



Access to Protection at Airports in Europe



Report on the monitoring experience
at airports in Amsterdam, Budapest,
Madrid, Prague, Vienna and Warsaw

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in Amsterdam, Budapest, Madrid,
Prague, Vienna and Warsaw

by

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(Magyar Helsinki Bizottság), Hungary

with

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Introduction

States have a legitimate right to control their borders and manage the entry of foreigners, but methods employed to prevent unauthorised entry of migrants must allow for those seeking protection to be identified so they can claim asylum. Safeguards must be employed to ensure that asylum seekers are not returned to any country without having their claim examined within a fair process first.

In most Member States of the European Union the number of persons crossing the state border at airports far exceeds those at land or sea borders. Yet access of asylum seekers to the territory and the asylum procedure is often still unregulated and ad hoc at such entry points. Although international and European instruments contain legal provisions and provide guidelines on procedures to ensure that asylum seekers get access to Europe, practices often do not reflect the protection envisaged in these instruments.

Countries also follow vastly different practices at border points, frustrating the objectives of the Common European Asylum System, which is intended to create a harmonized and protection-based framework for asylum across the EU.

The principle of non-refoulement in Article 33 (1) of the 1951 Convention relating to the Status of Refugees stipulates that all states are obliged not to return refugees to a country where their life would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. In addition, Article 31 establishes that states cannot impose penalties on refugees (and asylum seekers) who enter the country illegally from a country where their life or freedom is at risk, provided they “present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

EU law has incorporated the principle of non-refoulement and seeks to guarantee access of asylum seekers to the asylum procedure in the Qualification Directive¹ and the Asylum Procedures Directive,² which all Member

¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

States must transpose and implement in their national legal systems. In addition, EU Member States must ensure the right to an effective remedy against a decision of inadmissibility at border and transit zones.³

Despite these provisions, the number of asylum applications in the EU has dropped to a 20-year low, partly due to inappropriate practices of Member States that often ignore these principles and prevent refugees from entering Europe.

The project entitled “Monitoring access of asylum seekers to territory and procedure at European airports – exchange of experience and best practices” began in December 2006 with the participation of six European refugee-assisting non-governmental organizations. It sought to monitor how refugees’ access to Europe through airports is ensured in the law and practice of various Member States and to offer recommendations to various actors by building on good practices already in place in some of these countries. The project’s ultimate goal was to contribute to ensuring that asylum seekers arriving in the EU by air have access to and enjoy the right to international protection.

In order to achieve this goal, the project, coordinated by the Hungarian Helsinki Committee, has examined border practices in six major airports for eight months in 2007, namely: Amsterdam – Schiphol, Budapest – Ferihegy, Madrid – Barajas, Prague – Ruzyně, Vienna – Schwechat and Warsaw – Frederic Chopin international airports.

Participating NGOs were selected based on their experience in providing assistance to asylum seekers at airports as well as on their level of cooperation with their respective government agencies in border monitoring.

Following the series of monitoring missions and sharing of experiences, participating NGOs hope to contribute to increasing and harmonizing protection standards within the EU, moving closer to achieving the goals formulated in the 1999 Tampere European Council Conclusions, and thus ensuring that any individual asylum seeker would eventually undergo the same procedure and enjoy the same level of protection irrespective of which Member State the asylum application is lodged in. Establishing the envisaged common asylum system by 2010 is probably unrealistic, but cooperation between government and non-governmental actors in the field can lead to fuller respect for the right to seek and enjoy asylum in the EU.

This report aims to summarize the experiences and findings of the monitoring project in a strictly practical way, highlighting the most important aspects of airport procedures by country, sharing good practices that can and should be followed by other EU Member States, and providing a set of recommendations based on common concerns for border guard authorities and other relevant government agencies.

As the report focuses on improving practices, policy and legislative questions remain out of its scope as partners believe that many of the experienced problems concerning airport procedures can be remedied by the actors involved without actual legislative changes.

The report contains information current in January 2008.

³ Council Directive 2005/85/EC, Article 39

Participating Organizations

Asylum Coordination Austria (Asylkoordination Österreich)

<http://www.asyl.at>

Asylkoordination Österreich was founded in 1991 and campaigns for the rights of refugees and asylum seekers in Austria. It consists of approximately 40 humanitarian organizations as well as individual members in Austria. The organization fosters the exchange of information and cooperation between professionals working with refugees and organizes training sessions. Asylkoordination works closely with UNHCR and with administrative authorities and elected officials. The organization also conducts research and analysis of crucial issues in the field of asylum and migration and publishes a quarterly newspaper. Furthermore, the NGO specializes in anti-racism education and offers workshops, seminars, and role-playing events. The organization is also a member of different national and European networks which lobby for the rights of refugees and migrants and fight against racism. It is a member of the European Council on Refugees and Exiles (ECRE).

Dutch Council for Refugees (VluchtelingenWerk Nederland – VWN)

<http://www.vluchtelingenwerk.nl>

The Dutch Council for Refugees (DCR) is an independent, widely-based professional organization. Based on the Universal Declaration of Human Rights, it works to protect asylum seekers and refugees. This work is mainly done by its many volunteers and entails personal support and the protection of refugees' interests during admission, reception, and social participation primarily in the Netherlands. It is a member of the European Council on Refugees and Exiles (ECRE).

Hungarian Helsinki Committee – HHC (Magyar Helsinki Bizottság)

<http://www.helsinki.hu>

The Hungarian Helsinki Committee (HHC) monitors the enforcement of human rights enshrined in international human rights instruments, provides legal assistance to victims of human rights abuses falling under its scope of activity, and informs the public about rights violations. The organization strives to ensure that

domestic legislation guarantees the consistent implementation of human rights norms. The HHC promotes legal education and training in fields relevant to its activities, both in Hungary and abroad. Its main activities focus on protecting the rights of asylum seekers and foreigners in need of international protection as well as on monitoring the human rights performance of law enforcement agencies and the judicial system. It pays particular attention to detention conditions as well as the effective enforcement of the right to defense and equality before the law. The organization is a member of the European Council on Refugees and Exiles (ECRE).

Organisation for Aid to Refugees (Organizace pro pomoc uprchlíkům – OPU)

<http://www.opu.cz>

Organisation for Aid to Refugees (OPU) was established in Prague, Czech Republic in 1991. It is a non-profit, humanitarian organization registered by the Ministry of the Interior as a civil association since 28 November 1991. Over the past ten years, OPU has gradually gained expertise in matters related to the needs of asylum seekers, recognized refugees, and migrants in the Czech Republic.

The goal of the organization is to assist asylum seekers who request asylum in the Czech Republic due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, as well as recognized refugees and persons under the temporary protection regime. To achieve this, OPU employs professional, experienced and friendly staff whose main purpose is to provide effective help. OPU is a member of the European Council on Refugees and Exiles (ECRE).

Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej – SIP)

<http://www.interwencjaprawna.pl>

Association for Legal Intervention (SIP) is an NGO which was founded in May 2005, and aids people who are facing discrimination and at risk of marginalization by providing them legal and social assistance. Lawyers working in SIP represent clients before Polish and international authorities. The Association is also involved in advocacy activities aiming to achieve modifications in the legal system and social policy, through participation in conferences, monitoring activities, consulting legal acts, writing comments to legal provisions, preparing analyses and opinions. The Association is active in information campaigns, research activities, and promotes legal education for many different social groups. Most of its actions focus on refugees and children, as well as on the issues of restorative justice.

Spanish Commission for Refugees

(Comisión Española de Ayuda al Refugiado – CEAR)

<http://www.cear.es>

The Spanish Commission for Refugees (CEAR) was created in 1979 with the initial idea to support refugees arriving from South America. Today, it is an important organization with more than 200 workers and 700 volunteers, in more than 12 towns across Spain. CEAR works with asylum seekers, refugees, stateless people and immigrants, and it provides legal and social assistance, as well as labor and professional orientation to its clients. The organization also works in sensitizing programs, and carries out advocacy campaigns on asylum and immigration-related issues. CEAR provides legal assistance to asylum seekers in the main airports and harbors of Spain, as well as in refugee reception centers. CEAR is a member of the European Council on Refugees and Exiles (ECRE).

CHAPTER 3 .

Methodology

The project partners used a variety of methods to collect data throughout the project in order to obtain useful information and be able to compare and analyze it in an effective manner.

First, partners jointly developed a common questionnaire to use in the monitoring visits at the airports.

The questionnaires had three main sections: the first part included interviews with foreigners who were held in short-term detention facilities and were involved in the return procedure. The aim of this section was to gather information on the purpose of their coming to Europe (whether they were in need of international protection), their understanding of rights and responsibilities, and the procedures they have gone through at the airport since their arrival (e.g., interview with the border guards, interpreter available, legal assistance needed and available, etc).

The second part included an interview with those who have already submitted an asylum application to determine whether their experiences were any different from those undergoing the return procedure.

The third part of the questionnaire included information gathered from the files of persons who had already been returned to their city of departure to find out whether any persons potentially in need of protection had been refoiled and what procedures they had gone through.

The questionnaire included a section at the end with information on progress made or practical changes that had occurred since the previous visit, as well as on new potential areas of concern.

Partner organizations carried out visits to their respective airports. These visits took place twice a month for the duration of 8–9 months.⁴ Altogether over 75 questionnaires were collected from the six countries between February and October 2007.

Monitors also discussed their personal experiences with the system and the findings they might have made with border guard officials.

⁴ In some of the participating countries, monitoring visits began later due to the slower process to obtain permission from the border guards.

It is important to mention that partner organizations formed quite different agreements with their respective border guard authorities and not all participating organizations had access to the same type of facilities or could look into the files of returned persons. The most progressive agreement was made in December 2006 in Hungary between the National Border Guard Headquarters, the Hungarian Helsinki Committee (HHC) and the UNHCR Regional Representation. The tripartite agreement allows the HHC to access all border facilities where foreigners are held, to interview them, and look into the files of returned persons. In addition, the border guards provide monthly statistics on measures taken concerning foreigners apprehended.

In addition to the individual monitoring visits and questionnaires filled out, partners also conducted joint missions to airports to learn about and better compare practices and procedures of countries other than their own. These visits further helped identify good practices.

Altogether five joint visits took place with the participation of the host organization and two of the project partners:

- 8 May 2007: Budapest;
- 14 June 2007: Prague;
- 26 June 2007: Vienna;
- 17 July 2007: Amsterdam;
- 17 October 2007: Warsaw.

Unfortunately, no joint visit could not be made to the Madrid airport due to the slow permission process by the local border guard.

Partners also conducted research on their national legislation to assess how it complies with international and European instruments.

The Hungarian Helsinki Committee compiled the present report based on the individual questionnaires completed by the partners and on partner organizations' written contributions, which are included herein as country chapters.

Summary of Issues Concerning Airport Procedures in Six EU Member States

4.1 Austria

4.1.1 The Project Partner's Access to Facilities and to Persons of Concern

It is important to note that at the beginning of the project, Austria was the only country among the six EU Member States to have refused to grant the partner organization access to airport facilities, despite the direct and explicit support for the project by the European Commission. UNHCR in Austria was also reluctant to explicitly support the project.

Austrian authorities claimed that access to the files of returned persons raised data protection concerns. After a series of meetings that lasted two months with representatives of various authorities (officials from the Ministry of Interior, from the Border Guards, the local police, UNHCR, Caritas and others), the request for cooperation was finally turned down. This refusal was made partly because the Austrian authorities were not involved in the development of the project and also because the airport is already monitored by the Commission of the Human Rights Advisory Board (HRAB) of the Ministry of Interior and UNHCR. However, their findings must be kept confidential.

Eventually the following agreement was reached with the authorities:

- the joint visit with project partners could take place, including visits to all facilities of the airport;
- figures on returns and asylum applications would be provided;
- due to the lack of capacity, access to files of persons undergoing the return procedure would not be available;
- the project questionnaire was forwarded to the asylum agency that promised to ask some of the questions themselves, if they have capacity (although project partners did not think this was a real option).

Asylkoordination has also agreed with Caritas Vienna to share information on persons of concern at the airport but as Caritas did not have access to the rejection zone either, it became clear that monitoring would be rather unsystematic.

Considering all this, it has to be kept in mind that the findings of airport practices concerning the access of asylum seekers at the Vienna airport are based on a research methodology different from the other countries, as well as on informal information from other organizations and the respective authorities. The summary, therefore, follows a different structure than that of the other five countries.

4.1.2 Legislation Concerning the Rejection Zone

The Higher Administrative Court in Austria ruled on 16 April 2004 that foreigners' stay in the rejection zone of the airport constitutes detention. The financial ability to organize departure was considered to be merely theoretical because the foreigner could not assume, without any respective information, that contact to the outside world through the office telephone would enable her/him to organize a voluntary departure or to get legal advice.

An Indian national was subjected to pre-border control at the aircraft and was found without a travel document. The police transferred him to the rejection zone where he stayed from 23 June 2004 until 29 June 2004. After his complaint to the Independent Administrative Senate had been dismissed, an appeal was filed to the Higher Constitutional Court which was rejected in October 2005 and then the case was assigned to the Higher Administrative Court. In its decision, the Court explained that there was no legal basis for the deprivation of liberty because the person had to stay in a closed facility consisting of 3 rooms and a sanitary room. The Indian national claimed that he already asked for asylum when he was held by the border police on 23 June but the application was not forwarded as there was no interpreter. On 29 June, the expected day of return, he succeeded in submitting the asylum application.

The Austrian Human Rights Advisory Board published its "Considerations for an urgent report of the Board to the rejection zone at the Vienna Schwechat airport" in 2004, after a visit on 25 June 2004 in the newly established rejection zone. The situation was regarded as deprivation of liberty under Article 5 of the European Convention on Human Rights (ECHR) and not as restriction of movement that would allow the person concerned to leave the place any time and organize his departure. Furthermore, the lack of official notification and the review by the Independent Administrative Senate was criticized.

If a person applies for international protection, the police hand out initial information leaflets without any specific information about the airport procedure. Interpreters are available during the first interview. During this interview, a standard formula is used which focuses on personal data, means and travel route, transited countries or stays in other countries, and questions relevant in the Dublin II procedure to determine the responsible EU Member State for processing the asylum application. It also includes a brief report on the reasons for fleeing the country of origin and feared risks in case of return. Asylum seekers are then transferred to the "initial reception center" – which is in the same building as the rejection zone. On the basis of the first interview, the Federal Asylum Agency decides whether the refugee status determination procedure shall be processed under the special regulations on the airport procedure, or if the case should be considered in a regular procedure and the asylum seeker should be transferred to the reception center in Traiskirchen.

The asylum procedure starts with the determination of admissibility. If it is likely that the application will be declined due to safe third country reasons or Dublin II responsibilities, or the application is likely to be dismissed for other reasons, then the asylum seeker is obliged to consult a legal advisor who is present during the next

hearing. The admissibility procedure cannot exceed 20 days, unless consultations with other EU Member States appear to be necessary. If the Federal Asylum Agency intends to reject the application during the airport procedure, UNHCR has to be informed within one week. An asylum application lodged at the airport can only be rejected if there is no substantial evidence that the asylum seeker would be granted protection status. Furthermore, the rejection has to be approved by the UNCHR. Instead of a 14-days deadline, the appeals have to be submitted in seven days. The applications are examined by the Independent Federal Asylum Senate within two weeks.

Detention measures – more precisely the measures which require that the asylum seeker stay in the initial reception centre at the airport limiting his/her freedom of movement – which are ordered to implement rejection at the border can only be maintained for a maximum duration of six weeks. Rejection may be executed after the final decision concerning the asylum application has been made.

4.1.3 European Regulation Concerning the Rejection Procedures

In an internal order dated 9 October 2006, the Ministry of Interior reacted to the consideration of the Human Rights Advisory Board and communicated to police departments that a full protocol of the interview has to be taken indicating whether the statement of the rejected person has been made in the presence of an interpreter.

The internal order further announced the intention to provide a new standard form for the refusal of entry in accordance with the Schengen Borders Code,⁵ which will have to be signed by the border guard and the person concerned.

The Schengen Borders Code provides the right to a judicial review, and it prescribes that information in writing has to be provided with regard to contact addresses where information about legal representation is provided. The Ministry mentions that addresses of attorneys can be found under www.rechtsanwaelte.at. The list has to be printed out if a person undergoing return demands so. An information leaflet was submitted with this internal order and it has to be displayed in the rejection zone. The information leaflet was found posted during a visit in April 2007 and a list of interpreters was posted in the border guards' office.

4.1.4 Asylum and Return Procedures at Airport

Practically, refusal of entry is a non-formal procedure which requires the principle of non-refoulement to be examined and respected. The decision on refusal of entry can be appealed but due to the lack of a suspensive effect and free legal aid, the judicial review of a decision by the Independent Administrative Senate is often late, rendering it useless, because the foreigner has already been expelled. Persons under the return procedure are not provided specific written information on their situation; they are only informed about the possibility to organize their departure or explain reasons for a legal entry into the country, their right to make a telephone call, the right to appeal against the decision on rejection, and finally they are informed about available legal assistance. If a person submits an asylum application during the return procedure, the assistance of an interpreter is available during the first hearing by the police. Then the applicant is transferred to the “initial reception center” or in case of a regular refugee status determination procedure, to the reception center located in Traiskirchen.

The following information is not based on the first-hand monitoring experience of Asylkoordination, but instead on data provided by the authorities. Therefore, actual procedures cannot be described in detail.

⁵ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

Between February and September 2007, 185 foreigners were subject to refusal of entry at the Vienna airport (134 male, 48 female and 3 children). All cases of refusal of entry were based on Article 41 of the Aliens Police Act on the prevention of illegal entry. There were 124 persons who were not allowed to leave the aircraft or had been held in the rejection zone, while 16 persons applied for asylum.

According to data on refusals of entry provided by the police, persons who had applied for asylum were not held in the rejection zone. However, there are indications that some asylum seekers indeed had to stay in that facility. First of all, the number of asylum applications at the airport during this time period was much higher than in 2006. Two of these asylum seekers listed as persons under rejection measures stayed in the rejection zone for three days before applying for asylum but were not registered as held in the rejection zone. While 103 persons were held in the rejection zone, 80 had not been held in this closed facility.

The data provided shows that most of the persons whose entry had been refused were returned on the day of arrival (98 persons), one-third were returned the following day (58 persons), and 12 stayed for two days. The longest stay in the rejection zone lasted for four days. There were two cases where the duration of rejection at the border was even longer. In both cases, asylum applications had been submitted. An Indian man was returned to Seoul after 43 days, following a final negative decision on his asylum application. Another Indian national was kept there for 30 days, and he was returned to Prishtina, Kosovo after a final decision in first instance. Ironically, his entry to Prishtina was rejected and he was returned to Vienna.

Between February and August 2007, 495 persons submitted an asylum claim to the airport border police and were transferred to the first reception center/special transit at the airport to start the asylum procedure. The main countries of origin in 2007 were Turkey (138 applicants), Russian Federation (79), Iraq (53), Syria (50), India (48), unclear nationality (46), Iran (43). Other countries of origin included Serbia, Egypt, Sri Lanka, Lebanon, Afghanistan, Nepal, Somalia and Armenia.

Only five Chinese nationals applied for asylum, although Chinese nationals are the largest group affected by refusal of entry measures.

Protection gaps became evident through the case of three Burmese refugees that occurred at the time when the present report was being prepared. They stayed in the rejection zone for several days, while none of them was able to communicate with the border police and no interpreter was available. The border police realized that these people were asylum seekers only by accident.

4.1.5 Access to Legal Assistance

Information provided to foreigners subject to return does not contain any information about the right to seek asylum. As previously mentioned, they are informed in writing about the reasons for their rejection and the possibility to ask for a list of attorneys. No materials are available to provide information to persons who are not allowed to disembark from the aircraft.

Moreover, there is no free legal counselling or assistance provided by NGOs for persons under rejection measures at the airport. Legal advice may be requested by asking for the list of attorneys who are obliged to give free legal advice, but in practice this seems to be difficult as persons subject to return very often stay only for a few hours at the airport due to communication barriers.

Persons who apply for asylum have their first interview with the border guards who use a standard questionnaire. Applicants are asked about their reasons for fleeing their country and about the risks related to Article 3 of the ECHR in case of return.

If the asylum application is processed at the airport in an accelerated procedure, Caritas provides counselling and assistance to appeal the decision. If the Federal Asylum Agency rejects the application due to safe third country grounds or because another EU Member State is responsible for examining the asylum application, legal counselling has to be provided by an independent legal adviser (within the framework of the contract with the Austrian Integration Fund, which is under the control of the Ministry of Interior) who also has to be present at the hearing. Those legal advisers do not help with legal remedies. However, it should be noted that UNHCR has a supervisory role and has the power to object the decision.

Persons held in the rejection zone have no contact to Caritas. Only after applying for asylum and being transferred to the special transit zone/first reception center at the airport can they ask for assistance and have the possibility to use the telephone operated by Caritas. They may also get permission to use the phone in the police office but in this case the phone call will not be confidential.

The Human Rights Advisory Board and UNHCR have access to all persons held at the airport. They carry out periodic monitoring visits every two or three months.

4.1.6 Reception Conditions at the Airport

To ensure that return procedures can be carried out by the Austrian authorities, foreigners subject to such procedures are detained in a specific area at the airport waiting for expulsion. This detention facility can accommodate a maximum of thirteen persons. Contrary to the “initial reception center” where NGOs are permitted to carry out daily visits for different purposes, it is forbidden for NGOs to visit the facility which is used to prepare expulsion. Therefore no civilian oversight can be practiced in this area concerning the situation that foreigners face in detention. According to the Austrian Ministry of Interior, people do not have access to telephone in the latter facility, only in the border guards’ office.

Detainees in the “initial reception center” are provided the right to use a bathroom, to benefit from medical care, and to use the phone of Caritas social services. In contrast, persons in the return area are not provided any elementary rights of reception such as the use of a phone. It is also worrisome that returned persons are placed in a facility without any deadlines to carry out the expulsion, without appropriate reception conditions, including the possibility to spend some time in open air. Furthermore, these detainees have no real opportunity to communicate with anyone or to seek legal assistance.

4.2 Czech Republic

4.2.1 Legal Background

There are two steps that a foreigner has to take to submit an asylum application in the Czech Republic. First, he/she has to make a “declaration of the intention to apply for asylum” (asylum declaration). The asylum declaration is defined as an “expression of the alien’s will which makes it obvious that the alien is seeking protection in the Czech Republic against persecution”.⁶ This vague requirement indicates that there is no specific form for the asylum declaration prescribed by law. The asylum declaration may be made “in writing or orally and entered

⁶ Asylum Act (No. 325 of 1999 Coll.), Article 3 (1)

into a record⁷ to the Police or to the Ministry of Interior (MOI). In the case of an alien coming to the Czech Republic through the airport, this can be made only to the Police. If a foreigner cannot speak Czech, an interpreter has to be present during this procedure.

If the asylum declaration is made in the transit zone of an international airport, the person is immediately placed in a closed reception center in the transit zone where they are detained. Once he/she is in the facility, the MOI informs the person when he/she can submit an asylum application. The Ministry is not limited by any deadline prescribed by law to convey this information. According to Article 10 (5), it must do so “without undue delay”. In practice, the time between the asylum declaration and the submission of an asylum application usually takes a few days. The foreigner fills out the application with the support of an official of MOI and a interpreter of his/her “mother tongue, or a language in which he/she is able to communicate”.⁸ The refugee status determination procedure starts when this application has been filed. According to Article 23 (1), the MOI shall carry out an interview with every applicant, which usually takes place on the same day that the asylum application was lodged.

In the airport procedure, the asylum applicant stays in the transit zone’s reception center during the entire asylum procedure. There are, however, a few exceptions to this. According to Article 73 (2) (a) of the Asylum Act, “the Ministry shall transport the alien into a different asylum facility in the territory, designated by the Ministry, if it does not issue a decision within five days of the date of commencement of the proceedings for the grant of asylum”.

In the past there were problems with the extension of the five-day limit, as the MOI made a strict distinction between the term “to issue” the decision and “to deliver” the decision. The Ministry considered the day of issuing the decision the day when it notifies the asylum seeker that the decision is ready to be delivered to him/her, and not the day when the applicant physically receives the decision. Usually the decision was delivered in some cases 5 days later than when it had been issued. Obviously, this practice has unreasonably and unnecessarily extended the period that the asylum seeker had to spend in the closed reception center. OPU has submitted a complaint to the Czech Ombudsman, and the final report of the Ombudsman has confirmed the unlawfulness of the Ministry’s practice. However, the Ministry does not agree with the Ombudsman’s conclusion. Nevertheless, the MOI has considerably reduced the time for issuing the decision, and most decisions are now issued and delivered within five days. The decision is still delivered to the applicant in the presence of an interpreter.

Once the asylum application is rejected during the claimant’s stay at the airport, he/she can appeal to the court within seven days⁹ and has to await the decision at the airport. If the Court does not issue a decision within 45 days, the Ministry transports the person to an open reception facility in the territory.¹⁰ If the Court rejects the case, the person must stay at the airport’s reception center “until he travels out of the territory”.¹¹ The asylum seekers can opt for voluntary return to the country of origin or to a different country any time during this procedure. The term “issue a decision” was again interpreted in a negative way for an asylum seeker. The court’s decision was in a number of cases not delivered to the applicant in the 45 days time limit and the applicant was not released from the closed airport center.

⁷ Asylum Act, Article 3 (2)

⁸ Asylum Act, Article 22 (1)

⁹ Asylum Act, Article 32 (2) (b)

¹⁰ Asylum Act, Article 73 (2) (b)

¹¹ Asylum Act, Article 73 (3)

4.2.2 The Project Partner's Access to Facilities and to Persons of Concern

OPU has received permission from Refugee Facilities Administration (hereinafter SUZ) to enter the Prague Airport reception center, which is a facility designated for persons who have already applied for asylum. The SUZ, however, was cautious at the beginning about the cooperation with OPU. Concerning the access to the official reception center, OPU is participating in an UNHCR-financed project focusing on monitoring airport procedures. This guarantees OPU regular access to this facility. OPU and other NGOs do not have access to the transit zone, where people who are to be returned and had not applied for asylum are held. Therefore, monitoring the procedure concerning those persons was not possible. Asylum seekers meet border guards in another part of the building where the foreigners officially have to declare asylum (see under Point 4.2.1.). OPU does not have access to this part of the building, nor do the persons/potential applicants have any information about the possibility to contact lawyers. However, if the person asks for a lawyer, the necessary contact information is provided and the police wait until the lawyer arrives. This happened several times, according to the MOI. Thus, there is no external monitoring system in place to examine how exactly the asylum declaration is accepted. OPU has no access to the official MOI files either, unless the applicant is legally represented by the organization. As for statistical data, the SUZ, which is under the supervision of the Ministry, was supportive and provided OPU upon request with some data required as to the number of women, children and new applicants.

4.2.3 Information Provided to Persons of Concern

If they enter the country without valid travel documents, foreigners are issued an expulsion order written in the Czech language. In theory, the procedure is then translated to the person's mother tongue or a language that the person is capable of communicating in. OPU is of the opinion that this practice of delivering expulsion orders prior to initiating the asylum procedure violates the principle of non-refoulement because the term "non-refoulement" covers expulsion in any manner including physical expulsion and administrative expulsion as the first step in the expulsion procedure. Also, the Czech Constitutional Court defines expulsion as any step leading to removal of an alien from the territory.

After being moved to the closed reception center (detention), the asylum applicants are informed verbally about how to apply for asylum. They also receive several pages from the MOI about their rights, the closed reception center and the Dublin procedure. The leaflet also contains a list of NGOs they can contact for legal and other assistance. During the official interview with MOI, the applicants are informed verbally about their rights. However, OPU has received complaints from the applicants concerning the interviews, particularly about applicants not understanding the procedures.

Applicants can also receive a UNHCR-produced leaflet distributed in English, French, German, Russian and Arabic, either from OPU or from the authorities, which contains a comprehensive and easily understandable summary of the procedure and the availability of legal consultations with OPU.

4.2.4 Procedure at the Airport

When a foreigner enters the Czech Republic by air, border guards from the Aliens Police only examine whether he/she has valid travel documents. For persons who have no such documents or if their documents are forged, the border guards initiate a return procedure by issuing an expulsion order. Police authorities do not distinguish between a person fleeing a country because of persecution, and a person entering the country illegally for

other reasons. This lack of distinction carries the risk of breaching Articles 31 and 33 of the 1951 Refugee Convention.

In theory, there is one section in the expulsion order that examines “obstacles for deportation.” However, in most cases this process ends without a proper examination and a brief sentence stating that “no obstacles for deportation have been found”. This procedure is based on the MOI’s Department of Asylum and Migration Policy (DAMP) official country of origin information. This information is general in nature and brief, given that the returning order is issued within several hours. Yet, it seems to be a consistent practice (perhaps based on an internal list) as to which countries are considered problematic for deportation. However, if the person declares an intention to apply for asylum, an asylum procedure is initiated and the obstacles to deportation (in fact the need for asylum or subsidiary protection) should be identified in the course of the asylum procedure.

In cases where no “obstacles” are found, and the person does not declare an intention to apply for asylum, the deportation can be carried out very quickly without taking into consideration the individual’s circumstances and reasons for leaving his/her country. Taking into account that there are no specific rules as to how exactly the intention to ask for asylum should be declared in order to be accepted by the police, nor is there any external monitoring mechanism in place, the consequences of this practice can be very serious, likely leading to the frequent refoulement of persons in need of international protection. The situation is even more worrisome concerning vulnerable persons such as women, minors, or disabled persons as the border guards do not have the appropriate knowledge or skills to treat or communicate with them. On the other hand, MOI officials properly consider the vulnerability of some clients and release vulnerable asylum seekers to open accommodation centers. Furthermore, the recently adopted amendment to the Asylum Act stipulates that vulnerable categories of asylum seekers must be released to open accommodation centers.¹²

During this project, OPU was informed by external sources about three cases where deportation had been carried out against people who were most likely in need of international protection. One recent case concerns the deportation of three unaccompanied minor Kurdish girls (aged 13, 14 and 15). OPU received information prior to their arrival from Turkey that they would come to the Prague airport with the intention to continue traveling to Sweden in accordance with the Dublin Regulation¹³ to join their parents seeking asylum in Sweden. The following day, during a regular airport monitoring visit, the girls in question were not found at the reception center. The MOI refused to give information about whether they were held in the police detention area, which is located in another part of the building. This is a common practice as the police are not subordinated to the MOI directly, but to the Aliens Police Directorate. (At the Alien Police Directorate, no one provides any information over the phone). The following day, Swedish authorities informed OPU that the girls had been deported back to Turkey immediately upon their arrival, even before OPU received a notification. According to the information provided by the MOI, these girls travelled together in the group of other adult and minor Turkish nationals, held valid travel documents and their original destination was Moscow. The whole group then refused to continue their journey to their original destination. After they had been contacted by the police and the official interpreter had arrived, they stated that they did not want to ask for international protection and they peacefully returned to Turkey.

¹² Recent adoptions of the Asylum Act came into force on 21 December 2007. The provisions prescribing different treatment to vulnerable asylum seekers are included in Article 73 (7).

¹³ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

According to their parents, they were not able to get in touch with their daughters to know whether they were safe in the home country, and had no information about them. At the time of the present report, OPU filed a complaint against the police for its failure to appoint a guardian for the children and a complaint has been submitted to the Ombudsman. OPU strongly underlined that a child travelling with non-related, unknown adults cannot be considered a member of a group, but should be regarded as an unaccompanied minor and treated accordingly.

Concerning the airport procedure, once admitted to the territory and moved to the closed reception center, foreigners are verbally informed about the possibility to submit a written asylum application, which indicates the beginning of the asylum procedure. Then the applicants are interviewed officially by MOI officials in the presence of an interpreter. It is important to note that the quality of the interviews has recently improved, MOI officials receive better country of origin information, and the sources of information in many cases have also become more diverse than they previously were.

The applicants are also better informed about the possibility to appeal an expulsion decision. At the beginning of the project, interviewed foreigners complained about the lack of information on effective remedies against this order. However, the expulsion decision does contain information on the available appeal procedures (in Czech language).

OPU, however, still receives complaints from applicants about the interviews, particularly highlighting that:

- a) MOI officials often accuse applicants of making false statements. This stressful and fear-provoking environment often leads to the person not being able to fully describe his/her reason for leaving his/her country;
- b) MOI does not pay proper attention to the most important details of the applicant's statement;
- c) Incorrect interpretation can lead to discrepancies in the applicant's statements and can cause a lack of general understanding of the procedural rights in some cases.

Asylum seekers complained to OPU that they did not trust the interpreter. In some cases they believed that the interpreter belonged to a political party or social group that had persecuted them in their country of origin. These complaints ranged from a fear that comments were being misinterpreted to claims that interpreters had openly threatened applicants. Asylum seekers are entitled to submit a complaint against the interpreter and the Ministry has responded by providing new interpreters in some cases.

Concerning the time period foreigners spend at the reception center, OPU's monitoring experience shows that in the majority of cases the authorities respect the time limits provided by the Czech Asylum Act. If the decision is not delivered within five days of the interview, the applicant is transferred to an open reception facility. Applicants who receive a negative decision at the reception center can appeal to the court within seven days. This appeal has a suspensive effect. In case the court does not deliver a decision within 45 days, the applicants are also transferred to an open center.

It is important to mention, however, that during the course of this project there was not a single positive decision on asylum claims submitted at the airport. According to the Ministry of the Interior, only unfounded cases are decided within 5 days. The more complicated cases are decided later, after the person is moved to an open accommodation center. OPU believes that during the airport procedure, the negative decisions are issued hastily, without properly examining the applicant's statements or the current situation in the applicant's country of origin and even Sudanese and Kurdish asylum seekers can be quickly rejected. OPU is of the opinion that there is a huge difference between the likelihood of being granted asylum or subsidiary protection for a person arriving at the airport and a person arriving by land.

4.2.5 Legal Assistance

As previously mentioned, there is no possibility for any assistance at the closed detention area before entering the reception center.

At the closed reception center itself, during the asylum procedure, every applicant has the right to ask a specialized NGO for legal assistance as stated in the Czech Asylum Act. As mentioned above, a UNHCR-financed project focusing on monitoring airport procedures guarantees OPU's regular access to the airport reception center. OPU is cooperating closely with UNHCR and benefits from UNHCR support regarding the assistance at the airport. The applicant can also hire a private lawyer. In practice, hiring a private lawyer could be complicated, as an administrative permit is required to enter the closed transit zone at the airport. Nevertheless, applicants can use the public payphone located in the center, and/or ask to purchase a mobile phone and a SIM card.

There are two organizations providing regular free assistance at the airport. OPU specializes in legal assistance. There is a poster with the OPU contact address, phone numbers and regular visiting schedule posted in the accommodation section of the facility. The most frequent topics during the regular legal consultations led by an OPU lawyer were information about the procedure, the applicant's rights and his/her options in the given situation. Applicants could also receive free legal representation if necessary. The other organization visiting the airport is Caritas Czech Republic, whose social workers provide basic legal and social assistance such as buying phones and personal hygiene items.

4.2.6 Accommodation at the Airport

The reception center is a fairly new facility. It contains both accommodation and administrative areas. The administrative area consists of a reception room for the authorities, a medical room, several MOI offices, and a common room used also for legal counseling. In the common room, there are a few books and newspapers for the applicants.

The accommodation area consists of several separate rooms for male and female applicants and bathroom facilities, with a total capacity of 45 people. There is also a public payphone and a special room for vulnerable applicants such as unaccompanied women and children. The OPU monitor did not have access to the accommodation area to provide more information about the room's furnishings.

The food at the center is provided by the SUZ. In some special needs cases, Caritas can also help applicants obtain goods. Government-employed social workers and nurses are fairly supportive and they can also provide some leisure time equipment.

Despite all efforts to make the foreigners' stay as comfortable as possible, detained foreigners still stay in closed detention for an unreasonably long time where their freedom of movement is limited. This happens in line with the Czech Asylum Act, but OPU believes that in some cases Article 5 (f) and 5 (4) of the European Convention on Human Rights are violated. Some applicants suffer from significant physical and psychological problems in this environment, as they feel that they have been arrested without committing a crime. OPU has supported an NGO initiative aimed at establishing a time limit for staying in the reception center and also distinguishing among various groups of applicants. The Parliament has recently adopted an amendment of the Asylum Act reflecting these objectives.

4.3 Hungary

4.3.1 Legal Background

Both third country nationals and persons having the right to free movement may be refused entry to Hungary and be subjected to a return procedure at the border if they do not meet the conditions for entering the country. In the case of third country nationals, the reasons for refusal of entry are prescribed by the Schengen Borders Code. There are various reasons for refusal: lack of a valid travel document, lack of valid visa/permit, forged travel document, forged visa, etc. The refusal of entry and return is ordered in the form of an official decision, which has to be translated into the language the person concerned understands.

The return procedure has to be completed within eight days (within 72 hours in case of a person having the right to free movement). If this period expires, the person must be allowed to enter the country even though the expulsion procedure has to start simultaneously (in the case of a person having the right to free movement, it is just an option, not an obligation).

During the return procedure (until the return is completed, or if the above deadlines expire), the person has to stay at the premises designated by the authority. There are special accommodation premises both in Terminal 1 and Terminal 2 of the Budapest airport for this purpose. The proceeding authority has no obligation to conduct an interview during the return procedure.

The person can be sent to the country of departure, the country which is obliged to accept him/her, the country of his/her habitual residence or to any other country where the person may be allowed entry.

The law requires that the person under the return procedure receive a leaflet about basic rights and obligations in an alien policing procedure in a language he/she understands, and a separate information sheet must be handed over if the person is ordered to stay at the accommodation premises. Concerning the asylum procedure, any foreign national is entitled to apply for asylum upon arrival at the airport (including the transit zone). The right to seek asylum also extends to persons under official deportation from another country to a third country. The asylum application can be submitted in a verbal or written manner, it has no prescribed form and does not have to contain any reasons. The Border Guard¹⁴ is obliged to record the asylum application if the person wishes to submit an application verbally. In this case, the Border Guard will conduct a short interview in order to record the verbal application in writing and to acquire information about the travel route and the grounds of persecution. The interview is recorded officially in a protocol in the presence of an interpreter, and the protocol is attached to the person's file.

The new Act on Asylum¹⁵ entering into force on 1 January 2008 relieves the Border Guard from the duty of recording the asylum application in writing, and assigns it the obligation to notify the refugee authority, who has to record the application within 12 hours. Thus all duties concerning an interview or finding an interpreter will be transferred onto the refugee authority.

The authority receiving the asylum application has to immediately notify the refugee authority. After the application is recorded (and the interview by the border guard conducted), the refugee authority takes over the

¹⁴ As of 1 January 2008 the Border Guard ceased to exist as a separate entity and has been integrated into the regular police force.

¹⁵ Act LXXX of 2007 on asylum

case. In theory it would be possible to conduct a so-called accelerated asylum procedure in the case of persons applying for asylum at the airport, but in practice this method is hardly ever used. Consequently, such persons are treated in a regular procedure: a reception center is assigned for them and they receive a travel coupon with which they can travel to the reception center alone without an escort (persons applying for asylum at the airport cannot be placed in alien policing detention).

The new Act on Asylum introduces a two-phase administrative procedure beginning in January 2008. The first phase will consist of a preliminary admissibility procedure (as well as the completion of the so-called “Dublin procedure”). In cases involving foreigners applying for asylum at the airport, this preliminary procedure must be conducted at the airport, and persons will have to stay at the airport during the whole duration of the procedure. If their application is found admissible, they will be transferred to a reception center; otherwise an alien policing procedure will be started to expel them.

The law states that persons under the return procedure are entitled to have access to legal assistance. However, in practice this access is very limited due to the special nature of the airport and the return procedure. Only asylum seekers are provided with free legal assistance paid by the state-funded legal aid scheme, however as there are no organized legal aid units at the airport or in the reception centers, access to the legal aid services is not ensured. Only the Hungarian Helsinki Committee has regular access to persons under the return procedure, under a tripartite agreement signed in December 2006 between the National Headquarters of the Border Guard, the UNHCR and the Hungarian Helsinki Committee. The contact information of the HHC lawyer is posted in all premises where persons of concern may turn up.

The period of stay at the airport cannot exceed eight days. The average term spent in the facility is approximately two days.

4.3.2 The Project Partner’s Access to Facilities and Persons of Concern

As mentioned before, in December 2006, the Hungarian Helsinki Committee concluded a progressive tripartite agreement with the Headquarters of the Border Guard and the UNHCR Regional Representation. Under the tripartite agreement, the HHC monitor is allowed to talk to all persons held in the airport detention facilities, collect statistics on border measures taken against foreigners and have access to the official files of returned persons. Under the agreement, the HHC has to announce the monitoring visit two days in advance. Unannounced visits are not permitted under this scheme.

Both the National Border Guard Headquarters and the Budapest Border Guard Directorate have been supportive of the monitoring activity and have assisted the HHC with information and statistics.

With regard to cooperation to improve practices on the ground, potential areas of serious concern were usually discussed with border guard officers on duty and later with higher ranking officers. Together with the HHC, border guards tried to find ways to change the situation.

In practice, within the framework of the tripartite agreement, the monitor was provided with unrestricted access to accommodation premises for persons under the return procedure, the detention center and the so-called official transfer room. Access to persons of concern was satisfactory. The HHC did not experience any attempt on limiting or hindering its access by the border guards. The size of the Budapest Ferihegy airport is rather small and passenger traffic is lower than at major European airports, therefore there were several occasions when accommodation premises were empty and the monitor only reviewed files of returned persons.

Access to files by the HHC monitor was also adequate. Under the tripartite agreement, all personal data apart from references to nationality were deleted from the copy of the files to be reviewed. The selection of files accessed by the HHC monitor were also based on statistics of returned persons which referred only to nationality, without any breakdown on gender, age or any family relation (e.g. if the person is an unaccompanied minor). If the monitor had the opportunity to meet a person of concern, he had to ask him/her to sign a declaration which granted the monitor access to their files without restrictions on personal data.

Statistics were initially provided by the staff of the Budapest Border Guard Directorate (the directorate with jurisdiction over the airport units), but this practice was later replaced by centrally prepared statistics. The advantage of a locally provided database was the fact that it contained information up to the date of the monitor's arrival, while the centrally prepared information is distributed on a bi-weekly basis and does not include fresh data.

4.3.3 Information Provided to Persons of Concern

When a foreigner is denied entry to the territory of Hungary, the Border Guard initiates a return procedure. The person has to confirm in writing that he/she received the decision. An information leaflet is handed over to the foreigner, which contains very basic information about rights and obligations in the alien policing procedure in general, and does not include any reference to the return procedure (or its special features), nor any information about the possibility to seek asylum. Persons of concern may receive such information from the leaflets distributed by UNHCR and the HHC, which are displayed on the wall of the short-term detention facility.

The Border Guard has so far refused to include in the written information any reference to the right to apply for asylum or to provide any oral information about this right unless the foreigner explicitly expresses a direct intention to submit an asylum application. According to the border guards, the provision of any such information would be considered an attempt to persuade the foreigner to seek asylum.

Furthermore, according to the head of the alien policing department of the Budapest Border Guard Directorate, a person should either explicitly use the expression "menekült" (refugee in Hungarian), "refugee" or "asylum", or express clearly that he/she intends to avail him/herself of international protection against persecution on Convention grounds, or should show clear and visible signs that they are traumatized through body language (such as wounds, or very agitated or fearful behavior). In general, no interview is conducted before the return order is taken or the return is completed (see details below). The person has to be proactive, determined and self-conscious to be able to apply for asylum, and has to be fully informed about the possibility and method of submitting the asylum application. For obvious reasons, this type of behavior is rare among asylum seekers.

Act II of 2007 on the entry and stay of third country nationals, which came into force in July 2007, does not stipulate that the return order should be included in the form of a formal written decision. In contrast, Act I of 2007 on entry and stay of persons having the right of free movement and residence directly prescribes this form. According to the Border Guard, the return order taken in case of third country nationals (the form of which is prescribed by the Schengen Borders Code) is also considered to be a decision under the Act on Administrative Procedure, and consequently court review of the decision is also available for third country nationals (with the possibility to request the court to suspend the execution of the decision). However, at present the leaflets distributed do not contain any information about the available legal remedy. Nevertheless, the Border Guard has agreed to review this information in the leaflet.

If a person under a return procedure has to spend at least one night at the airport, and for this reason the person has to stay at the accommodation premises (an order which is made in a separate decision), a special information sheet is handed over. This sheet contains a brief summary of the rights and obligations concerning

the accommodation center. The designation of a compulsory place of confinement is also ordered by a formal resolution; therefore the foreigner can submit an appeal against it by demanding judicial review.

The Border Guard has recently introduced the practice of delivering decisions on returns in foreign languages (such as Ukrainian and some commonly used EU languages), and has promised to soon expand the variety of language versions to also include Arabic.

4.3.4 Procedure at the Airport

The typical reason for ordering return is the possession of a forged travel document/visa or the lack of valid travel documents. Under the current Hungarian legislation, the Border Guard is not obliged to conduct an interview during a return procedure. This practice may lead to the breach of Article 33 of the 1951 Refugee Convention as many refugees, particularly those who are persecuted by state agents, do not have the opportunity to obtain official travel documents. Without conducting a proper interview, it may be impossible to find out their reason for coming to Hungary.

Under the current law, the border guards' only duty is to record an asylum application and conduct a short interview about the travel route and the grounds of persecution. This interview is recorded in a protocol in the presence of an interpreter, and the protocol is then attached to the file of the person. The new Act on Asylum, that will enter into force from 1 January 2008, relieves the Border Guard from the duty of recording the asylum application in writing, and assigns the obligation to the Office of Immigration and Nationality (OIN), the official asylum authority. The OIN will have to record the application within 12 hours, thus all duties concerning an interview or finding an interpreter will be transferred to the OIN.

As previously explained, border guards usually expect asylum seekers to use certain phrases or explicit body language to indicate their wish to seek asylum in Hungary. In practice, this means that there are no "in-between" cases: the person of concern either expresses the intention to apply for asylum and in this case the application will be recorded in compliance with the border guards' legal obligation, or he/she will be subjected to the return procedure and will not be interviewed at all.

Still, it has occurred on one occasion that a person from Pakistan under the return procedure claimed that he had been trying to express in English to the border guards on duty that he would like to apply for asylum, and he also asked for assistance to contact a lawyer at the HHC, but both of his requests were ignored until the HHC monitor arrived by chance.

In another case, after having been returned to a third country from Hungary, two persons contacted UNHCR from the country of return and claimed that they had been refused access to the territory and the asylum procedure and had been refouled despite their repeated statements that they wished to apply for asylum.

The lack of an official interview both with persons under the return procedure or under an official transfer (persons who are transferred from another EU member state to their country of origin via Hungary pursuant to Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purpose of removal by air) poses a problem, particularly in complicated or unclear cases. Official measures taken or other important information cannot be later retraced without a documented interview. An interview is particularly important with persons having special needs such as families arriving with children, elderly or traumatized persons as they may be less vocal or open to express fear or need for international protection. An interview would help ensure that the border guards may gather adequate information on why the foreigner had come to Hungary.

The lack of an interview has other unwanted effects as well. The examination of the applicability of the non-refoulement principle (and thus the evaluation whether the country of return can be considered as a safe country for the person) is carried out simultaneously with the issue of the return order (in fact the result is included in the return order itself), so there is very little time available for this kind of examination. Border guards tend to perform this task without examining the individual circumstances of the person (for example by conducting an interview).

The lack of carrying out an interview with persons about to be returned has sometimes resulted in returning Iraqi citizens to Syria, as Syria in general is considered to be a safe third country. However, it should also be noted that there have been positive examples of Iraqi nationals not being returned to Syria even without valid travel documents, and border guards also claim that they are now more sensitive towards Iraqi nationals and tend to avoid returning them. Still, this rather seems to be a practice followed on an ad hoc basis than a standard one.

Furthermore, there are no serious attempts to find out and register unknown citizens' country of origin in the files, making it practically impossible to examine the real possibility of return. An interview would obviously be useful to reveal the real country of origin in cases where people arrive with a forged passport.

Judicial review of the decision on return is available by submitting an action to the competent court, but it has no suspensive effect on the execution of the return, unless the person explicitly asks the court to stay the execution of the return order. In this case, the court has to bring a separate, preliminary decision about the suspension within a short period.

4.3.5 Access to Legal Assistance

In theory, persons undergoing the return procedure are entitled to have access to legal assistance. In practice, this access is limited due to the special nature of the airport and the return procedure: the period spent at the airport may be very short (the person may be returned on the very day of arrival), a lawyer may not be able to contact a potential client easily, and persons of concern are not informed about the possibility of asking for legal assistance or representation (there is no legal obligation to include this in the information leaflet prepared by the Border Guard).

The only "institutionalized" form of providing legal assistance is provided by the Hungarian Helsinki Committee. The name and contact number of the HHC lawyer is displayed in all premises of the airport where persons under the return procedure may be placed, plus the contact information is displayed at the detention center. A public payphone is available in most of these premises and according to the Border Guard, a foreigner may place one phone call to an embassy or the HHC free of charge. The HHC's lawyer can provide legal assistance by phone, or if it becomes necessary, he may visit the airport and have access to the person of concern.

The HHC received a number of phone calls from returned foreigners during the project period. In most cases, oral consultation alone was sufficient: if a person wished to apply for asylum, the lawyer explained the basic options and necessary tasks, and then informed the officer on duty of the given border guard unit about the person's intentions. In the majority of the cases, the person was then admitted to the asylum procedure and also gained access to the territory of the country.

The HHC's lawyer also visited the airport on a regular basis, so clients he met could receive free legal advice or even legal representation if deemed necessary. For any other legal advisor or NGO not having an arrangement such as the HHC has with the Border Guard, it would be quite difficult to gain access to potential clients, especially considering the short period a person under the return procedure usually spends at the airport.

4.3.6 Accommodation at the Airport

In general, persons under a return procedure who have to spend at least one night at the airport are transferred to a special accommodation area, pursuant to a separate decision issued by the Border Guard. They are given a special information leaflet on their rights and obligations in this area. In some cases, the persons transferred here did not receive such a decision and/or the information leaflet.

The maximum period of stay at the airport is eight days. In some cases though, persons under the return procedure were not transferred to the accommodation premises and were kept in the so-called “official transfer” room, which is found very close to the passport control booths and is equipped only with chairs (a toilet is available only outside the room). The average time spent here is approximately two days.

In each terminal of the Ferihegy airport, the area for persons under the return procedure has two bedrooms with four beds each, and a bathroom adjacent to each room, thus women and men can be accommodated separately. If a family arrives together, the Border Guard usually allows them to stay together in one room.

The premises are quite new and usually clean, the beds are equipped with bedsheets. Still, the facility – partly stemming from its closed system – looks more like a prison. There is only one room other than the bedrooms where border guard officials stay on duty if the premises are in use. There is no possibility to go out for open-air exercises or to take a walk. There is no TV or radio available, nor books and newspapers, unless the person buys them at her/his own cost at the airport shops. Persons placed here usually stay in the bedroom until their return is carried out and moving outside for any reason (buying food, making phone calls, etc.) is only possible with a border guard officer escort.

Public payphones are located outside the detention area and persons have to be escorted there by an officer, which is sometimes difficult due to the limited number of personnel on duty. The use of this phone is only allowed at the cost of the person, but the use of mobile phones are also generally allowed.

Food is provided only if the returned person does not have adequate funds to buy it for him/herself. If they have funds, they are allowed to buy food at the airport cafeteria while escorted by the Border Guard. This cafeteria, however, is very expensive by Hungarian standards.

Asylum seekers are also held in the accommodation premises if the interview by the border guards cannot be completed quickly (e.g. it takes time to get an interpreter for a rare language), and/or if the refugee authority cannot take the clients over to administer and assign them to a reception center. (Under the current asylum law, it would be possible to conduct an accelerated procedure while keeping the asylum seekers at the airport, but this method is not currently used at all). The period of stay is limited to eight days. As the persons in this stage are in an asylum procedure, they should be provided with food and other necessities, regardless of their financial status, in accordance with the Reception Conditions Directive.¹⁶

As a result of legislative changes introduced by the new Act on Asylum (entry into force: 1 January 2008), the asylum procedure will consist of two phases, the first phase of which is a preliminary admissibility procedure. Thus from 2008 in case of foreigners applying for asylum at the airport, the preliminary assessment procedure must be conducted at the airport, and persons will have to stay at the airport during the duration of the preliminary assessment procedure.

¹⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

4.4 The Netherlands

4.4.1 Legal Background

Schiphol Airport is the fourth largest airport in Europe with regard to the number of passengers travelling through the airport each year. In 2006, Schiphol Airport received around 46 million passengers. It is frequently used as a transit destination. Therefore, many flights arrive from and depart to Asia, Africa, South America, the United States and Canada.

At Schiphol, the two authorities playing a role in the granting of access to the asylum procedure are the Royal Military Police (Koninklijke Marechaussee, RMP) and the Immigration and Naturalisation Service (IND). These organizations have the responsibility of granting access to the asylum procedure in the airport setting.

The Royal Military Police has several tasks in the Netherlands, among which is the enforcement of aliens legislation. The RMP Division at Schiphol Airport is divided into five brigades. One of those is responsible for aliens' cases, another for border control. The brigade for aliens' cases consists of several departments, among which is the Department of Claims, Identification and Article 4.¹⁷ If a person asks for asylum at the airport, the border control officials will hand him/her over to this department. In 2006, 1772 people worked for the RMP at Schiphol, and this number continues to increase.¹⁸ The Ministry of Defence is responsible for the RMP. However, in tasks related to migrants, the Ministry of Justice is also involved.

The RMP at Schiphol Airport is responsible for passport control. The RMP also checks the authenticity of travel documents if necessary. In 2006, the RMP found 2017 false documents.¹⁹ The RMP refuses entry to persons who do not fulfill the conditions to enter the Netherlands and the European Union. The RMP also plays a role in the expulsion of migrants, including former asylum seekers. RMP officers prepare migrants for expulsion in the last three hours before their departure. In some cases, they escort migrants on the flight to their country of origin or an other destination.

The Immigration and Naturalization Service opened an office at Schiphol Airport in 1994. The reason for the IND to start working at Schiphol was that a number of complaints were received about the methods used to expel migrants. The IND monitors the work of the RMP and advises its personnel.

At first the IND saw and checked every refusal of entry issued by the RMP. Later on, the focus of the IND changed to the return of migrants illegally staying in the Netherlands. In the beginning of 2007, the newly set up Return and Departure Service (Dienst Terugkeer en Vertrek), which falls under the Ministry of Justice, started its work on returns of migrants. Therefore, the personnel of the IND no longer deal with returns and expulsions. Four IND officers stayed at Schiphol airport. They will again focus on border control.²⁰

¹⁷ Article 4 Schengen Borders Code, concerning external borders.

¹⁸ Statistics: Royal Military Police, July 2007

¹⁹ Statistics: Royal Military Police, July 2007

²⁰ Yvonne Bakker, IND Border control, 23 February 2007

The rules with regard to border control and entry are to a very large extent based on the Schengen Borders Code (SBC). Each person entering or leaving the Netherlands should be subjected to a minimum check. The minimum check is based on Article 7 (2) of the SBC. Third country nationals are subjected to a more in-depth check in terms of Article 7 (3) and (4) of the SBC.²¹

Article 3 of the Aliens Act states that entry into the Netherlands shall be refused to a foreigner who:

- a) is not in possession of a valid travel document or is in possession of a valid travel document in which the requisite visa is missing;
- b) constitutes a serious threat to public order or national security;
- c) does not have sufficient means to defray both the costs of his stay in the Netherlands and the costs of his journey to a place outside the Netherlands where his entry is guaranteed, or
- d) does not fulfill the conditions laid down by or pursuant to Order in Council.

Almost none of the asylum seekers are in possession of a valid travel document or fulfill the other requirements for entry.²² Article 3 of the Aliens Act contains a special safeguard for asylum seekers: the border control officers shall not, save in accordance with a special direction issued by the Minister, refuse entry into the Netherlands to a foreigner who indicates that he/she wishes to ask for asylum. According to the asylum policy, the intention to refuse entry should be presented to the Head of the Immigration and Naturalization Service (IND). He is authorized to give a direction to refuse entry or not. In principle, the entry will be refused and the asylum seeker will be deprived of his liberty.

In the following cases the RMP should consult the IND if it intends to refuse entry to a person:

- The person has informed the RMP that he wishes to apply for asylum
- The person is, or claims to be, a citizen of the EU, European Economic Area or Switzerland;
- The refusal of entry is closely connected to the decision on authorization to stay in the Netherlands. This is always the case if:
 - a person claims to be a Dutch citizen
 - a person claims to have a special status
 - a person claims that he has been granted long stay in the Netherlands
 - a person has a authorization to stay in the Netherlands (mvv)
 - it concerns a foreign adopted child or foster child;
- The refusal of entry will prejudice an essential humanitarian interest or an essential interest of the Dutch State.²³

²¹ Article 7 (3) SBC states: On entry and exit, third-country nationals shall be subject to thorough checks. (a) Thorough checks on entry shall comprise verification of the conditions governing entry laid down in Article 5(1) and, where applicable, of documents authorizing residence and the pursuit of a professional activity. This shall include a detailed examination covering aspects, such as the authenticity of travel documents, the purpose of the stay, the means of subsistence and aspects concerning public policy, internal security, public health or international relations of any of the Member States.

²² Information: Royal Military Police, 2007

²³ A2/5.5.1 Vc

If a request to give a person the opportunity to apply for asylum is lodged by Amnesty International or other comparable organizations, the RMP shall also inform and consult the IND. This procedure was introduced following the case of an asylum seeker from Syria in 2005. This man was expelled to Damascus by the United States via Schiphol Airport, even though Amnesty International had requested that the immigration and border authorities provide the man an opportunity to claim asylum at Schiphol Airport.

According to Article 5 of the Aliens Act, a foreigner who has been refused entry into the Netherlands has to leave the Netherlands immediately. This obligation does not apply if he/she submits an asylum application. The obligation to leave then takes effect if the asylum application is rejected and the applicant is no longer a lawful resident in the Netherlands. If the foreigner is not able to leave the Netherlands immediately, he/she will be held in “border detention”. Foreigners who have been refused entry into the Netherlands can be claimed with the carrier irrespective of whether they have applied for asylum or not.²⁴ The carrier is obliged to return a person who has been refused entry and who has to leave the Netherlands immediately or who has been arrested to be expelled within six months after arrival. The RMP’s official target is to claim 85 % of the persons who are refused entry to the Netherlands. This target is normally reached.²⁵

4.4.2 The Project Partner’s Access to Facilities and to Persons of Concern

A request to monitor the airport was submitted to the District Commander General Beekman of the Ministry of Defense in February 2007 and the Dutch Council for Refugees (DCR) received permission to start the project in July 2007.

During the visits to the airport, the DCR had the opportunity to speak to Border Control Chiefs, Border Control Guards, and officials of the Department of Claims, Identification and Article 4 who had refused aliens and persons who had just asked for asylum. The DCR also had the opportunity to observe a number of gate controls. However, due to privacy regulations, there was no access to files. The RMP did provide figures on the number of refusals of “regular aliens” and asylum seekers.

In practice, DCR employees were escorted by both a staff member of the RMP Head Office and an official of the Border Control Brigade. The agreement was made that the RMP staff member would observe the interviews held with refused aliens. Furthermore, the DCR was not to present itself as a human rights organization to refused aliens. Instead, the DCR presented itself as an independent research organization investigating conditions at European airports.

In addition to the scheduled visits, the DCR also spoke to a number of lawyers who have experience in the field of border control proceedings, to DCR staff members in the main detention center for asylum seekers and to IND officials. Moreover, the DCR tried to find written information with regard to the question of whether asylum seekers get the opportunity to ask for asylum at Schiphol Airport. Several reports of the National Ombudsman were found (dating from 1998, 2002 and 2004) on complaints of asylum seekers who claimed not to have had the chance to apply for asylum at Schiphol Airport, as well as an incident reported by Amnesty International and an appeal against border detention that was declared well-founded by a Regional Court in January 2007. Some of these cases are summarized briefly throughout the paragraphs on the practices at Schiphol Airport.

²⁴ A2/5.5.8 Vc

²⁵ Information: Royal Military Police, July 2007

4.4.3 Information Provided to Persons of Concern

Individuals who do not meet the conditions to enter the Netherlands are refused entry in a written decision. The standard form as set out in Annex V, Part B of the SBC will be filled out. The reasons for refusal of entry will be ticked in the form. The alien should sign the form. If he/she refuses to do so, the border guard mentions this on the form.²⁶ The alien receives a copy of the refusal decision. On this decision, the RMP mentions the language in which it was explained to the person concerned. There are three options: the alien speaks Dutch and the refusal decision is therefore communicated in Dutch, it is communicated in a stated language that both the alien and the border control guard speak to a sufficient degree, or it is communicated with the help of a translator in a stated language. The DCR encourages that the language used is mentioned in the decision. This way, if the person wishes to appeal, his/her legal counselor can see in which language he/she was spoken to.

In addition to a copy of the refusal decision, the foreigner receives a folder concerning legal remedies. This folder states that he/she has a right to appeal the decision. For contact information, he/she is directed to the Border Control Chief, who can call the legal aid picket center for legal assistance. The DCR feels that it would be better if the number of the legal aid picket center was mentioned in the folder directly so that the person concerned would have the possibility to call by him/herself. Aliens might consider contacting the same person who was responsible for their refusal to get legal aid as an obstacle. If the number of the legal aid picket center was mentioned on the form, the foreigner would not have to involve the Border Control Chief in getting legal assistance. Unfortunately, the DCR has not been able to ask the legal aid picket center about their opinion on this issue. Some individual lawyers did mention it as a possible improvement.

Both the refusal decision and the form about legal remedies are available in several languages. The DCR has not been able to check if the information is always handed out in the proper language. This is because the refused foreigners that were spoken to at the Airport had not yet received the refusal decision and additional information. Their official refusals were still being completed at the times of the interviews. A Colombian man and a Dominican woman that were spoken to while being kept in border detention stated they had only received information in English, not in their native language, which was Spanish. They claimed not to be able to understand the papers they had received, because their level of English was not sufficient. The DCR encourages the RMP to hand out information in the mother tongue of the persons concerned.

4.4.4 Procedure at the Airport

As noted earlier, entry can be refused to a foreigner for several reasons. The border guards always interview the alien before he/she is officially refused. They can ask him/her about travel documents, the reason he/she came to the Netherlands, how long he/she plans to stay, and the amount of money he/she carries with him/her. The alien gets an opportunity to give a further explanation. If necessary, the border guards provide him/her with the opportunity to contact his/her embassy or any other person or organization that might clarify the situation or be able to help. There is no limit on how long the RMP can investigate a refusal.

If the person speaks Dutch or English to a sufficient degree, the border guard will speak to him/her in either of these languages. If he/she does not, the border guard will try to find a colleague who is proficient in a language the alien speaks. He/she can also call the Tolk en Vertaalcentrum Nederland, a service that provides

²⁶ Article 13 (2) of the SBC states that entry may only be refused by a substantiated decision stating the precise reasons for the refusal. Refusal shall be given by means of a standard form, as set out in Annex V, Part B, filled in by the authority empowered by national law to refuse entry. The completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision to refuse entry by means of that form.

translators and interpreters in as many as one hundred languages by telephone. At night, when it is difficult to get an interpreter, the RMP sometimes asks one of the airport cleaners with an ethnic background to help with translation. If it is not possible to get an interpreter, it depends on the reasons for apprehension whether a person will or will not be refused entry. The alien might also be asked to stay in the international lounge for the night, and come back for the interview the next morning. He will then be given some vouchers for food and drinks.

As an illustration of the difficulties that might arise from an insufficient level of communication, the DCR points to the case of a Turkish woman of Kurdish origin who arrived at Schiphol Airport on 15 December 1999. She was refused entry and was prosecuted for travelling with false documents. No interpreter was used. She was expelled the next day. If, with the help of an interpreter, it had been established that the complainant was of Kurdish origin, she could have been presented to the IND via a Confidential Indication Border Protection (Vertrouwelijke Aanwijzing Grensbewaking)²⁷ as is/was required for Turkish nationals of Kurdish origin by the Dutch policy concerning border protection. On 21 December 2002, the National Ombudsman concluded that the complaint was well-founded.²⁸

Following this case, the IND decided to ask every person who is refused entry into the Netherlands, explicitly about his/her ethnic background, instead of waiting until a person mentions this by him/herself. If a person of Turkish nationality claims to be Kurd, Armenian or Syrian Orthodox, the RMP should present the case to the IND before this person is actually refused entry to the Netherlands.

Every person who is refused entry to the Dutch territory can be detained.²⁹ If a person does not apply for asylum, the authorities will try to identify the carrier that brought the alien to the Netherlands. If the carrier is identified and there is a flight possibility the same or the next day, the alien will be expelled immediately. If this is not possible, the person will be detained in a place for border detention at Schiphol or at the expulsion center at the airport Zestienhoven. This is also the case if the public prosecutor decides to prosecute the alien for using false travel documents.

In January 2007, a regional court made an interesting and unusual decision. The asylum seeker in this case stated that he applied for asylum directly after he arrived in the Netherlands. He therefore should have been sent to the Application Center at Schiphol where asylum claims are processed. Instead he was detained. The Minister stated that the detention was justified because the asylum seeker used a false passport and was therefore suspected of a crime. He also used another name, did not have identity documents, and had no place to live in the Netherlands. Furthermore, the Greek authorities accepted a request for a Dublin transfer. After a negative decision, the asylum seeker would be transferred to Greece.

The court concluded that the detention measure was not lawful. The asylum seeker stated at the court hearing that he reported to the authorities immediately after his arrival. He told the authorities that the passport he used was false, he gave them his personal details, and stated that he was from Syria and wanted to apply for asylum in the Netherlands. The RMP's report did not contradict this. The court therefore concluded that the man had the intention to apply for asylum. The authorities should have sent the man to an Application Center in order to await the decision on his asylum application. According to the RMP's policy and to the border guards who were interviewed during the research period, foreigners do not have to explicitly say the word "asylum" or in Dutch

²⁷ As is described below.

²⁸ National Ombudsman, December 2002

²⁹ Section 6 AA

“asiel”. Certain gestures can be enough to express the wish to claim asylum. Some border guards even said they specifically ask people if they wish to apply for asylum.

As an extra safeguard to prevent cases of *refoulement*, there is a system of Confidential Indications Border Control (*Vertrouwelijke Aanwijzing Grensbewaking*). This means that for a number of countries that are considered unsafe by the IND, a special policy is followed. If a person from one of those unsafe countries is refused entry, the RMP asks him/her some additional questions, including what he or she thinks about a possible return to his/her country of origin. Refused aliens under this category can only be expelled after IND's approval. This procedure is also followed if the person concerned is a minor. In that case, the RMP also has to ask the individual whether he/she has a place to stay and someone to take care of him/her in the country of origin if he/she were expelled.

IND used to be able to enter the RMP's computer system, and could therefore see all refusal decisions. Since the RMP has changed to another computer system, the IND does not have access anymore. The DCR encourages IND's access so that they can help to ensure that no cases of *refoulement* occur.

At Schiphol Airport, there are several opportunities for an alien to apply for asylum. If there is a gate control, the alien can indicate that he/she wishes to ask for asylum the moment he/she gets off the airplane. If there is no gate control, the alien can walk up to any one of the four immigration desks at the international lounge at Schiphol Airport at any given moment to express his/her wish to apply for asylum. If he/she does not, and tries to get through at one of the passport checkpoints, he/she will probably be taken to one of the border control offices for not possessing the necessary travel documents. He/she can still express his/her wish to apply for asylum while the border control guards investigate the case. Some of the border guards spoken to during the research period said it somehow annoys them if a person applies for asylum only after he/she is apprehended. Others, however, told the DCR that they felt the time when a person asks for asylum is irrelevant. They emphasized that they understand aliens might hesitate to come up to uniformed officials because of experiences they might have had with the authorities in their countries. Irrespective of the border guards' personal opinion, the procedure is the same for all people that claim asylum.

The border guards send asylum seekers through to the Department of Claims, Identification and Article 4. There, a first short interview will be held to find out the persons' identity and nationality. Photos and fingerprints will be taken, he will be body-searched and his luggage will be searched. The RMP tries to find out where a person comes from and which flight he took in order to be able to claim the person with the carrier. The refusal of entry is also drafted here. The officials at the Department of Claims, Identification and Article 4 do not wear uniforms. This is because the RMP realizes that asylum seekers might have negative associations with men in uniforms. The decision to wear civilian clothes at this department was therefore made in consideration of the asylum seeker's position. Within six hours after arriving at this department, the asylum seeker will be sent to the Application Center. There, the asylum procedure will start. The RMP does not make any assessment of the asylum application whatsoever.

Asylum applicants applying at Schiphol Airport are deprived of their liberty and stay in the Application Center at the airport where their asylum applications are assessed. The IND has to inform the asylum seeker of his/her right to have a lawyer present at the first and second interview. If the asylum application is rejected in the accelerated procedure, or if there are reasons for the IND to detain the person while they further investigate the case, the asylum seeker will be taken to a detention center called the “*Grenshospitium*”. He/she has to stay in the detention center during the appeal and higher appeal (if he/she appeals at all) until his/her deportation. If the authorities do not succeed in deporting the rejected asylum seeker, he/she will eventually be released. This can take more than a year.

Asylum seekers who are kept in detention are provided with free legal assistance. A person can lodge an appeal before the regional court against the decision to detain him/her. If he/she does not appeal, the Immigration and Naturalisation Service will notify the district court of detention after 28 days. This notification is considered an appeal. The court session will take place no later than fourteen days after the appeal or the notification has been received. The court will then reach a decision within another seven days. Both the IND and the detained person can appeal against this decision of the court to the Administrative Jurisdiction Division of the Council of State (AJD). The detained person can appeal against the prolongation of the detention every four weeks, but the Immigration service does not give any more notifications to the regional court. This decision of the District Court is not open to appeal at the AJD.

A person who did not apply for asylum at Schiphol Airport and is detained awaiting his expulsion, can still apply for asylum. A person who is detained has to apply for asylum in the facility where he/she is detained.³⁰ The normal asylum procedure applies. People who are refused entry and apply for asylum have legal stay during the assessment of the application.³¹ Therefore they cannot be expelled, yet they can be held in border detention.

According to Article 63 of the Aliens Act, the authorities can expel foreigners who are illegally in the Netherlands.³² No separate decision is needed to expel a person who is refused entry to the Netherlands.

The IND is not obliged to hear the alien before expulsion. However, the alien can appeal the enforcement of the expulsion and at the same time request an interim measure (voorlopige voorziening) from the district court to avoid expulsion. In order to be able to appeal the enforcement of the expulsion and request an interim measure in time, the alien (and his/her lawyer) need to know the date of departure. The expulsion date is sometimes also needed to substantiate the “urgent need” for an interim measure. For asylum seekers in border detention this can be an obstacle, because the flight details are not always provided in practice. This could lead to situations in which a person is not able to appeal the expulsion or in which an interim measure is granted only hours or minutes before departure.

4.4.5 Access to Legal Assistance

A foreigner refused entry to the Netherlands can lodge an administrative appeal against this decision within four weeks. He/she receives a leaflet with information on the possible legal remedies, as described above. If the refused alien requests a lawyer, the Border Control Guard will inform an on-duty legal aid center, which can provide legal assistance free of charge. The administrative appeal does not have a suspensive effect. However, the refused alien can apply for an interim measure at the regional court.

The DCR has tried to get a clearer picture about the functioning of the legal aid procedure, because they have received worrisome signals from lawyers that they were not called by the on-duty legal aid center anymore. At the same time, some of the border guards stated that if the on-duty legal aid center was called, a lawyer hardly ever showed up. To be able to verify this, the DCR requested to speak to someone from the on-duty legal aid center several times. So far, the DCR has not had any contact. The legal aid line informed the DCR, however, that it does not specifically register the number of requests for legal assistance made by refused aliens. It would be interesting to know the number of times the legal aid line is called by a Border Control Chief or to hear about the on-duty legal aid centers’ experience with refusals of entry more in general.

³⁰ Section 3.108 of the Aliens Decree

³¹ According to section 5 AA, an alien who has been refused entry into the Netherlands has to leave the Netherlands immediately.

³² In 2006 the RMP expelled 12861 persons; statistics provided by the Royal Military Police, July 2007.

4.4.6 Accommodation at the Airport

Refused persons sometimes stay in the international lounge at the Airport to await their flight, as explained above. In this transit zone, there are special seats in which people can rest or sleep. The RMP usually directs the refused person to this more comfortable area within the international lounge. The Department of Claims, Identification and Article 4, which processes asylum claims at the Airport, has an office that is specifically designed for asylum seekers. It has glass walls so family members can see each other while one of them is being interviewed. There is a television and there are some toys for children.

No NGOs visit the Schiphol airport regularly in order to monitor the work of the RMP or the IND or to provide legal assistance to (possible) asylum seekers or persons who are not allowed entry to the Netherlands. There is a Meditation Center and pastoral care is also available at the Airport. The Center provides care to people who are in an emergency situation. Airline personnel, the RMP, information desks, medical service or emergency service refers people to the center. This can be the case if a person needs care because of his mental state or if a person is stranded or needs someone to talk to for example.

4.5 Poland

4.5.1 Legal Background

A decision to deny entry of a foreigner to Poland can be based either on the Act on Aliens of 13 June 2003 or the Schengen law (Schengen Borders Code, SBC). When a foreigner would like to stay in Poland for less than three months, the decision is based on the Schengen law (Article 13 in connection with Article 5 and SBC Annex V), and if they wish to stay longer, the Act on Aliens (Article 21) is applicable. The Act stipulates – among other things – that entry can be refused if the person does not have valid travel documents or a visa, if his/her data has been recorded in the index of aliens whose residence on the territory of the Republic of Poland is undesirable, he/she does not possess financial means, if there is a well-founded reason to suspect that his/her entry into or residence on the territory of the Republic of Poland may constitute a threat to public health, or his/her entry into the territory or residence may constitute a threat to national security.

According to the law, refusal should have a detailed justification. A different regulation applies to the refusal of short-term stay, which is based on a formula of the Schengen Borders Code (Annex V) not including any justification, only referring to the relevant provisions as the basis of rejection. In the case of the refusal of long-term stay, the Polish administrative procedure prescribes both reference to the legal ground of the decision and written justification. The return procedure should be carried out as soon as possible. In practice, the return procedure is usually completed within two days (it usually depends on the next returning flight to the country concerned). The person under return measures can be sent back either to his/her country of departure, or to the country of habitual residence, or to any other country allowing him/her lawful entry.

Third-country citizens who are subject to the return procedure receive written information regarding passport control in the territory of the EU and the refusal of entry to Poland. Both leaflets are available in a language that he/she understands.

Concerning the asylum procedure, application for asylum is possible upon arrival at the airport (including the transit zone) by submitting an oral or written application without any formal requirement.

At the Warsaw Airport, there are two different places for foreigners: one for foreigners who were denied access to Polish territory, and another one for asylum seekers.

During the return procedure there are two possibilities:

- a) the foreigner receives an official decision on obligation to stay at the designated place (“room for persons not accepted on Polish territory”) and they cannot move from that place until they are returned,
- b) the person does not get such a decision and can spend time waiting for their return flight in the transit zone.

There is no written rule that every returned foreigner should be held at this special place. Decision on obligation to stay in the designated place is rendered by the competent commanding officer of the Border Guard checkpoint. The decision can be appealed to the Commander in Chief of the Border Guard but there are no clear provisions on the procedure. In practice, it is made when Border Guard officers believe that the person may escape or may constitute a threat to public health or security.

There is an official decision on refusal. This decision may be appealed against but both the decision with its justification and the information about the procedure of the appeal is written only in Polish. However, it should be noted that the foreigner receives written information on the possibility of appeal in a language he/she understands.

4.5.2 The Project Partner’s Access to Facilities and to Persons of Concern

The Border Guard Office was very cooperative with SIP throughout the project. Still, the process of signing a monitoring agreement lasted almost two months due to the fact that the level of access to files requested was unprecedented. This access was eventually granted.

According to the agreement between SIP and the border guards, the monitors had access to:

- a) people who applied for asylum on the day of the monitoring visit;
- b) files of asylum seekers;
- c) files of people rejected entry to Poland.

The organization was not allowed to speak with persons who were denied access to Polish territory because the border guards were concerned that SIP would directly suggest that they apply for asylum. Finally, it was agreed that SIP could obtain information from the files about reasons for refusal of entry to Poland.

At the Warsaw Airport there are two different places for foreigners: one for foreigners who were denied access to Polish territory, and another one for asylum seekers. SIP had permission to visit the facility designated for asylum seekers but not the other one. For this reason, the organization did not always have an opportunity to speak with persons, as the number of foreigners asking for asylum at the Warsaw airport is low. In one case, an asylum seeker who had previously been denied access was interviewed so that some information on the return procedure could be collected.

During an international visit on 17 October 2007, SIP was allowed to visit the facility for persons under the return procedure only once.³³ However, unlimited access to files of returned persons was granted.

³³ SIP requested permission once again after a joint project visit in Amsterdam took place in July 2007. As there was no problem with visiting a similar facility and speaking with foreigners in detention both during the joint mission in Budapest and during the one in Amsterdam, the organization decided to give these examples to the border guards and ask for permission to make Polish monitoring as efficient as the other two joint missions were. The Chief of Border Guard sustained his first decision.

Border guards in general were very helpful, answering all questions and explaining their positions on various issues. However, the Border Guard Headquarters was generally concerned about the monitoring activity carried out by SIP.

4.5.3 Information Provided to Persons of Concern

When a foreigner arrives at the Warsaw airport, he/she has to go through two lines of control. The first line of control is to check passports, and if during this control any doubt about a foreigner arises, he/she is interviewed by the border guards in a special room (second line of control). The foreigner only receives written information at this second stage. The information, which is usually given in the person's mother tongue, focuses on:

- a) border control procedures for EU citizens;
- b) border control during entry and check-in procedures for third country nationals;
- c) legal basis for refusal of entry, the possibility to appeal within 14 days, and NGOs that provide free legal assistance.

There is no information, leaflet or poster about asylum. Information sheets on the appeal against the refusal of entry are available in the detention area. Written decisions – with reference to the right to appeal and the administrative forum which is responsible for the appeal – are only provided in Polish.

If a foreigner submits an asylum application, he/she receives written information in his/her mother tongue or in the official language of the country of origin – although this is not always the case. For example, there is no information in Chechen, only in Russian³⁴ – about:

- a) the “Dublin II procedure”;
- b) EURODAC;
- c) the asylum procedure in Poland;
- d) the principles of processing the claim for asylum in the EU;

In theory, all foreigners can read these leaflets. In practice, however, all held up foreigners sign that they received information without actually reading it. This often causes problems as these persons are often not knowledgeable about relevant procedures, where they are to be accommodated (particularly if it is a detention center and not an open center for asylum seekers) and the possibility of free legal assistance provided by NGOs. Often, these information leaflets are too long and complicated and foreigners have no time or opportunity to read and understand them.

4.5.4 Procedure at the Airport

During passport control, foreigners have an opportunity to apply for asylum. In the Polish practice it is enough to say that the foreigner needs protection, or is in danger in his/her country of origin. Consequently, there is no requirement to use any specific expression. After applying for asylum, a foreigner is directed to a special room at the airport where a border guard officer conducts an asylum interview. In this interview, asylum seekers have an opportunity to explain the basic reasons they are applying for protection (an immigration officer from the Office

³⁴ Nota bene that for years the vast majority of asylum seekers arriving in Poland have been ethnic Chechens from the Russian Federation.

for Aliens conducts a more detailed interview later on in the procedure). Such interviews are recorded officially in a protocol and the protocol is attached to the person's file. An interpreter also participates in this interview. If it is impossible to find an interpreter, this fact is recorded in the file. It usually occurs when a rare language is used (for example there is a lack of Sinhalese interpreters in Poland).

During the procedure, foreigners are placed in a special room. They are then sent to another facility, e.g. an open reception center (there are 17 such open centers in Poland), a guarded center or long-term detention facility (there are almost twenty in Poland). The places they are sent to differ according to their legal situation and to the Border Guard's decision. According to Polish law³⁵ the person applying for refugee status should not be detained. However, there are a few exceptions, i.e. unless he/she submits an application for granting asylum during the border control, not having the rights of entry on the territory of Poland prior to submission of an application for granting the refugee status he/she has already obtained a decision on expulsion. In such situations the foreigner should be placed in the guarded center or in arrest for the preparation of expulsion.³⁶ An arrest can be ordered if the person concerned poses a threat to national and public security. In practice, however, due to the insufficient number of places in guarded centers, single foreigners are often placed in detention facilities³⁷ while families are accommodated in open centres.³⁸ Unaccompanied minors,³⁹ persons with physical disabilities, presumable victims of torture and disabled persons⁴⁰ cannot be placed in detention.

If there is a need (mostly in case of serious illness or families with small children), border guards drive them to a hospital or to an open reception center.

It is also possible to apply for asylum after a return order is issued. After applying for refugee status, the person has an interview with an official dealing with asylum seekers and then an official record of the interview is made.

At the airport there is a special section dealing with asylum seekers and there are a few officers who are trained to work with victims of human trafficking.

According to the monitoring experience of SIP, the border guards are generally friendly and helpful, making it easy to apply for asylum. There was, however, one case of a person who later submitted an asylum application which raised serious concern about border guard procedures. In the file prepared by a border guard officer on duty there was a note to the head of the border guards, saying: "I request taking into consideration the possibility of accepting the asylum application," and an answer from the head of the airport: "I accept the asylum application". This may indicate that there is some kind of an internal procedure at the airport that asylum applications must be approved by the head of the airport border guards first.

Concerning interviews with rejected foreigners, the most serious issue concerns interpretation.

The first problem is that there is no interpreter readily available during this procedure. According to border guards, the officers can communicate in English, French, Russian and Arabic, which they said is usually

³⁵ Act on granting protection to aliens within the territory of Republic of Poland (Asylum Act), Article 40.

³⁶ Asylum Act, Article 41

³⁷ The situation has already improved because a new guarded centre was opened in October 2007.

³⁸ Since the time of writing the present report the situation has already changed as a new guarded centre was opened in November 2007.

³⁹ Asylum Act, Article 47 (5)

⁴⁰ Asylum Act, Article 54 (3)

sufficient. If the foreigner speaks another language, border guards said they try to organize a translator (for example Singhalese for persons from Sri Lanka).

Misinterpretation often also leads to inefficient hearings, preventing persons from clearly establishing their reasons for coming to Poland; thus, the border guards are rendered unable to decide whether the foreigner can be returned or not. During the monitoring visits, SIP found that the most typical reasons for rejecting a foreigner was because the “aim of the visit (was) different than declared”, adding that the person could only speak in his/her mother tongue that border guards failed to understand. This casts doubts over the efficiency of the above-mentioned “second line of control” in checking the reasons of coming to Poland.

In addition, interviews with rejected foreigners are not recorded, and no interview protocols are available. Unfortunately, this is lawful according to the Schengen Borders Code, which only requires border guards to fill out a one-page decision without any sufficient information about the individual circumstances of the person. Sometimes the decision contains additional hand written information, but this cannot be treated as an official protocol.

Persons under the return procedure receive information about their right to appeal to the Chief of the Border Guard within 14 days via the commanding officer of the Border Guard checkpoint that refused them entry. This appeal, however, has no suspensive effect. Therefore, the person is deported from Poland during the appeal. The appeal against the decision can be brought via mail or the Polish embassy. It is not surprising that the number of appeals is low.

4.5.5 Access to Legal Assistance

Persons who are refused entry to Poland receive written information about eight NGOs that provide free legal assistance. According to border guard officers, it is possible to call them for free or use a mobile phone (if the person has one). It is also possible to buy a phone card (if the person has money) and use a public payphone at the airport. There is no telephone in the detention room. According to the border guards, if a person would like to call an NGO, a lawyer, or the embassy, they allow him/her to use the phone of the border guards for free. This information could not be verified though, as SIP could not talk with foreigners in detention.

Upon examination of the files, it was revealed that no NGOs provided legal assistance between March and September 2007, raising some doubts about the efficiency of information provided about this opportunity and the possibility to actually make phone calls. The state does not provide legal aid to rejected foreigners and asylum seekers, although there have been some negotiations to assist asylum seekers. However, no concrete proposal has been accepted to date.

SIP’s monitoring experience shows that it is much easier for asylum seekers to contact a lawyer than for persons under the return procedure. This is partly because no organizations have access to detention facilities at the airport, and also border guards occasionally contact SIP themselves when a problematic asylum case arises. One such case concerned a grandmother from Dagestan who was returned from France under the Dublin II procedure without her 10-year-old granddaughter who stayed in France without any care. Border guards tried to help and contacted SIP for assistance, which is considered very progressive.

The only interview SIP could carry out with a rejected foreigner⁴¹ shows that the person was informed about the possibility to contact a lawyer, but at the same time he was somehow told that he would have to pay for legal

⁴¹ That foreigner first was refused entry and while he was waiting for a deportation, he asked for asylum so SIP could talk to him as an asylum seeker.

counseling (that was the reason why the person did not contact anybody at the end as he thought he could not afford it). According to the files, there were a few cases when foreigners called the embassy or hired a private attorney. At the same time, there was no case where a foreigner contacted an NGO for help.

4.5.6 Accommodation at the Airport

At the time of this report, the facility used in the old terminal is not adequate to accommodate people for a long period. The place for foreigners under the return procedure consists of one guarded room (same room for men, women and children, with a maximum capacity of 12 places) with a bathroom. There is no separate place to change clothes. This room is mostly used by men (hardly ever used by women and children). Detainees are allowed to leave, with supervision, to buy food or newspapers for example.

According to Polish law, meals are provided by the state, and foreigners can also buy something to eat if they can afford it. There is a doctor working at the airport so they have access to medical care if there is such a need. There is no public telephone available in this place. There is no information about the right and possibility to apply for asylum.

Polish law requires the border guards to issue a written decision when ordering the detention of a foreigner. In practice, this is carried out if the behavior of the person creates a well-founded suspicion that he/she may cause a threat to safety or may try to escape. Otherwise, persons can stay in the transit zone or in a hotel at the transit zone (if they can afford it). Border guards occasionally make the carrier pay for the hotel if there is a family or single parent with children who are not able to pay for accommodation themselves.

In practice, the return procedure is generally completed within two days, depending mainly on the time of the return flight.

In the future, there will be a whole unit for foreigners whose entry had been refused in a new building with three different rooms (one for men, one for women and one for families or for people who should be separated from other foreigners). There will be a bathroom, a kitchen, and an interview room in that unit. It will be under permanent monitoring (except for the bathrooms). There is no phone inside, but there is a public phone close to the unit that detained foreigners can use.

Facilities for asylum seekers are in a new terminal of the airport. There is a waiting room and a room for interviews. There is no need to have a place to stay overnight as the asylum procedure at the airport is completed within a few hours.

4.6 Spain

4.6.1 Legal Background

According to Spanish legislation, asylum seekers have to express their intention to apply for asylum verbally already at the airport. Lawyers have said that border guards often only accept the application if the asylum seeker uses the word “asylum”. Once the application is accepted, the police collect the relevant and necessary data and accompany the asylum seeker to the adequate facilities and make the necessary arrangements for the asylum interview with an official from the Office of Asylum and Refuge (OAR) and a lawyer of the applicant’s choice

(specialised lawyer from an NGO, usually CEAR, a lawyer from the Bar Association Legal Aid Shift or a private lawyer, and an interpreter if necessary). The police officer is not present at the asylum interview.

If the foreigner needs legal assistance from the Spanish Commission for Refugees (CEAR), he/she also has to express this explicitly, otherwise assistance will be provided by a lawyer from the Bar Association.

Asylum interviews are conducted by the Office of Asylum and Refuge of the Ministry of the Interior. As the asylum seeker is almost immediately taken to the interview, there is not much time to prepare the interview. The asylum seeker meets his/her lawyer and the interpreter if needed during the interview. Following the interview, the lawyer usually explains the asylum procedure to the applicant.

Once the asylum interview is completed, the asylum office has 72 hours to notify the asylum seeker of the resolution.⁴² This asylum application is also faxed to UNHCR, which will study the application and give its written opinion on the admission of the case.⁴³ If UNHCR thinks that the application should be admitted into a regular refugee status determination procedure, it has to provide relevant arguments to this end in its written report.

If the asylum seeker is not notified about the resolution in 72 hours, the asylum application has to be considered admissible (this, however, does not really happen in practice). If the asylum application is not admitted, the asylum seeker has an opportunity to appeal the decision within 24 hours.⁴⁴ This procedure is assisted by a lawyer and UNHCR is again asked to give an opinion on the case.

UNHCR also has an opportunity to interview the asylum seeker if it considers it necessary.⁴⁵ Finally, if the OAR admits the case based on new arguments or further clarification, the asylum seeker is allowed entry in Spanish territory and documented as an asylum seeker by the asylum authority.

If this final examination does not clarify the existing doubts or provides new elements to change the initial decision, the asylum seeker will be returned to his/her country of origin or former place of residence.⁴⁶ Yet, it is possible to present two types of judicial appeal. Firstly, against the administrative resolution of return in the delay of maximum two months and secondly, a special and urgent judicial appeal in case of potential immediate danger if the foreigner is sent back. The foreigner has the right to contact a lawyer through the Spanish consulate in his country of origin.

If the application is not admitted by the authorities but UNHCR has recommended its admissibility, the asylum seeker will automatically be allowed to enter Spanish territory in order to file an appeal against the inadmissibility decision before the National High Court (Audiencia Nacional).

Persons who do not ask for asylum but fail to present valid travel documents, a return plane ticket, hotel reservation or an invitation letter, are placed under the return procedure and accommodated in the designated facility at the airport. These requirements are not based on any concrete piece of legislation but are based on internal ministry regulations and border guard decisions.

⁴² Regulation 203/1995, from which application of law 5/1984 of March 26 on the regulation of the asylum procedure and the recognition of the refugee status is approved, modified by law 9/1994 of 19 of May, Article 20.

⁴³ Regulation 203/1995, Article 19 and 20

⁴⁴ Regulation 203/1995, Article 21 (1)

⁴⁵ Regulation 203/1995, Article 20 (1) (a)

⁴⁶ Regulation 203/1995, Article 22

Persons under the return procedure are also interviewed by the border guards. Upon request, they can have the assistance of a lawyer from the Bar Association free of charge. The hearing focuses on finding out if the person is indeed a tourist or a potential illegal immigrant. The border guards make a final decision on the case after the interview. It is possible to submit an administrative and then a judicial appeal, but experience shows that this is rarely successful.

4.6.2 The Project Partner's Access to Facilities and to Persons of Concern

CEAR has been monitoring the international airport in Madrid and providing legal assistance to asylum seekers for years. In 2006, the organization provided counseling to about 50% of all asylum seekers arriving through the airport, approximately 700 persons.

CEAR has daily contact with the police and the asylum authority, which provide information about practices in the asylum procedure. Its lawyers have full access to the files of the asylum seekers and CEAR receives official statistics on the number of asylum applications as well.

CEAR, however, had no access to persons detained at the airport facilities or to the official files of persons to whom the organization did not provide legal assistance. Thus, the monitoring was practically based on information gathered from asylum seekers, mainly persons from Columbia.

4.6.3 Information Provided to Persons of Concern

The asylum law stipulates that asylum seekers have to receive a leaflet with information about their rights and the asylum procedure. These leaflets are printed in Spanish, French, English and Arabic. If the foreigner does not speak any of these languages, he/she is assisted by an interpreter. In the asylum interview, representatives of the Office of Asylum and Refuge ask the asylum seeker whether he/she has received this leaflet. This answer is included in the asylum application. After the interview, lawyers from CEAR also inform the asylum seeker about the asylum procedure.

CEAR does not assist persons who are under the return procedure, but the aliens legislation stipulates that they are also entitled to receive information about their rights and the border guards' decisions have to be certified by an administrative resolution. These persons are assisted by a free legal aid lawyer of the Bar Association during the whole procedure at the airport. The lack of clear legislation on the criteria for returning foreigners does not guarantee in such cases the existence of an administrative resolution, based on concrete legal provisions, that could facilitate access to effective judicial review procedures.

It is important to note that persons under the return procedure and asylum seekers are placed in different facilities in order to prevent any communication and information sharing between them about the asylum procedure and practices. Border guards control both groups at the airport.

4.6.4 Procedure at the Airport

Interviews with foreigners take place in different ways and are based on the structure of an "application form" containing personal data and the asylum seeker's statements concerning the reasons for fleeing his/her country of origin. The interview with the person under a return procedure is not based on a strict application form

and criteria but depends on the questions the border guards may randomly ask. The interview is not registered either. In both cases, an interpreter is provided if necessary but there have been complaints about the quality of translation.

Although CEAR had no regular access to rejected foreigners, it had an opportunity to speak with a few persons of Bolivian, Paraguayan, Venezuelan and Brazilian nationality. On average, they were detained for two days before returned. In their cases, the border guards did not justify the reasons for sending the person back. In the decision, only formal reasons were mentioned such as “does not comply with the requirements of stay in Spain”.

If a foreigner does not have the necessary documents to enter Spain (passport, visa or residence permit) and does not apply for asylum, the interview is only a formality. However, if he/she has a valid passport and no visa is required, the interview becomes more problematic as the border guard often assume that the person is not really in Spain as a tourist.

In the past years, Spanish border guards lacked any written protocol for establishing whether a third country national who does not need a visa but at the same time does not have a residence and work permit in Spain either, really comes to Spain as a tourist. Recently, the Ministry of the Interior has introduced a procedure in which a Spanish national or legal resident has to officially invite a third country national in order for him/her to be allowed to enter the country. This procedure has to be carried out at a police station with a guarantee that the Spanish national or legal resident will host the guest in Spain and cover all costs.⁴⁷ If there is no official invitation letter, persons from a third country have to present a return ticket, hotel reservation and a certain amount of cash to verify their tourist status.

4.6.5 Access to Legal Assistance

Asylum seekers and other foreigners who do not have valid travel documents and are held at the airport have the right to legal assistance in the asylum application process or during the return procedure. The latter group is usually assisted by a lawyer from the Bar Association whose role is not particularly proactive, but rather acts as a witness to the interview.

Columbian asylum seekers who constitute the majority of asylum seekers at the Madrid airport, usually receive information about CEAR already in Columbia either from the Internet or third persons. This is probably the reason why over 50% of all asylum seekers at the Madrid airport are assisted by the organization.

If they do not already know the organization, social workers from the Red Cross (which provides social assistance), facilitate the contact between the asylum seekers and CEAR. In addition, they have public payphones available in order to call their embassy or a lawyer. However, they do have to pay to make these calls.

During the interview, the lawyer has the chance to ask questions in order to clarify any confusion or unclear aspects of the person's asylum claim. These questions asked by the lawyer are included in the asylum application. Once the asylum interview is concluded, the lawyer contacts the Office of Asylum and Refuge as well as

⁴⁷ Decree PRE/1283/2007 of 10 May 2007 of the Ministry of the Interior establishing the terms and the requirements concerning invitation letters issued by individuals in favour of foreigners wishing to have access to the territory of Spain for tourist or private reasons.

UNHCR by telephone in order to support the asylum application within the three day period when a decision on admissibility has to be reached.

If the application is rejected, the lawyer still has the opportunity to clarify or complete the asylum claim in the appeal against refusal. Normally, the lawyer receives information from OAR or UNHCR about their position on this case and about any potential confusion. In such a case, the lawyer can rewrite the claim.

Finally, the lawyer also mediates between the Red Cross, the border guards and the private security service.

4.6.6 Accommodation at the Airport

The airport facility has the capacity to accommodate 50 asylum seekers and 80 other foreigners. Asylum seekers can spend up to seven days at the airport following the asylum interview, and in some cases they have to wait two or three days to submit an application due to the lack of sufficient room for the interview.

There are officially two rooms allocated for the asylum interview but one of them is often used by the border guards to hold any foreigner who caused security problems there. It is also often difficult for the lawyer to find a separate room to meet his client.

The facilities are guarded by border guards, a social assistant from the Red Cross, and also by private security guards that do not always have the appropriate skills to carry out this task.

When the airport facility is full, asylum seekers have to sleep on mattresses on the floor. CEAR has also noted the lack of convenient areas for children and the lack of access to fresh air.

During the time of writing the present report, the airport facilities for asylum seekers were usually at their maximum capacity. As a consequence, a new building has recently been provided for the reception of asylum seekers. The new building features the same services as the older facilities (medical and social work services, attention to children, TV room, three interview rooms) but is more spacious (room for 180 persons) and features an open air area where asylum seekers can spend some time.

Best Practices in Airport Procedures in the Participating Countries

5.1 Cooperation Between State Authorities and Refugee-assisting Non-governmental Organizations

While the role of border guards is to enforce laws on the entry and stay of persons who are non-nationals by controlling entry into a given country, they are also responsible for ensuring that persons who may be in need of international protection are admitted to the country. Persons wishing to enter the country without meeting the necessary criteria are generally returned at the border. These procedures need to be carried out in compliance with both international and domestic law with due attention paid in practice to upholding the right to seek asylum.

The limited opportunity for civil society representatives, including refugee-assisting non-governmental organizations to monitor procedures and offer assistance to asylum seekers compounds refugees' difficulties in accessing Europe. Monitoring mechanisms by civil society organizations contribute to improving practices and increasing the transparency of the work of law enforcement agencies.

Cooperation arrangements between organizations concerned with protection of state borders and non-governmental organizations working to assist refugees are a prerequisite for monitoring airport procedures and the access of asylum seekers to Europe.

Such cooperation arrangements were successfully realized in the framework of our project, either on an ad hoc or more permanent basis. This certainly constitutes best practice in Europe.

Some of the project partners required lengthier negotiations with national authorities for access to be granted to the airport transit zones and asylum seekers staying in these locations. Others had on-going arrangements that, with perhaps some modifications, allowed easy access to the project's special area of interest.

As already referred to in the foregoing, the National Border Guard Headquarters, the UNHCR Regional Representation for Hungary, Poland, Slovakia and Slovenia and the Hungarian Helsinki Committee concluded a cooperation agreement in December 2006 to monitor the external borders of the country, including the Budapest Ferihegy Airport. The HHC's monitors are allowed to visit all airport facilities where foreigners

might be held, speak with all persons in the various facilities (including persons under return procedure) and look into the files of returned foreigners. In addition, in case someone applies for asylum at the airport, an HHC lawyer can represent him/her in the asylum procedure. This cooperation has proved to be very fruitful and as a result of the parties now working together, practices have improved notably since early 2007. Regular consultations in the framework of a trilateral working group are held to share experiences and positions, and in case of potential areas of concern, to find a common solution to the issue.

In Poland, the Polish authorities and SIP have also created very good cooperation and border guards have been very supportive of the project.

5.2 Access to Persons Under the Return Procedure

Regular access of refugee-assisting organizations to persons under the return procedure, including potential asylum seekers, has been found to be one of the most problematic issues in the six countries. Most countries separate asylum seekers and other foreigners at airport facilities and also deny NGOs access to the persons who have not applied for asylum at the airport, fearing that asylum seekers or lawyers will convince them to apply for asylum.

In contrast, Hungarian border guards, under the Tripartite Agreement, allow the HHC to speak with practically anybody at airport facilities. This practice has not generated a rise in the number of asylum applications in Hungary. Instead, it has created an opportunity for those without an official interview to share more details of their travels to the country and to fully understand the procedure in case information was not distributed properly or questions still remained about it. The purpose of the border guard authorities is clearly not to keep refugees out of the country, and the Hungarian practice also proves that granting monitors access to these persons also helps the authorities better abide by legislation.

5.3 Access to the Asylum Procedure in Transit Zones

Monitoring NGOs welcome the finding that none of the six participating countries apply border procedures that do not contain the basic guarantees and safeguards for asylum procedures despite the fact that the Procedures Directive allows this in exceptional cases.⁴⁸

5.4 Return Procedure Practices in Case of Vulnerable Persons

Although certain elements of the practice in the six countries involved in the project of returning persons traveling without valid documents is still worrisome and there are many areas where improvement is crucial (see below), it is worth noting that the Czech Republic and the Netherlands have introduced mechanisms to ensure that vulnerable persons receive more appropriate treatment.

At the Amsterdam airport, vulnerable persons have a more detailed interview to find out whether they would be exposed to danger at home upon return. Moreover, the Royal Military Police (RMP) in the Netherlands has to notify the Immigration and Naturalization Service (IND) about these cases. The person can only be expelled after the IND's permission. Another good practice in the Netherlands concerning the treatment of vulnerable

⁴⁸ Council Directive 2005/85/EC, Article 35

persons is that the RMP needs to inform and consult the IND in case a human rights organization has requested the RMP to provide an individual with the opportunity to apply for asylum.

In the Czech Republic, ministry officials make efforts to transfer families and unaccompanied minors to open reception facilities as soon as possible (however, the police procedure before applying for asylum is not entirely transparent).

While the return practice is still less transparent and at times problematic in Hungary as well, the border guards have recently refused to return to Syria an Iraqi woman traveling with forged documents. She arrived from Sweden to Damascus through Budapest, and was on her way back when she was intercepted. Border guards, however, decided to send her to Sweden instead of Syria, assuming that she has some form of legal status in Sweden. Though it seems to be a single case rather than a general practice, this progressive attitude by the Border Guard is welcomed, particularly concerning women, families with children and other potentially vulnerable persons.

5.5 Interview with All Persons Held at the Airport

At the Amsterdam airport, border guard authorities hold an interview with all persons whose entry is initially refused. This seems unique and very progressive as other countries typically hold interviews only with those who apply for asylum, while border guards automatically launch the return procedure for persons traveling without valid or with forged documents without taking into consideration their personal circumstances. Although the main purpose of the interview is to find out the carrier responsible for returning the person as well as any involvement of human traffickers or smugglers, such an interview still creates an opportunity for foreigners to explain the purpose of their travel. Due to this practice, cases of refoulement are rare in the Netherlands.

5.6 Detention and Freedom of Movement

Restrictions on the freedom of movement of persons under return procedures at the airport are also a common problem in the six countries. Member States have vastly different practices in this area in terms of length of detention, type of persons detained and conditions of detention. Although all countries use detention to ensure the return of rejected persons, in the Netherlands, border guards carry out an individual risk assessment to determine whether it is necessary to confine the person in the detention center of the airport. In many cases, border guards allow such persons to move freely within the premises of the transit zone and to report themselves at the gate upon departure.

5.7 Information Provision

Although there is room for improvement in the information provision on legal assistance in the Netherlands, the Dutch border guard authorities do mention the reason someone is refused on the refusal decision. They also mention the language in which the refused person was spoken to. Ideally, the information and decision is handed out in the person's mother tongue.

5.8 Legal Assistance

While access to legal assistance is secured in all countries, practices vary in terms of the beneficiaries, scope and the time limit of legal aid or legal assistance. Due to the special nature of airport procedures of potentially returning persons within a very short period, one of the main issues concerning legal assistance is the fact that

lawyers often arrive at the airport detention facility with significant delay, in some cases even after the person had already been returned.

In Spain, CEAR has a permanent presence at the airport with immediate access to persons of concern (although only to asylum seekers). The organization has daily contact with the border guards, the asylum office and UNHCR, significantly limiting the possibility of refoulement of asylum seekers and refugees.

In terms of access to persons, the cooperation agreement in Hungary allows the monitor to speak with the rejected persons and, in case any doubt arises about the lawfulness of the return, the lawyer can reveal the situation to the border guards.

5.9 Interpretation During the Procedures

Concerns regarding interpretation are frequent. Nevertheless, some positive examples have been identified in the course of the project. In the Netherlands, most border guards speak at least one common language (and as many of them have some ethnic background, their own) other than Dutch at a very high level, and a vast scale of languages are covered. Most importantly, there is a 24-hour central telephone service for interpreters that provides services in one hundred languages. It can be contacted within minutes and the interview can take place within a short time. This service is also used by NGOs. With this wide range of interpretation services available, it can be stated that the risk of misinterpretation and communication problems is lessened significantly, further ensuring that the appropriate personal circumstances of the foreigner can be revealed in an effective manner.

5.10 UNHCR's Involvement in the Airport Procedure

Project partners find it very progressive that UNHCR is involved in regular monitoring of airports in Austria, the Czech Republic, Hungary and Poland to ensure asylum seekers' access to the territory of the country.

In Austria, this is carried out in cooperation with the Commission of the Human Rights Advisory Board of the Ministry of Interior, while in the Czech Republic, Hungary and Poland it is conducted in a joint undertaking with local NGO partners. This further ensures transparency of the procedures and makes advocacy efforts to improve practices more efficient.

In addition, it is considered a good practice that in Spain UNHCR is also actively involved in the asylum procedure. As elaborated above, the organization is informed about all asylum applications and is asked to provide an opinion on the case. In addition, it has a chance to interview asylum applicants.

5.11 Accommodation

In Austria, authorities make sure that family unity is fully respected and foreigners who arrive with families and are denied entry are placed in the so-called initial reception center where their special needs can be better guaranteed. Similarly, in Hungary, whenever families are under the return procedure and are detained in the facilities found in the transit zone of the airport, accommodation is provided so that the family members would not be separated.

6. Common Areas of Concern

6.1 Access to Persons under the Return Procedure and Detention Facilities

While participating NGOs welcome the fact that – either within the project’s framework or regardless of the project – they all have been able to gain access to asylum seekers at the airport, it is alarming that some of the organizations could not visit detention facilities for persons who have not applied for asylum and were under a return procedure. Such foreigners are considered illegal migrants who are automatically not in need of international protection. Refugees are often forced to travel without valid documents, especially if it is their own state that persecutes them. Denying access to legal assistance opportunities provided by NGOs or lawyers at airports for persons who are under the return procedure runs the risk of migrants not being able to seek international protection.

The Asylum Procedures Directive provides that Member States have to allow legal advisers to enter “closed areas, such as detention facilities and transit zones, for the purpose of consulting [the] applicant”. There may only be an exception to this if the foreigner is considered a security risk.⁴⁹ It is arguable that the right of legal advisers to have access to the transit zones under the Asylum Procedures Directive should also be taken to apply to foreign nationals about to be returned.

6.2 Return Procedures

The lack of transparency of return procedures raises concerns about the procedure’s lawfulness in many cases. The often wide scope of interpretation afforded by not strictly defined legal grounds for return, such as “non-tourist purposes” (Spain) or “no obstacles to deportation found” (Czech Republic) may lead to arbitrary and ad hoc implementation by border guards.

The fact that, in most of the countries involved in the project, no interview or hearing is conducted with persons under the return procedure can prevent such persons from formulating claims to international protection.

⁴⁹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 16.

This can also prevent border guards from finding out the individual circumstances of the foreigner and his/her real reasons for leaving his/her country of origin. The lack of valid travel documents or forged passports/visas does not automatically prove bad faith or the unlawfulness of a person's arrival. As mentioned above, refugees do not always have an opportunity to obtain travel documents and their only chance to flee persecution is often with forged documents or without any papers at all. The denial of access to territory and to the asylum procedure as a consequence of a lack of an interview is in breach of the non-refoulement principle stipulated in Article 33 of the 1951 Refugee Convention.

6.3 Schengen Form for Refusal of Entry

The standard form for refusal of entry at the border (Schengen form) as prescribed by the Schengen Borders Code⁵⁰ does not provide sufficient information about the measure or the personal circumstances of the foreigner. The simple format of checkboxes for giving the reasons for refusal of entry does not allow any elaboration, further rendering the procedure vague and the subsequent retracing of detailed information impossible. In addition, the Schengen forms are often used in a basic common language, and not in the mother tongue of the person affected by the measure or in a language that he/she can understand, and despite the signature on the bottom that the foreigner understood the content, complaints have revealed the opposite.

6.4 Information Provision

Complaints about not understanding leaflets and other official forms received from the authorities were frequently heard by project partners despite national authorities' efforts to provide information in a variety of foreign languages. Clearly, distributing information on rights and responsibilities in the local language is simply not sufficient.

Foreigners subjected to refusal of entry do not receive official information on the possibility of applying for asylum in any of the six countries. This likely stems from the border guards' fear that foreigners may decide to submit an asylum claim even if they were not persecuted at home, just to obstruct their return. Knowing the often peculiar requirements in the participating countries for foreigners to express their desire to seek asylum (e.g. in Spain the use of the word "asylum" or distinctive body language in Hungary), the lack of clear information on how to apply might lead to refoulement in many cases.

6.5 Interpretation

Appropriate translation and interpretation has been found to be one of the most problematic areas in airport procedures. Interpreters are often not available for persons speaking less common languages, preventing them from describing their circumstances and reasons for arrival in detail. Such situations lead to frustration and failure to clearly record the interview and establish the necessary facts fully.

⁵⁰ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), Annex V, Part B

Apart from its availability, many complaints concern the quality of interpretation. This often comes from the fact that border guards sometimes try to translate themselves if they cannot secure a professional interpreter or simply use a person who they believe speaks the language but has no professional experience in such activity.

Furthermore, sometimes interpreters display an inappropriate attitude as they might belong to or empathize with a group or party that is close to the persecutor of the asylum seeker in the country of origin. Such interpreters may not fully translate what the interviewed foreigner said without alterations or add their own comments, distorting the content of the person's account and therefore seriously hindering the success of the interview.

6.6 Judicial Review

The project found that in the participating countries, despite the availability of court review against refusal of entry, it is in practice almost impossible to appeal the decision on non-admission to the territory. This is mainly due to the lack of understanding about procedures and legal remedies, the unreasonably short period of time for taking legal action against the return decision and the difficulties relating to access to legal advice.

Moreover, even if the person indeed manages to request court review against the return decision, in most countries this has no suspensive effect. Once a person is returned to his/her country, it is practically impossible to pursue the remedy due to the lack or inaccessibility of legal assistance, not to mention the fact that his/her life or personal security may be at risk.

6.7 Conditions of Detention/Accommodation

The Reception Conditions Directive provides that when an application for asylum is lodged at the border, Member States must provide housing that at least ensures the protection of family life, possibility of communicating with NGOs and access of legal advisors. When an asylum seeker is confined to a border post, Member States must at least make available material reception conditions which in any case cover basic needs.⁵¹

However, in many countries facilities designated at the airport for placing foreigners (among them, asylum seekers) are inappropriate in several respects. The facilities are usually clean and well maintained, but the prison-like circumstances in transit zones make detained foreigners feel that they are punished without having committed any crime, causing serious stress and potentially further trauma.

Although the Reception Conditions Directive remains vague on what "basic needs" means, it can be stated that satisfying basic needs such as separating women and men (unlike in Poland) or access to fresh air fall within this category. An airport environment, however, does not allow as much freedom of movement as other detention facilities (including access to fresh air), and foreigners are forced to bear inadequate circumstances for a seemingly unreasonable period (e.g. maximum seven days in Spain or eight days in Hungary). Moreover, although in theory all Member States provide meals to detained foreigners at the airport, monitors received complaints of the opposite practice. This is particularly harsh for those who cannot afford to buy their own food at the cafeteria.

⁵¹ Reception Conditions Directive, Article 14 (1) (a) and (8)

6.8 Identification of Asylum Seekers in Airport Procedures

It is clearly a challenging task for border guard officials to identify asylum seekers among migrants who are refused entry to the territory. Border guard officials are often not trained and lack the skills necessary to recognize if a person is in need of international protection.

As previously mentioned, requirements to admit someone in the asylum procedure such as using particular words or behaving in a particular way allow officials to ignore other, otherwise typical signs that may suggest that someone should not be returned. Refugees may not know the expected terminology such as “asylum” or “persecution”, for which they seem to be punished in practice. Traumatized persons (and even those who are not) may not be able to express fear in an obvious way. Torture or pain experienced at home may have led to quiet or the opposite, aggressive behavior, which would not immediately suggest trauma.

7. Recommendations

7.1 Regular Monitoring Arrangements and Strengthened Cooperation between Authorities, NGOs and UNHCR

It is recommended that all Member States establish cooperation agreements with refugee-assisting organizations and UNHCR to monitor the access of asylum seekers to the territory of the country, allowing access to all persons and airport facilities as well as to the files of returned persons. This will contribute to making airport procedures more transparent, improve compliance with legal standards and develop mutual trust among organizations working with migrants and refugees.

7.2 Access to Persons in Detention Facilities and Legal Assistance

All Member States should ensure the proper implementation of the Asylum Procedures Directive, which stipulates access of legal advisers to asylum applicants held in detention areas, including transit zones at airports.

In order to ensure that persons who may be in need of international protection have access to legal advice, lawyers provided by either the state as part of a legal aid scheme or NGO legal counselors should be notified of intercepted foreigners and allowed to participate in the first interview with the foreigner.

7.3 Interview with All Persons in the Procedure to Refuse Entry into the Country

Member States should prescribe that a detailed interview is held with all persons subjected to refusal of entry to ensure protection against refoulement and the identification of refugees. The interview would serve to find out the individual circumstances of the particular foreigner and his/her reasons for leaving the country of origin and would also provide a real opportunity for persons to seek asylum.

7.4 Information Provision on the Right to Seek Asylum and Assistance

Members States should provide written information on the procedure and the rights and responsibilities of foreigners subject to airport procedures in multiple languages that reflect the variety of languages spoken by asylum seekers arriving in the country.

It is critical that all foreigners intercepted and refused entry at the airport receive appropriate and detailed information on the possibility of appealing the decision. Although reference to the availability of judicial review appears in the Schengen form, it is practically useless and hard to notice, not to mention the fact that foreigners often do not understand the form despite their signature on the bottom.

Written information on the possibility to seek asylum and the asylum procedure should be displayed on the walls of airport premises, including passport control areas.

The contact information of lawyers or NGOs who can provide free legal assistance should be displayed in all premises where foreigners may be held and border guards should assist foreigners with contacting such service providers.

7.5 Interpretation Services

To resolve immediate communication barriers, it is strongly recommended that border guard officers who meet foreigners and deal with return or asylum procedures at airports participate in language courses at least in English or in another commonly spoken language.

However, border guard officials speaking the language of the foreigner or a language that he/she understands at less than full proficiency level should refrain from conducting detailed interviews in order to avoid misunderstandings at the crucial initial stage of establishing the facts and personal circumstances. Misinterpretation may have grave effects and could play a role in refoulement.

All Member States should secure professional interpreters speaking a wide range of languages who are available within a short period of time to assist at the airport. Border guards should ideally select professionals who have undergone specialized training as interpreters to avoid situations where the interpreter would not impartially and fully translate the foreigner's statements. In any case, all interpreters used by the border guards should be made aware of the basic professional requirements associated with dealing with foreigners involved in the return procedure.

7.6 Automatic Suspensive Effect for Judicial Review Against the Return Decision

In order for remedies against the decision to refuse entry and the return order to be effective and meaningful, the request for judicial review must have automatic suspensive effect. Once a foreigner is returned from the country, it is practically impossible to pursue legal remedies, which results in risking the life and security of potential asylum seekers.

7.7 Conditions of Detention/Accommodation

All Member States should ensure that facilities for foreigners confined at the airport or in airport transit zones for more than 24 hours provide adequate living standards with as few restrictions as possible. Authorities must keep in mind that these foreigners have only committed a minor offence by entering the country without valid travel documents – in case of refugees for a legitimate reason – therefore keeping them in prison-like conditions exceeds the purpose of the measure and is not proportionate to the offence they have committed.

It is recommended that Member States follow the practice of the Amsterdam Schiphol airport where foreigners move freely in the transit zone following an individual risk assessment.

Basic conditions of reception should be provided, such as separating men and women (unless it is a family), allowing the use of bathrooms at any time and daily access to open air. Meals that take into account foreigner's dietary and religious customs should be provided by the authorities.

7.8 Training of Border Guard Staff

It is recommended that all border guards working directly with foreigners at airports participate in regular intercultural, communication and basic legal trainings in order to better recognize if a person is in need of international protection. Authorities should consult with NGOs and UNHCR on this issue and engage in joint training activities.

The project “Monitoring access of asylum seekers to territory and procedure at European airports – exchange of experience and best practices” was supported by the European Refugee Fund and began in December 2006 with the participation of six European refugee-assisting non-governmental organizations. It sought to monitor how refugees’ access to Europe through airports is ensured in the law and in the practice of various European Union Member States and to offer recommendations by building on good practices already in place in some of these countries. This report contains experiences from six European airports: Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw.