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European Council
on Refugees and Exiles

Information Note on

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

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Introduction¹

The adoption of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) (hereinafter ‘recast Asylum Procedures Directive’) in June 2013 together with the recast Dublin Regulation,² the recast EURODAC Regulation³ and the recast Reception Conditions Directive⁴ constituted the final step in the second phase of harmonisation of asylum law in the EU Member States.

The purpose of the Directive is to establish common procedures for granting and withdrawing international protection pursuant to the recast Qualification Directive as opposed to the minimum standards that were established by Directive 2005/85/EC.⁵ the 2005 Asylum Procedures Directive. In this regard it should be noted that The Stockholm Programme underlined the “need to establish a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection”. Furthermore it stipulated that the Common European Asylum System (CEAS) should be based on high protection standards and that it is crucial that individuals, regardless of the Member State in which they lodged their claim, “are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination”.⁶ In order to increase the fairness and efficiency of asylum procedures in the EU, the Commission proposal presented in 2009 promoted the frontloading of asylum procedures, an objective ECRE fully supports. ECRE defines frontloading as the policy of financing asylum procedures with the requisite resources and expertise to make accurate and properly considered decisions at the first instance stage of the procedure.⁷ Other important objectives were the simplification of procedures and procedural concepts, including the reduction of exceptions to procedural guarantees, enhancing guarantees with respect to access to the procedure, and introducing additional guarantees such as the right to legal assistance at the first instance and specific guarantees for vulnerable

1. This Information Note was written with the support of EPIM (European Programme for Integration and Migration), The Sigrid Rausing Trust, Atlantic Philanthropies and UNHCR. The views expressed in this document are those of ECRE and do not necessarily reflect the views of the organisations mentioned. ECRE would like to thank the members of its Asylum Systems Core Group for their input and Cathryn Costello, Andrew W. Mellon University Lecturer in International Human Rights and Refugee Law at the Refugee Studies Centre, Oxford for her comments on this Information Note.
2. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereafter recast Dublin Regulation), *OJ* 2013 L180/31.
3. 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 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 and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (hereinafter ‘recast EURODAC Regulation), *OJ* 2013 L180/1.
4. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereafter ‘recast Reception Conditions Directive’), *OJ* 2013 L 180/96.
5. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter ‘2005 Asylum Procedures Directive’), *OJ* 2005 L 329/11
6. European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, *OJ* 2010 C 115/32.
7. So as to ensure that every asylum application is thoroughly and individually reviewed by a qualified decision-maker with adequate resources at his disposal. While it facilitates quicker decision-making, frontloading is not about the acceleration of procedures for its own sake and requires the inclusion of all necessary safeguards from the start of the procedure. Ensuring quality first instance decision-making also reduces unnecessary appeals and thereby saves time and resources and enables to hear appeals more quickly and more cost-effectively. See ECRE, *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe*, September 2005, p. 38.

applicants.⁸ The amended recast proposal presented by the Commission in June 2011, whilst introducing more flexibility for Member States and further guarantees in terms of cost-effectiveness, overall maintained the approach based on frontloading and ensuring respect for fundamental rights.⁹

The recast Asylum Procedures Directive significantly changes and improves certain procedural safeguards and guarantees laid down in the 2005 Asylum Procedures Directive. However, the Directive also still leaves considerable room for manoeuvre to Member States as to the way these standards may be transposed and implemented into national legislation, while some of its provisions continue to set rather low protection standards. Moreover, the, at times, extreme complexity of its provisions risks undermining the effectiveness of the procedural safeguards and consequently complicates its proper implementation. In this regard, ECRE encourages Member States to make use of the possibility under Article 5 of the recast Asylum Procedures Directive to introduce or retain more favourable standards in their national procedures insofar as those higher standards are compatible with the recast Asylum Procedures Directive. Whereas the recast Asylum Procedures now establishes common procedures for granting and withdrawing international protection, this should therefore not be interpreted as denying Member States any room for making effective use of the more favourable provisions clause.

In addition, the standards laid down in this Directive should and cannot be read in isolation. Their transposition and implementation is at the same time informed by and must comply with fundamental rights norms that are laid down in other sources of EU law, including the EU Charter of Fundamental Rights and the general principles of EU law as developed in the jurisprudence of the Court of Justice of the European Union (CJEU).¹⁰ It is explicitly stated that the Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24 and 47 of the Charter and that it has to be implemented accordingly.¹¹ Furthermore, Article 78 of the Treaty on the Functioning of the European Union (TFEU) explicitly obliges the European Union to ensure that a common European asylum policy is developed ‘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’. Therefore, Member States are under an obligation to transpose and implement this Directive in a manner which is consistent not only with the 1951 Convention on the Status of Refugees, but also with other relevant instruments such as the European Convention on Human Rights (ECHR), the Convention against Torture (CAT), the International Convention on the Rights of the Child (CAT), International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities. In fact, obligations deriving from international human rights law, the EU Charter of Fundamental Rights as well as general principles of EU law, may require Member States to go beyond the level of procedural guarantees laid down in the Directive with regard to certain provisions as allowed under Article 5 recast Asylum Procedures Directive.

According to Article 53 of the recast Asylum Procedures Directive, the 2005 Asylum Procedures Directive is repealed with effect from 21 July 2015. However, the United Kingdom and Ireland, which have opted out of the recast Asylum Procedures Directive, remain bound by the provisions of the 2005 Asylum Procedures Directive as a result of the Protocol on the position of Ireland and the United Kingdom as amended by the Treaty on the Functioning of the European Union (TFEU). Denmark is not bound by the recast Asylum Procedures Directive, nor by the 2005 Asylum Procedures Directive. However, given the considerably higher level of procedural guarantees and compliance with human rights law, ECRE encourages these Member

8. COM(2009) 554 final, *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 (Recast)*, Brussels, 21 October 2009.

9. COM(2011)319 final, *Amended 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 (Recast)*, Brussels, 1 June 2011.

10. Since the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties and has now become primary EU legislation. Secondary EU legislation must comply with and be interpreted in light of the EU Charter of Fundamental Rights. See Article 6(1) of the Treaty on European Union (TEU). For an in-depth analysis of the EU Charter Provisions see S. Peers, T. Hervey, J. Kenner and A. Ward (Ed.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland, Oregon, 2014.

11. See recital 60 recast Asylum Procedures Directive.

States to opt in to the recast Asylum Procedures Directive, taking into account ECRE's recommendations included in this document. The deadline for transposition of the provisions of the recast Asylum Procedures Directive, including Annex I is 21 July 2015, except for Articles 31(3), (4) and (5) relating to the time limits for concluding an examination procedure at first instance (6 – 21 months), which have a deadline of 20 July 2018.

This information note discusses key provisions in the recast Asylum Procedures Directive without aiming to provide a complete Article-by-Article analysis and therefore does not deal with a number of provisions that were not subject to any or any substantial changes from the 2005 Asylum Procedures Directive. It must also be read in light of ECRE's comments on the Commission proposal recasting the Asylum Procedures Directive¹² and the amended Commission proposal recasting the Asylum Procedures Directive¹³ as well as ECRE's information note on the 2005 Asylum Procedures Directive.¹⁴

Overview of Main Amendments

Although the recast Asylum Procedures Directive maintains the overall structure of the 2005 Asylum Procedures Directive, it includes numerous changes to the latter Directive. The following is an overview of the most important changes to the 2005 Asylum Procedures Directive:

- Member States are required to ensure that the personnel of the determining authority are properly trained and the possibility for Member States to provide that another authority than the determining authority is entrusted with taking decisions related to asylum is limited to processing Dublin cases and granting or refusing permission to enter in the framework of border procedures (**Article 4**).
- Specific time-limits are introduced with respect to the registration and lodging of applications for international protection (Article 6) and a new provision lays down Member States' obligations with regards to information and counselling in detention facilities and at border crossing points (**Article 8**).
- The possibility to omit a personal interview is limited to where a positive decision can be taken or where the determining authority considers that the applicant is unable or unfit to be interviewed, while the possibility to temporarily involve personnel of another authority in conducting personal interviews is introduced in case of large numbers of third country nationals applying simultaneously (Article 14). A personal interview on the admissibility of the application for international protection must in principle be conducted where a Member State applies such procedure (**Article 34**).
- A detailed provision on the report and recording of personal interviews requires an opportunity for the applicant to make comments and provide clarifications with regard to the report or transcript under certain conditions (**Article 17**).
- A new provision with regard to medical examination of applicants concerning signs of past persecution or serious harm is introduced (**Article 18**).
- A new provision is introduced requiring Member States to provide legal and procedural information free of charge in procedures at first instance at the request of the applicant (Article 19). Such information may be provided by non-governmental organisations or by professionals from government authorities or from specialised services of the State (**Article 21(1)**).
- There is a new obligation to assess within a reasonable period of time whether the applicant is in need of special procedural guarantees and to ensure that they are provided with adequate support (**Article 24**).

12. ECRE, *Comments on the European Commission Proposal to recast the Asylum Procedures Directive*, May 2010.

13. ECRE, *Comments on the Amended Commission Proposal to recast the Asylum Procedures Directive (COM(2011) 319 final)*, September 2011.

14. ECRE, *ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, October 2006.

Representatives of unaccompanied children are required to act in the best interests of the child and must have the necessary expertise while complex and detailed criteria determine the use of accelerated, inadmissibility and border procedures in the case of unaccompanied children (**Article 25**).

· The recast Directive now allows for the postponement of the conclusion of the examination procedure in case of an uncertain situation in the country of origin which is expected to be temporary up to 21 months (**Article 31(4) and (5)**).

· A clearer distinction is made between the prioritisation and acceleration of the examination of applications of international protection. An exhaustive list of 10 grounds for acceleration is introduced (**Article 31(7) and (8)**).

· The recast Asylum Procedures Directive no longer includes a provision on the minimum common list of third countries regarded as safe countries of origin and deletes the requirement of a Council decision adopting a common list of European safe third countries. The national designation of third countries as safe countries of origin must be based on a range of sources of information, including information from UNHCR, other Member States, the Council of Europe and other relevant international organisations and EASO. The designation of part of a country as safe is no longer allowed (**Article 37**).

· The possibility to make exceptions from the applicant's right to remain in the territory in case of subsequent applications for international protection is introduced (**Article 41**).

· The provision on the right to an effective remedy now explicitly requires a full and *ex nunc* examination of both facts and points of law and the right of applicants to remain in the territory pending the appeal although the latter may be the subject of a separate procedure before the court or tribunal in certain cases (**Article 46**).

Analysis of Key Articles

1. Scope (Article 3)

Article 3 now explicitly states that the Directive shall apply to all applications for international protection, which are defined as applications by third country nationals or stateless persons seeking refugee status or subsidiary protection status within the scope of the Qualification Directive from a Member State. As a result, the Directive requires Member States to apply a single procedure in which both eligibility for refugee status and for subsidiary protection status is examined. This reflects the current situation in all EU Member States, except Ireland, which has opted out of the Directive and is therefore not bound by this provision. ECRE is in favour of a single procedure as this is generally in the interests of both asylum seekers and States as it avoids the multiplication and unnecessary prolongation of the status determination procedure. In the case of *MM. v. Minister of Justice*, the CJEU held that when a Member State has chosen to establish two separate procedures to examine requests for refugee status and subsidiary protection status, one following the other as in Ireland, it is important that the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of these two procedures.¹⁵ Moreover, in the case of *H.N.* the CJEU held that an applicant must be able to submit an application for subsidiary protection and for refugee status at the same time while there should be no unreasonable delay in processing the application for subsidiary protection.¹⁶

Moreover, the geographical scope now explicitly includes not only applications made in the territory and at the border but also applications made in the territorial waters or in the transit zones of the Member States. As regards applications made in the territorial waters this now also automatically implies that the persons

¹⁵ CJEU, Case C- 277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney-General*, Judgment of 22 November 2012.

¹⁶ CJEU, Case C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney-General*, Judgment of 8 May 2014.

concerned should be disembarked on land and have their applications examined in accordance with the Directive according to recital 26. Such obligation is also cross-referenced in recital 10 of the preamble of the Regulation on external sea border surveillance in the context of Frontex-led operations.¹⁷

Notwithstanding that the scope of the Directive is limited to the territory and the territorial waters, Member States have an obligation under international human rights law to respect the principle of *non-refoulement* whenever they exercise effective control over individuals, including when they operate outside the territory. In the case of *Hirsi Jamaa and Others v. Italy* the European Court of Human Rights not only confirmed that Article 3 ECHR applies extra-territorially but also that procedural guarantees must be ensured. This implies an independent and rigorous scrutiny of an applicant's complaint that a removal to a third State would expose him or her to treatment prohibited under Article 3 ECHR and that the remedy must have suspensive effect. Moreover, the Court emphasised the crucial importance of effective access to legal assistance and interpretation in that regard. It is also important to note that the Court explicitly stated that the obligations of States under *inter alia* Article 3 ECHR apply regardless of whether the person intercepted has explicitly applied for asylum, which implies an obligation for States to proactively assess the risk of *refoulement*.¹⁸

2. Responsible authorities (Article 4)

Article 4 lays down the important obligation for Member States to designate a determining authority responsible for an appropriate examination of asylum applications and reduces significantly the possibilities for Member States to entrust other national authorities with the responsibility of taking asylum-related decisions compared to the corresponding provision under the 2005 Asylum Procedures Directive.¹⁹ Moreover, the designated determining authority must be provided with appropriate means and sufficiently competent and properly trained personnel.

ECRE believes it is of the utmost importance for Member States to invest in a well-resourced asylum procedure with qualified and permanently trained staff as this is essential to ensure fairness, quality and efficiency of decision-making at all stages of the procedure. In this regard ECRE welcomes in particular the obligation in Article 4(3) for Member States to ensure that persons interviewing applicants pursuant to this Directive must also have acquired general knowledge of problems that may impact negatively on the applicant's ability to be interviewed, such as indications of past torture. Expert NGOs, including ECRE member organisations, have developed useful and simple tools that can assist Member States in the identification of victims of torture and traumatised asylum seekers.²⁰ It is important that not only persons interviewing asylum seekers, but all staff members who come into direct contact with asylum seekers throughout the procedure acquire such knowledge, including personnel in reception and detention centres. Reduced ability to be interviewed will in many cases not be the only problem the persons concerned are confronted with and should therefore be considered as a presumption that they may also be in need of other special procedural guarantees or special reception needs. However, those interviewing applicants should also be able to detect and be aware of possible other factors that may negatively impact on the applicant's ability to be interviewed such as the absence of a same sex interviewer or interpreter or the horrific experiences they may have gone through during their journey to the EU, such as in the case of sea arrivals.

17. Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2014 L 189/93.

18. See ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012. According to the Court, it was for the Italian authorities, faced with a situation in which human rights were being systematically violated, to "find out about the treatment to which the applicants would be exposed after their return" (§ 133) and to ascertain "how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees" (§ 157).

19. See Article 4(2) 20025 Asylum Procedures Directive.

20. See, for instance, ACET, BZFO, Cordelia Foundation Hungary, FTDA, IRCT Denmark, Parcours D'Exil, Phaors, Process of Recognition and Orientation of Torture Victims in European Countries to Facilitate Care and Treatment (Protect), *Questionnaire and Observations for early identification of asylum seekers having suffered traumatic experiences*, available at www.protect-able.eu.

According to **Article 4(2)** Member States may opt for another authority than the determining authority to take decisions under the Dublin Regulation or to grant or refuse permission to enter in the framework of border procedures, the latter on the basis of a reasoned opinion of the determining authority. The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have held that transfers of asylum seekers to another EU Member State may result in the violation of the individual's fundamental rights, including the prohibition of *non-refoulement*, creating an obligation for States not to carry out the transfer to the responsible Member State.²¹ This has also been acknowledged in Article 3(2) of the recast Dublin Regulation²² and through the strengthening of the procedural safeguards for asylum seekers to challenge the application of the Dublin criteria. Therefore, deciding which state is responsible for the examination of an asylum application cannot be reduced to a purely technical application of "objective" criteria laid down in the Dublin Regulation. It also inevitably necessitates an analysis of the reception conditions and procedural standards in the responsible Member States and an assessment of whether or not the transfer may result in a breach of the principle of *non-refoulement* and therefore is also linked to an assessment of the person's international protection needs. This requires an authority with expert knowledge on refugee and human rights law and the EU asylum *acquis*.

Therefore, in ECRE's view the most effective option is for the specialised determining authority to deal with all matters relating to applications for international protection, including the application of the Dublin Regulation. This would serve as an additional guarantee against a purely "technical" application of the Dublin Regulation and would allow for a better-informed application of the dependent persons and discretionary clauses in the recast Dublin Regulation.²³ Moreover, where the authority comes to the conclusion that it is responsible for examining the application, such a system would ensure that it can immediately start examining the application, avoiding the additional and time-consuming process of transferring the file from the "Dublin" authority to the specialised determining authority.²⁴

Where another authority than the determining authority is responsible for applying the recast Dublin Regulation, ECRE recommends that personnel of such authority responsible for taking decisions under the Dublin Regulation receive the same comprehensive training programmes as required under **Article 4(3)** for the personnel of the specialised determining authority.

Where another authority than the determining authority is responsible for granting or refusing permission to enter in the framework of border procedures, Member States must ensure that such system does not in any way undermine asylum seeker's access to a fair and efficient asylum procedure and that the principle of *non-refoulement* is fully respected. Access to the territory is essential in order to ensure that those requesting international protection can effectively exercise the right to asylum as laid down in Article 18 of the EU Charter of Fundamental Rights and their other rights under the EU Charter and the EU asylum *acquis*. If Member States opt to make use of **Article 4(2) (b)**, the reasoned opinion of the determining authority cannot pre-empt the outcome of a full examination of a person's request for international protection and should therefore only relate to the question whether or not the asylum application, taking into account the

21. See ECHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011 and CJEU, *Joined Cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011.

22. "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union..."

23. See Article 16 and 17 recast Dublin Regulation. This is even more important in light of the strengthened obligation for Member States to keep or bring together an applicant who is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States with that family member in light of the CJEU jurisprudence in the case of *K. v. Bundesasylamt*, where the Court interpreted the corresponding Article 15(2) Dublin Regulation as meaning that in such situation a Member State which is not responsible for examining an application for asylum pursuant to the criteria laid down in Chapter III of that regulation becomes so responsible. See CJEU, Case 245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012.

24. In this regard it should be noted that the actual number of asylum seekers effectively transferred to another Member State under the Dublin system remains low. EASO estimates that EASO estimates that 25% of the outgoing requests in the period 2008-2012 resulted in the applicant being physically transferred to another Member State; See EASO, *Annual Report on the Situation of Asylum in the European Union 2013, 2014*, p. 30.

particular circumstances and special needs of the applicant, can be adequately examined in the context of a border procedure. As Article 4 explicitly includes the border and transit zones, in the scope of the Directive, a full examination of the individual's international protection needs must be guaranteed as soon as a person expresses a fear of being subjected to human rights violations if returned to the country of origin or another country or the wish to apply for international protection. Any decision not to give permission to enter can under no circumstances result in the return of such person before a full examination of the application for international protection has been carried out in accordance with the guarantees laid down in the recast Asylum Procedures Directive, including the right to an effective remedy.

Finally, it should be noted that **Article 4(5)** clarifies that an application for international protection made in the territory of a Member State but to the authorities of another Member State carrying out border or immigration controls there must be dealt with by the Member State in whose territory the application is made. This is in particular relevant in the context of Frontex operations during which border guards from other Member States are being deployed on the territory of the host Member State. In such case the deployed officers have an important responsibility to immediately refer the applicant for international protection to the national authority competent for the registration of the application so as to ensure that the time-limits for registration of the application laid down in **Article 6** are complied with in practice. Borders guards from other Member States deployed in the territory of another Member State must be considered as "other authorities which are likely to receive such applications" for the purpose of **Article 6(1)** as this provision does not distinguish between national or foreign authorities that are likely to receive such applications. This implies that those border guards from other EU Member States must have the relevant information and must have received the necessary level of training and instructions to inform applicants as to where and how applications for international protection may be lodged in the Member State where they carry out the border or immigration controls, notably in cases where they are not accompanied by border guards of that Member State.²⁵ This also applies to applications made to the authorities of another Member State participating in a Frontex-led operation at sea, in the territorial waters of a Member State hosting such operation.²⁶

3. Safeguards ensuring asylum seekers' access to the asylum procedure (Articles 6 -8)

Access to the procedure (Article 6)

This provision deals with Member States' obligations with regard to the registration of asylum applications made either to the authority competent under national law for the registration of asylum applications or to other authorities "likely to receive such applications, but not competent for their registration under national law".²⁷ ECRE welcomes the inclusion of clear deadlines within which the asylum application must be registered but reminds States that these are maximum deadlines and that it is in the interest of States and asylum seekers to have asylum applications registered as soon as possible after they have been made. As a general rule, States should aim to register asylum applications from the moment they are made to the competent authority as this enhances the legal certainty of the individuals concerned and confirms their status as an asylum seeker and their right to remain on the territory until a final decision has been made on their asylum application.²⁸ While more time may be needed in case of an asylum application made to an

25. See also below section 3 on access to the procedure.

26. As result of the combined reading of Article 3 recast Asylum Procedures Directive, which extends its scope to the territorial waters of the Member States and recital 10 of Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

27. See Article 6(1) recast Asylum Procedures Directive.

28. Which is confirmed in the preamble of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter 'Return Directive'), OJ 2008 L 348/98. Recital 9 of the Return Directive states explicitly that in accordance with "Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force".

authority not competent for the registration of asylum applications, efficient and swift referral mechanisms should be set up to reduce the time between the moment the application is made and the moment the application is registered as much as possible. Article 6(1) limits the role of other authorities which are likely to receive applications for international protection, such as police, border guards and personnel of detention facilities to informing applicants as to where and how their application may be lodged. They are therefore not allowed to carry out any other task that goes beyond the facilitation of the registration process, including recording information or statements of the asylum seeker relating to the substance of their request for international protection. At the same time, the provision imposes an obligation on Member States to ensure that such authorities receive the relevant information and the appropriate training to perform their task properly.

Furthermore, the provision distinguishes between “making” an application and “lodging” an application. Whereas the Directive does not provide a definition of both notions, Article 6(2) makes clear that an application can only be lodged once it has been made and therefore ‘completes’ the registration of the asylum application, but is not a necessary step for the applicant to enjoy the right to remain on the territory during the examination of the asylum application and be protected from *refoulement*. Moreover, since the Directive does not further impose any formal requirements to applicants with regard to how an asylum application must be made, any expression of the wish to obtain protection to any Member State authority must be considered as an application “being made”, whether this is done orally, in writing or in any other possible way.

It should be noted that in the case of *Hirsi Jammaa and Others v. Italy*, the European Court of Human Rights held that the obligations of States under Article 3 ECHR apply regardless of whether the person intercepted has explicitly applied for asylum. According to the Court, it was for the Italian authorities, faced with a situation in which human rights were being systematically violated, to “find out about the treatment to which the applicants would be exposed after their return” (§133) and to ascertain “how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees”.²⁹ In order to ensure full respect of the right to asylum and the principle of *non-refoulement* enshrined in Article 18 and 19 of the EU Charter of Fundamental Rights respectively, Member States should apply an inclusive and broad interpretation of when an application is “made” under the directive in order to ensure effective access to the asylum procedure and the rights deriving from it.

Furthermore, **Article 6(2)** requires Member States to ensure that a person who has made an application for international protection has an “effective opportunity to lodge it as soon as possible” and they may require that applications are lodged in person and/or at a designated place (Article 6(3)). The moment when an application is lodged is decisive to trigger certain obligations of Member States under the recast Reception Conditions Directive, such as information to applicants on their rights and obligations with regard to reception conditions,³⁰ the issuance of a document certifying the status of an asylum seeker or their right to stay on the territory,³¹ schooling and education of minors³² and access to the labour market.³³ However, material reception conditions must be made available to applicants “when they make their application for international protection”,³⁴ while the assessment of whether an applicant is a person with special reception needs must be initiated “within a reasonable period of time after the application for international protection is made”.³⁵ Moreover, the CJEU in the case of *Cimade, Gisti v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration* held that Member States’ obligations to provide material reception

29. ECtHR, *Hirsi Jammaa and Others v. Italy*, par. 157.

30. Article 5 recast Reception Conditions Directive requires Member States to inform applicants in a writing and in a language they understand or may reasonably be supposed to understand, within a reasonable time, not exceeding 15 days after they have lodged their application, of at least any established benefits and of the obligations with which they must comply relating to reception conditions.

31. Article 6 recast Reception Conditions Directive requires Member States to provide asylum seekers with such a document “within three days of the lodging of an application for international protection”, except when they are detained or in the context of a border procedure

32. According to Article 14(2) of the recast Reception Conditions Directive, access to the education system shall not be postponed for more than “three months from the date on which the application for international protection was lodged by or on behalf of the minor”.

33. According to Article 15 recast Reception Conditions Directive access to the labour market must be granted “no later than 9 months from the date when the application for international protection was lodged”.

34. Article 17(1) recast Reception Conditions Directive.

35. Article 22(1) recast Reception Conditions Directive.

conditions under the Reception Conditions Directive apply also with regards to asylum seekers awaiting a decision on which Member State will be held responsible for examining their application until the applicant is actually transferred to that Member State. Moreover, the CJEU also interpreted Article 4(1), according to which the Dublin procedure starts as soon as an application for asylum is first lodged with a Member State, must be interpreted as meaning that “an application for asylum is made before the process of determining the Member State responsible begins.”³⁶

ECRE is concerned that the possibility under **Article 6(2)** for Member States to apply Article 28 relating to the implicit withdrawal of asylum applications in case they have not been lodged as soon as possible, may in practice lead to arbitrariness if it is not further guided by strict limitations and criteria as to when and how this provision can be applied. ECRE reminds Member States that they have an obligation first and foremost under the Directive to ensure that applicants who have made an application have an effective opportunity to lodge it as soon as possible. In practice, asylum seekers are confronted with delays in the actual registration of their asylum application which create additional obstacles to access their rights under EU asylum law in some EU Member States.³⁷ Moreover, asylum seekers may also face practical obstacles to meeting administrative requirements for making or lodging the asylum application such as the need to provide an official address in order to register their application or the limited possibilities for securing an appointment with the determining authority.³⁸ In ECRE’s view, formal requirements for lodging asylum applications should be as minimal as possible and should take as little time as possible, as this will enhance the effectiveness of the opportunity provided to applicants and is in the interest of both asylum seekers and national administrations.³⁹

In this regard it should be noted that **Article 6(2)** only mentions the possibility of an implicit withdrawal where the applicant does not lodge an application *at all* and does not link it to an assessment of whether the applicant lodged the application *as soon as possible*. As a result, Article 6(2) can only be read as a provision which merely refers to the existence of Article 28 for reasons of internal consistency of the Directive, without creating any additional grounds for considering an application as implicitly withdrawn. In any case, as explained below, ECRE encourages Member States to simply discontinue the examination of the asylum application by making a note in the applicant’s file allowing for a swift reopening of the application, in case the applicant presents him or herself again to the authorities.

Member States must ensure that, where use is being made of a form to be submitted by an applicant or a national report for the purpose of lodging the application as laid down in **Article 6(4)**, applicants are provided with the necessary assistance to enable them to fill out such forms, where necessary. If not, applicants cannot be considered to have been provided with an *effective* opportunity as soon as possible and non-compliance with Article 6(4) should not be held against them. In this regard, ECRE reminds Member States that the CJEU has held that “a procedural system for exercising a right to residence permits provided for in Community law should be easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time.”⁴⁰ Moreover, the ECtHR in the case of *I.M. v. France* attached particular importance to the fact that the applicant had to comply in an accelerated procedure while being in detention with requirements under the normal procedure, such as the completion of a questionnaire in French, without having access to qualified linguistic and legal assistance,

36. CJEU, *Cimade, Gisti v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, Judgment of 27 September 2012, par. 41.

37. See for instance, AIDA, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common Asylum System. Annual Report 2012/2013* (hereinafter ‘*Not There Yet*’), September 2013, pp. 55.

38. See for instance, AIDA, *Country Report Greece*, Update August 2014, p. 18-24 and AIDA, *Mind the Gap: An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System. Annual Report 2013/2014* (hereinafter ‘*Mind the Gap*’), September 2014, pp. 47-48.

39. The right to good administration as a general principle of EU law is also applicable in instances where an applicant, who was acting in good faith, and who wishes to access the procedure but has their application withdrawn by virtue of the fact that they did not comply with the procedural rules “when this non-compliance arises from the behaviour or the administration itself”. See CJEU, Case C-428/05, *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export v. Hauptzollamt Hamburg-Jonas*, Judgment of 21 June 2007, par. 25.

40. See Court of Justice, Case C-327/02, *Panayotova v. Minister voor Vreemdelingenzaken en Integratie*, 16 November 2004, par. 27.

in finding a violation of Article 13 in conjunction with Article 3 ECHR.⁴¹

ECRE remains concerned with the possibility to extend time limits for registration of the asylum application laid down in **Article 6(1)** to 10 working days in cases of simultaneous applications for international protection by a large number of third country nationals or stateless nationals. In ECRE's view, the abovementioned deadlines of respectively 3 and 6 working days already provide sufficient flexibility for the authorities to ensure registration of asylum applications, including through electronic means. Longer periods of time between the moment of the asylum application being made and the actual registration increase the risk of asylum seekers being returned in practice before their protection needs have been examined in violation of the principle of *non-refoulement*. This is particularly the case at the border where the application of accelerated formal or informal readmission agreements may in practice lead to the return of asylum seekers before official registration of their asylum application.⁴²

In order to avoid this from happening, ECRE strongly recommends issuing a document certifying their status as an applicant for international protection as soon as they have made an application, interpreted in the way suggested by ECRE above, in all cases where registration does not coincide with making the application. Where possible, Member States should issue the document that is required under Article 6(1) recast Reception Conditions Directive or make use of the possibility to issue "other evidence equivalent to" such document "in specific cases" for that purpose. Such an approach would contribute to administrative efficiency, enhance legal certainty and reduce the delays in accessing certain rights under the recast Reception Conditions Directive.

Applications made on behalf of dependents or children (Article 7)

This provision unambiguously grants a right to each adult with legal capacity to make an application for international protection on his or her own behalf and establishes an obligation for Member States to inform dependent adults of such possibility as well as an obligation to ensure that each dependent adult consents with the lodging of an asylum application on their behalf. Although **Article 7(2)** refers to consent with regard to the "lodging of the asylum application", in ECRE's view this cannot be interpreted as meaning that the dependent adult should not be asked to consent to the application being *made* on his or her behalf. The consent of the dependent adult in the case of an application made on their behalf clearly mirrors the right of each adult with legal capacity to make an application on their own behalf. Moreover, Article 7(2) explicitly states that in case dependent adults do not consent to an application being made on their behalf, they "shall have an opportunity to make an application on their own behalf". As a result, as long as the dependent adult has legal capacity, the combined reading of **Article 7(1)** and **Article 7(2)** leads to the conclusion that under the recast Asylum Procedures Directive, no application can be made on behalf of a dependent adult without the latter's consent.

ECRE emphasises the importance of informing dependent adults accurately of their right to make an asylum application on their own behalf as this may be in their interest and may be necessary to ensure a full examination of international protection needs taking into account gender-related persecution. For instance, women may have a well-founded fear of persecution or risk serious harm independently from their husband but may be reluctant to reveal what happened to them in the presence of their husband, such as when they have become the victim of rape or have been subjected to domestic violence. Should their case simply be joined to that of their husband they may be denied international protection, whereas they may qualify for international protection under the recast Qualification Directive should their application be separately

41. See EctHR, *I.M. c. France*, Application No 9152/09, Judgment of 2 February 2012 (French only), par. 144 – 145.

42. This is explicitly acknowledged by the Commission in its recent evaluation of EU readmission agreements: "Although the safeguards under the EU *acquis* (such as access to asylum procedure and respect of *non-refoulement* principle) are by no means waived by the accelerated procedure, there is a potential for deficiencies in practice". See COM(2011) 76 final, *Communication from the Commission to the European Parliament and the Council. Evaluation of EU Readmission Agreements*, Brussels, 23 February 2011, p. 12. See also Human Rights Watch, *Buffeted in the Borderland. The Treatment of Migrants and Asylum Seekers in the Ukraine*, December 2010. pp. 21-24.

assessed. In this regard it should also be noted that the right of women asylum seekers to an independent claim to asylum and to be interviewed separately is considered by the UN Committee on the Elimination of Discrimination against Women as a key characteristic of gender-sensitive procedural safeguards in asylum procedures to ensure that they are able to present their cases on the basis of equality and non-discrimination.⁴³

Article 7(3) and (5) recast Asylum Procedures Directive still leave considerable room for manoeuvre for Member States as regards the capacity of children to make an application on their own behalf, through their parents or another adult responsible for them or through a representative. Nevertheless, ECRE reminds Member States that the best interests of the child should be a primary consideration when applying this Directive and that this must be done in compliance with the EU Charter of Fundamental Rights and the 1989 United Nations Convention on the Rights of the Child.⁴⁴ This means in particular with regard to unaccompanied children that they should be represented by an adult who is familiar with the child's background and who is competent and able to represent his or her best interests.⁴⁵

ECRE welcomes the obligation for Member States to ensure that the bodies referred to in Article 10 of the EU Return Directive⁴⁶ have the right to lodge an application for international protection on behalf of unaccompanied children as this potentially constitutes an additional tool to ensure access to the procedure and international protection for unaccompanied children. However, for it to be effective it is essential that the "appropriate bodies" in the Member States have received sufficient training in international refugee law and EU asylum law so as to ensure that the individual assessment of the personal circumstances of the unaccompanied child that precedes such decision enables those bodies to identify indications of possible international protection needs. It should therefore be mandatory for personnel of bodies referred to in Article 10 EU Return Directive to have received such training, for instance through successful completion of relevant e-learning training modules of EASO's Training Curriculum.⁴⁷ However, it is clear that such assessment can never substitute the examination of the child's need for international protection as this is the exclusive competence of the authorities mentioned in Article 4 of the recast Asylum Procedures Directive. The objective of the individual examination of the personal circumstances is therefore exclusively to assist the body assisting the unaccompanied child with his or her return, in assessing whether it is necessary to lodge an asylum application. In view of the fact that these bodies may not have specific expertise in the field of asylum, such bodies should in principle lodge such an application whenever it is explicitly requested by the unaccompanied child or whenever there is the slightest indication that they may be in need of international protection. Where this is not within their mandate, the bodies concerned should operate on the presumption that an unaccompanied child may have international protection needs and that therefore it is necessary to make an application on their behalf, where no such application has been made before.

Information and counselling in detention facilities and at border crossing points (Article 8)

Persons wishing to exercise the right to asylum at the border or in detention facilities often face difficulties to do so because of the specific circumstances they find themselves in. Therefore, the provision of accurate and timely information with regard to the possibility to apply for international protection and the modalities for making such an application is crucial to ensure "effective access to the examination procedure", as re-

43. See United Nations, Committee on the Elimination of Discrimination against Women, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, par. 50.

44. See recital 33 recast Asylum Procedures Directive.

45. UN Committee of the Rights of the Child, General Comment No 6. (2005), *Treatment of separated and unaccompanied children outside their country of origin*, par. 69. In addition, they should have access to qualified legal representation free of charge in all cases.

46. According to which appropriate bodies are bodies "other than the authorities enforcing return".

47. The EASO Training Curriculum consists of a number of interactive e-learning modules and face-to-face trainings covering various aspects of the EU asylum acquis and international protection and core aspects of the asylum procedure designed mainly for asylum case officers in EU Member States. For a general introduction to EASO's Training Curriculum, see EASO, *EASO Training Curriculum*, March 2014.

quired by the recast Asylum Procedures Directive.⁴⁸ ECRE is concerned that the wording used in **Article 8(1)** is unnecessarily complicated, is unclear and therefore fails to set a useful standard for Member States. It is hard to see how in practice border guards at border crossing-points or personnel in detention facilities should interpret “indications that third country nationals or stateless persons... may wish to make an application for international protection”. This provision leaves too much to the official’s subjective assessment of whatever ‘indications’ may be presented, itself being such a vague concept that it seems liable to create arbitrariness. As a consequence, a mere “indication” is not suitable as a benchmark to establish Member States’ obligation to provide third country nationals in such locations with information on the possibility to do so. If such a standard were to be applied on an individual basis it would most like result in discriminatory treatment of third country nationals, as an unqualified and subjective indication as to whether a person may or may not wish to apply for asylum cannot qualify as an objective justification for withholding such information from that person.

In ECRE’s view, in light of the CJEU’s jurisprudence requiring EU law provisions to be interpreted in a way which provides them with *effet utile*,⁴⁹ Article 8(1) must be read as requiring Member States to provide information detailing the possibility of making an application for international protection available to all third country nationals present in such locations. Such information must be provided pro-actively to all those apprehended at the border or held in detention facilities on an equal footing. This is the only way to give useful meaning to this provision in practice and in a non-discriminatory way.

Moreover, in order to be effective and useful, such information must be provided in a language the third country nationals concerned are able to understand. This is acknowledged to a certain extent by Article 8(1) by requiring Member States to make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure. Here again, the standard that this is only required “to the extent necessary” is reason for concern but must in any case be interpreted in light of the CJEU’s jurisprudence regarding the principle of effectiveness as a general principle of EU law.⁵⁰ Informing individuals of the possibility to make an asylum application is not an overly complicated task and does not require the use of disproportionate resources, as it can be provided by way of brochures or information leaflets or through oral communication, including audio-visual material that is freely accessible in detention facilities or border crossing points.⁵¹

ECRE welcomes the guarantee in **Article 8(2)** that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, and at external borders. NGO’s often play an indispensable role in ensuring that asylum seekers have a full understanding of their rights and how to assert them under national law and therefore often complement information provided otherwise by the authorities.

48. See recital 26 recast Asylum Procedures Directive emphasizing the crucial role of officials who come first into contact with persons seeking international protection, in particular border guards in ensuring access to the asylum procedure and the importance of training in providing persons who make an application for international protection with the relevant information as where and how to lodge such an application.

49. According to this principle, Member States are under an obligation to refrain from taking measures that would prevent, even temporarily, Union rules from having full force and effect. National Courts must therefore have the jurisdiction to set aside such national legislative provisions. See for instance ECJ, Case C -213/89, *Factortame and others*, Judgment of 19 June 1990, par. 20 and ECJ, C-118/00, *Gervais Larys and Institut national d’assurances sociales pour travailleurs indépendants (Inasti)*, Judgment of 28 June 2001, par. 50-53.

50. The principle of effectiveness requires that national rules and procedures should not render the exercise of EU rights impossible in practice. See e.g. CJEU, *Safalero Srl. V. Prefetto di Genova*, Judgment of 11 September 2003, par. 49. In this regard, not providing interpretation in detention facilities or border crossing points may undermine a person’s access to the asylum procedure and therefore the effectiveness of the right to asylum under Article 18 EU Charter of Fundamental Rights and the prohibition of the principle of non-refoulement under Article 19 EU Charter of Fundamental Rights.

51. Such obligation must also be observed in the context of joint border operations coordinated by Frontex, which include screening (establishing nationality and identity on a mandatory basis) and debriefing (gathering information on travel routes, use of smuggling networks etc. on a voluntary basis) interviews conducted at the border.

4. Right to remain in the Member State pending the examination (Article 9)

The right to remain on the territory until a final decision on the asylum application has been taken is essential in order to ensure that the principle of *non-refoulement*, which is at the core of the international protection regime, is respected in practice. In accordance with the jurisprudence of the ECtHR and the CJEU and Article 47 of the EU Charter of Fundamental Rights, this includes the right to remain during the examination of an appeal against a negative first instance decision. As discussed below, ECRE welcomes the strengthened safeguards in Article 46 of the recast Asylum Procedures Directive with respect to the suspensive effect of appeals against negative asylum decisions taken at the first instance. The combined reading of Article 9 and 46 of the recast Asylum Procedures Directive now, in principle, establishes an obligation for Member States to ensure a right to remain until a final decision has been taken at the appeal stage. However, this will require Member States to opt for a system ensuring automatic suspensive effect of appeals as suggested by ECRE.⁵²

Nevertheless, **Article 9(2)** still allows Member States to make an exception to the right to remain during the procedure at first instance where a person makes a subsequent application or where they will “surrender or extradite a person either to another Member State pursuant to obligations in accordance with the European arrest warrant or otherwise, or to a third country or to international courts or tribunals.”

ECRE reminds states that Article 9(2) is optional and therefore urges Member States not to make use of such possibility where it would result in asylum seekers being denied access to a full examination of their protection needs before being expelled from the territory or extradited to another State. As regards subsequent asylum applications, in particular refusing the right to remain in the case of a first subsequent asylum application risks undermining the principle of *non-refoulement*. In recent years the percentage of subsequent asylum applications in the EU has reached as much as 13% of all asylum applications in 2012,⁵³ whereas the proportion of new applicants, persons who had never been registered before in the asylum systems of the reporting Member States, was about 90% in 2013, suggesting that 10% were subsequent applicants.⁵⁴ In many cases such applications have been lodged by asylum seekers from countries for which recognition rates are usually high, such as Afghanistan, Somalia and Syria.⁵⁵ Therefore, the submission of subsequent asylum applications should be carefully examined to ensure that possible new elements are identified and fully taken into account. This necessarily implies a right for the applicants concerned to remain on the territory until a decision has been taken as to whether the subsequent application will be further examined in accordance with Article 40(3) and 41(1) recast Asylum Procedures Directive. ECRE reminds Member States that an exception of the right to remain in the case of a first subsequent application which is not further examined is limited under Article 41(1) (a) to where such application is lodged “merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State”. As is argued below, assessing whether such application is merely made to frustrate the enforcement of a removal decision is open to wide interpretation and may lead to arbitrariness. It is hard to see on the basis of what criteria such assessment will be made other than the submission of new elements and the situation in the country of return, which need to be examined anyway under Article 40 recast Asylum Procedures Directive. Moreover, where this is combined with the possibility of derogating from the obligation to provide for an effective remedy with suspensive effect under Article 41(2) (c) this would result in a system which would not provide sufficient guarantees to uphold the principle of *non-refoulement* in practice.

The possible exception to the right to remain in the case of an extradition of an asylum seeker to a third country raises similar concerns as there are no express safeguards to ensure that the relevant prosecution or extradition procedures are in line with international refugee or human rights law. In this respect, ECRE reminds States that diplomatic assurances are usually insufficient to disengage the State’s responsibility under Article 3 ECHR. In this manner the ECtHR has stated on various occasions that assurances are

⁵². See extensive discussion of Article 46 recast Asylum Procedures Directive below.

⁵³. See EASO, Annual Report on the Situation of Asylum in the European Union 2012, p. 18.

⁵⁴. See EASO, Annual Report on the Situation of Asylum in the European Union 2013, p. 13.

⁵⁵. See AIDA, *Not There Yet*, p. 12.

not in themselves sufficient to ensure adequate protection against the risk of ill-treatment.⁵⁶ It is only under the most stringent conditions that diplomatic assurances have been accepted under Article 3 ECHR. These conditions require *inter alia* a strict individualised assessment of the general context of the relations between the two countries concerned, the profile of the person whose return is contemplated, the level of guarantees provided and the willingness of the receiving State to cooperate with international monitoring mechanisms.⁵⁷ If Member States make use of such possibility, they must in any case be satisfied that the extradition decision will not result in direct or indirect *refoulement* in violation of their international and Union obligations.

Finally, ECRE reminds States that the Court has consistently confirmed the absolute nature of the principle of *non-refoulement* as laid down in Article 3 ECHR and that it has considered arguments based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community of the expelling or extraditing State if not sent back as misconceived.⁵⁸ This also implies that no higher standard of proof with regard to a possible violation of Article 3 ECHR may be required, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

5. Requirements for the examination of applications and first instance decisions (Articles 10 -11)

Requirements for the examination of applications (Article 10)

ECRE welcomes the explicit recognition in **Article 10(2)** of the primacy of eligibility for refugee status over subsidiary protection as it requires Member States to determine first whether applicants qualify as refugees and only if not, proceed to the examination of whether they are eligible for subsidiary protection. This is in line with the definition of “person eligible for subsidiary protection” in the recast Qualification Directive.⁵⁹ Such a principle also further supports the single procedure as the most logical and efficient system to determine the status of applicants for international protection under the EU asylum *acquis*. All EU Member States, except Ireland, now consider applications for refugee status and subsidiary protection status in a single procedure. In ECRE’s view, this benefits both asylum seekers and Member States as it avoids the use of cumbersome consecutive procedures. In a case concerning Ireland the CJEU confirmed that “the minimum requirements for granting subsidiary protection must serve to complement and add to the protection of refugees enshrined in the Geneva Convention” but also that it is for the competent authorities to determine the status that is most appropriate to the applicant’s situation.⁶⁰ Moreover, although the CJEU held that Article 41 of the EU Charter of Fundamental Rights does not preclude the establishment of two separate procedures, it acknowledged that such a system “risks extending the duration of the procedure and, accordingly, delaying the determination of the application for subsidiary protection”. The right to good administration as well as the principle of effectiveness requires that the entire procedure for considering an application for international protection does not exceed a reasonable period of time.⁶¹ In ECRE’s view, a single procedure constitutes a better guarantee that a person’s international protection needs under the (recast) Qualification Directive are determined within a reasonable time and assist in reducing the adminis-

56. See ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, Judgment of 17 January 2012, par. 187.

57. *Idem*, par. 189.

58. See ECtHR, *Saadi v. Italy*, Application no. 37201/06, Judgment of 28 February 2008, par. 139 and ECtHR, *Trabelsi v. Belgium*, Application no. 140/10, Judgment of 4 September 2014, par. 118

59. “‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but...”, see Article 2(f) recast Qualification Directive.

60. “given that a person seeking international protection is not necessarily in a position to ascertain the kind of protection applicable to their application and that refugee status offers greater protection than that conferred by subsidiary protection, it is, in principle, for the competent authorities to determine the status that is most appropriate to the applicant’s situation”. See CJEU, Case C- 604/12, *H.N. v; Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 8 May 2014, par. 34.

61. *Idem*, par. 56.

trative burden on asylum authorities.

According to **Article 10(3)(d)** personnel examining applications and taking decisions must have the possibility to seek expert advice on medical, cultural, religious, child-related or gender issues, where necessary. ECRE encourages determining authorities to facilitate the regular exchange of information between their staff and non-governmental experts on these issues as this is an important tool not only to improve the quality of first instance decision-making but also the early identification of applicants with special procedural needs, which is one of the key objectives of the second phase of harmonisation. This could also take the form of a structural dialogue between determining authorities and external experts and the involvement of such experts in initial and follow-up training, including in the framework of EASO trainings.

Member States are now under an obligation to provide for rules concerning the translation of documents that are relevant for the examination of applications,⁶² whereas this was only an optional provision in the 2005 Asylum Procedures Directive. While ECRE welcomes the establishment of clear rules governing the use of documents in another language than the language of the procedure, such rules should never preclude the submission of any documents supporting the applicant's asylum application without translation. Where national legislation requires an official translation, this should either be provided by the authorities or be paid for out of public funds.

Requirements for a decision by the determining authority (Article 11)

The obligation of the administration to give reasons for its decisions is explicitly referred to in Article 41 of the Charter of Fundamental Rights of the EU. Although the CJEU held in the case of *YS* that Article 41 of the Charter is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union it also explicitly stated that the right to good administration, enshrined in that provision, reflects a general principle of EU law.⁶³ Moreover, the CJEU consistently held that "the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand why this application is being rejected is a corollary of the principle of respect for the rights of the defence", which is a general principle of EU law.⁶⁴

The observance of the obligation for the administration to state reasons is also essential to ensure that every person is able to understand the reasons for such rejection and take an informed decision with respect to a possible appeal. In the context of an asylum procedure, it is paramount that the applicant fully understands the grounds on the basis of which the application for international protection was rejected in order to enable them to assess whether or not to lodge an appeal against such a decision. The obligation in Article 11(2) to state the reasons in fact and in law in case of a negative decision and information on how to challenge it, serves no purpose if the applicant is unable to understand it. Therefore, Member States must adopt a broad interpretation of their obligation to inform applicants of the result of the decision by the determining authority and the possibilities for challenging it under Article 12(1)(f) as discussed below.

6. Guarantees for applicants (Article 12)

Article 12 lays down the basic procedural guarantees Member States need to observe in the asylum procedure, regardless of the type of procedure that is being used and reaffirms, for the most part, Member States' obligations under the 2005 Asylum Procedures Directive.

Article 12(1) (a) and (f) obliges Member States to provide the required information to asylum seekers in a language they understand or are reasonably supposed to understand. The latter sets a very low and impracticable standard which may undermine the effectiveness of the guarantee. It may also be questionable

⁶². See Article 10(5) recast Asylum Procedures Directive.

⁶³. See CJEU, Joined Cases C-141/12 and 372/12, *YS v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. M, S*, Judgment of 17 July 2014, par. 68.

⁶⁴. See CJEU, Case C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, Judgment of 5 November 2014, par. 48. The right to be heard is inherent in respect for the rights of the defence. See CJEU, Case C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, Judgment of 11 December 2014, par. 30.

under the right to good administration, as a general principle of EU law.

ECRE calls on Member States to provide such information in a language they understand rather than using the vague standard of a “language they are reasonably supposed to understand” and to provide such information in all cases and not only where the asylum seeker is not represented or assisted by a legal adviser or other counsellor. Providing such information “in a language which they are reasonably supposed to understand” may lead to arbitrariness as the Directive does not include clear standards as to how this notion should be interpreted in practice. As **Article 12 (1) (f)** does not include an obligation to provide a written translation of the reasons of the decision, the communication of such information can be done orally through the services of interpreters which need to be provided during the interview. A proper understanding of why the application was refused and how it can be challenged is an essential feature of a fair and efficient asylum procedure. Therefore States should not apply a standard which is unclear and could result in asylum seekers being inaccurately informed not only about the reasons of the negative decision but also the ways and time limits to challenge it, as this can undermine the right to an effective remedy in practice.⁶⁵

Information on the procedure, asylum seekers’ rights and obligations and possible consequences of not cooperating with the authorities should be provided at the earliest possible stage and should preferably be repeated at each next step in the procedure. Here too, it is important for Member States to provide such information in a language the asylum seeker understands in order to ensure that the asylum seeker is fully aware of the importance of each procedural step and the need to fully cooperate with the authorities in establishing his or her protection needs. Information in a language asylum seekers understand also means that such information, while being accurate, must be provided in an easy to understand, non-technical manner. Good practice exists in a number of Member States where, in cooperation with NGOs assisting asylum seekers on a daily basis, information leaflets have been developed that are adapted to asylum seekers’ needs.⁶⁶

ECRE in particular welcomes new **Article 12(1)(d)** according to which asylum seekers must be given access to Country of Origin Information (COI) and information that was provided by experts on specific issues that was taken into consideration by the determining authority when making the individual decision. This is an important procedural safeguard that, if properly applied, will contribute to equality of arms within the asylum procedure, including with regards to the appeals procedure as applicants and their lawyers will dispose of the same information as the asylum authorities allowing for a better informed debate in front of an appeal body. However, the recast Asylum Procedures Directive does not prevent Member States ensuring such access at an earlier stage in the decision-making process. ECRE recommends the latter approach as this would serve the purpose of better informed first instance decision-making and the frontloading of the procedure. Such an approach is also supported by the right to good administration, enshrined in Article 41 EU Charter of Fundamental Rights, which reflects a general principle of EU law⁶⁷ and which includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken and the right to have access to his or her file, subject to confidentiality rules.⁶⁸ As the information referred to in Article 10(3) recast Asylum Procedures Directive is a substantial element on which the decision on the asylum application is based, access to such information should be provided at a useful time before the first instance decision is taken. Preferably this should be combined with the requirement to provide applicants with an opportunity to provide comments and clarifications to the interview report under Article 17(3) recast Asylum Procedures Directive as this would allow the applicant to react to COI or information provided by experts that the determining authority is taking into consideration when preparing the first instance decision. The CJEU has affirmed “the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure

⁶⁵. On the importance of written and oral translation of the first instance decision and instructions on how to appeal, see Fundamental Rights Agency, *Access to effective remedies: The asylum-seeker perspective*. Thematic Report, September 2010, pp. 12-17.

⁶⁶. For an example of good practice, see AIDA, *Country Report The Netherlands*, Update March 2014, p. 25.

⁶⁷. CJEU, Case C – 604/12, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 8 May 2014, par. 49.

⁶⁸. CJEU, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, par. 36 and *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, par. 46.

adversely affecting a person”⁶⁹ and that this “requires authorities to pay due attention to the observations thus submitted by the person concerned”.⁷⁰

7. The right to a personal interview and safeguards surrounding a personal interview (Articles 14 – 18)

Personal interview (Article 14)

The recast Asylum Procedures Directive now finally consolidates in Article 14 the principle that before a first instance decision is taken, the asylum seeker must be given the opportunity for a personal interview, with a person who is competent to conduct such an interview. Member States will no longer be able to omit a personal interview except where they can take a positive decision on refugee status without an interview or where the determining authority is of the opinion that the applicant is unfit or unable to be interviewed. In the latter case, according to **Article 14(2) (b)**, the determining authority must consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature.

Given the critical importance of the personal interview in the asylum procedure, the determining authority should in any case seek the expert advice of a professional as soon as it is established that the person is unfit or unable to be interviewed. The wording of the second sentence of Article 14(2)(b) limits the obligation to consult a medical professional to the assessment of the temporary or enduring nature of the condition of the applicant. However, conducting a personal interview may have important consequences for the individual’s well-being. For instance, in the case of traumatised asylum seekers a personal interview may provoke re-traumatisation in certain cases if this is conducted without the necessary guarantees.⁷¹ Therefore, in ECRE’s view, the decision whether a person is fit or able to be interviewed should also involve consultation of a medical professional in particular when the application is based on allegations of past torture or other forms of serious violence or where there are indications of the applicant having been subjected to torture or serious violence.

Where the provision is exclusively applied in relation to the assessment of whether the applicant’s condition is of a temporary or enduring nature, the medical professional’s opinion will, by definition, be required and not only when the determining authority is in “doubt”, as this can only concern a person’s medical condition, which is in any case outside the latter’s area of expertise. Therefore, in such cases, Article 14(2) (b) should be interpreted and applied as requiring in principle the consultation of a medical professional with regard to the assessment of the temporary or enduring nature of the applicant’s condition making him or her unable or unfit to be interviewed.

The obligation to organize, as a general rule, a personal interview is now not only required in the context of the examination of the substance of the asylum application. **Article 34(1)** also obliges Member States to conduct a personal interview on the admissibility of the application. ECRE welcomes this provision as it is an important safeguard, where States choose to apply admissibility procedures, to allow applicants to effectively present their views with regard to the application of the inadmissibility grounds laid down in Article 33 in their particular circumstances before a decision is taken on the admissibility of the application. However, ECRE is concerned that the possibility not to provide for a personal interview in the case of a subsequent asylum application⁷² would deprive asylum seekers of an important procedural tool to present new elements as those may not necessarily take the form of written evidence. As discussed below, ECRE recommends restricting the possibility of omitting a personal interview in cases of a first subsequent ap-

69. CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 22 November 2012, par. 85.

70. *Idem*, at par. 88.

71. See on the risk of re-traumatisation in the context of accelerated procedures, IRCT, *Recognising Victims of Torture in National Asylum Procedures. A comparative overview of early identification of victims and their access to medico-legal reports in asylum-receiving countries*, 2013, p. 67.

72. See Article 34(1) recast Asylum Procedures Directive.

plication to where it is possible to consider such application admissible on the basis of written material or where the applicant is unable or unfit to be interviewed.⁷³

The possibility under **Article 14(1)** to involve temporarily personnel other than the determining authority in conducting interviews on the “substance of each application” should only be used as a measure of last resort in ECRE’s view. Using non-expert staff for conducting personal interviews, which are at the heart of the asylum procedure, carries the risk of undermining the quality of the interview which inevitably has repercussions on the quality of decision-making and the next steps in the process. The precondition of such personnel having received relevant training in advance on refugee and human rights law, interview techniques and vulnerable asylum seekers should therefore be strictly complied with. In ECRE’s view, this would also require, as a minimum, that such training includes simulation exercises for such personnel, who will by definition lack any practical experience with conducting personal interviews in the context of an asylum procedure. Moreover, if States want to make use of such possibility, the necessary guarantees should be in place to ensure supervision by a staff member of the determining authority. However, in ECRE’s view, Member States should in principle aim to avoid the use of such methods by providing determining authorities with sufficient resources and properly trained personnel to anticipate and manage sudden increases in the number of asylum applications.

Requirements for a personal interview (Article 15)

ECRE welcomes the strengthening of Member States’ obligations to conduct personal interviews in a way which fully respects and takes into account an applicant’s gender, sexual orientation, gender identity or vulnerability and in a child-appropriate manner as laid down in Article **15(3)(a)** and **(e)**. In the case of *A, B, C* the CJEU established important restrictions on asylum authorities with regard to the methods used to assess the credibility of asylum seekers whose application is based on fear of persecution on grounds of sexual orientation. First, it emphasised that “Article 13(3)(a) of the Directive 2005/85 requires those authorities to conduct the interview in a manner that takes account of the personal and general circumstances surrounding the application”.⁷⁴ Furthermore, the CJEU stressed that the assessment of claims based on sexual orientations must be carried out with full respect of the right to human dignity and the right to respect for private and family life as affirmed in Article 1 and 7 of the EU Charter of Fundamental Rights. According to the CJEU this means that, although national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of the asylum seeker, questions concerning the details of the sexual practices of the applicant are not allowed as this would infringe Article 7 of the EU Charter. Moreover, the submission of applicants to ‘possible tests’ in order to demonstrate their homosexuality or even the production by applicants of evidence of their intimate acts, was clearly rejected by CJEU as such evidence does not necessarily have probative value and it would “of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter”. Finally, the CJEU also pointed to the sensitive nature of questions related to a person’s sexuality and the reticence applicants may have in revealing intimate aspects of their life. Therefore, EU asylum law does not allow to conclude that the declared sexuality of an applicant lacks credibility simply because they did not declare their homosexuality at the outset.⁷⁵

Moreover, **Article 15 (3) (b)** and **(c)** now includes an obligation in principle to provide for an interviewer and interpreter of the same sex at the request of the applicant. If applied consistently by Member States this will contribute significantly to the development of gender sensitive procedures that create the necessary conditions for applicants to fully trust the process and share often very delicate and sensitive information about their personal experiences.

The requirement of same sex interviewers and interpreters does not apply where the determining authority “has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her applications in a comprehensive manner”.⁷⁶ ECRE

⁷³. For further discussion, see section 15 on subsequent applications below.

⁷⁴. CJEU, Joined Cases C-148/13 to C-150/13, *A, B, C, v. Staatssecretaris van Veiligheid en Justitie*, Judgment of 2 December 2014, par. 61.

⁷⁵. *Idem*, par. 69 and 70.

⁷⁶. See Article 15 (3) (b) and (c) recast Asylum Procedures Directive.

understands this as being limited to those situations where an applicant would in principle oppose being interviewed or assisted by a person of the opposite sex and this would be exclusively driven by reasons that would amount to discrimination based on sex. ECRE agrees that the latter does not constitute a legitimate reason for a person to refuse an interview or interpretation of the opposite sex, but believes that a strict interpretation is required. There may be situations where the reason for the applicant's request may be difficult to determine or where it is related to the person's religion and therefore be indirectly linked to the persecution grounds the applicant is invoking.⁷⁷ In such instances Member States should respond positively to the applicant's request where this is possible in terms of availability of same sex interpreters and interviewers. In order to ensure a consistent and accurate approach across the EU, further guidance may be required by the Commission or through EASO following evaluation of its practical application by Member States.

Being able to communicate during the personal interview in a language applicants actually understand is paramount to enable them to effectively present the grounds for their application in a comprehensive manner as required by **Article 15(3)**. This not only is an important guarantee to ensure that applicants can fully and clearly express themselves during the interview, it obviously also is less time-consuming and avoids possible delays during the interview resulting from communicating in another language than the one the applicant is most comfortable with. ECRE therefore welcomes the requirement in Article 15(3) (c) that the communication through the interpreter should in principle take place in the language preferred by the applicant but is concerned that this is further qualified by providing that this is only "unless there is another language which he or she understands and in which he or she is able to communicate clearly". In the interest of establishing fair and effective asylum procedures, Member States should only make use of such possibility where it is impossible to provide for adequate interpretation in the language preferred by the applicant. As highlighted by UNHCR, there is a fundamental difference between the ability to make oneself understood in a language and the ability to present often complex factual information in the framework of an often complex procedure that may have important repercussions for the individual.⁷⁸ In this regard ECRE reminds Member States that the establishment of an interpreter's pool within EASO and the practical cooperation between EU Member States through Asylum Support Teams coordinated by EASO have increased the possibilities for addressing possible shortages they face with regard to interpretation in specific languages.

Moreover, it should be noted that access to interpretation services has been acknowledged by the European Court of Human Rights as an essential procedural safeguard in the context of an asylum procedure and absence of such services may lead to a violation of the right to an effective remedy as guaranteed under Article 13 ECHR.⁷⁹

Therefore, in ECRE's view, where Member States choose to make use of Article 15(3) (b), the necessary guarantees should be in place to ensure that the determining authority duly takes into account the fact that the personal interview was not conducted in the language preferred by the applicant, when assessing the credibility and accuracy of the applicant's statements during the personal interview and that this is explicitly mentioned in the decision taken on the asylum application.

Report and recording of personal interviews (Article 17)

Article 17 of the recast Asylum Procedures Directive establishes three important principles that are essential to ensure the quality of decision-making at first instance and are central in a policy based on frontloading: (1) accurate recording of the applicant's statements during the personal interview; (2) the opportunity for applicants to correct mistakes or misrepresentations of what was said during the interview or to clarify misunderstandings before a first instance decision is taken and (3) the right of applicants, their advisers and counsellors to have access to the report, transcript or recording of the personal interview before a first

⁷⁷. See in this context UNHCR's guidelines on religion-based refugee claims emphasising that "[I]n assessing religion-based claims, decision-makers need to appreciate the frequent interplay between religion and gender, race, ethnicity, cultural norms, identity, way of life and other factors". See UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, p. 10.

⁷⁸. UNHCR, *Improving Asylum Procedures. Comparative Analysis and Recommendations for Law and Practice. Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p.126.

⁷⁹. See ECHR, *I.M. v France*, par. 145, *Hirsi Jammaa and Others v. Italy*, par. 202 and *M.S.S. v. Belgium and Greece*, par. 301.

instance decision is taken.

First, as regards the obligation to properly record the applicant's statements during the personal interview, **Article 17 (1)** leaves Member States with the options of either a thorough and factual report containing all substantive elements or a transcript.

ECRE believes that adequate and accurate documentation of asylum seekers' statements during the interview is crucial for the conduct of a fair and efficient asylum procedure. It provides the very basis for the assessment of the protection needs of the asylum applicant, and therefore it is in the interest of both the applicant and the determining authority and appeal bodies to have a detailed and correct transcription of the content of the interview. ECRE's preferred option is therefore a verbatim transcript of every personal interview combined with audio-recording with the informed consent of the asylum seeker. The latter should be mandatory where free legal assistance and representation during the first instance is not available in practice.⁸⁰ ECRE notes that some Member States already have experience with audio-taping of interviews as a back-up to the transcript of the interview.⁸¹ The combination of both tools precludes any discussion or debate about what has been said during the interview and is beneficial for both the applicant and determining authority. This allows the determining authority to make a first instance decision based on a correct and full understanding of the applicant's statement.

Second, under **Article 17(3)** Member States are now under a clear obligation to allow the applicant to make comments and provide clarifications as regards the report or transcript before the determining authority takes a decision. ECRE considers this a key provision that, if properly applied in practice, will contribute to better quality of first instance decisions as it will provide the applicant and the determining authority with an opportunity to rectify any misconceptions and to provide any additional information necessary to ensure that the first instance decision is taken on the basis of correct and comprehensive information as regards to the applicant's asylum application. Applicants must be given an effective opportunity to provide comments or clarifications on the report or transcript. In ECRE's view this will in principle imply that applicants are provided with sufficient time after the personal interview to exercise their right, without excessively prolonging the asylum procedure. This is also required under the jurisprudence of the CJEU relating to the right to be heard which requires that the person concerned is given a reasonable time to effectively present his views.⁸² The possibility under Article 17(3) to provide such a possibility at the end of the personal interview is difficult to reconcile in practice with the principle of effectiveness and the right to be heard as interpreted by the CJEU. ECRE recommends in any case not to make use of this possibility in case the personal interview was a lengthy one or where the applicant is a person with special procedural needs and for whom the personal interview may have been particularly stressful.

Third, applicants and their legal advisors must in principle be given access to the report, transcript and where applicable, the recording of the personal interview before a decision is taken by the determining authority. Access to one's file is an inherent part of the right to good administration which reflects a general principle of EU law.⁸³ ECRE considers this to be another crucial guarantee in the Directive which will contribute to increased transparency and fairness within the asylum procedure.

⁸⁰. This is, for instance, the case in the UK. In the *Dirshe* case, the Court of Appeal decided that "[t]here is, therefore, real procedural unfairness as a result if a tape recording is not permitted when no representative or interpreter is present on behalf of the applicant. A tape recording provides the only sensible method of redressing the imbalance which results from the respondent being able to rely on a document created for him without an adequate opportunity for the applicant to refute it. *Dirshe, R (on the application of) v. Secretary of State for the Home Department* [2005] EWCA Civ 421 (20 April 2005).

⁸¹. For instance, Finland and Germany as well as the Netherlands (unaccompanied minors only) and Spain and the UK (in Early Legal Advice Pilot cases). See UNHCR, *Asylum Procedures Study - Section 5: Requirements for a personal interview*, p. 81.

⁸². See for instance CJEU, C-462/98 P", *Mediocurso v. Commission*, Judgment of 21 December 2000, par. 38. "However, no reasonable period was granted to it between the time at which it was able to examine the reports and the time at which it had to express its view. Indeed, it was on the very day that the reports were disclosed to it, during a meeting, that the appellant was called on to comment on the reports if it wished to do so. It must be held that, in such circumstances, the appellant did not on that occasion have an opportunity effectively to put forward its views on those documents.

⁸³. CJEU, Case C-604/12, H.N., par. 49.

However, the recast Asylum Procedures Directive allows for important derogations to the Member States' obligations to provide an opportunity for the applicant to comment on the report of the personal interview and provide access to the report or the recording before a first instance decision is taken. If Member States opt to provide for both a transcript and a recording of the personal interview, **Article 17(5)** does not require them to allow the asylum seeker and his or her legal advisor access to the recording in the procedures at first instance as long as such access is guaranteed in the appeals procedures. Moreover, in such a case it is not necessary for Member States to allow applicants to make comments on and/or provide clarification of the transcript.

In ECRE's view the provision of a transcript and an audio-recording does not of itself justify that the person should not be given an opportunity to provide comments and clarifications as to what is included in the transcript and the recording. This is in particular the case where such comments aim to provide additional information to what the applicant stated during the interview. Not providing the applicant with such an opportunity in these cases would undermine the applicant's right to be heard which, according to the jurisprudence of the CJEU has a very broad scope in the EU legal order and "guarantees every person to make known his views *effectively* during an administrative procedure and before the adoption of any decision liable to affect his interests adversely".⁸⁴

The possibility under **Article 17(5)** to grant access to the report or transcript and recording at the same time as the decision is made when the asylum application is being accelerated risks rendering one of the key guarantees laid down in Article 17 meaningless in practice. Although it is stated that this is without prejudice to Article 17(3), it will, in practice, result in denying the right to verify and provide additional comments before the decision is taken at first instance. As a consequence, it deprives both the authorities and the asylum seeker of an opportunity to verify whether the intended decision is based on a correct understanding of the applicant's statements and before the decision is taken. Because of the short time frames that apply, there is potentially an enhanced risk of a report of a personal interview not being entirely correct or complete in such procedures. Moreover, this is also arguable infringing the right to be heard and the right of access to the file as interpreted by the CJEU.⁸⁵ Moreover, it may also undermine the effectiveness of the appeal in case short time limits for lodging the appeal apply as the applicant will have had less time to verify the information included in the report, transcript or recording. As this is an optional provision, ECRE recommends to not make use of the possibility laid down in **Article 17(5)** last sentence but to give the applicant, also in the context of accelerated procedures, an opportunity to make further comments and provide clarifications, including when both a transcript and a recording is made of the personal interview as suggested above. Given the short time frames that may apply in accelerated procedures, such an approach would not only contribute to the frontloading of the asylum procedure in practice but also to a more efficient exercise of the right to an effective remedy.⁸⁶

ECRE questions the added value in the use of "audio-visual" recording of the personal interview in addition to a written verbatim report combined with the possibility of audio-taping with the informed consent of the applicant for international protection. It may be intimidating for applicants for international protection, in particular those who have been subjected to torture or other traumatising experiences such as rape, to speak about past persecution or their fear for persecution or serious harm in front of a camera.⁸⁷ Moreover, there is little practical experience with video-recording of asylum interviews, while in-depth research on the impact of such techniques is scarce. Therefore, ECRE recommends not to make use of visual recording of personal interviews and where it is used, to only allow it where the applicant gives his or her informed consent and not to use video recording for the purpose of assessing the credibility of the applicant's statements.

84. Italics added. CJEU, Case C- 277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 22 November 2013, par. 87.

85. See M. Reneman, "The right to a personal interview", in ECRE and Dutch Council for Refugees, *The Application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, p. 79-81

86. In the case of *I.M. v. France* the ECtHR found it problematic that the accelerated procedure did not allow the applicant to provide further clarifications to his statements that eventually proved to be essential for the recognition of his refugee status. See ECtHR, *I.M. v. France*, par. 147.

87. Video-recording potentially places an undue emphasis on the way an asylum seeker presents visually. This risks, at minimum, cultural misunderstandings, particularly in assessing credibility. See on this issue UKBA, *Considering the protection (asylum) claim and assessing credibility*, p. 15 available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/asylum-assessing.credibility.pdf?view=Binary>.

Medical examination (Article 18)

Where asylum seekers invoke being subjected to torture or other forms of serious physical or psychological violence to substantiate their asylum applications, medical examinations may play a decisive role in corroborating their statements. Article 18 concerns medical examinations concerning signs indicating past persecution or serious harm and within the context of an assessment of the substance of the asylum application in accordance with Article 4 recast Qualification Directive. ECRE welcomes the requirement that where such medical examinations are used, they must be carried out by qualified medical professionals. Because of the decisive role a medical examination can play in the assessment of a person's international protection needs, it is important that an expert opinion is provided to the determining authority. In ECRE's view, this necessarily implies that medical professionals are able to conduct such examinations independently and cannot be under any instruction of the determining authority calling for such a medical examination, including where they are designated by the State as is allowed under **Article 18(1) second paragraph**.⁸⁸

Furthermore, while **Article 18(1)** seems to leave an amount of discretion to the determining authority as to when a medical examination is "deemed relevant" for the assessment of the application for international protection, this should not be used to the extent that it undermines the effectiveness of the guarantee laid down in Article 18. The jurisprudence of the ECtHR implies at a minimum that the obligation to dispel any doubts about the cause of signs of persecution in principle rests with the determining authority, where the applicant has submitted initial evidence as to the origin of such signs.⁸⁹ However, it must be noted that Article 18 does not make the arrangement of a medical examination dependent on the submission of an initial medical report or material evidence of past persecution. As soon as it is deemed relevant for its examination, the determining authority is under an obligation to arrange for such examination by a qualified medical professional. While this will necessarily have to be assessed on a case-by-case basis, ECRE reminds Member States that useful tools have been developed by expert NGOs assisting States in the identification of asylum seekers with special reception needs or who are in need of special procedural guarantees. One such tool is the questionnaire developed through the Protect-Able project aiming to help authorities who come first into contact with asylum seekers to do a first screening of potential "psychological" vulnerability.⁹⁰ This could also be used by the determining authority as a first indication to assess whether a medical examination is relevant for the purpose of the examination of the asylum application.

Once a medical examination has been carried out and the results have been communicated, this will have to be taken into account by the determining authority when taking a decision on the application for international protection, regardless of whether a medical report was submitted at the request of the authority or at the initiative of the applicant.⁹¹ In accordance with Article 11(2) of the recast Asylum Procedures Directive, the reasons for not taking into account the medical examination will have to be clearly stated in the decision rejecting the application.⁹²

⁸⁸. In the case of Pfizer, the Court of First Instance established the criteria of excellence, independence and transparency with regard to scientific advice with regard to consumer health: "Thus, in order to fulfil its function, scientific advice on matters relating to consumer health must, in the interests of consumers and industry, be based on the principles of excellence, independence and transparency..."; See the CFI, Case T-13/99, *Pfizer Animal Health Sa and Others v Council*, judgment of 11 September 2002, par. 158-159.

⁸⁹. In such circumstances "it was for the Migration Board to dispel any doubts that might have persisted as to the cause of such scarring" and the "Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a *prima facie* case as to their origin". See ECtHR, *R.C. v. Sweden*, Application No. 41827/07, Judgment of 9 March 2010, par. 53.

⁹⁰. The Protect-Able project is coordinated by Parcours d'Exile and involves NGOs in 9 countries. For more information and tools developed by this project see <http://protect-able.eu/presentation/>.

⁹¹. According to Article 18(2) applicants for international protection must have the opportunity to arrange for a medical examination concerning signs that might indicate past persecution or serious harm at their own cost and must be informed of such possibility.

⁹². In the case of *R.J. v. France* the ECtHR found that the French authorities had failed to rebut the strong presumption of ill-treatment raised by the medical certificate about past torture submitted by the applicant. The mere statement by the French Court of Appeal that the certificate does not explain the link between the result of the medical examination and the allegations of torture by the applicant, is not sufficient. See ECtHR, *R.J. v. France*, Application no. 10466/11, Judgment of 19 September 2013, par. 41-42.

Asylum seekers may have been subjected to torture or ill-treatment in their country of origin but also during their journey they may have been victims of abuse, sexual exploitation and other forms of ill-treatment. In both cases the person's ability to be interviewed may be seriously affected, which will have to be taken into account by the determining authority in accordance with Article 24 of the recast Asylum Procedures Directive.⁹³

Article 18 remains silent as regards the standards and format of the medical examination on signs of past persecution. However, recital 31 explicitly refers to the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the so-called Istanbul Protocol as a basis for national measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence. Medico-legal reports, developed on the basis of the Istanbul Protocol, are being used in a number of EU Member States and have been generally acknowledged as helpful tools in the assessment of signs of past persecution in the context of the asylum procedure.⁹⁴ Whereas this is not strictly required under Article 18 of the recast Asylum Procedures Directive, ECRE strongly recommends Member States to provide for a legal basis in national legislation allowing for the use of medico-legal reports as this enhances the fairness, quality and efficiency of the decision-making in such cases.

8. Access to legal assistance and representation (Articles 19-23)

Quality legal assistance and representation throughout the asylum procedure is an essential safeguard to ensure fairness and efficiency. Due to the growing complexity of asylum procedures, professional and independent legal advice and assistance during the procedure has become in many countries indispensable for asylum seekers in order to assert their rights under the EU asylum *acquis* and to ensure that all aspects of their case are taken into account by asylum authorities.

In ECRE's view, where asylum seekers have insufficient financial resources to consult a lawyer at their own cost, they should have access to free legal assistance and representation at all stages of the asylum procedure, as is allowed under **Article 20(2)**. Providing free legal assistance under such conditions from the start of the procedure is also an important tool to achieve the objective of frontloading which is reflected in other provisions of the recast Asylum Procedures Directive as discussed above and aims to have the highest possible quality of the first instance decision.⁹⁵ Many errors in first instance decisions result from miscommunications or from an applicant's misunderstanding of procedural requirements. Such errors are often difficult to correct at the appeal stage and may result in the failure to identify those in need of protection and thus potentially lead to *refoulement*. Ensuring asylum seeker's access to legal assistance from the start of the procedure may help to avoid unnecessary complications at the appeal stage and reduce the need for persons in need of international protection to submit subsequent asylum applications.

Free legal assistance at the different stages of the procedure (Articles 19, 20 and 22)

Article 20(1) maintains, in principle, only an obligation for Member States to ensure access to free legal assistance and representation in appeals procedures but does not prevent Member States from providing such assistance also in procedures at the first instance. In addition to the benefits in terms of efficiency and fundamental rights protection as explained above, Member States do not need to provide for legal and procedural information under Article 19, in case they guarantee access to free legal assistance and representation in procedures at first instance.⁹⁶ In ECRE's view, this is a more efficient and straightforward approach than the separate provision of the ill-defined legal and procedural information specified in **Article**

⁹³. See below section 9.

⁹⁴. For a detailed overview of the practice in a selected number of European countries, see IRCT, *Recognising Victims of Torture in National Asylum Procedures. A comparative overview of early identification of victims and their access to medico-legal reports in asylum-receiving countries*, 2013.

⁹⁵. See for instance, the opportunity for asylum seekers to provide comments and clarifications to their statements during the personal interview under Article 17 and the use of medical examinations under Article 18 prior to taking a first instance decision.

⁹⁶. Article 20(2) recast Asylum Procedures Directive.

19, in addition to the information relating to negative decisions that Member States are required to provide under Article 11(2) and 12(1)(f). In practice it is hard to see how such information would be different from the information that asylum seekers are already entitled to under the latter provisions of the recast Asylum Procedures Directive. The transposition of this provision should not result in additional administrative burdens without providing any added value for the fundamental rights protection of asylum seekers.⁹⁷

ECRE reiterates its serious concerns with regard to the possibility in **Article 20(3)** to refuse free legal assistance and representation “where the applicant’s appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success”. In light of the disadvantaged position of asylum seekers in the asylum procedure, their unfamiliarity with national legislation and the irreversible harm that may result from the wrongful denial of international protection, ECRE believes that a “merits test” should in principle be avoided in an asylum context and therefore recommends Member States not to make use of such a possibility. The right to an effective remedy is crucial to ensure full respect of the principle of *non-refoulement* and is guaranteed under Article 46 recast Asylum Procedures Directive, Article 47 of the EU Charter of Fundamental Rights and Article 13 ECHR. Article 47 EU Charter explicitly requires that “legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice” and therefore affirms the centrality of effective access to legal assistance and representation to this fundamental right. In theory, a merits test is supposed to discourage appeals in cases that have little or no substance, but in practice it may result in depriving asylum seekers from an essential procedural guarantee, access to justice. It constitutes at the same time an exercise in trying to predict the outcome of an application for international protection based on a, by definition, incomplete assessment of the substance of the case, which is difficult to reconcile with the requirements of a full and extensive review of possible violations of Article 3 ECHR under the ECtHR jurisprudence relating to Article 13 ECHR.⁹⁸

If Member States choose to apply a “merits-test” the conditions laid down in **Article 20(3)** must be strictly applied. Asylum seekers must have access to an effective remedy before a court or tribunal against a decision to refuse free legal assistance and representation on that basis, and legal assistance and representation may not be “arbitrarily restricted” and the “applicant’s effective access to justice” may not be hindered as a result of such decision. This must be applied in light of the relevant jurisprudence of the ECtHR and the CJEU. The ECtHR has held in the case of *Airey v. Ireland* that the question whether legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and depends, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the capacity of the applicant to represent himself.⁹⁹ Also the financial situation of the applicant or his prospects of success may be taken into account.¹⁰⁰ In the case of *DEB* the CJEU found that Article 47 EU Charter requires that the same elements must be taken into account when a national court is assessing whether the conditions for granting legal aid amount to a limitation on the right to access to the courts which undermines the very core of that right.¹⁰¹ It should be noted that in the cited jurisprudence the reasonable prospect of success of the appeal is only one aspect among many others that need to be taken into account and therefore cannot be the sole reason for denying a person’s access to legal aid.

Article 22(2) reflects the important role that non-governmental organisations increasingly play in the provision of legal assistance and representation in the asylum procedure in a number of Member States. In particular, with regards to the provision of free legal assistance and representation in procedures at first instance, NGOs often have a crucial role in ensuring that the need for such assistance is covered as much as possible. In particular where States do not cover access to free legal assistance in first instance procedures, NGOs should be sufficiently funded to perform such roles and ensure that asylum seeker’s access

97. See also ECRE, *Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Asylum Procedures Directive (COM(2011) 319 final)*, September 2011, at p. 20-21.

98. See on this aspect ECtHR, *Sing and Others v. Belgium*, Application no. 3320/11, Judgment of 2 October 2012; ECtHR, *S.J. v. Belgium*, Application no. 770055/10, Judgment of 27 July 2014 (French only); *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011.

99. ECtHR, *Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979, par. 46.

100. ECtHR, *Steel and Morris v. United Kingdom*, Application no. 68416/01, Judgment of 15 February 2005, par. 62.

101. CJEU, Case C-279/09, *DEB v. Bundesrepublik Deutschland*, Judgment of 22 December 2010, par. 46. See also ECRE, *An examination of the Reception Conditions Directive and its recast in light of Article 41 and 47 of the Charter of Fundamental Rights*, December 2013, p. 20-21.

to justice is secured.¹⁰²

Conditions for the provision of free legal assistance and representation and legal and procedural information (Article 21)

Article 21(1) allows Member States to provide legal and procedural information referred to in Article 19 not only through NGOs but also through “professionals from government authorities or from specialised services of the State”. As it strictly concerns the provision of information, the involvement of government officials is acceptable. However, practice in many countries shows that involvement of non-governmental actors in the provision of such information often contributes to making such information more digestible and understandable to asylum seekers by ensuring that such information is provided in a less technical yet accurate manner.¹⁰³

Article 20(1) only allows Member States to make use of governmental actors with regard to the provision of legal and procedural information, which must be strictly distinguished from the provision of free legal assistance and representation in the context of appeal procedures. According to Article 20(1) second sentence only “such persons as admitted or permitted under national law” can provide such free legal assistance and representation. The purpose of legal assistance and representation at the appeal stage is to ensure that the fundamental rights and interests of the asylum seekers are defended and represented vis-à-vis the authorities. This requires mutual trust between the provider of free legal assistance and representation and the asylum seeker. Such mutual trust can only be established if the provider of legal assistance and representation presents the necessary guarantees of independence vis-à-vis the authorities and is under no instruction of state authorities. National legislation permitting or admitting persons to provide free legal assistance and representation with respect to appeal procedures must sufficiently reflect and be based on this important principle. This also implies that “professionals from government authorities or from specialised services of the State” cannot qualify as “persons admitted or permitted under national law” as referred to in Article 20(1) second sentence.

ECRE is concerned that **Article 21(2)** still allows for Member States to limit access to free legal assistance and representation only for appeals procedures before a court or tribunal of first instance and therefore not to guarantee such access for any further appeals or reviews or re-hearings. Such onward appeals are often limited to a review of the legality of the first instance Court’s decision and therefore require sophisticated legal reasoning which can only be provided by qualified lawyers or legal counsellors or advisors. As a result, free legal assistance and representation is as necessary to ensure the effectiveness of the remedy before a higher court as it is before a court or tribunal of first instance. States have other measures at their disposal to avoid manifestly unfounded onward or further appeals, such as admissibility criteria for lodging onward or further appeals. In so far as such admissibility criteria are reasonable and not unduly restrictive, they are less likely to undermine an asylum seeker’s rights under Article 46 of the recast Asylum Procedures Directive and Article 47 EU Charter of Fundamental Rights.

While Member States may lay down rules concerning modalities for filing and processing requests for legal assistance and representation and legal and procedural information free of charge as well as monetary and time limits, such rules must respect general principles of EU law, including the principles of effectiveness and equivalence. According to the jurisprudence of the CJEU this implies that “the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)”.¹⁰⁴

¹⁰². For an overview on asylum seekers’ access to free legal assistance in practice in selected EU Member States, see also AIDA, *Not There Yet*, pp. 64-70 and AIDA, *Mind the Gap*, pp. 57-59.

¹⁰³. See for instance AIDA, *Country Report Bulgaria*, Update April 2014, pp. 30-31 and *Country Report Poland*, Update June 2014, pp. 27-29.

¹⁰⁴. See CJEU, Case C-286/06, *Impact v Minister for Agriculture and Food, Minister for Arts, Sport and Tourism, Minister for Communications, Marine and Natural Resources, Minister for Foreign Affairs, Minister for Justice, Equality and Law Reform, Minister for Transport*, Judgement of 15 April 2008, par. 46.

Scope of legal assistance and representation (Article 23)

Article 23(3) now unambiguously asserts the right of each asylum seeker to bring a legal adviser or other counsellor to the personal interview. ECRE considers this to be a crucial safeguard as it removes an important obstacle to effective and qualitative legal assistance and representation and contributes to the quality of first instance decisions.¹⁰⁵ The presence of a lawyer during the personal interview is an additional guarantee that all relevant aspects of the asylum application are addressed as comprehensively as possible. Their presence may also encourage asylum seekers to cooperate with the asylum authorities where they may distrust the authorities as a result of their experiences in their country of origin. Whereas further rules may be adopted in national law governing the presence of such persons at personal interviews according to Article 23(4), they may never reduce their role in the personal interview to a purely passive one as they must in any case be provided with an opportunity to intervene according to Article 23(3).

The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, is part of the right to good administration, enshrined in Article 41 of the EU Charter, which according to the CJEU, reflects a general principle of EU law.¹⁰⁶ **Article 23(1)** of the recast Asylum Procedures Directive ensures access of a legal advisor or other counsellor who assists or represents an applicant to the information in the applicant's file upon the basis of which a decision is made or will be made. The possibility for Member States to make an exception where disclosure of such information would jeopardise *inter alia* national security or the security of persons, to whom the information relates is not unconditional.¹⁰⁷ Where Member States make use of this possibility they must ensure that such information is in any case available to the appeal body and must respect the rights of the defence. Access to the information upon the basis of which a decision is made or will be made is essential for an asylum seeker to effectively exercise their right to an effective remedy and to safeguard equality of arms in the asylum procedure. In ECRE's view, refusing access to such information can only be done in the most exceptional circumstances and only where it is established that the measure is proportionate to achieve the legitimate aim of protecting national security or the security of other individuals. In many cases, less intrusive measures, such as deleting specific references to individuals in the information concerned, will suffice to balance the interests of the State and the asylum seekers and should be used. Where this would not suffice, ECRE reminds Member States that **Article 23(1) (a) and (b)** in any case requires that the rights of the defence are fully respected. In this respect, in ECRE's view, the disclosure of such information through a legal advisor or counsellor who has undergone a security check presents better guarantees that the rights of the defence are fully complied with in practice.

¹⁰⁵. For an analysis of the provision of early legal advice in the United Kingdom, Ireland and Estonia, see, B. Anderson and S. Conlan, *Providing Protection. Access to early legal advice for asylum seekers*, 2014.

¹⁰⁶. CJEU, Case C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney-General*, Judgment of 8 May 2014, par. 49.

¹⁰⁷. In the case of ZZ, concerning an EU national denied entry on imperative grounds of public security to the United Kingdom, the CJEU was asked whether the principle of effective judicial protection requires a judicial body to ensure that the EU citizen is informed of the essence of the grounds against him, notwithstanding the fact that authorities consider that disclosure of the essence of the grounds against him would be contrary to the interests of State security. Referring to the importance of complying with the adversarial principle in light of Article 47 of the EU Charter of Fundamental Rights, the CJEU found that "the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard". As a result the CJEU held that failure by the national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision to refuse entry is based and to disclose the related evidence to him is limited to that which is strictly necessary and that he is informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence. See CJEU, Case C-300/11, *ZZ v. Secretary of State for the Home Department*, Judgment of 4 June 2013. See also N. de Boer, "Secret evidence and due process rights under EU law: ZZ" (2014) 51 *Common Market Law Review*, pp. 1235-1262.

9. Applicants in need of special procedural guarantees (Article 24)

The obligation to assess within a reasonable period of time after an application is made whether the applicant is in need of special procedural guarantees is an important requirement that, if applied properly, has the potential of contributing substantially to the quality of the asylum procedure for such applicants. This obligation must be read together with the obligation under the recast Reception Conditions Directive to assess the special reception needs of asylum seekers.¹⁰⁸

In ECRE's view, the early identification of victims of violence and particularly vulnerable persons is a crucial aspect of fair and efficient asylum systems, as it avoids delays in the examination of asylum applications, may prevent the deterioration of the mental and physical health of applicants and allows planning and channelling of applicants to caseworkers especially trained to examine those cases.¹⁰⁹ Member States should make an effort to ensure that such assessment takes place as soon as possible after the application is made, in line with ECRE's interpretation of Article 6 of the recast Asylum Procedures Directive as to when Member States should consider an application as made.¹¹⁰

The assessment of a person's special procedural and reception needs should preferably take place within the context of a predefined procedure or mechanism in order to maximise its effectiveness and fairness. Although special reception needs may not in all circumstances generate special procedural needs and vice-versa, they are often linked. Therefore, Member States should make use of the possibility under **Article 24(2)** to integrate the assessment of the need for special procedural guarantees into the assessment of the special reception needs of applicants. Whether such assessment is done through a separate administrative procedure or not, the applicant's rights under the EU Charter of Fundamental Rights and general principles of EU law, including the right to good administration, which includes the right to be heard before any individual measure that may adversely affect the applicant is taken and the obligation of a reasoned decision, will have to be respected in practice.¹¹¹

ECRE welcomes the provision that special procedural guarantees be provided also if their need appears at a later stage in the procedure (**Article 24(4)**). This is an important safeguard, as victims of torture or extreme violence may not always reveal these experiences at the beginning of the procedure. Mechanisms for the identification of special needs should be designed such that these needs can be effectively identified and addressed at any stage of the procedure. Providing adequate training for the identification of such applicants to those likely to come in contact with them during the procedure is key in this regard.

Article 24(3) does not define the content of the adequate support that should be provided to applicants in need of special procedural guarantees other than stating that it must "allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure". However, recital 29 provides useful guidance in stipulating that "[...] these applicants should be provided with adequate support, including sufficient time [...]" to substantiate and effectively submit their claim. Because of their particular vulnerability or their reluctance to reveal their experiences immediately, such as in the case of victims of torture or other serious violence, having sufficient time to submit further evidence or documentation is a crucial procedural guarantee. This advocates at the same time against the use of accelerated or border procedures as the speed with which such procedures are often conducted, makes them, as a rule, ill-suited to deal with applications of persons in need of special procedural guarantees.¹¹²

In this regard, ECRE welcomes the fact that Article 24(3) effectively creates a bar against the processing or

¹⁰⁸. See Article 22(1) recast Reception Conditions Directive.

¹⁰⁹. On the need to identify promptly asylum seekers who may have special protection or assistance needs see: UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, para 3.1.2 and para 3.4, available at: <http://www.refworld.org/docid/42d66dd84.html>.

¹¹⁰. See section 3 above.

¹¹¹. On the relevance of the right to good administration for the assessment of the special reception needs in absence of a specific administrative procedure, see ECRE, *An examination of the Reception Conditions Directive and its recast in light of Article 41 and 47 of the Charter of Fundamental Rights of the European Union*, December 2013, p. 14.

¹¹². See IRCT, *Recognising Victims of Torture in National Asylum Procedures. A comparative overview of early identification of victims and their access to medico-legal reports in asylum-receiving countries*, 2013, pp. 66-67.

continued processing of applicants who are in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence in accelerated or border procedures. In such cases the recast Directive assumes that, by definition, adequate support cannot be provided in the context of accelerated or border procedures and therefore Member States “shall not apply, or shall cease to apply” such procedures.

However, ECRE is concerned that despite abovementioned recital 29, Article 24(3) seems to allow Member States to process those claims through accelerated (Article 31(8)) and border procedures (Article 43) in other cases where persons are in need of special procedural guarantees. In ECRE’s view, all persons who have been identified as in need of special procedural guarantees must be exempted from accelerated or border procedures as a rule. This is because the reduced time limits to substantiate their applications and the frequent use of detention that are often implied in such procedures, has additional negative effects on all applicants in need of special procedural guarantees. Moreover, exempting applicants with special procedural needs from accelerated or border procedures *ab initio*, would contribute to improving the quality of first instance decision making and be consistent with the frontloading of asylum systems as advocated by ECRE.

ECRE notes that the provision does not define criteria to assess the adequacy of the support provided to applicants in need of special procedural guarantees when they undergo an accelerated procedure. If Member States opt to provide in national legislation for the possibility to subject these applicants to accelerated procedures, ECRE believes that objective criteria must be laid down in national law allowing to determine what type of support is required in light of the individual’s need for special procedural guarantees and to assess whether such support is adequate in their individual circumstances.

Finally, as the applications of asylum seekers in need of special procedural guarantees should not be processed in accelerated or border procedures for the reasons outlined above, ECRE recommends providing access to an effective remedy with automatic suspensive effect in accordance with Article 46(5) recast Asylum Procedures Directive in such cases. As is discussed extensively below, an appeal procedure whereby suspensive effect must be requested separately to a Court or Tribunal risks jeopardising the effectiveness of the remedy in practice.¹¹³ As there is an enhanced risk in the case of persons in need of special procedural guarantees, Member States should not provide for the possibility to apply Article 46(6) where they consider that accelerated and border procedures cannot be applied effectively. In such cases it has been established that adequate support in order for asylum seekers to be able to benefit from the rights and comply with their obligations under the Directive, cannot be provided in the context of an accelerated or border procedure. Because of their need for special procedural guarantees, this must be interpreted as including the capacity to benefit effectively from the right to an effective remedy in accordance with Article 46 recast Asylum Procedures Directive.

10. Guarantees for unaccompanied children (Article 25)

Unaccompanied children find themselves in a particularly vulnerable situation. Therefore, their protection poses specific challenges. ECRE acknowledges that **Article 25** of the recast Asylum Procedures Directive significantly raises procedural standards, as compared to the 2005 Asylum Procedures Directive.

ECRE welcomes in particular the following standards with regard to the role and qualifications of the representative which must be appointed by Member States as soon as possible:

-the principle that a representative must perform their duties in accordance with the principle of the best interests of the child and have the necessary expertise and that no organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied child can be eligible to become a representative. In ECRE’s view this requires the establishment of an effective screening procedure, regular evaluation and training of representatives on child rights under international human rights law, EU law and the EU Charter of Fundamental Rights and specific needs of children.

-the requirement that in principle the same person should represent the child throughout the procedure and should only be changed “when necessary”. In order to build mutual trust between the representative and the unaccompanied child, it is important that there is sufficient continuity in representation and that the

¹¹³. See below, section 17.

representative acts as a focal point for the child.

- the requirement that a representative and /or a legal advisor or other counsellor must be permitted to attend the personal interview and have an opportunity to ask questions or make comments. Given the different roles of representatives and legal advisors, national legislation should always allow for both to be present and intervene during the personal interview. This should in particular be the case where the representative is not a qualified lawyer so as to ensure that the child has access to quality legal assistance at all stages of the procedure and with regard to all procedural steps.

-the obligation to assume that an applicant is under 18 if doubts remain about the applicant's age after a medical examination has been carried out to determine the age of the applicant.

- the obligation to provide legal and procedural information to the representative. In particular where the representative does not have specific qualifications, in particular specific knowledge of asylum issues, this provision can ensure that all decisions affecting the child during the procedure are taken in an informed manner, with the aim of always ensuring the child's best interest.

Article 25 allows for the representative, who shall represent and assist the child, to be the same representative as referred to in the recast Reception Conditions Directive.¹¹⁴ This is ECRE's preferred option as appointing the same representative is in the interests of both the unaccompanied child and the authorities. For the unaccompanied children concerned this means that they have a unique focal point, whereas appointing different representatives could create confusion and undermine the necessary trust-based relationship with the representative. From the perspective of the authorities, appointing one representative avoids unnecessary duplication of roles adding to the administrative burden and costs. Moreover, the more detailed description of the role of the representative in Article 24 of the recast Reception Conditions Directive is much more in line with the duties of a legal guardian under Article 18 UN Convention on the Rights of the Child (UNCRC) as it includes an obligation to ensure the child's well-being in light of its protection and developmental needs. This allows for a holistic approach to the role of the representative under the asylum *acquis*, taking into account the general well-being of the child beyond complementing the child's limited legal capacity.¹¹⁵

While the Directive does not specifically provide for any qualifications or specific duties of the representative, these should be defined in national law. In ECRE's view, the latter should include as a minimum (1) advocating for the child's rights in his/her best interest, aimed at the protection and development of the child; (2) ensuring the child's participation in every decision which affects them; (3) protecting the safety of the child; (4) acting as a focal point for the child and a bridge between the child and other actors involved; (5) ensuring the timely identification and implementation of a durable solution.¹¹⁶

The Directive does not foresee regular assessments of the representative's work, nor the possibility for the child to be heard with regard to its appointment. Nevertheless, ECRE reminds Member States that the Directive must be transposed and implemented in line with the UN CRC. According to Article 25 UN CRC States Parties "recognize the right of a child who has been placed by the competent authorities for the purposes of care [and] protection [...] to a periodic review of the treatment provided [...]", including of the assistance by the legal representative.¹¹⁷ In addition, Article 12 UN CRC establishes the child's right to be heard in relation to all matters affecting them, "the views of the child being given due weight in accordance with the age and maturity of the child. [...] For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting [them]."

While welcoming the deletion of the exception to the appointment of the representative where the child is married or has been married, ECRE maintains its position that the exception to the obligation to appoint a representative where the unaccompanied child "will in all likelihood reach the age of 18 before a decision of first instance is taken" contravenes the UN CRC which defines a child as any person under 18. Therefore, in line with the UN CRC all persons under the age of 18 without exception are to be considered as children

¹¹⁴. Article 24(1) recast Reception Conditions Directive requires Member States to take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor .

¹¹⁵. See on this issue also Fundamental Rights Agency (FRA), *Guardianship for children deprived of parental care. A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, 2014.

¹¹⁶. Separated children in Europe programme, Core Standards for guardians of separated children in Europe, 2011.

¹¹⁷. On the accountability of the legal representative, see also FRA, *Guardianship for children deprived of parental care. A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, 2014, p. 28.

and be provided the same protection and guarantees, without differentiation in the rights they can enjoy and undue discrimination. ECRE urges States to adopt a generous approach in handling cases when children are involved, with the aim of ensuring the respect of the child's best interest,¹¹⁸ which not only constitutes one of the core principles of the UN CRC,¹¹⁹ but is also expressly recalled by the recast Asylum Procedures Directive in its Preamble and in **Article 25(6)**.¹²⁰ As underlined by UNHCR, a generous approach shall also be maintained towards unaccompanied children who have become adults during the course of the asylum procedure.¹²¹ Therefore, ECRE urges Member States not to transpose Article 25(2) recast Asylum Procedures Directive in national legislation.

In any case, **Article 25(2)** cannot be applied where the appointed representative is the same person as the representative referred to in Article 24 Reception Conditions Directive as recommended by ECRE. This is because the recast Reception Conditions Directive does not allow for such exception and **Article 25(2)** recast Asylum Procedures Directive only allows to refrain from appointing a representative without allowing states to make exceptions with regard to specific procedural steps only.

Article 25(6), while positively recalling the best interest of the child as a primary consideration for member States when implementing the Directive, allows for the application of accelerated procedures, border procedures and the safe third country concept to unaccompanied children in a considerable number of circumstances.

In ECRE's view, asylum applications of unaccompanied children should never be examined in accelerated or border procedures as they are ill-suited to take into account their particular vulnerability and ensure that their need for special procedural guarantees can be addressed in practice. Therefore, such procedures as a rule do not provide the necessary guarantees for compliance with Member States obligations' under international standards, including Articles 3 and 22 of the UN CRC, according to which the best interest of the child shall always be a primary consideration and appropriate measures shall be taken to ensure that a child who is seeking refugee status receives appropriate protection and assistance in the enjoyment of applicable rights. Rather, in light of their particular vulnerability, the asylum applications of unaccompanied children should be prioritised as laid down in Article 31(7)(b) recast Asylum Procedures Directive.

Article 25(5) establishes two important principles with regard to age assessment. First, Member States can only carry out an assessment of the applicant's age where they have doubts concerning the applicant's age. Secondly, if after such an age assessment Member States are still in doubt concerning the applicant's age, they must assume that the applicant is a minor. ECRE welcomes this provision as constituting an important safeguard against the systematic use of age assessment, while requiring that an individual should be given the benefit of the doubt in order to avoid that they are wrongfully deprived from child-specific guarantees. This implies an obligation to use age assessment only where there are grounds for serious doubt with regard to an individual's age,¹²² and never as a routine practice.¹²³ In addition, where age assessment is used and in light of the important consequences it may have for the individual concerned, he or she should always have the possibility to challenge the outcome of the age assessment.

Moreover, **Article 25(5)** also explicitly stipulates that medical examinations shall be carried out only when considered essential to determine the applicants age, and shall in any case be "the least invasive examination and shall be carried out by qualified medical professionals". As a result, it does not exclude the use of non-medical examinations to be performed for the assessment of the applicant's age. In ECRE's view, this is the preferred option and Member States should prioritise the use of such methods including interviews, social evaluation and the assessment of documentary evidence. Moreover, age assessment should always be undertaken by professionals who are independent and familiar with the individual's ethnic and cultural background.¹²⁴ In addition, medical examinations should be undertaken in a gender appropriate manner, in

¹¹⁸. See also ECRE, *Comments on the European Commission Proposal to recast the Asylum Procedures Directive*, May 2010, p. 31 and ECRE, *Position on Refugee Children*, November 1996, par. 30.

¹¹⁹. See Article 3 of the UN CRC.

¹²⁰. See recital 3 and Art. 25(6) recast Asylum Procedures Directive.

¹²¹. 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)*, 9 November 2004.

¹²². FRA, *Separated, asylum-seeking children in European Union Member States. Comparative report*, 2010, p.55.

¹²³. EASO, *EASO Age assessment practice in Europe*, 2013, p.13.

¹²⁴. SCEP, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012.

full respect of the applicant's dignity.¹²⁵

ECRE is particularly concerned with **Article 25(6)(b)**, which introduces the possibility for the determining authority to apply or continue to apply a border procedure "where there are serious grounds that the applicant is attempting to conceal elements which would likely lead to a negative decision" in case the unaccompanied child has misled the authorities or has destroyed documents in bad faith. Such decision could therefore be based on an imputed intention of an unaccompanied child, with no indication of the test that should be applied to decide that those unknown elements would likely lead to a negative decision nor of the criteria to assess whether the child had been given a full opportunity "to show good cause" for the actions mentioned above. This may lead to arbitrariness and goes against the requirement of an objective and impartial examination of asylum applications as required under Article 10 (3)(a) recast Asylum Procedures Directive.

In ECRE's view, **Article 25(6)** is overly complex and extremely problematic from a children's rights perspective as it may seriously jeopardise in practice unaccompanied children's effective access to the safeguards laid down in Article 25(1) to (5). Therefore, as it concerns an optional provision, ECRE urges Member States not to make use of the possibility to apply accelerated or border procedures. Instead, such applications should be prioritised in a regular procedure in accordance with Article 31(7)(b).

11. Withdrawal of asylum applications (Article 27 – 28)

Both the explicit and the implicit withdrawal of the asylum application can lead to either the discontinuation or the rejection of the asylum application according to Article 27(1) and 28(1). Member States may also either discontinue or reject an asylum application that was implicitly abandoned.

Article 28(1) (a) and (b) furthermore lay out the reasons under which an application can be assumed to have been implicitly withdrawn or abandoned, including because the asylum seeker failed to respond to requests for information or has not appeared for a personal interview, or because the applicant has not complied with reporting duties or left the place of accommodation without authorisation.

Member States should address the issue of implicit withdrawal or abandonment with caution as asylum seekers may have valid reasons for their failure to respond to requests or attend a personal interview that may be beyond their control as Article 28 explicitly acknowledges. For instance, an asylum seeker may not have responded to a request for information or not have appeared at an interview simply because the invitation never reached the asylum seeker due to administrative errors or due to the failure of the postal services. An asylum seeker may have been suddenly hospitalised at the time of the invitation etc.

In light of the serious consequences for the individual concerned, Member States should have a sufficiently flexible approach that in principle treats such cases as dormant with no decision taken until the applicant explicitly withdraws their application in accordance with **Article 27** or there is clear evidence that the applicant has left the territory of the EU. In ECRE's view this means that in all cases such asylum applications should be discontinued without a decision being taken and with a notice in the applicant's file rather than rejected¹²⁶. Discontinuation of the asylum application does not create any significant additional administrative burden for the authorities except the introduction of a notice while it presents the best guarantee for the asylum seeker that the principle of *non-refoulement* is fully respected in practice. Such an approach would allow for a swift re-opening of the procedure at any stage at the asylum seeker's request in case he or she has put forward an acceptable explanation for the failure to comply with any of the obligations referred to in Article 28(1) (a) and (b).

In this regard, ECRE welcomes the obligation in Article 28(2) for Member States to allow an applicant to request the re-opening of his or her case after a decision of discontinuation has been taken or to make a new asylum application which cannot be considered as a subsequent asylum application. However, ECRE sees no practical need for the option in **Article 28(2), second sentence** to restrict such an obligation in time and to treat such a request as a subsequent application after at least nine months, as discontinuation

¹²⁵. FRA, *Separated, asylum-seeking children in European Union Member States. Comparative report*, 2010, p.55.

¹²⁶. As is explicitly allowed under Article 27(2) recast Asylum Procedures Directive.

does not create any significant administrative burden, as mentioned above. Where Member States opt for discontinuation rather than rejection in the case of implicit withdrawal of the application, the situation of an asylum seeker asking for a re-opening of their file before nine months have passed is not fundamentally different from an asylum seeker doing so after nine months have passed. Also, the starting date of the nine month time limit would be by definition difficult to determine in absence of fixed time limits for a decision of discontinuation and the uncertainty of the moment whereby an application can be considered implicitly withdrawn or abandoned under Article 28(1) .

Should Member States opt to reject an asylum application they consider implicitly withdrawn or abandoned, this does not absolve them from the obligation to ensure that the applicant's protection needs are fully examined in one Member State in accordance with the recast Dublin Regulation. The recast Dublin Regulation explicitly states that a Member State is under an obligation to take back an applicant who has withdrawn an application under examination in that Member State; "when the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant before a decision on the substance has been taken at first instance, that Member State shall ensure that the applicant is entitled to request that the examination of his or her application be completed or to lodge a new application for international protection, which shall not be treated as a subsequent application as provided for in Directive 2013/32/EU".¹²⁷ In such cases, the Member State concerned must ensure that the "examination of the application is completed".¹²⁸ Article 18 (1)(c) and (2) of the recast Dublin Regulation does not distinguish between explicit or implicit withdrawal and therefore the Member State's obligation must be assumed to apply to both types of withdrawal referred to in the recast Asylum Procedures Directive.¹²⁹

12. Regular, accelerated and prioritised procedures (Article 31)

Through the deletion of old Article 24 of the 2005 Asylum Procedures Directive, the recast Asylum Procedures Directive now no longer allows for derogations from the basic principles and guarantees as laid down in Chapter II in the context of border procedures or procedures dealing with subsequent asylum applications. As a result, regardless of the type of procedure used to process asylum applications, the same set of basic guarantees with regard to the personal interview, access to legal assistance and interpretation and guarantees for asylum seekers in need of special procedural guarantees and unaccompanied children, as discussed above, must be guaranteed. This is a welcome development which will enhance the protection of asylum seekers' fundamental rights in all types of asylum procedures in EU Member States. It is hoped that this will encourage States to avoid the use of border procedures in the first place as they are ill-suited to ensure a proper examination of an individual's protection needs and rather process asylum applications made at the border in a regular procedure on the territory where access to procedural guarantees, including free legal assistance and interpretation is generally less problematic.

Time limits for a decision at first instance

While Article 31 sets as a principle that the examination of an asylum application must be concluded within 6 months of the lodging of the application,¹³⁰ it also provides for a possibility for Member States to extend such time limits for another 9 months or even 12 months. An extension of 9 months is possible in case (a) complex issues of fact and/or law are involved; (b) it is difficult to conclude the procedure within 6 months because a large number of third-country nationals or stateless persons apply simultaneously or (c) where the delay can clearly be attributed to the failure of the applicant to comply with its "cooperation" duties under Article 13. This can be further extended with another 3 months, by way of exception and in duly justified circumstances, "where necessary to ensure an adequate and complete examination". However, under no circumstances may the examination take any longer than 21 months from the lodging of the application.¹³¹

¹²⁷. See Article 18(2) recast Dublin Regulation.

¹²⁸. *Idem*.

¹²⁹. See also Article 28(3) stating that [T]his Article shall be without prejudice to Regulation (EU) No 604/2013.

¹³⁰. The date of lodging the application is not necessarily the date of making the application. See discussion above on Article 6.

¹³¹. See Article 31(5) recast Asylum Procedures Directive.

ECRE welcomes the fact that the Directive provides more clear guidance to Member States as to the time limits within which first instance procedures ought to be concluded. ECRE agrees that the conclusion of an examination within six months is a realistic and reasonable period of time that in many cases would allow a fair and full examination of the asylum application whilst respecting all procedural safeguards, provided the determining authority is sufficiently resourced and the staff are well-trained. This will also help to limit the period during which the persons granted international protection and those whose application is eventually rejected, remain in an uncertain situation, delaying their integration in the host country or the preparation of their return.

At the same time, flexibility is also needed to address the complexity of certain cases, and ECRE welcomes the fact that the time limits set in the Directive remain aspirational rather than setting a binding norm.

However, ECRE is most concerned with the possibility for Member States to postpone concluding the examination procedure “where the determining authority cannot reasonably be expected to decide within the time limits laid down in paragraph 3 due to an uncertain situation in the country of origin which is expected to be temporary”.¹³² Although recital 9 of the recast Asylum Procedures Directive provides some vague indications as to how the phrase ‘an uncertain situation in the country of origin’ should be determined, this remains open to potentially wide interpretation.¹³³ However, **Article 31(4)** must be applied without prejudice to Article 13 and 18 of the recast Qualification Directive which imposes *an obligation* on Member States to grant refugee status or subsidiary protection status to third country nationals who qualify as refugees or are eligible for subsidiary protection status.¹³⁴

As a result, as soon as an applicant fulfils the conditions, he or she should be granted such status as the EU asylum *acquis* does not provide for a legal basis for postponing the granting of the status to persons who qualify under the definition of refugee or beneficiary of subsidiary protection. Furthermore, any decision to postpone the conclusion of the examination must necessarily also respect the principle of good administration as a general principle of EU law which guarantees the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time.¹³⁵ As a result, both the recast Qualification Directive and the EU Charter militate against an extensive use of Article 31(4) of the recast Asylum Procedures Directive by “freezing” the examination of asylum applications for the mere reason that the situation in the country of origin is uncertain. Moreover, from a human rights perspective any situation could theoretically be considered as uncertain, which makes it very difficult to use in a non-arbitrary way.

¹³². Article 31(4) recast Asylum Procedures Directive.

¹³³. Recital 9 refers to the need to obtain precise and up-to-date information from relevant sources such as EASO, UNHCR, the Council of Europe and other relevant international organisations. According to the jurisprudence of the ECtHR, this also necessarily includes country of origin information as produced by reputable human rights organisations. In the case of *Salah Sheekh v. the Netherlands*, the ECtHR held that “given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable sources and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations”. See ECtHR, *Salah Sheekh v the Netherlands*, Application no. 1948/04, judgment of 11 January 2007, par. 136 and ECtHR, *NA v. The United Kingdom*, Application no. 25904/07, judgment of 17 July 2008, par. 119.

¹³⁴. See M.-T. Gil-Bazo, “Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum”, in A. Baldaccini, E. Guild and H. Toner, *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, Hart, 2007, p. 236-239.

¹³⁵. See recital 9 stating that Member States should “ensure that any postponement of conclusion of the procedure fully complies with their obligations under Directive 2011/95/EU and Article 41 of the Charter, without prejudice to the efficiency and fairness of the procedures under this Directive. As mentioned above, whereas the CJEU held in the case of *YS* that Article 41 of the EU Charter only states the right with regard to EU institutions, agencies, offices and bodies, it also explicitly stated that the right to good administration, as enshrined in the Article 41 of the EU Charter “reflects a general principle of EU law”. See CJEU, *YS v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. M, S*, Judgment of 17 July 2014, par.68. See also the case of Christopher Mellor on the impact of public and private projects on the environment, where the Advocate General found that “Article 41 of the Charter of Fundamental Rights does not just contain rules of good administration by the institutions but documents a general principle of law, which authorities of the Member States too must observe when applying Community law”. See Opinion of Advocate General Kokott, Case C-75/08, *Christopher Mellor v. Secretary of State for Communities and Local Government*, 22 January 2009, par. 33.

Whereas the evolving situation in a country of origin obviously is an important factor in the assessment of an asylum application and may indeed result in asylum authorities needing more time to take a decision, this should not refrain Member States from granting protection to those in need when they require it. Postponing a decision has important consequences for the applicant who may be confronted with poor reception or detention conditions, continued lack of access to the labour market and will have to wait even longer to be reunited with his or her family members. Swift decision making is also in the State's interests as it contributes to the efficiency of the procedure while postponing decisions prolong the provision of reception conditions to asylum seekers and delays the moment asylum seekers can become self-sustainable. Moreover, postponing decisions for almost two years certainly is at odds with the right to have one's affairs handled within a reasonable time that is part of the right to good administration as a general principle of EU law.

Nevertheless, in certain cases, taking a quality decision takes time and as much as it is not in the interest of asylum seekers and asylum authorities to delay decisions endlessly, rushing the taking of decisions may also be counterproductive.

Prioritisation versus Acceleration of asylum applications

In ECRE's view, prioritisation mechanisms as a caseload management tool are to be preferred over the acceleration of procedures, in particular where the latter implies the use of extremely short procedural timeframes as they are likely to undermine the quality of decision-making and the observance of asylum seekers' fundamental rights.¹³⁶ In ECRE's definition, prioritisation means that the determining authorities commit to processing the asylum application as soon as possible before other cases but within the same legal safeguards and within the same time limits provided by law, which must be reasonable.¹³⁷ ECRE agrees that the examination of the asylum application should be prioritised where the application is likely to be well-founded or where the applicant is vulnerable within the broad meaning of Article 22 of the recast Reception Conditions Directive. As unaccompanied children are particularly vulnerable, their applications should in any case be prioritised.

However, ECRE reminds States that the examination of asylum applications of other categories of vulnerable asylum seekers may have to be prioritised in order to ensure that their particular vulnerability is not negatively affected by the length of the procedure. At the same time, prioritisation does not necessarily mean a speedy conclusion of the examination and a quick decision. In many cases this will have to be assessed on a case-by-case basis. For instance, while it may generally be in the interest of a victim of torture to have his or her application assessed as soon as possible, in some cases this may not be the case and more time may be needed on the contrary to enable the person to prepare for the various procedural steps or to ensure that the person receives the necessary treatment. This will have to be assessed on a case-by-case basis and in ECRE's view, such assessment should also be part of the arrangement set up by Member States to identify the special procedural and reception needs of vulnerable asylum seekers as is required under Article 22 of the recast Reception Conditions Directive and Article 24 of the recast Asylum Procedures Directive.¹³⁸

Article 31 of the recast Asylum Procedures Directive now clearly distinguishes prioritisation and acceleration, as the latter is dealt with separately in **Article 31(8)**. ECRE welcomes the fact that the recast Asylum Procedures further reduces the possibilities for using accelerated procedures by providing an exhaustive list of 10 grounds on the basis of which an examination procedure may be accelerated. However, ECRE remains concerned that a number of the grounds listed are open to wide interpretation and are not directly linked to the substance of the asylum application. In line with UNHCR's EXCOM Conclusion No. 30, where States want to accelerate the examination procedures, this should be limited to cases which are clearly fraudulent or where the applicant has only submitted issues that are not related to the grounds for granting

¹³⁶. In particular access to legal assistance and access to an effective remedy can be seriously undermined where extremely short time limits apply in the framework of accelerated procedures. For a discussion of obstacles faced by asylum seekers in selected EU Member States, see AIDA, *Not There Yet*, pp. 68-69 and 73-77.

¹³⁷. ECRE, *The Way Forward. Towards Fair and Efficient Asylum Systems in Europe*, September 2005, p. 42.

¹³⁸. See above, section 9.

In ECRE's view, a number of the grounds laid down in Article 31 raise concern in this respect. This is in particular the case with the grounds mentioned in Article 31(8) (c), (d), (g), (h), (i) and (j). Most of these grounds suggest that the determining authority makes a value judgment to circumstances which are strictly speaking unrelated to the need for international protection. While such elements may be part of such an assessment, they should, as such, not determine whether or not the examination should be processed within shorter time limits and be barred from automatic suspensive effect of the appeal in case of a negative decision.¹⁴⁰

Article 31(8) (c) and (d) relate to the misleading of authorities and use of false documents and the destruction of identity documents in "bad faith". What constitutes bad faith or misleading of authorities or whether an application is lodged as soon as possible or only to prevent removal is obviously open to interpretation and difficult to assess objectively. Asylum seekers in most cases arrive without documentation or may have been forced by smugglers to dispose of their identity documents. The use of accelerated procedures on this ground may also be at odds with the principle of non-penalisation of refugees for their irregular entry into the territory that is enshrined in Article 31 of the 1951 Refugee Convention.¹⁴¹

Also the evaluation of whether an applicant makes an application, merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in removal¹⁴² can be highly subjective. As such this is and should remain distinct from assessing whether a person has a well-founded fear of persecution or has a real risk of serious harm, which is the only assessment that matters once a person has applied for international protection. The same applies to the situation where a person has entered the territory unlawfully and has not applied for international protection as soon as possible.¹⁴³ The well-founded fear or real risk of serious harm may materialise only at a later stage, such as in the case of international protection needs arising *sur place*. Asylum seekers may also have been instructed erroneously by those who facilitated their journey not to apply for asylum or they may have had the intention to travel on to another country and apply there because of the presence of family members in that other EU Member State but may have realised only at a later stage that this was not possible. Yet this does not prevent that those asylum seekers may have a well-founded fear of persecution or a real risk of serious harm. While applying **Article 31(8)(h)** in such cases does not have a negative impact on the procedural guarantees to be observed, it may result in a more biased approach by the asylum authority as to whether the asylum application is well-founded and therefore may create an additional hurdle for the asylum seekers concerned in having their application thoroughly examined on the substance. The fact that this ground is not suitable as a ground for acceleration is at least implicitly acknowledged in the Directive itself as it is explicitly excluded from the scope of Article 46(6)(a), which allows for a system whereby the right to remain on the territory during the appeal is not automatically granted but is subject to a separate Court decision either *ex officio* or upon the applicant's request. As a result, where a negative decision is taken in the context of an accelerated procedure based on Article 31(8)(h), the appeal must have automatic suspensive effect as required by Article 46(5) as is the case for any decision that is not taken in the context of an accelerated or inadmissibility procedure.

¹³⁹. See UNHCR, EXCOM Conclusion No. 30, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983. The EXCOM Conclusion allows for expeditious examination of "clearly abusive" or "manifestly unfounded" applications, defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum.

¹⁴⁰. With the exception of the situation where the applicant has entered the territory unlawfully and has not made an application as soon as possible mentioned in Article 31(8)(h). This ground is explicitly excluded from the scope of Article 46(6)(a). See below.

¹⁴¹. Article 31 1951 Refugee Convention prohibits the Contracting States to impose penalties, on account of their illegal entry or presence on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. This provision acknowledges that refugees frequently have no time to comply with immigration formalities and in many cases are not eligible to obtain an entry visa through the regular channels. See G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Edition, Oxford, 2007, pp. 264 – 265.

¹⁴². Article 31(8)(g).

¹⁴³. Article 31(8)(h).

Also the refusal of the person to have his or her fingerprints taken for the application of the EURODAC Regulation or the fact that a person has been forcibly expelled for serious reasons of public security or national law is unrelated to the person having a genuine claim for international protection or not. The refusal to comply with the obligation to have his or her fingerprints taken is only relevant to the determination of the Member State responsible for the examination of the asylum application and should be addressed in that context as it may prevent a proper determination of the claim. Where States make use of **Article 31(8)(i)**, this means that they have assumed responsibility for examining the asylum application under the Dublin Regulation and are therefore under an obligation to ensure that the application is fully and carefully examined. A refusal to provide fingerprints has become at that point immaterial and acceleration would in most cases constitute a “procedural punishment” for the applicant’s behaviour, rather than a legitimate and rational reason as to why the application must be accelerated.

Also the acceleration ground laid down in **Article 31(8)(j)** is in principle unrelated to the substance of the asylum application, whereas the lack of a clear definition of what constitutes a danger to the national security or public order of a Member State may result in arbitrariness and excessive use of accelerated procedures. In ECRE’s view, in such cases Member States have other measures at their disposal that are more effective to address possible national security or public order concerns, while rather more detailed examination of such cases may be needed, in particular where complex questions arise with regard to exclusion.¹⁴⁴ In this regard, it should also be noted that the Parliamentary Assembly of the Council of Europe recommended exempting asylum applicants considered to be a danger to national security or public order from accelerated procedures.¹⁴⁵

Whereas the recast Asylum Procedures Directive does not provide for a clear definition of acceleration or what it consists of at the first instance of the procedure, **Article 31(9)** imposes an obligation on Member States to lay down reasonable time limits for the adoption of a decision in the first instance procedure, where States decide to make use of Article 31(8). However, such time limits may be exceeded where necessary to ensure an adequate and complete examination of the application.

ECRE reminds Member States that Article 31(8) is optional and therefore States are under no obligation to implement accelerated procedures. ECRE’s preferred option is to process all asylum applications in a regular procedure according to the same reasonable time frames allowing for a thorough and efficient examination of the asylum application and where necessary prioritise certain caseloads as suggested above. Acceleration of the examination could most effectively occur after a full examination of all aspects of the application at the appeal level through shorter but reasonable time limits for hearing an appeal, provided that the asylum seeker’s access to an effective remedy is fully guaranteed.¹⁴⁶

Where Member States apply accelerated procedures on the basis of any of the 10 grounds listed in Article 31(8) recast Asylum Procedures Directive, the time limits laid down in national law for taking a decision should be sufficiently long so as to allow for a thorough and comprehensive examination of the person’s need for international protection. This requires not only that the person has sufficient time to substantiate his or her application, including during a personal interview and has access to free legal assistance but also that the staff member of the determining authority concerned has sufficient time to ensure a full and comprehensive examination, including access to up-to-date country or origin information and external experts were

¹⁴⁴. See UNHCR, *UNHCR comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012, p. 27. In this regard, it should also be recalled that under Article 32 and 33(2) of the 1951 Refugee Convention grounds of national security or public order constitute a basis for exceptions to the prohibition of expulsion of refugees or the principle of *non-refoulement*, whereas danger for the national security or public order is not among the exclusion clauses laid down in Article 1F of the 1951 Refugee Convention.

¹⁴⁵. Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, 7 October 2005, par. 8.9.

¹⁴⁶. See for a discussion as to what constitutes a reasonable time limit for lodging an appeal in the context of accelerated procedure and the guidance provided by the CJEU in the case of *Samba Diouf*, see section 17 below.

needed.¹⁴⁷ The CJEU has repeatedly confirmed that national procedural rules must not make it impossible or excessively difficult to exercise rights that individuals derive from EU law. In particular States may not apply rules “which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness”.¹⁴⁸ Extremely short time frames for decision-making in the context of accelerated asylum procedures, as currently applied in certain EU Member States, are likely to effectively jeopardise a key objective of the recast Asylum Procedures Directive which is to ensure an adequate and complete examination being carried out and the applicant’s effective access to basic principles and guarantees.¹⁴⁹ Where Member States make use of the optional Article 31(8), they should establish reasonable time limits in national legislation that provide *asylum seekers* with sufficient time to effectively submit all the elements of their claim, *those providing legal assistance* with sufficient time to examine and prepare their case and the *asylum authority* with sufficient time and resources to examine the asylum application in accordance with the basic guarantees and principles of the recast Asylum Procedures Directive as interpreted by ECRE in order to ensure quality first instance decisions.

13. Admissibility procedures (Articles 33 – 34)

Articles 33 and 34 establish the rules applicable to inadmissible applications. **Article 33(2)** establishes an exhaustive list of criteria on the basis of which an application for international protection may be considered as inadmissible, excluding the use of any other admissibility grounds in national law. ECRE reminds States that this is again an optional provision and that Member States are under no obligation to consider such applications as inadmissible.

As the consequence of considering an application as inadmissible is that Member States are not required to examine whether the applicant qualifies for international protection in accordance with the recast Qualification Directive. Member States should apply this notion only where it is guaranteed that protection is available and accessible elsewhere or where it is clear that the individual’s protection needs have been thoroughly examined and no new elements indicating a need for international protection have been submitted.

In ECRE’s view, where an applicant comes from a country which is not a Member State, which is considered as a safe third country for that person, such an application should not be considered as inadmissible. Given the potentially irreversible harm that may result (directly or indirectly) from returning an applicant to a third country, the question of whether a country may be considered safe or not for a particular applicant must necessarily be the subject of an independent and rigorous scrutiny and must be dealt with in a substantive determination procedure. This also follows logically from the combined application of States’ obligations under the ECHR’s jurisprudence and under Article 38 recast Asylum Procedures Directive which require a “case-by-case consideration of the safety of the country for a particular applicant”, an “individual examination of whether the third country concerned is safe for the particular applicant” and a possibility for the applicant to challenge the application of the concept “on the grounds that the third country is not safe in his or her particular circumstances”.¹⁵⁰ These requirements cannot be reconciled with the possibility under **Article 33(1)** not to examine whether the applicant qualifies for international protection. Therefore ECRE strongly recommends States not to make use of the possibility laid down in **Article 33(2) (c)** to consider ap-

147. In the context of research carried out by UNHCR on the implementation of the 2005 Asylum Procedures Directive in 2010, some caseworkers tasked with conducting asylum interviews expressed concern that, because of the short time limits that apply in accelerated procedures, they have not enough time to investigate and assess evidence. See UNHCR, *Study on Asylum Procedures. Section 9 – Prioritized and accelerated examination of applications*, p. 35-38.

148. See for instance, CJEU, Case C- 65/11 PPU, *Hassen El Dridi, Alias Karim Soufi*, Judgment of 28 April 2011, par. 55.

149. Recently, for instance, the detained fast track procedure, an accelerated procedure in the United Kingdom requiring in theory a decision within 3 days of detention and a time limit for appeal within 2 working days of receiving the decision was found partly unlawful by the High Court of Justice as “the DFT as operated carries an unacceptably high risk of unfairness” as there is not enough time for lawyers to do what needs doing to alleviate the deficiencies in this accelerated procedure. See *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) (9 July 2014), par. 197.

150. See Article 38(b) and (c) recast Asylum Procedures Directive. See also, for instance, with respect to a real risk of indirect refoulement, ECtHR, *Hirsi Jammaa and Others v. Italy*, par. 147-158.

plications from applicants from a safe third country as inadmissible but to consider these applications under the regular procedure in accordance with Article 31 (1) to (7) and in accordance with the basic guarantees and principles laid down in Chapter II.

ECRE welcomes the explicit requirement in **Article 34(1)** to allow applicants to present their views with regard to the application of the admissibility grounds referred to in Article 33 before a decision is taken. This is an important guarantee to ensure that an informed decision is taken that registers all aspects of the case and the individual's particular circumstances. ECRE believes that the blanket exclusion of a personal interview in the context of a preliminary examination of a subsequent application¹⁵¹ is undesirable. Asylum seekers may not always be able to present material proof of such new elements or may not be able to submit such elements in writing as is allowed under Article 42(2) (b), in particular where they do not have access to quality free legal assistance. Therefore, ECRE recommends restricting the possibility of omitting a personal interview in the case of a first subsequent asylum application to where it is possible to consider such application admissible on the basis of written material or where the applicant is unable or unfit to be interviewed. In any case, States should not make use of this possibility where the applicant has no access to free legal assistance for the purpose of submitting a subsequent application.

As the examination of admissibility grounds and the existence of and access to protection elsewhere requires a thorough understanding not only of the human rights situation and the political context in the third country concerned but also of international refugee and human rights law, personal interviews on the admissibility grounds should in principle be conducted by staff of the determining authority as defined in Article 4 recast Asylum Procedures Directive. This is also likely to be a more efficient option than using personnel of other authorities that are by definition less familiar with relevant concepts in refugee and human rights law. Even where they have received basic training with respect to human rights law, the Union asylum *acquis* and interview techniques, such staff may also be less sensitive to particular vulnerabilities of the applicant, which may further undermine the quality and efficiency of the personal interview. ECRE recommends States to use as a rule personnel of the determining authority to conduct personal interviews and only to make use of personnel of other authorities in the exceptional situation where the processing of a large number of asylum applications that are considered inadmissible risks undermining the effective operation of the asylum procedure and the timely examination of other asylum applications.

14. The safe country concepts (Articles 35 - 39)

The recast Asylum Procedures Directive continues to establish no less than 4 different safe country concepts. ECRE is in principle opposed to the use of such concepts as they risk to substantially dilute the only purpose of the asylum procedure, establishing whether the applicant is in need of international protection, by relying on general presumptions as regards the respect of human rights in the country concerned. Even where such presumption is rebuttable, this is often very difficult to do in practice as *de facto* the burden of proof is often entirely placed on the applicant, undermining a proper application of the duty of cooperation as laid down in Article 4 recast Qualification Directive.¹⁵²

Nevertheless, ECRE welcomes the fact that the recast Asylum Procedures Directive further reinforces the possibilities for applicants to challenge the safety of the country concerned in their particular circumstances with respect to the four safe country concepts and ensures access to a remedy with suspensive effect, at a minimum through the request for an interim measure, in such cases. These are important guarantees contributing to ensuring that the principle of *non-refoulement* is fully respected in practice. However, ECRE

¹⁵¹. as to whether new elements or findings have arisen or have been presented by the applicant which relate to the person's qualification as a person in need of international protection

¹⁵². According to Article 4(1) recast Qualification Directive Member States have a shared duty to cooperate actively with the applicant at the stage of determining the relevant elements of an application. On the meaning of Article 4(1) recast Qualification Directive see CJEU, C-277/11, *M.M. v Minister for Justice, Equality and Law Reform*, paras. 66-68. See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, Reissued, Geneva, December 2011, para. 196. In this context see also ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011, paras. 358-359; ECHR, *F.H. v Sweden*, Application No. 32621/06, 20 January 2009.

reminds Member States that the use of safe country concepts is optional under the recast Asylum Procedures Directive and strongly recommends not to transpose these provisions into national legislation as they may undermine a thorough examination of the applicant's international protection needs.

The concept of first country of asylum

ECRE remains concerned that **Article 35(b)** allows an applicant to be returned to a country where he or she has not been recognised as a refugee but “otherwise enjoys sufficient protection”.¹⁵³ The lack of definition of “sufficient protection” is worrying as it potentially allows for the application of very low standards. Mere protection against *refoulement* in the first country of asylum cannot be considered as “sufficient protection”, a concept which is furthermore not defined in EU *asylum* legislation. The full range of refugee rights enshrined in the 1951 Refugee Convention, the Qualification Directive and other international and European human rights instruments must be guaranteed.¹⁵⁴ Such protection must also be available in practice in the country concerned, which must be assessed on an individual basis by the State intending to apply the concept. Moreover, ECRE reminds States that applying the first country or asylum concept is not appropriate for countries where UNHCR undertakes refugee status determination because the state does not have the capacity to do so or cannot provide protection as defined above. In the case of *Abdolkani and Karimnia v. Turkey* concerning the planned deportation by Turkey of two Iranian nationals, former members of the Peoples Mojahedin Organisation in Iran (PMOI) to Iraq, the ECtHR found that their deportation to Iraq would violate Article 3 ECHR, notwithstanding the fact that they both had been recognized as refugees by UNHCR in Iraq¹⁵⁵. The ECtHR also confirmed 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”.¹⁵⁶ Consequently, an individual evaluation of safety is needed before protection may be refused including on first country of asylum grounds. The combined reading of recast Article 35, last sentence and Article 34(1) means that a personal interview on (at least) admissibility is required and an opportunity for applicants to challenge the application of the first country of asylum concept in their particular circumstances before a first instance decision is taken.

Recast Article 35 now also allows Member States to apply the criteria for considering a country as a safe third country as laid down in recast Article 38(1) when applying the concept of first country of asylum. ECRE considers that both concepts address two types of situations that are fundamentally different, namely where the applicant has obtained protection already¹⁵⁷ and where the applicant has not.¹⁵⁸ The assessment of the future risk for the person in the first country of asylum is linked to whether or the person can still avail themselves of protection in that country and whether or not they will be readmitted to that country. In ECRE's view this presupposes that the person has obtained a legal status on the basis of which they can access the rights granted under the 1951 Refugee Convention and other international human rights treaties in practice. If this is not the case, the person's application should indeed be considered in substance and where Member States choose to apply a safe third country concept, the criteria laid down in recast Article 38(1) should

¹⁵³. ECRE, *ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, October 2006 p. 22.

¹⁵⁴. See UNHCR, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, 13 October 1989, No. 58 (XL) – 1989; ECRE, *The Way Forward: Europe's role in the global refugee protection system. Guarding refugee protection standards in regions of origin*, December 2005 and Legomsky, Stephen, “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection”, (2003) 15 *IJRL*, p. 640.

¹⁵⁵. “Given that the applicants' deportation to Iraq would be carried out in the absence of a legal framework providing adequate safeguards against risks of death or ill-treatment in Iraq and against the applicants' removal to Iran by the Iraqi authorities, the Court considers that there are substantial grounds for believing that the applicants risk a violation of their rights under Article 3 of the Convention if returned to Iraq” See European Court of Human Rights, *Abdolkhani & Karimnia vs. Turkey*, Application n°30471/08, 22 September 2008, par. 89.

¹⁵⁶. *Ibid.*, par. 88.

¹⁵⁷. See Article 35 recast Asylum Procedures Directive referring to a situation where the applicant is recognised as a refugee or enjoys sufficient protection in a third country.

¹⁵⁸. See Article 38(1) recast Asylum Procedures Directive which refers to the possibility to request refugee status as part of the principles that must be observed in the third country with regard to which a Member States intends to apply the safe third country concept.

be complied with at a minimum.

The concept of safe country of origin and national designation of third countries as safe countries of origin.

Article 36 defining the concept of safe country of origin has not fundamentally changed compared to Article 31 of the 2005 Asylum Procedures Directive.¹⁵⁹ ECRE reminds Member States that the application of a safe country of origin concept remains optional.¹⁶⁰ Notwithstanding the strengthened procedural safeguards surrounding the application of the concept in the recast Asylum Procedures Directive, ECRE recommends States not to apply such a concept as it still risks setting an unsurmountable burden on the applicant to rebut the presumption of safety in practice. Even where caseworkers and decision-makers are properly trained, designating a third country as safe from the outset is likely to consciously or inadvertently influence the way the asylum application is perceived by the decision-maker at the start of the examination and therefore may result in a less thorough examination of the asylum application.¹⁶¹ In ECRE's view, the application of a safe country of origin concept distracts from the true purpose of the asylum procedure which is the individual examination of the protection needs of the asylum seeker, based on an objective and up-to-date assessment of the human rights situation in the country of origin and the individual circumstances of the asylum seeker, rather than on the basis of general assumptions about the situation in that country.

Moreover, the deletion of a legal basis in the directive for the adoption of a common list of safe countries of origin at EU level combined with the existence of national lists of safe countries of origin, seriously question whether the use of the safe country of origin list is compatible with the objective of establishing a CEAS and convergence of decision-making.¹⁶² Current practice in the EU shows that those Member States which apply national lists of safe countries of origin all apply different lists.¹⁶³ As there is no common understanding between EU Member States of the concept and hence disagreement as to which countries are safe and a considerable number of Member States do not have safe country lists, such lists are rather counterproductive in the context of building a CEAS as they inevitably contribute to diverging outcomes for asylum applications from such countries in the different EU Member States.

Notwithstanding its principled objection to the use of the safe country of origin concept, ECRE acknowledges and welcomes the strengthened procedural safeguards in the recast Asylum Procedures Directive that are now required for its application. First, in addition to the deletion of Article 29 2005 Asylum Procedures Directive, the recast Asylum Procedures Directive no longer allows for national legislation derogating from the criteria laid down in Annex II to the Directive for considering a country as safe¹⁶⁴ and the national designation of part of a country as safe or as safe for a specified group of persons in that country or part of a country.¹⁶⁵ Second, the recast Asylum Procedures Directive explicitly requires Member States to take into account a range of sources of information, including UNHCR, EASO and international organisations, and to

¹⁵⁹. Except for the deletion of Article 31(2) of the 2005 Asylum Procedures Directive which required Member States to consider an asylum application from a national of a country on the minimum common list of safe countries of origin, as unfounded. Since Article 29 on the minimum common list of third countries regarded as safe countries of origin is deleted from the recast Asylum Procedures following the CJEU judgment annulling parts of this provision, Article 31(2) had of course become meaningless. See Court of Justice, Case C-133/06, *European Parliament and Commission v. the Council*, Judgment of 6 May 2008.

¹⁶⁰. See recast Article 36(1) according to which a third country “designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if” (italics added).

¹⁶¹. A recent study on credibility assessment in EU asylum systems acknowledged the potential influence of societal, political and institutional pressure to prevent the abuse of the asylum system which may “subconsciously influence the mind-set of decision-makers, so that they approach the credibility assessment with scepticism and disbelief”. See UNHCR, *Beyond Proof. Credibility Assessment in EU Asylum Systems*, May 2013, p. 78.

¹⁶². According to the Stockholm Programme the “objective should be that similar cases should be treated alike and result in the same outcome” while recital 2 of the EASO Regulation refers to the need to reduce disparities in the granting of international protection.

¹⁶³. For an overview of the application of the safe country of origin and safe third country concept in selected EU Member States, see AIDA, *Mind the Gap*, pp. 48 – 53.

¹⁶⁴. See Article 30(2) 2005 Asylum Procedures Directive.

¹⁶⁵. See Article 30(3) 2005 Asylum Procedures Directive.

regularly review the situation in those countries.¹⁶⁶ While these are important safeguards, additional measures are necessary to ensure their effective enforcement. In ECRE's view, this requires a transparent and effective mechanism in national law that allows not only for the regular review of the list of safe countries of origin but also for the immediate removal of a country from the list where necessary in order to ensure that the examination of the asylum application is not subject to a presumption of safety where it is no longer justified under the Directive. Such a mechanism should provide for the inclusion of expert advice of the determining authority, in view of its central role and degree of specialisation required under Article 4 of the recast Asylum Procedures Directive as well as the consultation of UNHCR and human rights organisations with expertise on the human rights situation in the countries concerned.

Article 36 requires an individual examination of the application and an opportunity for the applicant to submit "any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with Directive 2011/95/EU." ECRE reminds states that this provision does not allow for derogation from the principles laid down in Article 4 recast Qualification Directive, including the duty for the asylum authorities to cooperate with the applicant in establishing the facts of the case. Hence, while it remains for the applicant to substantiate the asylum application, this may not result in placing the burden of proof entirely on the applicant, nor as setting a higher standard of proof. Also, applicants processed in an accelerated procedure on the grounds of the safe country of origin concept must have sufficient time to present the necessary material in support of their asylum application. In the case of *H.I.D., B.A.* the CJEU considered this an essential procedural safeguard to allow "the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin."¹⁶⁷

The concept of safe third country

Article 38 only contains two changes to the safe third country concept as defined in Article 27 of the 2005 Asylum Procedures Directive. First, **Article 38(1)** adds the absence of a "risk of serious harm as defined in Directive 2011/95/EU" to the list of criteria that need to be fulfilled for considering a country as a safe third country. Second, **Article 38 (2) (c)** now includes an explicit requirement for national rules to permit the applicant to "challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances" and to challenge the existence of a connection between the applicant and the third country concerned.

Although the criteria set in **Article 38(1)** does not state so explicitly, the guarantees with regard to the treatment of the applicant in the safe third country must not only be laid down in national legislation of the country concerned but must also be respected in practice. In the case of *Hirsi Jamaa and Others v. Italy*, the ECtHR, with respect to the risk of indirect *refoulement* from Libya, held that "the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees".¹⁶⁸ This includes a positive duty to verify the guarantees in place in the third country to ensure that the principle of *non-refoulement* is respected.¹⁶⁹ The examination of the particular circumstances of an applicant must include a thorough assessment not only whether the principle of *non-refoulement* is respected

¹⁶⁶. See Article 37(2) and (3) recast Asylum Procedures Directive. See also recitals 46 and 48 recast Asylum Procedures Directive.

¹⁶⁷. CJEU, Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 31 January 2013, par. 75. The Court also held that "in order to avoid any discrimination between applicants for asylum from a specific third country whose applications might be the subject of a prioritised examination procedure and nationals of other third countries whose applications are subject to the normal procedure, that prioritised procedure must not deprive applicants in the first category of the guarantees required by Article 23 of Directive 2005/85, which apply to all forms of procedure". See CJEU, *H.I.D., B.A.*, at par. 74.

¹⁶⁸. See ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012, par. 157.

¹⁶⁹. "It is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced". See ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012, par. 147. See also C. Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review* (2012)12:2, pp. 322-324.

in practice but also whether refugees have effective access to their rights guaranteed in the 1951 Refugee Convention. This implies in any case that the third country concerned has ratified the 1951 Refugee Convention and has done so without geographical limitation.

Through the inclusion of **Article 38(1) (b)**, the risk of serious harm in the safe country will have to be assessed according to the individual circumstances of the applicant. This is necessary with respect to the risk of such treatment in the safe third country concerned but also with respect to the risk of the person being expelled from such a country to another third country in violation of the principle of *non-refoulement*. As it is the case with respect to expulsion to another Council of Europe Member State,¹⁷⁰ the applicant's access to socio-economic rights in the third country will have to be part of the assessment of whether there is a risk of an Article 3 ECHR violation.¹⁷¹

This must be part of the rules to be laid down in national law requiring a connection between the applicant and the third country concerned. **Article 38(2)(a)** explicitly requires that such rules must stipulate that it must be reasonable for that person to go to that country and apply for asylum there. This requires, of course, that the applicant is admitted to the territory of the country concerned, as is explicitly acknowledged in **Article 38(4)**. This must be strictly interpreted in light of the standard laid down in Article 8(1) recast Qualification Directive with regard to internal protection, which requires an applicant to be able to safely and legally travel to a part of a country, in order for such a concept to be applied.¹⁷² In ECRE's view the same standard of safe and legal travel must apply whenever Member States want to make use of the safe third country concept. If it is not possible for the asylum seeker to safely and legally travel to the safe third country concerned, Member States should not apply the safe third country concept and determine whether the person is in need of international protection themselves. As mentioned above, as part of the reasonableness test, Member States must not only take into account an existing connection between the applicant and the third country but also the conditions an applicant will be subjected to in the third country. This is required by the case law of the ECtHR, which in the case of *M.S.S. v. Belgium and Greece*, found a violation of Article 3 ECHR on behalf of Belgium for knowingly having exposed a person to detention and living conditions that amounted to degrading treatment.¹⁷³ Also in cases concerning expulsion to countries that are not Member States of the Council of Europe, the ECtHR has included access to socio-economic rights as part of its assessment of the risk of a violation of Article 3 ECHR, including in relation to the application of an internal flight alternative.¹⁷⁴

Furthermore, in ECRE's view a meaningful connection between the applicant and the third country is required, such as family ties or strong cultural ties. The mere transit through such a country would not be sufficient, in particular where the applicant would in practice be deprived of their basic socio-economic rights in the absence of any networks or the presence of family members they could rely on in practice.

ECRE remains concerned about the standard set in **Article 38(2) (b)** allowing Member States to include, as part of their methodology for the application of the safe third country concept to a particular country or to a particular applicant, the "national designation of countries to be generally safe". For the same reasons mentioned above with regard to national lists of safe countries of origin, ECRE opposes the use of lists of safe third countries. Where States do operate such lists, national legislation must include effective guarantees, in accordance with **Article 38(2)(c)**, for the applicant to challenge the safety of the country concerned

¹⁷⁰. See ECtHR, *M.S.S. v. Belgium and Greece*, par. 250.

¹⁷¹. See ECtHR, *Hirsi Jamaa and Others v. Italy*, par. 121 where the Court refers to the risk of the applicants being subjected to precarious living conditions and a marginal and isolated position in Libyan society.

¹⁷². On the interpretation of Article 8 recast Qualification Directive, see ECRE, *Information Note on the 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)*, p. 7. On the application of Article 7 and 8 Qualification Directive in selected EU Member States, see ECRE, *Asylum Aid, Vluchtelingenwerk Nederland and Hungarian Helsinki Committee, Actors of Protection and the Application of the Internal Protection Alternative. European Comparative Report*, June 2014.

¹⁷³. The applicant had been living on the streets for several months without resources and no access to sanitary facilities while the Greek authorities remained inactive and had been detained in appalling conditions. See ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011, par. 367.

¹⁷⁴. See ECtHR, *Sufi and Elmi v. United Kingdom*, Application no. 8319/07 and 11449/07, Judgment of 28 June 2011, par. 278 – 292. and ECtHR, *Hirsi Jamaa and Others v. Italy*, par. 121.

and the existence of a connection with the third country in his or her particular circumstances. In line with a frontloading approach and the principle of effectiveness, Member States should clearly and systematically inform applicants of the possibility of the application of the safe third country concept where relevant at the earliest possible stage so as to provide them with an effective opportunity to rebut the presumption of safety before a first instance decision is taken.¹⁷⁵

Finally, ECRE reminds Member States of their obligation under **Article 38(3) (a) and (b)** to inform the applicant of the fact that a negative decision has been taken solely on the basis of the safe third country concept and to provide him or her with a document in the language of the safe third country concerned, informing the authorities in that country that the application has not been examined in substance. ECRE considers this to be an important guarantee that may contribute to ensure access to a substantive examination of the applicant's international protection needs in the third country concerned, where this has been denied in an EU Member State.

The European safe third country concept

ECRE regrets that the recast Asylum Procedures Directive maintains this concept, despite explicit recommendations for its deletion from UNHCR and international human rights organisations, including ECRE.¹⁷⁶ ECRE maintains the view that the concept is not in compliance with international human rights law as it allows Member States not to conduct an examination of an application for international protection and of the safety of the applicant based on the fact that the third country concerned ratified and observes the 1951 Refugee Convention and the ECHR, in case the applicant enters or seeks to enter irregularly from such a country. Moreover, the assessment of whether a third country meets the requirements laid down in **Article 39(2)** must not necessarily be carried out by the specialised asylum authority but can be done by any "competent authority". As such an authority may not have the necessary expertise in the field of asylum and refugee law, it may not be qualified to make a proper assessment of whether the 1951 Refugee Convention and the ECHR are observed in practice.

No category of applicants can lawfully be denied the right to have their claim for protection examined on such a basis as this would violate the right to asylum as laid down in Article 18 of the EU Charter of Fundamental Rights and prevent refugees and persons in need of subsidiary protection from asserting their rights under the 1951 Refugee Convention and the Qualification Directive. Having an asylum procedure in place prescribed by law does not necessarily mean that persons in need of international protection would have access to it in practice, even if the European safe third country concerned were to readmit the applicant on its territory.

However, at the same time **Article 39(3)** now requires Member States to allow applicants to challenge the concept on the grounds that the third country concerned is not safe in his or her particular circumstances. This is to be distinguished from the right to an effective remedy against such a decision which is guaranteed under Article 46(1) (iv) and therefore such a possibility to challenge the safety of the European safe third country in the applicant's individual circumstances must necessarily be guaranteed before a decision is taken not to conduct or not fully conduct an application on that basis in accordance with **Article 39(1)**. At the same time, **Article 39(4)** requires national law to include the necessary guarantees that such provision is applied in accordance with the principle of *non-refoulement*. Such rules must also ensure compliance with the jurisprudence of the ECtHR with regard to Article 3 ECHR in expulsion cases which requires a rigorous, full and *ex nunc* assessment of the existence of a real risk of being subjected to torture or inhuman or degrading treatment in the country of destination.¹⁷⁷ They must also guarantee the applicant's right to be

¹⁷⁵. See also ECRE's recommendations and observations with regard to Article 17 recast Asylum Procedures Directive above.

¹⁷⁶. See, for instance, UNHCR, *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, p. 30; ILPA, *ILPA Comments on Commission Proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) Com (2009) 554*, 21 October 2009, p. 29 and ECRE, *Comments on the Amended Commission Proposal to recast the Asylum Procedures Directive (COM(2011) 319 final)*, September 2011, p. 32.

¹⁷⁷. See ECtHR, *Sufi and Elmi*, par. 214-215.

heard before any individual measure which would affect him or her adversely is taken and the obligation of the administration to give reasons for its decisions.¹⁷⁸ Moreover, the CJEU in the case of *N.S. and M.E. and Others* referring to Article 36 (2)(a) and (b) of the 2005 Asylum Procedures Directive, held that its wording “indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions” and that therefore the presumption of safety must necessarily be regarded as rebuttable.¹⁷⁹ If this is to be done outside the context of the asylum procedure as envisaged in **Article 39(1)**, a separate procedure will necessarily have to be conducted in order to ensure compliance with the principle of *non-refoulement* and the procedural safeguards this entails at a minimum under the case law of the ECtHR and CJEU and the EU Charter of Fundamental Rights.

In light of the fact that the European safe third country concept is at variance with international human rights and refugee law, ECRE strongly recommends Member States not to transpose such concept in national legislation as Article 39 is an optional provision. ECRE strongly recommends those Member States that have such a concept in their national legislation to abolish it in national law so as to enhance consistency of national law with international human rights and refugee law and the EU Charter of Fundamental Rights.¹⁸⁰

15. Subsequent applications (Articles 40 - 42)

Article 40 maintains the criteria used in the 2005 Asylum Procedures Directive to define a subsequent application. **Article 40(2)** provides that subsequent applications must be subject to a preliminary examination for the purpose of a decision on the admissibility of such applications. Such preliminary examination concerns the existence of new elements or findings which have arisen or have been presented by the applicant relating to the examination as to whether the applicant qualifies as a beneficiary of international protection under the Qualification Directive. ECRE agrees that such applications can be processed in an admissibility procedure provided it offers the necessary procedural guarantees as recommended by ECRE above.¹⁸¹ The preliminary examination of the existence of new elements must necessarily be carried out by the determining authority, as the examination of subsequent applications is not among the cases listed in Article 4(2) for which an authority, other than the determining authority, can be made responsible.¹⁸² As discussed above, in ECRE’s view, as a rule a personal interview during a preliminary examination should be available to the asylum seeker lodging a subsequent application. This should in particular be granted in case of a first subsequent application and where asylum seekers are not able to present material proof of such new elements or may not be able to submit such elements in writing.

Where Member States want to make use of the possibility to omit a personal interview in the case of a first subsequent asylum application, ECRE recommends restricting this possibility to applications that can be considered admissible on the basis of written material or where the applicant is unable or unfit to be interviewed. In any case, States should not make use of this possibility where the applicant has no access to free legal assistance for the purpose of submitting a subsequent asylum application as this would seriously undermine the fairness of the procedure. Moreover, ECRE reminds States that **Article 42(2)(b)** does not allow for a preliminary examination to be conducted solely on the basis of written submissions in the case of an application lodged by a dependant or an unmarried child after an application had been lodged on their behalf. According to **Article 40(6)** the preliminary examination consists in those cases of examining whether there are facts relating to the dependant’s or the unmarried child’s situation which justify a separate application. While such an approach is in principle acceptable, this must be applied in full respect of the individual’s wish to have their asylum application examined separately. The very fact that such an application is lodged should therefore be considered as constituting a presumption that such facts justifying a separate application exist.

¹⁷⁸. See sections 5 and 6 above.

¹⁷⁹. CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H.*, Judgment of 21 December 2011, par. 103 and 104.

¹⁸⁰. At the time of writing, no EU Member State applies the European Safe Third Country Concept in practice.

¹⁸¹. See above section 13.

¹⁸². Which refers only to the processing of Dublin cases and the granting and refusing of permission to enter in the framework of border procedures. For an analysis see above, section 2.

In case the preliminary examination concludes that the new elements submitted by the applicant or the new findings “add significantly to the likelihood of the applicant qualifying as a beneficiary of international protection”, the application must be examined further in conformity with the basic rights and principles as laid down in Chapter II of the recast Asylum Procedures Directive.¹⁸³ Whereas the Directive does not give any further indication as to how to assess whether a new element or finding adds “significantly” to the likelihood of a person qualifying as a refugee or a person in need of subsidiary protection, in ECRE’s view Member States should use the same standard of proof with respect to the elements or findings submitted that is applicable in first asylum applications. Rather than requiring the applicant to submit new elements that prove the “well-foundedness” of their subsequent asylum application conclusively beyond doubt, an applicant can only be expected to show that there is a reasonable possibility of future persecution or substantial grounds for believing that they face a real risk of serious harm.¹⁸⁴ Moreover, in line with UNHCR’s recommendations States should refrain from a very formalistic interpretation of the requirement of the submission of new elements and adopt a broad and inclusive approach that takes into account the challenges encountered by asylum applicants in submitting all elements of their asylum application in a timely manner such as the lack of access to free legal assistance, extremely short procedures or personal circumstances such as age, trauma, having been subjected to torture or other serious violence etc.¹⁸⁵ In this respect, ECRE reminds Member States that according to **Article 40(3)** they may provide for “other reasons for a subsequent application to be further examined” than those strictly adding significantly to the likelihood of applicants qualifying for international protection. ECRE encourages Member States to make use of this possibility to allow for a flexible approach where this is needed to ensure that protection needs are fully and properly examined.

Article 41 now allows Member States to derogate from the right to remain in the territory where (1) a person has lodged a first subsequent asylum application merely to frustrate or delay an imminent removal or (2) a person makes another subsequent asylum application following a final decision considering a first subsequent application inadmissible or after a final decision to reject such application as unfounded. ECRE is concerned about this provision setting a very low standard that may undermine the effective enjoyment of EU Charter rights such as the right to asylum and the right to an effective remedy and the right to good administration as a general principle of EU law. This may in particular be the case where a Member State makes use of the possibility to only further examine a subsequent application where the person was incapable, through no fault of their own, of asserting the new elements or findings in the previous procedure or in the appeal procedure. The assessment of whether or not the person was capable of asserting those elements in a timely manner is often difficult and may be disputed. In particular where a person’s application was examined in an accelerated procedure with reduced procedural safeguards or extremely short time limits, asylum seekers may not have had an effective opportunity to submit such facts or findings in time.

Also, the assessment of whether an application is being submitted merely to frustrate imminent removal or not should take the circumstances in which the first asylum application has been examined duly into account.

In particular, in case of rejection of a first subsequent asylum application, denying a person the right to remain on the territory will inevitably result in the denial of the right to an effective remedy, where this is combined with the possibility to deny suspensive effect to an appeal lodged against such decision under **Article 41(2) (c)**.¹⁸⁶ ECRE strongly recommends Member States not to make use of the possibility to derogate from Article 46(8) in such a case as it would render the remedy against the decision rejecting a first subsequent asylum application meaningless in practice and would be in violation of Article 13 ECHR and 47 of the EU Charter of Fundamental Rights.¹⁸⁷

¹⁸³. See Article 40(3).

¹⁸⁴. See M. Reneman, “The standard and burden of proof”, in ECRE and Dutch Council for Refugees, *The Application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, p.106.

¹⁸⁵. See also UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 407.

¹⁸⁶. Which allows to derogate from recast Article 46(8) which obliges Member States to “allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraph 6 and 7”.

¹⁸⁷. For an in depth discussion of the requirements of an effective remedy according to the case law of the ECtHR and the CJEU see below section 17.

16. Border procedures (Article 43)

Evidence on state practice shows that the examination of asylum applications at the border remains problematic in many EU Member States and raises a number of questions as to the feasibility of guaranteeing effective access to the range of procedural safeguards in such a location. Asylum seekers' access to quality legal assistance and information is often undermined as their means of communication with the outside world are, by definition, limited, while UNHCR and NGO's often experience practical difficulties in accessing border areas to provide legal information or advice to those stranded at the border.¹⁸⁸ In addition to its devastating effects of detention on the mental and physical health of asylum seekers,¹⁸⁹ detention at the border pending the examination of the asylum application is not conducive to building mutual trust between the applicant and the asylum authorities, which is necessary to ensure a fair and complete examination of the asylum application.

Because of the difficulties in ensuring proper access to a quality examination of asylum applications inherent in border procedures, ECRE considers that in general such procedures are ill-suited to ensure an adequate examination of a person's protection needs. Moreover, as they often imply automatic detention, they are in tension with Article 31 of the 1951 Refugee Convention, according to which "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".¹⁹⁰

ECRE therefore recommends States not to examine asylum applications at the border but rather accommodate those applying at the border on the territory in order to ensure an adequate examination of their asylum application, thus, granting effective access of their fundamental rights under the EU asylum *acquis* as well as the EU Charter of Fundamental Rights. Such an approach is allowed under **Article 43 (1)** which remains an optional provision.¹⁹¹

If States wish to uphold border procedures, such procedures should be limited to the examination of the admissibility of the asylum application in accordance with Article 33 as interpreted by ECRE. For the reasons outlined above and in section 12, ECRE recommends States not to make use of the possibility in **Article 43(1)(b)** to examine the substance of the asylum application in an accelerated asylum procedure at the border as the reduced time-limits risk further undermining the quality of the examination and the applicant's access to the procedural guarantees as laid down in Chapter II of the recast Asylum Procedures Directive, which may further enhance the risk of violations of the principle of *non-refoulement*.

Furthermore, **Article 43(2)** confirms the already existing obligation for States to grant entry to the territory to an applicant with respect to whom no decision has been taken within a reasonable time in the framework of a border procedure or at the latest within four weeks. Although the provision does not stipulate as of when the four weeks must be calculated, this must be interpreted as meaning four weeks as of the day the asylum application was first made to the authorities at the border. Such interpretation further supports the objective to ensure that decisions on asylum applications are made as soon as possible as well as the objective to guarantee access to the asylum procedure in the EU legal framework by strengthening the role of border guards and other authorities in informing asylum seekers where to apply for asylum and to shorten the possible lapse of time between making and registering the asylum application.¹⁹²

Moreover, where the application of a border procedure implies detention, recast Article 43 will have to be

¹⁸⁸. For an overview of challenges in practice in selected Member States see ECRE/ELENA, *Survey on Legal Aid for Asylum Seekers in Europe*, October 2010, pp. 42-46.

¹⁸⁹. See JRS Europe, *Becoming Vulnerable in Detention, Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)*, June 2010.

¹⁹⁰. On the meaning of Article 31 Refugee Convention see Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention and protection*, June 2003.

¹⁹¹. See Article 43(1) according to which "Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide on at the border or in transit zones..." (italics added).

¹⁹². See Article 6 and ECRE's recommendations relating to the interpretation of this provision in section 3 above.

applied in line with Member States' obligations under the recast Reception Conditions Directive, which fully applies to asylum applications made at the border. In addition to the application of a necessity and proportionality test this implies *inter alia* an obligation for Member States to show that alternatives to detention, such as regular reporting or the deposit of a financial guarantee or an obligation to stay at an assigned place as laid down in national law, cannot be instead applied effectively in each individual case. ECRE notes that it is unclear how border detention on arrival can be reconciled with the legal duty to assess and apply alternatives to detention. It should be borne in mind that if asylum seekers are detained automatically at the border, in effect they are not in a position to demonstrate that they would comply with alternatives to detention. ECRE welcomes existing good practice such as in Belgium where unaccompanied asylum-seeking children and families with children applying at the borders are no longer detained in the closed centre at the airport but are accommodated in a reception facility on the territory that is accommodated to their special needs.¹⁹³ Good practice also exists in the Netherlands where since May 2014 families with under age children who are applying at the border in Schiphol airport are no longer detained upon arrival but are transferred to a reception centre on the territory, except when there is a suspicion of human trafficking or where Article 1F 1951 Refugee Convention might apply.¹⁹⁴

In this regard, where border procedures imply the detention of asylum seekers, ECRE considers a period of 4 weeks excessive and unnecessarily long, in particular where border procedures are limited to dealing with the admissibility of the asylum application at the border, as suggested by ECRE. Where Member States make use of Article 43 while detaining the applicant at the border, such a decision should be prioritised and should be taken as soon as possible after the asylum application was made. In this regard, ECRE reminds States that according to the recast Reception Conditions Directive asylum seekers can only be detained where it proves necessary and on the basis of an individual assessment of each individual case, if other less coercive alternatives measures cannot be applied effectively and that they shall be detained only for as short a period as possible.¹⁹⁵

ECRE considers that the possibility in **Article 43(3)** to apply border procedures at locations in proximity to the border or the transit zone in the event of large numbers of third country nationals lodging asylum applications at the border or in the transit zone sets a worrying standard. It does not contain clear guidance as to what constitutes a large number of third country nationals lodging an application for international protection and therefore leaves a wide margin of appreciation to Member States. Moreover, it is unclear as to what the legal consequences of such a decision would be with regards to the applicant's entry to the territory and detention. As it allows Member States to apply border procedures also "where and for as long as these third-country nationals or stateless persons are accommodated normally" at such locations, this may imply a legal fiction according to which such persons could be considered not to have entered the territory. ECRE strongly rejects such interpretation as this could contribute in the creation of legal grey zones for asylum seekers by postponing a decision as regards to their entry into the territory, which may also deprive them from accessing rights under the (recast) Reception Conditions Directive. It should be noted that human rights law has long prohibited such legal fictions.¹⁹⁶

Article 43(3) should not be used to extend the notion of border or transit zone to locations on the territory of a State and should under no circumstances be used to justify continued detention "at the border" beyond the grounds laid down in Article 8(3) of the recast Reception Conditions Directive and Article 27 of the recast Dublin Regulation. Where circumstances make it impossible for a Member State to conduct a procedure at the border or in the transit zone, persons applying for international protection should be admitted to the territory and their application examined according to the regular or accelerated procedure as recommended by ECRE, rather than being subjected to increased legal uncertainty.

¹⁹³. See AIDA, *Country Report Belgium*, Update June 2014, pp. 69 -72.

¹⁹⁴. See AIDA, *Mind the Gap*, pp. 73-74.

¹⁹⁵. See Article 8(2) and 9(1) of the recast Reception Conditions Directive.

¹⁹⁶. See ECtHR, *Amuur v. France*, Application no. 19776/92, judgment of 25 June 1996, par. 52 and ECtHR, *Shamsa v. Poland*, Application no. 45355/99 and 45357/99, Judgment of 27 November 2003 (French only), par. 45.

17. The right to an effective remedy (Article 46)

The right to an effective remedy is a fundamental safeguard to ensure protection from *refoulement* and therefore an inherent part of a fair and efficient asylum procedure. ECRE welcomes the strengthening of this right in the new Article 46 of the recast Asylum Procedures Directive on various aspects, including with regards to the scope of the review of the first instance decision, the time limits for lodging an appeal and its suspensive effect. Whereas this provision may still leave discretion to Member States as to how the key procedural safeguards necessary to ensure access to an effective remedy are being transposed into national law, it must be read and applied in line with their obligations under the EU Charter and the ECHR as interpreted by the CJEU and the ECtHR. Recent developments in the jurisprudence have further clarified and strengthened the requirements of an effective remedy and have narrowed down the room for manoeuvre for the Member States and are relevant for all EU Member States, including those opting out of the recast asylum legislation.

As a preliminary remark it should be noted that, whereas Article 13 ECHR does not, strictly speaking, require the right to appeal before a Court or Tribunal, Article 47 EU Charter of Fundamental Rights does so explicitly. In this regard, the question of whether a body constitutes a court or tribunal is informed by the CJEU case-law determining the factors to be taken into account to determine whether the body referring a question to the CJEU is a court or tribunal as required under Article 267 TFEU. This was confirmed by the CJEU in the case of *H.I.D., B.A.*, where it explicitly assessed whether the Irish Refugee Appeals Tribunal is a court or tribunal using factors “such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent”.¹⁹⁷

A full and ex nunc examination of facts and points of law.

Article 46(1) establishes a right to an effective remedy against an exhaustive list of decisions on applications for international protection, which cover all relevant decisions on such applications that are possible under the recast Directive.¹⁹⁸ Whereas the relevant paragraphs of Article 46 allows for special arrangements with regards to certain types of decisions, the recast directive does not allow for any exceptions to the rule that asylum seekers must have a right to an effective remedy against an individual decision on an asylum application, regardless of the type or nature of such a decision.¹⁹⁹

Article 46(3) generally reflects the requirement of a full and *ex nunc* examination of facts and points of law by a Court or Tribunal enshrined in Article 47 EU Charter of Fundamental Rights and Article 13 ECHR and the relevant jurisprudence of the ECtHR and CJEU. This sets an important standard determining the scope and the level of scrutiny of the appeal that is required in order for the remedy to be effective. A full and *ex nunc* assessment of facts and points of law implies that the material point in time is that of the Court’s consideration of the case. This means that the scrutiny by the national Court or Tribunal cannot be limited to an assessment of the evidence that was at the disposal at the time of the decision of the first instance authority but must include new evidence that has been obtained by the Court either *proprio motu* or has been sub-

¹⁹⁷. CJEU, Case C- 175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 31 January 2013, par. 83 and following.

¹⁹⁸. In the case of *Samba Diouf* the CJEU concerning the interpretation of the right to an effective remedy under the 2005 Asylum Procedures Directive held that “the decisions against which an applicant for asylum must have a remedy under Article 39(1) of Directive 2005/85 are those which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance”; See CJEU, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*, Judgment of 28 July 2011, par. 42.

¹⁹⁹. This is with the possible exception of the right to remain during an appeal against a decision rejecting a subsequent asylum application in accordance with Article 41(1) as discussed above.

mitted by the applicant or the authorities in the course of the proceedings before the Court.²⁰⁰ This means that the Court or Tribunal must conduct an in-depth examination of the material placed before it and that dates from after the first instance decision, including verifying proactively the evidence submitted in order to dispel any doubt about its authenticity.²⁰¹ Therefore, the competence of the Court or Tribunal to review the first instance decision can under no circumstances be limited to a summary or marginal scrutiny of the facts of the case and national legislation must contain the necessary guarantees in this respect.

Article 46(3) furthermore stipulates that a full and *ex nunc* examination includes an examination of the international protection needs pursuant to the recast Qualification Directive, where applicable and this must at least be guaranteed in appeals procedures before a Court or Tribunal of first instance. While ECRE agrees that a full and *ex nunc* assessment of the facts and points of law at the first instance appeal is a sufficient guarantee; higher courts should have a possibility to remedy manifest errors by the first instance court or tribunal in assessing the material facts in light of the irreversible nature of the harm caused to the asylum seeker in case of a violation of the principle of *non-refoulement*. Moreover, in principle such full and *ex nunc* examination must always include an examination of whether a person qualifies as a refugee or beneficiary of subsidiary protection as this is the very purpose of any decision taken with respect to an application for international protection listed in **Article 46(1)**. In ECRE's view, the reference to "where applicable" cannot be interpreted as excluding any decision taken with regard to an application for international protection under the recast Asylum Procedures Directive from a review of the international protection needs of the individual concerned. In ECRE's understanding such wording was introduced merely to address the situation where a decision taken on the asylum application is separate from the return decision but where both types of decisions can be appealed before the same Court and to avoid that the appeal, with regards to the return decision, would have to repeat the assessment of the international protection needs carried out under the appeal concerning the asylum decision. However, where the decision on the asylum application is separated from the decision on return, the latter should in any case be subject to a rigorous scrutiny and a full and *ex nunc* examination with respect to the possible violation of Article 3 ECHR in the country of return. This is notably required where the asylum application was rejected on the basis that the nationality of the applicant could not be established and the asylum authority did not assess the well-founded fear of persecution or the real risk of serious harm with respect to the country of actual return, where this is different from the country of nationality as stated by the applicant.²⁰²

Reasonable time-limits to exercise the right to an effective remedy

Reasonable time-limits for lodging an appeal are essential to ensure the effectiveness of the remedy that is at the disposal of the applicant. **Article 46(4)** now explicitly requires Member States to provide for reasonable time limits for the applicant to exercise their right to an effective remedy, which shall not render such exercise impossible or excessively difficult. The latter is an inherent part of the general EU law principle of judicial protection as developed in the jurisprudence of the CJEU.²⁰³

²⁰⁰. "Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities", see ECtHR, *Salah Sheekh v. the Netherlands*, Application no. 1948/04, Judgment of 11 January 2007, par. 136. Whereas *Salah Sheekh* concerns the violation of Article 3, the ECtHR in *M.S.S. v. Belgium and Greece* found a violation of Article 13 ECHR on behalf of Belgium because the extremely urgent procedure applicable at the time did not guarantee a thorough review and because "even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeal Board did not always take that material into account. See ECtHR, *M.S.S. v. Belgium and Greece*, Application no.30696/09, Judgment of 21 January 2011, par. 389.

²⁰¹. ECtHR, *Singh and Others v. Belgium*, Application no. 33210/11, Judgment of 2 October 2012 (French Only), par. 101-104.

²⁰². See on the protection gap resulting from such a system in certain cases in Belgium, AIDA, *Country Report Belgium*, Update June 2014, pp. 36 – 37. In the case of *Singh and others*, concerning the expulsion of an Afghan family via Russia, where the nationality of the applicants was disputed by the asylum authorities, the Court held that the right to an effective remedy requires a rigorous *ex nunc* examination of the risk of treatment contrary to Article 3 ECHR with respect to third countries as well in the case of chain *refoulement*. See ECtHR, *Singh and Others v Belgium*, Application no. 33210/11, Judgment 2 October 2012 (French only), par. 83 - 86.

²⁰³. See M. Reneman, EU asylum procedures and the right to an effective remedy, Uitgeverij BoxPress, 2012, p. 93-95.

What constitutes a reasonable time limit is not further defined in Article 46, except with regard to the right to an effective remedy in case of border or transit zone procedures. In the latter case, where a Member State wishes to make use of the possibility under **Article 46(6)** not to provide for an appeal with automatic suspensive effect on the applicant's right to remain in the Member State pending the appeal, a period of at least one week must be provided to the applicant to prepare such request and submit the arguments in favour of granting them the right to remain in the territory pending the outcome of the remedy.²⁰⁴ This standard reflects the jurisprudence of the ECtHR which has held that extremely short time-limits to lodge an appeal may render the effectiveness of the remedy illusory in practice and may therefore raise an issue under Article 13 ECHR. In the case of *I.M. v. France*, for instance, the ECtHR attached great importance to the fact that the applicant's access to an effective remedy was rendered very difficult by the extremely short time-limit of 48 hours for preparing the appeal.²⁰⁵

Whereas the recast Asylum Procedures Directive leaves discretion to Member States in determining the time limits for lodging appeals in procedures other than those conducted at the border, further guidance can be taken from the jurisprudence of the CJEU with regard to accelerated procedures. In the case of *Samba Diouf*, with regards to accelerated procedures, the CJEU highlighted that the important point in this respect is that the period prescribed must be "sufficient in practical terms to enable the applicant to prepare and bring an effective action".²⁰⁶ It furthermore considered that in general a 15-day time limit for bringing an action does not seem to be "insufficient in practical terms" and "appears reasonable and proportionate in relation to the rights and interests involved".²⁰⁷ However, at the same time, it indicated that in certain circumstances such a time limit may prove insufficient in a given situation which is for the national court to determine. As a result, according to the CJEU any time limit for lodging an appeal in an accelerated procedure against a negative decision under 15 days may no longer be reasonable and proportionate, whereas in view of particular circumstances a longer time limit for lodging the appeal may be required.

The right to remain on the territory pending the outcome of the appeal

The right to remain in the territory during the time necessary to lodge the appeal and pending the outcome of the appeal against a negative first instance decision is now explicitly established in the recast Asylum Procedures Directive. **Article 46(5)** includes the general principle of an automatic suspensive effect of the appeal in asylum cases, meaning that the lodging of the appeal within the time limit stipulated in the law automatically entails a right to remain on the territory and await the outcome of the remedy.

However, **Article 46(6)** and **(7)** allows Member States to apply a system where the court or tribunal has the power to rule whether or not the applicant may remain on the territory either upon the applicant's request or acting *ex officio*. Such a system may be applied in case of any of the decisions listed in **Article 46(6) (a)** to **(d)** and if such a decision results in ending the applicant's right to remain on the territory and where in such cases the right to remain pending the outcome of the remedy is not provided in national law.

However, the use of such a system in the context of border procedures is only allowed under the Directive if specific procedural safeguards are complied with in such cases including (1) access to necessary interpretation, (2) legal assistance; (3) the above-mentioned minimum time-limit of one week to prepare the request to remain on the territory pending the appeal and (4) the requirement that the court or tribunal examines the negative first instance decision in terms of fact and law.²⁰⁸

ECRE welcomes these additional safeguards in the context of procedures conducted at the border as research shows that asylum seekers often face serious obstacles in accessing legal assistance and interpre-

204. Article 46(7)(a) recast Asylum Procedures Directive.

205. ECtHR, *I.M. v. France*, Application no. 9152/09, Judgment of 2 February 2012, par. 150. For an overview of the various time-limits for lodging an appeal in the asylum procedure of selected EU Member States, see AIDA, *Not There Yet*, September 2013, pp. 71-74.

206. See CJEU, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011, par. 66.

207. *Idem*, par. 67.

208. Article 46(7) (a) and (b).

tation, including as a result of extremely short time limits for lodging an appeal.²⁰⁹ However, **Article 46(6)** and **(7)** must necessarily be applied and interpreted in light of the developments in the jurisprudence of the ECtHR with respect to the right to an effective remedy.

The ECtHR in asylum cases requires a remedy to have automatic suspensive effect in order to be effective. In principle, both a system in which the appeal itself or a system in which the request for interim protection pending the outcome of the remedy has automatic suspensive effect, can be compatible with Article 13 ECHR. However, it can be derived from the case-law that the second option is increasingly considered by the ECHR as problematic as it may not provide sufficient guarantees to ensure compliance with the principle of *non-refoulement*. In the case of *Conka v. Belgium* the ECtHR held that the extremely urgent procedure before the Conseil d'Etat did not comply with Article 13 ECHR because it was not guaranteed in fact and in law that this application for interim protection, pending the final outcome of the appeal before the Council of State, would suspend the enforcement of the expulsion measure.²¹⁰ In the case of *Abdolkani and Karimnia v. Turkey* the Court found that the applicant had not had access to an effective remedy *inter alia* because “[i]n any case, judicial review in deportation cases in Turkey cannot be regarded as an effective remedy since an application for annulment of a deportation order does not have suspensive effect unless the administrative court specifically orders a stay of execution of that order”.²¹¹

Also in the case of *M.S.S. v. Belgium and Greece*, the ECtHR held that the procedure for applying for a stay of execution under the extremely urgent procedure before the Aliens Appeals Board did not meet the requirements of Article 13 ECHR. This was because, despite its automatic suspensive effect, no close and rigorous scrutiny by the Aliens Appeals Board was guaranteed while “the burden of proof on the applicant was increased to such an extent as to hinder the examination on the merits of the alleged risk of a violation [of Article 3 ECHR]”.²¹² In another recent case against Belgium the Court furthermore found a violation of Article 13 ECHR as the extremely urgent procedure only guaranteed an automatic suspensive effect in case the expulsion was imminent, which presupposes that the applicant is detained and that a separate request for ordinary suspension was lodged before. Criticising the complexity of such a system, which also leaves the applicant with no option but to act at the very last moment in the procedure in order to secure the suspensive effect of the remedy, the ECtHR found that the remedies available to the applicant were not effective in the sense of Article 13 ECHR.²¹³

Finally, both in the case of *Conka v. Belgium* and the case of *M.A. v. Cyprus* the ECtHR stated that the requirements of Article 13 ECHR, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement and has “pointed out the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis”.²¹⁴ The Court held in particular that “it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13”.²¹⁵

²⁰⁹. See for instance AIDA, *Not There Yet*, pp. 68-69 and 73-77.

²¹⁰. “However, it appears that the authorities are not required to defer execution of the deportation order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the Conseil d'Etat to decide the application.” See ECtHR, *Conka v. Belgium*, Application no. 51564/99, Judgment of 5 February 2002, par. 83.

²¹¹. See ECtHR, *Abdolkani and Karimnia v. Turkey*, Application no. 30471, Judgment of 22 September 2009, par. 116.

²¹². See ECtHR, *M.S.S. v. Belgium and Greece*, par. 389.

²¹³. EctHR, *S.J. v. Belgium*, Application no. 70055/10, Judgment of 27 February 2014 (French only), par. 102-103. The Court, under Article 46 ECHR, instructed Belgium to amend its domestic legislation in order to guarantee access to an effective remedy with automatic suspensive effect to all foreigners subject to an order to leave the territory without making such remedy dependent on the introduction of another separate appeal. The Court specified also that the time limit for lodging such an appeal must be sufficient and that the suspensive effect must last until a complete and rigorous scrutiny of the risk of violation of Article 3 ECHR has been carried out with respect to the request for suspension.

²¹⁴. EctHR, *M.A. v. Cyprus*, Application no. 41872/10, Judgment of 23 July 2013, par. 137.

²¹⁵. EctHR, *Conka v. Belgium*, par. 82.

In the case of *A.C. and Others v. Spain*, the ECtHR found that the applicants did not have access to an effective remedy against their expulsion to Morocco as their request for the suspension of the expulsion order was rejected by the Spanish Administrative Court before it had examined the substance of their appeal in the administrative appeal procedure. As the latter had no automatic suspensive effect, only the interim measures ordered by the ECtHR under Article 39 of its Rules of Procedure had prevented their expulsion and therefore, Spanish legislation did not provide for an effective remedy. Here again, the Court warned of the risks involved in a system whereby suspensive effect is granted upon request as it cannot be excluded that suspensive effect is wrongly refused.²¹⁶

In light of the concerns raised by the ECtHR with regard to already existing similar systems in Council of Europe Member States, ECRE believes that the procedure laid down in **Article 46(6)** may not provide the necessary guarantees in practice to prevent violations of the principle of *non-refoulement*. In particular where such an appeal procedure is applied in the context of an accelerated or admissibility procedure with short time limits for lodging appeals this may jeopardise the applicant's access to an effective remedy in practice. Moreover, **Article 46(6)** only establishes the power of a Court or Tribunal to rule whether or not the applicant may remain on the territory of a Member State pending the appeal against one of the decisions listed in **Article 46(6) (a) to (d)** without explicitly requiring a full and *ex nunc* assessment of both facts and points of law with regard to such decisions.²¹⁷

However, it is clear from the jurisprudence of the ECtHR and the CJEU that such close and rigorous scrutiny as well as the other procedural guarantees enshrined in Article 13 ECHR and Article 47 EU Charter will have to be observed in procedures established on the basis of **Article 46(6)**.²¹⁸ Otherwise, if the court decided, on the basis of its power to rule whether the applicant may or may not remain on the territory by way of preliminary assessment, that the asylum seeker may not remain in the territory, but after a full examination of the appeal concludes that the asylum seeker is nevertheless in need of international protection, the individual may already have been returned and subjected to irreversible harm. As a result, the appeal could be disadvantageous on the basis of a rapid, incomplete assessment of the case, increasing the risk of violations of the principle of *non-refoulement*.

In ECRE's view, providing an asylum seeker with an automatic right to remain on the territory during the time limit within which the right to an effective remedy must be exercised and pending the outcome of the remedy in case the applicant exercises such a right, constitutes the best guarantee to ensure that their right to an effective remedy and the principle of *non-refoulement* are respected in practice. This reduces not only the risk of violations of the principle of *non-refoulement*, it also avoids additional burdens on the already stretched judicial systems as asylum seekers are not required to launch a separate request on their right to remain on the territory and Courts are not required to address this issue separately. Moreover, the suspensive effect of the appeal and therefore the effectiveness of the remedy in practice would depend less on factors that may be beyond the asylum seeker's control, such as access to and availability of adequate information and quality legal assistance.

Therefore, ECRE strongly recommends as a rule to ensure the applicant with a right to remain in the territory pending the examination of the appeal in accordance with **Article 46(5)** and not to make use of an appeal system as envisaged under **Article 46(6)** and **(7)**. Nevertheless, ECRE considers that such a system may be acceptable in the case of an appeal against an inadmissibility decision on an identical subsequent asylum application as envisaged in Article 33(2)(d) and provided that sufficient procedural guarantees are in place to ensure compliance with the principle of *non-refoulement* in line with Article 41(1) last sentence, and that a full examination of the merits of the first asylum application has taken place in accordance with

²¹⁶ ECtHR, *A.C. and Others v. Spain*, Application no. 6528/11, Judgment of 22 April (French only), par. 94.

²¹⁷ This is required under Article 46(3) with regard to the decisions listed in Article 46(1) not per se with regard to the Court's decision whether the applicant may remain on the territory pending the appeal against some of those decisions.

²¹⁸ In the case of *Samba Diouf*, concerning the right to an effective remedy in the accelerated procedure in Luxembourg the CJEU held that "[T]he right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebutable presumption as to the legality of those reasons". CJEU, Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011, par. 61.

the recast Qualification Directive and the recast Asylum Procedures Directive.

If Member States wish to apply **Article 46(6)**, ECRE recommends that such a system is only applied on the basis of the court or tribunal acting *ex officio* as this would at least avoid asylum seekers requiring to undertake a separate procedural step to ensure their right to remain in the territory pending the outcome of the appeal, which is a core aspect of the right to an effective remedy. Furthermore, in line with the jurisprudence of the ECtHR and the CJEU as discussed above, such appeal procedures will only meet the requirements of an effective remedy if (1) sufficient time is offered to the applicant to prepare the request for interim relief, if necessary with the help of a lawyer and/or interpreter; (2) the burden to prove the need to suspend the expulsion decision is not set too high; and (3) the court or tribunal deciding on the request performs a close and rigorous scrutiny of the risk of *refoulement*.

Conclusion

The recast Asylum Procedures Directive represents, in many aspects, an important improvement in the procedural guarantees for asylum seekers as laid down in EU law and as discussed throughout this information note. In particular with respect to access to the asylum procedure, the guarantees surrounding the personal interview and the right to an effective remedy, progress is significant. However, other provisions such as those relating to accelerated procedures, the various safe country concepts and the overall complexity of the Directive remain of concern to ECRE as highlighted in this information note. Therefore, Member States are encouraged to utilise their power to adopt more favourable provisions under Article 5 of the Directive in order to ensure full compliance with their obligations under international human rights law, the EU Charter of Fundamental Rights and the case-law of the ECtHR and the CJEU. This will be crucial to ensure that the objective of fair and efficient asylum procedures in the EU Member States is fully accomplished.

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