UNHCR
The UN
Refugee Agency

UNHCR Comments on the General Scheme of the International Protection Bill

I INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (hereinafter "UNHCR") has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to refugee problems.[1] Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees, while Article 35 of the 1951 Convention relating to the Status of Refugees (1951 Convention)[2] and Article II of the 1967 Protocol to the Convention (1967 Protocol)[3] oblige States Parties to cooperate with UNHCR in the exercise of its mandate, in particular by facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol. UNHCR's supervisory responsibility extends to each European Union (hereinafter "EU") Member State, all of which are States Parties to these instruments.

2. As agreed in the Stockholm Programme, the "establishment of a Common European Asylum System" is a key objective for the EU.[4] The Programme reaffirms that this system should be based on the full and inclusive application of the 1951 Convention and 1967 Protocol, as well as other relevant international treaties. UNHCR considers the Government's plans as set out in this proposal in the context of the aspiration to establish a Common European Asylum System.

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[1] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: http://www.unhcr.org/refworld/docid/3ae6b3628.html.

[2] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: http://www.unhcr.org/refworld/docid/3be01b964.html. According to Article 35(1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of this Convention" (hereinafter "Geneva Convention" or "1951 Convention").

[3] UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, available at: http://www.unhcr.org/refworld/docid/3ae6b3ae4.html (hereinafter "1967 Protocol").

[4] Council of the EU, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Doc. Nr.17024/09, Brussels, 2 December 2009, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF.

3. UNHCR welcomes the opportunity to comment on the proposed legislation at this early juncture. The proposed legislation will considerably overhaul the Irish system of international protection, and in particular will establish a single determination procedure, a long-held objective of the Irish authorities.

4. As a general comment, UNHCR welcomes the government's decision to approve legislation that will cut lengthy asylum decision procedures. The International Protection Bill will allow for a 'single procedure' to deal with all applications, cutting the length of time asylum-seekers have to wait to receive a decision and reducing long periods of time spent in direct provision. UNHCR has called since 2009 for the introduction of a single procedure. The enactment of this Bill will be of immeasurable benefit to people who flee persecution and indiscriminate violence in their own countries in the future and seek safety in Ireland. UNHCR stands ready to support the Irish authorities in their early implementation of the procedure.

5. UNHCR welcomes a great number of the provisions in the General Scheme. In particular:

- The introduction of a single procedure for the determination of eligibility for refugee status followed by, in the same first instance procedure, eligibility for subsidiary protection
- Rights granted to beneficiaries of subsidiary protection and refugee status which are almost identical
- A right of appeal for persons granted subsidiary protection but not refugee status
- A right of appeal with respect to decisions on admissibility and subsequent applications
- A general provision on credibility replicating the provision contained in 2013 SP Regulations.
- Full-time members at the International Protection Appeals Tribunal (IPAT)
- A requirement that the Public Appointment Service be responsible for the appointment of IPAT members
- Public hearings at IPAT
- Dispensing of the personal interview at first instance where there is sufficient evidence to grant refugee status
- Commissioning of medical reports at both 1st and 2nd instance by the determining bodies themselves
- Giving effect for the first time to the Temporary Protection Directive to which Ireland opted into
- New procedures giving unsuccessful applicants the opportunity to avail of voluntary return following a decision on international protection and leave to remain and prior to the issuance of a deportation order.

6. UNHCR has a number of comments aimed at further enhancing the Bill which are set out below and which we would be happy to discuss further. In these comments we have focused primarily on substantive points of principle and priority issues. UNHCR has already submitted detailed comments to the 2008 Immigration, Residency and Protection Bill which address in some cases the drafting of particular provisions that have been replicated again here and which we would refer you to again where relevant[5]. In order to facilitate reading, this document contains an outline of our general comments followed by more specific comments on each of the areas relating to UNHCR's mandate, outlining the main concerns and making reference to some specific sections of the General Scheme. Where possible and appropriate, alternative wording has been suggested.

II EUROPEAN AND INTERNATIONAL LAW CONTEXT

7. Measures relating to the Common European Asylum system are covered by Protocol, No 21, annexed to the Treaty of European Union and the Treaty on the Functioning of the European Union, "on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice". Ireland is not bound to participate in European instruments in this area but may opt-in to any it wishes to. In the first phase of EU harmonisation in the field of asylum, Ireland opted into the following core instruments: Procedures Directive[6], the Qualification Directive[7], Temporary Protection Directive[8], the EURODAC[9] and Dublin[10] Regulations. It chose not to opt-in to the Reception Conditions Directive. These instruments established a suite of minimum standards to be applied in the determination of applications for international protection (defined as refugee status and subsidiary protection).

8. To date Ireland has opted in to four instruments of the second phase of CEAS instruments, the Recast Dublin[11] and EURODAC[12] Regulations and also the EASO[13] and

[5] http://www.refworld.org/docid/47d7be382.html
[6] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
[7] 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
[8] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.
[9] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention
[10] 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
[11] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

AMIF[14] Regulations. These instruments set out a suite of common standards to be applied in the determination of applications for international protection.

9. Although Ireland has not, at present, opted in to the Recast Qualification[15] and Procedures Directives[16], this is an option that remains open to the State and the possibility of a future opt-in has not been excluded. Much of the wording of the General Scheme is closely based upon European Directives which it aims to transpose, the Qualification Directive, the Procedures Directive and the Temporary Protection Directive. It also aims to fully meet the standards set out in the Recast Qualification Directive notwithstanding that Ireland is not obliged by EU law to do so. The General Scheme also transposes in places the more favourable provisions of the Recast Procedures Directive. This approach is welcomed as it would be beneficial to avail of this opportunity to reflect best practice and to contemplate, as far as possible, a future opt-in to the Recasts. Accordingly where the Recast Directives contain more favourable standards or where they more clearly elucidate a principle to be applied, UNHCR would advocate reflecting the more recent provisions in the General Scheme.

10. The comments in this paper to a large extent draw on UNHCR's comments on the Asylum Qualification Directive[17] ("QD") and the Asylum Procedures Directive[18] ("APD"), as well as comments on the more recent Recasts[19].

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[12] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013

[13] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office

[14] Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund

[15] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

[16] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

[17] See UNHCR Annotated Comments on the EC 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 (OJ L 304/12 of 30.9.2004) ("UNHCR Annotated Comments on the 2004 Qualification Directive"), 28 January 2005, available at: http://www.refworld.org/docid/4200d8354.html

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

[19] UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), August 2010, available at: http://www.unhcr.org/refworld/docid/4c63ebd32.html. and UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international

11. As the long title of the General Scheme indicates it also aims to give further effect to the 1951 Convention and the 1967 Protocol. Both conventions are set out "for convenience of reference" in Schedules 1 and 2 of the General Scheme, as was previously the case in the Refugee Act 1996. The High Court in *N.S.*[20] has confirmed that this scheduling of the Conventions does not have the effect of incorporating them into law; the ratification of the Convention does not confer rights on applicants which may be invoked before the courts and there could be no legitimate expectation that its provisions could be successfully invoked to oust constitutional or statutory rights. Accordingly the provisions of the Refugee Act now and the International Protection Bill, when enacted, are the primary means by which the State purport to give statutory effect to its obligations under the 1951 Convention.

12. The Original and Recast Directives reflect the aim of EU Member States to create a common European asylum system based on a full and inclusive application of the 1951 Convention[21]. This includes the principle of non-refoulement and a comprehensive set of rights enabling refugees to achieve self-reliance and integrate into society in their host countries. The opening recitals to the Qualification Directive and its Recast furthermore clarify that it is not intended to modify existing international refugee law but provides binding guidance for its interpretation within the framework of the Convention. The Convention is acknowledged as the cornerstone of international legal regime of refugee protection. To maintain the Convention's centrality to international refugee protection, EU Member States need to take into consideration common understandings achieved in international fora, especially UNHCR's Executive Committee, as well as UNHCR's special supervisory responsibility over the application of the Convention by, inter alia, the issuance of guidelines and positions on relevant issues[22]. EU Member States should also consider State practice outside the EU when interpreting the Convention.

13. Article 3 of the Qualification Directive and its Recast, and Article 5 of the Procedures Directive and its Recast, state explicitly that Member States may introduce or retain more favourable standards in so far as those standards are compatible with the Directives. Read

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protection and the content of the protection granted (COM(2009)551, 21 October 2009), 29 July 2010, available at: http://www.unhcr.org/refworld/docid/4c503db52.html.

[20] N.S. v. Anderson [2004] IEHC 440

[21] Article 78 TFEU (ex Articles 63, points 1 and 2, and 64(2) TEC) states:
"1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

[22] Such guidelines are included in the UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 1979, (re-issued) December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html.

in conjunction with their corresponding recitals[23], these articles underlie that the Directives aim to set standards which leave States free to retain or introduce more favourable or additional standards of protection if they so choose. It is UNHCR's view that, the provisions of the Directives do not entirely reflect the standards of the 1951 Convention. Accordingly Member States are urged to assess carefully, in consultation with UNHCR as relevant, circumstances in which more favourable provisions need to be introduced or retained to ensure compliance with international refugee or human rights law. In this connection, more favourable national standards which reflect binding international obligations should always be deemed to be compatible with the Directive. This is, *inter alia*, reflected in the Recitals of the Directives which present the 1951 Convention as the basis and *"cornerstone"* of the international legal regime for the protection of refugees.

III SUBSTANTIVE PROVISIONS

i. Decisions on Admissibility – First Country of Asylum

14. Head 20 for the first time requires the Minister to find an application inadmissible in the case of applicants who have been granted status in another EU state or another "first country of asylum". This transposes Article 26 of the Procedures Directive.

Head 20: Inadmissible application

Provide along the following lines:

(1) The Minister shall determine an application for international protection to be inadmissible if any of the following circumstances applies:

(a) another EU Member State has granted refugee status or subsidiary protection status to the applicant, or

(b) a country other than an EU Member State is, in accordance with subhead (2), a first country of asylum for the applicant;

(2) A country is a first country of asylum for an applicant if he or she-

(a) (i) has been recognised in that country as a refugee and can still avail himself or herself of that protection, or

(ii) otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement,

and

(b) will be re-admitted to that country.

[23] Recital 7 Procedures Directive; Recital 14 Recast Procedures Directive; Recital 8 Qualification Directive; Recital 14 Recast Qualification Directive

15. The text of Head 20(2) replicates the wording of the first part of Article 26 of the Procedures Directive which is unchanged in its Recast. We would recall our observations made in UNHCRs comments on the Procedures Directive:

> *"UNHCR welcomes the requirement that a country be considered a first country of asylum only if the refugee can still avail him/herself of that protection. The Office notes, however, that the term 'sufficient protection' in Article 26(b) is not defined and may not represent an adequate safeguard or criterion when determining whether an asylum-seeker or refugee can be returned safely to a first country of asylum. In UNHCR's view, the protection should be effective and available in practice. The Office recommends, therefore, using the term 'effective protection' in national legislation and suggests the elaboration of explicit benchmarks in line with the standards outlined in the 1951 Convention and the Lisbon Conclusions on 'effective protection'.[24] Furthermore, the capacity of States to provide effective protection in practice should be taken into consideration, particularly if they are already hosting large refugee populations. Countries where the Office is engaged in refugee status determination under its mandate should, in principle, not be considered first countries of asylum. UNHCR often undertakes such functions because the State has neither the capacity to conduct status determination nor to provide effective protection. Generally, resettlement of persons recognized to be in need of international protection is required. The return to such countries of persons in need of international protection should therefore not be envisaged."*

16. UNHCR reiterates its view that any protection in that country should be available in practice.[25] This is demonstrated by the case law of ECtHR according to which the theoretical right of *non refoulement* is not sufficient.[26]

17. Article 26 further refers to the criteria of safety enshrined in Article 27(1) relating to the concept of safe third country but is regrettably optional for Member States when applying the concept of first asylum country. Head 20 makes no reference to these criteria and provides no further guidance as to how this concept is to be assessed. UNHCR believes that criteria should be used to define the notion of "effective protection" in line with the

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[24] 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers'- Lisbon Expert Roundtable, 9-10 December 2002, http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=3e5f323d7

[25] UN High Commissioner for Refugees (UNHCR), UNHCR comments on the European Commission's Proposal, op. cit., pp. 32-33.

[26] See, *inter alia*, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, para. 88, at: http://www.unhcr.org/refworld/docid/4ab8a1a42.html: "*The Court reiterates in this connection that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention*".

1951 Convention and the Lisbon Conclusions on "effective protection". *A fortiori*, the notion of "*sufficient protection*" if used by Member States should also be further defined in national legislation.

18. Article 38(1) of the Recast introduces a further new element which is also not reflected in Head 20: "The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances." In UNHCR's view this is an important additional safe-guard that should also be included.

Recommendations:

(1) The wording of Head 20(2) be amended to state:

"(2) A country is a first country of asylum for an applicant if he or she-

(i) has been recognised in that country as a refugee and can still avail himself or herself of ~~that~~ ***the effective*** *protection of that country, or*

(ii) otherwise enjoys sufficient ***and effective*** *protection in that country, including benefiting from the principle of non-refoulement"*

(2) That the criteria of this notion be clearly defined in the legislation in line with the 1951 Convention and the Lisbon Conclusions on "effective protection".

(3) That a new sentence be added to Head 20 stating:

"The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances."

ii. Actors of persecution or serious harm

19. Head 28 transposes Article 6 of the Qualification Directive and its Recast:

Head 28: Actors of persecution or serious harm

Provide along the following lines:

Actors of persecution or serious harm include:

(a) a state,

(b) parties or organisations controlling a state or a substantial part of the territory of a state, and

(c) non-state actors, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm.

20. UNHCR has long maintained that the 1951 Convention does not confer protection exclusively against persecution due to acts by State agents. Rather, persecutory acts

committed by non-State agents against whom the State is unwilling or unable to protect similarly give rise to refugee status under the 1951 Convention, provided, of course, the other criteria of the refugee definition are met.[27] In this connection, the question of whether a State actor exists who could be held accountable for not offering protection is not relevant.[28] The European Commission, in its report on the application of the 2004 Directive, noted that Member State practice has acknowledged that a broad range of actors are capable of persecution which gives rise to a need for refugee protection.[29]

21. The issue of state protection is dealt with comprehensively in Head 29 and therefore it is unnecessary to provide further reference to it here; recommendations are set out in respect of that head below.

Recommendation:

(4) Head 28 (c) be amended as follows:

"(c) non-state actors~~, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm.~~"

iii. Actors of protection

22. Head 29 outlines which actors may be considered as "actors of protection".

[27] See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/IP/4/Rev.1, 1979, para. 65, http://www.unhcr.org/refworld/docid/4f33c8d92.html; See also V. Türk, Non-State Agents of Persecution in: V Chetail and V Gowlland-Debbas (eds) Switzerland and the International Protection of Refugees, (The Hague: Kluwer Law International, 2002), 95–109; G. Goodwin-Gill, The Refugee in International Law (Oxford: Oxford University Press, 2nd ed., 1996) you need 3rd editions, 70-74; J. Hathaway, The Law of Refugee Status (Toronto: Butterworths, 1991), 124-131.

[28] This is acknowledged in the Explanatory Memorandum on Article 9(1), which clarified that the actor of the persecution was irrelevant: European Union: *European Commission, Explanatory Memorandum on the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, (COM(2001)510 final, 12.9.2001, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF, page 18.

[29] An EC QD implementation report states "Non-State actors accepted as actors of persecution in the practice of different Member States are reported to include guerrillas and paramilitaries, terrorists, local communities and tribes, criminals, family members, members of political parties or movements". European Commission, Report from the Commission to the European Parliament and to the Council on the application of 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, COM(2010)314 final, 16 June 2010, page 6, section 5.1.3, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0314:FIN:EN:PDF.

Head 29: Actors of protection

Provide along the following lines:

(1) Protection against persecution or serious harm can only be provided by:

(a) a state, or

(b) parties or organisations, including international organisations, controlling a state or a substantial part of the territory of a state,

provided that they are willing and able to offer protection in accordance with paragraph (2).

(2) Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided where the actors mentioned under subparagraphs (a) and (b) of subhead (1) take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

(3) When assessing whether an international organisation controls a state or a substantial part of its territory and provides protection as described in subhead (2) the Minister or, as the case may be, the Tribunal, shall take into account any guidance which may be provided in relevant European Union acts.

23. This Head uses the same wording as Art. 8 of the Recast Qualification Directive and UNHCR welcomes that the General Scheme transposes these more favourable provisions. The Recast provisions now reflect some of UNHCR's original concerns in relation to this Article. It provides greater clarity in determining whether an actor can be considered an "actor of protection". Article 7(1)-(2) now stipulates that the protection must be effective and non-temporary, specifies who can provide such protection, and that actors of protection must be willing and able to enforce the rule of law. This is a key provision in that UNHCR considers that "willingness to protect" is not sufficient in the absence of the "ability to protect".

24. This provision raises the question of the extent to which non-State entities can provide protection against the feared persecution or serious harm so as to reject the request for international protection. Generally, national protection can only be provided by the State, and not by non-State actors. It would, in UNHCR's view, be inappropriate to equate national protection provided by States with the activities of a certain administrative authority which may exercise some de facto – but not de jure – control over territory. Such control is often temporary and without the range of functions required of a State, including the ability to readmit nationals to the territory or to exercise other basic functions of government. Specifically, such non-State entities and bodies do not have the attributes of a

State, are not parties to international human rights treaties, and therefore cannot be held accountable for their actions as can a State. In practice, this generally has meant that their ability to enforce the rule of law is limited.[30] Specifically in respect of international organizations, such as the organs or agencies of United Nations, including the UNHCR, they enjoy privileges and immunities.[31]

25. While the final version of the Recast Directive uses the term "non-temporary", the Commission's original proposal for the recast referred to protection of a "durable" nature. UNHCR would support the interpretation of "non-temporary" to reflect this intention.

26. Determining the availability of protection requires an assessment of the effectiveness, accessibility and adequacy of available protection in the individual case. Possible guarantors of such protection or the existence of a legal system in a given country may be elements of this examination. However, the assessment to be made is whether the applicant's fear of persecution continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm. Further, use of the term "reasonable steps" as taken by actors of protection introduces a high level of subjectivity into the determination. In addition, while the initial burden of proof correctly lies on the state, the claimant faces a disproportionate burden to demonstrate that the measures taken by the actor of protection as insufficient, or "unreasonable".

27. UNHCR would recall the finding of the Court of Justice of the European Union ("CJEU") in Abdulla & Others regarding the interpretation of the degree of protection which must be afforded by actors of protection: "they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status".[32]

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[30] As the EC points out, "The lack of clarity of the concept allows for wide divergences and for very broad interpretations which may fall short of the standards set by the Geneva Convention on what constitutes adequate protection. For instance, national authorities interpreting broadly the current definition have considered clans and tribes as potential actors of protection despite the fact that these cannot be equated to States regarding their ability to provide protection. In other instances, authorities have considered non-governmental organisations as actors of protection with regard to women at risk of female genital mutilation and honour killings, despite the fact that such organisations can only provide temporary safety or even only shelter to victims of persecution".
European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, 21.10.2009, p. 6, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF.

[31] UN General Assembly, Convention on the Privileges and Immunities of the United Nations, 13 February 1946, available at: http://www.refworld.org/docid/3ae6b3902.html [accessed 4 May 2015]; UN General Assembly, Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, available at: http://www.refworld.org/docid/3ae6b3b10.html [accessed 4 May 2015]

[32] *Salahadin Abdulla and Others v. Germany*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: European Court of Justice, 2 March 2010, http://www.unhcr.org/refworld/docid/4b8e6ea22.html.

Recommendations:

(5) Amending Head 29(1) to:

"(1) Protection against persecution or serious harm can only be provided by:

a state, or

parties or organisations~~, including international organisations,~~ controlling a state or a substantial part of the territory of a state,

provided that they are willing and able to offer protection in accordance with paragraph (2)."

(6) Amending Head 29(2) to:

"(2) Protection against persecution or serious harm must be effective and of a ~~non-temporary~~ **durable** nature. Such protection is ~~generally~~ provided where the actors mentioned under subparagraphs (a) and (b) of subhead (1) ~~take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating~~ **operate** an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection."

(7) Adding a requirement to carry out "an assessment of the effectiveness, accessibility and adequacy of available protection in the individual's case"

iv. Internal Relocation Alternative

28. Head 30 concerns what is termed the Internal Relocation / Flight Alternative (IFA).

Head 30: Internal protection

Provide along the following lines:

(1) The Minister or, as the case may be, the Tribunal may determine that an applicant is not in need of international protection if in a part of the country of origin the applicant

(a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm, or

(b) has access to protection against persecution or serious harm,

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

(2) The Minister or, as the case may be, the Tribunal, in examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering harm, or has access to protection against persecution or serious harm in a part of the country of

origin in accordance with paragraph (1), shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Head 25.

(3) The Minister or, as the case may be, the Tribunal, in complying with this Head, shall ensure that precise and up-to-date information is obtained from relevant sources, such as the High Commissioner and the European Asylum Support Office.

29. UNHCR welcomes that the General Scheme transposes the more favourable provision of Article 8 of the Recast Qualification Directive. More generally however the General Scheme does not fully reflect UNHCR guidance[33] some of which is also averted to in Recital 27 of the Directive:

> *"Internal protection against persecution or serious harm should be effectively available to the applicant in a part of the country of origin where he or she can safely and legally travel to, gain admittance to and can reasonably be expected to settle. Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available.*

30. Article 8(1) recognizes that in cases involving persecution by non-State actors, an assessment of whether an internal flight, relocation or protection alternative in another part of the country exists such that international protection is not required. This is a two-step inquiry involving both a relevance and a reasonableness test, as reflected in Article 8(1)(b) [34] and in line with UNHCR's Guidelines on International Protection on "Internal Flight or Relocation Alternative" [35]. Apart from considering whether the applicant would not have a well-founded fear of persecution or would face serious harm in the relevant area, it also needs to be considered whether the applicant could practically, safely and legally access the proposed area (the relevance test), and only if this is possible, whether they could also reasonably be expected to relocate there (the reasonableness test). The latter test of reasonableness requires an assessment of all the circumstances, such that the individual, taking into account their personal circumstances, could live there without undue hardship.

[33] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 23 July 2003, HCR/GIP/03/04, available at: http://www.refworld.org/docid/3f2791a44.html

[34] See UNHCR Annotated Comments on the 2004 Qualification Directive, comment on Article 8.

[35] UNHCR Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 23 July 2003, HCR/GIP/03/04, available at: http://www.refworld.org/docid/3f2791a44.html

An assessment of an internal flight or relocation alternative is not normally necessary where the feared persecution emanates from State agents (see Recital 27), as they are presumed to be able to act throughout the territory.

31. This recast has made the test less subjective, moving from the formulation "reasonably be expected to stay" to "he or she can safely and legally travel to and gain admittance". Nevertheless, physical and legal access to another part of the country is merely one of the first steps towards enjoying effective protection from persecution, and is a necessary but insufficient condition. Article 8 read in conjunction with Recital 27 will require that the applicant "can safely and legally travel" and "gain admittance" to another part of his/her country, and that s/he "can reasonably be expected to settle" there. This reflects elements from the test established by the ECtHR in Salah Sheekh[36] and is in accordance with UNHCR's Guidelines on International Protection on "Internal Flight or Relocation Alternative".

32. The "reasonableness" test - as expressed here as "reasonably be expected" to live - cannot lead to the situation where the asylum-seeker has to demonstrate that s/he could not relocate to multiple possible locations. The proposed place of relocation must be properly and specifically identified by the State, with the applicant given an adequate opportunity to respond. The applicant cannot be required to respond to multiple places, a burden of proof that may prove unreasonably heavy.

33. Although Head 30(2) transposes Article 8(2) QD, it omits the phrase "at the time of taking the decision on the application have regard to". In UNHCR's view, it is important to make clear, as this additional phrase does, that any assessment of an internal relocation alternative needs to be made at the time of taking the decision and not in relation to an earlier or later time.

34. In the case of unaccompanied children, Recital 27 provides welcome guidance on assessing "availability of appropriate care and custodial arrangements", in considering whether internal protection is relevant and reasonable[37].

Recommendations:

(8) Amend Head 30(1) as follows:

"… and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably **and without undue hardship** be expected to settle there."

[36] *Salah Sheekh v. The Netherlands*, Council of Europe: European Court of Human Rights, 11 January 2007, http://www.unhcr.org/refworld/docid/45cb3dfd2.html.

[37] See paras. 53-57 on internal flight: UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, available at: http://www.refworld.org/docid/4b2f4f6d2.html

(9) Amend Head 30(2) to state:

"…in examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph (1), shall **at the time of taking the decision on the application** have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Head 25"

(10) Amend Head 30 to add the provisions:

"Where the State or agents of the State are the actors of persecution or serious harm, a presumption will apply that effective protection is not available to the applicant.

When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, must form part of the assessment as to whether that protection is effectively available."

v. Sur place claims

35. Head 27 concerns *sur place* claims.

Head 2: Interpretation

Provide along the following lines:

…

"Geneva Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (the text of which, in the English language, is, for convenience of reference, set out in Schedule 1 to this Act) and includes the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (the text of which, in the English language, is, for convenience of reference, set out in Schedule 2 to this Act); …

Head 27: International protection needs arising sur place

Provide along the following lines:

(1) A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.

(2) A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

(3) Without prejudice to the Geneva Convention, an applicant who is the subject of an application made with the consent of the Minister given under Head 21 shall not normally

be:

(a) the subject of a determination by the Minister under Head 35 that he or she is a person in respect of whom a refugee declaration should be given, or

(b) the subject of a decision by the Tribunal under Head 42 that he or she is a person in respect of whom a refugee declaration should be given,

if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

36. Head 27 transposes Article 5 of the Qualification Directive which is currently transposed in Regulation 6 of S.I. 518 of 2006. The recognition of *sur place* claims in Article 5(2) is in line with the general position taken in respect of the 1951 Convention. The requirement that a person must be outside his or her country to be a refugee does not mean that he or she must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time[38]. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees[39]. Thus, even where it cannot be established that the applicant has already held the belief, convictions or orientations in the country of origin, the asylum-seeker is entitled to the right of freedom of conscience, thought and expression, freedom of religion and freedom of association, within the limits defined in Article 2 of the 1951 Convention and other human rights instruments. Such freedoms include the right to change one's religion or convictions, which could occur subsequent to departure e.g., due to disaffection with the religion or policies of the country of origin, or greater awareness of the impact of certain policies.

37. Head 27(3) however introduces a new element into Irish law based on Article 5(3) of the Directive concerning the application of the concept to subsequent applications (as defined in Head 21). It states that the consent of the Minister shall not normally be given a declaration if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

38. There may be instances where an individual outside his or her country of origin who would otherwise not have a well-founded fear of persecution acts for the sole purpose of "manufacturing" an asylum claim. UNHCR appreciates that States face difficulty in assessing the validity of such claims and agrees with States that the practice should be discouraged. It would be preferable, however, to address difficult evidentiary and credibility questions by appropriate credibility assessments. Such an approach would also be in line with Article

[38] UNHCR Handbook para. 94
[39] UNHCR Handbook para. 95

4(3)(d) of the Directive[40]. In UNHCR's view, such an analysis does not require an assessment of whether the asylum-seeker acted in "bad faith" but rather, as in every case, whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad. The phrase "without prejudice to the Geneva Convention" in Article 5(3) would therefore require such an approach.

39. Irish jurisprudence on *sur place* claims also confirms that even though an applicant may not have acted in good faith in engaging in activities since leaving his country of origin, the key question remains as to whether s/he has a "well-founded fear". In *HM v Minister for Justice*, Cross J. stated that; "The essential question remains - whether the applicant had a well-founded fear of persecution, even if he had acted in bad faith."[41]

40. Finally with respect to terminology, the Geneva Convention is defined in Head 2 as set out above. Whilst the definition is very clear as regards what this refers to in the Head on interpretation, the Geneva Conventions are more frequently referred to in the context of International Humanitarian Law; it may be preferable to refer more specifically to the "1951 Convention" or to the Geneva Convention Relating to the Status of Refugees.

Recommendations:

(11) Deleting Head 27(3) concerning sur place claims in subsequent applications.

vi. Assessment of facts and circumstances

41. Head 25 generally and Head 25(5) in particular concern what's termed the assessment of facts and circumstances:

[40] "(3) The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

…

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;"

[41] HM v Minister for Justice [2012] IEHC 176, para. 35.

Head 25: Assessment of facts and circumstances

Provide along the following lines:

(5) The following matters shall be taken into account by the Minister or, as the case may be, the Tribunal for the purposes of the examination of an application for international protection or the determination of an appeal in respect of such an application:

…

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he could assert citizenship.

42. This Head outlines the considerations which the first and second instance bodies shall take into account when considering a protection application. These paragraphs transpose Arts. 4(3) of the Qualification Directive which states: "The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account …". Accordingly Head 25(5) omits two elements in its transposition: the requirement that the assessment be carried out on an individual basis; the characterisation of the list is a non-exhaustive one.

Assertion of nationality

43. Head 25(5)(e) requires decision makers to consider "whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he could assert citizenship." UNHCR recommends that this factor not form part of the SP assessment just as it should not feature in the refugee status determination assessment. There is no obligation on the part of an applicant under international law to avail him or herself of the protection of another country where s/he could "assert" nationality. The issue was explicitly discussed by the drafters of the Convention. It is regulated in Article 1A(2) (last sentence), which deals with applicants of dual nationality, and in Article 1E of the 1951 Convention. There is no margin beyond the limits of these provisions. For Article 1E to apply, a person otherwise included in the refugee definition would need to fulfil the requirement of having taken residence in the country and having been recognized by the competent authorities in that country "as having the rights and obligations which are attached to the possession of the nationality of that country". Since Article 1E is already reflected in Article 12(1)(b) of the 2004 Directive, Article 4(3)(e) should not be incorporated into national legislation and practice if full compatibility with Article 1 of the 1951 Convention is to be ensured.[42]

[42] See UNHCR, UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April, comment on Article 4(3)(e).

Compelling reasons

Head 25(6) speaks to the weight to be afforded to a finding that the applicant has already suffered persecution or serious harm and Head 25(7) to the aspects of an applicant's statement that need not be confirmed where the 1st or 2nd instance body is satisfied of certain matters.

Head 25: Assessment of facts and circumstances

(6) The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such serious harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

44. Arts. 4 (3)-(5) of the Qualification Directive are currently transposed in Regulation 5(1)-(3) of S.I. 518 2006 but these provisions were amended by the 2013 Subsidiary Protection Regulations which omitted the phrase in Regulation 5(2), "but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection." The corresponding provisions in respect of refugee status remained unchanged. UNHCR regrets that this provision has also been removed in the General Scheme, not just in relation to subsidiary protection but now also with respect to refugee status.

45. In line with general humanitarian principles, even where the assessment concludes that persecution or serious harm will not be repeated, compelling reasons arising out of previous persecution, may still warrant the granting of international protection. The basis for this position is the exception to the "ceased circumstances" cessation clauses in Articles 1C(5) and 1C(6) of the 1951 Convention which refers to "compelling reasons arising out of previous persecution". UNHCR has recommended that this provision should be interpreted to extend beyond the actual wording of the provision and to apply to the initial determination of refugee status according to Article 1A(2) of the Convention. The humanitarian reasoning behind this position is a recognition that the level of atrocious acts experienced by a person can in itself be of such extraordinary nature that a forward looking assessment in relation to the need for international protection is unnecessary. While such a provision would only apply in exception cases and the removal of this provision is unlikely to affect a large number of applicants, it is a well-established humanitarian principle that is grounded in State practice.43

[43] UN High Commissioner for Refugees (UNHCR), *Cessation of Status*, 9 October 1992, No. 69 (XLIII) - 1992, available at: http://www.refworld.org/docid/3ae68c431c.html, para. (e);

46. In *N -v- Minister for Justice & Ors* [2012] IEHC 499 the Irish High Court has similarly found in 2012 that Regulation 5(2) expresses "an intention to extend the humanitarian exception beyond the cessation context. The Minister thereby retained residual discretion to provide a form of quasi-humanitarian protection which is greater than the minimum level of protection required under the Qualification Directive, in the terms advocated by the UNHCR and the Executive Committee." Notwithstanding that Ms Justice Clark refers to a doubt regarding whether that addition may be *ultra vires* the powers of the minister to enact by S.I. she does not go on to consider the constitutionality of that section and in a subsequent case it was similarly applied without question.[44]

47. UNHCR also notes the complications that may arise from the removal of the "compelling reasons" provision with respect to existing Applicants who may have sought to rely on the compelling reasons provision in making their applications. This substantive change may accordingly have a negative effect on the determination of such applications under the new legislation.

Recommendations:

(12) Head 25(5) be amended as follows:

"~~The following matters shall be taken into account~~ **The assessment** of an application for international protection, or the determination of an appeal in respect of such an application **is to be carried out on an individual basis** by the Minister or, as the case may be, the Tribunal ~~for the purposes of the examination of an application for international protection or the determination of an appeal in respect of such an application~~ **and includes taking into account-…**"

(13) Head 25(5)(e) be deleted

(14) Head 25 (6) be amended to incorporate the original wording of Regulation 5(2) of SI 518 of 2006:

"…but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

UNHCR, Xhevdet Hoxha v. Special Adjudicator and B v. Immigration Appeal Tribunal, and the United Nations High Commissioner for Refugees (Intervener). Case for the Intervener, 5 January 2005, available at: http://www.refworld.org/docid/423ec5724.html.

[44] B (K) v Min for Justice & Refugee Appeals Tribunal [2013] IEHC 169

vii. Credibility

Head 26: Credibility

Provide along the following lines:

The Minister or the Tribunal, as the case may be, shall assess the credibility of an applicant for the purposes of the examination of his or her application or the determination of an appeal in respect of his or her application and in doing so shall have regard to all relevant matters.

48. UNHCR welcomes the omission in Head 26 of the elements of Section 11(b) of the Refugee Act, 1996 concerning the assessment of credibility, replicating instead Regulation 11 of the 2013 Subsidiary Protection Regulations. As regards the specific wording of that provision we would repeat our recommendations set out at paragraph 28 of our Observations of 2 October 2013 on those Regulations that the reference to "the credibility of an applicant" be re-worded to read "the credibility of an application". The reason for this recommendation is that UNHCR's research for its report Beyond Proof, Credibility Assessment in EU Asylum systems has shown the limits and dangers inherent in focussing on an assessment of an applicant's behaviour and the questionable assumptions that underpin such an approach. Rather, as the report notes:

> *"The term 'credibility assessment' in this context is used to refer to the process of gathering relevant information from the applicant, examining it in the light of all the information available to the decision-maker, and determining whether the statements of the applicant relating to material elements of the claim can be accepted, for the purpose of the determination of qualification for refugee and/or subsidiary protection status…*
>
> *"This understanding is also promoted by the European Asylum Curriculum (EAC) module on evidence assessment, which describes 'the assessment of credibility as a tool to establish a set of material facts to which you can apply the refugee definition (the findings of facts)'".*[45]

49. Secondly, while it is the legal position that all elements which will potentially form the basis for adverse credibility findings should be put to an applicant at interview, UNHCR would recommend that specific provision be made for this in the General Scheme.

[45] *UNHCR, Beyond Proof, Credibility Assessment in EU Asylum Systems,* p.27: Full Report, May 2013, available at: http://www.refworld.org/docid/519b1fb54.html

Recommendations:

(15) It is recommended that the wording of Head 26 be amended to state:

"The Minister or the Tribunal, as the case may be, shall assess the credibility of an ***application under this Act*** ~~*applicant*~~ *for the purposes of* ***its*** ~~*the*~~ *examination* ~~*of his or her application*~~ *or the determination of an appeal in respect of* ~~*his or her*~~ ***an*** *application and in doing so shall have regard to all relevant matters."*

(16) It is recommended that a specific provision be included in the Bill requiring all elements which will potentially form the basis for adverse credibility findings to be put to an applicant at interview or on appeal.

viii. Exclusion from eligibility for refugee status and subsidiary protection

50. Heads 9 and 11 state:

Head 9: Exclusion from being a refugee

Provide along the following lines:

(1) A person is excluded from being a refugee where he or she is-

(a) subject to subhead (4) is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance, or

(b) recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.

(2) A person is excluded from being a refugee where there are serious reasons for considering that he or she—

(a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,

(b) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or

(c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

(3) A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in subhead (2).

(4) Subhead (1)(a) shall not apply where the protection or assistance referred to therein has ceased for any reason, without the position of persons who had been receiving that protection or assistance being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations.

Head 11: Exclusion from eligibility for subsidiary protection

Provide along the following lines:

(1) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—

(a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,

(b) has committed a serious crime,

(c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations, or

(d) constitutes a danger to the community or to the security of the State.

(2) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in subhead (1).

(3) A person is excluded from being eligible for subsidiary protection if he or she has, prior to his or her arrival in the State, committed a crime or crimes, not referred to in subhead (1), which, if committed in the State, would be punishable by imprisonment and if he or she left his or her country of origin solely in order to avoid sanctions resulting from that crime or those crimes.

51. These Heads provide that, in a limited number of serious circumstances, an applicant may be excluded from eligibility for refugee status or subsidiary protection. Head 9 uses almost identical wording as Article 12 of the Qualification Directive and the slight changes in the text are not substantive. The text of the new Head differs in form slightly from its current text in s.2 of the Refugee Act 1996 which does not contain Head 9(3) or 9(4) above. Head 11 uses almost identical wording as Article 17 of the Qualification Directive and the slight changes in the text are not substantive. The text of the new Head is exactly the same as is currently contained in Regulation 17 of the 2013 SP Regulations.

52. UNHCR's position on this text has been set out in Comments on the Qualification Directive, Comments on the Recast Qualification Directive and Comments on the Immigration, Residence and Protection Bill 2008:

> *"Keeping in mind the serious consequences of excluding a person who is in need of protection, UNHCR argues that, as with any exception to human*

rights guarantees, the exclusion clauses must always be interpreted restrictively and used with great caution. The rationale for the exclusion clauses in the 1951 Convention is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice".[46]

53. With respect to Heads 9(1)(b) and (4):

"[Heads 9(1)(b) and (4)] cover the situation outlined in Article 1D of the 1951 Convention, which particularly refers to persons falling under the protection and assistance mandate of UNWRA for Palestinian refugees. The objective of Article 1D of the 1951 Convention is to avoid overlapping competencies between UNRWA and UNHCR, but also, in conjunction with UNHCR's Statute, to ensure the continuity of protection and assistance for Palestinian refugees as required. The fact that a Palestinian falls within paragraph 2 of Article 1D (automatic inclusion) does not necessarily mean that s/he cannot be returned to UNRWA's area of operations. Reasons not to return may be a danger of persecution or other serious protection-related problems or an inability to return, for example, because the authorities of the country concerned refuse readmission.

[Head 9(4) does not replicate paragraph 2 of Article 1D, the automatic inclusion, but simply makes an exception to the exclusion of persons getting UNRWA assistance and protection."

54. The omitted text from Article 1D referred to above is also contained in Article 12 of the Qualification Directive which states, "these persons shall ipso facto be entitled to the benefits of this Directive".

55. Head 9(1)(b) refers to the exclusion clause of Article 1E of the 1951 Convention excluding a person "who is recognised by the competent authorities of the country in which s/he has taken residence as having the right and obligations which are attached to the possession of the nationality of that country". Again we would recall our comments to the IRP Bill 2008:

"The rationale for this exclusion is that such persons would not be in need of international protection as they already have the rights and obligations which are attached to the possession of the nationality of that country. UNHCR is concerned that Section 73(1)(b) extends the scope of this exclusion clause by adding to the definition persons who have 'rights and obligations equivalent to those'.

[46] UNHCR's Comments on the Immigration, Residence and Protection Bill 2008, March 2008, p.18

A similar formulation is found in the Qualification Directive Article 12(1)(b) for which UNHCR had the following comments: 'It should be noted that Article 1E applies only to cases where the person is currently recognized by the country concerned as having these 'rights and obligations'. If the country granted such rights in the past but is no longer willing to do so, Article 1E does not apply. Similarly, Article 1E does not apply to the claims of individuals for whom the potential for such enjoyment of right exists, but who have never resided in that country'.[47]*"*

56. With respect to Head 11 and exclusion from subsidiary protection:

"Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate for persons in need of protection, UNHCR considers that the exclusion clauses in relation to subsidiary protection should be similar to those for refugees….

"UNHCR is therefore concerned with the broad wording of these exclusion clauses in relation to subsidiary protection. In particular UNHCR is concerned with [Head 11(1)(b)][48] *which excludes a person from subsidiary protection if he or she "has committed a serious crime". The provision does not specify where and when the serious crime has been committed; neither does it require the qualification that the crime be non-political."*[49]

57. UNHCR further notes that Heads 9(2)(c) and 11(1)(c) should not be read as broadening the scope of the exclusion clause found in Article 1F(c) to suggest that any act which could be seen as contrary to the Preamble and Article 1 and 2 of the United Nations Charter could give rise to exclusion under this provision.

"It is UNHCR's understanding that only those criminal acts which are contrary to the purposes and principles of the United Nations in a fundamental manner may trigger the application of Article 1F(c). The purposes and principles are set out in Articles 1 and 2 of the United Nations Charter and relate to international peace and security, and peaceful relations between States. However, the broad and general terms of Articles 1 and 2 of the Charter of the United Nations, which set out its purposes and principles, offer little guidance as to the criminal acts which could exclude a person from refugee status through the application of Article 1F(c) of the 1951 Convention. Whether or not a particular crime comes within the scope of Article 1F(c) will also depend on its impact and gravity on the international

[47] See paragraphs 7-11 of the following document: UNHCR, *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, March 2009, available at: http://www.unhcr.org/refworld/docid/49c3a3d12.html.
[48] Section 66(3)(b) IRP Bill 2008.
[49] UNHCR's Comments on the Immigration, Residence and Protection Bill 2008, March 2008, p.18

plane. Therefore Article 1F(c) should be interpreted restrictively in light of the gravity of the consequences of exclusion from refugee protection."[50]

58. UNHCR is also concerned with the exclusion provision in Head 11(1)(d). This provision is modelled on Article 17(1)(d) of the Qualification Directive, which in turn is similar in scope to Article 14(4-6) of the Qualification Directive (see further below re. revocation). Both provisions reflect the grounds which may give rise to loss of protection against refoulement provided for in Article 33(2) of the 1951 Convention. In its comments to the Qualification Directive, UNHCR expressed concern at the use of these exceptions to the principle of non-refoulement as grounds for exclusion from international protection beyond the provisions of Article 1F of the 1951 Convention, noting that in contrast to Article 1F, Article 33(2) was not conceived as a ground for terminating refugee status or an exclusion clause, and that States are therefore nonetheless obliged to grant the rights of the 1951 Convention which do not require lawful residence and which do not foresee exceptions for as long as a refugee remains within the jurisdiction of the State concerned. Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed with regard to Article 14 (4-6) of the Directive would apply to the provision in Head 11(1)(d).

59. Similarly UNHCR is concerned with Head 11(3) to non-serious crimes. Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed with regard to Article 12 of the Directive would seem to apply. UNHCR recommends that this exclusion clause be omitted from the Bill and would also recall that States' "obligations under international human rights law with regard to non-refoulement continue to apply in such cases".[51]

Recommendations:

(17) Amending Head 9(4) to add the sentence: "these persons shall ipso facto be entitled to the benefits of refugees recognised under this Act"

(18) Amending Head 9(1)(b) by deleting the words, "or rights and obligations equivalent to those" in order to be consistent with the language of Article 1E of the 1951 Convention.

(19) Amending Head 11(1)(b) so that it accords with the provisions 1951 Convention (and as set out in Head 9(2)(b), since the exclusion clauses in relation to subsidiary protection should be similar to those for refugees.

(20) Deleting the formulation "as set out in the Preamble 20 and Articles 1 and 2 of the Charter of the United Nations" in Heads 9(2)(c) and 11(1)(c), so that it accords with

[50] ibid p.17.
[51] UNHCR's Comments on the Immigration, Residence and Protection Bill 2008, p.18.

the provisions of the 1951 Convention.

(21) Deleting Head 11(3) so that only "serious crimes" may be the basis of exclusion.

ix. Revocation

60. The General Scheme transposes Articles 14 and 19 with respect to the revocation of refugee status and subsidiary protection status respectively in Head 46:

Head 46: Revocation of refugee declaration or subsidiary protection declaration

Provide along the following lines:

(1) The Minister shall revoke a refugee declaration given to a person if satisfied that-

(a) the person should have been or is excluded from being a refugee under Head 9,

(b) the person has, in accordance with Head 8, ceased to be a refugee, or

(c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person a refugee declaration.

(2) …

(3) The Minister shall revoke a subsidiary protection declaration given to a person if satisfied that-

(a) the person should have been or is excluded from being eligible for subsidiary protection under Head 11,

(b) the person has, in accordance with Head 10, ceased to be eligible for subsidiary protection, or

(c) misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person a subsidiary protection declaration…

61. Head 46 closely replicates the text of Articles 14 and 19 of the Qualification Directive. As with exclusion above, UNHCR's position on this text has already been set out in Comments on the Qualification Directive, Comments on the Recast Qualification Directive and Comments on the Immigration, Residence and Protection Bill 2008:

> *"The provision seems to confuse the legal concepts of cessation, cancellation and revocation. Cessation refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international refugee protection is no longer necessary or justified. Cancellation means a decision to invalidate a refugee status recognition, which is appropriate where it is subsequently established that the individual should never have been recognized, including*

in cases where he or she should have been excluded from international refugee protection. Revocation refers to the withdrawal of refugee status in situations where a person properly determined to be a refugee engages in conduct which comes within the scope of Article 1F(a) or (c) of the 1951 Convention after recognition. UNHCR requests states to differentiate between these concepts and their legal requirements in the implementing legislation.[52]

The language 'is excluded from being a refugee [under Head 9]' is understood to refer to a situation where refugee status can be ended or revoked because a refugee has committed a crime within the scope of Article 1F(a) and 1F(c) of the 1951 Convention after recognition. Revocation on the basis of Article 1F(a) or 1F(c) is permitted , as neither of these clauses contain a geographical or temporal limitation. For crimes other than those falling within the scope of Article 1F(a) or 1F(c), criminal prosecution would be foreseen, rather than revocation of refugee status.

As noted above, Article 1F(b) specifies that the serious, non-political crimes must have been committed outside the country of refuge prior to admission. The logic of the Convention is that the type of crimes covered by Article 1F(b) committed after admission would be handled through rigorous domestic criminal law enforcement, as well as the application of Articles 32 and 33(2) of the 1951 Convention, where necessary. Neither Article 1F(b) nor Article 32 or 33(2) provides for the loss of refugee status of a person who, at the time of the initial determination, met the eligibility criteria of the 1951 Convention. In cases which involve serious non-political crimes, Article 14(3)(a) should therefore be understood as referring to crimes committed prior to admission outside the country of refuge...

Misrepresentations or omission of facts, including the use of false documents, can only serve as a basis for cancelling refugee status if this amounts to objectively incorrect statements by the applicant which relate to material or relevant facts (that is, elements which were clearly instrumental to the recognition) and if there was an intention on the part of the applicant to mislead the decision maker. The use of forged documents should also be assessed in light of the circumstances of the case: in many instances, asylum - seekers need to rely on false papers to flee persecution. The use of false documents does not of itself render a claim fraudulent and should not automatically result in the cancellation of refugee status, provided the person revealed his/her true identity and nationality and it has formed the basis of

[52] See UNHCR 's Guidelines on Cessation (HCR/GIP/03/03); UNHCR's Guidelines on Exclusion and Background Note (HCR/GIP/03/05) ; and UNHCR , Note on the Cancellation of Refugee Status , 22 November 2004

the recognition decision.[53] The fact that refugees may sometimes be forced to make use of forged documents is also recognized by Article 31(1) of the 1951 Convention which exempts refugees (under specific conditions) from penalization on account of illegal entry into or stay in the country in which they apply for asylum."

62. In applying Articles 14(1-3), the burden of proof for establishing that the criteria are fulfilled should be on the Member State applying the provision.

Recommendations:

(22) Adding a provision which states that the burden of proof for establishing the criteria for revocation have been met lies with the State.

(23) Amending Head 46 (1) and (3) to bring it into conformity with the 1951 Convention. There should be a clear differentiation between the concepts of cessation, cancellation and revocation and their legal requirements

Head 46: Revocation of refugee declaration or subsidiary protection declaration

(2) The Minister may revoke a refugee declaration given to a person if satisfied that-

(a) there are reasonable grounds for regarding him or her as a danger to the security of the State, or

(b) the person, having been by a final judgment convicted, whether in the State or not, of a particularly serious crime, constitutes a danger to the community of the State.

63. In transposing these sections of Article 14(4) of the Qualification Directive the original wording has been followed in a slightly different format. The wording of these provisions in the Directives originates in the provision on non-refoulement in the 1951 Convention in Article 33:

"1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final

[53] See also UNHCR Note on the Cancellation of Refugee Status, 22 November 2004, available at: http://www.refworld.org/docid/41a5dfd94.html [accessed 4 May 2015]

judgement of a particularly serious crime, constitutes a danger to the community of that country."

64. These exceptional provisions thus stated properly relate to expulsion or return rather than revocation. This is somewhat alluded to in Articles 14 (5)-(6) of the Directive which are not contained in the General Scheme:

"5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State."

Thus section 6 seeks to extend to refugees their rights under the Convention for as long as they are present in the country of asylum and have not been expelled or returned in accordance with Article 33 of the Convention. UNHCR has previously expressed its concerns in relation to these provisions of the Qualification Directive:

"Article 14(4) of the Directive runs the risk of introducing substantive modifications to the exclusion clauses of the 1951 Convention, by adding the provision of Article 33(2) of the 1951 Convention (exceptions to the non-refoulement principle) as a basis for exclusion from refugee status. Under the Convention, the exclusion clauses and the exception to the non-refoulement principle serve different purposes. The rationale of Article 1F which exhaustively enumerates the grounds for exclusion based on the conduct of the applicant is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. By contrast, Article 33(2) deals with the treatment of refugees and defines the circumstances under which they could nonetheless be refouled. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgement of a particularly serious crime, poses a danger to the community. Article 33(2) was not, however, conceived as a ground for terminating refugee status... Assimilating the exceptions to the non - refoulement principle permitted under Article 33(2) to the exclusion clauses of Article 1F would therefore be incompatible with the 1951 Convention. Moreover, it may lead to a wrong interpretation of both Convention provisions.

'Status granted to a refugee' is therefore understood to refer to the asylum ('status') granted by the State rather than refugee status in the sense of

Article 1A (2) of the 1951 Convention ... States are therefore nonetheless obliged to grant the rights of the 1951 Convention which do not require lawful residence and which do not foresee exceptions for as long as the refugee remains within the jurisdiction of the State concerned.[54]

65. The same interpretation has also been accepted by the High Court in Ireland in *Abramov v. Minister of Justice, Equality and Law Reform*[55] concerning the existing corresponding provision of the Refugee Act s.21(1)(g):

"Accordingly, revocation of the status of refugee is only appropriate and compatible with the terms of the Geneva Convention where one of the events provided for that purpose in Article 1C has occurred. If a Contracting State considers that in the absence of any such change of circumstance, the presence of the refugee in its territory has become intolerable because of the conduct of the refugee, the appropriate course of action lies under Article 32, namely, expulsion. Where the effect of the decision to expel is to return the refugee to the country of nationality, expulsion is only permissible in accordance with Article 33(2) of the Convention namely upon the ground that the refugee has been convicted by a final judgment of a particularly serious crime and thus constitutes a danger to the community of the country of refuge."

Recommendations:

(24) Head 46 (2) be amended to bring it into conformity with the 1951 Convention.

x. Best interests of the child

66. The principle of the best interests of the child derives from Article 3(1) of the UN Convention on the Rights of Child (CRC), which provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' The concept of the best interests of the child is further elaborated upon by the UN Committee on the Rights of the Child[56].

67. In the application of the principle to protection decisions it is important to note that the consideration of the best interests of the child does not trump all other considerations. The principle of the best interests of the child directs the attention of the decision-maker to the rights of the child that may be relevant to the assessment of eligibility for international protection. Furthermore, the best interests principle is not absolute: the best interests of

[54] UNHCR Annotated Comments Qualification Directive, p.30
[55] Artur Abramov v. Minister of Justice, Equality and Law Reform [2010] IEHC 458
[56] General Comment No. 14, p.4

the child must be 'a primary' (as distinct from 'the paramount') consideration'. UNHCR has recently produced detailed practical guidance on the principle's application.[57]

68. The UN General Assembly unanimously adopted the Convention on the Rights of the Child on 20 November 1989 and it entered into force – or became legally binding on States Parties – in September 1990. Ireland ratified the Convention in 1992. The Child and Family agency[58] became an independent legal entity on the 1st of January 2014, comprising the Health Service Executive Children & Family Services, the Family Support Agency and the National Educational Welfare Board as well as incorporating some psychological services and a range of services responding to domestic, sexual and gender based violence. The CFA is now the dedicated State agency responsible for improving wellbeing and outcomes for children.[59] It represents a comprehensive reform of child protection, early intervention and family support services. Both the Child and Family Agency Act 2013, and the Children First Bill 2014[60] (published but not yet enacted) give significant prominence to the principle of the best interests of the child in relation to all functions the agency performs under the legislation.

69. Under EU law, certain rights of the child, including the principle of the best interests of the child and the right of the child to be heard, are restated in Article 24 of the EU Charter of Fundamental Rights (CFR). Following the passing of the Lisbon Treaty, the CFR now has the same legal status as the Treaties and it became legally binding in 2009. All EU secondary legislation and national measures that implement EU law must conform to the rights in the Charter. The International Protection Bill, when enacted, in implementing the Procedures Directive, the Qualification Directive and the Temporary Protection Directive, will bind the State in its transposition and application to do so in conformity with the rights contained in the CFR.

70. The Directives in question themselves make reference to principle of the best interests of the child. The Recast Procedures and Qualifications Directives contain more robust references to the rights of the child than the original Directives. Article 20 of the Qualification Directive requires the best interests of the child to be a primary consideration when implementing Chapter VII of the Directive[61]. The Refugee Act currently makes no reference to this principle although S.I. No. 52/2011 makes reference to it with respect to unaccompanied minors; the chairperson of the RAT has also issued guidelines on appeals from child applicants according to which the best interests of the child shall be a primary

[57] UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children* in Europe, October 2014, available at: http://www.refworld.org/docid/5423da264.html
[58] http://www.tusla.ie/
[59] See further: http://www.tusla.ie/about
[60] http://www.oireachtas.ie/documents/bills28/bills/2014/3014/b3014d.pdf
[61] See Recital 20 and Article 20(3) - (5)

consideration of the Tribunal during all dealings with a child.[62] The 2013 Subsidiary Regulations apply the principle to certain limited aspects of the Regulations. Whilst the Procedures Directive originally required the best interests principle to be applied in the case of unaccompanied minors only[63], it is notable that its Recast now requires the principle to be applied to the Directive as a whole.[64] The Recast Qualification Directive also contains a statement to that effect in Recital 18.[65] The Recast instruments contain a number of more specific provisions and recitals in relation to the principles and give some examples of how it is to be applied.

71. Under the Heads of the International Protection Bill the best interests of the child is required to be a primary consideration in the application of a number of sections:

- Head 23 re. medical assessment to determine the age of unaccompanied minor
- Head 33 re. unaccompanied minors
- Heads 47 - 49 re. the extension to refugees and beneficiaries of subsidiary protection of certain rights: Permission to reside in the State, access to employment; access to education; social welfare; health care; access to accommodation; freedom of movement; access to travel documents.
- Heads 50 and 51 re. the right to family reunification

Recommendation:

(25) Add a provision requiring the principle that the best interests of the child to be a primary consideration in all actions involving children under the provisions of the General Scheme.

IV PROCEDURAL AND OTHER PROVISIONS

i. Transitional Provisions – Application of the Law to Existing Applicants

72. The transitional provisions contained in Head 63 relate to applications in being and are drafted in a very technically fashion.

[62] Guidance Note No: 2015/1 issued pursuant to paragraph 17 of the Second Schedule of the Refugee Act 1996 (as amended)
[63] Recital 14, Article 2(i) and Article 17
[64] Recital 33, Article 25(6)
[65] The Recitals of a Directive are the statement of reasons for the act and are thus not "normative" or binding; they are intended to inform the interpretation of its provisions

Head 63: Transitional provisions relating to caseloads under the existing asylum legislation

Provide along the following lines:

(1) A person who has made an application for a declaration under section 8 of the Act of 1996 and whose application is not yet the subject of a recommendation under section 13 of that Act shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32.

(2) A person who has made an appeal under section 16 of the Act of 1996 against a recommendation of the Commissioner and the appeal has not been decided shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32 with the modification that the applicant is a person in respect of whom a refugee declaration should not be given.

(3) A person who has made an application for a declaration under section 8 of the Act of 1996, whose application has been the subject of a recommendation under section 13 of that Act against which no appeal lies and the Minister has not yet refused a declaration under section 17 of that Act, shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32 and the Tribunal shall decide any appeal with the modification that the applicant is a person in respect of whom a refugee declaration should not be given.

(4) A person who has made an application for a declaration under section 8 of the Act of 1996, whose application has been the subject of a recommendation under section 13 of that Act which has been affirmed under section 16 of that Act and the Minister has not yet refused a declaration under section 17 of that Act, shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32 and the Tribunal shall decide any appeal with the modification that the applicant is a person in respect of whom a refugee declaration should not be given.

(5) A person who is the subject of an application, within the meaning of Regulation 2(1) of the Regulations of 2013, where the Commissioner has not yet commenced the investigation of the application under Regulation 5 of those Regulations shall be deemed to have made an application for international protection under Head 12 and the Minister shall examine the application under Head 32 and the Tribunal shall decide any appeal with the modification that the applicant is a person in respect of whom a refugee declaration should not be given.

(6) A person who is an applicant within the meaning of section 1 of the Act of 1996, who is an applicant within the meaning of Regulation 2(1) of the Regulations of 2013 or who may make an application for a subsidiary protection declaration under Regulation 3 of those Regulations and who is not by this Head deemed to have made

an application for international protection under Head 12, shall, notwithstanding Head 5, continue to be subject to that Act, the Regulations of 2006 and the Regulations of 2013 for the purpose of an application for a declaration under that Act or an application for a subsidiary protection declaration under the Regulations of 2013.

73. Those provisions in effect would have the following consequences:

- Those in the current split procedure would for the most part be caught by these new provisions.
- All such cases will go back to the Minister to have the entirety /remainder of their application determined at 1st instance before advancing if they wish to avail of their right of appeal to the IPAT.
- Anyone who has received a determination, at either 1st instance or appeal, will not have that determination reopened (unless an application for a subsequent application is granted through the regular channels). The bodies will only assess so much of the application as had not previously been decided.
- The cut-off point for the application of the new Bill is whether or not ORAC has commenced investigating an application for subsidiary protection. If that has begun the applicant will continue to have their application determined under the old legislation. ORAC will finish determining their SP claim, they will have a right to appeal that to the RAT, and they will then (presumably although this is not stated explicitly) go on to make an application for leave to remain to the Minister as before.

74. UNHCR welcomes the fact that the General Scheme seeks to extend the benefits of the new provisions to existing applicants whilst balancing the aim not to require fresh determinations on applications that have already been made under the existing system. However the way these provisions are drafted may have unintended consequences in relation to some very specific classes of cases where applicants would or would not be included under the new legislation.

75. Head 5 does not seem to countenance the possibility, since the H.N. decision[66], of persons who have submitted an application for SP prior to a refusal of refugee status. As of 8 October 2014, under administrative arrangements, it has been possible to make an application for subsidiary protection at any time once an application for refugee status has been made, however it will not be considered until the application for refugee status has been determined to finality including any appeal. New Regulations were enacted on the 29th April 2015 enshrining these arrangements into law[67]. The phrasing of this Head would appear to preclude such persons from having their refugee application considered.

[66] C-604/12 N. v Minister for Justice, Equality and Law Reform and Others
[67] S.I. No. 137/2015 - European Union (Subsidiary Protection) (Amendment) Regulations 2015.

76. Furthermore, Head 6 is a default provision whereby Applicants within its terms will continue to be subject to the current procedures and legislation for the purpose of an application for refugee status or subsidiary protection. This provision could be interpreted as including:

- Persons who have received a negative recommendation from ORAC but not yet entered an appeal
- SP applicants at 1st instance whom ORAC has already commenced investigating
- Persons who have received a final negative determination from the Minister on refugee status and are eligible to lodge an application for SP under Reg 3 of the 2013 Regs but who have not yet done so.

77. The rationale for each particular reference point in Head 63 is not entirely clear and in some cases inconsistent. For example persons who are entitled to enter a new application for subsidiary protection shall be dealt with under the 2013 Regulations however persons who have already lodged an application (where the investigation has not commenced) will be dealt with under the new Act. The same could potentially be said for persons who have received a negative recommendation from ORAC but not yet entered an appeal.

78. It is imperative that such transitional arrangements are not overly cumbersome or create any legal uncertainty in their application. It is also important that such transitional provisions can be clearly understood by applicants and practitioners in the area and that they are perceived as being fair. One example is the reference point of ORAC having not yet commenced the investigation of a SP application under Regulation 5 of the 2013 Regulations; this seems somewhat arbitrary and open to differing interpretations.

79. In the case of persons who have already received a determination at 1st instance, the question of whether or not he/she should be facilitated to lodge a "subsequent application" prior to being sent back to 1st instance should be considered. In some instances there may have been a considerable passage of time in the interim and the situation in their country of origin may have changed significantly. Allowing for such a provision would be in the interests of the State to ensure that a final decision is reached on Applicants' protection claim which has fully determined all matters up to the point where return or deportation is considered.

Recommendations:

(26) It is recommended that in the drafting process care is taken to ensure that these provisions are drafted precisely in order to extend the benefits of the new Act to the greatest numbers of existing applicants as is practicable.

(27) In particular it is recommended that they are altered to as to ensure consistency as much as possible between applicants in similar positions and to ensure that applicants who lodge an application for SP at the same time as for refugee status are not prejudiced by the provisions.

(28) In the case of an Applicant who has already received a refugee determination at 1st instance, a transitional provision should specifically address the question of whether or not he/she may lodge a "subsequent application" prior to being sent back to 1st instance.

ii. Accelerated Appeal Procedures

80. The accelerated appeal procedures contained in s.13(5) and (6) of the Refugee Act 1996 (which were the subject of challenge in the S.U.N. case[68] in which UNHCR was joined as an amicus) are retained in part in the General Scheme in Head 35(4) and 39 - the situations in which they may apply have been reformulated and reduced from five to three.

Head 35: Report of examination and determination of application

Provide along the following lines:

…

(4) In addition to the setting out of a determination referred to in paragraph (c) subhead (3) the Minister may include in the report under subhead (1) any of the following findings made by the Minister-

(a) that the examination of the application for international protection revealed only issues that are not relevant or are of minimal relevance to the eligibility of the applicant for international protection,

(b) that the applicant has made inconsistent, contradictory, improbable or insufficient representations which are clearly unconvincing in relation to the eligibility of the applicant for international protection, or

(c) that the applicant has failed without reasonable cause to make his or her application

[68] S.U.N. v. RAT [2012] IEHC 338; UNHCR were joined on appeal to the Supreme Court before the appeal was ultimately withdrawn

earlier, having had opportunity to do so.

Head 39 – Accelerated appeal procedures for manifestly unfounded applications

Provide along the following lines:

Where the report of the Minister under Head 35(1) includes any of the findings referred to in Head 35(4) the following modifications shall apply in relation to the applicant concerned-

(a) the period of 15 working days referred to in Head 37(2)(a) shall be 10 working days,

(b) notwithstanding the provisions of Head 38 the Tribunal shall make its decision in relation to any appeal made by the applicant under Head 37 without holding an oral hearing

and

notification of these modifications shall be included in the statement referred to in Head 36(5)(e).

81. The consequences of the making of such a finding is: an Applicant shall have 10 rather than 15 working day to lodge an appeal; the IPAT must make its decision on appeal without holding an oral hearing. UNHCR welcomes the reduction in the number of situations to which such accelerated procedures may apply, however of the three possible findings at Head 35(4), the first two could be termed manifestly unfounded applications. UNHCR however has concerns in relation to the third possible finding, that "the applicant has failed without reasonable cause to make his or her application earlier, having had opportunity to do so." Such a finding does not relate to the core aspects of an application and accordingly could not be considered to reflect, in isolation, that an application is manifestly unfounded.

82. As a matter of general principle, UNHCR maintains (as set out in our legal submissions in the S.U.N.[69] case):

- an applicant should be given the possibility to request an oral hearing on appeal, in particular where facts or credibility are at issue, and
- the appeal authority should have the power to conduct an oral hearing either upon the applicant's request or at its own discretion.

83. The retention, in part, of this provision maintains the anomaly whereby the actions of the 1st instance body can limit the jurisdiction of the appeal tribunal. As the RAT currently, and the IPAT under the heads, are fulfilling the function of providing an effective remedy for the purposes of EU law it is questionable whether this arrangement would withstand further legal challenge.

[69] S.U.N. v. RAT [2012] IEHC 338

84. It would be preferable therefore were the Tribunal given the power to decide of its own motion in such cases whether an oral hearing is in fact required. The operation of the current provisions can in some instances create the situation whereby the Tribunal Member may feel constrained in adequately exploring the issues necessary to determine the appeal to their satisfaction.

Recommendations:

(29) Head 35(4)(c) should be deleted to remove the possibility of a finding being made that "the applicant has failed without reasonable cause to make his or her application earlier, having had opportunity to do so" resulting in the application of accelerated appeal procedures.

(30) Head 39 (b) should be amended as follows:

"notwithstanding the provisions of Head 38 the Tribunal shall make its decision in relation to any appeal made by the applicant under Head 37 without holding an oral hearing ***unless it is of the opinion that it is in the interests of justice to hold an oral hearing."***

iii. Report of Personal interview

85. Head 32A replicates existing provision in Irish law requiring a report to be prepared of the personal interview at 1st instance:

Head 32A: Personal interview

Provide along the following lines:

(1) As part of an examination referred to in Head 32 the Minister shall cause the applicant to be interviewed in relation to the matters referred to in paragraphs (a) and (b) of that Head ("the personal interview") at such time and place that the Minister may fix.

…

(12) Following the conclusion of a personal interview under this Head, the interviewer shall furnish to the Minister a report in writing of the interview.

86. This Head transposes Article 14 of the Procedures Directive:

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

87. Although Irish law does not currently contain guidance as to the contents of such a report it is the practice that a written note is prepared of everything of relevance that what

was said at interview and the Applicant is given an opportunity to read it, and to sign it if he/she is satisfied that it is an accurate account. It would be preferable if this was a specific requirement in legislation.

88. Furthermore, Article 17 of the Recast Procedures Directive now contains more favourable and detailed provisions in relation to records of interview:

> *"Article 17*
>
> *Report and recording of personal interviews*
>
> *1. Member States shall ensure that either a thorough and factual report containing all substantive elements or a transcript is made of every personal interview.*
>
> *2. Member States may provide for audio or audiovisual recording of the personal interview. Where such a recording is made, Member States shall ensure that the recording or a transcript thereof is available in connection with the applicant's file.*
>
> *3. Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript, at the end of the personal interview or within a specified time limit before the determining authority takes a decision. To that end, Member States shall ensure that the applicant is fully informed of the content of the report or of the substantive elements of the transcript, with the assistance of an interpreter if necessary. Member States shall then request the applicant to confirm that the content of the report or the transcript correctly reflects the interview.*
>
> *When the personal interview is recorded in accordance with paragraph 2 and the recording is admissible as evidence in the appeals procedures referred to in Chapter V, Member States need not request the applicant to confirm that the content of the report or the transcript correctly reflects the interview. Without prejudice to Article 16, where Member States provide for both a transcript and a recording of the personal interview, Member States need not allow the applicant to make comments on and/or provide clarification of the transcript.*
>
> *4. Where an applicant refuses to confirm that the content of the report or the transcript correctly reflects the personal interview, the reasons for his or her refusal shall be entered in the applicant's file.*
>
> *Such refusal shall not prevent the determining authority from taking a decision on the application.*

5. Applicants and their legal advisers or other counsellors, as defined in Article 23, shall have access to the report or the transcript and, where applicable, the recording, before the determining authority takes a decision.

Where Member States provide for both a transcript and a recording of the personal interview, Member States need not provide access to the recording in the procedures at first instance referred to in Chapter III. In such cases, they shall nevertheless provide access to the recording in the appeals procedures referred to in Chapter V.

Without prejudice to paragraph 3 of this Article, where the application is examined in accordance with Article 31(8), Member States may provide that access to the report or the transcript, and where applicable, the recording, is granted at the same time as the decision is made."

89. In UNHCR 's view, making a transcript of every personal interview constitutes the most adequate guarantee for the applicant to ensure accuracy of his/her statements than a thorough and factual report unless there is an audio-recording or audio-visual recording of the personal interview provided admittance as evidence in appeal procedure and compliance with data protection rules and confidentiality.[70] While oral testimony of the applicant in the examination of an application for international protection is crucial, UNHCR recalls the adverse consequence of a failure to record accurately the applicant's statements that may lead to an erroneous decision liable to challenge upon appeal for the Member State and carrying the risk of breach of non-refoulement for the applicant.[71] More specially, UNHCR reiterates its concerns that the requirement of "thorough and factual report containing all substantive elements" has the consequence of requiring the interviewer to determine which parts of the applicant's statements are worthy of recording in a written report. That may result in relevant oral evidence not being recorded and/or the meaning and accuracy of statements being unwittingly altered.[72] Despite the strong support provided by UNHCR in favour of the use of a transcript of the personal interview, if a Member State opts for a written summary report of the personal interview under the first disjunction of Article 17(1), it is UNHCR's view in line with its 2010 APD study that this should be permitted only if there is an audio recording of the entire personal interview, and this is admissible as evidence on appeal.[73]

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[70] UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions, March 2010, pages 158-164, available at: http://www.refworld.org/docid/4c63e52d2.html

[71] UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final. January 2012, page 16, available at: http://www.refworld.org/docid/4f3281762.html ;
UNHCR comments on the European Commission's proposal for a Recast Procedures Directive, August 2010, pages 25-26

[72] UNHCR comments on the European Commission's Amended Proposal for Recast Procedures Directive. January 2012, page 16, available at: http://www.refworld.org/docid/4f3281762.html ;
UNHCR comments on the European Commission's proposal for a Recast Procedures Directive, August 2010, pages 25-26

[73] UNHCR, Improving Asylum Procedures, p.164

90. UNHCR welcomes that recast Article 17 (2) introducing the possibility for Member States to use audio recording or audio-visual recording of the personal interview. UNHCR further welcomes the obligation enshrined under recast Article 17 (2) "where such a recording is made, Member States shall ensure that the recording or a transcript thereof is available in connection with the applicant's file". In UNHCR's view, the most effective way of making an accurate record of a personal interview is by audio or audio-visual recording.[74] It does not employ the human resources of the interviewer during the interview; it helps to eliminate disputes regarding the accuracy of the written report; it may help in addressing allegations of inaccurate interpretation during the personal interview, and provide a useful evidentiary resource to both the decision-maker and, in the case of any eventual appeal, the adjudicator. Clearly, rules on data protection and confidentiality apply and must be taken into consideration.[75]

91. More specially, the finding of the 2010 APD study[76] also revealed that making a transcript[77] of the interview hampers the interviewer's ability to establish a rapport with the applicant, slows the conduct of the interview and may have a negative impact on the flow of the interview. To that regard, UNHCR notes positively that recast Article 17(2) provides an effective way to address such as a practical difficulty by requiring Member States opting for audio recording or audio-visual to ensure that "the recording or a transcript thereof is available in connection with the applicant's file". With that in mind, UNHCR strongly encourages Member State to make a transcript of the audio or audio-visual recording that shall be used to satisfy the compulsory requirement of a transcript under Article 17(1). By doing so, the interviewer will be allowed to complete the written transcript based on the use of the audio or audio-visual recording either at the end of the interview or within a specified time frame. In case Member States have not opt for using audio or audio-visual recording provided by recast Article 17(2) and given the practical problem mentioned above, UNHCR encourages Member States to consider the use of transcribers to assist interviewers in the task of producing a genuine transcript.[78]

92. UNHCR welcomes recast Article 17(5) requiring the applicants and his/her legal advisers or other counsellors have access to the report or the transcript and where applicable, the audio or audio-visual recording before the determining authority takes a decision. This guarantee gives effect to the principle of equality of arms and gives the possibility to provide effectiveness to the guarantees provided by Article 17(3), first indent. However, UNHCR regrets that Article 17 (5) second indent allows an exception of this

[74] See UN High Commissioner for Refugees, Building in Quality – *A Manual on Building in High Quality Asylum System, Further Developing Asylum Quality in the European Union (FDQ)*, September 2011, page 26, at: http://www.unhcr.org/refworld/docid/4e85b36d2.html

[75] UNHCR comments on the European Commission's Amended Proposal for Recast Procedures Directive, January 2012, p.16, UNHCR comments on European Commission's proposal for a Recast Procedures Directive, August 2010, p. 26.

[76] UNHCR, Improving Asylum Procedures, pp. 158-164

[77] According to Oxford dictionary, a transcript is "a written or printed version of material originally presented in another medium" available at http://www.oxforddictionaries.com/definition/english/transcript

[78] UNHCR, Improving Asylum Procedures, p.164

important guarantee with regard to access to the audio or audio-visual recording in the procedures at first instance. In UNHCR's view, providing access to the audio or audio-visual recording to the applicant's legal adviser or counsellor will allow this latter to verify the accuracy of the transcript or the thorough and factual report before a decision is taken at first instance and therefore be provide an opportunity to make comments and/or clarifications on mistranslations or misconceptions. Ultimately, such a measure will improve the quality decision of first instance decisions resulting in fewer decisions being overturned on appeal. UNHCR therefore encourage Member States to provide the applicant and his/her legal counsellor with access to the audio or audio-visual recording at first instance procedures and before the determining authority takes a first instance decision on the application.

93. When transposing, UNHCR recommends that Member State include also in their national legislation that the applicant shall be afforded the opportunity during the interview to provide explanations in relation to contradictions/inconsistencies between evidences put forward by him/her and other sources of relevant information.

Recommendation:

(31) Head 32A be amended to give effect to Article 17 of the Recast Procedures Directive in line with UNHCR guidance.

(32) If this is not accepted then it is recommended at a minimum that Head 32A(12) be amended to require a a thorough and factual report containing all substantive elements to be produced of the personal interview

iv. Limitation to the contents of positive decisions

94. The current practice of sending to the applicant a full report when ORAC determines a claim for refugee status or subsidiary protection is proposed to be changed. Under the heads, where a positive determination is made by the Minister at first instance, then the only statement sent to an applicant would be that it has been found that he/she is a person in respect of whom a refugee declaration should be given will be sent.

Head 35: Report of examination and determination of application

Provide along the following lines:

(1) The Minister shall cause a written report to be prepared following the conclusion of an examination of an application for international protection in relation to the matters referred to in paragraphs (a) and (b) of Head 32.

(2) The report under subhead (1) shall-

(a) refer to the matters relevant to the application which are-

(i) raised by the applicant, in a personal interview under Head 32A or a preliminary interview under Head 13 or at any time before the conclusion of the examination, and

(ii) other matters the Minister considers appropriate,

(b) set out the determination of the Minister in relation to the application, and

(c) set out any of the findings referred to in subhead (4) made by the Minister in relation to the application….

Head 36: Notification of determination of application at first instance

Provide along the following lines:

(1) The Minister shall notify, in writing, the applicant, the applicant's legal representative (if known) and, whenever so requested by him or her, the High Commissioner, of the Minister's determination of the application under Head 35.

(2) …

(3) Where the Minister's determination is that the applicant is a person in respect of whom a refugee declaration should be given the notification under subhead (1) need only consist of that fact.

(4) Where the Minister's determination is that the applicant is a person in respect of whom a refugee declaration should not be given and in respect of whom a subsidiary protection declaration should be given, the notification under subhead (1) shall be accompanied by-

(a) a statement of the reasons for the part of the determination that the applicant is a person in respect of whom a refugee declaration should not be given,

…

(5) Where the Minister's determination includes the part that the applicant is a person in respect of whom neither a refugee declaration nor a subsidiary protection declaration should be given, the notification under subhead (1) shall be accompanied by-

(a) a statement of the reasons for that part of the determination,

…

95. We understand that this is the practice in some other Member States for the purposes of preventing a perceived risk of applicants sharing stories that led to a grant of status. The explanatory note to Head 36 states:

> *"The construction of subheads (4) and (5) is intended to ensure that a person who is not a refugee but is a person eligible for subsidiary protection does not need to be given the case established by the Minister for granting subsidiary protection status."*

96. Under Irish law at present ORAC makes its determination in what is referred to as a s.13 report. Its equivalent is now found in Head 35 of the bill according to which a report must refer to the matters relevant to the application which are:

- raised by the applicant, in a personal interview or a preliminary interview or at any time before the conclusion of the examination
- other matters the Minister considers appropriate

97. It must also contain any findings made under subhead 4 (i.e. accelerated appeal provisions, currently s.13(6) of the Refugee Act). Unlike under the Refugee Act, this head however does not refer to the making of any findings more generally by the Minister – this is an aspect of our training and support to ORAC at present that has been central to enhancing quality, specifically the need to make findings of fact. Finally the report must set out the determination of the Minister.

98. This omission would appear to be intentional as it is evident from Head 36 that the reasons for a decision are intended to be set out only in the notification sent out to applicants in certain circumstances.

99. This elaboration introduces an extra complexity to the report writing requirements of 1st instance determinations. In our training and support of state determination bodies we have emphasised that it's just as important to give adequate reasons for a grant as for a negative decision. This encourages decision makers to always provide an objective justification for their decisions. It is recommended that the current practice of issuing full decisions in the case of both negative and positive decisions continue.

100. In the Irish context it is questionable that it will be effective in limiting access to the reasons for positive decisions. The RAT currently provides public access to all of its decisions which is welcomed. Such an approach promotes transparency, consistency and good decision making and we would encourage the IPAT to continue this approach. Moreover the Freedom of Information Act 2014 became applicable to the state protection determination bodies as of 14th April 2015 and so such information would most likely be available to applicants through its provisions on personal information.

101. Finally, the omission of a requirement that a report at first instance make findings, coupled with the need in some instances to separately prepare "a statement of the reasons for the part of the determination that the applicant is a person in respect of whom a refugee declaration" may lead to a less efficient process. The need to make clear findings is key; if those findings are to be separated out from the report which contains the final determination, it may result in a practice of making fewer clear findings.

Recommendations:

(33) Head 35 be amended to add a requirement that the Minister set out his/her findings in addition to his determination and the particular findings set out in Head 4.

(34) Head 36 be amended so as to notify an applicant of the reasons for a decision irrespective if the determination is a positive or negative one.

v. Establishment of the International Protection Appeals Tribunal

102. The General Scheme provides for the creation of a new Tribunal, the International Protection Appeals Tribunal, to replace the current Refugee Appeals Tribunal. Head 64 provides that the same chairman and Tribunal Members will be carried over (with their consent) until a new recruitment process takes place through the Public Appointments Service. Only a small number of changes are proposed to the Tribunal as it is currently constituted:

- Members may now only be appointed for two terms each of 5 years duration (chair) and 3 years (members).
- Full time positions are now possible in addition to the Chairman. The possibility of hiring full-time members is very welcome. It may allow the Chair to avail of greater legal expertise in-house.
- An oral hearing may now be held in public where the applicant so consents and where, in the opinion of the Tribunal, it is "in the interests of justice to do so".
- The introduction of a requirement that the Public Appointment Service be responsible for the appointment of suitable members is also a welcome development.

103. The provision for a public hearing is also to be welcomed. The consent of the Applicant is a key safe-guard for situations where the anonymity of asylum seekers must be protected and to control for situations where persons likely to report back to their country of origin may seek to attend a hearing. Consideration might be given to making a public hearing a default where the Applicant consents and to providing guidance on the general expression "in the interests of justice". Special consideration could be given to the situation of vulnerable applicants, or claims relating to sexual or gender based violence. Consideration could also be given to the delivery of decisions, appropriately anonymised, in public.

104. In respect of the new arrangements for the IPAT UNHCR has some concerns related to particular aspects.

105. Comprehensive training, mentoring and other supports have been delivered to Tribunal members by a range of actors over the past 12 months or so at a financial cost to

the State. The quality and rate of case processing has been developing very well at the RAT and it would be ideal if the current incumbents could be retained without a requirement for them to re-apply for their positions

106. The limitation on the number of terms a Member may serve seems unduly restrictive and likely to result in the loss of Members with considerable expertise and experience. Perhaps an argument can be made for compassion fatigue, etc. but a longer period than 6 years in total would be welcome. The law of international protection is a very complicated and nuanced area of practice and the availability of experienced Tribunal Members with a body of developed expertise can serve to enrich the work of the Tribunal more generally. Furthermore, as the IPAT members will be appointed by the Minister for Justice, albeit following a recruitment process by the Public Appointments Service, the requirement for Tribunal Members to be reappointed after just three years may have a negative impact on their independence, perceived or otherwise, particularly as they will be hearing appeals from the decisions of the Minister. It would be preferable if the Tribunal was not reliant on the same Department for staffing and budgetary purposes but was accountable to an independent body such as the Court Service.

Recommendations:

(35) The existing Chairman and Tribunal Members be reappointed to the new IPAT without requiring them to reapply for their positions.

(36) Duration of terms of appointments to be lengthened to at least 10 years.

(37) New arrangements be considered to further promote the independence of the IPAT now that it will be reviewing the decisions of the Minister for Justice.

vi. Withdrawal and Deemed withdrawal of applications

107. Head 34 sets out provisions relating to withdrawal or deemed withdrawal of applications at first instance; Head 41 relates to the withdrawal of applications before IPAT. The proposed heads maintain the current provisions whereby the withdrawal of an application, whether explicit or by operation of a deemed withdrawn provision, automatically results in a negative determination on protection. If an applicant subsequently wishes to apply to have their application reopened, no procedure is available to them other than *via* the general subsequent application provisions (Head 21).

108. UNHCR has commented on this aspect of the Irish procedure on previous occasions.[79]. UNHCR notes that in a response to a Parliamentary Question of 30 April 2014, the provisions relating to withdrawal in the Recast procedure Directive were identified as

[79] See comments to the IRP Bill and 2013 Subsidiary Protection Regulations

being "particularly problematic aspects for the national asylum system" and thus motivating Ireland's decision not to opt-in to that Directive[80]. We would recall our comments to the 2008 IRP Bill:

> *"Given the declaratory nature of refugee status, the principle of non-refoulement also applies to those who meet the criteria of Article 1 of the 1951 Convention but have not had their status formally recognized, including, in particular, asylum seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status. UNHCR would have some concern with this in relation … protection applicants where the application is deemed withdrawn without consideration of the application on its merits."*[81]

109. Under the Procedures Directive as it currently applies in Ireland, there are a number of relevant provisions:

> *"Article 19*
>
> *Procedure in case of withdrawal of the application*
>
> *1. Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law,* ***when an applicant for asylum explicitly withdraws his/her application for asylum****, Member States shall ensure that* ***the determining authority takes a decision to either discontinue the examination or reject the application.***
>
> *2. Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority enters a notice in the applicant's file.*
>
> *Article 20*
>
> *Procedure in the case of implicit withdrawal or abandonment of the application*
>
> *1. When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC."*

[80] https://www.kildarestreet.com/wrans/?id=2014-04-30a.1615&s=%22Recast+procedures+Directive%22#g1618.r
[81] Para. 34, p.8

110. In the case of explicit withdrawal Ireland does not apply Article 19(2). Thus in the case of both explicit and implicit withdrawal there is a requirement that the determining authority *take a decision* to either discontinue the examination or reject the application. Under Irish law as it is currently drafted however and under the proposed heads at present, there is no decision actually taken in the sense that the determining body would consider certain matters before deciding which of the two options to take.

111. The difference between the two options is illustrated somewhat by the language of Article 19(2): rather than rejecting the application it is classified as being discontinued and noted in the file that the examination has ceased at that point. In relation to the other option the language of the Directive is informative, "or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC". Depending on what stage the investigation of the application has progressed, it is entirely possible that when an application is deemed withdrawn, the applicant will have *already established* an entitlement to refugee status. At present in Ireland for example if an applicant has initially demonstrated sufficient proof of Syrian nationality and given a basic account of his/her claim that may be sufficient to demonstrate an entitlement. Under Head 32(10) this situation is specifically catered for whereby a personal interview may be dispensed with where "based on the available evidence, the applicant is a refugee".

112. It can be argued therefore that if the second option under Article 20 is decided upon, i.e. to reject the application, this can only be done where the investigation has advanced sufficiently to be rejected on its merits. This interpretation is supported by the amended wording of the Recast Procedures Directive. Although Ireland has not opted-into the Recast Directive, one interpretation is that the amended wording clarifies the aspects of ambiguity in the first Directive. Article 28 states:

> *"1. When there is reasonable cause to consider that an applicant has implicitly withdrawn or abandoned his or her application, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided that the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 of Directive 2011/95/EU, to reject the application."*

113. Under current Irish law, the determining body is precluded from taking the decision specified in Article 20 by operation of the legislation requiring the Minister to automatically issue a negative determination in such instances. As such, there may currently be difficulties between Irish law and the requirements of the applicable Procedures Directive. UNHCR would therefore recommend that the same provisions should not be replicated in the General Scheme.

114. The importance of whether an application has been ultimately rejected or discontinued is relevant primarily to how an applicant may apply to have his application reopened and finalised, or alternatively reconsidered by way of the subsequent application procedure. The Procedures Directive states at Article 20:

> *"2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34.*
>
> *Member States may provide for a time-limit after which the applicant's case can no longer be re-opened.*
>
> *Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.*
>
> *Member States may allow the determining authority to take up the examination at the stage where it was discontinued."*

115. This paragraph, following on from the first, again refers to "decisions to discontinue" in a way that suggests such decisions are required to be taken in some instances rather than being optional provisions. Articles 32 and 34 refer to the subsequent applications procedure under which Irish law will only allow applicants to apply under this procedure to have a claim reopened. Importantly time-limits may be imposed after which time an applicant's case can no longer be re-opened. Under the Recast Procedures Directive these provisions are again modified. Article 28(2) now states:

> *"2.* ***Member States shall ensure that an applicant*** *who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken,* ***is entitled to request that his or her case be reopened or to make a new application which shall not be subject to the procedure referred to in Articles 40 and 41****.*
>
> *Member States may provide for a time limit of at least nine months after which the applicant's case can no longer be reopened or the new application may be treated as a subsequent application and subject to the procedure referred to in Articles 40 and 41. Member States may provide that the applicant's case may be reopened only once."*

116. We can see that in the Recast Directive separate procedures are now required in relation to an application to reopen a claim as opposed to a subsequent application more generally, whereby in the original Procedures Directive both applications could be considered under the latter procedures.

117. The Irish High Court has found in the *L.H.* case[82] that the subsequent application procedure as it then operated under Irish law, requires the Minister only to decide whether what was adduced by the applicant was new and that this obligation was not altered by the fact that the original application had not been fully processed but had been abandoned by the applicant and deemed withdrawn. Accordingly, under Irish law at present, if an Applicant has adduced sufficient evidence to establish their entitlement to refugee status prior to their application being withdrawn, and if they subsequently apply to have their application reassessed they will not be allowed to rely on any of that material in applying to have their case reopened.

118. As a result it may be argued that Irish legislation at present, and as it is proposed under the General Scheme, does not accord with the requirements of the Procedures Directive as the subsequent application procedure, required by Articles 32 and 34, is not broad or flexible enough to fulfil the role required of it by Article 20(2), i.e. to consider an application to have a case reopened after it has been discontinued.

119. A further matter to consider is that the Dublin III Regulations clearly create a right for applicants to have their cases reopened if transferred back to a country responsible for determining their protection claim in circumstances where their application had previously been deemed withdrawn. This is an explicit requirement of Article 18 of the Regulations and this has been given effect under Irish domestic law under the European Union (Dublin System) Regulations 2014[83]. This creates the anomalous situation that whilst applicants may not normally be in a position to have an application reopened following an implicit withdrawal decision, those who are "Dublined" back to Ireland may be entitled to have their application reopened in conformity with the Dublin III Regulations. This may create an incentive to applicants for secondary movement within the EU, the avoidance of which is a primary objective of the CEAS.

Recommendations:

(38) The deemed withdrawn provisions be amended in line with the Recast Procedures Directive provisions - where an application is explicitly or implicitly withdrawn the application should not be automatically rejected.

(39) Provision be made for applicants who have had their application discontinued to apply to have that application reopened. Such provision may be by amendment or addition to the current subsequent application provisions or by way of a separate novel procedure. Such a procedure should not be limited to a consideration of new

[82] L.H. v. Minister for Justice [2011] 3 IR 700

[83] Regulations 9 – 15; Reg. 12 introduces an extra step in requiring the applicant to set out reasons why their application for subsidiary protection should be reopened and as such may contravene the clear requirements of the Regulations

elements presented by the applicant in relation to the substance of his/her claim but should allow the applicant to advance explanations regarding why their application was originally withdrawn. Reasonable time limits could be imposed to restrict the operation of such provision.

V CONTENT OF INTERNATIONAL PROTECTION

i. Family Reunification

120. A number of significant changes are proposed in relation to the family reunification provisions as they currently apply. The provisions are primarily contained in Heads 50 and 51, the latter being almost identical in its contents. Head 50 relates to family members who are not in Ireland at the time the family reunification application is made whereas Head 51 relates to family members who are in Ireland at the time the family reunification application is made but who do not themselves qualify for protection in Ireland. Article 2(h) and 2(j) of the Qualification Directive and its Recast respectively and Article 23 of both are transposed by these heads. The Recast Qualification Directive introduced some minor amendments to these provisions but these are already incorporated into Irish law (with one exception set out below). The General Scheme proposes to retain Ireland's more generous provisions whereby family reunification is equally open to persons outside of Ireland. Head 52 transposes Article 20 (3) and (5) of the Qualification Directive concerning vulnerable persons and children in respect of persons covered by Heads 50 and 51.

Head 50: Permission to enter and reside for member of family of qualified person

Provide along the following lines:

(1) A qualified person (in this Head referred to as the "sponsor") may, within 12 months of the giving to the sponsor by the Minister of the refugee declaration or, as the case may be, the subsidiary protection declaration under Head 43, make an application to the Minister for permission to be given to a member of his or her family to enter and reside in the State.

(2) The Minister shall investigate, or cause to be investigated, an application under paragraph (1) to determine-

(a) the identity of the person who is the subject of the application,

(b) the relationship between the sponsor and the person who is the subject of the application, and

(c) the domestic circumstances of the person who is the subject of the application.

(3) It shall be the duty of the sponsor and the person who is the subject of the application to co-operate fully in the investigation under subhead (2) including to provide all information in his or her possession, control or procurement relevant to the

application.

(4) Subject to paragraph (7), if the Minister is satisfied that the person who is the subject of the application is a member of the family of the sponsor, the Minister shall give permission in writing to the person to enter and reside in the State and the person shall, subject to that permission being in force, be entitled to the rights and privileges specified in Head 47 in relation to a qualified person for such period as the sponsor is entitled to remain in the State.

(5) A permission given under subhead (4) shall cease to be in force if the person to whom it is given does not enter and reside in the State by a date specified by the Minister when giving the permission.

(6) A permission given under subhead (4) shall cease to be in force in relation to the spouse or the civil partner concerned in the event that the marriage or the civil partnership ceases to subsist.

(7) The Minister may refuse to give permission to enter and reside in the State to a person referred to in paragraph (4) or revoke any permission given to such a person—

(a) in the interest of national security or public policy ("*ordre public*"),

(b) where the person would be or is excluded from being a refugee in accordance with Head 9,

(c) where the person would be or is excluded from being eligible for subsidiary protection in accordance with Head 11,

(d) where the entitlement of the sponsor to remain in the State ceases, or

(e) where misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person the permission.

(8) In this Head and Head 51, "member of the family", in relation to the sponsor, means—

(a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State),

(b) where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date the sponsor made an application for international protection in the State),

(c) where the sponsor is, on the date of the application under paragraph (1), under the age of 18 years and is not married, his or her parents and their children who, on the date of the application under paragraph (1), are under the age of 18 years and are not married, or

(d) a child of the sponsor who, on the date of the application under paragraph (1), is under the age of 18 years and is not married.

Head 52: Situation of vulnerable persons and children

Provide along the following lines:

(1) In the application of Heads 47, 48, 49, 50 and 51 due regard shall be had to the specific situation of vulnerable persons such as persons under the age of 18 years (whether or not accompanied), disabled persons, elderly persons, pregnant women, single parents with children under the age of 18 years, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence.

In the application of Heads 47, 48, 49, 50 and 51 in relation to a child under the age of 18 years the best interests of the child shall be a primary consideration

121. The General Scheme proposes a number of significant changes to the way in which family reunification procedures currently operate. It would for the first time impose a time limit within which an application for family reunification can be made. Head 50(1) states that applications must be made within 12 months of a refugee or subsidiary protection declaration being made.

122. The imposition of time limits for family reunification is not addressed in the Qualification Directive (or its Recast). Article 23(1) of the Directive specifies that Member States shall ensure that family unity can be maintained. It could therefore be argued that this Head falls short of this requirement. Beneficiaries of protection are not always aware of their rights to family reunification and there can often be practical reasons why such an application may not be made within the first 12 months. Given the importance given to family tracing in the CEAS it would defeat its purposes where family members are identified after the permissible application period. Changes in family circumstances in the years following recognition of status, such as births, marriages and deaths, can create a pressing need for reunification of dependant family members where none previously existed. No flexibility or discretion is allowed for in the proposed provisions.

123. An application under the Heads can only be made for nuclear family member to enter or reside in Ireland. Unlike the Refugee Act, 1996 there is no provision giving the Minister discretion to allow dependent family members to enter or reside in Ireland. Article 23 (5) of the Directive concerns dependent family members:

> *"Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time."*

124. The explanatory notes of the Heads state that there is no intention to provide family reunification to such dependent members of the wider family. We would recall UNHCR's comments to the Qualification Directive in this regard:

"UNHCR encourages Member States to use a definition of the term "family member" which includes close relatives and unmarried children who lived together as a family unit and who are wholly or mainly dependent on the applicant. UNHCR notes in this regard that the definition which was agreed upon in the Temporary Protection Directive encompasses these family members.[84] *This is in line with the right to family unity, as outlined in the UNHCR Handbook which stipulates that other dependants living in the same household normally should benefit from the principle of family unity.*[85] *Furthermore, in UNHCR's view, respect for family unity should not be made conditional on whether the family was established before flight from the country of origin . Families which have been founded during flight or upon arrival in the asylum State also need to be taken into account. With reference to the UNHCR Executive Committee Conclusion No . 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b)(ii) , UNHCR recommends the application of liberal criteria in identifying those family members who can be admitted, with a view to promoting the unity of the family."*[86]

125. The proposed amendments to the operation of the current family reunification provisions under Irish law, while broader than what is required under the Qualification Directive significantly reduce their scope from the current position. Whilst the State may wish to limit the current provision regarding dependant relatives, which as a result of recent case law is now interpreted quite widely, the proposals could in effect be a disproportionate interference with the right to family life. This is particularly so in the Irish context given the prominent place given to the right in the Irish Constitution (see for example O'Leary & Lemiere[87]).

126. With respect to Head 50(8)(c) the definition of a family member under the Heads has been extended to include children of the applicant's parents who are under the age of 18 years and are not married (where the applicant is under the age of 18 years and is not also married). This is welcomed however this provision is not entirely in conformity with the new provision contained in Article 2(j) of the Recast Qualification Directive:

"'family members' means …

- *the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the*

[84] Council Directive 2001/44/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12 of 7 August 2001, Article 15.

[85] UNHCR, Handbook, para. 185. See also EXCOM, Conclusions Nos. 24 (XXXII) Family Reunification, 1981, para. 5, and 88 (L), 1999, para. (ii).

[86] UNHCR annotated comments, p.12

[87] O'Leary & Lemiere v Min for Justice [2011] IEHC 256

Member State concerned, when that beneficiary is a minor and unmarried" (emphasis added)

127. Head 50(5) introduces a further time limit on the grant of family reunification: if the beneficiary does not enter and reside in Ireland by a date specified by the Minister when giving the permission, the permission will cease. As the authorities will be aware, there are many practical difficulties that family members of refugees can face in seeking to come to Ireland to join their family. The financial costs relating to exit permits, travel documents, medical escort and many other ancillary costs of travel can be prohibitive. Persons frequently must wait a long time before they have secured the funds to facilitate the travel of a family member. Accordingly the operation of such a provision could lead to a disproportionate interference with the principle of family unity. It is also a concern that the legislation in no way indicates what kinds of time-limits are envisaged.

128. Subheads 50(6) and 51(5) of the General Scheme state that if a relationship ceases to subsist following the grant of a family reunification permission then the permission will cease. One consequence of this is that a person whose status emanates from family reunification may feel they cannot report or leave a relationship where domestic violence exists for fear of an impact on their status. The wording of the relevant sections imply that the cessation of an immigration permission in such circumstances applies with automatic effect without any discretion. This would appear to contradict the approach taken in the State's own immigration guidelines in respect of victims of domestic violence[88]. The guidelines allow affected persons to make an application for independent status as a victim of domestic violence.

129. Pursuant to section 18(1) of the Refugee Act, 1996, the Minister is to notify the UNHCR about any family reunification applications. It is a concern that there is no such provision in Head 50.

Recommendations:

(40) Head 50(1) be amended to allow persons to make applications for family reunification outside of the 12 month limit, or at the very least, where they were not in a position to do so within that timeframe for no fault of their own, for example where the whereabouts of their family member was unknown at the time.

(41) Head 50(8) be amended to apply a more liberal criteria in identifying family members who may be admitted, with a view to promoting the unity of the family, particularly in cases of dependency.

[88] http://inis.gov.ie/en/INIS/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf/Files/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf

(42) Head 50(8)(c) be amended as follows:

'(c) where the sponsor is, on the date of the application under paragraph (1), under the age of 18 years and is not married, his or her parents, ***or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned,*** *and their children who, on the date of the application under paragraph (1), are under the age of 18 years and are not married, or"*

(43) Head 50(5) be deleted.

(44) Heads 50(6) and 51(5) be amended to allow for the exercise of discretion in the case of victims of domestic abuse.

(45) A provision be added to Heads 50 and 51 to replicate the notification requirements with respect to UNHCR that currently apply by way of s.18(1) of the Refugee Act, 1996.

VI PERMISSIONS TO REMAIN AND RELATED CONSIDERATIONS

130. UNHCR has some limited comments to make in relation to the permission to remain procedures set out in the General Scheme, in respect of the aspects that fall within our mandate.

i. Personal interview

131. As mentioned above, UNHCR welcomes Ireland establishing a single procedure for assessing both refugee protection needs and subsidiary protection needs. The General Scheme suggests that not only protection concerns will be assessed in the single procedure, but that other issues including *non-refoulement* obligations under general human rights instruments and other reasons for granting a person a permission to reside in the State are looked at through a closely related and parallel determination procedure (Head 32 and 36A).

Head 32: Minister's examination of application

Provide along the following lines:

The Minister shall examine each application for international protection for the purpose of determining-

(a) whether the applicant is a person in respect of whom a refugee declaration should be given,

(b) whether the applicant is a person in respect of whom a refugee declaration should not be given and in respect of whom a subsidiary protection declaration should be given, or

(c) whether the applicant, being a person in respect of whom neither a refugee declaration nor a subsidiary protection declaration should be given, is a person in respect of whom a permission to reside in the State should be given in accordance with Head 36A.

Head 32A: Personal interview

Provide along the following lines:

(1) As part of an examination referred to in Head 32 the Minister shall cause the applicant to be interviewed in relation to the matters referred to in paragraphs (a) and (b) of that Head ("the personal interview") at such time and place that the Minister may fix.

…

(13) Following the conclusion of a personal interview under this Head, the interviewer shall furnish to the Minister a report in writing of the interview.

Head 36A: Examination and determination in relation to permission to remain

(1) The Minister shall, in respect of an applicant who-

(a) is the subject of a determination under Head 35(3)(c), and

(b) has informed the Minister of any reason or reasons why he or she should be given permission to remain in the State,

examine the reason or reasons presented by the applicant in writing or at the personal interview under Head 32A in relation to why he or she should be given permission to remain in the State.

132. Although Head 32A(1) makes it clear that the Minister shall cause the applicant to be interviewed only in relation to the assessment of refugee and subsidiary protection status[89], Heads 32A(12) and 36(A)(1) also require that anything relevant to a request by the applicant for permission to remain in the State in the event that his or her application for international protection is refused be recorded in the report of interview. The exact boundaries of if or when an Applicant may offer information or when an interviewer may ask questions relating to this aspect are not currently very clear. It is of paramount importance that Applicants feel at liberty to discuss all aspects of their protection case without fearing ancillary consequences. An Applicant, for example, may wish to admit to using fraudulent documents or otherwise make an admission of conduct with respect to their application for refugee status or subsidiary protection. If they are of the impression that they are not being questioned in respect of their protection application but rather a

[89] However certain exceptions are set out in Head 32A(8)

permission to remain application they may feel that such an admission would negatively impact them.

Recommendation:

(46) Further clarity be brought to this section during the drafting process so as to ensure that applicants have certainty regarding what questions may be asked of them at interview and what opportunities they may have, if any, to proffer information in relation to matters wider than their application for refugee status or subsidiary protection.

(47) Should such questioning be permitted it is only allowable at the very end of the protection interview and in a manner which explicitly acknowledges its purpose.

ii. Voluntary Return

133. Head 43A concerns voluntary return:

Head 43A: Option to voluntarily return to the country of origin

Provide along the following lines:

(1) The Minister may notify a person-

(a) whose application for international protection has not been the subject of a determination of the Minister under Head 35, or

(b) whose application for international protection has been the subject of a determination of the Minister under Head 35(3)(c),

of the option to inform the Minister of the person's wish to voluntarily return to his or her country of origin and of the relevant provisions of this Act.

(2) A notification under subhead (1) shall expire-

(a) on a day stated in the notification, or

(b) within a number of days from the sending of the notification, such number of days being stated in the notification.

(3) The Minister shall notify a person to whom the Minister has refused to give both a refugee declaration and a subsidiary protection declaration, and

(a) who has not informed the Minister of any reason why he or she should be given permission to remain in the State, or

(b) who is the subject of a determination of the Minister under Head 36A(3)(b),

of the option to inform the Minister of the person's wish to voluntarily return to his or her country of origin and of the relevant provisions of this Act.

(4) A notification under subhead (3) shall expire on the fifth day following it being given to the person concerned.

(5) If, before the expiry of the notification, a person who has been notified under subhead (1) or (3) informs the Minister of his or her wish to voluntarily return to his or her country of origin then the following provisions shall apply in relation to the person -

(a) for so long as the Minister is of the opinion that the person intends to return to his or her country of origin and for so long as the Minister is not of the opinion that adverse concerns relating to national security or criminality arise in relation to the person, Head 45 shall not apply in relation to the person, and

(b) in the event that the person leaves the State for the purpose of returning to his or her country of origin, and if applicable, withdraws his or her application for international protection or, as the case may be, his or her appeal under Head 37, a deportation order under this Act shall not be made in respect of the person.

134. UNHCR welcomes the inclusion in the General Scheme of the option for Applicants to voluntary return. Providing effective and efficient outcomes to persons who are not refugees is essential to maintain credible asylum systems and prevent irregular onward movement.[90] Demonstrating that misuse of the asylum system cannot function as a "back door" alternative to regular migration also serves as a strategy to deter irregular migration and to reduce incentives for human smuggling and trafficking. Sustainability of return is best guaranteed if individuals who do not have a right to stay in a host country return home voluntarily. Voluntariness ensures that the return takes place in a safe and dignified manner. It is also cost-effective for the returning State. Several countries have developed good practices to encourage and support voluntary and sustainable return. These include: the provision of information and counselling on return options and circumstances in the countries of origin; the granting of reintegration assistance; and post-return monitoring. Some countries have also established initiatives to ensure that the specific needs of groups, such as unaccompanied/separated children, people with disabilities, and others, are addressed during the return process.[91]

135. Voluntary return can be promoted and supported in many ways, ranging from pre-return support to post-return monitoring. Among the activities that have proven particularly useful are:

- the establishment of appropriate referral mechanisms for agencies assisting with voluntary return in the host country;

[90] The return of persons found not to be in need of international protection is an objective identified under Goal 2 of Protecting refugees within broader migration movements in *UNHCR's Agenda for Protection, October 2003, Third edition*, available at: http://www.refworld.org/docid/4714a1bf2.html

[91] UNHCR, Refugee Protection and Mixed Migration: The 10-Point Plan in action, February 2011, p.229 available at: http://www.refworld.org/docid/4d9430ea2.html

- the provision of information and counselling on return options;
- the dissemination of accurate and up-to-date country of origin information; and
- the provision of reintegration assistance. [92]

136. The provisions of the General Scheme are a welcome modification of existing practice. The introduction of a single procedure will make it possible for an Applicant to get a final decision on his/her protection application within a much faster period of time. The consideration of permission to remain applications at first instance also will mean that an Applicant will be much more aware of his/her chances of receiving a positive outcome to that application prior to the possible issuance of a deportation order.

137. UNHCR however has concerns in relation to two specific aspects of Head 43A. Firstly with respect to Heads 43A(1) and (2), the rationale for such provisions is unclear. The Explanatory Note does not provide any guidance on these provisions. An Applicant may wish to avail of voluntary return at any stage of the process. As stated above it is very important in this context that there is provision of accurate information and counselling on return options. Where this is not available the issuance of a notification a set out in Head 43A(1) may be perceived as a formal procedure connected with the Applicant's protection application. It is essential that such information is made available to Applicants in an impartial manner that ensures the voluntariness of any returns decision. Furthermore, Heads 43A(1) and (2) impose a temporal limit on when voluntary return may be availed of and as such impose an unnecessary restriction on its availability.

138. Secondly with respect to Head 43A(4), the time allowed is only 5 days. Section 34 of the Employment Permits (Amendment) Act 2014 has now amended s.5 of Illegal Immigrants (Trafficking) Act 2000 with respect to the rules to be followed for the initiation of judicial review proceedings. These rules now provide that an application for leave to apply for judicial review in respect of asylum and immigration matters[93] must be made within the 28 days of the date on which the person was notified of the decision, determination, recommendation, refusal or making of the order concerned.

139. Where an applicant has received notification of a final refusal of their applications for protection and where relevant, for permission to remain, it is important that they be given sufficient opportunity to discuss their options and the details of their cases with their legal advisers. Given the gravity of the decision faced by such persons and the need to be adequately advised on their options it is recommended that greater time be afforded to applicants to consider the option of voluntary return in conjunction with any legal consultations they may be having in relation to their case more generally.

[92] UNHCR, Refugee Protection and Mixed Migration: The 10-Point Plan in action, February 2011, p.234
[93] The specific matters concerned are set out in subsection (1)

Recommendations:

(48) Heads 43A(1) and (2) to be amended to provide that the option of voluntary return may be availed of at any stage up to the time limits set out in Head 43A(4).

(49) Extending the time afforded in Head 43A to an Applicant to notify the Minister of his/her intention to voluntarily return to his or her country of origin. At a minimum it is recommended that the period of 5 days be extended to 15 working days in order to allow sufficient time for the Applicant to access legal advice.

iii. Statelessness Determination

140. Through a series of resolutions beginning in 1994, the UN General Assembly gave UNHCR the formal mandate to prevent and reduce statelessness around the world, as well as to protect the rights of stateless persons. Twenty years earlier, the Assembly had asked UNHCR to provide assistance to individuals under the 1961 Convention on the Reduction of Statelessness.

141. UNHCR's governing Executive Committee provided guidance on how to implement this mandate in a "Conclusion on the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons" issued in 2006. This requires the agency to work with governments, other UN agencies and civil society to address the problem.

142. Ireland is a signatory and has ratified two international treaties on statelessness.

- The 1954 Convention relating to the Status of Stateless Persons
- The 1961 Convention on the Reduction of Statelessness

143. The *Irish Nationality and Citizenship Act 1956 (as amended)* contains a number of provisions giving effect to the 1961 Convention. The 1954 Convention is not given effect to in Irish legislation however some of its terms may be met through administrative arrangements, such as the issuance of a stateless travel document. Where stateless persons wish to apply for citizenship or a travel document, or simply to register with the immigration services, the lack of a determination procedure in Ireland can present a considerable obstacle.[94] Whilst the General Scheme gives effect to the 1951 Convention with respect to stateless persons, it does not give further effect to the 1954 Convention or provide in any way for a determination procedure. “It is implicit in the 1954 Convention that States must

[94] See further: *UNHCR, Scoping Paper: Statelessness in Ireland*, October 2014, available at: http://www.refworld.org/docid/5448b6344.html

identify stateless persons within their jurisdictions so as to provide them appropriate treatment in order to comply with their Convention commitments."[95]

144. Regrettably in a response to a recent parliamentary question[96] the current Minister for Justice ruled out the introduction of a determination procedure in the near future:

> *"Ireland is not unusual in so far as it does not have a specific procedure for determining statelessness claims... While the position adopted by other jurisdictions clearly does not determine the actions that Ireland might take in this area, some caution is nonetheless necessary to avoid a situation where Ireland, as a small country, could become a destination for stateless persons seeking access to a determination process. I have no immediate plans to introduce a formal determination procedure but will keep the matter under review, having regard also to developments in other jurisdictions and the nature of their determination procedures."*

145. UNHCR Ireland continues to work with Department of Justice officials to share information and to address their concerns. "Countries that have established a statelessness determination procedure have not seen an increased arrivals of persons to the country claiming statelessness stature."[97] However UNHCR would again call on the State to consider the possibility of using this opportunity to address the lack of a statelessness determination procedure by way of legislation. This could be by way of an enabling provision or some other mechanism allowing the Minister to introduce a procedure at a later date by way of a statutory instrument. Substantive provisions could also be included to be commenced at an appropriate time in the future.

Recommendation:

(50) Include in the General Scheme enabling provisions to give further effect to the 1954 Convention on Statelessness and to introduce a statelessness determination procedure.

(51) If or first recommendation is not accepted, then enabling provisions to be added to allow such procedures to be introduced at a future date through a statutory instrument or by the inclusion of substantive provisions on statelessness to be commenced at a later date.

[95] *UNHCR, Handbook on Protection of Stateless Persons*, p.6, 30 June 2014, available at: http://www.refworld.org/docid/53b676aa4.html

[96] http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/dail20140612000062#WRR00375

[97] *UNHCR, Statelessness determination procedures, Identifying and protecting stateless persons*, p.8, August 2014, available at: http://www.refworld.org/docid/5412a7be4.html