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The Legality of Examining Asylum Claims in Detention from the Perspective of Procedural Rights and their Effectiveness

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Introduction*

*“The greater the effect on the life of the individual...
the greater the need for procedural protections...”¹*

Refugee status determination is a procedure which attracts certain guarantees for an applicant. These guarantees will depend to a large extent on the procedural environment that the asylum process takes place in, which must respect principles of due process and fairness. An affront against procedural fairness is, however, more and more present within the European Union (EU) in light of certain devices and conditions which have the result of curtailing the accessibility and the ability of applicants to enforce and, thus, render their rights effective. The concept of a “safe country of origin,”² which is subsequently linked to manifestly unfounded claims and accelerated procedures, is amongst such tools, as are environments which restrict access to certain procedural guarantees, namely detention. Given the proliferation of administrative detention in asylum claims, then, it is highly pertinent to analyse the effects of detention on asylum procedures and notably on a substantive determination of a claim.

Through an analysis of applicable procedural rights relevant to the examination of an asylum claim, this legal briefing will ask the question whether detention can ever be in full alignment with the requirements of primary and secondary EU law from a substantive asylum claim angle. It will firstly underline what standards regulate status determination as well as the procedural threshold that has been established by the Court of Justice of the European Union (CJEU) in its judgments relating to the principle of effectiveness. Against this background, the briefing will elucidate upon state practice where asylum claims are processed in detention, from both the first stage of the procedure and the appeal stage. It contends that the chain of cause and effect of detention on in-merit asylum determinations stultifies any meaningful access to procedures rendering rights derived from EU law ineffective and detention, from the perspective of a procedural examination of a claim, unlawful.

The procedural framework for status determination and its application in detention

Notwithstanding the significant amount of opaqueness surrounding exact numbers of asylum seekers detained for administrative purposes, including the grounds and its length,³ from a comparative analysis of countries covered in the Asylum Information Database (AIDA) it is clear that recourse to detention of asylum applicants is widespread within the EU. States have made full use of the different grounds for detention provided for in EU legislation, leading to its systematic and automatic use, in some countries, for significant periods or even the entire duration of the asylum procedure.⁴ This is particularly the case for those Member States who impose detention at the border in an asylum procedure which is conditioned upon authorisation of entry into the territory.⁵ Indeed, in countries such

* ECRE thanks Ruben Wissing and Marjan Claes from the Belgian Refugee Council (CBAR-BCHV) for helpful comments. All errors remain ECRE’s own.

¹ Supreme Court of Canada, *Suresh v Canada (Minister for Immigration and Citizenship)* [2002] 1 SCR 3, Judgment of 11 January 2002; A Edwards, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, April 2011, available at: <http://bit.ly/1KxBuPb>, 37.

² ECRE Comments on the Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin and amending the recast Asylum Procedures Directive (COM(2015) 452), available at <http://bit.ly/1R8SDji>. ECRE, “Safe countries of origin”: A safe concept?, AIDA Legal Briefing No. 3, September 2015, available at: <http://bit.ly/1KBturV>.

³ ECRE, *Asylum Statistics in the European Union: A Need for Numbers*, AIDA Legal Briefing No. 2, August 2015, available at: <http://bit.ly/1EW5pKQ>.

⁴ See UNHCR, *Beyond Detention 2014-2019: A global strategy to support governments to end the detention of asylum-seekers and refugees*, 2014, available at: <http://bit.ly/1uzlRyN>, 5.

⁵ V Moreno Lax, ‘Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible under EU Law’ (2011) 11 Human Rights and International Legal Discourse 167. The author posits that the proliferation of detention for various reasons, modalities and duration has become an unfortunate corollary to a decision on entry for the purpose of adjudicating a claim to international protection. To illustrate, at the airport in Austria there is an assumption that the asylum seeker is not entitled to enter and a rejection of the asylum seeker at the border is conducted automatically. A decision rejecting the asylum application on the merits or as inadmissible is then issued. AIDA Country Report Austria: Third Update, January 2015, available at: <http://bit.ly/1KGTarL>, 40. In Malta, asylum seekers who do not have the requisite

as the Netherlands⁶ and Belgium,⁷ the indeterminate set of legal criteria required for entry to their territory, and the automatic imposition of detention where such requirements are not met, render nugatory the exhaustive grounds for administrative detention of asylum seekers in the recast Reception Conditions Directive,⁸ read in light of the non-penalisation clauses of Article 26 of the recast Asylum Procedures Directive⁹ and Article 31 of the 1951 Refugee Convention.

Analogous practice can also be seen in Malta, Greece and Cyprus, whereby the duration of detention can go hand in hand with the length of asylum status proceedings, including judicial review. Reports in all three countries document the frequency of detention of first-time applicants.¹⁰ In Hungary the newly established transit zones at the border subjects asylum applicants, except those who are visibly vulnerable, to a procedure which is held in detention, as defined by Article 5 ECHR.¹¹ Worryingly, prolonged periods of detention during asylum claims is a practice which could be soon established through the “hotspot” approach in Italy and Greece, whereby individuals may well be detained pending registration, fingerprinting and identification of potential international protection needs.¹² The latter implies, at the very least, a preliminary assessment of a claim.

The legality of such systematic detention in asylum cases is fraught with tension in light of the import of the ECHR and the EU Charter on detention. Notably, according to the European Court of Human Rights (ECtHR), Article 5(1)(f) ECHR, which by virtue of Article 52(3) of the Charter is incorporated into EU law, requires that detention to prevent unauthorised entry into the territory or detention with a view to deportation is in conformity with domestic legislation, raising obligations under the rule of law and an assessment of the arbitrariness of detention.¹³ Moreover, in the context of pre-deportation detention, proceedings must be in progress and undertaken with due diligence.¹⁴ The requirements

documentation are classified as prohibited migrants and are detained upon arrival AIDA Country Report Malta: Third Update, February 2015, available at: <http://bit.ly/1Q8gHCh>, 13.

⁶ Article 3(1)(a)-(d) Dutch Aliens Act denies entry to the territory for persons who do not possess a valid document or visa to cross the border, are a danger to the public order or national security, do not possess sufficient means to cover the expenses of a stay in the Netherlands as well as travel expenses to a place outside the Netherlands where their access is guaranteed, do not fulfil the requirements set by a general policy measure and who do not sufficiently motivate their intention to stay. Article 6(1)-(2) Dutch Aliens Act allows detention where entry has been refused: AIDA Country Report Netherlands: Third Update, January 2015, available at: <http://bit.ly/1LEWHpf>, 55. The Netherlands have seen a 79% increase in border detention in the first half of 2014 compared to numbers for the same period in 2013. However, since July 2015 the Netherlands has a new procedure relating to applications lodged at the border, which limits the period of detention to four weeks. Territorial detention may, however, apply where there are national security concerns or a belief that clauses of Article 1 F of the Refugee Convention are applicable: AIDA, *Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, available at <http://bit.ly/1ighgPs>, 72-73.

⁷ Article 52/3(2) Belgian Aliens Act allows detention where the individual does not have the required travel documents. Where an asylum claim is lodged, no authorisation to enter the territory will be given, instead the asylum application will be carried out in detention at the border: AIDA Country Report Belgium: Third Update, February 2015, available at: <http://bit.ly/1S14Qaf>, 35. The systematic use of detention at the border has been subject to criticism by the Council of Europe Commissioner for Human Rights, available at <http://bit.ly/1MTI7he>.

⁸ 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), OJ 2013 L180/96.

⁹ 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), OJ 2013 L180/60.

¹⁰ In Malta, asylum seekers who do not have the requisite documentation are classified as prohibited migrants and are detained upon arrival AIDA Country Report Malta: Third Update, February 2015, available at: <http://bit.ly/1Q8gHCh>, 13; AIDA Country Report Greece: Third Update, February 2015, 79 available at <http://bit.ly/1JPKp9F>; AIDA Country Report Cyprus: Third Update, February 2015, 11 available at <http://bit.ly/1Q8gVJE>.

¹¹ AIDA, *Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary*, October 2015, available at: <http://bit.ly/1KD4WYf>.

¹² European Commission, *Explanatory note on the “Hotspot” approach*, July 2015, available at: <http://bit.ly/1N46jCT>, 12.

¹³ Expanded upon in ECtHR, *Saadi v United Kingdom*, Application No 13229/03, Judgment of 29 January 2008 as meaning that detention must be carried out in good faith, closely connected to the purpose of preventing unauthorised entry of the person, an appropriate place and conditions and that detention should not exceed that reasonably required for the purpose pursued. See also ECtHR, *Amuur v France*, Application No 19776/92, Judgment of 25 June 1996.

¹⁴ ECtHR, *Chahal v United Kingdom*, Application No 22414/93, Judgment of 15 November 1996.

that detention be necessary and proportionate are also part and parcel of assessing its lawfulness, as specified in Article 8(2) of the recast Reception Conditions Directive and Article 52(1) of the Charter.

Similar arguments are to be made where administrative detention is imposed at other stages of the asylum procedure, i.e. in order to secure a transfer under the Dublin III Regulation¹⁵ when there is a significant risk that the applicant will abscond,¹⁶ or where an initial or subsequent asylum application has been made from detention pending removal. In the former case detailed analysis has been undertaken as to whether detention for Dublin transfer purposes coheres with the right to liberty under human rights and EU law¹⁷ and in the latter, domestic practice, in some Member States, raises concerns over whether the requirements of Article 8 of the recast Reception Conditions Directive, notably proportionality and the effectiveness of less coercive alternative measures, are even assessed, let alone complied with.¹⁸

The legality of detention in asylum cases with regard to grounds and accompanying guarantees has therefore been hotly debated. However, less, up until recently,¹⁹ has been said on the procedural lawfulness of substantively assessing an asylum claim in detention. Given the frequency of siphoning asylum applicants into detention along with the duration of detention which can cover the in-merit determination of claims and appeal, an analysis of the procedural legality in closed conditions is not without cause, especially since the lodging of an asylum application and its determination are processes which attract procedural guarantees in their own right.

In this regard and as will be demonstrated below, the procedural impediments that detention generates are hardly conducive to the overriding obligation on Member States to ensure effective access to the asylum procedure, comprising of sufficient procedural guarantees listed in the recast Asylum Procedures Directive. This argument is further bolstered when assessing the set of EU procedural standards which have been established through the interpretation given by the CJEU to the Charter and general principles, derived from EU law itself. According to the Court, both primary law obligations must be respected and abided by when taking a decision that falls within the scope of EU law²⁰ and thus not only will the Charter and general principles be used as a means to test the legality of the Directive's provisions, EU measures must be interpreted in a way that renders them compatible with said sources.²¹ Given that national rules will be examined against this interpretation of EU law,²² the Charter and general principles provide meaning and scope to national asylum procedures, thereby establishing extensive procedural requirements which, as a matter of legal obligation, must be complied with by Member States. It is, therefore, worth setting out what guarantees are required by relevant Charter rights, principles and case-law with regard to asylum procedures and determination of an asylum claim.

The Charter brings with it specific procedural guarantees, which in themselves encompass a range of distinct rights, and which are determinative for a rigorous, adequate and complete treatment of an

¹⁵ 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 stateless person (recast), OJ 2013 L180/31.

¹⁶ Article 28(2) Dublin III Regulation, which is subject to an individual assessment as well as a proportionality and less coercive alternative measures test.

¹⁷ ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No. 1, June 2015, available at: <http://bit.ly/1Jk1Ly1>.

¹⁸ AIDA, *Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, 100.

¹⁹ The topic has been raised in a series of litigation in the UK discussed below and has previously been discussed in ECtHR case law in *Shamayev v Georgia and Russia*, Application No 36378/02, Judgment of 12 April 2005; *Garabayev v Russia*, Application No 38411/02, Judgment of 7 June 2007; and *Conka v Belgium*, Application No 51654/99, Judgment of 5 May 2002, albeit in a context considering access to an effective remedy and access to legal representation which was indeed exacerbated by the persons detention.

²⁰ Article 51(1) Charter; CJEU, Case C-256/11 *Dereci*, Judgment of 15 November 2011; Case C-299/95 *Kremzow*, Judgment of 20 May 1997; Case C-309/96 *Daniele Annibaldi*, Judgment of 18 December 1997. This is certainly the case for national asylum procedures which have been brought into the remit of EU law by the recast Asylum Procedures Directive.

²¹ CJEU, Case C-314/89 *Rauh*, Judgment of 21 March 1991. See also M Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart Publishing, 2014) 15.

²² *Ibid.*

asylum claim.²³ This is true for the right to asylum under Article 18 which, read in conjunction with secondary EU law and general principles, comprises of an assessment of a claim in a fair and efficient process, including access to trained responsible authorities, interpreters and legal representation.²⁴ Moreover, viewed as distinct rights but also clearly relevant for Article 18 of the Charter are Articles 41, 47 and 48 relating respectively to the right to be heard before any individual measure which would adversely affect an individual is taken,²⁵ right to effective judicial protection and scrutiny,²⁶ including a reasoned decision which provides a factual and legal assessment and is clear and impartial,²⁷ as well as the rights of the defence and the right to fair legal process in all judicial proceedings.²⁸

It is crucial to bear in mind that these primary rights exist in a multi-level constitutional system of the EU. Not only do they constitute in themselves general principles of EU law but they must also be interpreted to at least the same level of protection as relevant rights under the ECHR.²⁹ Therefore, the scope and meaning of these substantive and procedural rights will be moulded by ECtHR jurisprudence, vital given the ECtHR's rulings on effective remedies as well as effective access to courts (applicable by virtue of Article 47), whereby sufficient time-limits, legal assistance and legal aid will be indispensable to ensure that the right is effective in practice as well as in law.³⁰ The requirement on national authorities to offer active protection of rights not only constitutes a general principle in itself, then, but also permeates through ECtHR jurisprudence. Much like the principle of effective judicial protection, the principle of effectiveness, therefore, acts as a lynchpin to vindicate individual rights accorded by EU law, thereby ensuring their full force and effect.³¹

The principle of effectiveness has been interpreted to mean that national procedures may not render practically impossible or excessively difficult the exercise of rights conferred by EU law (i.e. the rights listed above)³² and that any procedural hurdles should be removed or guarantees be put in place to ensure that the right is effective.³³ The "impossibility" or "excessive difficulty" test will be measured with reference to the domestic provisions role in the wider national procedural context, with specific attention being paid to the protection of the rights of the defence, the principle of legal certainty and the proper conduct of a procedure.³⁴ Accordingly, the Court's jurisprudence reveals a clear proportionality assessment requiring an evaluation of the legitimate aim of a national provision in a

²³ Required by Article 4 of 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) ("recast Qualification Directive"), OJ 2011 L337/9. See also Recital 34 and Article 10 recast Asylum Procedures Directive.

²⁴ Articles 4 and 12 recast Asylum Procedures Directive.

²⁵ A right that the CJEU has confirmed is inherent in the rights of the defence, a general principle of EU law: Case C-249/13 *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, Judgment of 11 December 2014; Case C-166/13 *Sophie Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis*, Judgment of 5 November 2014. However, arguably, it is also a component of the right to good administration as well as Articles 47 and 48 of the Charter in the asylum context: Case C-277/11 *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 22 November 2012, paras 81-94, but the Court has distanced itself from this point in return decisions. See E Guild, 'The right to be heard in immigration and asylum cases: the CJEU moves towards a definition', EU Law Analysis, 16 January 2015, available at: <http://bit.ly/1LNnlz3>.

²⁶ CJEU, Case C-222/84 *Johnston*, Judgment of 15 May 1986, para 18.

²⁷ CJEU, Joined Cases C-372/09 and C-373/09 *Josep Penarroja Fa*, Judgment of 17 March 2011; Case C-222/86 *Heylens*, Judgment of 15 October 1987, paras 15 and 17; Case C-430/10 *Hristo Gaydarov*, Judgment of 17 November 2011. By virtue of Article 52(3) and 47 of the Charter, ECtHR jurisprudence on the right to a fair trial is applicable, which comprises of right to access to a court and right to a reasoned decision.

²⁸ CJEU, Case C-277/11 *MM v Minister for Justice, Equality and Law Reform*, para 82.

²⁹ Article 52(3) Charter.

³⁰ ECtHR, *Hilal v UK*, Application No 45276/99, Judgment of 6 March 2001, para 75. See also ECtHR, *Conka v Belgium*, para 46: "the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy."

³¹ CJEU, Case C-213/89 *Factortame I*, Judgment of 19 June 1990, paras 19 and 20. See also C Costello, 'The European asylum procedures directive in legal context', UNHCR Working Paper No 134, November 2006, 29.

³² CJEU, Case 33/76 *Rewe*, Judgment of 16 December 1976.

³³ CJEU, Case C-276/01 *Steffensen*, Judgment of 10 April 2003, para 66.

³⁴ CJEU, Case C-312/93 *Peterbroeck*, Judgment of 14 December 1995, para 14.

broader procedural setting and weighed against the effective access to and application of a right.³⁵ This is evidenced in *ZZ*, where the CJEU held that the right to judicial review must be carried out in a procedure which strikes an appropriate balance between state security requirements and the right to effective judicial protection, whilst limiting any interference with the exercise of that right to that which is strictly necessary.³⁶ Moreover, when ruling upon the difficulty to exercise an EU right, the Court has measured the national procedural rule against the particular facts of the case, shown in *Pontin* where abbreviated deadlines were found to be against the effectiveness of a pregnant woman's rights under EU law.³⁷

From the above jurisprudence, then, the principle of effectiveness predominantly boils down to procedural fairness,³⁸ whereby the Court largely tends to determine the scope and meaning of effectiveness with regard to EU rights according to the procedural context, including the rights at stake as well as the circumstances pertaining to the individual. This is apparent from case law which has tended towards protection of those in a weaker legal position, who may be unaware of their rights or may encounter difficulties when enforcing them.³⁹ With regards to an asylum claim, a contextual examination of the procedure is particularly salient, especially where it is held in detention. Accordingly, it will be fundamental for national authorities to take into account that the litigants are "members of a particularly underprivileged and vulnerable population group in need of special protection,"⁴⁰ may not, due to language barriers as well as the complexity of the procedure, fully understand domestic asylum processes,⁴¹ and are invoking rights which are non-derogable.

Moreover, with regard to a holistic assessment of the procedure, the CJEU has ruled that a lack of procedural guarantees in one stage of the procedure may be compensated for in an earlier or later stage of the procedure, thus rendering the respective EU rights effective.⁴² An opportunity to remedy procedural deficiencies in the context of detention is, however, marred with difficulties given that a decision to detain may last for the entire substantive examination of a claim and consequently has a ricocheting effect on access to the panoply of rights within the asylum context, as explored below. Indeed, this is even more so since there are worrying accounts in some countries that the decision to detain has ramifications not only on procedural rights but also on the actual credibility of a claim. For example, in the UK those who were placed in the Detained Fast-Track (DFT) system had a 95-99% rate of refusal, giving the impression that claims placed in detention were viewed as unfounded.⁴³

It is with this procedural framework in mind that an examination of state practice will be undertaken in order to analyse whether EU rights from the prism of their effectiveness are liable to be infringed when the examination of an asylum claim is carried out in detention and, indeed, what impact that has on the lawfulness of detention itself.

³⁵ M Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy' (2014) 25:4 International Journal of Refugee Law 717, 726. This proportionality assessment is further anchored in Article 52(1) of the Charter.

³⁶ CJEU, Case C-300/11, *ZZ*, Judgment of 4 June 2013, paras 64-68.

³⁷ CJEU, Case C-63/08 *Pontin*, Judgment of 29 October 2009.

³⁸ CJEU, *ZZ*, paras 64-68.

³⁹ CJEU, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores*, Judgment of 27 June 2000; *Pontin*. See M Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy', 726. Indeed, this methodology has also been followed in domestic jurisprudence which places greater importance on safeguards for those who are vulnerable: UK High Court, *Detention Action v Secretary of State for the Home Department and Equality and Human Rights Commission* [2014] EWHC 2245 (Admin), Judgment of 9 July 2014, para 198.

⁴⁰ ECtHR, *MSS v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, para 251.

⁴¹ AIDA, *Mind the Gap*, Annual Report 2013/2014, 110.

⁴² CJEU, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission*, Judgment of 3 September 2008, para 337. See M Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy' (2014) 25:4 International Journal of Refugee Law, 738.

⁴³ AIDA Country Report United Kingdom: Third Update, 35. When the DFT was still operational this was exceedingly worrying given that a person could be detained on the ground that the claim could be decided quickly. If one takes the argument further this suggested, then, that the speed of a claim had become an independent ground for rejecting an asylum application.

The examination of procedures in detention

Detention prior to and pending an initial decision

As highlighted above, the examination of an asylum determination carries with it certain obligations on Member States and, subsequently, rights for individual applicants.⁴⁴ The effectiveness of these rights will be assessed against a backdrop of whether the asylum applicant has practical access to the determination procedure.⁴⁵ This corresponds with EU law obliging national authorities to take a decision after an appropriate examination of a claim, comprising of an individual, objective and impartial assessment.⁴⁶ Indeed, procedural obligations deriving from the right to an effective remedy, such as an independent and rigorous scrutiny of the complaint, arguably govern initial decision making as well as appeals.⁴⁷ These obligations directly hinge on the information obligations listed in Article 8 of the recast Asylum Procedures Directive as well as the communicative guarantees codified in Article 16 of the same Directive, Article 4 of the Qualification Directive and Article 41 of the Charter which allows for the applicant to make his or her point of view known⁴⁸ in order to substantiate the application as completely as possible. Indeed, one could argue that the asylum determination must take place in a rigorous adjudicatory framework given the right to a reasoned decision, also a component of Article 41, in which a factual and legal assessment is undertaken.⁴⁹ According to jurisprudence, the reasoned decision will depend on the legal rules, the degree of the individual's engagement within the process and time-pressures, with individual decisions requiring a great deal of elaboration.⁵⁰ A similar line of reasoning has been advanced by the European Commission on Human Rights in *Hatami v Sweden* whereby the Commission required a thorough assessment of evidence to be undertaken "in light of particularities of the asylum process and the communicative"⁵¹ barriers that an applicant faces as a result.

Arguably then, the effectiveness of Article 41 and its corresponding rights will be reliant on an adequate period of time required to compile relevant evidence and for the decision maker's assessment, as well as appropriate information for the applicant, including legal assistance, representation and interpretation. This point is in line with ECtHR jurisprudence which has referenced these elements, notably intelligible and understandable information as well as the availability of interpreters and legal assistance at the initial stages of a procedure, as components of effective access to procedural rights.⁵² In the domestic setting a similar line of argumentation has been advanced with regard to the Detained-Fast Track system in the UK where the UK High Court confirmed that the safeguarding of asylum procedural rights and a fair hearing depend on legal assistance, which in a system of detention and curtailed time-limits, prior to a substantive examination, cannot be assured.⁵³

It comes as little surprise that in other Member States which enforce administrative detention, either as part of a border procedure or on the territory where an application is made pending deportation, communicative and information guarantees are significantly curtailed, placing a premium on the effectiveness of primary rights, the fairness of the procedure and subsequently the procedural

⁴⁴ See C Costello, 'The European asylum procedures directive in legal context', 23.

⁴⁵ ECtHR, *Artico v Italy*, App No 6694/74, judgment of 13th May 1980, para 33.

⁴⁶ Article 10 recast Asylum Procedures Directive.

⁴⁷ D Cantor, 'Reframing Relationships: Revisiting the procedural standards for refugee status determination in light of recent human rights treaty body jurisprudence' (2015) 34:1 Refugee Survey Quarterly 79; ECtHR, *Jabari v Turkey*, Application No 40035/98, Judgment of 11 July 2000.

⁴⁸ CJEU, Case 17/74 *Transocean Marine Paint*, Judgment of 23 October 1974, para 15.

⁴⁹ CJEU, Case 41/69 *ACF Chemiefarma v Commission*, Judgment of 15 July 1970.

⁵⁰ CJEU, Case C-350/88 *Delacre v Commission*, Judgment of 14 February 1990, para 422; Case 5/67 *Beus*, Judgment of 13 March 1968. See C Costello, 'The Asylum Procedures Directive in Legal Context', 27.

⁵¹ ECtHR, *Hatami v Sweden*, Application No 32448/96, Judgment of 23 April 1998. C Costello, 'The Asylum Procedures Directive in Legal Context', 181.

⁵² Applying to an effective remedy, ECtHR, *Conka v Belgium*, para 44. Further the ECtHR has emphasised that under Article 6 ECHR early access to a lawyer particularly where serious charges are involved must be ensured. ECtHR [GC], *Salduz v. Turkey*, Application No 36391/02, Judgment of 27 November 2008, para 54. By virtue of Article 51 and 47 of the Charter, Article 6 and relevant jurisprudence applies. For more information see ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, available at <http://bit.ly/1fXbWya>, 66.

⁵³ UK High Court, *Detention Action v Secretary of State for the Home Department and Equality and Human Rights Commission*, para 195.

lawfulness of detention. To illustrate in France, asylum applicants are usually assisted in their application, either by staff in reception centres or via orientation platforms where the first stage of the asylum procedure is held outside of detention.⁵⁴ However, where detention is enforced at the border or with a view to returning the individual and an asylum application is then lodged, reports and case law have documented restricted if not complete cancellation of understandable information provided on the asylum procedure as well as linguistic aid.⁵⁵ The “procedural laxity”⁵⁶ accompanying detention undermines Article 12 of the recast Asylum Procedures Directive, which specifies that appropriate communication, underpinning the personal interview (and consequently the rights listed above), cannot be ensured without such interpretative services. As a consequence, this arguably has an effect on the legality of detention itself. As the French courts have confirmed, non-compliance with procedural guarantees related to an asylum claim within detention, renders the detention irregular and thus unlawful.⁵⁷ Indeed, when set against the requirements of legitimacy, non-arbitrariness, and due-diligence from the ECtHR, it is clear that procedural irregularities as a result of the context and conditions of detention can render the legal grounds of detention, in themselves, untenable.⁵⁸

It is therefore particularly noteworthy that in other Member States detention acts as a highly intrusive means of curtailing actual, let alone effective, access to procedural rights and is symptomatic of limited, if any, contact with legal assistance as well as presence of lawyers at the substantive interview, a right which is specifically provided for in Articles 20 and 23 of the recast Asylum Procedures Directive.⁵⁹ A stark demonstration of this is within the closed border procedure at the transit zones in Hungary, which only considers the admissibility of a claim. This procedure is marred with procedural illegality not least given the automatic imposition of detention and the highly concentrated time limits within which the decision on inadmissibility is systematically given.⁶⁰ The distinctly truncated timetable in which to challenge a preliminary conclusion of inadmissibility is exacerbated by the closed environment, whereby no permanent access to legal advice is ensured or, for certain NGOs, in fact authorised.⁶¹ Given that any rebuttal to inadmissibility, namely that Serbia is not a safe third country for the applicant, is highly dependent on access to legal counsel and the collation of supporting documentation, the conditions of detention annihilate any effective access to the right to legal information, counselling and advice, which subsequently make up the corollary right to a reasoned decision.

⁵⁴ AIDA Country Report France: Third Update, 25.

⁵⁵ AIDA Country Report France: Third Update, January 2015, available at: <http://bit.ly/1SwhezD>, 47 and 84; Cour d’Appel de Douai, Decision No 15/00530, 10 June 2015 and Tribunal de Grande Instance d’Evry, Decision No 14/00216, 30 May 2014. Also the case in Cyprus, AIDA Country Report Cyprus: First Update, February 2015, available at: <http://bit.ly/1H3kAWy>, 36.

⁵⁶ C Costello, ‘The Asylum Procedures Directive in Legal Context’, 180.

⁵⁷ « De sorte que l’appelant n’ayant pas été informé de l’intégralité de ses droits, ce qui lui fait nécessairement grief au sens de l’article L552-13 du code de l’entrée et du séjour des étrangers et du droit d’asile, la procédure est irrégulière et justifie qu’il soit mis fin à la rétention. » Cour d’Appel de Douai, Decision No 15/00530, 10 June 2015.

⁵⁸ To illustrate the ECtHR has ruled that detention can be arbitrary where the special needs of a person are not accommodated for; ECtHR, *Popov v France*, Application No 39472.07, Judgment of 19 January 2012. Moreover, in domestic case law non-compliance with procedures relating to medical examination rendered the detention unlawful *R (on the application of EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin) para 53. For further information see below on UK High Court, *Detention Action* [2015] EWHC 1689 (Admin), Judgment of 12 June 2015 and UK Court of Appeal, *The Lord Chancellor v Detention Action*, [2015] ECWA Civ 840, Judgment of 29 July 2015.

⁵⁹ AIDA Country Report Belgium: Third Update, 39. AIDA Country Report Greece: Third Update, April 2015, available at: <http://bit.ly/1HE5MNf>, 54.

⁶⁰ For detailed information see Hungarian Helsinki Committee (HHC), No country for refugees: New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary, 18 September 2015, available at: <http://bit.ly/1iQP8SC> where the HHC documents that decisions on inadmissibility, which is given to 99% of asylum applications on the basis that the individual crossed through Serbia to get to Hungary, are handed out in sometimes less than an hour. Other procedural black holes within detention at the transit zones relate to a lack of a reasoned detention order as well as a judicial review mechanism by which to contest the legality of detention.

⁶¹ Section 51(11) of the Asylum Act allows three days to rebut the presumption of safety, however the HHC documents that decisions taken against the applicant’s statement that they disagree with the application of the Safe Third Country concept to their case is taken almost immediately by the Office of Immigration and Nationality. HHC, No country for refugees, 5.

In the case of Greece the stark reality of detention and its inevitable appendixes is demonstrated in the pre-removal detention centres where many first-time applicants are held, as a consequence of obstacles in accessing the asylum procedure. In the Fylakio Pre-Removal Centre, there is one NGO lawyer and one interpreter present for those who wish to make an asylum application. Moreover, communication and eventual access with external lawyers is made practically redundant given that access to detention centres and their clients is predicated upon a phone call which the asylum seekers themselves must pay for.⁶² Additionally, there have been concerns over confidentiality, evidenced in Greece where police in Fylakio appear to be able to listen into personal interviews, in direct contradiction to Article 15(2) of the recast Asylum Procedures Directive.⁶³

In Belgium, serious problems have been reported with regards to the short time in which to prepare and substantiate a claim as well as the physical barrier that detention poses in terms of contact with legal practitioners. Indeed, evidence demonstrates that many asylum applicants are unable to even make contact with their legal representative let alone organise for the lawyer to visit and prepare before the personal interview takes place.⁶⁴

Detention prior to and pending an appeal

As hinted to above, detention also has significant reverberations on the appeal stage of a claim, especially since in approximately half of the AIDA countries surveyed appeals in detention are conducted in an accelerated procedure. It must be borne in mind that the framework for an effective remedy as well as effective judicial protection and right of access to the court is firmly anchored in EU primary law (Article 47 of the Charter) and Article 46 of the recast Asylum Procedures Directive, and as a result the adequacy of an appeal will be measured against the standards established by these rights. Indeed, Article 47 of the Charter is contingent on procedural rules, including effective access to a lawyer and legal aid “which grant a fair prospect of a case to be instituted and which provide admissibility criteria allowing actual access to a fair hearing and a court.”⁶⁵ In this regard, the contextual setting of an appeal will often determine whether states are complying with their procedural obligations under a right to an effective remedy. To illustrate, both European courts have made reference to short time limits for appeals, with the ECtHR finding a three day time-limit for lodging an appeal too short,⁶⁶ and the CJEU specifically highlighting that compacted deadlines do not, in some cases, meet the conditions required by effectiveness.⁶⁷ Indeed, in *Samba Diouf*, the CJEU held that time limits for lodging an appeal against the negative asylum decision should be sufficient in practical terms to enable the applicant to prepare and bring an effective action.⁶⁸

Moreover, restrictions to legal representation as well as legal aid have been found to undermine the right to effective remedy, which will depend considerably on the complexity of the applicable law and procedure as well as the applicant’s capacity to represent him or herself.⁶⁹ Thus, the ECtHR has ruled that obstacles preventing access to lawyers must be taken into account when assessing the accessibility of a remedy, which has been found to be defect where there is limited preparation time or

⁶² AIDA Country Report Greece: Third Update, April 2015, available at: <http://bit.ly/1HE5MNf>, 54 and 87.

⁶³ AIDA Country Report Greece: Third Update, 40.

⁶⁴ Information received from the Belgian Refugee Council also specifies that a lack of quality legal aid provided to asylum applicants is prevalent in all detention centres, linked to inexperienced trainee lawyers dealing with these cases. However, practice appears to have improved in the detention centre located close to the airport (Caricole) as specialised asylum lawyers can now be appointed. For more information see AIDA Country Report Belgium, Third Update, 39.

⁶⁵ H Hofmann, ‘Article 47- Right to an Effective Remedy’ in S Peers *et al*, *The EU Charter of Fundamental Rights: A commentary* (Hart Publishing, 2014), 1217. ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, available at <http://bit.ly/1fXbWya>, 62.

⁶⁶ ECtHR, *Perez de Rada Cavanilles v Spain*, Application No 116/1997/900/1112, Judgment of 28 October 1998.

⁶⁷ CJEU, Case C-261/95 *Palmisani*, Judgment of 10 July 1997, para 27; Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, Judgment of 14 December 1995.

⁶⁸ CJEU, Case C-69/10, *Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration*, Judgment of 28 July 2011, para 66; ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, available at <http://bit.ly/1fXbWya>, 95.

⁶⁹ CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Judgment of 22 December 2010, para 61.

discussion with the client on the case,⁷⁰ lack of timely information on legal assistance⁷¹ and a shortage of legal aid practitioners.⁷² As has been evidenced by case law and state practice (below) detention has a considerable domino effect on legal assistance and representation in appeals, precluding an effective remedy. Indeed, in *IM v France*, which found a violation of Article 13 ECHR read in conjunction with Article 3, the physical impediments to legal assistance experienced in the initial decision-making phase (leading to a negative credibility finding) were replicated in the appeal stage, albeit to an even greater extent given that the necessary access to legal assistance in order to rectify these procedural errors was yet again hampered.⁷³

Given that legal assistance and representation during the appeals procedure, albeit subject to certain conditions, is explicitly provided for in Articles 20-23 of the recast Asylum Procedures Directive, it is particularly disconcerting that detention exacerbates further procedural deficiencies which are already apparent in procedures undertaken outside of detention. For example, in Greece legal representation to file an appeal is not obligatory and often precluded given restrictions on legal aid.⁷⁴ These barriers to an effective remedy are aggravated when an appeal procedure is held in detention given the large populace held, finite resources of NGOs, restricted access of NGOs to detention centres and the actual placement of centres which are remotely accessible.⁷⁵ Similarly, and in dereliction of the ECtHRs jurisprudence in *Moiseyev v Russia*, which found a violation of Article 6 ECHR on account of the difficulties encountered by the defence, namely conditions of detention, the remote access to detention centres in Cyprus means that communication with lawyers is dependent on the sending of faxes, which in turn must be authorised by the Director of the centre and can be read by detention staff.⁷⁶ Worryingly, in Malta standardised appeal forms required to lodge an appeal are not always provided in detention centres, a practice which renders null any effective access to legal representation let alone an effective remedy.⁷⁷

Acting as a double procedural blow to an effective remedy is detention coupled with accelerated procedures within the appeal stage. In France, the border procedure is accompanied by detention and a time limit of 48 hours to lodge an appeal, which is to be accompanied with a legal justification in French. Whilst the time-lines of a hearing are not specified, according to recently amended legislation, a decision on the appeal will be given by the Administrative Court within 72 hours.⁷⁸ Given that an effective remedy is predicated on access to legal representation, it is highly troublesome that contact with lawyers depends on financial means (purchasing phone cards) or requesting a lawyer in a separate hearing on the extension of a stay in the waiting zone.⁷⁹ Indeed, detention as well as the urgency of appeal means that lawyers may only meet the client an hour before the hearing, which is in clear violation of Article 46(4) of the recast Asylum Procedures Directive.

Similarly, the accelerated procedures for appeals in conjunction with detention diminish any practical effect of an effective remedy in Hungary whereby an appeal must be lodged within seven days and a decision given by either a judge or court clerk within eight days.⁸⁰ The deficiencies present in the first instance determination, namely systematic inadmissibility decisions and quasi-denial of legal assistance, as well as the continued barriers to effective legal representation in preparing an appeal,

⁷⁰ ECtHR, *IM v France*, Application No 9152/09, Judgment of 2 February 2012, paras 26 and 151.

⁷¹ ECtHR, *Čonka v Belgium*, para 44.

⁷² ECtHR, *MSS v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, para 319. The ECtHR has also held that a right to a fair trial under Article 6 ECHR, depends on the adequacy of arrangements for the preparation of a trial, including the practical difficulties encountered by the defence such as the conditions of detention: *Moiseyev v Russia*, Application No 62936/00, Judgment 9 October 2008.

⁷³ ECtHR, *IM v France*, paras 144-148.

⁷⁴ AIDA Country Report Greece: Third Update, 42.

⁷⁵ AIDA Country Report Greece: Third Update, 87.

⁷⁶ The ECtHR has held that a right to a fair trial under Article 6 ECHR, depends on the adequacy of arrangements for the preparation of a trial, including the practical difficulties encountered by the defence such as the conditions of detention: *Moiseyev v Russia*, Application No 62936/00, Judgment 9 October 2008. AIDA Country Report Cyprus: Third Update, February 2015, 69.

⁷⁷ AIDA Country Report Malta: Third Update, February 2015, available at <http://bit.ly/1Q8gHCh>, 16.

⁷⁸ Article L213-9 Code of entry and residence of foreigners and asylum (Ceseda), as amended by Article 13 Law n. 2015-925 of 29 July 2015 on asylum reform.

⁷⁹ AIDA Country Report France: Third Update, 38.

⁸⁰ HHC, No country for refugees: New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary, 18 September 2015, available at: <http://bit.ly/1iQP8SC>, 5.

required by Article 46(7) of the recast Asylum Procedures Directive, makes it extremely difficult for an applicant to corroborate evidence in order to rebut the adverse finding of the OIN. Indeed, it is argued that a full and *ex nunc* examination of facts and points of law is contingent on the possibility for the individual to present his or her appeal fairly, which may well be further at risk where the hearing, as in the case of the Hungarian border procedure, is conducted through means of a video conferencing tool.⁸¹

The system of detention and acceleration in appeals and their subsequent effect on procedural guarantees has been well litigated in a recent bout of UK case law on the appeal system in the DFT, whereby the detention regime was subsequently found to be structurally unfair and, thus, unlawful. In a proportionality exercise reminiscent of the one carried out by the CJEU in *ZZ*, the High Court judgment, which was upheld by the Court of Appeal, weighed the objective of detention against the effectiveness of due process rights concluding that the UK government's justification of processing an appeal in detention on grounds of a quick decision privileged speed and convenience to the detriment and ultimate sacrifice of the applicant's rights of access to a court, a fair hearing and effective remedy.⁸²

Moreover, an argument raised by the UK courts which is equally applicable to appeals held in detention but not subject to acceleration, is the multitude of tasks that the applicant is faced with prior to the substantive hearing on an appeal.⁸³ This point is salient with regards to other countries which proceed with determination claims within detention, as the applicant will be faced with a dual procedure of appealing against the rejected decision on the asylum application as well as applying for judicial review of the detention order itself, and in some countries applying for a suspension of the return order issued at the border.⁸⁴ Indeed, these procedures reveal their own deficiencies in protection guarantees and the effectiveness of rights, which can have the consequence of prolonging a period of, arguably, unlawful detention. This is particularly evident in Hungary whereby territorial detention acts as a full frontal attack not only due to access to legal representatives within detention to appeal a negative decision but also on an effective judicial review procedure of the detention order and its prolongation. Given a lack of knowledge and contact with clients in detention appointed lawyers often provide ineffective legal assistance to challenge the order, which is highly disconcerting given the poorly reasoned decision relating to the imposition of detention and its continuation.⁸⁵

Arguably, then, even where a procedure is not accelerated, the number of responsibilities on the applicant in detention, coupled with the communicative barriers and the lack of effective information and assistance that this entails, subjects the claimant to a serious procedural disadvantage, impacting on the access and effectiveness of a remedy and, as a consequence, the substantive fairness of the proceedings.

⁸¹ AIDA, *The new asylum procedure at the border and restrictions to accessing protection in Hungary*, October 2015, Forthcoming.

⁸² UK High Court, *Detention Action* [2015] EWHC 1689 (Admin), Judgment of 12 June 2015, para 66. UK Court of Appeal, *The Lord Chancellor v Detention Action*, [2015] ECWA Civ 840, Judgment of 29 July 2015, para 49.

⁸³ This includes assessing the legality of the detention itself and preparing for arguments against if the criteria of detention are not met, applying for bail, as well as compiling argumentation against the refusal letter which may include organisation of translation and expert evidence: UK High Court, *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber), Secretary of State for the Home Department interested party* [2015] EWHC 1689 (Admin), Judgment of 12 June 2015, para 22.

⁸⁴ This is the case in Belgium where extremely accelerated timetables to appeal a return decision (15 days) without its suspension during the asylum procedure mean that the appeal deadline often comes to an end before the decision on the asylum application has even been furnished: AIDA Country Report Belgium: Third Update, 37.

⁸⁵ In some cases legal representatives fail to examine a detention order thoroughly, thus presenting no argumentation against a prolongation of the detention order, leading to an extension of detention for 60 more days: AIDA Country Report Hungary: Third Update, 62. A lack of legal preparation and a lack of access to the client is also apparent in Italy: AIDA Country Report Italy: Third Update, January 2015, available at: <http://bit.ly/1Vkl3c>, 93-94.

Conclusion

Any assessment of the legality of detention of asylum seekers should take place not only from compliance with grounds, necessity and proportionality but also from a procedural rights angle related to the substantive asylum claim itself. In this manner the general principle of effectiveness requires that limitations on EU rights are not restricted to that which impairs the very essence of the right. Any limitation must be proportionate to the means employed and the aim pursued with regard to the contextual environment of the procedure, as well as the claimant. Arguably this test of proportionality will look favourably on a state that employs the least onerous measure and indeed this is specifically provided for in the recast Reception Conditions Directive in the form of alternatives to detention.

Given the rights at stake within an asylum process, the complexity of the procedure, language barriers and the multitude of tasks which the applicant must undertake as a consequence of a detention order as well as the debatable legality from a grounds perspective, it has been advanced that determination procedures and appeals carried out in detention fall considerably short of the requirements of effectiveness. By way of a considerable knock-on effect, then, it is posited that detention and the conditions that this gives rise to in practice are very difficult to reconcile with the guarantees required by asylum determination procedures and most notably the effectiveness of these rights. This has been perfectly demonstrated in UK case law which, in short, provides that the only way to ensure the procedural fairness of a claim is for the appeal not to be conducted in detention.⁸⁶ The precepts for a substantive examination of an asylum claim should therefore bolster any argumentation on the unlawfulness of imposed administrative detention for asylum applicants.

⁸⁶ Indeed, the First Tier Tribunal has found that previous determinations heard within the DFT are to be set aside and are to be reheard outside the detention regime. UK First Tier Tribunal (Immigration and Asylum Chamber), Judgment of 4 August 2015, accessible at <http://bit.ly/1L2Xla5>.