235</sup> As for when this information shall be given, the APD stipulates, “in time to enable [applicants] to exercise the rights guaranteed in this Directive.”<sup>236</sup>

This is distinct, however, from the information laid out in the Reception Conditions Directive. Where the APD outlines rights and obligations related to the asylum procedure, the RCD concerns the treatment of applicants within the territory of the hosting Member State, including housing, food, and basic health care. The RCD notes that applicants for international protection shall be informed of “any established benefits and of the obligations with which they must comply relating to reception conditions” as well as “information on organizations or groups of persons that provide specific legal assistance and organizations that might be able to help or inform them concerning the available reception conditions, including health care.”<sup>237</sup> The RCD, like the APD, provides interpretation services (“in writing [or orally] and, in a language that the applicant understands or is reasonably supposed to understand”).<sup>238</sup> As for timing, this information is to be provided “within a reasonable time not exceeding 15 days after [applicants] have lodged their application for international protection.”<sup>239</sup>

## NATIONAL STANDARDS

Under Estonian law, applicants are entitled to legal information regarding their rights and obligations during the asylum procedure and regarding reception conditions within 15 days.

The AGIPA entitles applicants for international protection to “receive information...concerning his or her rights and obligations, including information concerning legal assistance, assistance relating to reception conditions, organizations providing information, time-frame for proceedings for international protection and the consequences of failure to comply with obligations.”<sup>240</sup> It also clearly provides for interpretation services (“orally and in writing in a language which he or she understands”).<sup>241</sup> The timing of this information, however, is given as “at the earliest opportunity but no later than within 15 days as of the submission of the application.”<sup>242</sup>

Here, Section 10 of the AGIPA has combined provisions from both Articles 8(1) of the APD and 5(1) of the RCD. In combining the provisions, however, the AGIPA has not provided the correct timing on information on the asylum procedure. In conjunction with Recitals 27-28,<sup>243</sup> UNHCR understands the APD’s “in time to enable them to exercise the rights guaranteed in this Directive” to mean that an asylum-seeker should receive information as soon as possible after expressing a wish to apply for international protection. The AGIPA’s “no later than 15 days as of the submission of the application” is too long a time-frame for applicants to be notified of their rights and obligations related to the asylum procedure; they could jeopardize their applications by missing crucial deadlines or unknowingly fail to comply with set obligations. Instead, this time-frame is only appropriate for information concerning reception conditions; information on benefits and basic healthcare is not instrumental to an asylum-seeker’s request for international protection.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> Article 5 (1) of the RCD.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> Section 10 (1) of the AGIPA.

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> Recitals 27-28 of the APD. “(27) Given that third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection, they should comply with the obligations, and benefit from the rights, under this Directive and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. To that end, Member States should register the fact that those persons are applicants for international protection as soon as possible. (28) In order to facilitate access to the examination procedure at border crossing points and in detention facilities, information should be made available on the possibility to apply for international protection. Basic communication necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements.”

## CURRENT PRACTICE

The INFORM report notes that applicants are given information both orally and in writing regarding the guidelines set out in Section 10(2)1) of the AGIPA in addition to “materials on organizations they may contact if they wish to receive additional information or consultation...including the [EHRC] and UNHCR.”<sup>244</sup>

Neither UNHCR nor EHRC have been able to directly monitor whether relevant legal information is provided to asylum-seekers by the PBGB at the border. Of the asylum-seekers who applied for asylum at the border and were later counselled by the EHRC, none reported receiving information about the possibility to receive legal aid from the EHRC. The EHRC has pointed out that one reason for this could be that the number of asylum-seekers who apply for international protection at the border is very low. Only 25 people did so in 2017, compared to the 68 that lodged their application inside the territory of Estonia. In order to increase awareness about its counselling services for asylum-seekers, the EHRC has sent its leaflets specifically to PBGB border crossing points.

In terms of timing, the Ministry of Interior has reported that leaflets and oral explanations are provided whenever an application for international protection is made.<sup>245</sup> Applicants also confirm by signature that they have received this information.<sup>246</sup> In the case that a translation is necessary, the Ministry of the Interior notes that the materials are translated as soon as possible, within the set time-frame.<sup>247</sup> UNHCR has not yet been able to directly monitor the consistency nor time-frames of such practice.

As for detention, RCD 5(1) requires Member States to ensure that applicants are informed about organizations that provide specific legal assistance. This provision is properly implemented in Estonia; detained applicants are provided with counselling and assisted with applying for state legal aid. Additionally, detained asylum-seekers are provided with information on how to contact UNHCR or different Estonian NGOs, including the EHRC.

Recently, the Ministry of the Interior and Ministry of Social Affairs initiated a joint review of the written materials distributed and explained to individual applicants and beneficiaries of international protection.<sup>248</sup> As a result, the Ministries report that new materials are being drafted, taking into account the suggestions of, among others, UNHCR, the International Organization for Migration (IOM), and local NGOs.<sup>249</sup> The new materials are expected to be finalized by the end of August 2018.<sup>250</sup>

---

<sup>244</sup> Vetik, *Legal and Procedural Information: Estonia Report*, p. 24.

<sup>245</sup> Estonian Ministry of the Interior, e-mail correspondence with UNHCR, 31.07.2018.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> Estonian Ministry of the Interior, 31.07.2018 e-mail.

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

## RECOMMENDATIONS

UNHCR has noted the time-frame discrepancy between the APD, RCD and AGIPA in past comments and on earlier drafts of the AGIPA.<sup>251</sup> However the AGIPA is still not in line with the APD.

**Recommendation 7:** To amend Section 10(2) of the AGIPA by:

- a) Deleting the words “not later than within 15 days” in Item 1 of Section 10(2) and revising the wording as follows: “receive information, immediately after submission of the application for international protection orally and in writing in a language which he or she understands concerning the procedure to be followed, his or her rights and obligations during the procedure, including information concerning legal assistance, time-frame for proceedings for international protection and the consequences of failure to comply with obligations;”
- b) Adding a new Item 11 with the following provision: “to receive within a reasonable time not exceeding 15 days after lodging of their application for international protection, orally and in writing in a language that the applicant understands, information on any established benefits and on the obligations relating to reception conditions which they must comply with, as well as information on organizations or groups of persons that provide specific legal assistance and organizations that might be able to help or inform them concerning available reception conditions, including health care.”

### 5.3.2 LEGAL AID DURING THE ADMINISTRATIVE (FIRST INSTANCE) PROCEDURE

#### RELEVANT STANDARDS IN EU LAW

Under EU law, during procedures at first instance, applicants are guaranteed, on request, free legal and procedural information in light of their particular circumstances by either relevant authorities or other NGOs.

The APD recognizes that it is in “the interests of both Member States and applicants to ensure a correct recognition of international protection needs already at first instance.”<sup>252</sup> It stipulates that “Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant’s particular circumstances.”<sup>253</sup> There are two key points in this provision. First, applicants now have a proactive role in “request[ing]” legal and procedural information. Relevant authorities do not have a positive duty to provide such information without being prompted by a request. Second, “in light of an applicant’s particular circumstances” indicates that the information cannot be overly broad, but must be specific to the applicant. These circumstances could relate to the applicant’s gender, age, particular vulnerability, etc.; the APD leaves the language open to interpretation.

When it comes to the actors involved in providing free legal and procedural information, the APD provides flexibility. It recognizes that “[i]t would be disproportionate to require Member States to provide such information only through the services of qualified lawyers.”<sup>254</sup> Thus, “Member States may provide that the legal and procedural information free of charge referred to in Article 19 is provided by non-governmental organizations, by

<sup>251</sup> UN High Commissioner for Refugees (UNHCR), *Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the revised Law Proposal amending the Act on Granting International Protection to Aliens and other related laws (draft law 81 SE)*, March 2016, available at: <http://www.refworld.org/docid/5829b4e44.html>; UNHCR, *Additional Observations by the UNHCR RRNE on amending the AGIPA*, August 2015.

<sup>252</sup> Recital 22 of the APD.

<sup>253</sup> Article 19 (1) of the APD; Recital 22 of the APD.

<sup>254</sup> Recital 22 of the APD.



professionals from government authorities or from specialized services of the State.”<sup>255</sup> The State is not confined to being the sole source of information during first instance procedures and others may also fulfil this obligation. Importantly, the required provision of legal assistance does not prohibit the State from going beyond this standard and providing legal representation at first instance as well.<sup>256</sup> In such cases, Article 19 does not apply.<sup>257</sup>

During the substantive interview, relevant authorities are required to “select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview.”<sup>258</sup> Applicants are also permitted “to bring to the personal interview a legal adviser or other counsellor,” though “Member States may stipulate that the legal adviser or other counsellor may only intervene at the end of the personal interview.”<sup>259</sup> Thus, at the substantive interview stage, only legal assistance in the form of interpretation services is mandatory, while legal representation at the interview is optional.

<sup>255</sup> *Id.* at Article 21 (1).

<sup>256</sup> *Id.* at Article 20 (2).

<sup>257</sup> *Ibid.*

<sup>258</sup> *Id.* at Article 15 (3)(c).

<sup>259</sup> *Id.* at Article 23 (3).

## PROPOSED ADDITIONAL STANDARDS UNDER EU LAW

Applicants are entitled to free legal aid at all stages of the procedure, including information in light of their particular circumstances, preparation of the application and participation in the interview.

As noted previously, applicants must be informed of the right to request and be provided “free legal assistance and representation at all stages of the procedure.”<sup>260</sup> The proposed APR defines legal assistance and representation at first instance as including:

- the provision of information on the procedure in the light of the applicant’s individual circumstances;
- assistance in the preparation of the application and personal interview, including participation in the personal interview as necessary; [and]
- explanation of the reasons for and consequences of a decision refusing to grant international protection as well as information on how to challenge that decision.<sup>261</sup>

Several things are worth noting here. First, rather than applicants simply having the right to legal aid on request, they are also entitled to be *informed* of the right to request it. This mitigates against situations in which applicants do not exercise a right because they are not aware of it. Second, rather than legal aid entitlements being attached to specific stages of the procedure, the proposed APR provides the ability to request legal aid at “all stages.” This, again, lends itself to more expansive practices, including other forms of early legal assistance. Finally, while the proposed APR mimics the APD in part (a), the proposed APR sets a higher standard in providing “assistance in the preparation of the application” as well as “participation in the personal interview [by a legal representative] as necessary.”

## SELECT INTERNATIONAL PRACTICE

The ELA Report highlighted the success of pilot programmes and practices in the UK and Ireland related to the provision of early legal advice at first instance. In the UK, the Solihull Pilot “facilitated an interactive and flexible process before, during, and after the asylum interview with greater decision maker/legal representative liaison and NGO/UNHCR involvement in oversight and evaluation.” The evaluation found, as a result, higher initial grant rates, lower appeal rates, neutral costs, and a qualitatively significant change in culture.<sup>262</sup> The UK also designed the Early Legal Assistance Project and developed a system in which an applicant “was referred to a legal representative within five days of lodging an application and prior to the substantive interview the legal representative would assist the applicant in the production of a witness statement.”<sup>263</sup> This project also saw success in the improved quality of decision making and increasing confidence in asylum-seekers’ initial decisions.<sup>264</sup> Witness statements in particular received direct praise; “[they] added credibility to the asylum system, ensuring that a minimum level of information/evidence was available at the earliest opportunity for all cases.”<sup>265</sup>

In Ireland, a local NGO, the Irish Refugee Council, undertook to provide early legal advice to asylum-seekers. This involved having a solicitor conduct an initial interview followed by preparing a detailed statement of the claim.<sup>266</sup> The process often required several appointments and an interpreter so that all available evidence, including

<sup>260</sup> Article 14 (2) of the proposed APR.

<sup>261</sup> *Id.* at Article 15 (2).

<sup>262</sup> Asylum Aid, *Providing protection*, p. 14.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Id.* at p. 17.

<sup>265</sup> *Id.* at p. 15.

<sup>266</sup> *Id.* at p. 20.

submissions being made prior to or (sometimes in light of issues raised) during an interview, was included.<sup>267</sup> All of the Irish stakeholders interviewed for the ELA report noted two broad reasons why the provision of early legal advice was important: “trust and efficiency” and “to move the system away from an adversarial stance and towards a greater inquisitorial and collaborative process.”<sup>268</sup>

Estonian decision-makers were also in favour of providing early legal advice after the submission of an application.<sup>269</sup> They felt that it (i) helped to facilitate communication between asylum-seekers and authorities and encouraged asylum-seekers to be more “cooperative” and trusting of the system, (ii) alleviated the time pressure when limited to only 10 days to appeal a negative decision, and (iii) contributed to the case owners’ work with helpful and up-to-date country of origin information.<sup>270</sup>

According to EASO, several countries broadened their scope of providing legal assistance to applicants or took steps toward enhancing the effectiveness of legal assistance in 2017.<sup>271</sup> Belgium continued to guarantee free legal assistance.<sup>272</sup> Bulgaria provided legal aid at first instance under the AMIF for the first time.<sup>273</sup> Hungary selected five lawyers via public tender to provide legal representation and counselling for asylum-seekers in transit zones on top of already-existing free legal assistance services.<sup>274</sup> The Swiss government has also continued preparations for implementing major legislative and organizational reforms to the asylum system, including the provision of free legal assistance for the purposes of an important safeguard against short timelines for processing asylum claims.<sup>275</sup>

The ECRE/ELENA Legal Note also provides many examples of good practice in regards to the provision of legal aid at first instance.<sup>276</sup> In Spain, the right to legal aid is guaranteed in national legislation except where asylum applicants renounce it.<sup>277</sup> In this vein, the Spanish Supreme Court has ruled that administrative authorities must go beyond informing asylum applicants about the possibility to receive legal aid and must indicate in their asylum file whether they accept or reject legal aid.<sup>278</sup> In Slovenia, legal aid is not guaranteed by law, but free legal assistance and representation (including in the interview) is generally provided by the PIC (Legal-Informational Centre for NGOs) financed partly by the AMIF and partly by the Slovenian government.<sup>279</sup> In Switzerland, while legal aid is not available at present, a new asylum system is foreseen for 2019 and will include access to legal aid at first instance.<sup>280</sup>

The ECRE/ELENA Legal Note also provides insights into legal services offered within the scope of assistance and representation. In the Netherlands, as a general rule, asylum applicants are assigned to legal representatives, who meet with them before the actual start of the asylum procedure and prepare them for their interviews.<sup>281</sup> These legal representatives get fixed compensation for the first instance procedure and can choose to be present during the asylum interview (compensation is, however, the same whether they are present or not).<sup>282</sup> In Portugal, legal

---

<sup>267</sup> *Ibid.*

<sup>268</sup> Asylum Aid, *Providing protection*, p. 20.

<sup>269</sup> *Id.* at p. 26.

<sup>270</sup> *Id.* at pp. 26-27.

<sup>271</sup> European Union: European Asylum Support Office (EASO), *Annual Report on the Situation of Asylum in the European Union 2017*, June 2018, p. 128, available at: <https://www.easo.europa.eu/sites/default/files/Annual-Report-2017-Final.pdf>.

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

<sup>275</sup> *Id.* at p. 129.

<sup>276</sup> ECRE, ECRE/ELENA Legal Note on Access to Legal Aid, p. 5.

<sup>277</sup> *Id.* at p. 5.

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> *Id.* at p. 9.

<sup>281</sup> *Id.* at p. 5.

<sup>282</sup> ECRE, *ECRE/ELENA Legal Note on Access to Legal Aid*, p. 5.

aid providers are not present in asylum interviews (with the exception of interviews with asylum applicants who are children).<sup>283</sup> However, legal advice is provided at first instance by the Portuguese Refugee Council under an agreement with the Portuguese Government.<sup>284</sup> This legal advice includes the review of statements provided by the applicant to the authorities, preparation of legal requests to amend information given at the interview, and providing additional evidence and other contacts to the authorities.<sup>285</sup>

## NATIONAL STANDARDS

Under Estonian law, applicants have the right to communicate with a legal adviser, relevant competent state authorities, NGOs, and/or UNHCR, but there are no specific provisions or entitlements on legal aid at first instance.

The AGIPA makes no specific provision for legal aid at first instance nor in light of an applicant's particular circumstances. Regarding first instance legal assistance or advice, the AGIPA stipulates that applicants have the right "to communicate with family members, a legal adviser, relevant competent state authorities, and representatives of international [organizations like the UNHCR] or non-governmental organizations."<sup>286</sup> However, the AGIPA does not define the function of these organizations or if they are to be recognized as a source of legal or procedural information.

## CURRENT PRACTICE

According to the INFORM Report, the PBGB at points of entry and counsellors at detention and accommodation centres are the main providers of information to asylum-seekers.<sup>287</sup> Asylum-seekers also have the right to request information from UNHCR.<sup>288</sup> NGOs, however, are not involved by the State in the provision of legal information. The INFORM Report cites state agencies expressing "concern that NGOs may duplicate the information provided by the PBGB" and that it would be "difficult to ensure that the State and the NGO are not offering contradictory information."<sup>289</sup> Instead, emphasis is placed on counsellors funded by the AMIF to provide free information to asylum-seekers staying in the Harku/Soodevahe detention and Vao and Vägeva accommodation centres.

The INFORM Report goes on to describe the procedures conducted by these counsellors, including discussing the criteria set out by the AGIPA with applicants in light of their particular circumstances.<sup>290</sup> The Ministry of the Interior confirms this assessment, noting that one of the main tasks of the counsellors is to explain, in detail, the relevant procedure and reception-related issues to applicants based on their personal circumstances.<sup>291</sup>

Monitoring visits conducted by UNHCR to the Harku detention and Vao accommodation centres from 2017-2018 have revealed that the scope and quality of counselling services, including communication with asylum-seekers, varies significantly. Counselling in Harku includes a wider range of services, including: (i) provision of information about applicants' rights and obligations, both in detention and asylum-related procedures, (ii) facilitation of communication with UNHCR, IOM, various state authorities, and civil society organizations, including the EHRC, and (iii) preparation of applications for state legal aid.

<sup>283</sup> *Id.* at p. 5.

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> Section 10 (2) Item 7) of the AGIPA.

<sup>287</sup> Vetik, *Legal and Procedural Information: Estonia Report*, p. 11.

<sup>288</sup> *Ibid.*

<sup>289</sup> *Id.* at p. 24.

<sup>290</sup> Vetik, *Legal and Procedural Information: Estonia Report*, p. 25.

<sup>291</sup> Estonian Ministry of the Interior, 31.07.2018 e-mail.



The scope of counselling provided in Vao, however, mainly encompassed filling out applications for state legal aid and sharing standard templates with the description of applicants' rights and obligations.<sup>292</sup> Many asylum-seekers interviewed during monitoring visits to the Vao accommodation centre pointed to difficulties in communicating with the counsellor due to his limited proficiency in foreign languages other than Russian.

Regrettably, both counsellors do not yet provide legal advice on the merits of an applicant's asylum claim, assist in preparations for asylum interviews, or help in preparing responses to drafts of preliminary decisions by the PBGB. In order to fill this gap UNHCR has initiated a project in cooperation with the EHRC which provides free legal aid at first instance, including legal representation during asylum interviews.

UNHCR considers it important to enable applicants to fully exercise their rights given the complexity of the refugee status determination procedure. Provision of legal assistance in the administrative (first instance) procedure, including in preparation for the asylum application and personal interview, would significantly improve applicants' access to an effective remedy and defence. Likewise, the EU Commission considers it necessary and appropriate to extend the right to legal aid in the administrative procedure, noting that this practice is already in place in 22 of the Member States.<sup>293</sup> The Commission goes on to highlight that this practice shows that the provision of free legal assistance and representation is useful to ensure good quality assistance, leading to better quality administrative decisions with possibly fewer appeals.<sup>294</sup>

UNHCR recognizes the commendable initiative taken by Estonia to raise the capacity of counsellors through organized trainings in 2017.<sup>295</sup> These trainings are critical since the counsellor in Harku had not been educated or trained as a lawyer and the counsellor in Vao lacked experience working with asylum cases. UNHCR believes that greater focus in these areas of competency would significantly improve the quality of counselling to asylum-seekers in Estonia.

The Ministry of the Interior agrees that the competency of the counsellors in Harku and Vao is an important factor in the asylum procedure.<sup>296</sup> An analysis was completed on the first phase of the AMIF project, spanning from 1 July 2015 to 30 June 2018, which included services offered by counsellors. As a result, changes will be made to the provision of counselling services, including raising the counsellors' level of competency and proactivity as well as ensuring that all applicants receive more coherent services.<sup>297</sup> The PBGB also agrees that the counsellors in Harku and Vao would benefit from more training and experience in asylum cases and plans to provide more specific trainings.<sup>298</sup> The PBGB also highlighted a new focus on providing improved and follow-up trainings to all PBGB bureau officials dealing with asylum cases.<sup>299</sup>

For the most recent launch of the second phase of the AMIF project, spanning from 1 July 2018 to 31 December 2020, the Ministry of the Interior foresees two new full-time counsellors in the accommodation and detention centres.<sup>300</sup> These counsellors will be provided with sufficient training to facilitate more comprehensive and coherent services.<sup>301</sup>

---

<sup>292</sup> EHRC monitoring visits to Vao and Vägeva accommodation centres on 27 July 2017, 19 October 2017 and 15 February 2018; UNHCR monitoring visits on 27 April 2017 and 31 May 2018.

<sup>293</sup> Proposed APR, Explanatory Memorandum, p. 14.

<sup>294</sup> *Ibid.*

<sup>295</sup> In 2017, counsellors in detention and accommodation centres attended various international training courses, including the broad-based in-service training about the EU Asylum Acquis and administrative law concerning aliens. See UNHRC, *Consideration of reports submitted by States parties: Estonia*, 2018, CCPR/C/EST/4, para 128, available at: <https://bit.ly/2Ux8KyE>.

<sup>296</sup> Estonian Ministry of the Interior, 31.07.2018 e-mail.

<sup>297</sup> *Ibid.*

<sup>298</sup> PBGB, e-mail correspondence with UNHCR, 03.08.2018.

<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

Currently however, according to the EHRC, the counsellor previously employed in the Vao accommodation centre no longer works there. The EHRC reported that the Soodevahe detention centre counsellor is covering services for both accommodation and detention centres until a new person is found. It is thus far unclear how this arrangement works in practice, as these centres are located very far apart from one another. EHRC also noted that the new counsellors, when hired, may not be physically based in the centres and thus the system of providing services may change. UNHCR recognizes that temporary gaps in project-based services, particularly in transition, are not abnormal. However, UNHCR wishes to highlight that reliance on projects to provide essential services is not ideal, as the system can suffer from prolonged delays in funding structures.

UNHCR also finds it necessary to ensure that asylum-seekers staying outside the Vao accommodation centre can benefit from legal counselling services. The same view has been expressed by the Legal Chancellor of Estonia.<sup>302</sup> The Ministry of the Interior also noted that the second phase AMIF project foresees that the counsellors would provide services to all applicants irrespective of their place of residence.<sup>303</sup> As an alternative, perhaps the already existing and well-functioning system of the PBGB migration advisors could be employed for these purposes, by expanding the scope of their services to include asylum matters.<sup>304</sup>

## RECOMMENDATIONS

The current national asylum legislation makes no specific provision ensuring legal and procedural information in the light of the applicant's particular circumstances. It is, however, in the interests of Estonia to ensure a correct determination of international protection needs of the applicant already at first instance. To that end, applicants should be provided at first instance, free of charge, with legal and procedural information, taking into account their particular circumstances. These circumstances could relate to the applicant's gender, age, particular vulnerability, etc.; the APD leaves the language open to interpretation. The provision of such information should, inter alia, enable the applicants to better understand the procedure, thus helping them to comply with the relevant obligations.

**Recommendation 8:** To amend the national legislation and introduce the legal standard ensuring the provision of legal and procedural information free of charge, including, at least, information on the asylum procedure "in the light of the particular circumstances of the applicant".



In addition to changes in legislation, adjustments to the asylum procedure in practice would improve both the efficiency and effectiveness of the system. While Section 10 of the AGIPA requires state institutions to provide information about certain rights, this does not guarantee or delineate the responsibilities involved in legal counselling for asylum-seekers. Asylum-seekers frequently lack education, not to mention legal expertise, and are not familiar with the Estonian administrative and legal framework. Therefore, the information and services provided by counsellors in accommodation and detention centres are important to asylum-seekers' full access to justice. NGOs providing legal information and counselling can contribute to this goal and be a key ally in a more cooperative system between asylum-seekers and state institutions.

<sup>302</sup> The Legal Chancellor concluded that asylum-seekers shall be provided the possibility to obtain legal counselling irrespective of the place of their residence in Estonia. See "Reception of unaccompanied migrant children", 22 August 2017, p. 9, Item 29. Available (in Estonian) at: <https://bit.ly/2NYGq5M>.

<sup>303</sup> Estonian Ministry of the Interior, 31.07.2018 e-mail.

<sup>304</sup> According to the current description of advisory services, their main goal is to support foreigners settling in Estonia for work, entrepreneurship, study, and/or research. See PBGB, "Migration advisors", available at: <https://www2.politsei.ee/en/teenused/migratsiooninoustajad/>.

**Recommendation 9:** To continue increasing the capacity of counsellors in the Vao accommodation and Soodevahe detention centres to provide specific legal advice and information. This may include competency in the basics of Estonia's asylum procedure and AGIPA, as well as a better understanding of non-profit services available to applicants, and assistance in responding to preliminary decisions by the PBGB.

**Recommendation 10:** To consider expanding the scope of counselling services offered by PBGB special migration advisors in the service bureaus of Harjumaa County and beyond to include coverage of asylum matters. Note that this would strictly be for the provision of objective legal information, since tailored legal advice needs to be provided by independent legal service providers, to avoid any potential conflict of interests.

**Recommendation 11:** To include NGOs where appropriate as a recognized source of legal information in addition to state authorities. This may include the provision of legal aid to asylum-seekers in relation to the merits of an asylum claim, assistance in preparations for and representation during asylum interviews, and help in preparing responses to drafts of preliminary decisions by the PBGB.



Bearing in mind the good practices highlighted by the ELA Report from the UK, Ireland and Belgium as well as the proposed new standards outlined in the proposed APR, Estonia may consider introducing additional procedural safeguards in the national legislation. This may include:

- (i) a possibility for asylum-seekers to meet with a free legal advisor prior to the asylum interview, in order to discuss, collect and submit corroborating evidence. A detailed witness statement/claim prior to the interview to be prepared with the help of a legal adviser could also be a requirement, and
- (ii) a right to have a free legal representative (lawyer) at the asylum interview and later on during the administrative procedure, in order to be able to draft follow-up notices and responses to inquiries from the PBGB.

Such procedural safeguards would allow the PBGB to carry out more focused and effective asylum interviews down the line, which would have a positive ripple effect through the decision and appeal process and improve the perception of the system itself.

**Recommendation 12:** To introduce the right to request free legal aid at all stages of the asylum procedure, including during examination by the PBGB, in order to assist asylum-seekers in preparing their application, as well as in preparing for and participating in the asylum interview.

### 5.3.3 RIGHT TO LEGAL ASSISTANCE AND REPRESENTATION AT OWN COST

#### RELEVANT STANDARDS IN EU LAW

Under EU law, applicants are entitled to legal assistance and representation organized at their own cost.

Throughout “all stages of the [asylum] procedure,” the APD makes clear that applicants “shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection.”<sup>305</sup> This does not derogate from an applicant’s entitlement to free legal assistance and representation. However, the option, if within the applicant’s means, is always available and can be invoked at any time.

#### NATIONAL STANDARDS

Under Estonian law, applicants are entitled to communicate with a legal adviser in addition to legal assistance and representation at their own cost.

While not a direct transposition of the APD, both the AGIPA and CACP provide for the foundation of the right to consult with or retain a legal adviser at an applicant’s own cost. The AGIPA entitles applicants to the right “to communicate with...a legal adviser,” though it does not go on to define the type of legal adviser or whether they would be funded by the state, an NGO, or the applicant.<sup>306</sup> The CACP, which governs all administrative proceedings, including cases of international protection, is more direct. It stipulates that “a participant in proceedings may participate...through a representative” and that “[p]ersonal participation does not extinguish a person’s right to have a representative or adviser.”<sup>307</sup>

#### CURRENT PRACTICE

The Estonian Bar Association has provided that the fee for hiring a state legal aid lawyer in administrative court for international protection cases is €36/half hour, with the total cost not to exceed €400 at each level of the court system.<sup>308</sup> The bases for the calculation of fees payable for state legal aid is established by the Ministry of Justice.<sup>309</sup>

So far, UNHCR has not observed instances in which asylum-seekers have requested the right to consult a legal adviser or other counsellor at their own cost regarding their applications for international protection in Estonia.

#### RECOMMENDATIONS

Estonian national legislation is in line with the APD. UNHCR has no specific recommendations in this regard.

<sup>305</sup> Article 22 (1) of the APD.

<sup>306</sup> Section 10 (2) Item 7) of the AGIPA.

<sup>307</sup> Section 31 of the CACP.

<sup>308</sup> Estonian Bar Association, 01.08.2018 e-mail.

<sup>309</sup> *Ibid.*

# 6. ACCESS TO LEGAL AID IN APPEALS PROCEDURES

## 6.1 At the border

As mentioned previously in [Section 3.3](#), applications for international protection may be rejected at the border either on admissibility grounds or on the merits in the accelerated procedure. This section focuses on the remedies available to applicants rejected at the border.

### RELEVANT STANDARDS IN INTERNATIONAL AND EU LAW

Under international and EU law, applicants rejected at the border have the right to an effective remedy. This includes those with special procedural guarantees. In cases where applicants do not have an automatic right to remain in the territory, they are entitled to legal assistance and at least one week to prepare a request to remain. They are also guaranteed free legal assistance and representation on request in the appeals procedures.

Article 46(1) of the APD guarantees the right to an effective remedy to all applicants whose applications are rejected either as inadmissible or unfounded.<sup>310</sup> This is irrespective of where the asylum application was submitted (at the border or inside the country).

According to the Charter, the right to an effective remedy includes the right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>311</sup> This includes “being advised, defended and represented” and being granted legal aid “in so far as [it] is necessary to ensure effective access to justice.”<sup>312</sup> As outlined in Section 2, the ECtHR has held that the right to an effective remedy includes an automatic suspensive effect<sup>313</sup> and the realistic possibility to access the remedy in practice.<sup>314</sup> The lack of legal aid can render an effective remedy inaccessible. In *M.S.S. v. Belgium and Greece*, the ECtHR noted that the applicant had no practical means of paying for legal representation and received no information on the availability of legal advice.<sup>315</sup> This, coupled with the shortage of legal aid practitioners, meant the applicant was unable to access the asylum procedure effectively and did not have access to an effective remedy.<sup>316</sup>

As a general rule, rejected applicants at the border or transit zone are subject to automatic suspensive effect and allowed to “remain in the territory” until their time limit to appeal the decision is up and the outcome of their appeal is decided.<sup>317</sup> This right to remain is not, however, guaranteed to certain cases,<sup>318</sup> including those applications rejected:

- as manifestly unfounded in accordance with Article 32(2) APD or as unfounded after examination in accordance with Article 31(8) APD;

<sup>310</sup> Article 46 (1)(a-b) of the APD.

<sup>311</sup> *The Charter*, 2012/C 326/02, Article 47.

<sup>312</sup> *Ibid.*

<sup>313</sup> *Jamaa*, 27765/09, ECtHR.

<sup>314</sup> *Conka*, 51564/99, ECtHR.

<sup>315</sup> *M.S.S.*, 30696/09, ECtHR, para. 319.

<sup>316</sup> *Ibid.*

<sup>317</sup> Article 46 (5) of the APD.

<sup>318</sup> *Id.* at Article 46 (6).

- as inadmissible on the basis of Article 33(2)(a), (b) or (d) or Article 39 APD (European safe third country)
- for reopening after the examination has been discontinued under Article 28 APD (implicit withdrawal or abandonment).

Instead, in all these cases, “a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State.”<sup>319</sup> Importantly, the courts are to make such rulings either on “the applicant’s request” or “acting *ex officio*.” The latter is relevant when the court is making a different decision that will indirectly result in ending an applicant’s right to remain, or the country’s national law does not provide for the right to remain pending the outcome of the remedy.<sup>320</sup>

Importantly, in the event that the above exceptions for the right to remain apply to applicants rejected at the border, they must be provided with legal assistance.<sup>321</sup> Specifically, “legal assistance and at least one week to prepare the request and submit to the court...the argument in favour of granting [an applicant] the right to remain on the territory pending the outcome of the effective remedy.”<sup>322</sup> Though the APD does not elaborate further on the type of legal assistance in Article 46(7), it is possible to look to Article 20(1), outlining legal assistance in appeals procedures. It notes that legal assistance “shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.”<sup>323</sup> Should an applicant rejected at the border not receive this legal assistance for their appeal, automatic suspensive effect applies.<sup>324</sup>

The above is also applicable to applicants in need of special procedural guarantees. As discussed in [Section 5.2](#), in some cases, applicants in need of special procedural guarantees are to be exempted from the accelerated and border procedure. However, if not exempted, Member States are to at least provide legal assistance in requesting the right to remain as outlined above.<sup>325</sup>

The Dublin III Regulation also provides for legal assistance when appealing decisions to reject an application under admissibility review. It specifically requires Member States to “ensure that legal assistance is granted on request free of charge where the [rejected applicant] cannot afford the costs involved” and the appeal is not considered to have “no tangible prospect of success.”<sup>326</sup> Importantly, the Dublin III Regulation also outlines an applicant’s “right to remain in the Member State...pending the outcome of [an] appeal or review [of transfer decisions].”<sup>327</sup> This indicates that “access to legal assistance” should include not just an appeal against a negative decision, but also a request to remain in the territory of the Member State concerned.<sup>328</sup> Finally, legal assistance is defined under the Dublin III Regulation as, at least, “the preparation of the required procedural documents and representation before a court.”<sup>329</sup>

When it comes to decisions made “at the border or transit zones” on the admissibility or merits of an application, applicants are subject to the same guarantees as those examined in a regular procedure. Specifically, the APD requires Member States to “provide for procedures, in accordance with the basic principles and guarantees of [the APD]...at the border or transit zones.”<sup>330</sup> For further discussion of these basic principles, see [Subsection 5.3.2](#).

<sup>319</sup> *Id.* at Article 46 (5).

<sup>320</sup> *Ibid.*

<sup>321</sup> *Id.* at Article 46 (7)(a).

<sup>322</sup> *Ibid.*

<sup>323</sup> Article 20 (1) of the APD.

<sup>324</sup> *Id.* at Article 46 (5) and (7).

<sup>325</sup> Article 24 (3) of the APD.

<sup>326</sup> Article 27 (6) of the Dublin III Regulation.

<sup>327</sup> *Id.* at Article 27 (1)(a).

<sup>328</sup> *Id.* at Article 27 (5).

<sup>329</sup> *Id.* at Article 27 (6).

<sup>330</sup> Article 43 (1) of the APD.

## PROPOSED ADDITIONAL STANDARDS UNDER EU LAW

Applicants rejected at the border have the right to an effective remedy. In cases where they do not have an automatic right to remain in the territory, applicants are entitled to legal assistance and two weeks to prepare a request to remain.

The proposed APR carries very similar language to the APD above for legal assistance and representation in appeals procedures. The only significant deviation is a longer time-frame for preparing an appeal for the right to remain in the territory pending the outcome of the remedy. Where the APD provides for “at least one week,” the proposed APR notes that an applicant shall lodge an appeal “within two weeks” either “from the date when the decision of the determining authority is notified to the applicant or from the moment the legal adviser or counsellor is appointed if the applicant has introduced a request for free legal assistance and representation.”<sup>331</sup>

## SELECT INTERNATIONAL PRACTICE

According to the Portuguese Asylum Act, the Immigration Borders Service shall immediately inform a UNHCR representative and the Portuguese Council for Refugees that an application for asylum has been lodged at the border.<sup>332</sup> This helps to ensure that asylum applicants at the borders are, at the very least, able to access legal aid provided by the Portuguese Council for Refugees.

## NATIONAL STANDARDS

Under Estonian law, applicants rejected at the border have the right to an effective remedy. In cases where they do not have an automatic right to remain in the territory, applicants are entitled to legal aid and 10 days to prepare a request to remain.

Section 251(1) of the AGIPA provides that any “decision on rejection of an application...[for] international protection may be contested in the administrative court within 10 days,” which includes applications rejected at the border or transit zones.<sup>333</sup> Applicants whose applications are rejected, whether at the border or not, still retain their rights under the AGIPA, including “the right to stay in the territory of Estonia until the final decision is made.”<sup>334</sup> This right is not, however, guaranteed to those applicants who are rejected:

- On the basis of the Dublin III Regulation (inadmissibility),
- Under specified clauses/subsections of the AGIPA in Section 201 (clearly unfounded),<sup>335</sup>
- Section 21 of the AGIPA (first country of asylum, safe third country, subsequent application),<sup>336</sup>
- Section 23 of the AGIPA (withdrawal, abandonment of asylum application).<sup>337</sup>

<sup>331</sup> Article 53 (6) of the proposed APR.

<sup>332</sup> European Council on Refugees and Exiles, *ECRE/ELENA Legal Note on Access to Legal Aid in Europe*, November 2017, Legal Note #02, page 7, available at: <http://www.refworld.org/docid/5a128fb14.html>.

<sup>333</sup> Section 25<sup>1</sup> (1) of the AGIPA.

<sup>334</sup> *Id.* at Section 25<sup>1</sup> (2).

<sup>335</sup> *Id.* at Section 20<sup>1</sup> 1)-6) and 8)-9).

<sup>336</sup> *Id.* at Section 21 (1)1),2), and 4).

<sup>337</sup> *Id.* at Section 23 (3) and (6); Section 25<sup>1</sup> (3) of the AGIPA. “[T]he court conducting the proceeding of the matter shall decide on the right of the applicant to stay in Estonia during the judicial proceedings.”

Instead, in all the above situations, the AGIPA foresees an administrative court deciding whether the applicant may stay in Estonia, pending examination of their complaint on the decision rejecting their asylum application.<sup>338</sup> While this is similar to the APD, there is one notable difference. The AGIPA notes that “the court conducting the proceeding of the matter shall decide on the right of the applicant to stay in Estonia.” It does not stipulate, like the APD, that a court may act *ex officio* in relevant situations to review an applicant’s right to remain in Estonia. Instead, the AGIPA provides that applicants shall submit a complaint to the court and specifically request the court to examine whether they may stay in Estonia pending the outcome of their complaint.<sup>339</sup>

Applicants rejected “at the border” under the exceptional grounds described above (except the decision rejecting an application under the Dublin III Regulation<sup>340</sup>) are entitled, *inter alia*, to state legal aid.<sup>341</sup> This legal aid is to be provided “during the period of 10 days” and includes “preparation of the appeal and presenting the arguments to the court.”<sup>342</sup> Interestingly, the AGIPA does not elaborate on how an applicant’s eligibility for state legal aid changes once the complaint is registered, the 10 days are over, or the court decides to grant the right to remain in the territory. The Ministry of the Interior considers that in such situations the court may decide whether the legal aid is continuously needed for examination of the decision rejecting the asylum application (Article 20(3) APD and Article 27(6) Dublin III Regulation).<sup>343</sup>

## CURRENT PRACTICE

As was discussed in previous sections, in practice it appears rather difficult for individuals to exercise their right to legal aid if rejected at the border or transit zones.

Although asylum-seekers may not always have technical restrictions on their access to state legal aid, those wishing to obtain such aid at the border in order to appeal may still face a number of challenges. Upon arrival at border crossing points, asylum-seekers will not know the language, landscape, or legal procedures of the country in which they have found themselves. In addition to their disorientation in an unfamiliar setting, asylum-seekers must cope with the strain of fleeing persecution and any associated trauma.

In comparison to accommodation or detention centres that employ full-time counsellors and/or are visited by local NGOs offering legal advice and assistance, Estonian border facilities contain limited resources and personnel dedicated solely to the asylum procedure. Despite a general lack of free legal counselling at the border, either by NGOs or state employees, asylum-seekers must navigate requesting state legal aid with an administrative court on their own. This must be accomplished swiftly, as the time-limit for appeal is a maximum of 10 days and begins from the moment an applicant receives his/her decision.<sup>344</sup> Without comprehensive data, it remains unclear how quickly asylum-seekers rejected at the border apply for and gain access to state legal aid and whether or not any associated delays impact the success of their appeals.

<sup>338</sup> Section 25<sup>1</sup> (3) of the AGIPA.

<sup>339</sup> *Id.* at Section 25<sup>1</sup> (7).

<sup>340</sup> Currently Estonia does not take “Dublin decisions” at the border. Consequently, the AGIPA does not foresee the right to state legal aid for those applicants who may request the right to remain after being rejected at the border on the basis of the Dublin III Regulation (admissibility).

<sup>341</sup> Section 25<sup>1</sup> (7) of the AGIPA.

<sup>342</sup> *Ibid.*

<sup>343</sup> Ministry of the Interior, reply to UNHCR, 08 April 2019.

<sup>344</sup> Section 25<sup>1</sup> of the AGIPA.



## RECOMMENDATIONS

The AGIPA is largely in line with the APD by providing the right to appeal as well as legal aid in submitting a request to remain in the territory. Although Estonian legislation provides for the right to appeal and receive legal aid at the border, these rights are difficult to access in practice. Providing state legal aid at the border is challenging for a number of reasons. The most obvious obstacle is that points of first contact can be isolated or far removed from state legal aid providers. Nevertheless, to ensure all applicants are being provided fair and effective access to the asylum procedure as well as an effective remedy, it is important to define and implement necessary safeguards at the border. Therefore it is important to facilitate the access to state legal aid for those applicants who are rejected at the border and who wish to contest a negative decision and/or submit a request to remain in the territory.

### Recommendation 13:

- (a) Continue to raise the capacity of PBGB border guards and other persons of first contact at the border to recognize the right of applicants to an effective remedy through appeal;
- (b) Introduce an automatic appointment of state legal aid lawyers for applicants who are rejected at the border and who wish to contest the decision;
- (c) Involve NGOs in the provision of legal aid for applicants rejected at the border.

## 6.2 In detention

### RELEVANT STANDARDS IN INTERNATIONAL AND EU LAW

Under international and EU law, applicants are entitled to an effective remedy, including legal assistance and representation against a decision to be placed or kept in detention.

Applicants in detention are able to lodge appeals against, among other things, (i) the decision to reject their applications for international protection or (ii) the decision to place or keep them in detention. Applicants in the first scenario follow the same procedures as those inside the territory of Estonia, discussed in more detail in [Section 6.3](#). Applicants in the second scenario are guaranteed an effective remedy.

Article 5(4) of the ECHR provides that “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”<sup>345</sup> Legal aid is, again, a vital component of an individual’s right to an effective remedy. In *A.A. v. Greece*, the ECtHR found that the lack of legal aid for a detained Palestinian asylum-seeker made the remedy available purely in theory and, therefore, amounted to a violation of Article 5(4) of the ECHR.<sup>346</sup> In *Suso Musa v. Malta*, the ECtHR found that, although the authorities were not obliged to provide free legal aid in the context of detention proceedings, the lack thereof may raise the issue of accessibility of effective remedies.<sup>347</sup> The ECtHR also concluded that, in this case, a proper system enabling immigration detainees to have access to effective legal aid in Malta was lacking.

<sup>345</sup> ECHR, Article 5 (4).

<sup>346</sup> *A.A. v. Greece*, Application no. 12186/08, Council of Europe: European Court of Human Rights, 22 July 2010, para. 78, available at: <http://goo.gl/9MqZch>.

<sup>347</sup> *Suso Musa v. Malta*, Application no. 42337/12, Council of Europe: European Court of Human Rights, 23 July 2013, available at: <http://www.refworld.org/cases,ECHR,52025a8f4.html>.

The RCD addresses all of these issues. First, it requires that, “where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant.”<sup>348</sup> The RCD also provides that detained applicants are procedurally guaranteed written notice of and reasons for detention as laid down in national law, “as well as [written notice] of the possibility to request free legal assistance and representation.”<sup>349</sup> “[A]ccess to free legal assistance and representation” under the RCD includes, at least, “the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.”<sup>350</sup>

## SELECT INTERNATIONAL PRACTICE

In the UK, the Court of Appeal ruled that the “detained fast-track procedure,” which was suspended in June 2015, did not strike a balance between speed and fairness, in light of the practical difficulties when trying to fulfil the procedural requirements of lodging an appeal and having limited access to legal aid while detained.<sup>351</sup> The Constitutional Court of the Czech Republic, in a pre-removal detention case, ruled that no effective remedy was available to the detainees against a real risk of breaching Articles 2 and 3 of the ECHR because of the lack of access to legal aid.<sup>352</sup> It also considered that the presence of NGOs in the detention centre did not in itself meet the State’s obligation to guarantee access to legal advice and representation.<sup>353</sup>

## NATIONAL STANDARDS

Under Estonian law, applicants are entitled to state legal aid against a decision to be placed or kept in detention.

The AGIPA is in line with international and EU standards when it comes to legal aid entitlements in contesting a detention order. Section 10(2) Item 9 of the AGIPA ensures “legal assistance in the administrative court proceedings for contestation of the decision made on the basis of this Act.”<sup>354</sup> Section 362(2), specifically, of the AGIPA outlines the procedure: “[i]f it is necessary to detain an applicant for international protection...for longer than 48 hours, the [PBGB]...shall apply to the administrative court for the permission to detain the applicant...and place him or her in the detention centre for up to two months.”<sup>355</sup> The AGIPA defines the legal aid available in accordance with the Section 4(3) Item 5 of the SLAA “representing a person in administrative court proceedings.”<sup>356</sup>

<sup>348</sup> Article 9 (3) of the RCD.

<sup>349</sup> *Id.* at Article 9 (4).

<sup>350</sup> *Id.* at Article 9 (6).

<sup>351</sup> European Council on Refugees and Exiles, *ECRE/ELENA Legal Note on Access to Legal Aid in Europe*, November 2017, Legal Note #02, page 9, available at: <http://www.refworld.org/docid/5a128fb14.html>.

<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*

<sup>354</sup> Section 10 (2) Item 9) of the AGIPA.

<sup>355</sup> Section 362 (2) of the AGIPA.

<sup>356</sup> Section 4 (3) Item 5) of the SLAA.

## CURRENT PRACTICE

In practice, state legal aid often becomes available only when an applicant has already spent some time in detention. According to national law, the PBGB may detain an applicant for up to 48 hours and only after this period is the PBGB required to seek permission of the administrative court to detain applicants further. If the court authorizes further detention (typically for a period of two months), applicants are transferred to the Harku (now Soodevahe) detention centre, where they are entitled to counselling, including assistance with preparing a request for state legal aid. Therefore, detained asylum-seekers normally obtain effective access to state legal aid only after the administrative court has authorized their detention for two months and the appeal against the decision has begun. There are, however, positive exceptions, such as when detained applicants are already granted state legal aid prior to their hearings before the administrative court.<sup>357</sup>

The EHRC has observed that most detained applicants are provided with information on the reasons for an order of detention, how to challenge it, and the possibility to request legal aid in a language they understand. The state legal aid lawyer prepares and submits appeals against the detention order and, should the PBGB apply for an extension of the detention order, participates in the hearing before the administrative court.

The Harku detention centre had one counsellor who provided information and assistance in applying for state legal aid. The counsellor, who is employed through the AMIF project,<sup>358</sup> worked five days a week from nine to five, and was available to persons awaiting deportation as well as detained asylum-seekers. Immediately upon a person's arrival, the counsellor filled in an application for state legal aid and provided, inter alia, UNHCR and EHRC's contact information for further legal counselling. State legal aid providers and NGOs providing legal aid had access to the Harku detention centre at any time. The EHRC reports that cooperation and information sharing between the counsellor at the centre and counsellors outside the centre is very quick and effective.

Monitoring visits to the Harku detention centre revealed that, when asked about state legal aid, detainees complain of seeing their lawyer either not enough or not at all.<sup>359</sup> According to interviewed asylum-seekers, the state-appointed lawyer prefers to communicate indirectly through the detention centre's counsellor. As a rule, where there are hearings in the administrative court on extension of a detention order, detained asylum-seekers rarely leave the detention centre. Communication during court hearings, including with their own lawyer, occurs through a video conference system.

In June 2018 UNHCR witnessed the case of a detained applicant from Uganda who was provided with a state legal aid lawyer, but who never gained the opportunity to meet and discuss his case with his lawyer prior to the court hearing concerning his detention.<sup>360</sup> In the end, the administrative court authorized the extension of the applicant's detention beyond the first 48 hours for another two months.<sup>361</sup> This visit confirms the need for more precise regulation with regard to the provision of state legal aid to detained asylum-seekers in Estonia.

The concerns raised by detained asylum-seekers regarding communication with the state legal aid lawyer as well as the procedure for appealing a negative final decision on their request for international protection while in detention are covered in more detail in [section 6.3](#). The experiences of applicants with special procedural guarantees attempting to navigate their detention appeals were described in [section 5.2](#).

<sup>357</sup> UNHCR visit to the Harku detention centre on 01 June 2018.

<sup>358</sup> AMIF funds for legal counsellors is divided into two phases, the first lasting from 1 July 2015 to 30 June 2018 and the second from 1 July 2018 to 31 December 2020. As of the writing of this report, the counsellor staffing is in transition. See Estonian Ministry of the Interior, List of supported AMIF projects, available at: <https://bit.ly/2TwJb4t>.

<sup>359</sup> Monitoring visits to Harku detention centre by the EHRC on 2 March 2017, 29 May 2017, 15 August 2017 and 28 November 2017.

<sup>360</sup> Visit to the Harku detention centre by UNHCR on 01 June 2018.

<sup>361</sup> *Ibid.*

## RECOMMENDATIONS

Applicants have the right to appeal an order of detention and are, in practice, provided state legal aid in pursuit of such appeals. While UNHCR welcomes the positive practice of granting state legal aid to applicants appealing orders of detention, the need for ensuring mandatory access to legal aid at the first administrative court stage (examining the PBGB's request to continue detention beyond 48 hours) remains. This is an essential safeguard for protecting applicants from arbitrary detention.

**Recommendation 14:** To amend the AGIPA with a provision ensuring effective access of all asylum-seekers to state legal aid at the stage of judicial examination of the PBGB requests to extend detention beyond 48 hours.

### 6.3 In cases of a negative asylum decision

#### RELEVANT STANDARDS IN EU LAW

Under EU law, after a negative decision, applicants are entitled to legal information and interpretation services explaining the decision and how to challenge it, in addition to state provided legal aid in the appeals procedure.

When an application for international protection is rejected under regular procedure, the APD has several provisions in place.

First, the decision must be explained, including how it can be challenged. Article 11(2) of the APD stipulates “the reasons in fact and in law [shall be] stated in the decision and information on how to challenge a negative decision is given in writing.”<sup>362</sup> Article 12(1)(f) adds to this provision by providing that applicants “shall be informed of the result of the decision...in a language that they understand or are reasonably supposed to understand.”<sup>363</sup> Finally, Article 19(1) adds to these guarantees by requiring “Member States, on request, [to] provide applicants with information – in addition to that given in accordance with Article 11(2) and Article 12(1)(f) – in order to clarify the reasons for such decision and explain how it can be challenged.”<sup>364</sup> Thus, applicants are automatically entitled to notification of a negative decision and the basic reasons behind it, interpretation services, and instructions on how to challenge the decision. Further clarification of the decision and explanation however, must be triggered by a “request” from the applicant.

Importantly, if the negative decision is a withdrawal of international protection, the guarantee for further clarification of the decision is not provided. The APD notes, “[o]nce the competent authority has taken the decision to withdraw international protection, Article 20, Article 22, Article 23(1) and Article 29 are equally applicable.”<sup>365</sup> Here, Article 19 is deliberately not included among the safeguards. The other specified articles concern, respectively, free legal assistance and representation in appeals,<sup>366</sup> the right to legal assistance and representation at an applicant's own cost,<sup>367</sup> access to information in the applicant's file,<sup>368</sup> and the role of UNHCR.<sup>369</sup> Unaccompanied children, however, still enjoy Article 19 guarantees even in procedures for withdrawal.<sup>370</sup>

<sup>362</sup> Article 11 (2) of the APD.

<sup>363</sup> *Id.* at Article 12 (1)(f).

<sup>364</sup> *Id.* at Article 19 (1).

<sup>365</sup> *Id.* at Article 45 (4).

<sup>366</sup> *Id.* at Article 20.

<sup>367</sup> *Id.* at Article 22.

<sup>368</sup> Article 23 (1) of the APD.

<sup>369</sup> *Id.* at Article 29.

<sup>370</sup> *Id.* at Article 25 (4). “Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information as referred to in Article 19 also in the procedures for the withdrawal of international protection provided for in Chapter IV.”

Second, applicants are entitled to interpretation services throughout the appeals process where necessary. With respect to the [appeals] procedures,<sup>371</sup> applicants “shall receive the services of an interpreter...whenever necessary...and appropriate communication cannot be ensured without such services” and “those services shall be paid for out of public funds.”<sup>372</sup>

Finally, and most importantly, under the APD, applicants are entitled to legal aid. Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.<sup>373</sup> While the guarantee for legal aid must again be triggered by a “request,” the services stipulated cover all the necessary components of an appeal.

## NATIONAL STANDARDS

Under Estonian law, after a negative decision, applicants are entitled to legal information and interpretation services explaining the decision and how to challenge it, in addition to state provided legal aid in the appeals procedure.

The AGIPA makes several provisions regarding a negative decision. First, applicants are guaranteed notice. A rejection “shall be communicated to an alien without delay.”<sup>374</sup> Second, the decision must be explained and in a language they understand. “The decision to reject an application for international protection...shall be translated to the applicant wholly unless the applicant has a [legal] representative.”<sup>375</sup> Third, and most importantly, applicants are entitled to “get legal assistance in the administrative court proceedings for contestation of the decision.”<sup>376</sup> As noted earlier, the AGIPA defines this legal assistance in accordance with the Section 4(3) Item 5 of the SLAA as “representing a person in administrative court proceedings.”<sup>377</sup> Finally, while the AGIPA is silent regarding the provision of legal information regarding how to challenge a negative decision, Article 57 of the Administrative Procedure Act 2001 (APA) requires such information be included in any administrative decision, including the PBGB’s decision to reject an asylum application.<sup>378</sup> According to Section 1(3) of the AGIPA, the APA is applicable to proceedings of international protection and provides for the overall framework for all procedural actions. Among other principles, the APA requires administrative authorities to give explanations,<sup>379</sup> hear the opinions and objections of applicants,<sup>380</sup> and meet prerequisites for the lawfulness of administrative acts.<sup>381</sup> While these and other core principles are not duplicated in the AGIPA, they are nevertheless applicable and always followed in international protection proceedings.

<sup>371</sup> *Id.* at Article 12 (2).

<sup>372</sup> *Id.* at Article 12 (1)(b).

<sup>373</sup> *Id.* at Article 20 (1).

<sup>374</sup> Section 25 (3) of the AGIPA.

<sup>375</sup> *Id.* at Section 30 (6).

<sup>376</sup> Section 10 (2) Item 9) of the AGIPA.

<sup>377</sup> Section 4 (3) Item 5) of the SLAA.

<sup>378</sup> *Haldusmenetluse seadus* (RT I 2001, 58, 354), adopted on 06 June 2001, available in English at: <https://bit.ly/2TBb0sb>.

<sup>379</sup> Section 36 of the APA.

<sup>380</sup> Section 40 of the APA.

<sup>381</sup> Section 54 of the APA.

## CURRENT PRACTICE

In practice, when a negative decision is received, the accommodation or detention centre's legal counsellors (or lawyers from the EHRC), advise asylum-seekers to apply for state legal aid and fill in the application for them. Applications for state legal aid for appeal procedures are usually approved, since asylum-seekers frequently have no legal knowledge, proficiency in Estonian, ability to represent themselves, or the financial means to hire a lawyer. The EHRC has observed that the Tallinn Administrative Court and Harju County Court approve all the applications for legal aid in international protection appeal procedures. The Tartu Administrative Court's practice, however, varies. In October 2017, an Armenian asylum-seeker's request was rejected because he spoke Russian and therefore was considered to be able to represent himself in the administrative court.<sup>382</sup> In cases where an application for state legal aid is rejected, asylum-seekers have the option of turning to the EHRC directly for representation.

Regarding the negative decision itself, every rejection by the PBGB includes information on how to appeal. The Ministry of the Interior has also noted that counsellors at the detention and accommodation centres, in addition to providing practical assistance in seeking state legal aid, are responsible for explaining the decision to applicants in detail.<sup>383</sup> This includes explaining, based on the applicant's particular circumstances, the reasons for the negative decision, its consequences, and how to appeal against it.<sup>384</sup>

Despite all these efforts, language barriers still represent a significant obstacle for effective appeals in court. Communication between the state lawyer and asylum-seekers, especially those detained, is impaired for a number of reasons. First, not every asylum-seeker is able to communicate in English or Russian, the two most widely spoken foreign languages in Estonia. Second, the state-appointed lawyer's typical routine is to send asylum-seekers the full text of original court decisions in Estonian with only a short cover letter in a language the applicant is supposed to understand. According to interviewed asylum-seekers who stayed in the Harku detention centre, the state-appointed lawyer also preferred to communicate indirectly through the detention centre's counsellor.

The above practice of lack of or partial translation of asylum and court decisions is an illustrative example of an unforeseen weakness in national legislation, including Article 30(6) AGIPA. There, the AGIPA stipulates that negative decisions "be translated to the applicant wholly unless the applicant has a [legal] representative."<sup>385</sup> Yet it would seem that applicants that do have a representative, do not always receive translations in full.

Detained asylum-seekers have also expressed concerns about the limited number of state legal aid lawyers.<sup>386</sup> It appears that, until the end of 2018, only one lawyer<sup>387</sup> continued to represent all asylum-seekers in their appeals regarding detention and negative asylum decisions. Asylum-seekers worry about such a high workload for their representative and have expressed the wish to have options when choosing a lawyer.<sup>388</sup>

The high demand for assistance, language barriers, and minimal opportunities to interact have real consequences for state legal services and asylum-seekers' applications. UNHCR was made aware of a case in June 2018 in which a stateless applicant was deported back to Russia. It was reported that the state legal aid lawyer did submit an appeal in court, but that by then the applicant had already been deported back to the Russian Federation.<sup>389</sup> In another case, in 2017, a family from Albania was unable to meet with the lawyer appointed to them under the SLAA either before or after their hearings in court. During the whole appeal process, the lawyer communicated

<sup>382</sup> Tartu Administrative Court, case no 3-17-2047, 16 October 2017.

<sup>383</sup> Estonian Ministry of the Interior, 31.07.2018 e-mail.

<sup>384</sup> *Ibid.*

<sup>385</sup> Section 30 (6) of the AGIPA.

<sup>386</sup> Monitoring visits to Harku detention centre by the EHRC in 2017.

<sup>387</sup> Mr. Keijo Lindeberg from Law Firm Lindeberg.

<sup>388</sup> *Ibid.*

<sup>389</sup> XX (Stateless) complaint to UNHCR, 20 June 2018.

with the family only via email and in English (a language which the family members did not understand).<sup>390</sup> When the court rejected the appeal, the family received an email from their lawyer with the text of the judgment without a thorough explanation of the decision. The family sent several requests for assistance and complaints to their lawyer, but received no response.<sup>391</sup>

## RECOMMENDATIONS

The AGIPA provides for several entitlements in the right to legal assistance in appeals procedures. One instance remains, however, in which national legislation and practice are not yet aligned. The fact that applicants have a legal representative does not always mean that they will receive a full translation of their (negative) asylum decision. Providing full translations of asylum decisions would allow asylum-seekers to make a personal assessment on whether or not to accept the decision. This may then help to reduce the number of unfounded appeals, in turn relieving the burden on state lawyers and reviewing courts.

### Recommendation 15:

(a) To delete the words “unless the applicant has a representative” from Section 30(6) of the AGIPA as follows:

- “The decision to reject an application for international protection, to issue a residence permit or to refuse issue of a residence permit shall be translated to the applicant wholly.”

(b) To amend the relevant national legislation to ensure that state legal aid lawyers have the capacity to provide asylum-seekers with full translations of court decisions examining the asylum- and detention-related aspects of their cases.



In practice, improving access to and quality of the state legal aid provided to asylum-seekers would improve the efficiency and effectiveness of the national asylum system and increase trust in it.

**Recommendation 16:** To review the current conditions for the provision of state legal aid to asylum-seekers, especially those who are detained, and consider introducing additional safeguards ensuring that all asylum-seekers have the opportunity to consult in person with their state legal aid lawyer. Also consider ensuring that the applicant and the state legal aid lawyer communicate in a language the applicant is supposed to understand.



Although UNHCR and EHRC have received a number of complaints concerning the quality of state-provided legal aid, a more comprehensive analysis of challenges and obstacles is needed.

**Recommendation 17:** To consider allowing an independent study to be undertaken to review the quality of state legal aid in Estonia and thoroughly investigate the concerns of asylum-seekers raised.

<sup>390</sup> *Ibid.*

<sup>391</sup> XX (Albania) e-mail correspondence, 2017.

# 7. CONCLUSIONS

---

## 7.1 Summary of recommendations

Estonia's asylum system has evolved significantly since the AGIPA's first entry into force in 2006. Amendments to the AGIPA in 2016, particularly, transposing the recast Asylum Procedures and Reception Conditions Directives, introduced several new safeguards and obligations for asylum-seekers and government authorities. Estonia's adoption of the EU Asylum Acquis and ensuing implementation demonstrates its commitment to a fair and efficient asylum procedure. UNHCR has undertaken this study to support Estonia in its efforts and provide a useful tool for assessment of Estonia's national standards relating to the provision of legal aid to asylum-seekers. The recommendations throughout this report are aimed at improving Estonia's overall asylum system and raising the current national standards to good practices found in similarly situated EU Member States.

Many aspects of Estonia's asylum system represent good faith efforts to serve the specific and changing needs of asylum-seekers over time. When asylum-seekers first arrive in Estonia, they are often faced with linguistic, cultural, and procedural barriers that can seem insurmountable. In addition, and not to be forgotten, persons seeking asylum are fleeing persecution and are likely to have suffered physical and/or psychological trauma. That Estonia's legal framework outlines the means for asylum-seekers to be recognized, informed, assisted, and represented demonstrates its commitment to providing effective access to legal aid. Participation in AMIF-funded projects, organized capacity trainings, and review of distributed materials also indicate a continued focus on delivering quality legal aid.

Naturally, however, areas for improving access to and quality of legal aid to asylum-seekers in Estonia remain. Legislative amendments to the AGIPA based on the current APD and good practices from other countries would address shortcomings and improve the system. These include recognizing vulnerable applicants' need for special procedural safeguards and advice, providing information on applicants' rights and obligations within an apt time-frame, improving communication between asylum-seekers and state legal aid providers, allowing for legal representation at all stages of the procedure (notably at first instance), enhancing the capacity of lawyers, and ensuring full translations of asylum decisions. Making progress in each of these areas would directly contribute to a fair and efficient asylum procedure. A number of practices would also benefit from moderate to substantial adjustment. These include establishing a realistic possibility for asylum-seekers to receive state legal aid at the border, identifying vulnerable applicants who generally require additional legal assistance early, providing more comprehensive legal counselling support in detention and accommodation centres, and ensuring applicants have the opportunity to consult and communicate effectively with their state-appointed lawyer prior to, during, and after their hearings. Each of these recommendations would strengthen every stage of the asylum procedure, from entry, application, first instance, and appeal. Enhancements in part lead to betterment overall.

A quality asylum system is not an end in itself. Improvements in providing free legal aid to asylum-seekers have been shown to be cost-effective and increase the quality of the system. In terms of cost, quality legal aid focuses on material elements of an asylum-seeker's claim early on and thereby reduces the burden of fact discovery and analysis by decision-makers. In addition, applicants that benefit from an efficient asylum procedure are better prepared and decision quality is strengthened, resulting in a lower rate of appeals. As for trust, adept and collaborative legal representation leads to a less adversarial environment, applicants that are better informed of the procedure, and increased confidence of all parties in the decision-making process. Of course, for persons in need of international protection, a strong asylum system serves an even more important role: as a safeguard of their fundamental rights, most importantly their right to *non-refoulement*.



## **7.2** Need for further analysis

The information provided on the current practice with regard to asylum-seekers' access to legal aid in Estonia is the result of observations made by UNHCR, the EHRC, and authors of independent reports. These have provided valuable initial insight into the challenges asylum-seekers face in the implementation and exercise of their rights and obligations under the national asylum system. Formal conclusions, however, require further careful and systematic study. In order to truly identify all possible obstacles and areas of improvement within the Estonian asylum system, extensive quantitative and qualitative data is required. Data should be gathered on country and reception conditions, consistent state legal aid practices, and analysis of the success or failure of applications at various stages throughout the procedure.<sup>392</sup>

The conclusions and recommendations put forth by UNHCR throughout this report, although made thoughtfully, are based on initial assessment. Determining the quality and efficiency of legal aid accorded to asylum-seekers requires comprehensive in-depth analysis involving a wider range of stakeholders and beneficiaries. A fair and efficient system would ensure that the particular needs and circumstances of persons seeking international protection in Estonia are adequately met. Free legal assistance would be promptly available to asylum-seekers processed at the border or in areas removed from major cities as well as those detained. Quality legal assistance and representation is in the interest of all States. Ensuring that international protection needs are identified accurately and early improves the first instance (administrative) procedure and contributes to greater efficiency overall.

UNHCR, therefore, encourages Estonia to support a thorough assessment of its national system of provision of legal aid to asylum-seekers and commit to addressing any challenges found therein.

---

### **RECOMMENDATIONS**

The purpose of this report is to assess access to and quality of legal aid to asylum-seekers in Estonia. Below is a summary of recommendations for different stages of Estonia's national asylum procedure. For more detailed analysis, line-by-line legislative amendments, or further explanation, refer to the "Recommendations" paragraph at the end of each corresponding section or subsection.

---

<sup>392</sup> For more information on guiding principles for quality legal aid see: Information Centre about Asylum and Refugees, Review of quality issues in legal advice: measuring and costing quality in asylum work – Executive Summary, available at: <http://bit.ly/2zHI5GQ>; ECRE, Right to Justice: Quality Legal Assistance for Unaccompanied Children – Annex I, Guiding Principles for Quality Legal Assistance for Unaccompanied Children, available at: <http://bit.ly/2zAwACp>; ECRE/ELENA, Survey on legal aid for asylum seekers in Europe (2010), pp. 156-162, available at: <http://bit.ly/2oBIZIE>.

# SUMMARY OF RECOMMENDATIONS

---

## Access to legal aid at entry points ([Section 4](#))

1. Provide a realistic possibility for persons denied entry to seek and receive an effective remedy via state legal aid at the border and in transit zones.

## Legal information at the border and in detention facilities ([Section 5.1](#))

2. Identify potential applicants based on objective indications of their need for international protection, rather than a subjective “reasoned ground to believe” they wish to apply.
3. Set out requirements and conditions to ensure expedient knowledge about and effective access to NGOs and persons providing legal advice and counselling at the border.
4. Provide early legal advice to applicants as soon as possible.

## Special procedural guarantees for vulnerable applicants ([Section 5.2](#))

5. Standardize PBGB trainings regarding the identification, recording in writing, and service of vulnerable applicants and/or persons in need of special procedural guarantees.
6. Guarantee that unaccompanied children are immediately assigned a lawyer as soon as they are identified.

## Information on rights and obligations during the procedure ([Subsection 5.3.1](#))

7. Amend the national legislation to ensure applicants receive:
  - a. legal information on the asylum procedure immediately after submission of their application; and
  - b. legal information on reception conditions within 15 days after submission of their application.

## Legal assistance and advice during the procedure ([Subsection 5.3.2](#))

8. Establish applicants’ right to receive free legal and procedural information “in the light of their particular circumstances”.
9. Raise the capacity of counsellors in the Vao accommodation and Soodevahe detention centres, including on basic asylum procedure/law, non-profit services available to applicants, and how to assist applicants in responding to preliminary PBGB decisions.
10. Expand the scope of counselling services offered by the PBGB special migration advisors in the service bureaus of Harjumaa County to include asylum matters.
11. Recognize NGOs, where applicable, as a source of legal and procedural information.
12. Guarantee applicants the right to free legal aid at all stages of the procedure, including in preparation of the application and interview.

### **Access to legal aid in appeals procedures at the border ([Section 6.1](#))**

13. Facilitate access to state legal aid for applicants who wish to contest a negative decision received at the border. Train PBGB border guards to recognize the right of applicants to an effective remedy through appeal. Introduce automatic appointment of state legal aid lawyers to applicants. Involve NGOs in the process of providing legal aid at the border.

### **Access to legal aid in appeals procedures in detention ([Section 6.2](#))**

14. Ensure effective access of all applicants to state legal aid at the stage of judicial examination of the PBGB requests to extend detention beyond 48 hours.

### **Access to legal aid in appeals after a negative decision ([Section 6.3](#))**

15. Guarantee applicants receive a full translation of the reasons for a negative asylum decision and relevant judgments in a language they understand, irrespective of whether the applicant has a legal representative (lawyer) or not.
16. Ensure applicants have the opportunity to effectively consult with their state provided lawyer at all stages of appeal, including before hearings, regular communication via phone or e-mail, and in the transmission of appropriately translated documents and decisions.
17. Undertake a comprehensive and independent study to review the quality of state legal aid in Estonia and thoroughly investigate the concerns of asylum-seekers raised.

