THE PROCEDURES DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED MEMBER STATES
The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States

Karin Zwaan (ed.)
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Preface

The presentations on which this book is based, were originally given during a seminar on the Procedures Directive (Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status). This seminar took place in Nijmegen, at the Centre for Migration Law, Radboud University, on Wednesday 12 December 2007. This was only little more than a week after the date the Member States should have implemented the Directive in their national legislation.

We have decided to publish a book on the results of the seminar so that those unable to attend may benefit from the wealth of knowledge and information which was shared during the seminar.

I would like to thank the lecturers – Tineke Strik, Maria Michelogiannaki, Blanche Tax, Kris Pollet, Nuria Arenas, Adam Bulandra, Cathryn Costello, Marcelle Reneman and Julia Duchrow – for coming to speak and for giving their permission to publish their lectures in this book. I am also grateful to Lara Olivetti, who did not lecture that day, but allows us to share her knowledge on the Italian implementation of the Procedures Directive. I also thank Katarzyna Przybysławksa for her work on co-writing the chapter on the implementation of the Directive in Poland.

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Tineke Strik works at the Centre for Migration Law at the Radboud University of Nijmegen as a researcher on European asylum and migration law, and its effect on the national law of the Member States. She is also member of the Dutch Senate, with particular interest for European Affairs and Justice and Home Affairs. She has studied Dutch and International Public Law, and has worked for the Dutch Refugee Council and the Aliens Chamber of a District Court. Afterwards she worked for the Green party (GroenLinks) in the Parliament as a policy advisor on justice and asylum and migration matters. At the Ministry of Justice she coordinated the Dutch contribution in the legislation process of the EU Justice and Home Affairs.

Blanche Tax is an EU Affairs Officer in UNHCR’s Brussels office. She has worked as a protection officer with UNHCR in several field locations. Before joining the Brussels team in 2006, she was Head of a Field Office dealing with protection of and assistance to internally displaced persons in Sri Lanka. Previously, she was in charge of UNHCR’s protection unit in Tbilisi (Georgia) and the refugee status determination unit in Bangkok (Thailand). Before joining UNHCR in 2000, she worked with Amnesty International and the Dutch Council for Refugees on refugee protection in the Netherlands and she lectured Refugee and Immigration Law at Leiden University as a staff member of the Institute of Immigration Law. She has degrees in law and history (international relations) from Utrecht University.

Karin Zwaan is the academic coordinator of the Centre for Migration Law, Radboud University Nijmegen, the Netherlands. She teaches Dutch migration law and refugee law at that university. She wrote her thesis on the safe third country exception (2003) and has published widely on refugee issues, including a book on UNHCR and the European Asylum Law (2005 Nijmegen: WLP) and edited a book on the Qualification Directive (2007 Nijmegen: WLP).
Introduction

Karin Zwaan*

On 1 December 2007, the deadline for the implementation of the Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Procedures Directive)\(^1\) expired. By 3 December 2007 only 6 Member States (Bulgaria, Germany, Austria, Luxemburg, Romania and the United Kingdom) had notified the European Commission on the measures taken for transposition.\(^2\) This book is on the central themes, problem issues, and the implementation of the Procedures Directive. The main objective of the Procedures Directive is, as recital 6 explains, to limit the secondary movements of asylum seekers between Member States, where these movements are caused by differences in national law. To this end, the Directive sets out common minimum standards for asylum procedures in Member States.

The book is divided in two sections. The first section, containing four lectures goes into the central themes and the problem issues of the Procedures Directive. The second part of the book focuses on the implementation of the Procedures Directive in a selected number of Member States. Contributions on the implementation or non-implementation in Belgium, Spain, Poland, the United Kingdom, the Netherlands, Germany and Italy are included.

In the first article of the first section, Strik gives an overview of the Directive. She goes into the legal basis and the establishment of the Procedures Directive and gives an overview of the content of the Directive. She discusses the main provisions by analysing their legal implications. Also she addresses the effect that the Procedures Directive may have on the level of protection for asylum seekers.

The negotiations on the Procedures Directive were closely followed by Michelogiannaki. She describes in her contribution how the Procedures Directive was the result of intense negotiations. She goes into the historical background of the Procedures Directive. Also she highlights the basic parameters that influenced the negotiations, namely: 1. the difficulties to harmonise procedural law; 2. Member States’ new political views on safe countries; 3. Adoption of new national legislation; 4. International actuality and; 5. Decision-making process. Michelogiannaki defines also some major problematic issues during the negotiations, as there were the scope of the Procedures Directive; the right to free legal assistance; detention; the different types of procedures; the safe countries of origin and safe third countries exceptions and; the right to an effective remedy. She states that one should not underestimate the difficulties that had to be overcome and the compromises that had to be reached, in order to decide unanimously each and every provision of the

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text and that the Procedures Directive has to be perceived as a first step towards the harmonization of procedures.

Tax, in her article, goes into a number of UNHCR activities and plans for monitoring asylum procedures in Europe, including the implementation of the Asylum Procedures Directive, to ensure compliance with standards in international refugee law and human rights law. It is hoped and expected that such monitoring and related advocacy activities will have an impact on both the implementation of the Asylum Procedures Directive and on future proposals for amendments in order to ‘upgrade’ the minimum standards included in the Directive, ideally resulting in further harmonization of procedures at a high level of procedural protection. Declaration 17 to the Amsterdam Treaty specifically requires consultations with UNHCR on matters relating to asylum policy.

In her article, Zwaan examines the relationship between the Europeanization of asylum and the therefore evolving role of the European Court of Justice. Her paper consists of four parts. Part I goes into the competence of the ECJ in asylum matters. Part II describes the role and influence of the preliminary references before the ECJ. Part III discusses the request to the ECJ by the European Parliament for the annulment of Articles 29(1) and (2) and 36(3) of the Procedures Directive, subsidiary to annul the complete Procedures Directive and the opinion of Advocate general Maduro. In her conclusion she addresses the possibilities for effective judicial protection of the asylum rights which individuals derive from community law after the implementation of the Procedures - and Qualification Directive.

The second part of the book starts with an article on the implementation of the Procedures Directive in Belgium. With the adoption of two laws of 15 September 2006, the Belgian Aliens legislation was subject to fundamental changes. Pollet writes in his contribution on Belgium, that the main objectives of this legislative operation were twofold: to implement three EU directives related to immigration and asylum in national legislation (the Qualification Directive, Victims of Trafficking Directive and the Family Reunification Directive) and to carry out a drastic reform of the Belgian asylum procedure. Although the legislative package of September 2006 represents the most radical reform of the Belgian asylum procedure since the establishment of the Belgian Commissioner-General for Refugees and Stateless Persons, the laws of 15 September 2006 did not implement the Procedures Directive in Belgian legislation. The implementation of the Procedures Directive should have been the subject of a next stage of implementation of EU immigration-related legislation. The assumption was however, as Pollet indicates, that the newly designed asylum procedure already largely complied with the Procedures Directive and would not require major amendments.

As the Asylum Procedures Directive has only marginally been implemented yet into national legislation in Belgium and the deadline for transposition for at least part of the Directive expired, Pollet’s contribution analyses whether or not the new Belgian Asylum Procedure is indeed already in compliance with the Procedures Directive and to what extent further legislative changes are needed to ensure such compliance.

In the contribution of Arenas on Spain she indicates that Spain also is one of the EU Member States that still has not implemented the Procedures Directive. The
Draft of the new Asylum Act, expected to incorporate not only the Procedures Directive but also the Qualification Directive it is not likely to be approved before the next Parliamentary Elections. Arenas goes into the possible problems of implementing the Procedures Directive in Spain. This should include granting genuine access to asylum procedure for those who are forced to flee in precarious conditions and to provide applicants with proper assistance upon arrival and, once they express a wish to stay or manifest a fear of being returned, not to leave them to their own devices between the moment of first contact with the authorities not competent of their application and the moment they can formally initiate asylum procedure.

Bulandra and Przybysławska describe the situation in Poland. Also in Poland the implementation of the Procedures Directive (and of the Qualification Directive as well) is absent. The authors indicate that it is absolutely crucial to qualify as refugee each individual who is in actual need of protection and for that reason all regulations in this area of law must be exert in a manner not allowing for any disregard, even if this leads to accidentally granting protection to someone not deserving it. According to Bulandra and Przybysławska some of the Procedures Directive’s provisions may cause problems in the process of transposition as they are contrary to Refugee Convention. Also they indicate that in a practical dimension the opportunism of administration may lead to the misinterpretation of legal grounds for refugee recognition and restrain it only to particular dispositions of the Procedures Directive. Such danger is distinctive particularly in Poland, where administrative practice is based on strict introduction of respective regulations with disregard to general principles, and is reluctant to broader interpretation of legal institutions, especially according to its function or aim, not just the grammatical or lexical reading, Bulandra and Przybysławska warn.

Evaluating the process of national legislation adjustment to European standards in Poland, Bulandra and Przybysławska assume that implementation of fair regulations, complying with the Geneva Convention and its interpretations derived from the years of positive experiences of asylum seekers protection, as well as positive national practice in the area of international protection will certify the attachment to European tradition of humanity, but its lack, delay or negative practice diminishes those efforts and undermine Polish voice, authority and influence in a common EU policy.

The implementation of the Procedures in the United Kingdom is highlighted by Costello. With regard the implementation process, she describes how the long negotiations on the Procedures Directive allowed for domestic parliamentary scrutiny of the various drafts and by the time it came to the implementation stage then, stakeholders had already voiced serious criticisms. The means of implementation of the Procedures Directive in the UK was secondary legislation by way of the Asylum (Procedures) Regulations 2007. Costello finds that the UK did not have to bring in many substantial domestic changes, given the Procedures Directive’s watery, highly qualified guarantees.

Reneman describes the Dutch implementation of the Procedures Directive. From her contribution it becomes clear the implementation of the Procedures Directive has not lead to significant changes in the Dutch asylum procedure. According to the Dutch legislator the Procedures Directive only required minor changes.
of Dutch legislation with regard to the asylum procedure (Aliens Act 2000, the Aliens Decree and other regulations). Only with regard to the safe country of origin and safe third country concepts, new provisions were incorporated in the Aliens Act and the Aliens Decree. The legislative proposal implementing the Procedures Directive was adopted on 13 November 2007. Amendments to the Aliens Decree and regulations were implemented in December 2007. As is indicated by Reneman, the implementation of the Procedures Directive did not lead to a lower standard of protection in the asylum procedure. The Dutch government is of the opinion that there is no reason to make use of the many exceptions to safeguards provided for in the Procedures Directive. Therefore no new exceptions to important safeguards, such as the right to a personal interview and the right to free legal aid, were introduced. Reneman also discusses two aspects of the Dutch asylum procedure which have been strongly criticised and might be at odds with the Procedures Directive, namely the accelerated procedure and the right to an effective remedy.

For Germany, the implementation of the Procedures Directive, formed part of major implementation procedure, through an Act implementing eleven EU directives into German law, as can be read in the article of Duchrow. She goes into to the rules governing the German asylum procedure, being the (amended) Asylum Procedures Act of 1993. She concludes that the implementation of the Asylum Procedures Directive has resulted in only very few changes with regard to pre-existing German legislation.

The book ends with a contribution by the hand of Olivetti, who describes the implementation in Italy. In implementing the Procedures Directive, as she describes, the Italian legislator simply proceeded on the same path when confronted with the Qualification Directive: namely adding new norms were on top of the already existing ones and others were abrogated, by avoiding the adoption of a coordinated text of law. At the transposition deadline of 1 December 2007, the Italian Council of Ministers had approved a legislative decree for implementing Directive 2005/85/EC adding more rules to the existing structure. Due to this multi-layered structure of the law, Olivetti argues, it becomes complicated to achieve correct and complete information on the norms in force.

This book offers insight in all the different aspects of the Procedures Directive: the central themes, the problem issues and the implementation.
Part One:
Central Themes and Problem Issues
Procedures Directive: An Overview

Tineke Strik

1. Procedures Directive, an overview

In this article, I will first make some short comments on the legal basis and the establishment of the Procedures Directive. Secondly, I will give a brief overview of the content of the directive. Next, I will discuss the main provisions by analysing their legal implications. Finally, I will address some questions on the importance of the Directive and the effect that it is likely to have on the level of protection for asylum seekers.

On 1 December 2005, the Council on Justice and Home Affairs adopted the “Procedures Directive”. The legal basis for this Directive is Article 63 paragraph (1) (d) of the Amsterdam Treaty. With the adoption of this Directive, the Council finished its legislative programme in the field of asylum, as described in title IV of the Treaty. On 1 December 2007, the deadline for transposition of this Directive expired, except for the provisions on the right to legal assistance, which have to be transposed at 1 December 2008. The Directive has to be applied on asylum claims that are submitted after this date, and withdrawal procedures started after this date.

The decision-making process of the Directive was an uphill battle, which revealed the ambivalence of the Member States towards harmonisation of asylum law. They all tried to amend the draft Directive with the purpose of being able to maintain their national law. Consequently, the negotiations, which took place from the beginning of 2001 until the end of December 2005, were tough. This attitude of governments has had a huge impact on the final result. It minimised the originally proposed procedural safeguards for asylum seekers, and the Directive has become a menu à la carte.

The main objective of the Procedures Directive is, as recital 6 explains, to limit the secondary movements of asylum seekers between Member States, where these movements are caused by differences in national law. To this end, the Directive sets out common minimum standards for asylum procedures in Member States. Article 5 and recital 7 stipulate that Member States may introduce or maintain more favourable standards on asylum procedures.
1.1 Legal basis

Article 63 Amsterdam Treaty paragraph 1 prescribes that the instruments being adopted on the basis of that Article, are in accordance with the Refugee Convention and its Protocol of 1967, and other relevant Treaties. One of the important “other relevant Treaties” is the European Convention on Human Rights and the jurisprudence of the European Court on Human rights. The Preamble of the Procedures Directive also refers to these instruments in recital 2. Recital 8 of the Directive states that it respects the fundamental rights, and it mentions explicitly the Charter of Fundamental Rights of the European Union. Another important juridical implication is the fact that with the adoption of the Directive based on the EC-Treaty, the application of the Directive has to be in compliance with European Community Law, including the norms that derive from the jurisprudence of the Court of Justice.

1.2 Overview

The first Chapter of the Directive reflects its purpose and scope, and it gives some definitions. Article 2 (b) describes an application for asylum as “an application that can be understood as a request for international protection from a Member State under the Geneva Convention”. Any request for international protection should be interpreted in that way, unless the applicant explicitly requests another kind of protection that can be applied for separately. Article 3 provides that the Directive applies to all applications for asylum in the territory, including those lodged at the border or in the transit zones of the Member States. It also stipulates that the Directive applies to the withdrawal of Refugee Status. Article 4 obliges Member States to designate a responsible authority for an appropriate examination of the application.

Chapter II contains a catalogue of guarantees that Member States have to observe during the examination of an application for asylum. It starts with the right to access to an asylum procedure, and the right for the asylum seeker to remain in the Member State during the examination of his application. Then the Chapter imposes some requirements on the examination of the application by the determining authorities. The examination has to be done individually, objectively and impartially by experts on asylum law, taking up-to-date information into account. It also prescribes some criteria on the quality of the decision itself. It must be a written decision, a rejection must be motivated in fact and in law, and accompanied by information on ways to challenge the decision. Articles 10 to 14 provide for certain rights: the right to be informed and to use the services of an interpreter, the right to a personal interview and the right to have access to UNHCR and legal aid. Article 17 imposes special guarantees for unaccompanied minors. This Article allows Member States to use medical examinations for determining the age of an applicant, but prohibits rejecting the application on the sole ground that he refused cooperation to this medical assessment. The best interests of the child have to be a primary consideration.

Article 18 is the only provision on detention. It prohibits Member State to hold a person in detention on the sole ground that he is an asylum seeker and it ensures
a speedy judicial review in the case of detention. The topic appeared to be too sen-
sitive to reach more agreement, but the Member States are negotiating on it again
with regard to the so called Returns Directive.¹

Chapter III deals with the procedure at first instance. Article 23 obliges Member
States to examine the applications in accordance with the above-mentioned guar-
antees. They should process the applications as soon as possible, but they are also al-
lowed to prioritise or accelerate an examination. Yet, the examination still has to
be in accordance with the guarantees of Chapter II.

Article 24 on the other hand, does offer Member States the opportunity to
derogate from the guarantees of Chapter II in specific procedures. These are border
procedures and the preliminary examination of subsequent applications. For these
two procedures, some special procedural guarantees are formulated in the Direc-
tive. The third procedure in which Member States may derogate from Chapter II,
is the examination of applications of asylum seekers who have entered the Member
State illegally from a European safe country.

Article 25 mentions the grounds on which a Member State may consider an ap-
application inadmissible. In these cases the authorities are not obliged to examine
whether the asylum seeker qualifies as a refugee in accordance with the Qualifica-
tion Directive.

Furthermore Chapter III contains four different concepts of safe countries: the
first country of asylum, the safe third country, the safe country of origin, and the
European safe third countries concept. The first three concepts provide for special
rules, but their application still has to comply with the guarantees of Chapter II.
The European safe third country concept is the most deviating one, since it offers
Member States the possibility to deny asylum seekers access to the asylum proce-
dure.

Chapter IV prescribes procedural rules and guarantees in cases of withdrawal of
refugee status.

Chapter V relates to the appeals procedures, concentrated in one Article. This
Article 39 determines for which decisions applicants must have a right to an effec-
tive remedy. Member States must provide for time-limits to enable asylum seekers
to exercise their right to an effective remedy. Paragraph three obliges Member
States to provide for rules on the suspensive effect of an appeal. If a Member State
doesn’t provide for the suspensive effect by law, it has to lay down criteria on the
possibility of a request for a protective measure.

and of the Council on common standards and procedures in Member States for returning il-
legally staying third-country nationals, 1 September 2005.
2. Relationship with other EU instruments

2.1 Relationship between the Procedures Directive and the Dublin Regulation

Recital 29 makes clear, that the Procedures Directive is not applicable on procedures governed by the Dublin Regulation. This instrument has its own rules on the right to appeal in case the Regulation is applied. Once the decision is made which Member State is responsible for the examination, this examination will have to take place according to the Procedures Directive. This priority of the Dublin Regulation brings Norway, Iceland and Switzerland in a special position, as being no Member of the European Union but taking part in the Dublin Regulation. They can be held responsible for the processing of an application, but they are not obliged to fulfil the requirements of the Procedures Directive. The safe third country concepts won’t apply on them either, because the Dublin Regulation is to be applied first.

2.2 Relationship between the Procedures Directive and the Qualification Directive

The Qualification Directive imposes, inter alia, the criteria for the determination of an application and withdrawal of status. The Procedures Directive imposes the procedural rules and safeguards for the way an application is examined. The two directives are complementary. Several provisions of the one Directive refer to the related provision in the other Directive. They are so closely related, that for a good understanding and interpretation of both Directives you need to read them in connection with each other. A good example is the provisions on the responsibility for the examination: the second paragraph of Article 8 of the Procedures Directive obliges Member States to guarantee a thorough examination. It mentions three criteria on the impartiality and professionalism. But other important criteria for a thorough examination are laid down in Article 4 of the Qualification Directive. That provision prescribes the way the determining authorities have to assess and judge of the relevant elements of an application. The first and second paragraphs of Article 4 include obligations for the asylum seeker with regard to the submission of these relevant elements. Article 11 (2) (b) Procedures Directive obliges the asylum seeker to hand over documents in their possession relevant to the examination of the claim.

Both directives also deal with the cooperation between the authorities and the asylum seeker. The first paragraph of Article 4 Qualification Directive obliges the

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5 Council Regulation № 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; OJ L50 of 25.2.2003.

Member State to cooperate with the asylum seeker. Recital 13 of the Procedures Directive underlines the right of an asylum seeker to have the opportunity to cooperate and communicate with the authorities; Article 11 reflects his obligation to do so, “insofar as these obligations are necessary for the processing of the application”.

2.3 Scope

In relation to the scope of both Directives, there are similarities and differences. The common principle is that the Directives only apply to third country nationals and stateless persons. EU-citizens are excluded.

An important difference however is that the Qualification Directive applies to both persons seeking refugee status and persons applying for subsidiary protection. The Procedures Directive only applies to asylum seekers requesting refugee status. If a Member State also examines the application on grounds for subsidiary protection, they have to apply this Directive throughout the procedure.

Furthermore, the Qualification Directive only applies to applications of asylum seekers who are outside the country of which they have the nationality or where they used to live as a stateless person. The Procedures Directive does not apply on requests for diplomatic or territorial asylum submitted to representations of Member States.

3. Derogations on safeguards

Chapter II includes a number of procedural rights for an asylum seeker, which have not been laid down in a legal instrument before. That’s one of the spectacular characteristics of the Directive. More disappointing however, is that on many of these guarantees, the Member States have introduced a number of derogation clauses.

3.1 Access

These derogations already start with the right to access to the asylum procedure. Recital 13 and Article 6 paragraph 2 oblige Member States to grant everyone access to an asylum procedure. On the other hand, Article 25 (2) mentions a number of grounds on which the Member State does not have to examine whether the applicant qualifies as a refugee. In these situations, the claim can be considered inadmissible. This is the case, inter alia if the asylum seeker comes from a first country of asylum or from a safe third country. As the Directive only applies on requests for recognition as refugee, Article 25 implies that Member States are not obliged to do any examination on inadmissible applications. The only guaranteed assessment here

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7 Article 2 (b) Procedures Directive, Article 2 (c), (d) and (e) Qualification Directive.
8 Article 3 (3)
9 Article 3 (2).
10 Article 25 (2) (b) and (c).
is the examination that is needed to consider a country as a safe country. Articles 26
and 27 require a certain assessment before these concepts can be applied.

An application that is identical to a former one that has already been finally re-
jected, can also be considered inadmissible.\(^{11}\) But here also, some assessment is
necessary before the authorities may conclude that the applications are identical.

Article 36 goes even further. According to this provision, Member States don’t
have to examine an application nor the safety of the applicant, if the applicant en-
ters (or tries to enter) the territory illegally from a so-called “European safe third
country”. This implies that Member States may deny them access to an asylum
procedure. These exceptions undermine seriously the above-mentioned provisions
on access for everyone.

3.2 The right to await the decision

In principle, according to Article 7, an asylum seeker may await the first decision
on his application. Paragraph 2 mentions some exceptions. The principle is not ap-
plied if a subsequent application will not be further examined or if the asylum
seeker will be transferred to another Member State on the basis of a European Ar-
rest Warrant. More problematic is the addition: “or otherwise, or to a third coun-
country, or to international criminal courts or tribunals”. This open formulation enables
Member States in many cases to surrender or extradite an asylum seeker without
proper examination of the asylum claim. Here the non-refoulement obligations of
the Refugee Convention and the European Convention on Human Rights will
have to function as a safeguard.

3.3 Competent authority

Article 4 obliges Member States to appoint a competent determining authority. 
Paragraph 2 however, mentions a number of cases in which another authority may
be responsible. In the situations in which the guarantees of Chapter II apply, there
seems to be no problem, as Articles 8 and 9 of that Chapter impose requirements
on the determining authorities and on the examination. But that does not count for
border procedures, the preliminary examination of subsequent applications and the
application of the concept of European safe third countries.\(^{12}\) In these cases, asylum
seekers cannot rely on any guarantee on the expertise of the determining authority.

3.4 Personal interview

A personal interview has to be conducted by a competent authority and with an in-
terpreter that speaks a language that the applicant may reasonably be supposed to
understand. So it doesn’t have to be his native language. Member States are not
obliged to request applicant’s approval of the written report they have to make.
Therefore, there is no guarantee that the applicant can correct or add elements.

\(^{11}\) Article 25 (2) (f).
\(^{12}\) See Paragraph 1.4 and 1.5.
With regard to the right to a personal interview, provided for in Article 12, paragraph 2 and 3 offer a number of occasions in which the personal interview may be omitted. Some of these grounds are vaguely formulated, like paragraph 3: “when it is not reasonably practicable”. The non-exhaustive examples at this criterion all relate to the circumstances of the applicant; therefore any logistical difficulty on the side of the authorities cannot legitimate an exception. Another criterion is when the authority has already had a meeting with the applicant in order to assist him with the application. As no definition of “meeting” is given, there is no guarantee that this meeting can be regarded as an equivalent of an interview. Asylum seekers are supposed to submit their claim as soon as possible, and the moment of submission doesn’t necessarily offer sufficient opportunity to bring forward the relevant elements on which the application is based.

Paragraph 2 (c) determines that a personal interview can be omitted if the authorities consider an application unfounded on a number of grounds, which are described in Article 23 (4). Among these grounds is the application of a safe third country or a safe country of origin. This is hard to justify in the light of Article 31, in which the first paragraph allows Member States to apply this concept only after an individual examination, and if the applicant has not submitted any grounds for considering the country not to be safe. Without a personal interview however, it is not easy to conduct a proper assessment, and it will be difficult for an asylum seeker to rebut the presumption of safety of his country. Furthermore, the personal interview may be omitted if the applicant has only raised issues that are irrelevant or of minimal relevance for the status determination. Yet, these grounds should beg for clarifying questions or a confrontation in an interview, before the intention to refuse can be carried out. Omitting a personal interview on these grounds contradicts with the obligations for the Member State in Article 4 Qualification Directive.

3.5 The right to legal assistance

Asylum seekers have a right to access to a legal adviser throughout the procedure, but at their own expense. They have the right to free legal assistance if a negative decision has been made. This right however, is limited to procedures at first instance that are likely to succeed, to asylum seekers who lack sufficient resources and to legal advisers who are specifically designated by national law. Member States may also impose time- and monetary limits on the provision of. These limits, as well as the criterion of a chance of successfulness, may not be arbitrarily restricted.

13 Article 12 (2) (b).
14 Article 23 (4) (c) (i).
15 Article 12 (2) (c) jo Article 23 (4) (a).
16 Article 12 (2) (c) jo Article 23 (4) (g).
17 Article 15 (1).
18 Article 15 (2) jo (3).
19 Article 15 (3) last subparagraph and (5) (a).
4. Specific procedures

4.1 Accelerated procedures

As already mentioned, Article 23 allows Member States to prioritise or accelerate an examination. The provision does not define the terms prioritise or accelerate, but you can imagine that it includes measures taken to shorten the nature of the examination procedure. The third paragraph allows the application on asylum seekers with special needs. Most presumably it refers to prioritisation, which is indeed preferable in these cases. But acceleration might better be not applied to vulnerable groups, such as unaccompanied minors or traumatised people.

Paragraphs 3 and 4 are somewhat contradictory. The third paragraph allows a Member State to do so in all cases, the fourth paragraph sets out a list of situations in which this is possible. This seems a little superfluous, unless this combination implies that Member States may not automatically accelerate an examination, but must limit its application to asylum claims that are not likely to result in refugee status. Many of the grounds here mentioned, are the same grounds on which a personal interview may be omitted.\(^20\)

Still, also accelerated procedures have to comply with Chapter II but also with Article 4 of the Qualification Directive, which obliges a full examination of all relevant facts concerning the asylum claim. It is to be hoped that this application will be subject of close scrutiny on appeal or review.

4.2 Specific procedures

As already mentioned, Article 24 provides for three possible procedures that may derogate from the guarantees of Chapter II.

A subsequent application may firstly be assessed in a preliminary examination, which can be limited to the written submission and the documents, handed over by the applicant.\(^21\) The applicant has a right to information about the procedure, access to UNHCR and to the services of an interpreter. The examination is limited to the question whether there are new elements or findings that justify a new application for asylum. If these arise, and if they significantly enlarge the chance that the applicant qualifies as a refugee, then the further examination shall be in conformity with Chapter II.

4.3 Border procedures

In principle, border procedures, in which a Member State decides upon an application at the border or in a transit zone, have to comply with the principles of Chapter II.\(^22\) Nevertheless, Paragraph 2 makes an exception for border procedures that already exist in the national law at the time of adoption of the Procedures Direc-

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\(^{20}\) Article 12 (2) (c).
\(^{21}\) Article 32.
\(^{22}\) Article 35 (1).
tive. They are described as procedures to decide if the applicant may enter the territory of the Member State. These procedures do not have to comply with Chapter II, but they have to fulfil the requirements of the third paragraph of Article 35. These six guarantees are: the right to remain at this location until a decision is made, information on rights and obligations, an interview by a professional, access to the services of an interpreter and to a legal adviser, and a representative in the case of an unaccompanied minor.

This procedure may not exceed four weeks. When a decision has not been taken by then, the applicant shall be granted access to the territory. This procedure clearly deviates from Article 18, which prohibits holding asylum seekers in detention on the sole ground of having lodged a claim.

The third procedure that is outside the scope of Chapter II, is the European safe third country.23

5. Safe countries concepts

5.1 First country of asylum

A country can be considered to be a first country of asylum on two grounds: if the applicant has been recognised in that country as a refugee and he can still avail himself that protection.24 The second ground is if he otherwise enjoys sufficient protection in that country, including the guarantee of non-refoulement. If a country is considered a first country of asylum, the Member State may consider the application inadmissible. The Directive lacks a definition on “sufficient protection”. UNHCR’s suggestion to replace this term by “effective protection” in transposing legislation is a wise one.25 That term has already been defined in asylum law. This would improve the harmonisation and the legal certainty of the asylum seeker.

5.2 Safe third country

Member States may consider an application inadmissible if the asylum seeker can grant protection in a safe third country.26 The first paragraph of Article 27 sets out the obligatory criteria for these countries. These criteria imply that the country must observe the obligations of the Refugee Convention and the non-refoulement principle of the European Convention on Human Rights. These criteria are less comprehensive and strict than those prescribed for the application of the safe country of origin.

23 See Paragraph 1.5.
24 Article 26.
26 Article 27.
Paragraph 2 is obviously a product of difficult negotiations, in which they could not agree on common rules. It prescribes that Member State must lay down rules requiring a connection between the asylum seeker and the third country, which can result in a big variety of national criteria, and rules on the methodology for the determination that the country is safe. The formulation is cryptic: it “shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe”. Because of the second clause, which refers to the general safety of the country, you might argue that since the next criterion under (c), that obliges an individual examination, the two obligations must be regarded as cumulative. An individual assessment in each case, regarding to both aspects of the safety, is therefore required. Besides that, the applicant must have the opportunity to rebut the presumption that he will be safe in that particular country. Article 39, third paragraph under (c) obliges Member States to provide for rules dealing with the grounds for challenging a decision that an application is inadmissible because a third country is considered to be safe.

5.3 Safe country of origin

Member States may retain or introduce legislation that allows for the designation of a third country as a safe country of origin. In these cases the application can be rejected, if the applicant has the nationality of that country or is a stateless person who formerly was habitually resident in that country. An important condition is that the applicant has not submitted grounds for considering that the country is not safe for him, in terms of his qualification as a refugee. Only if the legislation in a Member State already permits so before the date of adoption of the Directive, the Member State may retain the designation of a part of a country as safe, or a country as safe for a specified group.

In annex II the criteria are laid down. In imposing the absence of persecution, the criteria refer to Article 9 of the Qualification Directive and it uses the definition of harm, as defined in Article 15 of that Directive. For the assessment, Member States have to take into account the national legislation and its application, the observance of the European Convention on human rights, the international convention for civil and political rights and/or the Convention against torture. The formulation and/or does raise the question whether these criteria are cumulative or not.

Finally, the country must observe the principle of non-refoulement of the Refugee Convention, and it must have a system of effective remedies against violations of these rights and freedoms.

Article 29 obliges the Council to adopt a minimum common list of third countries of origin that comply with these criteria. Surprisingly, where Member States are allowed to have their national policy on safe countries of origin, albeit according the obligatory criteria, Article 31 Paragraph 2 obliges Member States to apply the concept of safe countries of origin on countries that will be on that common

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27 Article 30.
28 Article 30 (3).
list. As this obligation means less protection for an asylum seeker, the provision derogates from the principle that the Directive gives only minimum standards for the procedure. It is still an unanswered question whether this obligation is not beyond the power of the European Community, as the legal basis of Article 63 paragraph 1(d) is limited to minimum standards.

5.4 European safe country

The most far-reaching concept of safe countries, is the concept of the European safe country. If an asylum seeker enters, or tries to enter the Member State from such a country, the Member State is not obliged to examine his application for asylum. The applicant has to be informed on the basis of this decision, and be provided with a document informing the authorities of the third country. If the applicant isn’t re-admitted by the third country, the Member State shall ensure access to a procedure that complies with Chapter II.

This term “European Safe Country” is not defined in the Directive, but paragraph 2 sets out three conditions that have to be met. The country must have ratified the Refugee Convention (without geographical limitations) and the European Convention on Human Rights, and observe them. The country must have an asylum procedure prescribed by law. Paragraph 3 of Article 36 states that the Council will, by qualified majority and after having consulted the European Parliament establish a common list of these European safe third countries. There is little point in the Dublin States being placed on the list. The non-EU-Member States who participate in the Council of Europe have ratified the European Convention, so they are potential candidates for inclusion. But there may be concerns about their observation of human rights, which would make inclusion problematic. Most of them also lack access to a proper asylum procedure. Turkey cannot be placed in the list because of the geographical limitations of the Refugee Convention. For these reasons, it is doubtful that there are currently any countries likely to be listed by the Council as a “European Safe Country”. The establishment of a common list therefore could take a long time. Until then, Member States may maintain their national list, on the condition that their legislation has been including this concept already before the adoption of the Directive. These safe countries on the national list however, have to fulfil the criteria of paragraph 2 a, b and c.

6. Appeal: effective remedy

The provisions on appeal are laid down in Article 39. It sets out a non-exhaustive list of decisions of which applicants must have a right to an effective remedy. Paragraph three obliges Member States to provide for rules, “in accordance with international law”, on the suspensive effect of an appeal. If a Member State doesn’t provide for suspensive effect by law, it has to lay down criteria on the possibility of a legal remedy in order to request for a protective measure.

29 Article 36.
Recital 27 explains that an effective remedy must be interpreted within the meaning of Article 234 of the Treaty. Perhaps this reference was meant to guarantee that the reviewing authority is able to refer a preliminary question to the Court of Justice. The recital adds that the “effectiveness (...) depends on the administrative and judicial system of each Member State seen as a whole”. According to Ackers, this sentence is added as a concession to the United Kingdom and some other Member States, demanding a guarantee that their appeal system and method of review would comply with this Directive. Fortunately, this judgement is up to the Court of Justice.

Although the Directive is not very demanding on the right to appeal and the right to await the outcome of it, Member States are bound by the way the meaning and implications of the term “effective remedy” has been developed in jurisprudence of the European Court on Human Rights. The Court considers the granting of suspensive effect to an appeal or review as an important safeguard in order to avoid irreversible effects of a deportation. But an effective remedy requires an independent and vigorous scrutiny as well, which implies an ex nunc assessment of the decision on the asylum claim. Besides this case law of the ECHR, by the adoption of the Procedures Directive (and of the Qualification Directive) the processing of asylum claims must comply with the procedural principles of Community Law. The Court of Justice already confirmed this in his judgment on the Family Reunification Directive (2003/86/EC). In the same judgment, the Court for the first time explicitly referred to the EU Charter of Fundamental Rights. Because this instrument was explicitly mentioned in the Preamble of the Directive, the Court treated the Charter as part of the Community obligations. Also the Preamble of the Procedures Directive mentions the Charter in recital 8. By this reference, the Articles 18 and 19 of the Charter, relating to the right to asylum and the prohibition of refoulement, have become part of Community law. Article 47 of the Charter, which is based on Article 12 ECHR, gives the right to an effective remedy before a tribunal. The right to “effective legal protection” in Community law is even more extensive since it guarantees the right to an effective remedy before a court. Furthermore, the national autonomy is limited by two important Community principles: the principle of equivalence and the principle of effectiveness. This means that national rules may not make the enforcement of European law more difficult than the enforcement of national law, or make it excessively difficult. The EC jurisprudence also imposes a number of procedural norms which are related to

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34 C-540/03, paragraph 38.
35 C-222/84 Johnston (1986); C-222/86 Heylens (1987); C-97/91 Borelli (1992).
36 See C-33/76 Rewe (1976); C-13/01 Safalero (2003).
the application of some special provisions of the Procedures Directive, such as the right to a hearing or the right to legal aid.37

7. Conclusion

In conclusion, the Directive grants many possibilities to Member States to retain their national policy and therefore to keep the differences between the national laws. Some minimum standards have even sunk below the minimum level of the international norms. But the core provisions related to the examination of the majority of applications have set high standards, and have formalised important safeguards for asylum seekers. In combination with the Qualification Directive, Member States are now obliged to a thorough, individual assessment, in cooperation with the asylum seeker. It is to be expected that the Court of Justice will apply the general EC-principles while interpreting the Directive, including its principle regarding the right to an effective remedy, and will interpret the derogation clauses in a strict way. It is now up to the European institutions to conserve and strengthen the core safeguards in the coming Common European Asylum System.

The Negotiations of Directive 2005/85/EC

Maria Michelogiannaki

A. Historical Background

The Procedures Directive is the fifth piece of legislation which had to be adopted on the basis of the Amsterdam Treaty, in the context of the asylum policy.


These were proved to be the most intense, lengthy and difficult negotiations, compared to any other that had taken place in the past, regarding the asylum agenda.

Numerous meetings of the competent Council working group, along with meetings of justice and home affairs Counselors of the Permanent Representations of the Member States in Brussels, informal talks among Delegations concerned, contacts with UNHCR and major NGOs and, finally, several Ministerial Sessions formed the background in which the negotiations took place for a period of nearly three years.

The progress of the discussions on principal issues has also influenced the working methods of the Presidencies.

A general approach was first reached on 29 April 2004, subject to further negotiations to adopt a binding list of safe countries of origin. On 19 November 2004 it was decided to postpone the adoption of such a list at a later stage, after the adoption of the Directive.

Due to the substantial changes which were involved in the proposal, the European Parliament had to be consulted again. It delivered its Opinion on 27 September 2005, in which 102 amendments were proposed. In its Opinion the EP enhanced procedural guarantees for applicants and advocated for higher standards of harmonization. None of the proposed amendments was taken into account by the Council, who finally adopted the Directive on 13 December 2005.

The European Parliament brought an action for annulment as far as it concerns the procedure to be followed for the adoption of the safe countries lists (Articles 29(1) and (2) and 36(3) PD).

B. The Difficulties of the Negotiations

The basic parameters that influenced the negotiations were the following:

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1. **The difficulties to harmonise procedural law**

By its nature procedural law is very detailed and very often quite complicated. Asylum procedures differ considerably among Member States, as they reflect different administrative national traditions and practices as well as different constitutional arrangements. Moreover, detailed international standards applicable in this field do not exist.

2. **Member States’ new political views on safe countries**

The increased number of asylum applications, lodged by nationals of countries which were considered by some Member States as “safe”, influenced, during the negotiations, several Member States’ positions regarding the establishment of lists of safe countries of origin. Following a Declaration made initially by France, Germany, Italy, Spain and the United Kingdom in June 2003, it was agreed by the JHA Council in October 2003, that a minimum common list of safe countries of origin should be part of the Directive. The negotiations on this issue delayed considerably the adoption of the Directive.

Prior to the beginning of the negotiations, the increased number of asylum applications lodged by nationals of the, then, candidate counties, led the Member States concerned to request their consideration as safe countries of origin. To this end, two political statements were issued: on 15 October 2002 the Conference of the Representatives of the governments of the Member States within the Council declared that the candidate countries, as from the date of signature of the accession Treaty, should be considered “safe countries of origin”, and on 28 November 2002 the Council declared that EFTA and candidate countries (as from the date of signature of the accession Treaty) should be considered as safe third countries.

3. **Adoption of new national legislation**

During the nearly three years of negotiations, a number of Member States adopted new domestic asylum legislation, often in very tense internal political background. Consequently, individual positions changed through negotiations, rendering the discussions even more complicated.

4. **International actuality**

The war in Iraq and the fear of a mass influx of asylum seekers in the EU, had a considerable influence in the Member States’ disposal to alter their well established national practices in favor of new standards, which were in many cases more constrained. It also influenced some Member States to come forward with new political ideas on handling asylum applications (e.g. the processing of asylum applications in centers outside the EU, or the establishment of lists of safe countries).
5. **Decision-making process**

Amidst the above background, the requirement for a unanimous decision among 14 Member States could only make the negotiations more difficult. Any Member State could veto a possible agreement in order to push forward its own requests.

C. **Problematic Issues**

Each and every provision of the proposal has been scrutinized and finally amended, either considerably or not. There are, however, some major issues which we can distinguish, the final wording which provoked general criticisms for the Directive as a whole, such as the level of harmonization achieved, the Directive’s compatibility with international law and its efficiency in safeguarding applicants’ rights.

1. **Scope of the Directive**

From the beginning of the negotiations until the very end, a number of Member States requested the extension of the scope of the Directive to cover all forms of international protection. Based on the letter of Article 63(1) under d of the Treaty and because of the absence of a common definition of the subsidiary protection at that time, the Commission has proposed – and most Member States agreed – to cover only the asylum applications. The wording of Article 3(3) of the Directive reflects a compromise which concerns Member States which apply, in general, a common procedure.

As to the personal scope, the request of some Member States to extend the scope to cover also asylum applications lodged by EU nationals was very quickly abandoned, due to the strong opposition of other Member States.

2. **Free legal assistance**

This is another issue which highlights the extreme differences among Member States’ national legislations.

Positions varied from not granting free legal assistance at all, to granting it, but under many restrictions, stemming from national practices. A flagrant example was the “legal merit test”, which was very important for some Member States, but quite unknown to some others.

Article 15 finally, incorporated many restrictions, a “not more favorable treatment” clause and an additional year to the general transposition period.

3. **Detention**

Detention proved to be a very sensitive issue which went through troublesome discussions. The Commission proposed one provision for detention during the first instance and another for detention after a Member State agreed to take charge under the Dublin Convention. Any attempt to define and qualify the conditions for
detention failed. Some Member States insisted to exclude from the scope of the provision the detention at the borders, whereas other Member States wanted to expand the reasons for which a person could be detainted (e.g. for identification purposes, or if they have destroyed their documents). No agreement could be reached either on the duration of the detention. Even the very basic content, to which the provision was finally reduced, provoked reservations as far as it referred to the need of a “speedy” judicial review.

4. Different types of procedures

The initial distinction between regular and accelerated procedures for specific categories of applications exhaustively listed in the proposal, soon proved difficult to be agreed upon. Long discussions to define accelerated procedures resulted in an increase of the list, based on every Member State’s experience and needs.

Finally, the solution found was to set a general target to process applications in accordance with the guarantees of the Directive and to include a number of “specific” procedures, which are practically defined in terms of restrictions of the applicants guarantees.

5. Safe countries of origin and safe third countries

One could write extensively about how the political considerations of Member States evolved, the numerous drafting exercises, the difficulties for attempting to reach common approaches, or to establish common lists, as well as, the criticisms expressed by NGOs, concerning the insufficient guarantees for the applicants.

The discussions were initiated by Member States who were confronted by an increase of applications lodged by nationals of candidate countries. As mentioned above, in autumn 2002, two political statements were approved by the Conference of the representatives of the Governments of the member states and the Council, by which candidate countries, as from the date of the signing of the accession Treaty, were considered both safe countries of origin and safe third countries.

Safe third countries

Different ideas were developed around this notion, such as the idea of “transit processing centers outside the EU” where applicants could have effective protection, the German 1993 “asylum compromise”, the request for common lists or finally, the UK 2003 Asylum Bill.

Two sets of provisions were finally agreed upon: a) one, providing the conditions for national designation (Art. 27), the drafting of which was considerably improved through the discussions, in order to include important guarantees for the applicants (see especially Art. 27(2) (c), and b) another one to provide for the exceptional safe third country concept (possibility for the establishment of common lists and standstill clause for Member States already applying the concept).

Safe countries of origin

The background of the idea was the wish of several Member States to accelerate the processing of non-international protection applications. Several Member States
have declared their wish for a minimum common list of “safe countries of origin”. A first agreement was reached in October 2003: a minimum list to be established on the basis of the criteria laid down in an Annex which would be part of the Directive, along with and a mechanism to amend that list. The criteria listed in the Annex tried to reach a balance between adequate protection of the applicants, whilst ensuring the effectiveness of the measure to deal with unfounded applications. For some Member States, the criteria for designation were considered very stringent. They also insisted on the possibility to recognize a part of a country as safe for specified groups of persons. The issue of the existence of the death penalty in a specific country, as part of the safety test, also divided Member States.

The negotiations were blocked once more. Consequently, the criteria for recognition listed in the Annex became less stringent and the introduction of a standstill clause allowed Member States to keep their national lists, based on less stringent criteria.

The adoption of the Directive was considerably delayed, due to the discussions for the establishment of a common list. It was proved impossible to agree unanimously on any of the proposed countries, therefore a derivative legal basis was introduced, which would enable the Council to adopt the list, at a later stage. The Council would decide, by qualified majority, on a proposal from the Commission, after consultation of the European Parliament.

The European Parliament challenged before the European Court of Justice the proposed procedure. It will be interesting to see if the Court will follow the Opinion of the Advocate General (Case C-133/06).

6. Effective remedy

The discussions on the right and the conditions to challenge a negative decision, brought in light considerable differences among Member States, concerning the organization of their judicial system (e.g. different forms of remedies), the cases for which a right to challenge a decision is allowed and, the most sensitive issue, which is the right to remain in the territory while the outcome of the appeal is pending. During many drafting sessions, Member States examined possible solutions to draft in more details the conditions around the right to remain in the territory during the appeal phase. As no solution could be decided on unanimously, it was left to Member States to lay down criteria whether a remedy would have suspensive effect or, whether there would be a right to request it before a court.

There was also no chance to decide on any other procedural guarantees in the appeal phase (e.g. time limits). This is why recital 27 of the Directive states expressly that the effectiveness of the remedy depends on the administrative and judicial systems of the Member States, seen as a whole.

D. Challenges

The outcome of the negotiations can be easily criticized for achieving only a very low level of harmonization, for not ensuring higher level of guarantees for the applicants through the procedures, both at first instance and the appeal phase, for ac-
commodating or permitting national practices, which are often doubtful or, for being marginally compatible with international law.

We can all agree that the added value of the Directive to the existing soft law is less than expected. We can also agree that the level of harmonization achieved is not very ambitious.

However, one should not underestimate the difficulties that had to be overcome and the compromises that had to be reached, in order to decide unanimously each and every provision of the text.

It was a very difficult task, both on Commission’s and Presidencies’ side, requiring a lot of energy to find solutions to satisfy all 14 Member States, and, at the same time, to keep up with the general goal.

One should also remember that the discussions for harmonizing procedures have started on the basis of the original Commission’s proposal back in 2000.

The fact that an agreement was finally reached five years later, underlines how difficult this goal has been.

The Directive must be considered as a first step towards the harmonization of procedures. Any further development in the direction of a Common European Asylum System will be voted on by the Council by qualified majority and in co-decision with the European Parliament.

It will be very interesting to see, within this framework, what the content of a new Directive might be.

In the meantime, the Commission and the Court will guarantee the proper implementation of Member States’ obligations and the correct use of their discretionary powers.
The Asylum Procedures Directive and UNHCR’s role – from critique to positively influencing its implementation

Blanche Tax

1. Introduction

UNHCR’s role as a crucial player in the development of the European acquis on asylum has been recorded unequivocally in the legal documents and political statements that underlie the asylum harmonization process in the European Union. At the 1999 Tampere summit, it was confirmed that a common European Asylum System should be based on the “full and inclusive” application of the 1951 Convention relating to the Status of Refugees. Article 35 of the 1951 Convention outlines UNHCR’s role in supervising the implementation of the Refugee Convention. Declaration 17 to the Amsterdam Treaty, which forms the legal basis for the development of the EU asylum acquis, requires consultations with UNHCR on matters relating to asylum policy. Amongst the specific legal instruments developed on the basis of the Amsterdam Treaty and the Tampere Conclusions, the Asylum Procedures Directive explicitly refers to UNHCR’s role in the asylum

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2 Article 35, 1951 Convention relating to the status of refugees: Co-operation of the national authorities with the United Nations: 1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. 2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning: (a) The condition of refugees, (b) The implementation of this Convention, and (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.
3 Declaration 17 on Article 73k (later re-numbered Art. 63) of the treaty establishing the European Community (Amsterdam Treaty): Consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organizations on matters relating to asylum policy.
procedure, by requiring in its Article 21 that states allow UNHCR access to applicants and information in their claims, as well as the possibility to present its views.\footnote{Article 21, Asylum Procedures Directive: The role of UNHCR: 1) Member States shall allow the UNHCR: (a) to have access to applicants for asylum, including those in detention and in airport or port transit zones; (b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto; (c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure. 2) Paragraph 1 shall also apply to an organization, which is working on the territory of the Member State on behalf of the UNHCR pursuant to an agreement with that Member State.}

2. The Asylum Procedures Directive

After the Commission presented its proposal for the Asylum Procedures Directive, UNHCR published a first set of comments on the draft. A more detailed set of comments was published after political agreement had been reached on the Directive’s final text.\footnote{UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004) (10 Feb. 2005), at http://www.unhcr.org/protect/PROTECTION/43661ea42.pdf.} In the design of the first phase instruments, it was clear that the Asylum Procedures Directive together with the Qualification Directive,\footnote{Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30.9.04.} would go to the core of refugee law and practice, and as such would be of key importance. As such, it was disappointing that the Directive as adopted incorporates many political compromises and allows Member States in many cases to keep or adopt procedural standards below those incorporated in international law. In UNHCR’s response to the European Commission’s 2007 Green Paper on the Common European Asylum System,\footnote{UNHCR response to the European Commission’s Green Paper on the Future Common European Asylum System, September 2007, at http://www.unhcr.org/protect/PROTECTION/46e53de52.pdf.} the Office emphasized inter alia the need to eliminate all provisions which permit States to derogate from the agreed minimum standards, and which could in some cases lead to breaches of international law.\footnote{Op. cit. footnote 8, answers to questions 2 and 3, p. 15-16.}

In this article, I will not elaborate on UNHCR’s comments on the Asylum Procedures Directive and suggestions for improving it. I would refer those interested in UNHCR’s substantial review of the Asylum Procedures Directive’s provisions and recommendations for its improvements to UNHCR’s comments and UNHCR’s response to the European Commission’s Green Paper on the future Common European Asylum System.

It has to be kept in mind that UNHCR’s comments on the Asylum Procedures Directive pre-dated the deadline for its transposition into national law. Although
the comments were grounded in many years of UNHCR experience with asylum procedures in EU Member States, they were limited to a theoretical review of the expected impact of the Directive and related concerns about a restrictive interpretation of its articles. As the Directive had not yet entered into force and as most Member States had not yet transposed it even by the time UNHCR’s response to the Commission’s 2007 Green Paper was published, the agency’s comments could not be based on a review of practice. The deadline for transposition of the Directive (with the exception of Article 15) was 1 December 2007, so even at present there is still very little information on the actual impact of the Directive on practice of the EU Member States and to what extent concerns about a restrictive interpretation of the Directive will indeed materialize.

I would like to focus instead on a number of UNHCR activities and plans for monitoring asylum procedures in Europe, including the implementation of the Asylum Procedures Directive, to ensure compliance with standards in international refugee law and human rights law. These activities serve, amongst other purposes, to obtain precise information on the actual implementation of the Asylum Procedures Directive. As information source, these activities can guide UNHCR and others in focusing advocacy on those procedural aspects where change is needed most. It is hoped and expected that such monitoring and related advocacy activities will have an impact on both the implementation of the Asylum Procedures Directive and on future proposals for amendments in order to ‘upgrade’ the minimum standards included in the Directive, ideally resulting in further harmonization of procedures at a high level of procedural protection.

3. UNHCR activities relating to asylum procedures in the European Union

In this chapter, I will describe, in a non-exhaustive manner, a number of ongoing UNHCR activities relating to asylum procedures in Member States and/or the EU as a whole. UNHCR has been performing and will continue to perform these regular activities in Europe, resources permitting, on the basis of its Mandate, seeking to ensure to the extent possible that persons in need of international protection for 1951 Convention reasons or in need of complementary forms of protection have access to fair procedures and will eventually receive protection. The activities which I have chosen to describe can all be linked directly to the Asylum Procedures Directive or to specific provisions of the Directive.

3.1 Influencing national practice – regular monitoring of legislation, transposition and implementation at national level

Apart from its policy work at EU level, seeking to influence EU legislation in order to ensure it strengthens protection in Europe, complies with international refugee law and human rights law and harmonizes high minimum standards, UNHCR of-

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10 Transposition deadline for Art. 15 is 1 December 2008.
fices across Europe actively monitor legislative developments within individual Member States. Such monitoring has been a main task and activity since UNHCR offices were established in EU countries (and elsewhere), long before the process of harmonization of EU asylum legislation began.

If asylum legislation or policies in a Member State fall short of international standards, UNHCR will employ different methods to bring this to the attention of the responsible authorities and advocate for change. In numerous situations, UNHCR has provided technical expertise to states, by supporting the drafting of new asylum legislation or commenting on draft laws produced by the authorities.

EU harmonization has inserted a new layer into this ongoing task of ensuring consistency of national legislative frameworks with international law. For UNHCR, harmonization is not an end in itself, but a means towards ensuring the highest possible protection standards across the EU. As such, UNHCR has used its general comments on EU legislative proposals as tools in working with national Governments, seeking their commitment to transpose, whenever possible and appropriate, higher standards than the minimum standards permitted by EU Directives. Especially where UNHCR considers that EU minimum standards fall short of international refugee law or human rights law standards, which is the case for a substantial number of provisions of the Asylum Procedures Directive, it is of key importance to support and promote in as many Member States as possible transposition at a higher level, to prevent national legislation from falling short of obligations stemming from international law. However, also where EU minimum standards are in compliance with international law, UNHCR has worked towards transposition of ‘best practices’ whenever possible.

3.2 Influencing access to procedures – border monitoring and first arrival

Article 35 of the Asylum Procedures Directive regulates Member States’ asylum procedures at the borders. Member States may derogate from an important number of basic principles and safeguards in procedures applied at the border or in transit zones. UNHCR does not see any reason for requirements of due process of law in asylum cases submitted at the border to be less than for claims submitted within the territory. Rather, the principle of non-discrimination requires that all asylum-seekers, irrespective of whether they apply at the border (including air and sea ports), or inside the country, benefit from the same basic principles and guarantees. Such differences in safeguards may compel asylum-seekers and refugees to enter and stay illegally, in order to be assured of higher standards in the asylum procedure.\(^\text{11}\)

UNHCR has, for many years, monitored asylum practice at borders through different mechanisms on a structural or more ad hoc basis, depending amongst others on access, needs, staff resources and relations with the responsible authorities. Border monitoring is an indispensable tool for gathering information on access to

\(^{11}\) See Provisional comments, op. cit. footnote 6, regarding Art. 35.
territory and access to procedures and provides UNHCR with information that forms the basis of advocacy work and follow-up with authorities.

UNHCR has recently developed a number of innovative activities relating to border monitoring, access to territory and access to procedures.

3.2.a Border monitoring activities in Eastern Europe
(The Hungarian model)

In December 2006, UNHCR, the Hungarian Helsinki Committee (HHC) and the Hungarian Border Guards concluded a tripartite agreement on ‘modalities of mutual co-operation and coordination to support access of asylum seekers to the territory of, and the asylum procedures of the Republic of Hungary’. The agreement includes the establishment of a border monitoring framework in which UNHCR and the HHC are given access to monitor ‘the facilitation by the border guards of the entry of persons in need of protection to the territory of, and access to the asylum procedures of the Republic of Hungary as well as their protection against refoulement’.

The innovative elements of this project include
i) the tripartite nature of the agreement, including HHC as a full partner in the project;
ii) the full access provided by the Hungarian authorities to people crossing the borders and related files;
iii) random access to border crossing points and persons who have crossed the borders, including to files and documentation, allowing to follow the trail of persons who crossed the border also outside monitoring hours.

The main result of the agreement thus far has been to provide UNHCR with a consistent and stable mechanism to gather information on what takes place at the entry points into Hungary. It also appears to have improved individuals’ access to the territory and the asylum procedures. At Budapest airport, applications have gone up from one applicant in the period 2005-2006 to ten in 2007. Although this rise may have been influenced by other factors also, it appears to be a positive indication of improved access to territory and procedures. The agreement also provides UNHCR with a regular platform to discuss with the Border Guards issues of concern, such as the prosecution of asylum-seekers with forged travel documents, cases of suspected refoulement, and questionable practices with regard to return to so-called ‘safe third countries’.

Despite the amount of attention in the press and in political debates devoted to the Mediterranean, much larger numbers of people arrive via land routes through Eastern Europe. UNHCR therefore considers this project as a most interesting model to develop further and to replicate in other countries in the (sub-)region. In September, UNHCR signed a similar agreement with the Slovak Aliens and Border Police and the Bratislava-based Human Rights League for monitoring activities at Slovakia’s land borders and airports, ensuring access to territory and procedures. Similar arrangements are anticipated with Slovenia and Poland.
3.2.b The Lampedusa project

In 2005, the Italian island of Lampedusa was regularly in the news, as one of the locations where large numbers of people arrived, having crossed the Mediterranean from North-Africa, usually in small boats after often life-threatening journeys. Whereas these arrivals were mainly perceived to be economic migrants, refugees, who were using the same route, were amongst them. Although many of the arrivals in Lampedusa were from North African countries (mainly from Morocco), there were a significant number of Eritreans, Ethiopians, Somalis and Sudanese amongst them. Most arrived via Libya; while some departed from the North-Eastern coast of Tunisia. Amongst the arrivals were substantial numbers of unaccompanied minors.

In this context, UNHCR was of the opinion that, in order to perform its mandate responsibilities, it would be important to be able to monitor the situation in Lampedusa closely to ensure that international obligations towards persons in need of international protection would be met. To this end, UNHCR initiated a dialogue with the responsible Italian authorities. In August 2005, the Italian Ministry of Interior invited UNHCR to create a permanent presence in Lampedusa, together with IOM and the Italian Red Cross. UNHCR and the other two agencies accepted this invitation and reached an agreement with the authorities on terms of reference in late 2005. Funding was secured from the Italian authorities and under the European Commission’s ARGO budget line. The project called “Praesidium”, with the programmatic title *Strengthening of reception capacity in respect of migration flows reaching the island of Lampedusa*, was initially approved for the duration of one year.

The project started in March 2006 and has since then been jointly implemented by IOM, the Italian Red Cross and UNHCR. Each agency has deployed a staff member to the island. The project also foresees the permanent presence of one interpreter/cultural mediator for each of the three agencies. Each of the three agencies have been assigned specific tasks and target groups, in line with their respective mandates (IOM focuses on economic migrants, the Red Cross on separated children and UNHCR on asylum seekers amongst the arrivals).

The main activities of the three agencies consist in providing information and counselling to the various categories of arrivals. The arrivals include (in no particular order) asylum seekers, economic migrants, victims of trafficking, separated children and persons belonging to other vulnerable groups. For UNHCR, the provision of information and counselling supports *inter alia* the early identification of asylum seekers and persons in need of special assistance, which allows the Office to ensure appropriate follow-up. UNHCR speaks directly with arriving people and distributes leaflets containing basic information on the right to apply for asylum and on the asylum procedure. Subsequently UNHCR, IOM and the Italian Red Cross are available for individual consultations. If, during or after a consultation someone decides to apply for asylum, UNHCR refers them to the police for the recording of their application. In addition to these activities UNHCR also inter-

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12 The leaflets are available in Italian, English, French, Arabic, Amharic, Tigrina, Bangla and Urdu.
vens in close co-operation with the other operational partners with the management of the center, in order to suggest improvements of the material, social and medical assistance.

UNHCR’s initial evaluation of the project, in particular with regards to UNHCR’s presence and interventions, is very positive. In UNHCR’s assessment, since the start of the project, the provision of information on the asylum procedure, as well as the admission practice, has remarkably improved. In addition, the project has also increased UNHCR ability to monitor the actual follow-up regarding asylum applications of arrivals in Lampedusa.

Based on the positive initial outcomes, the project was further extended (‘Praesidium II’). The project partners with the Italian Ministry of Interior and with Save the Children as a new partner have now proposed to continue and to further extend this type of project also to other areas of (mostly spontaneous and sporadic) arrivals, namely Apulia (reception centers in Bari and Foggia), Calabria (reception center in Crotone) and Southern Sardinia (where a significant recent increase in arrivals is reported and where a reception center is under construction). To this end, a proposal for a project ‘Praesidium III’ was submitted and is likely to be approved for further EU funding from spring 2008 until February 2009.

In 2008, UNHCR’s role in Lampedusa will be part of a more extensive evaluation and lessons-learned review on UNHCR’s operational involvement in situations of mixed migration by UNHCR’s Policy Development and Evaluation Service.

3.3 Promoting and implementing best practices in the use of country-of-origin information (COI)

Article 8.2 (b) and Article 38 1(c) of the Asylum Procedures Directive refer to UNHCR as a source of country-of-origin information. In Article 8 on requirements for the examination of applications, decision-makers’ access to ‘precise and up-to-date’ COI is given its proper place as a crucial element of an ‘appropriate examination’.

UNHCR produces a number of COI-papers each year. Its operational presence in many countries which are also countries of origin of asylum seekers and refugees provides UNHCR with relevant and reliable information which forms the basis of COI-papers. In addition, UNHCR has played a key role in initiatives towards further cooperation in this field. The 2004 UNHCR publication “Country of Origin Information: Towards enhanced Cooperation”13 has been acknowledged14 as the first major initiative to formalize substantive COI quality standards. More recently, in line with the objectives defined by the Hague Programme, a project group of eight EU Member States’ asylum authorities have produced a draft for “Common EU Guidelines for Processing Country of Origin Information”.15 It is encouraging

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15 Produced in 2007, not publicly available.
that EU Member States are working towards more harmonized standards for production of COI. As a member of the Reference Group of this project, UNHCR has supported this project and commented on the drafting process, based on its expertise on COI and its production.

The abovementioned initiatives have resulted in major steps forward in harmonized standards for production of COI. Through its renewed Refworld system, publicly accessible, UNHCR has also worked towards wide availability of high quality COI products. Persons of concern to UNHCR will benefit from wide availability of (high quality) COI, as its use will increase the likelihood that a correct decision will be made in individual asylum cases and as such have a positive influence on the quality of asylum procedures.

UNHCR has followed closely developments at EU level towards a common COI-portal, which would connect a number of national COI systems, including also UNHCR’s Refworld. UNHCR, in principle, supports this endeavor, as it is likely to improve decisions in individual cases, in particular in Member States where at present access to high quality COI is not assured. However, the Office has expressed concern about access to the common portal. If access is limited to Member States, it may have a negative affect on the position of the asylum-seeker and his/her legal representative, as they will not have the same possibilities to research and use information on the factual situation in the country of origin as the decision maker. The principle of ‘equality-of-arms’ could be at stake. Similarly, it would be important that judges, who make decisions in appeal procedures would have equal access to the portal. The same considerations regarding access are valid for a possible future common COI-database, which, according to the Commission’s Communication on Strengthened Practical Cooperation of February 2006, is foreseen to be developed “in the longer term” as a significant step in the process of improving access to COI.

Where progress has been made on joint quality standards for production or co-production of factual COI-products and on wider availability of COI, no such progress has been made on joint assessment of COI. In 2007, UNHCR had clear positions as regard protection needs of asylum seekers from, amongst others, Iraq, Sri Lanka and Somalia, based on assessments of the factual situation in those countries. Research has shown that Member States interpret the needs for protection in these countries very differently. A well-known example is the situation of Iraqi refugees, for whom protection rates varied in 2007 from 0% in certain countries to over 70% in others. As long as Member States continue to attach widely varying conclusions to the same factual information as regards the situation in countries of origin, quality of decisions will continue to vary accordingly. European Commis-

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17 Even when joint reports are produced after joint COI-missions, these do not contain any assessments of risks for specific groups of persons with particular profiles.

sion Vice-President Frattini recognized this in a letter of April 2007 to German Home Affairs Minister Schäuble in his capacity of chair of the JHA Council, in which he stated that “(…) this disparity (in national policies vis-à-vis Iraqi Asylum Seekers, BT) is an indication that the Union is not moving towards the creation of a level playing field in the area of asylum”.¹⁹ UNHCR will continue to encourage more harmonized assessments of COI, but in the end this remains a matter of political will. In the mean time, international courts may play an increasingly important role in determining, clarifying and harmonizing the standard of proof required in asylum cases.

3.4 Promoting best practices in determining the best interest of separated children

Article 17 (6) of the Asylum Procedures Directive states that the best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Article.

In its provisional comments, UNHCR expressed concern that admissibility, border or accelerated procedures generally do not provide for sufficient flexibility and time to take the situation of separated children into account. Furthermore, the personnel conducting these procedures will often not be specially qualified to deal with children’s asylum claims. The lack of a formal procedure to determine a child’s best interest in asylum procedures is also an issue of serious concern. One good practice example is that applied in Belgium, where unaccompanied children applying for asylum to the border are in principle not detained but referred to an “observation and orientation center” which is the first stop for all unaccompanied foreign minors, whether or not they are seeking asylum. UNHCR recommends that, consistent with Article 3 CRC, the application of the best interest of the child principle throughout the whole asylum procedure should be explicitly required.²⁰ UNHCR is involved in several activities specifically focusing on promoting best practices in determining the best interest of separated children. When separated children arrive in Europe, their treatment requires special attention in terms of protection during and after the asylum process, which is often not made available. As a partner in the Separated Children in Europe project (SCEP),²¹ a joint UNHCR-Save the Children initiative, UNHCR has for many years contributed to efforts to improve the situation of separated children through research, policy initiatives and advocacy at national and regional levels. SCEP has published a Statement of Good Practice,²² which has been used by UNHCR and NGOs to advocate with national governments for better standards and practice.

¹⁹ Letter of Commissioner Frattini to German Home Affairs Minister Schäuble, 5 April 2007.
²⁰ Provisional comments on Article 15 (in final numbering Article 17 of the Asylum Procedures Directive).
In May 2006, UNHCR released a provisional version of “UNHCR Guidelines on Formal Determination of the Best Interest of the Child”. These guidelines set out the legal and other principles to guide decision-makers in determining when to make a formal Best Interest Determination (BID), who should make the determination, what procedural safeguards should be followed and how criteria should be applied to make a decision in a particular case. The guidelines have not been developed as a framework for States to meet their obligations in this respect, although they do refer to States’ obligations. They are developed for UNHCR staff and staff of implementing partners, who need to make and document formal determinations at field level.

Despite this, the document has been used to explain the concept of a formal BID to staff working in national asylum services and child protection services and to advocate for its use. An added benefit of such activities is that they can bring staff of different relevant national services together, who usually do not communicate much. This positive effect was observed at an event in Brussels, where the Federal Ministry of Justice and UNHCR brought together asylum decision makers, social workers, including staff working in reception facilities. Many of the participants met each other for the first time at this event. Apart from formal discussions on how to implement a BID, informal working group sessions resulted in exchanges of experiences and useful networking. No steps have been taken as of yet in Belgium, to adopt a procedure ensuring that a (separated) child’s best interest is determined, in particular in the context of determining durable solutions for asylum seeking / refugee children. Improved communication and exchanges between the many actors involved in a separated child’s legal procedure and social care providers can however be seen as an important step forward.

4. Proposed future ‘project-based’ UNHCR activities relating to asylum procedures in the European Union

Apart from regular, ongoing activities, UNHCR has been increasingly engaging in ‘project-based’ research and reporting projects in the EU, especially on issues where we noted a gap in information on the actual implementation and impact of EU legislation. Good examples of this approach are a 2006 study on the impact of the Dublin II Regulation and a 2007 study on the impact of selected articles of the Qualification Directive. These studies have provided the Office with extensive experience and insights in how most effectively to work with Member States in analyzing practice, and to produce recommendations and guidance which is of the maximum benefit for authorities on the ground.

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25 UNHCR, Asylum in the EU – A study of the implementation of the Qualification Directive (2007).
Both of these studies highlighted a number of procedural issues and concerns that UNHCR sees as in pressing need of further analysis and recommendations (including, among others, the nature of an effective remedy, which arises in the Dublin context; and the importance of written reasons for decisions, as exemplified by the Qualification Directive analysis). Through its partnership with and input to the Odysseus network’s research on the Reception Conditions Directive, conducted on behalf of the EC in 2006, UNHCR also derived further knowledge of effective analytical methods for examining and producing constructive recommendations on asylum instruments, as well as a substantive understanding of procedural gaps apparent also through the reception analysis (including for instance regarding provision of information to asylum seekers; differential treatment of people in different stages of the procedure, etc).

Through these projects, UNHCR has also confirmed the interest of Member States in receiving information about the practices and approaches of other States, and the positive benefits around such information exchange. As a result, these initiatives have provided clear evidence of the need and key areas of focus for an Asylum Procedures project.

Building on experience derived from and the positive impact of these previous projects, UNHCR has submitted two proposals for projects under the 2007 community actions of the European Refugee Fund, both involving a substantial amount of research, (comparative) analysis.

The first of these two proposed projects focuses specifically on the Asylum Procedures Directive.

4.1 “Improving EU Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice”

UNHCR sees a pressing need for data on the actual implementation and impact of this Directive on practice in Member States, in particular because this will be the only Directive for which no formal evaluation (commissioned) by the Commission will have taken place before amendments will be proposed by it. UNHCR hopes that, if its ERF proposal will be selected, the information resulting from this project will fill this gap to the extent possible.

The proposal, ‘Improving EU Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice’, includes a wide-ranging comparative analysis of the transposition and the practical application of key provisions into national law by selected EU Member States (Belgium, Czech Republic, Finland, France, Greece, Italy, Netherlands, Spain, United Kingdom).

Based on the analysis, UNHCR will produce by October 2009 a set of concrete recommendations to guide Member States’ authorities in the interpretation and application of the Directive, as well as to inform discussions and work towards

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26 If the proposal will not be selected for ERF funding, UNHCR intends to complete a much smaller scale version of the project, using its own financial resources.

27 In addition, Bulgaria, Germany and Slovenia will also be included in the analysis and outputs, but funded from other, non-ERF sources.
strengthening and improve asylum procedures through measures at EU and national level. Key procedural aspects to be studied will be drawn from: examination of applications, including use of COI (Art. 8 and 9); personal interviews (Art. 12-14); detention (Art. 18); withdrawal of applications (Art. 19, 20 and 33); data protection and documentation (Art. 22); accelerated procedures (Art. 23(4)), including the first country of asylum concept (Art. 26); safe third country and European safe third country concept (Art. 27 and 36); safe country of origin concept (Art. 29-31); as well potentially as inadmissible and unfounded applications (Art. 25 and 28); subsequent applications (Art. 32 and 34); border procedures (Art. 35); and effective remedies (Art. 39).

In the Member States selected for analysis, UNHCR will conduct the analysis and formulation of conclusions and recommendations. The analysis at national level will aim to identify best practices, as well as areas of divergence in interpretation and practice, including any which could raise questions of compatibility with international standards. The comparative analysis and guidance on law and practice will aim to strengthen Member States’ national practices and laws, and provide a basis for exchange of information between Member States. It will also aim to inform the European Commission and other EU institutions, including through recommendations directed at the EU level, which will seek to encourage more consistent approaches and greater practical cooperation, as well potentially as proposing adjustments where appropriate to the legal framework. This analysis and guidance will also seek to provide constructive input to discussions on how to achieve greater harmonization at a higher standard of quality and in line with international law, through the future Common European Asylum System.

In terms of methodology, the project will involve four main elements: (1) legal analysis of the transposition of key provisions of the Asylum Procedures Directive in national law, (2) observation, research and data gathering about the practice of the asylum procedure in each of the Member States, including examination of asylum case-files and decisions, and physical observation of interviews and other key procedural steps, (3) interviews with representatives of asylum authorities at first and relevant further instances and other key participants in or observers of the process and (4) assembling and synthesizing national data and preparation of a set of guidelines, recommendations and findings.

4.2 “Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe sub-region” (ASQAEM)

The second proposal UNHCR has submitted under the 2007 ERF Community Actions will cover Austria, Bulgaria, Germany, Hungary, Poland, Romania, Slovakia and Slovenia and focuses on quality of decision-making. The project is inspired by a successful multi-year project in the United Kingdom, the Quality Initiative, in which UNHCR worked closely with the UK Home Office in assessing and improving many aspects of decision-making. The Home Office’ willingness to allow
UNHCR access to many crucial aspects of its decision-making process and to its decision-makers, was a crucial factor in the projects’ success.\(^{28}\)

The quality of decisions for claims for protection by persons in need of international protection varies widely in the countries covered by the ASQAEM proposal. While the asylum systems are established and functioning and national asylum legislation duly enacted, gaps, deficiencies and inconsistencies in procedures and practice remain. Consequently, for certain nationalities, the chances of being granted protection varies considerably between each of the eight participating EU member states. This is mainly on account of different procedural approaches. In addition, the criteria for granting of refugee status and subsidiary protection vary widely demonstrating a need for harmonization and practice exchanges to advance the intention of constructing a common European asylum system. Monitoring and observation has also indicated that there are justifiable concerns over the fairness and efficiency of the asylum procedures in the countries covered.

UNHCR aims for this project to be implemented over an 18 months period, to contribute substantially to achieving the continuous development and enhancement of fair and efficient asylum procedures in the participating countries. To this end, if selected for ERF-funding,\(^ {29}\) the project will promote adherence to established common international protection standards in the European Union, with a focus on how the concerned EU Member States, from a transnational perspective, are undertaking the assessment of asylum claims after having transposed relevant EU instruments including in particular the Asylum Procedures Directive. It will, after a process of independent and objective evaluation, implement specifically designed actions to improve the quality, fairness and efficiency of first and second instance international protection determination decision making in each country. In addition, the project will have a training component to ensure an in-house quality assurance mechanism to continually develop the capacity of decision-makers and other stakeholders. Partnership exchanges between asylum systems of the participating member states will be established to find common solutions to common challenges in decision-making for international protection.

To this end, the project will include the following actions at the first instance:

1) An independent and objective evaluation through close proximity monitoring of the current methods in the asylum procedure to determine the level of application of the 1951 Convention and other relevant instruments, especially the EC Qualification and Procedures Directives;
2) Intensive training, coaching and exchange of experiences, using transnational partnerships, on the best methods to determine the need for international protection in a single procedure;
3) One-on-one coaching based on individual case evaluation and analysis in order to identify gaps and to train concerned decision makers on how to close them;

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\(^{29}\) If the proposal will not be selected for ERF funding, UNHCR intends to complete a much smaller scale version of the project, using its own financial resources.
4) Thematic training of decision makers focusing on credibility assessments and the use of country of origin information;
5) Elaboration of common approaches to deal with specific themes such as nationality, internal relocation alternative, accelerated procedures, etc.

It is expected that the findings and follow-up actions generated by this project will significantly contribute to the quality of asylum procedures and decision-making in the participating countries. As such, this project will not only identify shortcomings in the implementation and interpretation of the Asylum Procedures Directive, but also immediately seek to remedy such shortcomings.

5. UNHCR and the Asylum Procedures Directive – what next?

Having listed a number of UNHCR activities which are likely to produce information on the state of asylum procedures within EU Member States, including on implementation of the Asylum Procedures Directive, the logical question how this data can be used to improve procedures, influence the implementation of the Asylum Procedures Directive and ultimately improve the protection of refugees. UNHCR expects to use these data for advocacy at different levels, to influence both law and practice.

1) At EU-level, UNHCR will use information on transposition and practice in Member States to lobby the EU institutions and Member States for improvements in the Asylum Procedures Directive, through proposed amendments and subsequent negotiations, as part of the process of completing the Common European Asylum System by 2010 as foreseen in the Hague Programme.

2) Also at EU-level, UNHCR intends to use data on procedural practices across the EU to work towards better implementation, by advocating for, amongst others, the development of guidelines and quality control mechanisms, specifically targeting those procedural areas where, according to the information collected, improvements are most needed.

3) At Member State level, UNHCR will use the findings of regular and project-based monitoring activities to work directly with the responsible authorities towards improved legislation.

4) Also at Member State and regional level, UNHCR will seek to use the collected data to have a direct impact on implementation of the Asylum Procedures Directive, by seeking to drive or at least be systematically consulted in the design and implementation of quality-assurance mechanisms.

5) UNHCR is considering how it can make better strategic use of litigation, both at national level and at European level through both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), to influence

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30 ‘Regional level’ is referring to groups of countries within the EU, as covered by EU Regional Offices, or groups of countries covered under specific project proposals (such as the ERF submissions ‘Improving EU Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice’ or ‘Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe sub-region’).
legislation and implementation. With the first request for a preliminary ruling on the interpretation of a provision of the Qualification Directive submitted to the ECJ,31 and with the changes proposed upon the entry into force of the Lisbon Treaty foreseen in 2009, allowing lower courts to directly refer preliminary questions to the European Court of Justice, the courts’ influence on the implementation of European asylum legislation will increase even further. The jurisprudence of the ECtHR has already proven to be of major importance for the interpretation of important concepts of human rights law directly affecting the position of refugees and others with international protection needs. Decisions in national courts in precedent-setting cases have also had a major impact on practice. Using data on most pressing issues that need to be addressed, UNHCR will need to develop a mechanism to identify cases that merit UNHCR interventions at national and European levels. If engagement with court proceedings will increase, the organization will also need to address what form UNHCR’s interventions should take and how to ensure consistency in its interventions before courts. If successful, however, an active UNHCR role in strategic litigation can be expected to have an important impact on asylum procedures and practice across the EU.

6. Some specific challenges

There are a number of factors which may affect UNHCR’s ability to influence the implementation of the Asylum Procedures Directive. These include:

The timeframe for the second phase of work toward a Common European Asylum System

Despite UNHCR’s efforts to fill this gap to a certain extent through its proposed project on Asylum Procedures under the 2007 ERF community actions, it remains a serious problem that the Hague Programme timeframe for completion of the second phase of the Common European Asylum System, does not allow for an evaluation of the Asylum Procedures Directive before the instrument is up for revision and amendments will be proposed. The fact that an analysis of actual experience with the Directive’s implementation in the very short period since its entry-into-force does not yet exist seriously increases the risk that certain problems with the implementation of the Directive may not yet be known in full at that stage and may as such not be addressed. It therefore appears to be of critical importance that avenues remain open to further amend the Directive at a later stage, when more detailed knowledge about problems and shortcomings in its implementation have been observed and analyzed, remain open.

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Access to territory and asylum procedures, and the asylum-migration debate

UNHCR and other actors\textsuperscript{32} have increasingly expressed concern over barriers that persons in need of international protection need to overcome when trying to gain access to the territory of the European Union and to asylum procedures. The best procedure is of no value at all if people in need of protection are prevented from entering it. In the context of arrivals from North-Africa arriving in the EU after crossing the Mediterranean by boat, the Member States focus on ‘the fight against illegal immigration’ with limited attention for the fact that amongst the migrants are persons in need of international protection, who often have no other option but to resort to the services of human smugglers in their effort to reach safety. The creation in 2005 of the European Agency for the Management of Operational Co-operation at the External Borders (FRONTEX), with a 35.2 Million Euros budget in 2007,\textsuperscript{33} reflects Members States’ preoccupation with illegal migration. It is reason for concern that FRONTEX has quoted decreased arrivals as a measure of success for its operations, without any qualifications. This indicates not only that it is increasingly difficult, also for those with legitimate protection reasons, to enter the EU, but also that border management systems are geared towards keeping people out, instead of employing ‘protection-sensitive’ entry-management strategies which would allow those who left for protection reasons to enter EU Member States. The impact of FRONTEX can not be underestimated. However, it is important to keep in mind that FRONTEX only coordinates border management. Responsibility and decision-making powers remain with individual Member States, which need to devise better ways to balance the fight against illegal immigration with their international obligations towards persons in need of international protection in their jurisdiction.

Also, despite the attention devoted in the media and in the political debate to people arriving at the external sea borders in the South, numbers of people arriving at the external land borders in the East of the EU have consistently been substantially larger. Whereas FRONTEX initially focused its operations on the South, it is now increasingly active also in the East. UNHCR’s border monitoring projects in these regions are therefore of key importance in ensuring access to territory for those in need of protection.

It is a matter of grave concern if people potentially in need of international protection are purposefully kept out of Member States’ jurisdiction, prevented from accessing territories and asylum procedures and ultimately from accessing protection. Any debate over the quality of procedures is futile if those in need of protection cannot reach a location where they can lodge an asylum claim. Issues of access to territory and procedures therefore continue to need to be addressed vigorously.

\textsuperscript{32} E.g. ECRE, \textit{Defending refugees’ access to protection in Europe}, December 2007 at www.ecre.org .

\textsuperscript{33} For 2007 Frontex was granted a budget of 22.2 million EUR plus additional 13 million EUR in reserve, see www.frontex.eu.int.
UNHCR reorganization in Europe

In 2009, UNHCR will embark on a process of further ‘regionalization’ of its presence in Europe. UNHCR representations in individual Member States will be grouped under strengthened regional offices, in an effort to work more strategically across borders. This process will bring both opportunities and risks for UNHCR’s protection and advocacy work within the European Union. Reduced human resources in a number of national offices will render it even more important for UNHCR to forge strategic partnerships with non-governmental organizations, lawyers, academics and others, and make even better strategic choices on where limited resources can have most impact. Strengthened co-ordination of the work in individual Member States in regional offices may on the other hand result in more consistent advocacy methods, messages and strategies.

7. Conclusion

Academic experts, other members of civil society and UNHCR have all studied and criticized the Asylum Procedures Directive for its many political compromises, resulting in a number of minimum standards, which in some cases allow Member States to go below standards incorporated in international law.

Now that the transposition deadline has passed and the Directive has entered into force, it is of crucial importance to monitor its implementation, in particular but not only the implementation of the more problematic articles. Through this monitoring, a picture can be formed on what the real problems are in asylum procedures when only applying the Directive’s minimum standards. How will the Directive affect asylum procedures in individual member states? Will practices change, deteriorate? Will most Member States implement the minimum standards, or will some keep better practices? Are there unexpected implementation problems with certain provisions which were not foreseen? Monitoring activities and direct work with responsible authorities at all levels can already contribute to a certain extent towards a more protection-sensitive interpretation of the Asylum Procedures Directive. At the same time, information can be gathered on the negative effects of the most problematic provisions that truly affect asylum seekers’ right to a fair procedure at its core. This information can be used in litigation strategies or to build arguments for advocacy with the Commission to propose amendments to the Asylum Procedures Directive. The UNHCR activities described above are all expected to contribute in one way or the other to this process of information gathering, working towards protection-oriented interpretations of the Directive and amendments of standards which are clearly inadequate.

Despite the 2010 deadline for completion of the Common European Asylum System, work towards harmonized European standards for asylum procedures which are fair, dignified and accessible, with appropriate safeguards and guarantees, is not close to being completed. The entry into force of the Asylum Procedures Directive is just one step in that direction.
The European Court of Justice, Preliminary References, and the Challenge of the Procedures Directive by the European Parliament

Karin Zwaan*

1. Introduction

To ensure that EU law is enforced, understood and uniformly applied in all 27 Member States, a judicial institution is essential. This is why the three European Courts (Court of Justice, 1952; the Court of First Instance, 1988; and the Civil Service Tribunal, 2004) play such a vital role in the European arena. With its own supranational Court, the EC legal order permeates national legal orders, bringing legal doctrines, and general principles of EC law in reach of national judges and litigants.

In this paper I will examine the relationship between the Europeanisation of asylum and the therefore evolving role of the European Court of Justice in this field. This paper contains four parts. In the first part I will go into the competence of the ECJ in asylum matters. Secondly, I will describe the role and influence of the preliminary references before the ECJ. Thirdly I will discuss the request to the ECJ by the European Parliament for the annulment of Articles 29(1) and (2) and 36(3) of the Procedures Directive, subsidiary to annul the complete Procedures Directive and the opinion of Advocate General Maduro. In the conclusion of this paper, I address the possibilities for effective judicial protection of the asylum rights which individuals derive from community law after the implementation of the Procedures and Qualification Directive.

2. Competence, kinds of appeal

It is interesting today to specify the role and the competence of the ECJ with regard to the Procedures Directive. It is known that, generally speaking, there are two ways to gain access to the Court of Justice. There is the direct (I) and the indirect (II) way.

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1 These are the provisions providing for a common list of ‘safe countries of origin’ and for a common list of ‘super-safe countries’.

2 As a source of knowledge and inspiration for this lecture and article I am very much indebted to an earlier article on this topic by Jean-Yves Carlier: ‘The Role of the European Court of Justice’ in: K. Zwaan (ed.), The Qualification Directive. Central Themes, Problem Issues, and Implementation in Selected Member States, Nijmegen: WLP 2007, pp. 31-37.
(I)

An individual may directly contest a decision taken by a Community institution before the Court of First Instance. He must be the addressee of the taken decision or directly and individually concerned by the act in question. This option is, with regard to the Procedures Directive of no importance as it is clear that a natural person could not be considered as having a “direct and individual concern” following Article 230 EC.

It is possible though, for a European Institution such as the Parliament or the Commission, to institute proceedings against a Directive. The European Parliament took this step regarding the Procedures Directive, and this step was also taken regarding the Family Reunification Directive.

In this case of 2006 the ECJ refused the request for annulment of the final subparagraph of Article 4(1), Article 4(6) and Article 8. The EP had argued that these articles infringed the fundamental right for respect for family life as embedded in – among others – article 8 ECHR, and also invoked the principle of non-discrimination of Article 14 ECHR.

Important though in this judgement are the findings of the Court with regards the admissibility of the action based on Article 230 EC. The Court states that the fact that the provisions of a directive that are challenged in an action for annulment that afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive, cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC. Furthermore, the Court argues such provisions could, in themselves, not respect fundamental rights if they required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.

The conclusion of Advocate General Maduro with regard to the annulment of certain articles of the Procedures Directive is more successful for the EP.

(II)

It is possible to gain access to the Court indirectly where a case is being dealt with by the national courts. If the domestic court is confronted with a legal problem, it may suspend proceedings and ask for a preliminary ruling to give an interpretation or review the legality of a Community law. Individuals will be then indirectly involved in the procedure.

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3 Case C-133/06, European Parliament v Council of the European Union.
5 ECJ 27 June 2006, Case C-540/03.
6 See further paragraph 4 of this contribution.
3. Preliminary references

I will go into the preliminary question with regard to a Directive in general, and to the Procedures Directive in particular. The preliminary ruling system is a fundamental mechanism of European Union law aimed at enabling national courts to ensure uniform interpretation and application of that law in all Member States. Under the preliminary ruling procedure, is it the Court’s role to give an interpretation of Community law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national courts. It is not for the Court to decide issues of fact raised in the national proceedings or to resolve differences of opinion on the interpretation or application of rules of national law. It is for the referring national court to draw up the appropriate conclusions from the Courts reply.

When is there a possibility or an obligation of preliminary question?

The general rule of Article 234 EC is well known: “any” court or tribunal “may” refer questions to the Court “if it considers that a decision on the question is necessary to enable it to give judgment” and “courts against whose decisions there is no judicial remedy under national law” must refer such questions.

Article 68 EC introduces two limitations to preliminary questions. One is formal: only courts whose decisions are not subject to review have competence to refer a question in this matter (Art. 68, para. 1 EC). This formal limitation is under much debate. It is argued that as the ECJ is expected to play a major part in overseeing the compliance with the total asylum acquis, not merely the national court of last instance should be able to refer questions of interpretations to the ECJ.⁷

The other limitation is substantial, and probably less important for the Procedures Directive. It is the exclusion of questions about “maintenance of law and order and the safeguarding of national security” linked to internal borders control (Art. 68, para. 2, EC).

How does this preliminary ruling work in practice? After receiving a copy from the Court Registry of the request for a preliminary ruling, the "interested parties" - the litigants before the national court, the Member States and the other institutions – may submit a document, referred to as written observations, within a period of two months (extended on account of distance by a period of 10 days in all cases). This time limit is mandatory and cannot therefore be extended.

The purpose of the written observations is to suggest the answers which the Court should give to the questions referred to it, and to set out succinctly, but completely, the reasoning on which those answers are based. It is important to bring to the attention of the Court the factual circumstances of the case before the national court and the relevant provisions of the national legislation at issue. It must be emphasised that none of the parties is entitled to reply in writing to the written

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⁷ In the Draft treaty amending the Treaty on European Union and the Treaty establishing the European Community it is proposed to delete Article 68(1) EC.
observations submitted by the others. Any response to the written observations of other parties must be made orally at the hearing. For that purpose, the written observations are notified to all the parties once the written procedure is completed and the necessary translations have been made. The submission of written observations is strongly recommended since the time allowed for oral argument at the hearing is strictly limited. However, any party who has not submitted written observations retains the right to present oral argument, in particular his responses to the written arguments, at the hearing, if a hearing is held.8

A reference for a preliminary ruling in general calls for the national proceedings to be stayed until the Court has given its ruling.

What shall be the preliminary question?

The national court could pose two kinds of questions. Firstly, the conformity of national law with the Procedures Directive (I).

Secondly, the conformity of the Procedures Directive with international law, general EC law principles and general national law principles (II).

I. The conformity of national law with the Procedures Directive

The Procedures Directive as well as the Qualification Directive purport to set down minimum standards only. As the Procedures Directive provides for minimum standards with, as often in a Directive, there is the possibility for Member States to “introduce or retain more favourable standards”, and there is no need for a preliminary question if the domestic law is more favourable than the directive. Absent is the Procedures – and the Qualification Directive is a standstill clause, explicitly precluding Member States from lowering their domestic standards when implementing these Directives. Member States have amended their asylum laws in the course of the negotiations on the Procedures Directive, which took more than five years.9 Critics argue that the concept of ‘minimum standards’ is equated with the lowest common denominator or the lowest possible standard of protections.10 This is perhaps why the European Commission stresses in its Green Paper on the future of the Common European Asylum System, that in the second stage of the CEAS the goals should be to achieve both a higher common standards of protec-

8 See further the ‘Notes for the Guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities’, January 2007, to be found on curia.europa.eu.


tion and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States.\textsuperscript{11}

It of course could also happen that domestic law is less protective than the Directive.

The central question is that of the direct effect of a Directive, and particularly the vertical direct effect between a person and the State.\textsuperscript{12}

If the Treaty provides that a regulation is “directly applicable” (art. 249 EC), it did not for a Directive. However, case law came to the conclusion that it is not because a Directive is not directly applicable that some provision of the Directive could not have direct effect. A provision of Community law, including provisions of a Directive, has direct effect when it is clear, precise and unconditional. The wording of each provision is the most important test.

Due process protections have become entrenched in EU Member States by the coming into force of the Procedures Directive. If one tries the exercise to look at the wording of all articles in the Procedures Directive, the result will not be easy, and I will not do it here.\textsuperscript{13} A lot of provisions in the Procedures Directive leave Member States discretion, so this will ban the direct effect.

I imagine that in the Articles 3(1) 9, 10, 13, 23(1), 29(1) and 38 PD one can find those precise and unconditional terms. These articles could be perceived as having direct effect.

The question of direct effect of articles of the Procedures Directive is a difficult one. In the UNHCR research on the implementation of the Qualification Directive it emerged that there was no evident uniform approach by the authorities of a selected number of Member States to which Articles of the Qualification Directive, if any, should be applied directly.\textsuperscript{14} One can predict that the same goes for the direct effect of Articles of the Procedures Directive.

II. The conformity of the Procedures Directive with international law (1), general EC law principles (2), and general national law principles (3)

If there is a doubt on the interpretation of the conformity between Community law, as transposed by national law, and international law, at the end of the domestic procedure, it would be the responsibility of the court whose decision will not be subject to review, to refer a preliminary question to the ECJ.

The Procedures Directive is an instrument of secondary EC legislation. EC law has primacy and Member States are required to take all appropriate steps to elimi-


nate incompatibilities between their obligations under EC law and under public international law. Also there is the obligation for EC law to comply with human rights as general principles of Community law. So there may be a need for the ECJ to look at the relationship of the Procedures Directive with international refugee and human rights law.\(^\text{15}\)

Member States may be required to adopt higher standards than those set out in the Procedures Directive under certain circumstances. This is the case when there are other binding sources of fundamental rights law binding the Member States in question. This can be so when there are at stake general principles of EU law (1.), international human rights law like the applicable norms of the ECHR and the Geneva Refugee Convention (2.) and the general principles of national administrative law (3.).\(^\text{16}\)

1. Under the EC general principles, the right to an effective judicial protection is established. It applies to all EC rights, and is thus broader than only Article 13 ECHR. With regard to Community law, according to the case law of the ECJ individuals must be able to invoke the rights which Community law confers to them before a national court.\(^\text{17}\) Under the harmonisation of asylum legislation, Community law will confer such rights to third country nationals, for example claims to residence permits and guarantees regarding the application of the safe third country. The requirement of judicial control regarding these rights is a general principle of law, which underlies the constitutional traditions common to the Member States. Community law requires effective judicial scrutiny of the decision of national authorities taken pursuant to the applicable provisions of Community law.

2. On fundamental rights, the jurisprudence of the ECtHR has been predominant. This jurisprudence has been applied by the ECJ as a pre-eminent source of international fundamental rights.\(^\text{18}\) The ECJ has consistently held that fundamental rights form an integral part of the general principles of Community law whose observance the Courts ensures.\(^\text{19}\) With regard the Procedures Directive there seems to be a tension between the absence of Community rules in the Procedures Directive on the right to remain during the appeals procedure. It is left to the Member States to ensure that the national rules and their application are in conformity with the principle of non-refoulement of the Refugee Convention. It is not Community law in itself which may breach international refugee law. It is to be seen whether the ECJ will perceive the right to remain during the

\(^{15}\) Article 307 EC.


\(^{17}\) ECJ 15 May 1986, Case C-222/84 (Johnston), para.13.


\(^{19}\) E.g. ECJ 10 July 2003, Case C-20/00 and C-64/00 (Booker Aquaculture Ltd.).
appeal as part of the notion of a right to an effective remedy as part of a general community principle as mentioned under 1.  

The Dutch Council of State has asked for a preliminary ruling on the interpretation of Article 15c of the Qualification Directive just recently, among others asking the Court on the linkage between Article 3 ECHR and Article 15c QD.

3. The ECJ requires national authorities to act in accordance with their national procedural and substantive administrative rules when implementing EC law.  

In theory, there is a solution for every difficulty of interpretation of the Procedures Directive, if necessary by a preliminary ruling in Luxembourg. The differentiated procedural guarantees in the Procedures Directive must be interpreted and applied in a consistent and predictable manner compatible with the general principles of EC law, and other international norms.  

And as is the case in all matters regarding the implementation of EC law, it will be in the end the national judges who will find themselves playing the most crucial role in the interpretation of the Procedures Directive.


I will now go into the challenge of the Procedures Directive by the EP. In this case the ECJ is being asked to rule on a legal question of fundamental importance for the Community institutional system and the institutional balance which underpins it. The EP primarily asked on the basis of the first paragraph of Article 230(1) EC for the annulment of Articles 29(1) and (2) and 36(3) of the Procedures Directive, 

subsidiary to annul the complete directive.

The question is whether it is permissible under Community law to create secondary legal bases for the purpose of adopting legislative measures following a simplified procedure as opposed to that laid down by the ‘Treaty.

In his reasoned opinion of 27 September 2007, Advocate General Maduro, with regard to the question of the legal basis, goes into three questions:

20 R. Byrne writes on this topic in, ‘Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures’, European Journal of Migration and Law 2005, p. 86: “For Member States to implement Article 38 PD in line with ‘international obligations’ they must extend their obligation beyond the suggested baseline approach of offering the ‘possibility’ of suspensive effect, as proposed by the Commission, and ensure the right to an appeal with suspensive effect for all asylum claimants”. 

21 E.g. ECJ 13 April 2000, Case C-292/97, Kjell Karlsson and others. 


24 These are the provisions providing for a common list of ‘safe countries of origin’ and for a common list of ‘super-safe countries’. 

25 Conclusion of AG Poiares Maduro delivered on 27 September 2007 in Case C-133/06.
1. Directive 2005/85 – the final stage of the necessary legislation?
2. Do the lists of safe countries fall under the heading of executive matters?
3. The question of the legality of secondary legal bases

**On question 1:**
According to Article 67(5) EC the Council is to adopt the measures provided for in Article 63(1) and (2)(a) EC in accordance with the co-decision procedure referred to in Article 251 EC provided that it has adopted ‘Community legislation defining the common rules and basic principles governing these issues’, that is to say governing the asylum policy provided for by Article 63(1) EC and some of the measures on refugees and displaced persons, those referred to in Article 63 2(a) (EC). In the present case, the Council took the view that the establishment of the list of safe countries and the list of European safe countries forms part of the Community legislation defining the common rules and basic principles on asylum.

According to AG Maduro, the essential question is thus (para. 17), “whether the adoption and amendment of the lists of safe countries constitute implementing measures. In the event that they do, it is of little importance whether or not the contested directive is the last element of the necessary legislation, as the lists of safe countries could be adopted pursuant to a secondary legal basis according to a simplified procedure such as that chosen by the Council. However, the Parliament submits specifically that the naming of the safe countries comes under the competence of the Community legislature.”

**On question 2:**
In support of categorisation as implementing measures, Maduro points out (para. 19) that both in the Commission’s initial proposal and in its amended proposal, it fell to the Member States to designate the safe countries on the basis of the criteria laid down in the directive. Conversely, although the criteria for designation appear in the directive, the fact that the Council finally decided to adopt common lists of safe countries for the purpose of approximating the existing national lists and providing national legal systems which have not yet adopted measures to that effect with minimum lists militates in favour of categorisation as a legislative measure.

Maduro argues that it is not necessary to resolve this question in the present case. He states (para. 20):

“Even if the naming of safe countries were not to constitute part of the ‘basic elements of the matter to be dealt with’ and the contested provisions were to be regarded as a reservation of implementing powers, it must be agreed that they do not comply with the conditions governing legality.”

So we may continue with question number 3.

**On question 3:**
The final question that needs to be answered is that of the permissibility of delegation of legislative power. The possible acknowledgment of the legal value of practices emanating either from the institutions or the Member States must in any event
be strictly delimited. Furthermore, Maduro argues (para. 31), the legislative procedures laid down by the Treaties establish the extent to which each institution is to be associated with the taking of decisions and thus establishes an institutional balance.

In the present case, Maduro states (para. 33), the procedures for the taking of decisions provided for under the contested secondary legal bases (qualified majority within the Council and consultation of the Parliament) differ from the procedures laid down by Article 67(5) EC, the legal basis for which the Parliament and the Commission argue (unanimity within the Council and consultation of the Parliament if the designation of safe countries still formed part of the necessary legislation; qualified majority within the Council and co-decision if the contested directive should be regarded as the final stage of the necessary legislation). The use of secondary legal bases cannot therefore be allowed, because it undermines the principle that the institutions must act within the limits of their powers and the principle of institutional balance.

He finally concludes (para. 36):

“In the light of all of these considerations, I propose that the Court should hold that the Council was not entitled to adopt, in the contested directive, the contested secondary legal bases with a view to the adoption of legislative measures under a simplified procedure as compared with that provided for by Article 67(5) EC. Consequently, the pleas of lack of competence and infringement of the Treaty raised by the Parliament should be upheld and the contested provisions should be annulled.”

So Maduro argues that the ECJ should annul the provisions providing for a common list of “safe countries of origin” and for a common list of “super-safe countries”.

As of course the Court is not bound to follow in any way the reasoned opinion of Advocate General Maduro I am awaiting the judgment before the ECJ in this case with high expectations.

5. Conclusion

Community law requires an effective judicial protection of the rights which individuals derive from Community Law. The task to apply Community law falls mainly to national courts, in as much as they retain jurisdiction to review the administrative implementation of Community law, for which the authorities of the Member States are essentially responsible. In the case of the Procedures Directive, that directly confers individual rights, it is the national court that must uphold these rights. So protection must be mainly sought from domestic courts, sometimes by way of a preliminary ruling. I have attempted to describe the tension between getting effective judicial protection on an individual basis for the individual protection seekers and the need for enforcing, understanding and the uniform application of the Procedures Directive. In Articles 9, 10, 13, 23 and 38 PD one can find precise and unconditional terms that could be perceived as having direct effect.
It is up to the national courts to find a striking balance between interpreting the articles of the Procedures Directive themselves, and where necessary refer a question to the ECJ. And all of this also together with respect for fundamental rights as envisaged in international, EU and national law. This seems to be a highly demanding task.
Part Two:
The Implementation of the Directive
in Selected Member States
The New Asylum Procedure in Belgium and its Compliance with the Asylum Procedures Directive: A Legal Analysis

Kris Pollet*

1. Introduction


The law of 15 September 2006 reforming the Council of State and establishing the Aliens Litigation Council introduces major changes in the competences of the Council of State with regard to Aliens law by amending the Law establishing the Council of State and at the same time creates a new Administrative Court competent to deal with appeals against individual decisions taken in the framework of the Aliens Act. As a result, the new Aliens Litigation Council is entrusted with competences of the Council of State as an appeal court against immigration related individual decisions while it replaces the former Permanent Appeals Commission for Refugees in the asylum procedure.6

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1 Law of 15 September 2006 amending the law of 15 December 1980 with regard to access, residence, establishment and expulsion of aliens, Moniteur belge, 6 October 2006.
3 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ 2004 L 261/19.
5 Moniteur belge, 6 October 2006.
6 Several provisions of both laws of 15 September 2006 are being challenged before the Constitutional Court. Actions for annulment have been lodged by a number of non-governmental organisations providing assistance to asylum seekers and foreigners in Belgium as well as by the Francophone and Flemish Bar Association. See for official announcements: Moniteur belge, 8 June 2007 and Moniteur belge, 14 June 2007. The Constitutional Court has authority to
Although the legislative package of September 2006 represents the most radical reform of the Belgian asylum procedure since the establishment of the Belgian Commissioner-General for Refugees and Stateless Persons (hereafter Commissioner-General for Refugees), the laws of 15 September 2006 do not implement Council Directive 2005/85/EC in Belgian legislation. At the time of adoption, the main concern of the Belgian Government was to implement the Qualification Directive before 10 October 2006, the deadline for transposition in national legislation. As Belgium was one of the few EU Member States that did not have a subsidiary protection status in its national legislation, the government feared that rejected asylum seekers would apply en masse for the subsidiary protection status once the deadline for transposition passed. The implementation of the Asylum Procedures Directive should have been the subject of a next stage of implementation of EU immigration-related legislation in which the transposition of EU Directives 2003/109/EC and 2004/38/EC was also planned, although at the same time the assumption was that the newly designed asylum procedure already largely complied with the Asylum Procedures Directive and would not require major amendments. The law of 25 April 2007 amending the Aliens Act of 15 December 1980 indeed implements the 2003 Long Term Residents Directive as well as the 2004 Directive on the right to free movement and residence of EU nationals and members of their family. However, as far as the implementation of the Asylum Procedures Directive is concerned, the law limits implementation of the directive to one specific provision: Article 11, § 2, d allowing the competent authorities to search the applicant and the items he/she carries with him/her. Article 1 of the Royal Decree of 27 April 2007 equally pretends to implement the Asylum Procedures Directive but is in reality also limited to implementation of the same Article 11, § 2, d. In addi-

pronounce judgment on any violation by a regulation having force of law of inter alia fundamental rights and liberties guaranteed in Section II of the Constitution (including the principles of equal treatment and non-discrimination laid down in Article 10 and 11) and the protection of aliens (Article 191). Non-compliance with fundamental rights and freedoms laid down in international and supranational norms (including EC legislation) can be taken into account indirectly by the Court through the application of the principle of non-discrimination.

11 Royal Decree of 27 April 2007 amending Royal Decree of 8 October 1981 with regard to access, residence, establishment and expulsion of aliens, Moniteur belge, 21 May 2005. The communication of the Belgian government to the Commission stating that Belgium has partly transposed the Asylum Procedures Directive is therefore rather ironic. The legislative
tion to the assumption that no major changes were needed in light of the minimum standards laid down in the Asylum Procedures Directive, apparently also the pending annulment case before the European Court of Justice launched by the European Parliament against the Council with regard to the Asylum Procedures Directive\textsuperscript{12} was used as a justification for not taking further action with regard to full implementation. At the time of writing, no concrete proposals for new amendments to the Aliens Law exist.

As the Asylum Procedures Directive has only marginally been implemented yet into national legislation in Belgium and the deadline for transposition for at least part of the directive expired on 1 December 2007, this contribution will analyse whether or not the new Belgian Asylum Procedure is indeed already in compliance with the Asylum Procedures Directive and to what extent further legislative changes are needed to ensure such compliance. First, a general overview of the new architecture of the Belgian Asylum Procedure will be presented. Second, the overall compliance with the basic principles underlying the Asylum Procedures Directive will be analysed, concentrating mainly on the provisions with regard to inadmissible applications and criteria to prioritise or accelerate the examination of asylum applications as laid down in Article 23, the safe third country concept in Article 27 and the right to an effective remedy before a Court or Tribunal as laid down in Article 39 of the Directive.

2. Overview of the New Asylum Procedure in Belgium

There were several reasons why the Belgian government decided to reform the asylum procedure. Although the numbers of asylum applications decreased considerably since 2000,\textsuperscript{13} both the Permanent Appeals Commission for Refugees and the Council of State were confronted with a huge backlog. The particularly complicated structure of the Belgian asylum procedure was generally acknowledged to be one of the main causes. Asylum claims were assessed in two stages: a first stage in which the admissibility of the asylum claim was examined and if declared admissible, a second stage in which the substance of the claim was examined. The first stage involved a first decision on admissibility by the Office des Etrangers with a possibility of an administrative appeal to the Commissioner-General for Refugees chamber of the Council of State in its opinion with regard to the Royal Decree of 27 April 2007 pointed to the deadline for implementation of the Asylum Procedures Directive and stated that the question whether compatibility of the Aliens Act with the Asylum Procedures Directive required additional legislative initiatives should be examined, as the law of 15 September 2006 amending the Aliens Act does not include an explicit reference to the implementation of the Asylum Procedures Directive. See Avis 42.564/4 du 18 avril 2007 de la section de législation du Conseil d’État.

\textsuperscript{12} See Case C-133/06 and the opinion of Advocate-General M. Poiares Maduro of 27 September 2007.

\textsuperscript{13} Whereas more than 42,000 asylum applications were registered in 2000, only 11,587 new asylum applications were registered in 2006. See Commissioner-General for Refugees and Stateless Persons, Asylum Statistics 2006, to be consulted on the website: http://www.belgium.be/eportal/application?pageid=charterPodPage&navId=30523&languageParameter=nl.
and finally a possibility to ask for suspension and/or annulment of the decision of the Commissioner-General for Refugees before the Council of State. In the second stage a first decision on the substance was taken by the Commissioner-General for Refugees with the possibility of an appeal before the Permanent Appeals Commission for Refugees. The annulment of the decision of the Permanent Appeals Commission could subsequently also be requested before the Council of State. Applicants had access to material reception conditions during the appeal proceedings before the Council of State, although these proceedings did not have an automatic suspensive effect.

As a result, one of the major objectives of the reform is to simplify that structure. In the new system established by the laws of 15 September 2006 the distinction between examination of the admissibility and the substance of the asylum application is abolished. Instead a system is created whereby all applications are in principle examined in substance by the Commissioner General for Refugees with a possibility of an appeal before the new Aliens Litigation Council and a cassation appeal before the Council of State. In order to assess the conformity of the new asylum procedure with the Asylum Procedures Directive, the main characteristics and safeguards of the new procedure need to be described in some more detail. Before doing so, it should be noted that the new Belgian asylum procedure is in principle a single procedure which means that both claims for refugee status and subsidiary protection status will be examined by the Commissioner-General for Refugees in the same procedure. A strict hierarchy applies according to which the Commissioner-General for Refugees can only verify whether the applicant qualifies for subsidiary protection after it has become clear that the application does not qualify under the refugee definition.\(^\text{14}\)

However, the principle of a single procedure applies with one exception: medical cases will be dealt with in a separate administrative procedure by the Office des Etrangers. According to the new Article 9 ter of the Aliens Act third country nationals with an identity document suffering from an illness that is either life-threatening or presents a real risk of inhuman or degrading treatment because there is no adequate treatment in the country of origin can apply for a residence permit to the Office des Etrangers. The assessment of the real risk of inhuman and degrading treatment will be done by a competent doctor who advises the Office des Etrangers that eventually decides on whether or not a residence permit will be granted. The Commissioner-General for Refugees was considered not to have the necessary expertise to deal with such cases and therefore it was decided to exclude these cases from the asylum procedure. As these cases are not dealt with in the asylum procedure, a different legal remedy is available to the applicant in case of a negative decision. Only a non-suspensive annulment or suspension procedure before the Aliens Litigation Council (Immigration Chambers) to be lodged within 30 days is possible.

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\(^{14}\) As reflected clearly in the definition of subsidiary protection in Article 48/4 Aliens Act.
2.1 The processing of the asylum application by the Commissioner-General for Refugees

The central role of the Commissioner-General for Refugees as the key determining authority in the asylum procedure is even more emphasised in the new procedure. As a principle, the Commissioner-General for Refugees is the only competent body at administrative level to examine and decide upon the asylum applications for which Belgium is responsible in the framework of the Dublin II Regulation. The Commissioner-General for Refugees is an administrative authority that processes asylum claims independently, although it is financed on the budget of the Minister of Home Affairs. Both the processing of asylum applications and decision-making are the full and exclusive responsibility of the Commissioner-general for Refugees in which the Minister of Home Affairs can in principle not intervene.\(^{15}\)

Although the Commissioner-General for Refugees is the main determining body, and although the role of the Office des Etrangers in the asylum procedure has been drastically reduced, it still intervenes at crucial moments in the asylum process. Indeed, the Office des Etrangers continues to apply the Dublin II Regulation and the EURODAC Regulation, decides on subsequent applications and takes decisions on entry to the territory of asylum seekers who are considered to present a threat to public order or national security. It is also responsible for recording a statement of the applicant with regard to his identity, travel route, origin and the handing out of a questionnaire with regard to the reasons for his or her application (to prepare the interview on the content of the asylum claim for which the Commissioner-General for Refugees is now exclusively responsible). The continued involvement of the Office des Etrangers on crucial aspects of the processing of the asylum application is to be deplored as it complicates the architecture of the asylum procedure and is at odds with the general philosophy of the reform.\(^{16}\) The Asylum Procedures Directive imposes an obligation on the Member States to designate for all procedures a determining authority for an appropriate examination of the appli-

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\(^{15}\) Two innovations in the law of 15 September seem to undermine the Commissioner-General for Refugees’ independence vis-à-vis the Minister of Home Affairs, at least in theory: 1) The Minister can ask the Commissioner-General for Refugees to withdraw refugee status within a period of 10 years since the asylum application of the refugee (in case the refugee status was obtained on the basis of false declarations or documents) or the subsidiary protection status within a period of five years since the asylum application of the person concerned (cessation clauses and exclusion clauses). In that case the Commissioner-General for Refugees must take a decision within 60 working days and the granting of a permanent residence permit is automatically suspended for a year. In case of withdrawal of status because of post-factum application of exclusion clauses, the Commissioner-General for Refugees must give an opinion to the Minister whether removal would violate Article 3 ECHR or not (see Article 49 §2 and 49/2 §4 and 5 of the Aliens Act). 2) The Minister can at any time request the Commissioner-General for Refugees to prioritise the examination of an asylum application of a particular asylum seeker. In such cases the Commissioner-General for Refugees must take a decision within 15 days after it has been decided that Belgium is the State responsible for the examination (see Article 52/2 §2, 2° of the Aliens Act).

\(^{16}\) See on this aspect also M. Lemmens en J. Roggen, ‘De hervorming van de asielprocedure anno 2006: een verbetering van de rechtspositie?’, T. Vreemd., 2007, p. 6-22.
cations in accordance with the Directive, in particular Articles 8(2) and 9. However, this does not mean that under the Directive one authority should exclusively be responsible for examining asylum applications. Article 4(2) of the Asylum Procedures Directive contains an exhaustive list of “purposes” for which Member States may provide that another authority is responsible. As a result it is in compliance with the Asylum Procedures Directive for the Office des Etrangers to deal with Dublin cases, to decide on the entry of asylum seekers that pose a threat to public security and to deal with subsequent cases. The role of the Office des Etrangers with regard to the recording of a statement of the applicant with regard to his identity, travel route, origin and the questionnaire may be more problematic in light of Article 4(2) of the Asylum Procedures Directive. The tasks that may be conferred to another responsible authority than the determining authority mentioned in Article 4(1) are enumerated exhaustively in Article 4(2) and do not provide for the possibility of a division of labour between two or more authorities. Strictly speaking recording the statement of the applicant with regard to his country of origin, travel route and identity would only be compatible with Article 4(2) in relation to the application of the Dublin Regulation as this can be done by another authority. It is questionable whether the system of an intake by one authority which in practice takes the form of an interview and the assessment by another authority would be in conformity with Article 4(2) of the Asylum Procedures Directive. In addition, the Office des Etrangers remains competent to determine the language (French or Dutch) in which the asylum procedure (procedure before the Commissioner-General for Refugees and the Aliens Litigation Council) will be conducted. This may be problematic in light of Article 4(2) as well.

Although the admissibility stage of the asylum procedure has been abolished, the admissibility criteria that were applied in the former procedure are maintained and can be applied by the Commissioner-General for Refugees. The following admissibility criteria apply:
- the application is manifestly unfounded because it is fraudulent or is not based on any of the grounds for international protection;
- the person has been expelled from the country less than 10 years ago;
- the person has stayed longer than three months in a third country without fear for persecution or real risk for serious harm;
- the person has stayed in several safe third countries for a total period of three months;
- the applicant has applied for asylum later than eight working days after he entered the territory;

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18 Article 4(2)(b) Asylum Procedures Directive. In case of expulsion, the Minister has to consult the Commissioner-general for Refugees on the asylum application which is explicitly mentioned in Article 4(2) (b).
19 The choice of the procedural language is not as neutral as it may seem in the Belgian context. In particular at the level of the Permanent Appeals Commission as well as at the level of the Council of State different interpretations and approaches towards protection standards between the two linguistic chambers in both Courts have emerged in the past.
the applicant does not comply with reporting requirements or the obligation to reply to a request for information within 15 days.

Formally, the Commissioner-General for Refugees takes a decision on the substance of the case but the new Article 52 of the Aliens Act allows to reject the application on the basis of one of the mentioned criteria, meaning that a person can be considered not to be a refugee because he or she has not introduced his or her asylum application timely or has not complied with reporting requirements, without necessarily entering into an examination of the reasons why the person claims to have left his or her country of origin.

The Commissioner-General for Refugees must deal with a number of cases with priority. Cases in which the admissibility criteria can be applied and where the applicant is kept in detention (mainly those applying at the airport) should be processed with priority and within a period of two months.20 In certain circumstances the Commissioner-General for Refugees must decide cases “before any other and within 15 days”: whenever the person is in prison or is a danger to public order or national security or whenever the Minister or the Home Office asks the Commissioner-General for Refugees to do so.21 The circumstances in which the examination of the asylum application can be accelerated or prioritised in the Belgian procedure are all mentioned in the list provided by Article 23(4) of the Asylum Procedures Directive.

When the asylum seeker is staying irregularly on the territory or entered the territory in an irregular way, detention during the asylum procedure is possible in all cases where the admissibility criteria apply.22 In addition detention is possible in case of a subsequent asylum application, when the applicant refuses to reveal his identity or uses a false identity, whenever the applicant has destroyed his identity or travel document, whenever the application is mainly used to delay execution of an expulsion order or has not mentioned that he has introduced an application in another country as well. Detention is in principle for maximum 2 months but can be prolonged up to 8 months in exceptional cases. It should also be mentioned that detention is also possible during the Dublin-procedure in order to determine whether or not Belgium is the responsible state.23 Detention in such cases should in principle be no longer than 1 month but can be extended with one month if the assessment of a take charge or take back request is particularly complex.

Finally, a special and accelerated procedure applies with regard to EU nationals. EU nationals can still apply for asylum in Belgium, but the Commissioner-General for Refugees can decide not to take into consideration such an application if the well founded fear for persecution or the real risk for serious harm is not clearly established in the application. The Commissioner-General for Refugees decides within 5 days in such cases and only an appeal to annul the application to the Aliens Litigation Council is possible, which is not suspensive and does not allow for

20 Article 52 § 5 of the Aliens Act.
21 New Article 52/2 of the Aliens Act.
22 Article 74/6 § 1 bis of the Aliens Act.
23 Article 51/5 § 1 of the Aliens Act.
a review of the facts of the case. Although this is in line with the declaration to the Aznar Protocol made by Belgium and is still more favourable than the Asylum Procedures Directive, it remains problematic that EU nationals in the asylum procedure have less procedural guarantees than third country nationals.

2.2 Appeal Procedure at the Aliens Litigation Council

As mentioned above, the new Aliens Litigation Council is a new Administrative Court competent exclusively to deal with appeals against individual decisions taken within the framework of the Aliens Act. This means that the Court is competent to deal not only with appeals lodged against negative decisions of the Commissioner-General for Refugees but is also competent to deal with migration related decisions taken by the Minister of Home Affairs or the Office des Etrangers. However, different rules apply with regard to procedural safeguards as well as the nature of the Court’s competences when dealing with appeals in both types of cases. Here, only the main characteristics of the procedure before the Aliens Litigation Council with regard to asylum cases will be discussed. It is clear that the new Court is somewhere in between the competences of the former Permanent Appeals Commission for Refugees and the competences of the Council of State in the old asylum procedure. The latter’s role was limited to controlling whether or not the decisions met the requirements of adequate motivation of the decision. In the old asylum procedure the Permanent Appeals Commission for Refugees could fully review the decision of the Commissioner-General for Refugees on the substance of the asylum claim and re-examine the case in full, including country of origin information and facts underlying the asylum application.

A major change is that the procedure is now predominantly in writing and that the appeal petition must in principle contain all the arguments against the decision of the Commissioner-General for Refugees. At the Aliens Litigation Council’ hearing parties can make oral remarks but cannot plea beyond what has been included in the petition. The basic presumption is that the Commissioner-General for Refugees has a full competence to examine all facts and to collect all information necessary to decide on the asylum claim. As a result, the applicant must provide all information about his case immediately to the Commissioner-General for Refugees. New elements with regard to the fear of persecution/risk of serious harm that have not been presented to the Commissioner-General for Refugees can be added to the written appeal petition but the applicant must prove that he was unable to present these elements at an earlier stage in the procedure. Furthermore, the judge can decide to take into consideration all new elements, even those that have been presented for the first time at the moment of the hearing by the Court. However, this is only possible when three conditions are met:

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25 New Article 39/76 § 1 of the Aliens Act. It should be noted that also the Minister of Home Affairs can lodge an appeal against decisions of the Commissioner-General for Refugees he considers to be unlawful (New Article 39/56).
- there must be a link with the case file as established by the Commissioner-General for Refugees;
- the new elements forwarded must show beyond doubt that the appeal will succeed;
- the party that invokes these elements must show that these elements could not have been presented at an earlier stage in the procedure.

If such elements are being presented, the Commissioner-General for Refugees, at the request of one of the parties or at its own initiative can examine those new elements and make a written report about it within a delay determined by the Court. In this case, the proceedings before the Court of Aliens Litigation are suspended and will be resumed when the results of the additional examination are ready.

The appeal with the Aliens Litigation Council in asylum cases has automatic suspensive effect. During the time limit for lodging an appeal and as long as no final decision has been taken by the Aliens Litigation Council no expulsion measure can be executed.26

A second important characteristic is that the Court of Aliens Litigation lacks any competence to conduct research into the circumstances of the case or even the situation in the country of origin of the asylum seeker. This is the exclusive competence of the Commissioner-General for Refugees.

The Aliens Litigation Council can take three types of decisions.27 It can either:
- confirm the decision of the Commissioner-General for Refugees to refuse refugee status or subsidiary protection status;
- reform the decision of the Commissioner-General for Refugees and recognise refugee status or subsidiary protection status;
- annul the decision because the decision is affected by a substantial irregularity that can not be remedied by the Aliens Litigation Council or because essential elements are missing and as a result the Aliens Litigation Council can not confirm or reform the decision without additional research. As a result the case must be sent back to the Commissioner-General for Refugees who must take a new decision on the asylum application which is again subject to appeal.

The Aliens Litigation Council must take a decision in principle within a period of three months after the appeal has been lodged (normal procedure).28 If the case was dealt with as a priority by the Commissioner-General for Refugees, the Court of Aliens Litigation must examine the appeal as a priority as well. In such cases a decision must be taken by the Court in principle within two months.

An accelerated procedure applies before the Court when the applicant is in detention. A hearing must be organized within five days after the appeal has been lodged and the Aliens Litigation Council must decide within five working days after closure of the proceedings.

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27 New Article 39/2 § 1 of the Aliens Act.
28 New Article 39/71 § 3.
Both in the regular and the accelerated procedure parties must introduce the appeal within 15 days after the decision of the Commissioner-General for Refugees has been sent to the applicant. Remarkably, in case the applicant is detained, the time used to introduce an appeal is added to the maximum detention period as laid down in law. In case the Commissioner-General for Refugees is conducting additional research of new elements put forward by the applicant at the request of the Aliens Litigation Council, the maximum period of detention is automatically prolonged with one month.

2.3 Cassation procedure at the Council of State

Finally, the decision of the Aliens Litigation Council is open to an appeal for cassation to the Council of State. Such an appeal should be introduced within 30 days after the decision of the Aliens Litigation Council has been sent to the parties but is always subject to a pre-screening procedure in order to determine whether the appeal can be admitted to the procedure before the Council of State or not. The Council of State will not examine the facts of the case. Only violation of the law or essential procedural requirements that have influenced the content of the decision and insofar as the violation can effectively lead to cassation of the decision will be allowed to the cassation procedure. In addition, cases that raise important questions with regard to maintaining unity of jurisprudence will be allowed to the cassation procedure by the Council of State. As a result, a very strict filtering mechanism is applied. In practice, appeals for cassation are very exceptionally allowed to the procedure before the Council of State.

3. An asylum procedure in accordance with the Asylum Procedures Directive?

The Asylum Procedures Directive is certainly the most problematic directive within the EU asylum acquis. It introduces a series of restrictive concepts which are putting access to an equitable asylum procedure at risk, while at the same time the level of procedural guarantees granted to asylum seekers under the directive remain fairly low. At the same time, much is left to the discretion of the Member States when implementing the directive. As a result, also as an instrument of harmonization of the Member States’ asylum policies, the directive can be questioned.

It is fair to say that generally, the new Belgium Asylum Procedure is to a great extent already in accordance with the minimum standards laid down in the Asylum Procedures Directive and in fact applies higher standards than required under the directive. Belgium does not apply the concept of safe country of origin and does not use lists of safe countries or safe third countries, although the concept of safe

29 Whereas the time-limit to lodge an appeal to the Aliens Litigation Council in other than asylum cases is 30 days. See new Article 39/57 of the Aliens Act.
30 New Article 74/5 § 3 of the Aliens Act.
31 No official statistics exist so far.
third countries can in theory be applied by the asylum bodies, but in practice rarely is. However, this does not mean that no changes are required in order to bring the Aliens Act in line with the Asylum Procedures Directive. The current Aliens Act does not contain any specific guarantees with regard to the use of the safe third country concept in the asylum procedure. Also, the way admissibility criteria can still be used in the asylum procedure and the limited competences of the new Aliens Litigation Council may be problematic in light of Article 39 of the Asylum Procedures Directive. Finally, specific provisions of the Royal Decree establishing the procedure before the Commissioner-General for Refugees will need to be amended as well.

3.1 Safe third country concept

According to Article 27 of the Asylum Procedures Directive, the safe third country concept can only be applied if the asylum authorities are satisfied that the applicant will be treated in accordance with four principles in the third country concerned: life and liberty are not threatened, the non-refoulement principle is respected and the possibility exists to request refugee status and receive protection in accordance with the Geneva Convention. Secondly, Member States are under an obligation to lay down rules in national law with regard to 1) the necessary connection between the asylum applicant and the third country where he is supposed to go, 2) rules on the methodology to apply the safe third country concept, in particular the case-by-case consideration of the safety of the third country for each applicant OR national designation of countries to be generally safe and 3) rules allowing for a possibility for the applicant to rebut the presumption of safety. None of these elements are laid down explicitly in the Aliens Act, nor in Royal Decrees implementing the Aliens Act and should be included if the safe third country concept is to be maintained in the Belgian Asylum Procedure.

Article 27 (3) (b) also obliges Member States to inform an applicant and provide him with a document informing the authorities of the third country that the application has not been examined in substance when they implement a decision that is solely based on the application of the safe third country concept. Currently no such guarantee exists either in legislation or in administrative practice. In theory, according to the new Article 52 of the Aliens Act, the Commissioner-General for Refugees can reject an application solely on this basis. However, in practice the Commissioner-General for Refugees does apply the safe third country concept in very few occasions and negative decisions are so far never taken solely on the basis of the safe third country concept. Nevertheless, measures need to be taken to provide applicants with such a document in order to ensure full implementation of the Directive. Another option would be to abolish the application of the safe third country concept in the asylum procedure and delete existing references in the Aliens Act.32

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32 Article 27, 1 of the Asylum Procedures Directive does not contain an obligation to apply the safe third country concept as it constructed as a ‘may’ clause but if Member States choose to apply the concept it requires Member States to observe the guarantees enumerated.
3.2 Admissibility criteria

As mentioned above, although the new Asylum Procedure has abolished the distinction between the examination of the admissibility and the substance of the asylum claim, the former admissibility criteria have been maintained in the new asylum procedure. Refugee status or subsidiary protection status can – at least in theory – be rejected by the Commissioner-General for Refugees if the applicant did not apply for asylum within eight working days after arrival or stayed in a third country for longer than three months and left that country without fear for persecution or real risk of serious harm or because the application is manifestly unfounded. In particular the purely formal admissibility criteria (no or late response to a request for information, late introduction of the asylum claim) are problematic in light of the Asylum Procedures Directive and should be deleted. According to considerations 22 and 23 of the Asylum Procedures Directive Member States should examine all applications on the substance, except in three cases:
- where it can be reasonably assumed that another country would do the examination or provide sufficient protection;
- where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to that country;
- where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that country.

In addition, according to Article 25 of the Procedures Directive, Member States may consider an application for asylum as inadmissible and are as a consequence not obliged to examine whether the applicant qualifies as a refugee where another Member State has granted refugee status, a country of first asylum or a safe third country exists or the applicant has been granted a status equivalent to the rights and benefits of refugee status or is still awaiting the outcome of the procedure to obtain such status or the applicant has lodged an identical application after a final decision. In its current formulation, the new Article 52 of the Aliens Act still allows the Commissioner-General for Refugees to reject asylum applications for purely formal reasons that are not related to the substance of the claim and without any examination in substance taking place. During the Parliamentary debate the Commissioner-General for Refugees admitted that this might be problematic in light of the non-refoulement principle although he also reassured the Parliament that it was not his intention to apply Article 52 without examination of the substance. The Minister of the Interior also announced during the parliamentary debate that the admissibility criteria would be reviewed at a later stage when implementing the Asylum Procedures Directive.

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The provisions in the Aliens Act allowing for a prioritised treatment of asylum applications, notably where the admissibility criteria can be applied are compatible with Article 23(4) of the Asylum Procedures Directive that allows for such a mechanism to be applied. However, the list of criteria in Article 23(4) is considerably longer than the list of admissibility criteria in the Aliens Act. It remains to be seen whether future implementation of the Asylum Procedures Directive will expand that list.

The list of criteria on the basis of which applicants for asylum can be detained includes not only all admissibility criteria laid down in Article 52 of the Aliens Act but also a number of the criteria enumerated in Article 23(4) of the Asylum Procedures Directive. Such criteria include the fact that the asylum seeker refuses to communicate his/her identity or nationality or provides false information with regard to his/her identity or submits false travel or identity documents; the asylum seeker has destroyed an identity or travel document; the asylum application is merely made in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; and the asylum seeker hampers registration of his/her fingerprints. It is clear that the Aliens Act uses the criteria of Article 23(4) of the Directive for another purpose than the one determined in the Directive. Whereas Article 23(4) only allows the Member States to use these criteria to accelerate or prioritize these asylum applications, in the Belgian Aliens Act they are used to detain asylum seekers. If not a violation of the Asylum Procedures Directive as such, the extended possibilities for detention of asylum seekers is certainly at odds with the existing presumption against detention of asylum seekers in international human rights law and standards.

3.3 An effective remedy?

According to Article 39, 1 of the Asylum Procedures Directive, the Member States are under an obligation to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal. The modalities of this effective remedy are not specified and as a result the directive does not contain clear rules with regard to the time-limits for exercising this right, nor with regard to the question of whether the appeal should have suspensive effect or not. However, although this is

35 New Article 74/6 § 1 bis, 10°. See the corresponding Article 23(4) (d) of the Asylum Procedures Directive. The Aliens Act covers misleading of the authorities with regard to identity and nationality as such and is broader than Article 23, 4 (d) of the Asylum Procedures Directive that requires that this can only justify a prioritized or accelerated procedure if withholding relevant information or documents with respect to his/her identity and/or nationality “could have had a negative impact on the decision”.


38 New Article 74/6 § 1 bis, 13° (Article 23, 4 (n) Asylum Procedures Directive).

left to the discretion of the Member States, they shall provide for these rules in accordance with their international obligations. This obviously includes the jurisprudence of the European Court of Human Rights, in particular with regard to Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In the Conka case, the Court found that the procedure before the Conseil d’État was not an effective remedy as it had no suspensive effect. The cassation procedure before the Conseil d’État in the new asylum procedure has no suspensive effect either and can therefore to be said not to be an effective remedy either under Article 39 of the Asylum Procedures Directive or under Article 13 ECHR. However, according to recital 27 of the Asylum Procedures Directive, the effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole. The appeal procedure before the Aliens Litigation Council has suspensive effect and allows for a review of the facts of the case, although under certain conditions.

In cases where applications are rejected on the basis of formal criteria, questions arise whether the procedure before the Aliens Litigation Council provides for an effective remedy, in particular in light of the limited possibility for the Court to take into consideration new elements put forward after the decision of the Commissioner-General for Refugees and the fact that it lacks any competence to conduct own research. If an application is rejected because the applicant was not present at the interview or failed to provide requested information to the Commissioner-General for Refugees, the Aliens Litigation Council could theoretically reject the application without any examination of the substance of the claim. Indeed, the applicant could still present his reasons for claiming asylum in the appeal to the Aliens Litigation Council but that would necessarily be considered as new elements. As mentioned above, in such case the applicant must always justify why these elements were not presented to the Commissioner-General for Refugees at an earlier stage in the procedure. If interpreted strictly, the Court of Aliens Litigation must reject the appeal by confirming the decision of the Commissioner-General for Refugees if the asylum seeker can not prove force majeur. In that case, no examination of the substance of the asylum claim would have taken place either by the Commissioner-General for Refugees nor by the Court of Aliens Litigation. As a consequence no effective remedy is available to the asylum seeker in such cases. The appeal for cassation to the Council of State can not remedy this as it will fail to pass the test to be allowed to the procedure before the Council of State.

On the other hand, if the Aliens Litigation Council would accept the appeal as a new element, it should normally annul the decision of the Commissioner-General for Refugees as it is not allowed to conduct its own research into the facts of the claim which is an exclusive competence of the Commissioner-General for Refugees. The lack of competence for the Aliens Litigation Council to conduct research on the facts of the case is in contradiction with the approach taken by the

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40 European Court of Human Rights, Conka v. Belgium, 5 February 2002.
European Court of Human Right in Salah Sheekh.\textsuperscript{41} Here the Strasbourg Court assessed the risk for the applicant, if expelled, of suffering treatment proscribed by Article 3 in light of all the material placed before it by the parties in the case and of material obtained \textit{proprio motu}. This is necessary, according to the Court as the applicant has provided “reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government”. Furthermore the Court explicitly states that “in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and \textit{ex nunc} assessment is called for as the situation in a country of destination may change in the course of time”.\textsuperscript{42} Although the Court did not find a violation of Article 13 ECHR in this case, the importance it attaches to accurate and adequate country of origin information and the need for administrative and judicial authorities to have access to a variety of reliable sources at the time of the expulsion which it can obtain \textit{proprio motu} if necessary, in order to assess a possible violation of Article 3 can not be ignored. As a result, the lack of competences of the Aliens Litigation Council with regard to research needs to be reconsidered.

3.4 Procedural guarantees at the level of the Commissioner-General for Refugees

In 2003, the Belgian Government adopted two Royal Decrees laying down procedural rules and guarantees with regard to the processing of asylum claims by the Office des Etrangers and the Commissioner-General for Refugees under the old procedure.\textsuperscript{43} Both decrees are to a large extent already in line with the relevant chapter in the Asylum Procedures Directive laying down the basic principles and guarantees for asylum seekers. Nevertheless, amendments will be needed on three aspects in order to bring the respective decrees fully in line with the Asylum Procedures Directive.


\textsuperscript{42} \textit{Ibid.}, par. 136.

\textsuperscript{43} Royal Decree of 11 July 2003 laying down rules on the functioning of and judicial procedure before the Commissioner-General for Refugees and Stateless Persons, \textit{Moniteur belge}, 27 January 2004 and Royal Decree of 11 July 2003 determining aspects of the procedure to be applied by the department of the Office des Etrangers charged with the examination of asylum applications in the framework of the law of 15 December 1980 on access to the territory, residence, establishment and expulsion of foreigners, \textit{Moniteur belge}, 27 January 2004. As the role of the Office des Etrangers in the examination of asylum applications has been reduced, certain chapters of the latter Royal Decree have no longer any meaning in practice. However, as the Office des Etrangers still has a considerable role to play in the new architecture of the asylum procedure, as described above, some procedural rules as laid down in the Royal Decree will need to be maintained. A detailed analysis of the latter goes beyond the scope of this contribution.
First, according to Article 23, 2 of the Asylum Procedures Directive Member States must ensure that where a decision is not taken within six months the applicant is either informed of the delay or receives information on the time-frame within which the decision on the application is to be expected. No such obligation exists currently in Belgian legislation and must be implemented. This could be achieved by amending the Royal Decrees of 11 July 2003.

Second, the Royal Decree allows the Commissioner-General for Refugees to omit a personal interview if the asylum seeker has invoked twice a valid reason for his or her absence at the planned interview.\footnote{Article 18 § 2 of the Royal Decree of 11 July 2003 laying down rules on the functioning of and judicial procedure before the Commissioner-General for Refugees and Stateless Persons.} He can also do so in case there is no competent interpreter available. An interpreter is as a principle provided by the Commissioner-General for Refugees. If no such interpreter is available, the Commissioner-General for Refugees can ask the asylum-seeker to bring an interpreter to the interview. If the asylum-seeker is not able to do so the Commissioner-General for Refugees can take a decision without a personal interview of the asylum seeker but must propose to make a written statement. Should the latter not be possible, the Commissioner-General for Refugees can nevertheless take a decision.\footnote{Article 20 § 3 of the Royal Decree of 11 July 2003 laying down rules on the functioning of and judicial procedure before the Commissioner-General for Refugees and Stateless Persons.} Article 12 of the Asylum Procedures Directive allows Member States to derogate from the obligation of a personal interview on each application \textit{inter alia} when a positive decision can be taken without such interview or where the determining authority considers the application to be unfounded for certain reasons enumerated in Article 23 of the Directive. Moreover, such an interview can be omitted where the asylum seeker is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control. The latter seems to refer exclusively to medical or psychological reasons as it is stated that “when in doubt, Member States may require a medical or psychological certificate”. Lack of an adequate interpreter is not listed in Article 12 of the Asylum Procedures Directive as one of the reasons for omitting a personal interview. The provisions in the directive dealing with providing interpretation services\footnote{Article 10, 1 (b) and 13 of the Asylum Procedures Directive.} seem to leave no room for exceptions to the obligation to provide interpretation services. As it is formulated now in the Royal decree the compatibility of the relevant provisions in the Royal decree with Articles 10, 12 and 13 of the Asylum Procedures Directive can be seriously questioned.

Finally, Article 22 of the Asylum Procedures Directive obliges Member States to withhold from directly disclosing information regarding individual applications for asylum to the alleged persecutors or to obtain any information form the alleged persecutor in a manner that would result in such persecutor being directly informed of the fact that an application has been made. Such an obligation is not explicitly laid down in the Belgian Aliens Act nor in the Royal Decrees and could usefully be included in the Royal Decrees.
4. Conclusion

Belgium has failed to meet the deadline for transposition of the Asylum Procedures Directive as it has only implemented formally one particular provision of the Directive so far in its national legislation. This is remarkable as a fundamental reform of the asylum procedure was carried out in 2006. In many ways, the current asylum procedure already complies with the minimum standards as laid down in the directive. Nevertheless, amendments with regard to the admissibility criteria, the safe third country concept, specific procedural rules laid down in the Royal Decree relating to the procedure at the Commissioner-General for Refugees are inevitable. The procedure at the newly established Aliens Litigation Council as well as the limitations to its competences equally raise questions with regard to the right to an effective remedy, including under Article 39 of the Asylum Procedures Directive.
The Southern Border of Europe: “Right to Asylum between Seas and Fences”
The Spanish position relating to the transposition of the Procedures Directive

Nuría Arenas*

Spain is one of the EU Member States that still has not transposed the Procedures Directive (Article 43 Procedures Directive). The Draft of the new Asylum Act, a text which all of us have heard about but which is not of public access, is expected to comply not only with the Procedures Directive but also with the Qualification Directive. The Draft has not yet passed through National Parliament and it is not likely to be approved before the next Parliamentary Elections in March 2008.

While a new Asylum Act is being adopted,¹ the Spanish Government intends to carry out dispositions of the Procedures Directive as much as possible. In the absence of national legislation implementing the Procedures Directive fully, it is difficult to say which of its provisions are so clear and unconditional that they should apply directly. Therefore, Spain’s interpretation is based on established national practice compatible with the Directive. This is going to be an arduous process because of the intrinsic complexity of the Directive² and because some procedures do

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² The complexity of the Directive is a proof of the difficulties to harmonise procedural law. Ackers explains that the points of departure of Member States were too different from one another to come to more than an agreement on basic principles. Asylum procedures are embedded in general administrative law, national administrative traditions and specific constitutional arrangements. Procedural law is difficult to harmonise and this was one of the first instruments on procedural law affecting national proceedings to be negotiated at EU level. Member States have had very different experiences in terms of the number of cases. For an exhaustive analysis of the Procedures Directive negotiations, see: D. Ackers, ‘The Negotiations on the Asylum Procedures Directive’, EJML, 7, 2005, p. 2.
not exist in Spain. The majority of applications in Spain are not sufficiently substantiated and the admissibility procedure applied in these cases by the authorities is different from the accelerated procedure proposed by the Directive. This is only one example to illustrate the critical problems challenging our asylum system in the months to come.

These difficulties are aggravated by the concerns relating to the legality of the Directive. The Procedures Directive is the cornerstone of the Common European Asylum System, validating the entire system. Without access to a fair and efficient procedure, the rest of the substantive rules lack sense. Nevertheless, the Procedures Directive has been considered an erosion of the global asylum system, a sum of the restrictive and controversial practices which fall short of accepted international legal standards, a norm that not only would breach Member States’ obligations under international refugee and human rights law, but damage the Union’s credibility in the international and human rights debate.

The Directive is a rule of a “minimum standards” according to EC competence under Article 63 EC Law. Nevertheless, it is doubtful that introduction of more favourable standards by Member States through the transposition of the Directive (Article 5 PD) could be a solution in this case.

At the southern border of Europe, Spain has been especially involved in some of the most dramatic episodes around the fluxes control. Every year, thousands of people try to reach the Spanish coast in terrible conditions. Most of them do not succeed, as the 6,000 migrants who died en route to the Canary Islands in 2006. The Spanish response is moving between the consternation and blunt action to deter migrants found on the high seas (with the help of FRONTEX) and in overseas enclaves like Ceuta and Melilla, and externalization of asylum by signing readmission agreements with the countries of origin. The policy is based upon the “paradigm of retaining fluxes” that forms European asylum and migration law the last few years. Thus, the new Spanish Asylum Act must become an opportunity to amend past mistakes and establish the conditions for meeting international obligations in this field.

Pending the transposition Act, let me outline the main concerns relating to our current asylum procedure and comment on the foreseen disposition of the new Asylum Act, which for the time being must be treated as a hypothesis.

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5 NGOs and the Canary Island authorities estimate that 6000 immigrants died on their journey. The Civil Guard reported around 2000 deaths.
This study focuses on two main issues. Firstly, I will discuss the procedural right of asylum seekers (specifically, the right to remain; to legal assistance and to a personal interview) and secondly, some issues in the framework of the procedures at first instance. However, let me first pay some attention to the scope of application of the Directive.

1. **Scope of application (Art. 3 Procedures Directive)**

In principle and according to Article 3, applications for protection other than that emanating from the Geneva Convention are excluded. Considering the objective of all Member States applying a ‘single procedure’ in the future, it would be advisable that the Directive set the standards for a comprehensive procedure, which would not exclude any application for asylum or protection on humanitarian ground. Nevertheless, the Directive leaves this open to the Member States, who may decide to apply the Directive to all procedures for international protection. Leaving this choice to the Member States diminishes the value of the Directive in combating the phenomenon of “asylum shopping”.

Despite the gaps in the asylum and subsidiary protection procedure in Spain, and the many legislative modifications still to be made, it is true, as Gortázar states, that the Spanish system can be classified as one of ventanilla única (one-stop shop): the same institutions deal with recognition of refugee status, and, if rejected, the possibility of offering another type of protection.6 Taking into account the current Spanish regulation and the fact that the next Asylum Act is expected to implement both the Procedures - and Qualification Directive, it is foreseen that Spain will apply the Procedures Directive to both, avoiding different procedural guaranties for similar kinds of international protection.

The Directive shall not apply in cases of request for diplomatic or territorial asylum submitted to representation of Member States (Article 3.2 Procedures Directive). There are serious doubts about the continuity of this right in the forthcoming Spanish regulation.

2. **The core of the Directive: Procedural rights of asylum seekers to be applied during the examination, review and appeal**

2.1 **Access to the procedure**

Access to the procedure is the essential corollary of the right to asylum enshrined in the Universal Declaration of Human Rights (Article 14) and in the recent Charter of Fundamental Rights of the European Union (Article 18). Safeguards must be

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given to each asylum-seeker that his application for refugee status will be examined carefully and impartially. Neither the place (which, in Spain, could be one of the many border posts, office for Asylum or Aliens, police station, embassies or consulates for applications submitted abroad) nor the time of application should be an obstacle.

The PD does not provide for a special time frame for applications, though the Spanish legislation lays down the principle of “immediacy”, making it advisable to apply within one month from arrival\(^7\) to avoid that the application will be considered unfounded, even though it is a rebuttal presumption\(^8\) and the application is neither rejected nor excluded on this sole ground.\(^9\)

According to the Directive, there are no relevant consequences – except those relating to information – of no decision being taken within the six months provided by Article 23 PD. In Spain, on the contrary, the “negative silence” principle implies that absence of a decision within 6 months shall be interpreted as a rejection of asylum.\(^10\) It is thus assumed that the period for examination at first instance may not exceed six months,\(^11\) unlike the period of one year in the Reception Condition Directive (Article 11.2 RCD).

Now I will focus on the three rights which are most contested in practice and in respect of which the Directive lays down exceptions requested by Spain during negotiations. These exceptions are: the right to personal interview granted through the first meeting with the applicant, the right to legal assistance granted at the express request of the applicant, and no automatic suspensive effects of the appeals.

### 2.2 Personal Interview (Article 12, 13 and 14 Procedures Directive)

In Spain, the right to a personal interview is granted through the meeting with the applicant in order to submit the application for asylum. This first meeting with the competent authority is expected not to be a mere formality, but to provide a complete examination supported by every safeguard (those provided by Article 13 PD at least).

The High Court has established, according to Article 25 of the 1995 Implementing Rules, that (a second) hearing is not compulsory in non-admissibility proceedings when examination does not include the facts other than those put forward during the first meeting. This Spanish practice lies behind the exception to the right to a personal interview provided by the Directive (Article 12.2.b).\(^{12}\)

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7 Article 7.1 1995 Implementing Rules. The time limit to present an asylum claim inside the territory is one month, except where an asylum seeker has entered Spain legally, in which case application can be made at any time while the claimant is legally present.
8 Article 7.2 1995 Implementing Rules.
9 Articles 8.1 and 23.4.i PD.
10 In the admissibility procedure the “positive silence principle” is applied, after 60 days with no decision on admissibility in the territory and after 4 days in the border procedure (Article 17.2 and 20.2 of 1995 Implementing Rules).
11 Article 24.4 of 1995 Implementing Rules.
12 In Spain all applicants fill in a questionnaire in the presence of an official when they lodge their application. In practice, applicants have a conversation with the official concerned be-
However, in Spain the “meeting-interview” is granted to all the applicants, including where the application is unfounded, while the Directive does not provide for an interview in these cases (Article 12.2.c).

The obligation to give access to the written report of the interview is highly relevant and it is a gap in the current Spanish regulation that should be filled by forthcoming transposition.\(^\text{13}\) NGO’s claim that the access would be more effective before the determining authority takes a first instance decision, otherwise contradiction or inconsistencies in the claim could put credibility of the asylum-seeker at risk, potentially giving grounds for considering the application “unfounded”.

2.3 Legal assistance (Article 15 and 16 Procedures Directive)

Spain ensures that all applicants for asylum have the right to “legal assistance” and an “interpreter” in order to submit their application and during “the entire procedure”.\(^\text{14}\) Free legal aid is a universal right granted by the Spanish Constitution. No one can be deprived of this right in any procedure. It should be noted that the right to free legal assistance has to be granted “before” the beginning of the administrative procedure in order to prepare the submission.\(^\text{15}\)

It is true that the intention to apply for legal aid must be declared unequivocally, a requirement criticised due to asylum-seeker’s ignorance of the language and of the legislation on asylum.\(^\text{16}\) But it is also true that the authorities have an obligation to inform adequately on the right to obtain free legal assistance and significant jurisprudence underlines this duty. This requirement should be effective. The Administration fulfils this obligation only by providing complete information on the possibility of having the assistance of a lawyer in the language understood by the applicant before the questionnaire is finalised. The document resulting from the meeting constitutes the basis for the applicant’s file. Consequently, an exception was introduced for the situation where the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with filling in his/her application and submitting the essential information regarding the application (Article 12.2.b). D. Ackers, ‘The Negotiations on the Asylum Procedures Directive’, \textit{op.cit.}, p. 15.

\(^\text{13}\) Article 14.2 PD.

\(^\text{14}\) Article 4.1 of the 1994 Asylum Act and Article 8.4 of the 1995 Implementation Rules. According to the PD free legal assistance is required only in the event of a negative decision, hence, in appeals proceedings (Arts.15–16 PD).

\(^\text{15}\) \textit{Vid. inter alia}: Supreme Court decisions (Sentencias del Tribunal Supremo) of 21 April 2006 and 31 May 2006 (number of the appeals: 2675/2003 and 2981/2003).

\(^\text{16}\) Recently, the Network of Independent Experts to Asses the Safeguarding of Fundamental Rights by the European Union Member States has attracted the attention of Spain because the assistance of a lawyer is certainly allowed, but if the illegal immigrant has unequivocally declared his intention to apply for asylum, it is a difficult task due to the ignorance of the language and of the legislation on asylum. Network of Independent Experts to Asses the Safeguarding of Fundamental Rights by the European Union Member States, \textit{2005 Synthesis Report}, Article 18: Right to Asylum, p. 148.
applicant. The breach of this obligation constitutes a lack of an essential procedural condition making it necessary to begin the entire procedure anew.

In Spain, every asylum seeker arriving at an airport is assisted by a lawyer, even with no such request from the applicant, due to the strict time restraints of the border procedure.

In spite of this guarantee in law, in practice there are many complaints about the difficulties involved in effective compliance with this legal provision. The system has been several times criticized by the High Court for unqualified aid of public defenders. Nowadays, lawyers undergo a special compulsory training on asylum, which nevertheless is too short to adequately include all international, European and national practices on asylum. For the first time in Spain, a “Good Practices Guideline” has been edited by the Ministry of the Interior, specifically to help all decision makers in the submission of applications for asylum. It could be helpful in securing a more open and clear asylum procedure.

2.4 Right to remain and suspensive effect of appeals (Article 7 and 39 Procedures Directive)

The matter of suspension of expulsion orders during appeal proceedings is left to domestic legislation. The limited “effectiveness” of remedies which do not grant the applicant a right to remain has become one of the most worrying aspects of European regulation, particularly because of the severity and irreversible implications of refoulement.

During the negotiation of the Directive, Spain requested not to recognize the suspensive effect as a rule. In Spain, the suspensive effect of appeals is decided by Court upon request of the person concerned on a case by case basis, instead of being provided by law. The case law of the Spanish Constitutional Court provides that the right to an effective remedy before a Court, foreseen in Article 24 of the Spanish Constitution, is satisfied with the Court’s intervention with respect to interim measures. Nevertheless, in the opinion of some authors, the Spanish judicial doctrine and the jurisprudence reveal an irregular application of this provision.

Taking into account provisions of the Directive and absence of Community rules on the right to remain pending appeals, this right is left in the ambit of international obligations. Thus, the ECtHR case law has underlined that the right to request suspensive effect is not sufficient for a remedy to be in compliance with Arti-

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17 High Court decisions (Sentencias de la Audiencia Nacional) of 27 October 2006 (decision n. 108/2006); 9 October 2006 (decision n. 131/2006).
18 Supreme Court decisions of 16 October 2006 (decision n. 671/2003; decision n. 2649/2003; decision n. 6864/2003); 27 October 2006 (decision n. 7384/2003); 31 October 2006 (decision n. 7400/2006); 22 December 2006 (decision n. 9111/2003).
20 As Gortázar states, the judicial doctrine not enabling us to deduce a well established interpretation that asylum seekers’ claims pending an appeal process should or should not be granted a suspensive effect and under which circumstances. C.J. Gortázar Rotaecho, ‘Study on the single asylum procedure. National Report: Spain’, op. cit., p. 353.
Taking the *I.T.* decision together with the *Jabari* and *Conka* judgements, it is not plausible to argue that any form of exception from suspensive effect is permissible in relation to removal to third countries.

It should be noted that Courts seldom recognise the suspensive effect of appeals. According to the Spanish case law “the individual interest should be subordinate to the general interest” unless special circumstances apply. At the same time, only the 5.6% of applicants receive asylum on appeals, compared to 30-60% in other European countries according to the ILPA study.

The Spanish regulation is based on a simplified and streamlined mechanism dependent on the quality of first instance decision-making; therefore, it is essential that the procedure is full of guarantees. In this sense, the role of UNHCR in Spanish procedure is remarkable and exceeds a mere special assurance. Santolaya underlines that UNHCR influence in Spain is far beyond the Geneva Convention provisions and comparative law (or disposition of Procedures Directive, especially, the unfortunate Article 10.1.c).

Nevertheless, the combination of an abusive utilization of an non-admission procedure (a procedure that must be exceptionally applied) and a limited use of

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23 *Inter alia*, High Court 16 November 2006 (decision n. 197/2006).


25 The OAR (examining authority: Asylum and Refuge Office) must notify the Spanish representative of UNHCR of all applications for asylum within 24 hours following the reception of the application by the Office. If an examiner concludes that the claim is inadmissible, the examiner notifies the UNHCR that it has 10 days to visit the OAR office, review the file and make a written recommendation. The failure to comply with this formality gives rise to the nullity of the resolution (nevertheless, the notification does not have to be individualized and a simple list is sufficient and the issue of this report is not compulsory). The OAR seldom decides on admission without UNHCR’s support in cases on inadmissibility.

The possibility to stop return in cases of non-admission at the border, in which UNHCR disagreed with the criteria of the Ministry of the Interior, Article 22.2, 1994 Asylum Act (the judge always has the power to suspend the administrative act of non-admission, the current provision only lays down that in certain cases this will take effect automatically; it is a “privilege evidence” that could be taken into account by judges).

The decision not to suspend must be motivated and the applicant has the right to an emergency suspension proceeding for exceptional circumstances only.

suspensive effects of appeals by Courts could be in breach of Spain’s international obligations.

3. **Procedures at first instance**

The aim of this section is twofold: first, to analyse the potential incompatibility of Spanish non-admission procedure after the transposition deadline of the Directive and, secondly, to set out Spanish practices relating to disputed procedural notions like “safe country of origin”, “safe third country” and “European safe third countries concept”.

3.1 **The Spanish inadmissibility procedure (decision on admissibility in sixty days)**

Spanish law provides for a unique regular procedure with a “preliminary phase”, the inadmissibility procedure establishing bases for excluding asylum seekers from the complete asylum procedure (the legislation specifies six bases of inadmissibility).27

There is no time to study in depth the problems around the application of this procedure.28 The relevant issue is determining the compatibility of the Procedures Directive with the inadmissibility procedure prior to the emergence of an amended Asylum Act. The Procedures Directive does not allow States to reject claims as unfounded or implausible in an admissibility proceeding. In this sense, the Spanish Administration has argued that the non-admission procedure is only a “term”, and in fact this is an accelerated procedure with appropriate guarantees. Nevertheless, the Directive provides that States may prioritize or accelerate procedures in a large

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27 Article 5.6, 1994 Asylum Act:
- None of the grounds for recognition of refugee status are invoked in the request for asylum.
- The request submitted is merely the reiteration of a request that has already been rejected in Spain, provided that no new circumstances have arisen in the country of origin involving a substantial change in the merits of the request.
- The request is based on facts, information or allegations which are openly false, implausible or, because they are no longer valid or significant, do not constitute the basis of a need of protection.
- When examination of the request is not the responsibility of Spain according to those International Convention to which Spain is a party.
- If the asylum seeker has been recognized as a refugee and has the right to reside and be granted asylum in another State, or if the asylum seeker has arrived from another State from which he could have requested protection.

28 For a critical study of the admissibility procedure in Spain, *vid* M. Fullerton, ‘Inadmissible in Iberia: The Fate of Asylum Seekers in Spain and Portugal’, *IJRL*, 2005, p. 659-687. It is surprising that the author makes a severe analysis of the admissibility procedure applied in Spain and proposes the accelerated one as solution with no comments about the obvious problems also between this procedure and international Refugee Law.
number of circumstances, though no application should be diverted from a procedure that would assess the merits of the claim.

The Procedures Directive limits the grounds for rejecting a claim as inadmissible to three situations: where the asylum seeker has obtained protection, the exception of safe third country, and repetitive application (Article 25 PD). The Spanish inadmissibility procedure dismisses asylum applications on broader grounds, and therefore contravenes the PD.

It is true that the standard of rights provided in the Spanish inadmissibility procedure is higher than that proposed for the accelerated one by the Directive, nevertheless to avoid infringing the PD, from 1 December 2007 on Spain should use the “regular procedure” to examine all asylum applications.

3.2 Border Procedure (decision on asylum in seven days)

Asylum seekers must have access to a fair and satisfactory asylum procedure irrespective of the manner and place where they enter the territory.

In Spain, the border procedure is reserved for major airports and, on occasion, Spanish sea ports. An asylum seeker who lands clandestinely aboard a patera is taken to the Centre for Migrants and is subject to the regular procedure (and the preliminary phase sixty days inadmissibility procedure).

While Article 35 of the Directive is not transposed, peremptory border procedure is allowed pursuant to the guarantees laid down by the Directive in Chapter II. The problem with the Spanish border procedure is not its peremptory nature, but its link to the non-admission procedure not provided for in the Directive.

In Spain, the non-admission procedure at the border has a particular regulation characterized by its peremptory nature, directly linked to the compulsory permanence at the border post (maximum 72 hours according to Constitutional requirements). The decision of the Ministry of the Interior on admissibility will be communicated to the person held at the border within a maximum period of four days. This resolution admits only one review, which the applicant for asylum must submit within 24 hours following the notification of inadmissibility; the Ministry of the Interior will decide on its review within a period of 48 hours. During this time (a total of seven days), the applicant for asylum will be held at the border and will be provided with adequate resources. If, after four days the applicant is not notified of the admissibility of his application, the principle of positive administrative silence applies and he is admitted to the ordinary procedure.29

3.3 The Spanish safe third country practice

It will be necessary to develop and modify Spanish legislation to make a clear distinction between the grounds for refusal proposed by the Directive: inadmissibility, unfounded and manifestly unfounded applications, subsequent or repeated applica-

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29 Four days is the maximum period laid down by 1994 Asylum Act unlike the four weeks provided by the Directive.
tions on the one hand, and the different procedures, some of which are unknown in the current Spanish Asylum Act, on the other hand.

Posing an even higher concern, the Directive will significantly expand the bases for utilization of disputed procedural notions like “safe country of origin”, “safe third country” and “European safe third countries concept” practices that, as Costello has pointed out, have proved to be unjust, unfair and inefficient.30

Spain has rejected the use of updated lists of safe third countries and no introduction of such lists is expected. The concept is applied but in a restrictive way and using abstract criteria in law, giving the possibility to “rebut the presumption of safety” on an individual basis. It follows from High Court jurisprudence that existing “meaningful links” with the country and humanitarian considerations must be taken into account in order to decide which country should be responsible for the treatment of application. Currently, the precise parameters of legal requirements to establish the connection are not clear. The Spanish jurisprudence has pointed out that the principle is not valid if the person only passes through the country in question and, in practice, another non-admission ground is taken into account.

Looking at readmission agreements between African States and Spain, it should be noted that according to Article 27.1(d) it does not suffice that the State Party participates in International Refugee Law instruments. It is necessary also that both Parties provide a procedure for determining refugee status and grant the secondary rights under the Geneva Convention. For example, both the procedure and rights are unknown in Morocco, with which Spain has a readmission agreement.

The Directive recognises two different sets of criteria for the designation of a safe country of origin and three modalities for establishing the lists. The exceptional criteria have become a norm and this, in the case of Spain with a restrictive application of this principle in practice, will have a remarkable influence on the law in progress.

Although it is not likely that in compliance with Article 30.1 Procedures Directive Spain will introduce its list of safe third countries of origin, the common list that should be adopted by the Council will be compulsory for Spain.

In addition to other human rights concerns, this is a clear example of Member States being required to dilute their standards of protection by a measure of EC Law, which is not substantiated in Community legal order.

The criteria could be more alarming in the case of “European safe third countries” called super safe countries. Member States are allowed not to carry out any, or at least not a complete, examination regarding applicants who enter their territory from a European third country.

Battjes underlines that the arrangement applies only to applicants who entered or are interring illegally. The procedure cannot apply to persons who instead report themselves at the border to the competent authorities. Although they are not authorised to enter, their application must be processed in accordance with border procedure, which would entitle to individual examination of the claim. This ques-

tion is important for Spain, where only in 2006, 72 applications for asylum from Russian nationals were examined with 14 being granted Geneva Convention status and 13 subsidiary protection, while 32 were refused.

As Spain studies all applications for asylum on individual basis, with the only exception being the Dublin Regulation, a non-rebuttable presumption is not acceptable.

4. Conclusion

Spanish legislation on asylum grants higher standards than the minimum standards according to the Directive. But, the real problem is although Spain has one of the most extensive borders in Europe, it holds only the twelfth position in granting refugee status in the EU. In 2006, asylum applications numbered 5,809; between 1995 and 2005 Spain conceded refugee status to 2,864 asylum-seekers.

In the weekend of 8–9 December 2007, in the framework of the EU-Africa Summit held in Lisbon, the Spanish Prime Minister Zapatero called for an EU-Africa Pact to limit irregular migration. This is Spain’s main concern after a record 31,000 Africans landed on the Canary Islands in 2006. Such a pact should aim at improvements in education, employments and infrastructures in African countries. This is the basis for enhanced cooperation in the fight against irregular migration, including strengthening of border security and reaching agreements on the issues of return and readmission of illegal migrants to their countries of origin.

Thanks to the European Union Border agency patrolling West African coast, the number of arrivals has dropped by more than 60 percent this year. European borders become more impenetrable, a new “iron curtain”, sometimes visible like the six metres fence built in Ceuta and Melilla, sometimes invisible like that in the Atlantic Ocean. Yet, not a word is mentioned about the necessity to enhance Spanish and European capacity to ensure international protection for those who need it.

This is one of the most important problems not resolved by the Directive: namely, granting genuine access to asylum procedure for those who are forced to flee in precarious conditions. The challenge is to provide applicants with proper assistance upon arrival and, once they express a wish to stay or manifest a fear of being returned, not to leave them to their own devices between the moment of first contact with the authorities not competent of their application and the moment they can formally initiate asylum procedure.

Measures to deflect, deter, avoid or impede access to the procedure devoid the right to asylum of its content.

31 In 2006, it examined 5,809 asylum applications. 3,392 were admitted to the procedure (58.4%); not admitted: 2417 (41.6%). Rate of recognition of refugee status: 8.38%. On other grounds: 9.13%. See: Ministry of the Interior. Asylum and Refuge Office, Memoria Estadística de la Oficina de Asilo y Refugio, 2006.
Selected Aspects of Implementation of the Procedures Directive in Poland in the Larger Context of the EU Asylum Policy

Adam Bulandra and Katarzyna Przybyszewska J.D.*

Introduction

The present chapter is the outcome of the international conference in Nijmegen, the Netherlands on the 12th of December 2007, attended by a representative of the Halina Niec Legal Aid Center. The article discusses selected crucial issues related to the implementation of the Procedures Directive in Poland, mainly those which we found most important for the principle of due process of law and to secure the fair level of international protection for asylum seekers in Poland.

Harmonization through Implementation – Aims of EU Asylum Policy

Since 1 May 2004, after having joined the European Union, Poland became a part of a political, social and economical community. The process of accession significantly broadened the borders of the continent covered by a unified economy and common values. Within that process the territory of the European Union became the natural destination of migration moves from less developed or less integrated parts of the world. The Polish border has become the longest external border of the Community and for that reason Poland needed to prepare for a major change in its migration experience.

Alongside the external migration problem, Europe needs to cope with the secondary movement issue, especially the settlement of new Member States’ citizens, who usually have strictly economical grounds, transforming labour markets of the old EU Member States. Since 2004 over three million Polish citizens are working seasonally or permanently outside Poland in other EU states. Considering these trends European politicians with a high degree of self-restraint refer to a historically, socially and civically justified need of opening the borders to people from other parts of the world. For many human rights activists the more apparent cultural divisions, problems with integration of North-African and Middle-Eastern Muslim migrants, cause raising anxiety. It did not change the fact that Europe with its basic freedoms, economical attractiveness and prospect of better life and well-being will not prevent others from migration attempts.

* Halina Niec Legal Aid Centre – an independent NGO providing free legal assistance to asylum seekers and refugees.
The European challenge to limit migration flows has apparent effects, such as restrictions on common asylum policies. This causes escalation of tensions and introduction of means disproportionate to the initial aim, such as unlimited detention. It creates the sphere of double standards of human rights protection – one for EU citizens and one for illegal migrants and refugees. Europe is proud of its social and economical achievements but sets barriers where they are in fact not necessary or justified. Through its administration the EU gradually confines the trust of its inhabitants by treating every immigrant with suspicion, assuming that the reason for migration is always clearly economical.

Contemporary Europe forgot what was its initial value – creating an area of freedom, human rights and humanitarian values that allows long-lasting peaceful coexistence.

The major goal of EU legislation activities, but also its current challenge, is ensuring unified legal standards and practice within its territory and within the frames of common policies. Therefore, considering that all Member States are parties to the 1951 Geneva Convention, the introduction of the Procedures Directive seemed to be precious for the asylum seekers situation, provided that the shape of regulations included would serve the highest legal standards, respecting the European tradition of jurisprudence in the area of the fundamental rights, especially the heritage of the European Court of Human Rights and the European Court of Justice in Luxemburg.

The structure of a unified procedure of assessing the need for international protection should match the aim of such protection and comply with asylum doctrine, so no one deserving protection would be without it.

However, harmonization of the asylum systems shall be based on a positive understanding of individual human rights and constructed after and upon a broad discussion of the many stakeholders about the meaning of human rights and standards of protection.

It is absolutely crucial to qualify as a refugee each individual who is actually in need of protection. For that reason all regulations in this area of law must be exerted in a manner not allowing for any disregard, even if this leads to accidentally granting protection to someone not deserving it. The opposite situation would be far more dangerous as we must remember that regardless of our nationality, ethnical background, race, religion or participation in particular social groups, we are all humans, deserving equal and just treatment and the right to obtain assistance whenever justified.

Unfortunately, the final version of the Procedures Directive brought huge disappointment to everybody who cared about the fate of asylum seekers and the highest possible level of human rights protection.

Some of the Directive’s provisions might cause problems in the process of transposition as they are contrary to the Refugee Convention. In a practical dimension the opportunism of administration may lead to the misinterpretation of legal grounds for refugee recognition and restrain it only to particular dispositions of the Procedures Directive, strictly understood and introduced, even if in reality they are flexible.

Such danger is distinctive particularly in Poland, where administrative practice is based on strict introduction of respective regulations with disregard of general prin-
SELECTED ASPECTS OF IMPLEMENTATION OF THE PD IN POLAND

ciples, and is reluctant to broader interpretation of legal institutions, especially according to its function or aim, not just the grammatical or lexical reading.

Nonetheless, without adequate shape of refugee determination process or any other forms of subsidiary protection, standards of protection are vague. Even the best regulations in the scope of qualification would lose their importance without the possibility of achieving them in fair procedure.

Generally the necessity to secure international protection to aliens who fled persecution is so significant to raise standards of democracy and creation of human solidarity that it is advisable to establish fair, just, transparent and flexible common asylum systems going beyond the Geneva Convention requirements. We should not forget that the Geneva Convention was proclaimed in the period where racism and patriarchy was quite natural and equal rights of LGBT (an acronym referring collectively to Lesbian, Gay, Bisexual, and Transgender/Transsexual people) people where not even disputed.

Evaluating the process of national legislation’s adjustment to European standards in Poland, we need to assume that implementation of fair regulations, complying with the Geneva Convention and its interpretations derived from the years of positive experiences of asylum seekers protection, as well as positive national practice in the area of international protection will certify the attachment to European tradition of humanity, but its lack, delay or negative practice diminishes those efforts and undermine Polish voice, authority and influence in a common EU policy. Sadly, the current quality of the refugee determination process in Poland is disappointing. The refugee definition accepted by the Polish authorities is narrowly interpreted and some of the prerequisites are understood awkwardly.

For that reason during the implementation process of the Procedures Directive, as well as the Qualification Directive, which is also still not transposed, it is desirable to trigger a broad discussion on the shape of national legislation, the rules of proceedings, access to judicial review and legal assistance. Such discussion never occurred in Poland and most of the regulations in this area are implemented regardless of the arguments put forward by NGOs and experts, usually according to temporal needs and the pressure to resolve the arising problems.

At present the Polish determination authority employees do not have relevant knowledge about the EU regulations in the scope of international asylum law, international practice or even the national administrative courts’ jurisprudence as well as the general rules of the Geneva Convention interpretation. They are paid less, which causes constant vacancies on positions. The quality of decisions is poor, justifications cursory and written in a ”cut and paste” mode. Even the translations of the EU legal instruments are often incorrect. The Polish government seems to ignore that European Union Directives are binding according to their principles and goals, not just particular regulations and for that reason their implementation does not need to be straightforward. The particular regulations might be adjusted to national system and its tradition, but in Polish reality they are transposed directly as they are written which causes problems of discrepancy between already existing institutions.

European Directives are more of a notion of common ideas than just a legal act, so implementation shall take into account all principles that gave impulse to issue
such a regulation. One of such ideas, of the most significant importance is the idea of establishment and progression of the area of freedom, safety and justice.

Acceptance of this principle is a precondition of each amendment of the national law and its adjustment to EU standards that ought to lead to common standards achievement. Unfortunately these principles and rules are not widely shared by the government of Poland. The only principle followed by Polish authorities is the legal obligation (not the need though) of implementation. The deadlines of implementation are rarely observed and all amendments are passed soon before the date of the first report to the Commission on the progress of implementation.

Major Regulations regarding the Principles of the Refugee Status Determination Procedure

Preamble 7 of the Procedures Directive states:

It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State.

In the opinion of many human rights activists, such a commitment defines the need and obligation to introduce higher standards, merely to avoid possible discrimination and differences between the levels of protection in Member States.

Contrary to its initial aim, the introduction of the minimal standards caused a decrease of protection levels in all dimensions of asylum systems: procedural, in qualification, and in reception. Despite the fact that many countries did not introduce even the minimal requirements stipulated in asylum law Directives, most just stopped on the minimal ones, hindering improvement in the area of managing migration and securing the rights of the migrants. However, there is a need of introduction of such legal or institutional instruments, which would encourage or even award the countries for implementation of good practices and higher standards in all areas of concern. This is especially important if we assume that having higher standards than minimal standards in one of the Member States causes the feeling of automatic discrimination in those which do adhere to the minimum standards. However, each time a higher standard is introduced somewhere it shall automatically become a minimal point of reference for the others.

Furthermore, the standards of the Procedures Directive are indeed minimal. Personally we doubt that any EU citizen would accept such legal solutions, level of protection and rights’ guarantees in their own case which means there are different standards of treatment for EU or EEC citizens and for the other aliens, especially asylum seekers. Most of them are not properly justified and do not meet democratic standards. One of the possible reasons is that the fear of migration and related problems, like unemployment, crime and possible terrorist threat are still predominant in migration policy and prevail over the necessity of human rights protection and even the problem of ageing of the European society.
Here again, the Polish government declared in the justifications attached to all amendments presented to the Parliament throughout the recent years that only minimal standards should be introduced. It is not a good sign for the establishment of the new migration and asylum policy and affects the process of national legal system adjustment.

Poland does not have a clear and consistent migration policy so legal provisions and other issues are frequently regulated ad hoc. Also, Poland does not have a considerable migrant population. For many years the most important migration issue was repatriation of aliens with Polish origin forcibly deported into U.S.S.R. territory during the Second World War and shortly after the war (period 1946-1953). Those issues are regulated in the Act on repatriation of 9 November 2000 (Journal of Laws 2000, No. 106, item 1118). This Act does however not cover descendants of Polish citizens who resided in Belarus and Ukraine, but the Ministry of Internal Affairs may decide to extend the benefits of the Act so as to cover such persons. So far, such a decision has not been taken. Presently, Parliament established alternative solutions in the form of a Polish origin confirmation document (The Polish Charter).

Nowadays, the main migration issues in Poland are the Chechen war refugees and seasonal workers’ migration from Belarus and Ukraine. Still, the migration of the Vietnamese that began shortly after the power shift in Poland in 1989 is still apparent and now creates a huge but closed community. Seasonal workers are coming to Poland from Ukraine and Belarus to take jobs in agriculture, pastures and fruit plantations, as well as in construction areas. Due to huge Polish economical migration to Great Britain and other EU Member States without transitional periods regarding labour markets (estimated for two million seasonal workers and for 500,000 permanently) Poland lacks some of the specialized workers in many areas of the national economy. This gap needs to be filled by migrants. Therefore, in order to prevent the rise of the scale of grey economy, the Polish Government worked out an adoption of new standards and rules regarding the issue of work permits to economical migrants. This regulation aimed to fasten the procedure and to make it more cost-effective. The Polish Government already introduced a temporary solution allowing Eastern migrants to work on more favourable grounds up to six months per year. The process described above is one of the most natural migration movements of people towards better economical opportunities. This is however one of the many migration issues of present importance. Another one is the situation of illegal migrants, especially those from former Soviet Union states. Numerous groups of people, cautiously estimated for 20-30,000, did not gain any citizenship after the collapse of the Soviet Union and therefore remained on Polish territory stateless and unable to determine their legal status, but also unable to return to the countries that emerged after the fall of the USSR. Even though the problems described above concern regular migration of people with no need of international protection, the restrictive nature of the Polish migration system causes reference of those who had lost the legal grounds to stay in Poland and to protective means. These are the only effective ways to avoid deportation in a situation of those people as in Polish migration sequence there is no possibility to re-establish the legal status that was lost. The Procedures Directive will, however, be in force for these groups of people too.
Currently, however, as refugee flows are rising, the problem of assessing the need of international protection will become more significant. In Poland it concerns mainly the fugitives from Chechnya. There is an 88% rate of Chechens among the whole population of asylum seekers in Poland and most of them are not afforded with refugee status as in other EU Member States, but stay subsidiary protected. This is causing the secondary movement to Western and Southern Europe countries. The Dublin II Regulation is unable to prevent such movement, as NGOs in Poland observe many cases of multiple returns of Chechens, who were granted subsidiary protection in Poland. Every time they are returned they flee again and such process will be probably ongoing until the asylum seekers’ protection system will be equal among Member States, both in legal dimension and in the matter of material reception. We assume that in Poland these processes will not be fast, despite even ERF or EQUAL initiatives, as the level of hostility towards aliens, particularly on governmental level, is quite high.

It might be reflected if the strong sense of national identity, that characterizes Polish people, as well as negative historical experiences, does not cause recession towards aliens or even the hostile attitude towards them. Another significant factor was identified by Grzymała-Kazłowska and Okólski, who claim that during the period of existence of the Polish People’s Republic the country was closed for migration, so the generation grown up in that system had no chance to develop any attitude towards foreigners as they had no personal contacts. There is a strong link between prejudice to immigrants and the stereotypes concerning them. Such stereotypes are born and strengthened on the very early stage of socialization, usually before such person is able to perceive the meaning of such an approach. Pilch rightly argues that the level of tolerance depends on the state of conscience (knowledge) and some features related to the style of upbringing. The higher level of tolerance is conditional upon the level of knowledge and information about the object of observation. Grzymała-Kałkowska and Okólski determined that the attitude of Polish people towards migrants is related to the level of welfare and development of their country of origin, cultural and political similarity to Polish society, past bilateral relations and media picture of such migrants. Accepting those facts we see that the attitude to asylum seekers is far from perfect. Only half of the Polish

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4 Grzymała-Kazłowska and Okólsk, op. cit., p. 27.
society would accept the presence of refugees in the territory of Poland for a long-term period, much less would accept their settlement.

The EVS\(^5\) research revealed a significant rise of xenophobia in Poland between 1990 and 1999 and showed that Polish people are one of the major opponents in Europe to migration movement.\(^6\) According to the researchers this was caused by the materialization of the migrants and their presence in mass media, as well as the experience gained by Polish society in personal contacts. The tolerance was rather a declared value, covering up a real lack of trust.\(^7\)

From another research conducted by Łukowski between 1995-1997 in the framework of the project Immigrants, reasons for immigration, demographic and social features and existence in Polish society, carried out by the Polish State Committee for Scientific Research, it may be concluded that a significant direct xenophobic attitude towards migrants of African roots is not uncommon in Poland.\(^8\) Reflecting the reasons of such an approach, it may be noted that “different cultural patterns and codes might lead to cognitive reluctance, and as a result, to creation of social distance. Lack of knowledge and fear against aliens cause the defensive reactions such as hostility”.\(^9\) Considering the reasons of such a negative attitude towards foreigners, in one of the studies it was revealed that 70% of the inquired persons agreed with the statement that migrants raise the crime rate. Only 12% of the inquired group disagreed.\(^10\) Such a negative attitude concerns aliens searching for work in construction (54%), who want to buy land and build a house (58%). A positive attitude is present only for foreigners married to Polish citizens (92%) or having Polish ancestors (77%).\(^11\)

There are therefore two major factors modeling the reluctance to migration in Poland: a threat to security and economical stability, including the competition on the labor market. These factors shape migration policies in other countries too.\(^12\) Such climate does not foster any kind of migration, not to mention people in need

\(^5\) European Values Studies.


\(^7\) Grzymała-Kazłowska and Okólski, op. cit., p. 25-27.

\(^8\) Łukowski W., ‘Czy Polska stanie się krajem imigracyjnym?’, Prace Migracyjne, nr. 12, ISS UW, Wrzesień 1997, p. 19. (‘Will Poland Ever Become a Migration State?’).


\(^10\) Pawelec-Górny A., ‘Postawy Polaków wobec cudzoziemców’, Prace Migracyjne, nr. 8, ISS UW, Lipiec 1997, p. 7 (‘The attitude of Polish people towards Foreigners’).


of protection. Hostility is not only distinctive for the Polish society itself but also for the political leaders, pronouncing their bad attitude in the media.\textsuperscript{13}

Weinar indicates that compared to Western European Countries and even other countries of our region, Poland became a phenomenon characterized by the lack of public debate about the migration trends and politics. The public opinion has also no visible impact on the shape of the system, nor is in any way interested in the flow of foreigners.\textsuperscript{14} This situation is not surprising in the view of SOPEMI report results which showed that the total number of migrants settled in Poland between 1952-2002 is 1,359,200 persons.\textsuperscript{15} Such low numbers will definitely change after the full implementation of asylum and migration Directives, especially the Dublin II Regulation and the Schengen Treaty restricting the secondary movement of illegal aliens and asylum seekers to other EU Member States and because of the fact that Poland has become a border country of the European Union with the longest external border and in prevailing number of cases will be considered the first reception country.

Finally, the introduction of the Eurodac system and the Schengen Treaty which introduced the rules of controlling aliens’ movement within the territory of the EU, and the Dublin II Regulation which constituted the basis to assess the responsibility of Member States of protection determination, will force Polish government to elaborate a consistent and true migration policy as currently such policy does not exist and all amendments in migration law are introduced ad hoc.\textsuperscript{16}

The presence and possibility of settlement of foreigners on the territory of Poland is strictly dependant on administrative and political decisions without significant influence of Polish society.

In Poland, migration systems have always been marked by the tendency to restrict the immigration flow by setting barriers, and in its legal frames concentrated on obligations and restrictions on the right of entry, setting aside the privileges according to the securitization principle. Such a dimension of policy affects not only the “inflow” of aliens but equally the “outflow” of the Polish citizens, which occurred during the year-long debate on double taxation of Polish workers in Great Britain when Polish government abstained from finding a just solution for its own citizens.

Nevertheless, since the date of the Polish accession to the European Community we experienced a slight shift in policy-making, affected by Europeanization and the obligation to adjust the system to common standards. Such a adjustment was based on several fundamental changes. First, in migration bills: the Act on aliens\textsuperscript{17} and the Act on granting protection to aliens on the territory of Poland\textsuperscript{18} the

\begin{thebibliography}{9}
\bibitem{MrozowskiM1997} Mrozowski M., ‘Obraz imigranta na łamach prasy polskiej’, Proces Migracyjny, nr. 1, ISS UW, Styczen 1997, p. 7 (‘The Picture of Immigrant in the Polish Press’).
\bibitem{Ibidem} Ibidem, p. 39.
\bibitem{Najnowsztrendy} Najnowsze trendy w międzynarodowym ruchu migracyjnym, The 2005 SOPEMI Report for Poland.
\bibitem{Weinar} Weinar, op. cit., p. 84.
\end{thebibliography}
category of EU citizens was excluded from these instruments. The special status of Community members was regulated in a separate bill on the terms and conditions of the entry into and the stay in the territory of the Republic of Poland of the citizens of the EU Member States and the members of their families.19

Secondly, Poland was obliged to implement common standards of protection included in the so-called Reception, Family Reunification, Qualification and Procedures Directives.20 All those instruments are already binding, except for some procedural regulations on access to legal assistance, which come into force in the fall of 2008. The state of Polish implementation process is, till March 2008, limited only to the Reception and Family Reunification Directives, which means there is a major delay, causing disproportions in the level of protection compared to other Member States.

The openness of the migration system is not only related to legal solutions but also to its practical dimension. The evidence of xenophobic attitude may be derived from the shape of restrictive aliens law when regulations introduced are arbitrary and discriminatory and the overall system is focused on keeping migrants out rather than welcoming them. The Polish migration system, despite all changes, might be considered restrictive. Its numerous flaws might be perceived as xenophobic both by Polish human rights activists and Western European observers.

There are several factors that make the Polish system hostile to foreigners and asylum seekers. First of all, Polish authorities arbitrarily assume that only minimum standards of all common EU regulations will be implemented, including the procedural aspect of the asylum protection. The meaning of minimal standards shows that the system not complying with those basic rules might be hardly considered democratic. The balancing on the edge of democracy and fundamental human rights protection principles cannot be found appropriate or praiseworthy, but Polish government seems to ignore this. It means also that Poland will stay one of the Member States with the lowest standards of protection and no prospects for improvement. This will cause a feeling of discrimination as the same category of aliens in other EU states may enjoy a better package of benefits. Such a feeling will be enforced by poor reception conditions, including lack of adequate social assistance, medical help and access to therapy.

One of the major problems is the limited access to information and legal aid, described in detail below. As we know, such access is crucial as a guarantee for a fair procedure. In Poland free legal assistance is still provided by a small number of NGOs and for aliens in detention such assistance does virtually not exist.

Polish government declined the introduction of any type of early integration institutions, and the right to integration programs is granted only to recognized refugees. They are, however, inadequate and retrenched by severe conditions (e.g. obligation to submit application for the integration program within a two weeks term after the delivery of the decision granting refugee status).

The restriction on the freedom of movement, despite turbulent debate in Parliament, was established in the most unfriendly manner resting on, as Weinard said, a stereotype of fraudulent asylum seekers.\(^{21}\) A suspicious attitude, implied as a rule in approach to aliens seeking protection, considering the purpose and importance of international protection, shows the extremely hostile or irresponsible attitude towards the issue at stake. Migration is perceived entirely as a threat, not as a privilege or a possible benefit for the culture and economy.

In the implementation process most of the regulations in migration law are introduced not due to consistent strategy planning but at the moment of temporal need to solve problems. Even in such a situation the amendments are backward and restrictive.

Closed societies have difficulties with gaining openness, tolerance and acceptance of different cultures and heritages. At present, governments and politics play a key role in establishing positive relations between nations and people of different races, religions and backgrounds. It may be assumed though that the level of hospitality is positively related to asylum policy restrictiveness. Polish government does nothing to make foreigners feel safe and secure, so we do not expect any breakthrough in the future that would make Poland a friendly country, not only for a short tourist visit, but also for settlement and asylum destination. The real spirit of xenophobia is not in the hearts of people but arises from a system that shapes those hearts.

Another problem in making migration problems visible is the lack of a strong migrant community. Until 2007 there was only one refugee association, but it crumbled when its President was accused on the alleged infection of at least 15 Polish women with the HIV virus. At present there are not many foreigners’ representatives who may speak on their behalf.

Furthermore, even EU structural funds are spent mostly on projects led by governmental agencies and to infrastructural needs. Less than 20% of such funds were granted to NGOs, and among the projects led by organizations none concentrated on policy shaping.

Within those limits the process of implementation of asylum Directives, including the procedures Directive, will be hardly progressing. The migration issues are not the most important problems at stake presently in Poland, and the lack of public discussion about migration issues in Poland does not help and allows the government without public pressure to postpone indispensable changes.

For that reason the Qualification and Procedures Directives are not yet implemented. Until now, the procedure Directive has been only translated into the Polish language and the manner of translation requires several remarks. First of all, it was done straightforward word by word, without any adaptation to Polish language.

\(^{21}\) Weinard, op. cit., p. 188-193.
Basic Principles of Fair Procedures

To obtain the full transposition of the Procedures Directive both in legal terms and practical dimension there are two major rights and freedoms that needed to be treated with considerably respective attention. These two legal institutions are crucial to secure the sufficient level of one of the most important rights in the scope of fair procedure – the right to defend oneself. These rights are: access to information and legal aid, and right to personal freedom. The first one helps an alien to understand usually different legal systems and the benefits he may obtain, the second gives him a leeway to look for the evidence and manage his case.

Right to Information

The right to obtain information is the cornerstone of effective participation in any proceeding and implementation of one’s rights. The right to information charges the state with a positive obligation to perform all procedural steps with full respect of the need to inform applicants about their rights, obligations, the meaning and the consequences of the proceedings and the criteria for refugee status. It is absolutely crucial that the obligation to inform applicants is carried out with due diligence, considering its decisive meaning for the procedure and its influence. The realization of the right to information should not be limited to preparing and distributing written leaflets including information on the rights and obligations of an asylum seeker during the procedure. Although written information is crucial, it does not exhaust the obligation to provide asylum seekers with adequate information. Taking into consideration the specific situation and plight of asylum seekers, they should be informed at every stage about their rights and obligations as well as the meaning of all procedural steps they are bound to take. Handing a leaflet at the beginning of the Refugee Status Determination (RSD) procedure certainly is not sufficient. It is also important to note that the right to information also indicates that all procedural activities should be carried out with the participation of an interpreter. Such a requirement is difficult to satisfy, especially in border situations. Nevertheless, the participation of an interpreter is a must and the lack thereof hampers the right to information.

The Problem of Legal Counseling

The right to legal assistance embedded in the Directive is neither unconditional nor universal. The obligation incumbent on the state is in fact rudimentary and merely provides for the basic procedural rights of the applicant. The Directive does not provide free legal aid on the initial stage and on the judicial review stage concen-
trating solely on the appeal from the negative decision. Such a provision is ineffective and thus constituted legal assistance is illusive. The construction of this Article of the Directive seems to be based on the false presumption that legal aid is not necessary during the initial stage. What is more, the drafters of this provision seem to be taking the position that the initial stage of the procedure is in matter of fact more credible if no legal assistance is in place, because early consultation with a lawyer may influence or even determine the direction of proceedings and steps taken by the applicant. Before the appeal stage therefore there are no guarantees of free legal advice in place. Moreover, in Poland determination authorities often justify the lack of grounds to gain international protection on the presumption of the best possible knowledge of the EU procedures, especially the Dublin II Regulations and first safe country principle. On that basis, protection is denied whenever an attempt to flee somewhere to the West occurs.

Such an approach actually hampers many asylum seekers’ chances of protection. Early consultation has major implications on the further procedure equipping the asylum seeker with useful knowledge of his/her rights and obligations which is the basis of active participation in the procedure. Lack of pre-decision legal aid often considerably limits the scope of activity of the asylum seeker. The knowledge of adequate procedures and criteria for refugee recognition among asylum seekers arriving in host countries is in most instances superficial or even erroneous. The information on their rights provided during the course of the RSD procedure is on the other hand inefficient which brings about the risk of their eventual rejection.

Furthermore, the right to legal assistance at the initial stage according to the Directive is not related to a state obligation to provide for free legal advice. The applicant is solely afforded the right to consult a lawyer at his/her own cost. Such a right is therefore ineffective and the formulation of this Article is superfluous. Irrespective of the Directive, all asylum seekers already enjoy the right to receive adequate information and they are allowed to contact any governmental or non-governmental agency that they choose which is based on general human rights standards. States may not – based on their international obligations stemming from customary law – deny the general right to information and legal assistance which are perceived as preconditions of due process of law. Therefore, the amending effect of the Directive may only take place if the states decide to implement the right to legal assistance not merely by allowing the asylum seekers to contact lawyers at their own cost, but by actively securing this possibility and/or financing its costs.

It is a shame that the Directive only so humbly refers to such an important human rights guarantee as the right to legal assistance before appeal. The meaning of this Article of the Directive remains empty unless the governments attach proper importance to the organization of legal aid systems in their respective countries.

As a rule, asylum seekers who are given decisions denying refugee status recognition may seek the possibility of benefiting from free legal aid. This possibility does not cover all rejected applicants, however.

The Directive stipulates a catalogue of criteria preconditioning access to free legal advice on the appeal level. These criteria are to be fulfilled jointly and are the following:
- those who lack sufficient resources;
- only for appeal stage (and no onward appeal or review);
It is arguable that legal aid should be regarded as a fundamental right under EU law. Though the right to legal aid has not yet been literally recognized by the European Court of Justice, it may be just a matter of time. EU law applies the standard of fair trial prescribed in Article 6 of the European Convention on Human Rights and Fundamental Freedoms whenever rights from the EU Charter of Fundamental Rights are being invoked. Article 18 of the EU Charter invokes the right to asylum which should also be related to the standard of fair trial. Moreover Article 47 of the EU charter in subpara. 3 expressly states that “Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice”. Therefore, even though the ECtHR does not apply the principle of fair trial to refugee proceedings which are carried out in the administrative track through the application of Article 47, the standard of fair trial comes into play.

It follows therefore, that all the rules of fair trial in the scope and according to the meaning worked out throughout the years by the European Court of Human Rights remain the standard in case of asylum and Strasbourg case law applies whenever there is a threat to access to justice for asylum seekers. Consequently, one of the preconditions of securing effective access to justice for asylum seekers is the existence of free legal assistance to those needy of such aid. Legal aid is directly related to the principle of equality of arms developed by the Strasbourg Court. Conversely, lack of free legal advice may undermine the fairness of procedures and make the access to justice illusive.

The provision of free legal aid to foreigners seeking protection in host states is the test for their democracy and rule of law. The accessibility of information and aid is even more indicative in this context than the existence and scope of legal assistance provided to state’s citizens. The ignorance of law, and a general lack of understanding of a given country’s procedures, rules and modalities may disable the effective participation of a foreigner in the refugee procedure and reduce his/her chances to obtain protection. Additional impediments include lack of knowledge of the host country language, lack of financial resources and constraints on the freedom of movement. Therefore, asylum seekers often experience major difficulties in accessing legal assistance in case there is no system of legal assistance designed to include all important locations.

The shape of Article 13 of the PD shows the lack of understanding and respect by its drafters to the issue of legal assistance and support for the endangered foreigners in EU states. One of the biggest challenges for the EC is asylum and the possibility of providing protection to those fleeing persecution. This goal is included in the preamble attached to all EC Acts concerning these issues and is to be understood as an obligation of all EU states of bearing justified costs for achieving this aim. Such a justified cost is without doubt the cost of providing broad accessibility to legal assistance and other forms of aid and enforcing limitations on such aid is the sign of failing in pursue of the overriding goal. Putting limits on the legal guarantees serving the integrity of the procedures creates a system that is inherently fallacious and is liable to declining of the substantial value of issued decisions. Such
limitations are additionally severe considering the fact that the great majority of foreigners seeking protection in EU states cannot afford to pay for legal counseling and therefore are bound to depend on the guarantees of their host states in this regard.

From this it follows that states should be aiming to introduce a higher standard of free legal aid than the Directive prescribes so as to secure their full access to the RSD procedure and enable meaningful protection. The system of state-sponsored legal aid to asylum seekers should entail all stages of the procedure, not just the appeal. The participation of a legal advisor in the pre-decision stage is crucial for its outcome.

The costs of such organized legal assistance will undoubtedly be considerably higher but they may be diminished if this task is given to NGOs specialized in asylum and refugee law and legal aid. Such organizations possess adequate contacts, experience and already know the modalities of providing legal aid to asylum seekers. Such organizations are far more flexible than the bar and are better prepared to render assistance in various locations. Moreover, they are capable of providing legal aid throughout the procedure, continuing the aid given to an asylum seeker from the early pre-decision stage until the final decision. Such continuation is extremely important in terms of the trust of the asylum seeker in his/her lawyer and the understanding of the procedure and their rights and obligations.

In Poland, at present, state-sponsored legal assistance is available in limited scope solely on the judicial review stage. Such an institution enables to free the applicant from the costs of an attorney if he/she cannot afford to pay. In practice, motions for a state-sponsored attorney in judicial review proceedings concerning asylum seekers are rarely filed and rarely accepted. The vast majority of applicants are not represented by any legal advisor, some are supported by NGOs adhering to proceedings based on the rules of the court.

The Directive stipulates that free legal assistance may be provided at appeal stage only if the appeal is likely to succeed. Such a criterion is both unreasonable and difficult to apply in practice. For one, the very basic meaning and function of the appeal is to change the decision which the applicant does not agree with. It is therefore the very basic principle of fair procedure and effective legal remedy that every appeal is likely to succeed as it triggers the process of re-examining the application in the whole context of the case files and applicants testimony. The arbitrary assessment of the rate of success of a given appeal undermines the fairness of the procedure. The question remains, which authority should determine whether in a given case the appeal is likely to succeed and therefore the applicant is eligible to benefit from free legal advice and representation. Anyhow, such determination is premature and arbitrary and leaves a margin for abuse.

Another failure of the Directive in this respect is obliging the alien to reimburse the born costs of legal assistance and representation in case when their financial situation ameliorates. Such a principle may create reluctance to benefit from any assistance at all having in mind that the future amelioration of their financial situation may force them to cover its costs.

In Polish law the applicable rules of administrative procedure which relate to the role of a legal plenipotentiary do not require that the plenipotentiary should be an attorney (during the course of administrative procedure). Therefore, there is a
possibility of broad activities in terms of providing legal assistance by NGOs which normally employ lawyers who are not (yet) members of the bar. The legal position and possibilities of the plenipotentiary are almost equal to the position of the applicant. The specific character of the asylum procedure requires of course that the foreigner files the motion for asylum personally and is personally interviewed by the decision-making authority (the plenipotentiary may be present). Other than that, the plenipotentiary may represent the applicant by filing other legal motions, appeals, presenting additional evidence, requesting additional interviews etc. The plenipotentiary may also access the case files, and take notes or make copies.

The effectiveness of legal assistance is based among other factors, on its accessibility. Therefore, the legal conditions of access to the detention and guarded centers for aliens are of major importance. According to the general rule, every alien enjoys the right to freely contact any NGO or private lawyer while in detention or a guarded centre. In practice some NGOs in Poland provide legal aid in both open reception centers and detention arrests. While rendering legal assistance in open centers normally requires simply a general consent from the agency administering these centers accessing detention facilities is more complex. Detention centers where aliens and asylum seekers are placed are run both by the Police and Border Guards. Accessibility to such places is for obvious reasons restricted. NGOs willing to provide legal aid are obliged to apply for a permission to enter. The present act on providing protection to aliens in Poland allows NGOs to access all places where asylum seekers may be accommodated. The only problematic issue which requires further attention is the question whether the initiative of meeting should be coming from the NGO/lawyer or specifically from the alien. Though according to penal proceedings, it is for the detainee to ask for a lawyer or initiate a meeting with an NGO, this rule does not seem so apparent however regarding asylum procedure. It is justified to argue that asylum seekers are a specific group requiring special attention and assistance, especially legal assistance in order to secure effective access to justice. Therefore both asylum seekers themselves and NGOs have the right to initiate a meeting. Implementation of such a right may be difficult in practice as far as detention arrests are concerned. Due to restrictions on entry into detention facilities, the general rule based in criminal proceedings code requires the detainee to request a meeting with a lawyer. The initiative to meet asylum seekers or other aliens and provide them with information and legal advice is therefore generally immaterial, coming from NGOs or lawyers. In practice however, detention facilities governed by Border Guards in Poland are accessible to NGOs and lawyers. The Border Guards are aware of the specific situation of foreigners seeking protection in Poland, who found themselves without a legal status and were placed in detention. Therefore requests for authorization to enter detention arrests or guarded centers filed by NGOs are generally admitted.

Regular visits carried out by some NGOs, including the Halina Nieć Legal Aid Center are normally resulting in a permanent authorization for entry which does not require additional proceedings to enter a given facility. The planned visit may be carried out upon merely informing the detention facility about the date of the visit. Denial of entry is extremely rare and it is related to objective obstacles such as other monitoring, remodeling of the facility etc.
It is crucial however that Polish law specifies the legal basis for NGOs to obtain permission to enter any detention facility that accommodates aliens seeking protection, not only asylum seekers. At present, in practical terms, detention facilities governed by the Border Guards are accessible to NGOs, this is not the case however for Police run deportation arrests which are usually less understanding of these special needs. Without a clear law-based authorization for NGOs to enter any detention facility where aliens seeking protection might be kept the access to legal aid will not be complete. Even developed good practices are not sufficient as meaningful access to legal aid needs to be legally secured and clearly stipulated so as to eliminate any room for potential abuse or arbitrary denial.

In general terms it is important to emphasize that all aliens enjoy the inherent right to personally contact NGOs which statutory goals include the issue of international protection, and according to the so called Reception Directive such a right may be implemented and initiated also by the NGO without the need to linger until the foreigner him/herself decides to seek assistance from their side.

The preconditions which determine the effectiveness of legal aid in the asylum context are the following:
- legal aid should be rendered by qualified lawyers, trained in refugee and migration law;
- legal aid should be rendered in a variety of languages and having in mind the question of gender sensitivity;
- legal aid should be made available in NGOs’ offices as well as reception centers and detention facilities;
- the right to initiate contact with NGOs/lawyers in order to receive legal aid should not be constrained to the alien only, NGOs should also have right to freely contact aliens in detention of their own initiative;
- legal aid should be made available from the initial stage (even before the formal filing for asylum by an alien) until the judicial review stage;
- legal aid to all asylum seekers and other aliens seeking protection should be free of charge, considering their plight as persons fleeing persecution;
- legal aid to asylum seekers should be sponsored by the state but the implementation of this task should be left to NGOs.

The conditions of providing legal assistance according to the Directive are different however. The Directive stipulates that free of charge legal aid should be provided only when:
- the asylum seeker lacks sufficient resources;
- only for appeal stage (and no onward appeal or review);
- only if appeal is likely to succeed;
- only by legal advisers designated by national law.

From the comparison of these above enumerated conditions it is evident that the Directive does not imply guaranteeing effective legal aid to asylum seekers but rather a minimum standard of legal assistance. Legal assistance is not effective unless it’s rendered in an indiscriminate manner. Assisting solely those who lack resources and only those who have chances to succeed creates arbitrary divisions among the asylum seeker population and is deeply unfair. Moreover limiting legal aid to the
appeal stage only undermines the effectiveness of the procedure and diminishes the chances of success for the applicant. Another problematic sphere may be the sentence implying that only legal advisers designated by national law are eligible to provide legal assistance to asylum seekers. In Poland such a provision, if implemented literally may cause the exclusion of NGOs from the task of providing legal aid. All NGOs providing legal assistance in Poland base their activities on lawyers who are not members of the bar. Imposing a rule in national law which would limit providing legal aid to members of the bar may effectively eliminate NGO-based lawyers from this field. On the other hand bar-members are not willing to take on this task and they are not qualified in refugee matters. Such a condition may therefore prejudice the system of legal assistance and bring about severe deficiencies of any meaningful legal aid whatsoever. The shape of future legal aid system depends however on careful interpretation of this article. In Poland, the RSD procedure is conducted in the administrative track and therefore any person with legal capacity may act as the asylum seeker’s plenipotentiary.

The deadline for implementation of free legal aid according to the Procedures Directive is near, and all Member States should be ready to fulfill the set criteria for this assistance in December 2008. In Poland questions relating to the provision of free legal aid in asylum cases were included in the more general act on providing legal aid. The draft of the law was introduced to the Polish Parliament but as there were new elections in the fall of 2007 the works on the draft were discontinued. According to information from the Parliament, the draft of this act has not been yet introduced and it is not very likely that Poland will be able to meet the deadline for implementation of the Directive in this respect.

Personal Freedom of Aliens

One of the instruments to regulate migration policy is the possibility to restrict freedom of aliens. The Procedures Directive is very brief in the matter of detention. In Article 18 it just mentions that Member States shall not hold a person in detention for the sole reason that such a person is an applicant for asylum. This Article also sets an obligation on Member States to ensure the speedy judicial review for those already detained. More regulations are incorporated in the Reception Directive, which provides several fundamental rules in the process of detention imposition. At first, detention must be imposed with respect to the principle of necessity. This means that priority should be given for the means causing minimum interference. Generally, the fundamental principle, derived from the Geneva Convention is the freedom of movement for all asylum seekers. If the restriction seems to be necessary it must be proportionate, non-discriminatory and non-arbitrary. Usually lighter forms of restrictions shall be imposed, like: obligation to stay in a certain city or in a certain place or address. Detention shall not be imposed automatically and without just and good reason.

The ethical ground for the restriction of personal freedom is the belief that each country has the right to control the number of persons present on its territory and freely shape the migration policies. It should be underlined however that personal freedom is one of the most fundamental rights, derived from the concept of dignity.
and for that reason can be limited only in exceptional situations. The system of detention shall be though subsidiary, and allowed only if the purpose for detention cannot be achieved in another manner.

The right to personal freedom is secured by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as Poland is part of this treaty, and according to constitutional regulations such international treaties might be implied directly.

Article 5 of the ECHR states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   f) the lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

The Convention allows seizing and detaining an alien under lawful conditions. In the course of ECHR jurisprudence lawfulness is understood as conformity with material law and with the rules of procedure. Detention must also serve directly one of the purposes mentioned in the Article 5(f): deportation or extradition, or the prevention of illegal entry to the territory. We need to remember that according to Polish law the presence of an asylum seeker after submitting application is legal.

To comply with those requirements seizure of an alien will be lawful only if there are grounds to issue order for extradition or deportation and this purpose is to be achieved through detention means only. The reason for detention must be achieved without unjustified delay and the authority appointed for deportation procedures is directly responsible for the observance of this principle. If in any moment of the case it reveals that expulsion is no longer possible or probable the detention is no longer serving the purpose of deportation and shall be abolished (see: Ali vs. Switzerland – the Commission Report 26.2.1997, ECHR). Other verdicts indicate that deportation or extradition procedure must be conducted with proper accuracy and shall not be extended in time.

Each case is subjected for judicial review accessible for a detainee, and conducted in a transparent and non-arbitrary manner (Amuur v. France ECtHR 25.6.1996, Shamsa v. Poland).

Arbitrariness occurs when the law in imprecise which allows for unrestricted use. This may cause different verdicts in similar cases. The law might be also too precise not allowing a court to judge individually. It usually happens when the grounds for detention are strict, do not refer to individual situation of the object, but only to circumstances generally justifying detention imposition, not allowing for the court’s discretion in the scope of the individual reasons. Such law imposes detention in unjustified cases, which leads to severe discrimination. Arbitrariness might also be noticed in practical dimension whenever rules and principles of the procedure are not observed and detention itself not properly justified or rationally grounded. In the case of Jalloh v. The Netherlands, the International Court of Justice ruled that detention becomes arbitrary when there are no reasonable prospects
for successful deportation. Such a situation usually occurs after the first three, maximum four months of detention. The same applies when the national Embassy do not confirm personal data of the detainee.

Detention, especially regarding an asylum seeker must be always imposed with observance of the principle of necessity. The subsidiarity of detention has two dimensions. The first is based on the trust that states shall have to its inhabitants, including asylum seekers. The second imposes the obligation to seek and develop liberty means to control aliens looking for international protection. The UNHCR guidelines on applicable criteria and standards relating to detention of asylum seekers states that an asylum seeker shall be set free unless his attitude is contrary to the prescribed rules or constitutes a threat to national security. Guidelines offer many alternative ways to control aliens such as police supervision, custody, personal warrant or bail, accommodation in reception centers, etc.

Polish migration bills do not meet the above requirements and standards both in legal and practical dimension.

The act on granting protection to aliens within the territory of Poland states in Article 40:

An alien applying for granting the refugee status shall not be detained unless:

1) he/she submits an application for granting the refugee status:
   a) during the border control, not having the right of entry on the territory of the Republic of Poland,
   b) staying on the territory of the Republic of Poland illegally;

2) prior to submission of an application for granting the refugee status he/she:
   a) crossed or attempted to cross the border contrary to the laws,
   b) obtained the decision on obligation to leave the territory of the Republic of Poland or the decision on expulsion;

3) the circumstances referred to in Article 88 sec. 1 of Act of 13 June 2003 of Aliens (grounds for deportation – cit. auth) apply and this fact has occurred after submission of an application for granting the refugee status.

Article 41 regards grounds for imposition detention in certain types of institutions, as there are two means of detention: guarded center for aliens with less severe regulations and arrests for the purpose of expulsion for those who do not conform to those regulations:

With reservation of Article 47 sec. 5 and Article 54 sec. 3, an alien referred to in Article 40 shall be placed in the guarded center or in the arrest for the purpose of expulsion. The arrest for the purpose of expulsion shall be applied if the circumstances determined by the Border Guard indicate that it is necessary for the reason of state security and defense as well as for the public security and policy (original spelling).

Analyzing these regulations it must be underlined that there is no discretion left to the court deciding. In every case that the prerequisites are met seizure and detention is imposed. Such form of the rule violates the principle of subsidiaries and affects the constitutional competences of the courts and its independence in the bal-
ance of powers. It makes detention arbitrary equalizing unequal cases. One of the basic principle of legislation requires elimination of discretion whenever the individual right or liberty is enforced and allowance of discretion in case of sanctions or irrevocable decisions. It may happen, not so rarely, that general principles and sense of justice or even particular individual circumstances of an alien stand against imposition of detention, even if material prerequisites are met. Finally the general rule of setting asylum seekers free, incorporated in Article 40 is consumed by the following exceptions quoted in the subparagraphs of that article.

The construction of the law covers the whole population of asylum seekers with detention threat. As there are less than 800 places in total in detention facilities, and less than 250 in guarded centers the Border Guards must justify on non-legal grounds to whom application for detention is directed. This makes the system arbitrary from the very beginning.

Another important fact is the abuse of grounds justifying detention or its prolongation. In many cases of asylum seekers, their stay in a detention institution is prolonged on the grounds for the illegal migrants, which absolutely infringes the fundamentals of the legal system. Such prolongation is possible whenever deportations were not successfully enforced due to the fault of alien. The prerequisite of fault is interpreted quite freely and justifications are cursory and insufficient. The fault must be understood in criminal law terms, which means in Polish doctrine not conformity with the norm in view of obligation. To present an example, courts always blame aliens for impossibility of personal data conformation by their national Embassies, stating that the alien provided false data, whereas the reasons of that fact might be numerous, such as the general lack of cooperation of the country of origin, governmental policies of such countries supporting emigration, lack of personal records due to infrastructural problems, wars, conflicts or natural disasters.

In the case of an asylum seeker detention prolongation is only possible if the determination authority delivered the negative decision on refugee status within the limit of three months and detention is necessary to issue a final decision in the case. Usually according to law, the determination authority has six month for consideration. Here, the time limit is shortened which prompts the organ to render negative decisions even without proper consideration of the case just to uphold detention. The prolongation and its period shall not be imposed automatically for another 90 days period, but justified to the principle of necessity and serve its purpose. Though, in each case of unjustified delay or lack of activity on behalf of the authority responsible for deporting the alien shall be released. This is not happening in Poland as there is no control over the courts, no transparency and no fair judicial review accessible to asylum seekers, nor to other detainees. The alien is present in court only during the hearing regarding the detention imposition, but has no right for public defense. The asylum seeker is not able to be present during prolongation hearing even on his/her request as there is no possibility to escort him. Non-governmental organizations providing free legal assistance have no legal opportunity to join such a hearing and there is no practice to appoint public defender on request in such cases. It means that an asylum seeker not knowing the language and legal system is unable to defend his rights and the whole process of judicial review is illusive.
The duration of detention, up to 12 months, makes Polish asylum system extremely severe and contrary to Article 32 of Geneva Convention. A year-long deprivation of freedom is perceived by aliens seeking protection as unjustified punishments, sometimes more severe than persecution suffered in countries of origin but still constituting a well-founded fear.

Detention practice, considering also inhumane conditions\textsuperscript{22} in detention facilities, creates one of the major problems within the frames of implementation process and causes tensions in migration community in Poland.

\textbf{Which Standards are Higher?}

Polish administrative procedure, even though adopted in 1960, presents the highest legal standards, especially in the scope of fair process guarantees. There are therefore several aspects of the asylum procedure which present higher standards to the requirements of the Procedures Directive.

\textbf{Access to the Files and Access to Asylum Seekers placed in Detention Areas}

The access to the files of the case is regulated by chapter III of the Code of administrative procedure. It allows the party in the proceedings and his/her representative to access the files and make notes at any stage of the case. Ban on access to files might be imposed only for national security reasons, however it does not concern persons with special certificates that allow access to the classified information.

Additionally upon request of an alien the protocol of an interview is provided. Other certified copies of the files are given only if vital interest of the party was showed. In practical dimension the authorities are cooperative and often provide parties with copies and excerpts from the files.

According to the act on granting protection to aliens within the territory of Poland aliens may freely contact NGOs and UNHCR representatives. Employees of these organizations are allowed to enter detention areas to provide legal, medical or social assistance. The access to the centers is usually enabled upon prior permission given by the authority responsible for each facility. This permission is long-lasting and does not need renewal.

\textsuperscript{22} “The conditions in centers for third country national (detention camps, open centers as well as transit centers and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states”, Contract ref: IP/C/LIBE/IC/2006-181 p. 125-129.
Interview in the Procedure

In each case and each type of the procedure, the determination authority is responsible for conducting a detailed interview with an alien about the grounds of protection and his fears. Any kind of cursory interview would have been contrary to Article 7 and 77 sec. 1 of the Code of administrative procedure. These regulations oblige the administration organ to gather comprehensive evidence and consider it in detail. Such consideration cannot be partial and cannot avoid or omit any detail, fact or circumstance that might be crucial to reveal truth in the case.

The Standard of Unaccompanied Minors Treatment and Custody

Legal capacity in administrative procedure in Poland is admitted to persons who turned 18. The age of asylum seekers is determined through the documents they carry with them or in the framework of their first medical examination - should there be any doubt about their age. Minors receive special accommodation conditions and mental health care. Their procedure is carried out by specially trained persons.

There are a number of special regulations for the reception of unaccompanied minors, such as special demands of the accommodation facilities, the asylum procedure is carried out under observance of special rules, and all measures concerning these procedures are carried out by professionally trained persons.

Under Article 47 of the Act on Granting Protection to Aliens, the asylum authority is allowed to accommodate unaccompanied minors from the age of 13 in accommodation centers for adults. This provision is not in keeping with Article 19 of the Reception Directive, which sets a minimum age of 16 for accommodation in adult centers, but in practice they are placed mostly in the orphanages where the conditions are sufficient.

There are two forms of legal representation for the child: the guardian, representing the child in the asylum procedure and supporting the interests of the child, and the custodian, who takes care of the child. In most cases, custodians are social workers or NGO volunteers. The interview and other parts of the procedure that require the presence of the minor are conducted with presence of guardian, custodian, psychologist, social worker and a trusted person named by the alien.

Two Instances of Administrative Procedures

The competent authority for the entire asylum procedure is (CAO, org. Szef UdsC) (Chief of the Office for Aliens), which is run under the Ministry of the Interior Affairs and Administration.

The appeal organ is an independent quasi-judicial body a Refugee Council (R.C – org. RdU) in which at least half of the members must have a relevant legal qualification. Following these two instances, the judicial review is held by the Voivodship Administrative Court and the Supreme Administrative Court; two legal in-
stances to which asylum seekers can have recourse. The second one is an extraordi-
inary appeal that must be presented by barrister or counselor.

The appeal from the decision on refusal to grant refugee status needs to be sub-
mitted within 14 days from the date of decision delivery. It does not need any jus-
tification, just statement of disagreement. The alien does not need to provide any
proof or evidence, which he did not carry with himself, which he is obliged to re-
veal and might be totally passive. The burden of proof is in Polish administrative
procedure put on authority. According to Article 7 and 77 sec. 1 it has a legal obli-
gation to gather comprehensive evidence and consider it in details. Such considera-
tions cannot be partial and cannot avoid or omit any detail, fact or circumstance
that may be crucial to reveal the truth in the case. The written justification must
give reasons in the matter of law and in the matter of facts, present discussion on
each evidence obtained and submitted and confront it with the rules of logics, per-
sonal experience and knowledge.

Upon receiving a negative decision from the Refugee Board, the applicant can
submit a complaint within 30 days from the day of its delivery to the Voivodship
Administrative Court in Warsaw. The claim is put through the Refugee Board.
The asylum seeker may complain errors in facts or errors in law. The judicial re-
view is free of charge only if such application was submitted together with the
claim. Request for free of charge judicial review need to be submitted on a form
and is almost always provided.

The applicant can appeal the Voivodship Administrative Court’s verdict to the
Supreme Administrative Court within 30 days from the delivery of the court’s or-
der. The appeal must be drafted by an attorney or counselor who acts on behalf of
the applicant.

The extraordinary claim shall explain what legal rules or provisions were vio-
lated by the proceeding Court (not administrative organs) in the course of the pro-
cedure or in the matter of law interpretation. Both Courts determine in the course
of proceedings if the decision conforms to the law. The appellant is called to appear
but attendance is not mandatory. The Court can uphold the decision or overturn
it-in this situation, the case is reversed for further examination. This may cause a
problem, especially considering the fact that in practice the level of administrative
procedure in Poland is very poor. For that reason Courts rarely decide on facts.
Usually decisions are overturned due to errors in proceedings, mostly law in-
fringements in the evidence gathering process. The poor quality of administration
and limiting the power of courts to cassation may cause endless legal disputes with-
out any essential output.

Other Better Standards

The Polish government did not introduce national lists of safe countries of origin,
nor use the safe third country concept. There are also no transit zones or border
procedures. Such institutions are also absent from the project of amendments that
was presented to the previous Parliament.
Summary

Summarizing the issues discussed in this chapter we are very skeptical as to the course and directions of the implementation process, as well as the future shape of the asylum, or even migration policy in Poland. The most positive factor is the legal model of administrative procedure which in Poland secures for now all basic principles of the fair procedure. Unfortunately the code of administrative procedure is implemented only in those stages where particular alien’s law regulations are absent. This means that only wise implementation of EU asylum law will preserve the basic principles of the Geneva Convention. The Government’s belief that only minimal standards shall be introduced in Poland raises serious concerns. Combined with a lack of effective legal aid, tightened access to information and broadly used detention, this results in Poland becoming one of the most hostile countries towards asylum seekers. For these reasons secondary movement is an indispensable effect of the protection system in Poland.
1. Legal Context and Legal Effects of the Processes Directive

The Procedures Directive1 (‘PD’) is the most controversial of the post-Amsterdam asylum measures. The tortuous negotiations among 14 national governments,2 each with veto powers, led to lowest-common denominator lawmaking at its worst. National governments vied to ensure that their domestic systems remained unaffected by the EC measure3 and jealously guarded their discretion in procedural matters.4 I have previously described the PD in the following terms:

‘[T]he variety of procedures permitted reflects an assumption that it is possible to determine the cogency of claims on the basis of generalisations or cursory examination. This runs counter to any informed context-sensitive understanding of the asylum process. In the worst cases under the Procedures Directive, such as the supersafe third country provisions, the generalised assessment entirely substitutes for any individual process. In the Directive, we see the result of a legislative process which should have established clear minimal guarantees, but instead cast a negotiated settlement in law, apparently reinvesting national administra-

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2 The then 15 Member State governments of the EC, minus Denmark, which does not participate in Title IV EC. The UK exercised its Title IV EC opt-in to participate in the negotiations.


Although the PD purports to set down only minimum standards, it does not set down a clear set of minimal guarantees. Rather, it tends either to confer broad discretion on the Member States, leaving them much apparent leeway to do as they please, or in those instances where it does set out discernable rights for asylum seekers, subjects these to various, often sweeping, exceptions. As a result, vigilance at the national implementation stage is crucial, to ensure that the PD does not provide a pretext for reduction in standards. Usually, when the EC enacts minimum standards legislation, it includes a standstill clause, explicitly precluding Member States from lowering their domestic standards. Such a clause is notably absent in the PD. Nonetheless, the logic of minimum standards would suggest that a reduction of domestic standards would at least be inappropriate.

Legally, the apparent discretion conferred by the PD is limited by fundamental rights law, in particular by the ECHR and the general principles of EC law. In particular, we must recall the ruling of the ECJ in the Family Reunification case, emphasising that Member States are bound to respect fundamental rights in their implementation and application of EC directives, and that these directives’ validity depends on their being amenable to be so implemented. The ECJ stated that,

‘a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.’

ECHR standards are binding in the implementation and application of the PD. In all areas where they exercise discretion, Member States must ensure compliance

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6 The EC’s competence under Title IV EC is confined to establishing minimum standards. See also, Article 5 and Recital 7 PD.


with the ECtHR, even if they are acting within the scope of EC law. ECHR standards are also applied by the ECJ, and inform the development of the general principles of EC law. The ECtHR has set out guidelines for the risk appraisal under Article 3 ECHR, in cases such as Vilvarajah v UK and Hatami v Sweden. Recently in Salah Sheekh, the ECtHR found that the Dutch authorities had erred in their assessment under Article 3 ECHR, as the applicant, being a member of a minority ethnic group, would not be able to obtain protection from a clan in one of the ‘relatively safe’ areas in his country of origin, Somalia. As Gyulai notes, Salah Sheekh marks the culmination of an increasing tendency of the ECtHR to set assessment standards in explicit terms.

The application of EC rules also brings with it the general principles of EC law, including procedural fairness and the principle of proportionality. These well-established and entrenched principles of EC law guarantee inter alia a right to a hearing, a reasoned decision and effective judicial protection. Elsewhere I have illustrated how the PD must be re-read in light of these general principles. We face a period of prolonged legal uncertainty as the implications of the general principles are teased out in the judicial arena.

We should also recall the crucial role of UK judges in shaping and safeguarding asylum procedures. Few aspects of asylum procedures have been untouched by judicial intervention. While an exhaustive treatment of this topic is beyond the scope of this chapter, I do allude to select national court rulings. Thus, the chapter not only gives an account of the legislative transposition, but also seeks to give a sense of the domestic administrative law context in which the PD will be implemented, as well as the potential for fruitful cross-fertilisation between domestic administrative law and the general principles of EC law going forward.

As well as recalling the general principles that should shape our interpretation of the PD, we must also bear in mind the various doctrines establishing the legal effects of directives in the domestic legal system. Once the implementation date is passed, provisions of EC directives may produce direct and indirect effect in the domestic legal system. Direct effect requires national judges to treat sufficiently clear provisions of EC directives as creating rights individuals may invoke against

15 Above n 5.
the Member State and public authorities.\textsuperscript{17} Indirect effect requires national judges to do all in their power to interpret national law in line with EC directives. This duty of harmonious interpretation applies to all national law, not just implementation measures themselves.\textsuperscript{18} Indirect effect has the potential to iron out discrepancies between national law and EC law, within certain constraints. It also means that the letter of the new UK rules discussed in this chapter may ultimately be less important than the PD and its future judicial interpretation. Furthermore, where provisions of a directive embody general principles of EC law, some enhanced legal effects may be observed.\textsuperscript{19} In implementing directives, Member States must provide effective remedies,\textsuperscript{20} and if a Directive is not implemented or implemented improperly, a remedy in damages may be available against the Member State.\textsuperscript{21} Ultimately, where national law conflicts with a directive, the doctrine of supremacy requires national judges to disapply the national law.\textsuperscript{22}

At present many interpretative controversies await resolution, as preliminary references are out of reach of most decision-making tribunals and national courts, as only national courts of final instance may currently make references on EC asylum matters.\textsuperscript{23} In addition, in the UK attempts of questionable legality have been made to deter national immigration tribunals from making references on other non-Title IV issues of EC law, including pertaining to EU Citizenship. The Asylum and Immigration Tribunal (‘AIT’) issued a practice direction stating that only its President or Deputy President, or a group including one of them, can make preliminary reference the ECJ under Article 234 EC,\textsuperscript{24} notwithstanding that all members constitute ‘tribunals’ within that article’s meaning.\textsuperscript{25} For persons seeking asylum, accessing decisive rulings is even more costly and protracted than it would otherwise be.


\textsuperscript{18} Case C-106/89 \textit{Marleasing SA v CIA} [1990] ECR I-4135; Case C-212/04 \textit{Ademeler} [2006] ECR I-6057.


\textsuperscript{20} Case 14/83 \textit{Von Colson} [1984] ECR 1891.


\textsuperscript{22} Case 6/64 \textit{Costa v ENEL} [1964] ECR 585.

\textsuperscript{23} Article 68 EC. The Treaty of Lisbon (Reform Treaty) would change this, if it enters into force. See also new urgent reference procedure, Information Note [2008] OJ C64/1.


\textsuperscript{25} Applying the criteria developed by the ECJ in Case 246/80 \textit{Boekmeulen v Huisarts Registratie Commissie} [1981] ECR 2311 and subsequent rulings.
2. Process and means of implementation

Concerning the UK domestic process, the PD’s long negotiations allowed for domestic parliamentary scrutiny of the various drafts. In the UK, drafts were debated on the floor of the House of Commons and twice examined by the House of Lords European Committee. By the time it came to the implementation stage then, stakeholders had already voiced serious criticisms. The Border & Immigration Agency ('BIA') published a consultative Implementation Paper on the transposition of the PD. Although it gave only 6 weeks for submissions, many stakeholders responded. The Implementation Paper rationalises that '[d]ue to the technical nature of implementation and the small/limited cadre of interest it would generate, a shorter consultation period with the key stakeholders was agreed to be sufficient'.

Implementation was via secondary legislation. Under the European Communities Act 1972, EC directives may usually be implemented by means of secondary legislation (i.e. statutory instrument), which may even amend existing primary legislation (i.e. statute) under a so-called 'prospective Henry VIII clause'. In essence, such clauses permit the executive or a member thereof to amend parliamentary enactments. The UK chose to implement the PD by way of the Asylum (Procedures) Regulations 2007. These regulations amend the provisions of the Nationality, Immigration and Asylum Act 2002 on safe country of origin ('SCO'), discussed in Part 5 below. Two other procedural changes are contained in the Regulations, concerning the right to an interpreter and the provision of written notice of withdrawal of status at appeal. In addition to these changes to the statutory scheme, the


27 See, for example, ILPA, above n 1.

28 Above n 26.


30 Implementation Paper, above n 26, para. 7.6.

31 Section 2 European Communities Act 1972.


UK also brought in changes to the rules governing first-instance asylum decision-making, the Immigration Rules, discussed in Part 3 below. The AIT is the main appellate body, since a single tier appellate structure was introduced by the Asylum and Immigration (Treatment of Claimants etc) Act 2004. Changes were also made to its rules and those governing the Special Immigration Appeals Commission (‘SIAC’). Both sets of rules also have the status of binding delegated legislation, drafted by the Lord Chancellor. SIAC deals with a small proportion of asylum appeals, mainly where issues of national security arise. As the bulk of the procedural rules in the PD only apply at first instance, the changes to the appeals procedures were less significant than those to the Immigration Rules. They deal with the right to an interpreter in appeal and some other circumstances and the entitlement to have an appeal heard within a reasonable time.

The legally binding force of all these new UK rules is important, as although the EC Treaty permits Member States a ‘choice of form and methods’ as to how Directives are implemented, the ECJ’s caselaw requires the implementation to be in legally binding form. The Implementation Paper acknowledges that many of the rule changes are required to give statutory effect to current practices, in order to meet this requirement. Consequently, there has been an overall increase in the practices now set out as binding rules in delegated legislation. However, there is also a range of soft law instruments used in the asylum determination process. These include ‘Asylum Policy Instructions’, ‘Operational Guidance Notes’ and ‘Asylum Instructions’. It is not usually permissible as a matter of EC law to implement Directives by means of non-binding administrative guidance, so it would also be legally dubious to leave important aspects of the PD for clarification by soft law means.

35 The post of Lord Chancellor is currently fused with that of Secretary of State for Justice. See further <http://www.justice.gov.uk/about/ministers.htm>.
36 For full text of the Act, go to <www.opsi.gov.uk/acts/acts1997/ukpga_19970068_en_1#l1g8>.
37 Section 97 Nationality, Immigration and Asylum Act 2002.
38 Article 10(2) PD provides that ‘With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones referred to in paragraph 1(b), (c) and (d) of this Article.’
40 Article 249 EC.
43 Available at <www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>. 116
Before we proceed to examine the new Immigration Rules implementing the PD, a quick overview of other recent and on-going reforms in the asylum process may be useful. Since 2003, the UNHCR Quality Initiative has been underway, aiming at improving UK asylum determination processes. It entails UNHCR representatives working with first-instance asylum adjudicators, and recommending reforms, some of which have been implemented. Of particular interest at present is a pilot project to enhance quality by focusing resources, including legal aid, at the first instance stage. First assessments of this ‘Solihull Pilot’ are promising, although it remains to be formally evaluated. From April 2007, a ‘New Asylum Model’ (‘NAM’) was introduced in the UK to deal with asylum claims lodged after that date. ‘NAM case owners’ take decisions on behalf of the Secretary of State for the Home Office. Case-ownership connotes the continuous responsibility of one official for the determination. The NAM system is not a unified one, however. For instance, there is a controversial detained fast-track into which some claims are diverted. Thus, the asylum process in the UK is far from static. Changes are prompted mainly by domestic political concerns, rather than EC harmonisation. However, the EC level provides the new legal context in which these reforms must take effect.

3. Changes to the Immigration Rules

The Immigration Rules are adopted under the Immigration Act 1971. The Statement of Changes in Immigration Rules HC 82 is the key document to consult to understand the impact of the PD. As well the changes themselves, it also contains an Explanatory Memorandum and a 30-page Transposition Note. The Transposition Note goes through the articles of the PD one by one and explains the UK’s response thereto. A consolidated version of the Immigration Rules is now also available online.

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45 The UNHCR reports and governmental responses thereto are now on the BIA website <www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/Reports/unhcrreports/>.


47 For a critique, see BiD Working Against the Clock: inadequacy and injustice in the fast track system (July 2006).

48 Section 3(2) Immigration Act 1971 provides that the Secretary of State shall ‘from time to time (and as soon as may be) lay before Parliament statements of the rules or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act …’.

available. What follows is necessarily a selective rather than an exhaustive account of the changes.

**Articles 2, 3, 4, 6 PD – Scope of the Rule Changes**

The Home Secretary, in the form of NAM case-owners acting on his/her behalf, is the ‘responsible authority’ for the purposes of the PD. However, some types of decisions are in practice taken by immigration officials, rather than these trained case-owners. For instance, the Refugee Council points out that entry decisions concerning those entering from STCs are in practice taken by immigration officials.

The PD applies to ‘applications for asylum’ made in the territory, including at the border. It allows Member States to choose whether to apply the Directive to subsidiary protection applications. The UK has chosen to apply the same Rules to applications for both asylum and ‘humanitarian protection’. However, the scope of subsidiary protection under the Qualification Directive (‘QD’) remains to be clarified, in particular the meaning of Article 15 QD on ‘serious harm’. A pre-

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51 Article 4 PD.
52 Above n 26.
53 Article 2(b) PD.
54 Article 3(3) and 3(4) PD.
55 Rule 326.
56 According to Rule 339C, ‘A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
(ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
(iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
(iv) he is not excluded from a grant of humanitarian protection.
Serious harm consists of:
(i) the death penalty or execution;
(ii) unlawful killing;
(iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or
(iv) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’
58 Article 15 QD defines ‘serious harm’ as:
(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
liminary reference has already been made to the ECJ concerning the meaning of Article 15(c) on armed conflict. 58 On 25 March 2008, the AIT gave an extensive ruling, interpreting Article 15(c) in a test case on Iraqis. 59

Concerning Article 15(b) QD, the UK government and some commentators 60 take the view that the phrase 'in the country of origin' 61 means that subsidiary protection does not include Article 3 ECHR cases 62 concerning the absence of adequate health care in the country of origin. However, it remains to be seen whether this interpretation is correct.

Article 6(2) PD is implemented by Rule 327A, which states that 'Every person has the right to make an application for asylum on his own behalf'. The qualifying provision, Article 6(3) is implemented by Rule 349, 63 in a manner insufficiently attentive to the need to treat dependents separately where they may have separate claims, and in particular to interview them separately in particular where gender sensitivity so demands.

Article 7 PD – Right to Remain

Article 7 provides that the right to remain in the Member State lasts only until the first instance decision is made, rather than until all appeals are exhausted. The current position in UK law is that appeals do have suspensive effect, unless the claim is certified as manifestly unfounded. However, the certification practices appear to be in tension with the caselaw of the ECtHR on effective remedies, as discussed in Part 7 below.

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59 QD, KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023.
60 See further, H. Battjes, Human Rights Protection in the EU’s Legal Framework: The Relationship between the European Court of Justice and the European Court of Human Rights, Paper circulated at the ILPA/IARLJ Seminar on the Qualification Directive (26 June 2006), p. 6. He argues: '[T]he expression “in the country of origin” excludes humanitarian cases as meant in D v UK from the definition.’
61 The Immigration Rules refer not to ‘in the country of origin’ but the ‘country of return.’ See above n 55.
62 The ECtHR found an Article 3 violation in these circumstances, highlighting the ‘very exceptional circumstances’ of the cases. D v UK (1997) 24 EHRR 425. See also Application No 30930/96, BB v France, 7 September 1998. For UK House of Lords consideration of this caselaw, see N v Secretary of State for the Home Office [2005] UKHL 31.
63 The lengthy and detailed Rule 349 refers to the ‘spouse, civil partner, unmarried or same-sex partner, or minor child accompanying a principal applicant’, who may be dealt with in a joint application under certain conditions and with certain consequences.
CATHRYN COSTELLO

Article 8 PD – Requirements for the Examination

Rule 339MA copied out Article 8(1), without its qualifying clause, and so provides that ‘Applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.’

The qualitative requirements in Article 8(2) PD have prompted three additions to the Rules. The core requirement of Article 8(2)(a) that decisions be taken ‘individually, objectively and impartially’ is reflected in Rule 339J.

Concerning country of origin information, Article 8(2)(b) is reflected in Rule 339JA, which adds that the information may be provided to decision-makers ‘in the form of a consolidated country information report’. This phrase reflects the practice in the UK of circulating country of origin information to decision-makers in the form of Operational Guidance Notes. A recent study has demonstrated their controversial content, with the Notes on Iraq diverging starkly from the view of UNHCR.64 Given that quality standards for country of origin information are now an EC legal requirement,65 appropriate institutional changes are warranted. For example, both ILPA and the Refugee Council urge greater scrutiny of the Operational Guidance Notes on country of origin information.66

Rule 339HA reflects the requirement in Article 8(2)(c) concerning decision-makers knowledge of ‘relevant standards applicable in the field of asylum and refugee law’.

Overall the Rules contain a relatively faithful transposition of Article 8.

However, there remains a tension between Article 8 PD and section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. Article 4 QD should also be borne in mind, as it sets out important rules on evidential assessment. Noll argues that these will ‘exceed present practice in the Member States’67 and represent a ‘unique contribution to the debate on assessing evidence’.68 Section 8 requires decision-makers to draw negative credibility inferences from a range of uncooperative behaviour on the part of asylum-seekers, including the failure to provide documentation. As Thomas notes, ‘the intention is that the provision will

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64 M. Sperl, ‘Fortress Europe and the Iraqi ‘intruders’: Iraqi asylum-seekers and the EU, 2003-2007’, (2007) New Issues in Refugee Research Research Paper No 144. While UNHCR took the view that in general, there was no internal flight alternative there, the Home Office maintained that ‘there is general freedom of movement within the country and it is unlikely that internal relocation would be unduly harsh for men, and women with partners or relatives.’

65 Gyulai, above n 14.

66 ILPA recommends that it be subject to also be subjected to the scrutiny of the Advisory Panel on country of origin information. ILPA, above n 29, p. 20. Similarly the Refugee Council recommends ‘independent scrutiny of these important documents to ensure that such important internal guidance to Case Owners meets the requirements of the Directive. This should also cover country of origin information collected on “fact-finding” missions conducted by the Home Office.’ Refugee Council, above n 29, 4.


68 Ibid. at 297.
induce claimants to co-operate and be honest in the determination of their claim’.69 However, the IAT has blunted the section’s impact, by insisting that the distortion of evidential assessment resulting from the section must be kept to a minimum.70 There is an ‘Asylum Policy Instruction’ dealing with credibility assessment and establishing the material facts of an asylum claim, which elaborates on the application of section 8.71 It would seem timely to revisit section 8, in order to avoid inevitable judicial challenges thereto.

Article 9 PD – Requirements for a Decision

Article 9 PD requires that decisions are in writing, and that negative decisions generally contain ‘the reasons in fact and in law … and information on how to challenge a negative decision’.72 As regards reasoned decisions, an addition to Rule 336 provides that ‘Where an application for asylum is refused, the reasons in fact and law shall be stated in the decision and information provided in writing on how to challenge the decision.’ This requirement reflects a general principle of EC law, which should be borne in mind in interpreting these provisions.73

Article 9(2) PD provides that ‘Member States need not provide information on how to challenge a negative decision in writing where the applicant has been informed at an earlier stage either in writing or by electronic means accessible to the applicant of how to challenge such a decision.’74 Article 10(1)(e) PD that applicants ‘shall be informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 9(2)’. The UK response in the new Rule 333:

‘Written notice of decisions on applications for asylum shall be given in reasonable time. Where the applicant is legally represented, notice may instead be given to the representative. Where the applicant has no legal representative and free legal assistance is not available, he shall be informed of the decision on the application for asylum and, if the application is rejected, how to challenge the decision, in a language that he may reasonably be supposed to understand.’

In failing to enshrine a general obligation to inform all asylum seekers of the means of challenge, the UK has exploited every last drop of discretion afforded by the PD, and failed to introduce a clear workable rule.

69 Thomas, above n 77, p. 93.
70 Ibid., p. 95, citing SM v Secretary of State for the Home Department (Section 8: Judge’s Process) Iran [2005] UKIAT00116, para 8.
71 Above n 43.
72 Article 9(1) and 9(2) first indent, PD.
73 Costello, above n 5, p. 182-184.
74 Article 9(2) third indent PD.
Article 10 PD – Guarantees for Applicants

Article 10(1)(a) on information for the asylum applicant is substantially reflected in Rule 357A. However, on interpreters, Rule 339ND reflects Article 10(1)(b) and part of Article 13(3)(b), providing that the Secretary of State ‘shall provide at public expense an interpreter for the purpose of allowing the applicant to submit his case, wherever necessary. The Secretary of State shall select an interpreter who can ensure appropriate communication between the applicant and the representative of the Secretary of State who conducts the interview’. Criticisms have been leveled at this rule for failure to specify who shall decide whether the communication is appropriate.75

Article 12 PD – Personal Interviews

Rule 339NA implements Article 12 PD on interviews. Unfortunately, the Rule also replicates the most controversial provisions of Article 23(4) PD on dispensing with asylum interviews. Article 23(4)(a) PD is reflected in 339NA(iii) concerning the applicant’s submission of only irrelevant/minimally relevant facts. Article 23(4)(g) PD is substantially replicated in Rule 339NA(iv), apparently allowing the interview to be dispensed with where ‘the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC’. As I have argued elsewhere, the apparent discretion to dispense with interviews is constrained by the general principle of EC law on the right to be heard.76 Nonetheless, the UK’s direct copying out of the PD’s most controversial provisions is regrettable. The Rules do not incorporate Article 12(3), which states that the absence of an interview should not prevent a decision being taken.

Article 13 PD – Requirements for a Personal Interview

Rule 339NB reflects Article 13(1) and (2) PD on attendance at and confidentiality of interviews. Interviews shall normally take place without family members present, unless the Secretary of State thinks it is necessary for an appropriate examination that they be present. Again, it would have been desirable, particular in light of the importance of gender-sensitisation of the asylum process, to establish a stronger duty to interview individual family members, in particular women.

There are some discrepancies in the transposition of Article 13(3) PD, which provides:

‘Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

75 Refugee Council, above n 29, p. 4-5.
76 Costello, above n 5, p. 180-182.
(a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability, insofar as it is possible to do so; and
(b) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate.

In contrast, according to Rule 339HA ‘The Secretary of State shall ensure that the personnel examining applications for asylum and taking decisions on his behalf have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.’ Clearly Article 13(3)(a) imposes a more onerous obligation. Similarly, Article 13(3)(b) PD appears to impose a more stringent notion of effective communication than Rule 339ND (discussed above in relation to Article 10 PD).

**Article 14 PD – Form of Decisions**

Article 14(1) PD requires that the report of the asylum interview contain ‘at least the essential information regarding the application’. Rule 339 NC aims to give effect to Article 14, but entails a reduction of current UK practice, which is to provide a copy of the complete interview record. Although it appears the intention is to maintain the current practice, the failure to codify it is regrettable.

**Article 15 PD – Legal Assistance & Aid**

Article 15(1) PD on legal assistance is reflected in Rule 333B. Article 15(2) provides a right to legal aid only at the appeal stage. In the UK the legal aid rules have recently changed payment in asylum cases to a fixed fee basis, and introduced a merits test. In sharp contrast to the general erosion of access to legal aid, the Solihull Pilot provides an example of good practice, with emphasis on early access to legal advice to enhance the quality of decision-making. In order to prompt wider adoption of this good practice, it may be worth considering whether there is an EC fundamental right to legal aid in some circumstances.

**Article 17 PD – Unaccompanied Minors**

Article 17 PD deals with guarantees for unaccompanied minors. It should be read in light of Article 19 of the Reception Conditions Directive, which requires legal

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77 ILPA, above n 29, p. 10.
79 Costello, above n 5, p. 188-189.
guardianship measures for unaccompanied minors. The UK has not implemented this provision. However, the Rules giving effect to Article 17 envisage unaccompanied minors making application on their own behalf, with legal assistance or representation, so a tension emerges.

Article 17(5) controversially allows medical examinations to be used to determine age, under certain conditions. This use of the term ‘determine’ is misleading, given the wide margin of error in such medical examination. While the Rules have not been amended to reflect Article 17(5), in practice the UK, authorities frequently dispute the age of asylum applications, and the use of medical evidence, in particular X-rays, for age assessment has been condemned as unreliable, contrary to medical ethics and a violation of human rights.

Article 17(6) provides that ‘The best interests of the child shall be a primary consideration for Member States when implementing this Article.’ The UK chose not to incorporate this provision, as it claims that other domestic procedures ensure the welfare of children. The BIA Implementation Paper also refers to the UK’s general reservation to the UN Convention on the Rights of the Child in its comment on this article. The lawfulness of this reservation is doubtful, and in any event the ‘best interests’ standard also forms part of the general principles of EC law, and so cannot be avoided by national authorities applying the PD.

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80 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18. Article 19(1) provides ‘Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.’

81 See for example, Rule 352ZA:

‘The Secretary of State shall as soon as possible after an unaccompanied child makes an application for asylum take measures to ensure that a representative represents and/or assists the unaccompanied child with respect to the examination of the application and ensure that the representative is given the opportunity to inform the unaccompanied child about the meaning and possible consequences of the interview and, where appropriate, how to prepare himself for the interview. The representative shall have the right to be present at the interview and ask questions and make comments in the interview, within the framework set by the interviewer.’

82 Article 17(5) PD.

83 See in particular, ILPA/H. Crawley, When is a child not a child? Asylum, age disputes and the process of age assessment (May 2007). The report runs to 225 pages and contains detailed empirical evidence of poor age determination practices.

84 Implementation Paper, above n 26, para. 79.

85 ILPA, above n 29, p. 11-12.

86 Case C-540/03 Parliament v Council, above n 9.
4. **Safe Country of Origin**

a. **The European Common List of SCOs**

The PD establishes a procedure to establish a common list of countries which all Member States must treat as SCO.\(^\text{87}\) The effect of such a list would have to be tempered by the fact that the PD may only establish minimum, rather than common, standards. Originally it was foreseen that the common list would be adopted with the Directive, as an Annex thereto.\(^\text{88}\) However, it proved impossible to reach the requisite unanimous agreement on the list, so the Directive now foresees later adoption of a common list.\(^\text{89}\) At least two attempts to agree such a list have failed.\(^\text{90}\) The more recent, in June 2006, floundered not only due to the absence of agreement in the Council, but also due to differences among the College of Commissioners.\(^\text{91}\)

Moreover, the derivate legal base in the PD for the adoption of this common list is legally dubious, and has prompted the Parliament’s legal challenge.\(^\text{92}\) The Parliament’s main argument is that the procedure set out for agreeing common lists of STCs and SCOs should require co-decision, rather than mere consultation. On 27 September 2007, AG Maduro gave an Opinion accepting the Parliament’s arguments, and urging the ECJ partially to annul the PD. For now, it seems unlikely that any common list will be adopted. Nonetheless, the UK Regulations contain a new Section 94A, which would permit the UK to rely on this common list, were it to be adopted.\(^\text{93}\)

A further problem with common SCO designation is that an entire country must be deemed safe for its entire population. It is not possible to make group or geographically-specific designations, unlike under the UK’s domestic list.\(^\text{94}\) As a re-

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\(^{87}\) Article 29(1) PD.


\(^{91}\) Although the issue appears set to reappear on the agenda. See further, ‘Frattini set to come up with longer list of ‘safe’ countries’ EU Observer, 2 June 2006, available at http://euobserver.com/9/21764.


\(^{93}\) Asylum (Procedures) Regulations 2007, above n 33.

\(^{94}\) Section 27 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 added the following new sections to Section 94 of the Nationality, Immigration and Asylum Act 2002:

> “(5A) If the Secretary of State is satisfied that the statements in subsection (5) (a) and (b) are true of a State or part of a State in relation to a description of person, an order under subsection (5) may add the State or part to the list in subsection (4) in respect of that description of person.

> (5B) Where a State or part of a State is added to the list in subsection (4) in respect of a description of person, subsection (3) shall have effect in relation to a claimant only if the Secre-
sult, the UK would seem to prefer to maintain its own more context-sensitive list, as is explicitly permitted under the Procedures Directive.95

b. UK SCO

As regards the application of SCO in general, the PD fails to set out clear requirements concerning the examination of whether the particular country is safe for the individual applicant.96 The Recitals display considerable ambivalence on this point,97 with the text referring to the applicant submitting ‘serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances’.98

However, in the UK, there is already caselaw restricting the government’s ability both to designate countries as ‘safe’ and to apply SCO in individual cases. For example, the designation of Pakistan as a SCO was struck down as ‘irrational’ in light of the evidence about the treatment of women and Ahmadis in that country.99 In contrast however, the inclusion of India on the UK White List was upheld, on the basis that the reference to ‘in general’ in the legislation meant that persecution of one particular group did not preclude SCO designation.100 The court did however also emphasise the importance of each individual case being decided on its merits.101

95 Article 30(1) PD provides: ‘Without prejudice to Article 29, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum. This may include the designation of part of a country as safe where the conditions set out in Annex II are fulfilled in relation to that part.’

96 Article 31(1) PD.

97 Recital 21 PD acknowledges that SCO designation ‘cannot establish an absolute guarantee of safety for nationals of that country.’ However, Recital 19 PD refers to the ‘rebuttable presumption of the safety’ of the SCO and Recital 17 PD states that Member States should be able to presume safety for a particular applicant ‘unless he/she presents serious counter-indications.’

98 Article 31(1) PD.


100 Under the Asylum and Immigration Appeals Act 1993 an expedited process with limited rights of appeal could be applied to asylum applicants coming from countries where ‘in general no serious risk of persecution’ existed.

101 R (Balwinder Singh) v SSHD and Special Adjudicator [2001] EWHC Admin 925.
Despite these constraints, in practice SCO is used increasingly, and there is a clear procedural deterioration evident from the 1993 Asylum and Immigration Appeals Act to the 2000 Nationality Immigration and Asylum Act. Subsequently a new UK scheme was set up to ‘super fast-track’ applicants from certain countries, applying a two–day time limit.

As mentioned above, the Asylum (Procedures) Regulations 2007 amend Section 94 of the Nationality, Immigration and Asylum Act 2002, in order to bring it in line with Article 30(4) and (5) PD, which provide:

4. In assessing whether a country is a safe country of origin in accordance with paragraphs 2 and 3, Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned.

5. The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations.’

Old Section 94(5) allowed the Secretary of State to add to the SCO list if satisfied that:

‘(a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
(b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom’s obligations under the Human Rights Convention.’

The 2007 Regulations insert a new Section 5(D), concerning the conditions for designating SCOs.

‘(5D) In deciding whether the statements in subsection (5) (a) and (b) are true of a State or part of a State, the Secretary of State –
(a) shall have regard to all the circumstances of the State or part (including its laws and how they are applied), and
(b) shall have regard to information from any appropriate source (including other member States and international organisations).’

While it is possible to interpret 74(5D)(a) as broadly in line with Article 30(4), Article 30(5) imposes a more onerous burden that Section 74(5D)(b). The Directive requires ‘a range of sources, including...’ while the UK Regulations refer to ‘any appropriate source’ in the singular. The former spells out a range to include named

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5. Safe Third Country

The PD contains three variations of STC rules, first country of asylum (‘FCA’), STC simpliciter and supersafe TC. It also permits Dublin cases to be treated as ‘inadmissible’. The supersafe third country system presupposes that the EU will adopt a common list of such countries. However, for the reasons outlined in the relation to SCO, for now, it seems unlikely that any common list will be adopted. Moreover, even if a common list were in place, its operation in the UK would create tensions in light of judicial rulings on STC.

Pertaining to STC in the UK, Rule 345 (2A) requires reasons to be given. Otherwise the UK rules on STC remain textually the same. However, to understand the UK context, it is crucial to bear in mind the existing constraints placed by the judiciary on the use of STC and Dublin removals. The ECtHR case of TI v UK will be familiar to most readers, where the Strasbourg court permitted a Dublin removal from the UK to Germany, but in so doing emphasised that states remain responsible for ensuring that such transfers (be they Dublin transfers within the EU or STC transfers to third countries) do not violate Convention rights. Based on the TI precedent, the UK courts in Ex p Adan and Aitseguer precluded Dublin removals, when onward removal to unsafe countries was likely.

This caselaw prompted a legislative response, namely the introduction of an irrebuttable statutory presumption that EU Member States were ‘safe’ for the purposes of return, thus precluding judicial enquiry into whether those states would provide effective protection. Most recently, however, the UK High Court in

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104 Article 26 PD.
105 Article 27 PD.
106 Article 36 PD. The practice may be applied either where the Council has agreed a common list of such supersafe countries (Article 36(3)) or in the absence of such a list, Member States may maintain their own in force (Article 36(7).) For an analysis and critique of all three, see C. Costello, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’, (2005) European Journal of Migration and Law, p. 30.
107 Article 25(1) PD.
110 Immigration and Asylum Act 1999, section 11(1). As Thomas notes, ‘The effect of the 1999 Act has been to nullify the effect of Adan’, citing cases R (on the application of Samer and Richt) v Secretary of State for the Home Department [2001] EWHC Admin 545; Ibrahim v Secretary of State for the Home Department [2001] ImmAR 430; R v Secretary of State for the Home Department ex p Hatim [2001] EWHC Admin 574; R v Secretary of State for the Home Department ex p
Nasseri\textsuperscript{111} declared that this statutory provision was incompatible with Article 3 ECHR.\textsuperscript{112} A ‘declaration of incompatibility’ is the peculiar remedy under the Human Rights Act 1998, connoting that it is not possible for the court to reinterpret the impugned provision in line with the UK’s ECHR obligations. The declaration has no legal effect, and leaves it to Parliament or indeed the executive to amend the legislation. If \textit{Nasseri} were decided on the basis of the EC general principles of law though, a UK judge would be empowered to provide a stronger remedy of disapplication of the statutory provision, rather than mere declaration of incompatibility.\textsuperscript{113}

In the Implementation Paper, the BIA claimed that the PD permits the use of irrebuttable statutory presumption.\textsuperscript{114} However, a more contextual reading of Article 27 PD suggests otherwise.\textsuperscript{115} The PD requires Member States to set out ‘rules on methodology’ to determine whether STC presumptions apply to ‘a particular country or to a particular applicant’.\textsuperscript{116} These rules must be:

\begin{quote}
'[I]n accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.'\textsuperscript{117}
\end{quote}

Although this rule affords some discretion to the Member States, it must also be read in line with the EC general principles.\textsuperscript{118}

The Original Proposal for the PD required that the applicant have a ‘connection or close links’ with the country or ‘has had the opportunity during a previous stay in that country to avail himself of the protection of the authorities’.\textsuperscript{119} However, the final version of the PD merely requires national law to set out ‘rules requiring a connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country’.\textsuperscript{120} The UK has interpreted this to permit removal once there is reason to

\textsuperscript{111} \textit{Nasseri v Secretary of State for the Home Department} [2007] EWHC 1548 (Admin).
\textsuperscript{112} See Sections 3 and 4 Human Rights Act 1998.
\textsuperscript{113} A consequence of the doctrine of supremacy of EC law, above n 22.
\textsuperscript{114} Implementation Paper, above n 26, paras 93–94.
\textsuperscript{115} ILPA, above n 29, 18.
\textsuperscript{116} Article 27(2)(b) PD.
\textsuperscript{118} Costello, above n 5, p. 186.
\textsuperscript{120} Article 27(2)(a). Recital 23 refers to ‘connection to a third country as defined in national law.’
believe the asylum seeker would be admitted to the STC. This is difficult to square with the basic notion that the STC concept relates to places where the asylum seeker had the opportunity to claim asylum previously. Admittedly, the ‘precise parameters’ of the legal requirement of connection are unclear in international law, but it seems that the UK is attempting to empty it of all meaning here, undermining the longstanding UNHCR position on ‘meaningful links’.

6. Detention

Article 18 PD provides:

‘1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.
2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.’

Regrettably, the UK has not transposed Article 18 into the Immigration Rules. The current UK practice of using detention invariably as part of its fast-track procedure is in tension with Article 18. Part III of the Immigration and Asylum Act 1999, which was never implemented and was finally repealed by the Nationality and Immigration Act 2002, would have provided for automatic judicial review after 7 and 35 days of detention.

The interpretation of Article 18 PD going forward will be particularly important. Article 5(1)(f) ECHR provides that the right to liberty may only be removed in certain limited circumstances, including in circumstances of ‘lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition’. Unfortunately in its long-awaited ruling in Saadi, a split ECtHR failed to condemn detention of asylum seekers outright. However, the Council of Europe’s Human Rights Commissioner, Thomas Hammarberg, has since made a statement urging that ‘the judgment … not be understood as a justification for a general practice of detention’ emphasising the strict requirements for lawful detention practices. It remains questionable whether an extension of UK fast-track procedures would meet these requirements.

121 BIA, Implementation Paper, above n 26, para 95. See further ILPA, above n 29, p. 19.
124 Application No 13229/03 Saadi v the United Kingdom Grand Chamber 29 January 2008.
125 Thomas Hammarberg, States should not impose penalties on arriving asylum-seekers, 18 March 2008.
7. Judicial Review

Article 39 PD provides not a right to appeal as such, but rather a ‘right to an effective remedy, before a court or tribunal’. As I have argued, this provision must be read in light of the EC general principle affording a right to an effective remedy. AIT decisions are subject to statutory judicial review, but its scope has been the subject of great political controversy. In particular, the attempt to oust judicial review in the Asylum and Immigration (Treatment of Claimants etc) Act 2004 led to a constitutional furore. Now, a review and reconsideration process is available, whereby the High Court may review whether the AIT has made a material error of law, and if so, will order that the AIT reconsider its decision. As Thomas has put it ‘the new … process probably goes as far as it is possible to limit or restrict judicial review short of an outright ouster’. There are tight time limits of between two and five days. Again, although the text of the PD does not call such time limits into question, the caselaw of the ECJ on effective judicial protection certainly does.

Concerning suspensive effect, the PD requires Member States ‘where appropriate’ to adopt rules ‘in accordance with their international obligations’ dealing with whether the remedy has suspensive effect. As mentioned above, Article 7 provides that the right to remain in the Member State lasts only until the first instance decision is made, rather than until all appeals are exhausted. Meanwhile in contrast, the ECtHR has reiterated its insistence on a requirement of suspensive appeals as a necessary feature of an effective remedy under Article 13 ECHR, most recently in Gebrehemedin, building on Jabari v Turkey, Hilal v UK and Conka v Bel-

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126 Article 39 PD.
127 Costello, above n 5, 184-188.
128 For an account of the ‘ouster clause’ in the Asylum and Immigration (Treatment of Claimants, etc) Bill 2004, see Rawlings, above n 16.
129 Nationality, Immigration and Asylum Act 2002, s. 103A(1) as inserted by the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. Where the decision was produced by a panel of three or more legally qualified members, there is a right of appeal to the Court of Appeal. Nationality, Immigration and Asylum Act 2002, s. 103E.
131 Nationality, Immigration and Asylum Act 2002, s. 103A(3)(a); Asylum and Immigration (Fast Track Time Limits) Order 2005 SI 2005/561.
132 See cases discussed in P Craig & G De Burca EU Law (4th edition, OUP, 2007), p. 313-325, in particular p. 323. As well as the short time limits themselves, there also appear to be various dubious practices surrounding the serving of notice of AIT determinations by the Home Office. See Thomas, above n 141, p. 677.
133 Article 39(3) PD.
Clearly, there is a tension with the current UK practice. Non-suspensive appeals in the UK arise in ‘clearly unfounded’ and SCO cases, use of which is increasingly frequent.

8. Conclusions

The BIA’s key assertion in relation to the implementation of the PD is that ‘[i]n policy and operational terms, it is not anticipated that implementation will have a significant impact’. Like other national governments, the UK’s negotiating aim was precisely to ensure that the PD would not require it to introduce substantial domestic changes, given the PD’s watery, highly qualified guarantees. In terms of immediate changes embodied in the new rules, the BIA’s characterisation is accurate.

My assessment of the actual textual changed introduced is mixed. Despite the fact that the Directive aims to establish only minimum standards, it has been used as a pretext to lower standards in at least one case, concerning access to interview reports. The inclusion of the worst Article 23(4) PD grounds for dispensing asylum interviews is also deplorable. On the positive side, the additional constraints on national safe country of origin designation are welcome. Reading the new Section 5(D) of section 94 of the Nationality, Immigration and Asylum Act 2002 in light of Article 30(4) and (5) PD may well reduce the scope of designate countries as safe.

In addition, aside from their substance, the very codification of administrative practices in legally binding form, as EC law requires, is legally significant. For example, it certainly has the capacity to increase statutory judicial review. As the High Court’s jurisdiction is confined to review for ‘error of law’, the scope for legal errors is now increased, as detailed matters of procedural practice come to be laid down in legally binding instruments.

On safe third country, despite the absence of textual changes to the UK rules, the effect of incorporation of the EC general principles is to preclude the use of irrefutable statutory presumptions of safety, and so the effects of the ruling in Nusseni may well be copperfastened. Again, there is some potential in the terse Article 18 PD on detention, in particular its guarantee of ‘speedy judicial review’. Article 39 PD read in light of the general principles precludes ouster of judicial review, and incorporates the ECHR standards on suspensive effect. Thus over time, the EC legal context will make a difference. Particularly important are the EC law doctrines concerning the legal effects of directives in the domestic legal order, and the general principles of EC law. The right to effective judicial protection in particular may provide some fruitful ground for cross-fertilisation between domestic administrative law and the general principles of EC law.

139 Above n 111.
Implementation of the Procedures Directive in the Netherlands

Marcelle Reneman*

The Procedures Directive has not lead to significant changes in the Dutch asylum procedure. According to the Dutch legislator the Procedures Directive only required minor changes of the Aliens Act 2000, the Aliens Decree and other regulations. Only with regard to the safe country of origin and safe third country concepts, new provisions were incorporated in the Aliens Act and the Aliens Decree. However, many of these provisions did not intend to change the current Dutch policy with regard to safe countries of origin and safe third countries, but served to implement the directive according to the requirements of Community law.

The implementation of the Procedures Directive did not lead to a lower standard of protection in the asylum procedure either. The Dutch government is of the opinion that there is no reason to make use of the many exceptions to safeguards provided for in the Procedures Directive. According to the government these exceptions are often based on practices in other Member States, and they are not necessarily useful in the Dutch context. The State Secretary of Justice wrote to the Lower House that the starting point of the legislative proposal, which intends to implement the directive, was to respect the principles of the Aliens Acts 2000, one of which is to guarantee the quality of the decision in first instance. Therefore no new exceptions to important safeguards, such as the right to a personal interview and the right to free legal aid, were introduced.

The legislative proposal implementing the Procedures Directive was adopted on 13 November 2007. Amendments to the Aliens Decree and regulations were implemented in December 2007.

In this paper I will first address the implementation of the safe country of origin and safe third country provisions in the Netherlands. After that I will describe the implementation of the right to information (Article 10 (1a) of the Directive). To

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1 In the Netherlands claims for refugee status and subsidiary protection are assessed in one asylum procedure. Therefore the Procedures Directive is applicable to the whole asylum procedure (Article 3 of the Directive).

2 Provisions, which used to be laid down in policy rules only, were moved to the Aliens Decree or the Aliens Regulation.


5 Published on 27 November, Staatsblad 2007, 450.

6 The amendments of the Aliens Decree were published on 29 November 2007, Staatsblad 2007, 484.
conclude I will discuss two aspects of the Dutch asylum procedure, which have been strongly criticised and might be at odds with the Procedures Directive: the accelerated procedure and the right to an effective remedy.

Safe country of origin

According to the Aliens Act 2000, in the assessment of the asylum claim, the fact should be taken into account that the asylum seeker comes from a country, which is a party to the Refugee Convention and the European Convention on Human Rights (henceforth: ECHR) or the Convention against Torture (henceforth: CAT) and the asylum seeker has not made plausible that such country does not fulfil its treaty obligations with regard to him.\(^7\) No list of safe countries of origin exists in the Netherlands. A reference to the European common list of safe countries of origin, mentioned in Article 29 of the Directive was added by the amendment of the Aliens Act 2000 of November 2007. In the explanatory memorandum to this amendment and in policy rules it is stressed that the asylum seeker should be able to submit facts and circumstances, which substantiate that the country cannot be considered a safe country of origin in his particular case. Only if the asylum seeker does not refer to such circumstances or if these circumstances are not made plausible, the asylum claim can be rejected because the asylum seeker comes from a safe country of origin.\(^8\)

Safe third country

There are two provisions in the Aliens Act 2000, which refer to the safe third country concept. One provision states that the asylum claim will be rejected if the asylum seeker will be transferred to a safe third country, on the ground of a readmission agreement.\(^9\) The asylum seeker must have stayed in that country and the country should be a party to the Refugee Convention, the ECHR and the CAT, or it must otherwise have committed itself to observe the non-refoulement principles laid down in these conventions. If the conditions of this provision are met, there is no discretion: the asylum claim will be rejected.

The second provision states that the assessment of an application shall take account, among other things, of the fact that the alien has stayed in a third country that is a party to the Convention on Refugees and the ECHR or the CAT, and that the alien has not made plausible that this country does not fulfil its treaty obligations with regard to him.\(^10\) It follows from the wording of this provision (shall take account of the fact) that if the conditions of this provision are met, the asylum

\(^7\) Article 31 (1g) Aliens Act 2000.

\(^8\) Paragraph C4/3.12 Aliens Act implementation guidelines (Vreemdelingen Circulaire).

\(^9\) Article 30 (d) Aliens Act 2000.

claim does not necessarily need to be rejected. There is no list of safe third countries in the Netherlands.

Article 27 of the Procedures Directive applies to both provisions concerning safe third countries. The text of the provisions in the Aliens Act will not be amended. Instead a new provision was incorporated in the Aliens Decree. Below I will address the way in which the Netherlands had implemented the conditions for application of the safe country of origin concept and the obligation to lay down rules in national legislation with regard to:

- the connection between the person seeking asylum and the third country,
- the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant,
- the individual examination.

**Conditions for application safe country of origin concept**

In a new provision in the Aliens Decree the conditions of Article 27 (1) Procedures Directive are literally included.\(^{11}\) In the explanatory memorandum the legislator states that the Procedures Directive and the Aliens Act 2000 have a different approach with regard to the safe country of origin concept. The directive stresses that the safe third country can only be applied if the competent authorities are satisfied that the asylum seeker will be treated in accordance with the principles mentioned in Article 27. The third country should observe these principles in practice in order to be considered safe. The Aliens Act 2000 only requires that the third country is party to the conventions, in which the principles mentioned in Article 27, are laid down. According to the Dutch legislator this approach offers enough safeguards that an asylum seeker will in practice be treated in accordance with the principles of Article 27. After all the basic principle of treaty law is that treaty obligations are observed by the States, which are party with a treaty. Therefore it is clear that the Aliens Act 2000 and the Directive aim at the same result and no amendment of the existing legislation was needed.\(^{12}\) To be sure however, the legislator chose to include the approach of Article 27 of the directive in the Aliens Decree. The provision in the Aliens Decree makes clear that an asylum claim can only be rejected on the ground that the asylum seeker stayed in a safe third country, if he will be treated in accordance with the principles mentioned in Article 27.\(^{13}\)

The safe third country concept is further elaborated in policy rules. With regard to application of the safe third country concept, which is based on a readmission agreement, agreements, treaties or written statements by the third country, which

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11. Article 3.106a Aliens Decree.
13. One could argue that this changes the character of Article 30 (d) of the Aliens Act which leaves no room to grant an asylum status if the conditions for the application of the third safe country concept, laid down in this provision (which does not include the principles of Article 27 of the Directive), are met.
are supported by practice, can substantiate that the conditions laid down in Article 27 of the directive are met.\footnote{Paragraph C3/5 Aliens Act implementation guidelines (Vreemdelingen Circulaire).}

The safe third country concept, which is not based on a readmission agreement will not be applied, if it is apparent from generally known facts that this country does not observe its treaty obligations. It concerns countries with regard to which the Netherlands has taken special policy measures: asylum seekers from this country are granted an asylum status based on a general protection policy or the time-limit for the assessment of their asylum claim has been extended. A country is also not considered safe, if it appears from country reports by the Dutch Ministry of Foreign Affairs that it violates basic human rights. With regard to asylum seekers, who stayed in these countries, the presumption of safeness, which follows from the fact that this country signed the Refugee Convention and the ECHR or the CAT, will not be automatically upheld. The asylum seeker who stayed in such a country will easily make plausible that this country does not observe its treaty obligations with regard to him.

\section*{Methodology}

The Aliens Decree states that the asylum claim shall only be rejected by application of the safe third country concept, if ‘\textit{according to the opinion of our Minister}', ‘\textit{taken into account all the relevant facts and circumstances}',\footnote{The Minister of Justice.} the conditions of Article 27 are met. These words aim to implement Article 27 (2) of the Procedures Directive, which requires Member States to lay down rules in national legislation on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe. The wording mentioned above, leaves the minister a large margin of appreciation, which normally leads to very limited judicial review by the Dutch courts.\footnote{My translation in Dutch: ‘\textit{naar het oordeel van Onze Minister}', ‘\textit{alle relevante feiten en omstandigheden in aanmerking nemend}'.} It should be examined whether a marginal scrutiny of the application of a safe third country exception is admissible under Community law.

\footnote{The same wording (‘\textit{naar het oordeel van Onze Minister}') is used in Article 29 (1d) Aliens Act 2000, which concerns the general protection policy. The Council of State considered that in deciding whether a general protection policy should be introduced, the Minister has a large margin of appreciation, of which the application can only not sustain judicial review, if the decision should be considered to be in violation with the law or if the Minister could, taken into account all relevant interests and the factual bases of the decision, in reasonableness not come to this decision. Council of State 8 November 2001, nr. 200104464/1.}

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**Individual assessment**

The new provision in the Aliens Decree states that the assessment of the asylum application should include the plea by the asylum seeker that he will be subjected to torture, inhuman or degrading treatment or punishment in the third country.\(^{18}\) This provision applies to both safe third countries concepts included in the Aliens Act 2000.

Strangely enough the individual assessment is only elaborated in policy rules with regard to the countries with which the Netherlands has no readmission agreement. According to these policy rules the safe third country concept can only be applied when the asylum seeker will not be returned to his country of origin in violation with the prohibition of refoulement. The asylum seeker’s account is the starting point of the assessment of the question whether the third country observes its treaty obligations with regard to the asylum seeker or not. The asylum seeker needs to explain his personal situation and how this relates to the general situation in the third country. The burden of proof does not only lie with the asylum seeker. The Immigration and Naturalisation Service (henceforth Immigration Service) should also examine whether the third country observes its treaty obligations in practice.\(^ {19}\)

The safe third country concept can only be applied when the asylum seeker has access to this third country. For application of the safe third country concept, which is based on a readmission agreement, it is required that the third country accepted the readmission claim in writing.

**Connection with safe third country**

The asylum application will only be rejected if the asylum seeker has a connection with the third country, which renders it reasonable to expect him to return to that country. In the assessment whether such a connection with the third country exists, all relevant facts and circumstances, among which the nature, duration and circumstances of the previous stay in that country, will be taken into account.\(^ {20}\)

This provision is further elaborated in policy rules. Again there are different criteria for third countries with which the Netherlands has a readmission agreement. The fact that a readmission claim is accepted by the third country shows that there is a connection, which justifies the return to that country.\(^ {21}\)

If no readmission agreement exists, the safe third country exception can only be applied if the asylum seeker actually stayed in this third country. It cannot be applied if the asylum seeker only passed through. It is deemed relevant whether the asylum seeker had the intention to travel to the Netherlands, when he was still in the country of origin. A stay of two weeks or more in the third country shows that the asylum seeker had no intention to travel to the Netherlands, unless objective...
facts or circumstances, such as documents, show otherwise. If the asylum seeker stayed less than two weeks in the third country, the burden of proof shifts to the Dutch authorities. It is accepted that the asylum seeker intended to travel to the Netherlands, unless objective facts or circumstances, such as travel documents which show no indication of a planned trip to the Netherlands, show otherwise.  

Access to the asylum procedure

Article 27 (4) of the Procedures Directive states that where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II of the Directive. In the Netherlands a second asylum claim after refusal of entry by the safe third country, could be regarded as a subsequent asylum claim. The Immigration Service is allowed to refuse these claims without assessment of the substance of the claim if no new facts or circumstances are submitted. To be sure that in the situation described in article 27 (4) of the Directive the asylum claim will be assessed in full, a new provision was included in the Aliens Act 2000. It states that an asylum claim will not be considered a subsequent application if the first asylum application was rejected on the ground of a third safe country exception, the asylum seeker was refused entry to that country and the asylum seeker lodged another asylum application in the Netherlands.

The right to information

According to Article 10 (1a) of the Procedures Directive asylum seekers shall be informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. This information shall be given in time to enable them to exercise the rights guaranteed in the directive and to comply with the obligations described in the Directive.

In the Netherlands the said information is provided in a brochure. This brochure is distributed, when the asylum seeker reports at one of the asylum application centres. If the asylum seeker arrived by land, he will usually have a few weeks after the distribution of this brochure, in which he can prepare for the asylum procedure with the help of (volunteer workers of) the Dutch Council for Refugees. However, if he arrives at the external border of the European Union (most likely Schiphol airport or the harbour of Rotterdam), the asylum procedure starts right after the distribution of the brochure. In this situation it is unlikely that the asylum seeker will have enough time to meet all his obligations, especially if he is expected to get documents from his country of origin.

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22 Paragraph C4/3.8.1 Aliens Act implementation guidelines (Vreemdelingen Circulaire).
24 Article 3.43a Regulations on aliens (Voorschrijf Vreemdelingen).
The accelerated procedure

One of the most controversial aspects of the Dutch asylum procedure is the accelerated asylum procedure, also called AC-procedure or 48 hours procedure. This procedure takes 48 working hours, of which five hours are reserved for legal aid to the asylum seeker. Rejection of the asylum application is not limited to certain categories of asylum seekers. Every asylum case can be rejected in this procedure, as long as (according to the Immigration Service) no complicated examination is necessary. This includes asylum cases lodged by children, traumatised asylum seekers and other vulnerable persons.

The Advisory Committee on Aliens Affairs,25 UNHCR,26 national and international NGO’s27 and academics28 directed substantial criticism against the accelerated asylum procedure. Also the Committee evaluation of the Aliens Act 2000 concluded that the current emphasis on the assessment of asylum cases in the 48-hours procedure is at the expense of the quality of the decisions.29 The main concerns are that during the AC-procedure, asylum seekers do not get enough time and opportunity to rest, to prepare for the asylum procedure, to obtain documents or other proof to substantiate the asylum claim, to get legal aid and to tell their asylum account. Not enough attention is paid to medical problems which may interfere with the ability to talk about the asylum account during the personal interview.

According to the State Secretary of Justice, the AC-procedure complies with the basic principles and guarantees described in Chapter II of the Procedures Directive. Although the time-limits in the AC-procedure are shorter than in the normal asylum procedure30, the procedural safeguards are the same. The asylum seeker gets information on the asylum procedure, before the procedure starts and he gets a personal interview. Free legal aid and interpreters are provided for. According to the State Secretary of Justice, the accelerated procedure therefore provides for more safeguards than the Procedures Directive requires.31

30 In this procedure the decision on the asylum application should be taken within six months. Therefore, the asylum seeker has much more time and opportunity to substantiate his asylum claim.
It is true that at first sight, the AC-procedure does not seem to be at odds with the provisions laid down in the Procedure Directive. However, asylum seekers can now invoke a few clear rights granted by Community law, most importantly a right to asylum. National proceedings, in which a person claims these rights, fall within the scope of Community law, and will thus be governed by the general principles of Community law, such as the right to effective judicial protection. This principle requires procedural safeguards regarding the decision making procedure, such as the right to be heard and the obligation to state reasons, but also with regard to the burden of proof and time-limits. Therefore the principle of effective judicial protection, as well as other general principles of Community law could require more procedural safeguards than the AC-procedure offers to asylum seekers at the moment.

Although, according to the Dutch government, the Procedures Directive does not require significant changes in the Dutch asylum procedure, there are plans for change. The government stated in their coalition agreement of February 2007 that the asylum procedure will be improved, in particular by improving the 48 hours procedure. The Ministry of Justice is currently working on a proposal.

### Right to an effective remedy

Article 39 of the Procedures Directive requires the Member States to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against a decision taken on their asylum application. In the Netherlands there are a few aspects of judicial review, which might lead to a violation of the right to an effective remedy, especially when this right is interpreted in the light of the principle of effective judicial protection, which is mainly based on Article 6 and 13 ECHR. These aspects are: a lack of (automatic) suspensive effect of the appeal against the rejection of the asylum claim for some categories of asylum seekers and the limited scope of the judicial review by these courts.

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32 Article 13 and 18 of the Qualification Directive.

33 C. Costello, *New issues in Refugee Research: The European Asylum Procedures directive in legal context*, UNHCR November 2006. On p. 23 Costello states: ‘in the asylum context, the Qualification Directive arguably creates a right to asylum and so once this right is at issue, the EC general principles must be respected, including those which mirror Articles 6 and 13 ECHR’.

34 See for example C-462/98P *Mediocurso* [2000], para. 38, in which the Court of Justice considered that no reasonable period was granted between the time at which the appellant was able to examine certain reports and the time at which it had to express its view. In such circumstances, the appellant did not on that occasion have an opportunity effectively to put forward its views on those documents.

35 C-222/86 *Heylens* [1987].


37 C-312/93, *Peterbroeck* [1995].

Suspensive effect

According to Article 39 (3) of the Procedures Directive the Member States need to provide for rules concerning the suspensive effect of the appeal against an asylum decision. These rules must be in accordance with the international obligations of the Member States. The European Court of Human Rights decided in its case-law that the appeal against the rejection of an asylum claim should have automatic suspensive effect.\(^{38}\)

In the Netherlands there are several categories of asylum seekers, which have no access to an appeal with automatic suspensive effect. If the asylum seeker’s asylum application is rejected in the AC-procedure, if he is placed in aliens detention or if he lodged a subsequent asylum request, the appeal to the regional court does not have suspensive effect. The asylum seeker can request an interim measure to the court in order to be allowed to await the court’s decision on the appeal in the Netherlands. According to policy rules, the asylum seeker will not be expelled before the decision on this (first) request is taken by the court\(^{39}\). However in some cases the Immigration Service is not obliged to wait for the decision of the court on the request for an interim measure:
- The asylum seeker is considered a danger for public order or national security;
- There is a risk that the opportunity to return a person to the country of origin or a third country will be lost;
- The subsequent asylum request is rejected because no new facts or circumstances were submitted.\(^{40}\)

Therefore in some cases there is a risk that a person will be expelled before the court decided on the appeal against the decision on the asylum claim. In these cases the appeal can in my opinion not be considered an effective remedy as required by Article 39 of the Procedures Directive.

Limited scope of judicial review

There are two ways in which the judicial review, performed by the Dutch courts is limited. In the first place the core part of the judgment on the asylum decision consists of a marginal scrutiny. Judicial review of the minister's position with regard to the following issues is limited:
- the question which documents are necessary for the assessment of the application;

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\(^{38}\) ECtHR, 26 April 2007, nr. 25389/05 (Gebremedhin v. France), para 67. The Court considered: ‘La Cour en déduit en l’espèce que, n’ayant pas eu accès […] à un recours de plein droit suspensif, le requérant n’a pas disposé d’un “recours effectif” pour faire valoir son grief tiré de l’article 3 de la Convention. Il y a donc eu violation de l’article 13 de la Convention combiné avec cette disposition’.

\(^{39}\) The court usually decides on the appeal and the request for the interim measure at the same time.

\(^{40}\) Paragraph C22/5.3 Aliens Act implementation guidelines (Vreemdelingencirculaire).
- the question whether a lack of documents can be attributed to the asylum seeker;
- the credibility of the asylum account;
- the question whether the suspicions, expectations or conclusions of/made by the applicant based on the facts established, are made plausible.

The court can only assess whether the minister’s position on these aspects is reasonable. Sometimes even decisions concerning the qualification of the facts are subject to marginal judicial review. Several academics and NGO’s argued that the limited scope of judicial review is ad odds with Article 13 ECHR. The European Court of Human Rights considered that

‘the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3’. 44

Spijkerboer and Vermeulen wrote in 2005:

‘The European Court of Human Rights has found that the British asylum procedure in which a substantially more intense judicial review is conducted, does not violate Article 13 ECHR. The Court pays much attention in its decisions to the fact that, although the British standard of review suggests a marginal review/scrutiny, in fact a thorough and detailed review takes place. This suggests – and this is the second conclusion – that such a review is deemed necessary by the court. Thirdly: if we regard the way in which the court itself applies the required rigorous scrutiny, it might be concluded that the Dutch judicial review defers in such a degree that it can not be regarded as a rigorous scrutiny that meets the requirements of Article 13 ECHR’. 45

The second problem is that the scope of judicial review is very limited in case of a subsequent asylum application. If an asylum seeker lodges a subsequent asylum application the Minister of Justice has the authority to refuse reconsideration of this

41 Can the asylum seeker, based on the established facts be considered a refugee or a person who qualifies for subsidiary protection?
43 Dutch Council for Refugees, ECRE and others, Amicus curiae brief in the case X v. the Netherlands (appl. nr. 31252/03), www.vluchtelingenwerk.nl, but also UNHCR, Implementation of the Aliens Act 2000: UNHCR’s Observations and Recommendations, July 2003. UNHCR recommended that ‘(…) measures be taken to ensure a full review of questions of both facts and law in the case of appeals in asylum cases’.
44 ECtHR 11 July 2000, nr. 40035/98 (Jabari v. Turkey).
application, if no new facts or circumstances are raised. Judicial review of the decision on a subsequent asylum request is limited to the question whether new facts or circumstances have arisen in the subsequent application, even if the minister chose to consider a subsequent application in substance. Only if the court considers that new facts and circumstances are raised, it will assess the decision on the asylum application in substance.

What limits the scope of judicial review even further is the fact that the concept ‘new facts and changed circumstances’ is interpreted very restrictively by the Dutch courts. Facts and circumstances that occurred before the communication of the decision on the first asylum application, are not considered new facts or changed circumstances, if they could be and therefore should have been submitted before the communication of this decision. Only in exceptional cases the court acknowledges that the facts and circumstances could not be submitted before the communication of the decision on the first asylum application. Even if a person is (severely) traumatized, he is expected to mention the traumatising events (briefly) before the communication of the decision on the first asylum application. Documents or evidence that already existed before the communication of the decision on the first asylum application, are not considered new facts if they could have been submitted before this decision. Problems in getting documents from the country of origin, from family members or other persons, are normally not accepted as a valid reason why the documents could not be submitted earlier. (Fax)copies of documents and documents that are not translated or are not dated are no new facts or circumstances.

Academics and NGO’s argued that this case-law could very well lead to violations of Article 3 and 13 ECHR, especially if the first asylum application was rejected in the accelerated procedure. Spijkerboer en Vermeulen state:

‘If it concerns the AC-procedure, the time-limits are short; and they are applied rigidly. Also if it does not concern an AC-procedure, the ne bis in idem-rule is applied automatically and mechanically and moreover ex officio. Thus, fairly often, the court is prevented from giving a judgment on the substance of an appeal to Article 3 ECHR, while the alien can possibly not be blamed for exceeding the time-limit. The appeal procedure, to which this rule is applied, does in this situation not provide for an effective remedy as required by Article 13 ECHR, because the judicial review concerns primarily the compliance with national procedural law and not the assessment of the appeal on Article 3 ECHR to a full extend. If the asylum seeker, who has exhausted all domestic remedies, sub-

46 However, the Immigration Service can decide to assess the asylum application in substance, although no new facts or circumstances were submitted by the asylum seeker. In case of subsequent asylum applications, which are based on new policy rules, reconsideration of the case cannot be refused.


quently puts a complaint before the European Court of Human Rights, the Court will assess the appeal to article 3 ECHR to a full extend. By doing so, the Court could become judge in first instance, because the national court fails to perform a review in conformity with Article 13 ECHR.\textsuperscript{50}

If the scope of judicial review in the Netherlands is indeed ad odds with Article 13 ECHR, this will very likely also lead to a violation of Article 39 of the Procedures Directive read in the light of the principle of effective judicial protection.\textsuperscript{51} This issue was raised in the First Chamber during the consideration of the bill, which intends to implement the Procedures Directive. The State Secretary of Justice stated that all aspects of an asylum procedure taken together determine whether the asylum procedure constitutes an effective remedy: the scope of judicial review, the assessment of new facts and circumstances, access to interpreters and legal aid and the suspensive effect of the remedy. She stressed that the marginal judicial review only concerns the minister's position with regard to the credibility of the asylum account, if no documents are available which substantiate that account. The qualification of the facts is subject to a full judicial review by the court. Furthermore she pointed at the fact that the court in appeal reviews the asylum case ‘ex nunc’, in conformity with the requirements set by the ECtHR. According to the State Secretary the Netherlands therefore complies with the obligation to provide an effective remedy.\textsuperscript{52}

In 2007 a bill has been introduced in Parliament which seeks to improve judicial protection in asylum cases.\textsuperscript{53} The proposal contains amendments of the Aliens Act 2000 both with regard to the marginal judicial review and the assessment of new facts and circumstances by the court. It is however not certain that the bill will be adopted.

**Conclusion**

According to the Dutch government, the Dutch asylum procedure in general already complied with the provisions of the Procedures Directive. The Aliens Act 2000, regulations and policy rules were only amended with regard to the safe country of origin and notably the safe third country concept. How much significance these changes will have in practice, is hard to say. At the moment the safe country of origin and safe third country exceptions are not very often applied by the Dutch Immigration Service.

The serious concerns with regard to some aspects of the Dutch asylum procedure, in particular the accelerated procedure and the lack of an effective remedy


\textsuperscript{51} It is even possible that the principle of effective judicial protection itself will require a more rigorous scrutiny than article 13 ECHR. However, the case-law of the Court of Justice is not conclusive on the scope of judicial review which is expected of the national courts.

\textsuperscript{52} EK 13 November 2007, EK 7, 7-253.

\textsuperscript{53} Proposal nr. 30830, currently pending in the Lower House.
remain however. Many argue that the asylum procedure does not provide an effective remedy as required by Article 13 ECHR. This means that Article 39 of the Procedure Directive may also be violated. Whether the Procedures Directive and the Qualification Directive interpreted in the light of the general principle of effective judicial review require changes, will be for the national courts and in last instance the Court of Justice to decide.
The Implementation of the Asylum Procedures Directive in Germany

Julia Duchrow*

1. Introduction

The Asylum Procedure in Germany is regulated according to the Asylum Procedures Act of 1993.¹ This Act was amended several times, the most recent amendments took place on 14 March 2005, through the introduction of a new Immigration Act² and on 29 August 2007 through an Act implementing eleven EU directives into German law.³ Besides the implementation of the Asylum Procedures Directive the Qualification Directive was implemented, that already resulted in major changes of German law, when the Aliens Act was amended in March 2005.

The changes were linked to the protection of persons fleeing persecution by non-state actors and to the improvement of the status granted to persons who were given refugee or subsidiary protection. The implementation of the Qualification Directive in August 2007 led furthermore to amendments of the German Procedures Act. One change, which is not linked to the Asylum Procedures Directive, but to the Qualification Directive, relates to Section 3 of the German Procedures Act, which defines the conditions for granting (and exclusion) of refugee protection. In practice however, this new provision will not change the legal status quo significantly, since it refers to the regulation in German law that guarantees the right to non-refoulement according to Article 33 (1) of the Refugee Convention, but does not implement the inclusion clauses of the Refugee Convention in Article 1 A. Another change of the German Asylum Procedures Act, that is linked to the Qualification Directive (Article 5 (1) and (2)), relates to Sec. 28 (2) of the German Procedures Act, which in general forbids the granting of the Refugee status to “refugees sur place” who ask for refugee protection in a second asylum claim. In relation to the withdrawal of the refugee status an amendment has been introduced in Sec. 73 of the German Asylum Procedures Act, which widens the possibility to withdraw the refugee status. These changes in the law are linked to the preconditions of a withdrawal of status and are therefore linked to the presumptions of the Qualification Directive and not to the Procedures Directive.

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Regarding the implementation of the Asylum Procedures Directive, however, only minor changes of existing legislation were necessary. In fact German government had negotiated “well” during the drafting process of the Asylum Procedures Directive, ensuring that many provisions of the Directive were modelled upon existing German law. Especially the concepts of “safe country of origin” (sicherer Herkunftstaat) and “safe third country” (sicherer Drittstaat) respectively as they are now laid down in Article 36 of the Directive have been part of German law since 1993. It was then, in 1993, that the right to asylum guaranteed under the German constitution was restricted significantly.

2. Amendments of the German Asylum Procedures Act motivated by the implementation of the Procedures Directive

2.1 Sec. 9 (2) of the Act – the Role of UNHCR in the Asylum Procedure

In relation to the implementation of Article 21 of the Asylum Procedures Directive, which sets standards for member states in connection with the cooperation with UNHCR during the asylum procedure, Sec.  9 of the German Asylum Procedures Act was amended. Sec. 9 (1) of the Asylum Procedures Act gives the right to foreigners to contact UNHCR and allows the High Commissioner to intervene in individual asylum claims. In line with Article 21 (1) (a) of the Procedures Directive UNHCR has the right to contact the asylum seeker in detention, but also in the transit zone of the airport. The new Sec. 9 (2) of the German Asylum Procedures Act obliges the Federal Office for Migration and Refugees to transmit all the necessary information on an individual asylum procedure to the High Commissioner on its request. The provision guarantees, that UNHCR can comply with its right according to Article 35 of the Refugee Convention to control the implementation of the Refugee Convention. Sec. 9 (3) of the Asylum Procedures Act underlines, that decisions and other details of the procedure, especially the grounds for the asylum claim will be made accessible to the High Commissioner only, if the asylum seeker agrees. During the legislative process UNHCR has stressed, that the transmission of the decisions should mean, that the grounds for the decision are also being transmitted to UNHCR as was the practice in the past.4 In contradiction to Article 21 (1) c) of the Procedures Directive the German regulation in Sec. 9 does not foresee explicitly, that the decisions and grounds for the decisions by the Courts involved in the appeal procedures are being transmitted to UNHCR. In the legislative process this has been clearly criticised by UNHCR and it suggested a new formulation for the legislation,5 which has not bee taken into account in the final legislation.

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4 UNHCR Stellungnahme zum Richtlinienumsetzungsgesetz, A-Drs. 16 (4) 209 G, p. 39.
5 UNHCR Stellungnahme zum Richtlinienumsetzungsgesetz, A-Drs. 16 (4) 209 G, p. 39.
2.2 Procedure at the Border and Inadmissible Claims

Several changes were introduced in connection with asylum seekers deemed to have passed a “safe third country” on their way to German territory. In order to make these changes understandable the German concept of a “safe third country” that was introduced in the German Constitution in 1993 has to be described.

a. The German Concept of the “Safe Third Country”

The concept of “safe third country” as it is laid down in Article 16a (2) of the German constitution implies that a person, who entered Germany through a country which is defined as “safe third country”, is not entitled to the constitutionally guaranteed right to asylum. Since the enlargement of the European Union as of 1 May 2004, all but two neighbour states are members to the EU and consequently “safe third states”, which excludes an asylum claim according to Article 16a (2) Sentence 1 of the German Constitution. The exceptions are Norway and Switzerland, which are, however, qualified as “safe third countries” even though they are not members of the Union.

A “safe third country” can be any country, which has ratified the Refugee Convention and the European Convention on Human Rights. By the time the concept of “safe third country” was introduced the new provision criticised for not being in line with fundamental principles of the Constitution and ultimately appealed before the German Constitutional Court by an Iraqi and an Iranian national who had been deported to Greece and Austria according to this concept.

In its decision the Court was, however, satisfied that this concept of “safe third country” is in line with the Constitution. The Court called this principle a “generalisation by law” (normative Vergewisserung), which provides for a legal basis to argue that certain countries are safe and that no assessment in every individual case is necessary. The Court, however, indicated a set of preconditions. According to them, a country can only be assumed to be a “safe third country” if it has submitted itself to the jurisdiction of the controlling organs of the European Convention on Human Rights. Furthermore the Court found that the authorities of the respective state must be under an obligation to comply fully with the Conventions, without exceptions for certain groups claiming asylum. In addition, it has to be guaranteed, that the person can lodge an asylum claim and if she missed out on a specific time limit to lodge such a claim it has to be made sure before the deportation of a person, that it is not in breach of the Refugee Convention. According to the Constitutional Court, a “chain deportation” back to the country of origin should be excluded in practice.

Pursuant to the Asylum Procedures Act a person coming from a “safe third country” shall immediately be returned to it at the border or close to it when found (Section 18 (2) and (3)). If the claimant entered German territory, the asylum claim is rejected and the claimant is directly deported to the “safe third country”, if it is not possible to send her back to her country of origin. Article 36 of the Direc-

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6 GK AsylVfG 50 , Nov. 1997, Kommentar Art.16a GG, vor II-2, Rn.96.
tive seems to be a repetition of that concept. The “safe third country” concept in Germany has lost its importance when the enlargement of the EU took place and all the countries surrounding Germany, except Switzerland, became member states of the EU. For Germany the concept became therefore obsolete. In fact a recent amendment of the Asylum Procedures Act introduced new forms of procedures for asylum claims whereby the claimant comes from a country which has a border with Germany. In these cases the Dublin II regulation applies.

b. Border Procedure

In the amended law of August 2007 further changes of the existing procedure were introduced, which are only slightly connected to the implementation of the Asylum Procedures Directive. One of these changes concerns the amendment of the possibility to refuse the entry to Germany. In Sec. 18 (2) No. 2 of the Asylum Procedures Act it now provides that border guards can refuse the entry of a refugee into Germany if there are reasons to believe that, according to an international treaty binding on Germany, another state is responsible for the execution of the asylum procedure. In the explanation to the amendment it is stated that in practice no changes will take place, since also before the amendment entered into force it was possible to refuse someone’s entry into the territory, if the person was safe from persecution in a third state.9 The amendment focuses primarily on cases, in which the Dublin II Regulation and the Dublin Treaty apply and another state is responsible to determine whether the asylum is rejected or not.

As mentioned before also previously the entry into the German territory could be refused on the ground that the states surrounding Germany were safe third countries. In the legislative process it has therefore been criticised by several organisations10 and experts11 in parliament, that the proposed amendment was unnecessary and that it could result in an increase of cases in which this regulation would apply. Such an expansion of the cases could be EU regulations through which third countries are being selected as responsible for the conduction of the asylum assessment. Another possibility of widening the countries to which the refusal of entry could apply is if the EU agrees in an international treaty with a third state, that this state is responsible in future for the conduction of the asylum process. The fact that there is a notable tendency to shift the responsibility for conducting asylum procedures

8 Dublin II Regulation, Regulation No. 343/2003/EG (ABl. L50, p.1).
9 (Explanation of the law), Gesetzesbegründung zum Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 23.4.2007, BT-Drs. 16/5065 vom 23.4.07, p. 215.

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outside of the territory of the EU\textsuperscript{12} raises the suspicion that the number of third states which could be made responsible for conducting the asylum procedure could be increased. These states would not necessarily be limited to states which are member states to the European Convention on Human Rights (ECHR) or the Refugee Convention. Therefore, the fear that refugees could be denied access to German territory, because a state that does not guarantee a fair asylum procedure has to determine whether asylum is granted or not, is founded.

Furthermore, according to the amendment it does not have to be sure that the other state is responsible for the conduction of the asylum case. As already mentioned, it is sufficient, that there are reasons to believe, that another state is responsible. Before the amendment the law required that it had to be obvious, that another state is responsible for assessing the asylum claim. As a consequence the new regulation gives a wider discretion to border officials which could lead to a protection gap for the individual seeking protection in Germany. It is questionable, whether the new regulation is in line with the above mentioned jurisdiction of the Constitutional Court, which foresees the possibility for the individual to proof that, although a country was determined as safe, he or she is not secure from chain refoulement back to the country were the persecution occurred.\textsuperscript{13} It is also questionable how the German authorities can guarantee, that a rejection at the border, because another state appears to be responsible for the conduction of the asylum procedure, does not lead to a violation of the non-refoulement principle in Article 33 (1) of the Refugee Convention.\textsuperscript{14} In practice it is foreseeable, that no assessment of the claim will take place.

c. Detention during the Border Procedure
With the last amendment of the Aliens Act the possibility was introduced, to detain refugees at the border, until the decision to return the asylum seeker to the country that is deemed to be responsible for the asylum procedure (Sec. 15 (5) of the Aliens Act) is taken. The consequence is, that the asylum seekers can be detained during the whole procedure in which a transferal is being decided on. The detention is independent of any individual grounds for detention and only based on the administrative possibilities of the border authorities to transmit the asylum seeker. In the drafting process of the legislation, the provision has been criticised by experts, since

\textsuperscript{12} Weinzierl, Stellungnahme für die Anhörung zum EU-Richtlinienumsetzungsgesetz des Innenausschusses des dt. Bundestages am 21.05.2007, A-Drs. 16(4)209 J, p. 20.


\textsuperscript{14} See Mole, Asylum and the European Convention on Human Rights, p. 46, on the possible violations of the rights set out in the European Convention on Human Rights through the "safe third country" concept.
the detention of asylum seekers should be an exception. UNHCR asked without success to delete the provision.

d. Introduction of Inadmissible Claims

In the new legislation inadmissible claims were introduced as a new category into the asylum procedure. In the previous legislation the concept of an inadmissible claim did not exist. In Sec. 27a of the Procedural Act, inadmissible claims are defined as claims where another state deemed responsible for conducting the asylum procedure because of EU law or because of an international treaty. According to the new provision, it is not necessary, that the claimant has passed the territory of the state which is deemed responsible to conduct the asylum claim.

As the explanation of the law states, the newly introduced category is aimed at cases in which a state has responsibility for the conduction of the asylum claim because of the Dublin II Regulation and the Dublin Treaty. The regulation does replace a previous clause which defined asylum claims as disregarded (unbeachtlich) if another state was responsible for conducting the asylum procedure according to an international treaty. The asylum claim had to be rejected in case the applicant passed a third country, that deemed to be safe. As mentioned before the argument of the German legislator is, that since all the states surrounding Germany were “safe third countries” and are now members to the Dublin Convention, nothing would change in practice. As in the case of claims at the border, the possibility of widening of cases in which new legislation could be applied is based on the formulation, which includes future agreements or regulations which deal with the responsibility for the conduction of the asylum procedure. Such future regulations could be the result of EU regulations, which are directly applicable in national law, but also international treaties between German and a third country. Just like in 2003 when the Dublin Regulation was introduced, a similar regulation could be introduced with e.g. Ukrain and a claim of a Chechnyan asylum seeker would than be rejected as inadmissible. The German constitutional safeguards applying to the “safe third country” concept as described above would not apply, since an EU regulation is directly applicable in German law.

The regulation poses various problems. First, there is no limit set to the number of future states that could be made responsible for the conduction of an asylum claim. As mentioned above a tendency exists to externalise the responsibility for asylum claims, even if the effectiveness and fairness of the asylum procedure is not sufficiently assessed. Secondly it remains unclear how the claimant can ask for his different rights included in the Dublin II Convention. Since the claim is not as-

15 Marx, Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, Innenausschuss, A-Drs. 16(4)209 D, p. 15.
16 UNHCR, Stellungnahme für die Anhörung zum EU-Richtlinienumsetzungsgesetz des Innenausschusses des dt. Bundestages am 21.05.2007, A-Drs. 16(4)209, p. 13.
17 (Explanation of the legislation), Gesetzesbegründung zum Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 23.4.2007, BT-Drs. 16/5065 vom 23.4.07, p. 160.
18 § 29 Abs. 3 AsylVfG- Alt (old).
19 § 29 Abs. 3 S. 2 iVm § 26a AsylVfG-Alt (old).
sessed in its substance, the claimant can not ask the state to pick up the case on humanitarian grounds like it is prescribed in Article 15 Dublin II. According to Article 15 a member state who is actually not responsible on the basis of the Dublin II provisions can nevertheless examine the application of an asylum seeker on humanitarian grounds.\textsuperscript{20} It remains also unsolved how other rights coming from the Dublin II Regulation, like the right to family reunification according to Article 7 (2) of the Dublin II Regulation can be asked for. Furthermore the problem occurs, that if a state has lost its responsibility for the case, because the time limit of six months has passed a situation could occur, where no responsibility for the asylum claim of any state could exist. During the legislative process it has been pointed out, that the danger of “refugees in orbit” is not excluded.\textsuperscript{21}

e. Legal Remedies against the Rejection as “Inadmissible”

The legal consequence of the rejection of the claim as “inadmissible” is, that the claimant is being told which other state is responsible for the conduction of the proceeding. Furthermore an expulsion order is issued to the asylum seeker. No remedy with suspensive effect is allowed against this decision. The possibility to restore the suspensive effect is not given (Sec. 34a (2) of the Asylum Procedures Act). This norm has been amended by the law implementing the Asylum Procedures Directive. In case the claimant appeals against his asylum decision as inadmissible he has to proceed with his case from his country of origin. To proceed with the case from outside of Germany mostly leads to a closure of the case, because the appeal is seen as dropped according to Sec. 81 of the Asylum Procedures Act. The restriction of the legal remedy through the amendment has been widely criticised as a violation of national and international law,\textsuperscript{22} since national law also explicitly provides in Article 19 (4) of the Constitution, for the existence of an effective legal remedy.\textsuperscript{23}

Furthermore, the Dublin II regulation in itself allows to exclude the suspensive effect of a legal remedy, but does not foresee, that the suspensive effect can not be reinstalled.\textsuperscript{24}

In addition, it remains unclear, how German authorities can guarantee, that the obligations deriving from the European Convention of Human Rights are met. It is to be noted, that in general the European Court of Human Rights is not in a position to assess community law indirectly through the assessment of a transposition act of EU law into national law. The Court responsible to do so, is obviously the

\textsuperscript{20} UNHCR, Stellungnahme für die Anhörung zum EU-Richtlinienumsetzungsgesetz des Innenausschusses des dt. Bundestages am 21.05.2007, A-Drs. 16 (4) 209 G, p. 40.

\textsuperscript{21} Marx, Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, Innenausschuss, A-Drs. 16(4)209 D, p. 36.

\textsuperscript{22} Amnesty International u.a., Gemeinsame Stellungnahme vom März 2007, p. 8.

\textsuperscript{23} Jarass-Pieroth, Grundgesetz für die Bundesrepublik Deutschland, Kommentar 7, Auflage 2004, Art. 23, Rn. 39.

\textsuperscript{24} Deutscher Caritasverband und Diakonisches Werk, Stellungnahme des Deutschen Caritasverbandes und des Diakonischen Werkes der EKD zum Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, Innenausschuss, A-Drs. 16 (4) 209 B, p. 41.
European Court of Justice. If a member state to the Convention has transmitted its sovereignty to an international organisation and a comparable guarantee of fundamental rights exists, it has to be assumed, that obligations set out in the European Convention on Human Rights are respected. This presumption can proof to the contrary, if in an individual case the protection of the rights set out in the convention were obviously not protected. In the case of the German legislation however it is questionable, whether it was introduced in the course of the implementation of community law. Since the elimination of any effective remedy is neither foreseen in the Procedures Directive (see Article 39) nor in the Dublin II regulation it can not be assumed, that Germany has repealed the possibility to reinstall the suspensive effect of an appeal through an interim measure.

The Procedures Directive does allow member states in Article 39 (3) (a) and (b) to suspend the suspensive effect of a legal remedy. This does not mean that states can introduce regulations which repeal any possibility to reinstall the suspensive effect of the appeal through an interim measure, especially if this constitutes a violation of international obligations (Article 39 (3)).

The European Court of Human Rights has made clear in T.I. v. UK that every state has to examine by itself, whether it meets its obligation according to the European Convention on Human Rights. The state cannot rely on the responsibility of another state that might be in charge of examining a claim, because conventional rights are at stake. It remains unclear, how German authorities can comply with their clear obligation to assess a violation of conventional rights, if another state appears to be responsible for the conduction of the asylum claim and the claim is firstly rejected as inadmissible and secondly no remedy with a suspensive effect is allowed for. At no stage of the procedure an assessment of the grounds of the claim will take place. On top of this argument it has to be considered, that Article 13 of the European Convention of Human Rights demands an effective remedy. This means, that there has to be a court or another instance, which may be appealed to, able to reinforce the substance of the conventional rights. The remedy has to effective in a factual and legal sense. If a violation of Article 3 of the European Convention of Human Rights is claimed – one of the most fundamental principle in international law – the appeal of the individual has to be carefully assessed. Even if the member states have a certain discretion to shape the appeal, in any case the appeal has to contain a possibility to suspend the execution of the decision.

Furthermore it is a fundamental principle of Community law to have an effective remedy according to the jurisdiction of the ECJ, as well as to Article 47 (1) of the Charter of Fundamental Rights.

It has to be taken into account that the lack of an effective remedy can lead to chain deportations especially in a situation, whereby very different standards are applied.

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25 EGMR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, Application no. 45036/98, § 164.
plied in the application of the Dublin II Regulation, for example the humanitarian clause in Article 15 of the regulation and also in the recognition of asylum seekers despite common minimum standards. This fact has been shown by the EU Commission in the evaluation of the application of the Dublin regulation.\textsuperscript{30} The Green paper of the Commission on the future Common European Asylum System\textsuperscript{31} shows furthermore indirectly, that the standards of recognition of refugees diverge in the member states, since the Commission points out, that next steps for a Common Asylum system are needed. In a comparative study conducted by UNHCR it has been shown, that the European Community is still far away from common recognition standards.\textsuperscript{32}

2.3 Information Given to the Applicant Before and During the Asylum Procedure

In order to implement the rights to information of the asylum seekers set out in Article 10 of the Procedures Directive, Sec. 24 (1) and Sec. 31 (1) of the German Procedures Act were amended. Information about the asylum procedure and the decision taken is to be given to the applicant in a language, which German authority can “reasonably suppose, that the foreigner understands it”. Article 10 (1)(a) asks the authorities that the applicants shall be informed in a language which they may “reasonably be supposed to understand”. The implementation is therefore in line with the wording of the Directive, but it is questionable, if an asylum seeker may be able to fully make use of their rights to a fair asylum procedure.

3. Parts of the Directive which have not been Implemented Fully

3.1 Article 4 and Article 7 of the Directive and Extraditions of Asylum Seekers and Refugees

Under Sec. 4 of the German Asylum Procedures Act decisions in the Asylum Procedure are binding for all other authorities in Germany. Sec. 4 second sentence of the Asylum Procedures Act makes a difference, if the extradition of the asylum seeker is requested. Even if the extradition is requested by the country of origin, the decision by the authority or a court deciding on the merit of the asylum claim is not binding. This means that concerning the same case and the same facts of a case, two different decisions of two different decision making bodies – on the one side the authorities dealing with the asylum claim and on the other side the authorities dealing with the extradition request – can be taken. In practice this legal problem has played only a little role. Over the last two years however, the importance of this norm has been increasing. The most famous case is pending before the

\textsuperscript{31} COM (2007) 301 final, S. 3
European Court of Human Rights. Atmaca is a Turkish citizen whose extradition has been seen as admissible by the Frankfurt am Main Court of Appeal, but the Darmstadt Administrative Court has recognised him as refugee and declared that he could not be deported to Turkey. The European Court of Human Rights has indicated to the German government that under Rule 39 of the Rules of the Court, the applicant should not be extradited to Turkey until further notice.

a. The Competent Authority Determining the Asylum Application and Withdrawing the Asylum Status in an Extradition Case
The problem of the extradition of refugees in Germany highlights different shortcomings in the implementation of the Procedures Directive. The decision on the extradition of an asylum seeker or recognized asylum seeker touches in practical sense his right to asylum, since the obligation not to refoule the applicant is touched. In this sense the authorities have to stick to the procedure set out by the Procedures Directive.

Article 4 (1) of the Procedures Directive obliges member states to determine for all procedures a determining authority which shall be responsible for the appropriate examination of the asylum application. Other authorities can be determined according to Article 4 (2), for example if an application has to be processed, in which it is considered to transfer the applicant to another state according to the rules establishing criteria and mechanisms for determining which State is responsible. The example of an extradition case is not mentioned in Article 4 of the Directive. This means that the authority responsible for this decision has to be the authority determined for the examination of the applications in general. In Germany this is the Federal Office for Migration and Refugees. In case of an extradition this decision is taken by a Higher Regional Court with competent jurisdiction. Therefore, not the authority set out in Article 4 of the Directive. This applies to the determining procedure, as well as to the procedure withdrawing the status according to Article 38 of the Directive. The reason to name a competent authority is that it is assumed, that the person in charge deciding on asylum applications and the withdrawal of a status has the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing the directive (see Article 4 (3)). It cannot be assumed that a High Court dealing with criminal matters or rarely with extradition matters does fulfil this precondition.

b. The Procedure of Determination and the Withdrawal of the status in extradition cases as violation of Article 7 and 38 of the Directive
A further gap in implementing the Procedures Directive in German law could lie in the fact that according to law and in practice, the extradition of asylum applicants is not excluded by law. Article 7 (1) of the Procedures Directive sets out very clearly that applicants should remain in the Member State, for the sole purpose of the procedure. In Article 7 (2) of the Directive the exceptions are made in case of extradition, which stays in accordance with the obligation of the member State pursuant to its obligations in “accordance with a European arrest warrant (…)”, or

 Application no. 45293/06 Atmaca v. Germany.
to a third country, or to an international criminal court or tribunal”. The term “third country” remains unclear. In the Directive the “third country” can be the country of origin, since a third country is normally defined as a country, which is not a member State of the European Union. In line with the sense of the provision it does not seem consistent to assume, that the country of origin is a third country. Otherwise a distinction between different extraditions would not have been necessary. The exception to Article 7 (1) could just have been made for any extradition request.\textsuperscript{34} In the light of an effective protection regime it would make no sense, if the persecuting country of origin could get hold of its citizens awaiting the asylum determining procedure. Since the extradition of an asylum seeker has the factual effect as a deportation of an asylum seeker, the procedure to withdraw the refugee status has to be respected.\textsuperscript{35} This means that before the extradition takes place a withdrawal of the refugee status has to be decided upon in line with the provisions set out in Article 38 of the Directive and the legal remedies in Article 39 (1) (e). This is not foreseen in German law, since Sec. 4 second sentence explicitly allows the authorities deciding upon the extradition not to take into account the decisions of the authorities competent to decide on the granting of a refugee status.

3.2 The Protection of Minors in the Asylum Procedure

Article 17 of the Asylum Procedures Directive provides for special rights for minors in the asylum procedure. Especially Article 17 (6) of the Directive emphasizes that best interest of the child shall be a primary consideration for Member States when implementing the rights of the minor in the asylum procedure. In the German Asylum Procedures Act no specific referral is made to the special needs of protection of a child. The German Asylum Procedure considers persons over 16 years of age as adults (Sec. 12 (1) of the German Procedures Act). No specific support, like a representative as foreseen in Article 17 (1)(a) is given to them. The Procedures Directive defines an “unaccompanied minor” as a person below the age of 18 (Article 2 (h)). In this respect the German Asylum Procedures Act is not in line with the Directive even if the Directive does allow member States to keep their laws in force prior to 1 December 2005 (Article 17 (3)) if these laws did not foresee the appointment of a representative. This provision does not mean that a member state can have a whole different notion of the term “unaccompanied minor” like the German law does. Furthermore, in respect of the international obligations of Germany regarding the Convention of the child, which protects children up to the age of 18, Germany urgently needs to change Sec. 12 of the Procedure Act.

In order to give special attention to the needs of unaccompanied minors in the asylum procedure, the Procedures Directive in Article 17 (4) does ask member states to have specially trained personal conducting the interview during the asylum procedure. This also is not foreseen in the German Asylum Procedure. During the legislative process UNHCR has therefore proposed to amend Sec. 24 (1) sentence 34


\textsuperscript{35} \textit{Idem}, p. 28.
5 and add a specific provision according to which, the interview of an unaccompa-
nied minor has to be conducted by specially trained personnel.36

Since minors are also affected by the border procedure37 described above minors
will not be in a position to look for their family members as foreseen in Article 6 of
the Dublin II regulation.

4. Some Widely Debated Parts of the German Asylum Procedures
Act, which have not been Amended

As already mentioned above, some areas of the German Asylum Procedure Act
have not been amended, because the Directive had been modelled according to the
German Act. Two of these areas, that should be mentioned here, are the German
concept of the “safe country of origin” and secondly the right to free legal assis-
tance.

4.1 The German concept of the “safe country of origin”

According to Article 16a (3) of the German Constitution, states in which arguably
no persecution, torture or inhuman degrading treatment occur can be designated as
“safe country of origin” by statutory law. As a consequence it is presumed that a
person is not a victim of persecution, torture or inhuman degrading treatment, if
she originally comes from such a “safe country of origin”. Her asylum claim will be
rejected as “manifestly unfounded” according to the Asylum Procedures Act unless
she puts forward facts, which support the resumption that she is in fact facing per-
secution.38 Since the amendment of the Procedures Act only Ghana is designated a
“safe country of origin”. Until then the new member states of the EU were desig-
nated as safe country of origin like Bulgaria, Romania or Hungary. Adding to that,
Senegal was designated a “safe country of origin”. This provision had been criti-
cised at the time.

4.2 Right to free legal assistance

In the Asylum Procedure before the Federal Office of Migration and Refugees –
the first instance of the procedure – no free legal assistance to the asylum seeker is
provided for. This has been criticised, since the legal assistance in the first instance
is crucial for the procedure as a whole. Preparing the interview and filing the asy-
lum claim is decisive for the outcome of the whole procedure. This is especially the
case in an asylum system whereby many procedures are handled in an accelerated
manner. Good legal assistance is therefore a tool to a fair and efficient asylum pro-
cedure. Under certain circumstances free legal assistance is given to the asylum

36 UNHCR, Stellungnahme für die Anhörung zum EU-Richtlinienumsetzungsgesetz des In-
37 § 18 Abs. 2 Nr. 2 AsylVfG.
38 § 29a Abs. 1 AsylVfG.
seeker during the appeal procedure.\textsuperscript{39} The precondition is that the asylum seeker lacks sufficient financial resources. Furthermore – and this precondition is often difficult to fulfil – the appeal has to be likely to succeed.

The Asylum Procedures Directive does guarantee free legal assistance only for the appeal procedure (Article 15 (2)). It allows member states in Article 15 (3) – (5) of the Directive to restrict the free legal assistance to cases, in which the plaintiff lacks sufficient financial resources (Article 15 (3b)) and to an appeal which is likely to succeed (Article 15 (3d)). Since the concept for free legal assistance under German law is identical with the provisions of the Procedure Directive no implementation of the Directive into German law was necessary, even if in favour of a fair asylum procedure an implementation of a more favourable standard to guarantee free legal assistance would have been appropriate.

5. Conclusion

The implementation of the Asylum Procedures Directive has resulted in only very few changes with regard to pre-existing German legislation. Many key concepts now prominently included in the Directive, such as the concepts of “safe third country” and “safe country of origin”, have been part of German law already since the amendment of the German Constitution in 1993. This is not to say that German legislation has not been substantially modified in the course of the implementation of recent EU Directives on Asylum law and procedure. However, the great majority of these modifications, including the denial of any effective legal remedy, were in fact triggered by the Dublin II Regulation rather than the Asylum Procedures Directive. In future it will be interesting to see, if the European Court of Justice will uphold the standards of the suspensive effect of a legal remedy enshrined in Community Law. The same applies to the concerns raised in this paper regarding the provision in the German Asylum Procedures Act, according to which the extradition of recognized asylum seekers may be admissible.

\textsuperscript{39} § 166 VwGO.
Implementation of the Procedures Directive (2005/85) in Italy

Lara Olivetti

1. Introduction

This contribution proposes to detect the Italian response to Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. After an introductory approach to the general setting of the Italian regulation of the right of asylum, we will follow the steps of the legislative process for implementing the new community norms on asylum procedures (Chapters 2 and 3). That will allow us to understand how a limited transposition of the Directive’s provisions brought to the introduction of measures sensibly upgrading the existing national standard and stretching beyond the Directive’s horizon itself. The Italian implementing norms will be examined through the pattern followed by the community legislator in the Directive in order to better highlight the features of the Italian regulation with relationship to the issues addressed by the Directive: general provisions, basic principles and guarantees, procedures at first instance, procedures for withdrawal of refugee status, appeals.

2. Legal Framework and Implementation Process

The right to asylum is recognized since 1948 by the Constitution of the Italian Republic on a broad basis to “the foreigner who is denied in his own country the real exercise of the democratic liberties guaranteed by the Italian Constitution”. Still, the legislator has never enacted laws providing access to such a right. Rather the Italian Parliament ratified in 1954 the Geneva Convention Relating to the Status of Refugees and only in 1990 dedicated a few norms to refugee status application within the framework of the Aliens Act.

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While the 2001 Constitution Reform retained the State’s competence in matters of asylum vis-à-vis the Regions,³ the 1998 Aliens Act introduced a general prohibition of deportation to countries where the concerned foreigner can be exposed to persecution⁴ and 2002 Aliens Act Reform provided for a further integration of the existing norms leaving relevant issues uncharted.⁵ On one side, the Court of Cassation recognized the right to apply for constitutional asylum - following Article 10 of the Constitution - at any Italian civil Tribunal by declaring its direct application.⁶ On the other side, the European Union Council Directive on minimum standards for the reception of asylum seekers⁷ led to the introduction of a whole set of new norms building up a layered structure of subsequent law acts lacking coordination.⁸

The Italian legislator proceeded on the same path when confronted with Council Directive 2004/83 EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or otherwise needing international protection and Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. New norms were added on top of the existing ones and others were abrogated, by avoiding the adoption of a coordinated text of law. At the transposition deadline of 1 December 2007, the Italian Council of Ministers had approved a legislative decree for implementing Directive 2005/85/EC adding more rules to the existing structure.⁹ The decree was adopted on 28 January and published on 16 February 2008.¹⁰ The Implementation Decree will enter into force on 2 March 2008.

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³ Constitution Article 117 section 2 (see above note n. 1) as reformed by Constitutional Law n. 3 of October 18th, 2001.
⁶ Corte di Cassazione, I civil law section, April 9th, 2002, no. 5055.
As for March 2nd 2008, the Italian asylum law in force will be the following:
- 1948 Constitution on the Italian Republic (with particular reference to Article 10);
- Aliens Act of February 28th, 1990 no. 39 (as amended by 2002 Aliens Act of 30 July): Article 1 sections 1,2,3,8,9,10 and 11, Articles 1 sexies and 1 septies;\(^\text{12}\)
- 1998 Aliens Act, Articles 5 (6), 19 (1) and 2,\(^\text{13}\)
- Council Regulation 343/2003 of 18 February 2003;
- Asylum Application Procedure Regulation no. 303 of 16 September 2004 (in force until a new regulation will be adopted according to Article 38 of Government legislative decree no. 25/2008);

The Italian process of European Union Directives implementation is prompted on a yearly basis by the obligation for the Parliament to adopt an act of law in order to transpose all directives with expiring deadlines for implementation under 1989 Act of Parliament on implementation procedures and obligations under community law.\(^\text{14}\) The juridical instrument is an act of Parliament called legge comunitaria. It may include proxies to the Government to pass decrees giving European Union directives due implementation within a set deadline, according to criteria and principles set by the Parliament.\(^\text{15}\)

The Procedures Directive engaged the Italian Parliament into animated discussions between summer and winter 2006. Deputies and senators addressed for the first time the issue of a future European Union minimum common list of safe foreign countries from where asylum applications could be rejected, or even refused to be admitted. Elaborated provisions of the Directive opened prospects for the Member States to further select asylum applications if the Member State authorities ascertain that the applicants reached the state territory from countries where, according to the legal situation, the application of the law and the general circumstances, the potential asylum seekers are neither subject to persecution, torture or

\(^{11}\) Official Gazette of the Italian Republic, no. 196 of 27 August 1954.

\(^{12}\) See note no. 2.

\(^{13}\) See note no. 4.


inhuman or degrading treatment or punishment, the concerned country has ratified international protection conventions, it has in place an asylum procedure prescribed by law, it has granted refugee status and the applicant still can avail himself/herself of that protection, he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, he/she will be admitted to that country. More norms resulted intricate, by proposing to combine various categories of “safe countries” with the further possibility for the Member State to differentiate the procedures for handling applications, if a number of listed circumstances occur. Parliamentary proceedings mark an escalating pressure in the discussion when considering that social and political parties in Italy called for the adoption of a comprehensive law on asylum, putting order among the various forms of protection based on both international and national law. However, a long list of EU directives needed to be transposed before the set deadlines and the yearly statute of community law accomplishment had to be enacted.16

That helped the Italian Parliament members to quickly resume the legislation process in a way that we may call “minimum effort/maximum output”. Implementation of the Procedures Directive was ensured with a proxy to the government with a single specific principle to observe:

“[A]pplications shall be declared unfounded in case the asylum applicant is a safe Third Country national or, if stateless, he was habitually resident in that country, or he comes from a safe country of origin, unless the applicant has submitted serious grounds for considering the country not to be safe in his particular circumstances. Serious grounds may include discrimination and repression of the applicant’s conduct being prosecuted by the state of origin or provenance, but not amount to an offence according to the Italian legal system.”17

The deadline for implementing Directive 2005/85 was set in one year (4 March 2008), during which the Government was to adopt the transposing decree upon proposal of the President of the Council of Ministers or of the Minister for European Policies and the Minister with prevailing institutional competence on the subject, upon agreement with other Ministers of concerned matters and after acquiring the advisory opinion of both Parliament Chambers.18

The ongoing legislative process at the Italian Government for implementing EC Directive 2005/85, as well as Directive 2004/83 during 2007, became a field of animated discussions between the Government and social parties. Human rights organisations working for asylum seekers gathered around the so-called “Asylum Ta-

18 Parliament Chambers Advisory opinions had to be communicated to the Council of Ministers within forty days from request, following Article 1 (3) of the legge comunitaria. Only the Chamber of Deputies communicated its Advisory opinion in this legislative process.
ble" (Tavolo Asilo) which soon was recognised as one of the main stakeholders the Government met while drafting the implementing decrees. This network animated debates at various levels of the society and in the Parliament around the many issues raised by the Directives and the need to reform the existing regulation of the access to the right of asylum in Italy in point of: rejection of any measure aimed at excluding the admissibility of applications from selected countries, a common procedure for all applications for international protection, the need to reform the responsible authorities system in order to guarantee their independence from the executive, the adoption of specific measures for vulnerable applicants, conferring Tribunals the competence of examining appeals against first instance decisions, the right to remain in the state territory pending the application and its possible challenges, the right to adequate legal assistance at all steps of the procedure, the right to access legal assistance on the expenses of the State for those lacking financial resources, the need to decentralise the asylum seekers reception system and to significantly limit the cases of asylum seekers detention.

The Chamber of Deputies actively contributed to the legislative process with its Advisory Opinion by setting specific conditions and observations for amending the Procedures Directive decree draft. The Chamber recalled the results of the Investigating Commission on state-run reception and detention centres for immigrants and asylum seekers and required the Government to lay down guarantees to prevent that the negative consequences reported by the Commission will be repeated, namely to avoid the widespread detention of undocumented asylum applicants and to limit the recourse to state-run centres to emergencies for transfer operations. The Chamber’s recommendations also regarded the need to ensure access to legal assistance on the State’s expenses for this category of foreigners without the cooperation of the Consulate of the State of origin as provided by the existing law, extending the fifteen-days term for appeals, measures aimed at favouring the right to an effective remedy and further recommendations for taking measures ensuring the independence of competent authorities for the evaluation of asylum application.


The transposition decrees of Directives 2003/84/EC and 2005/85/EC have been adopted by the Government during Council of Ministers session of 9 November 2007.

The discussion in the Council had reportedly not ended and amendments may have been discussed in point of extending the opportunity to set a second term for interview, due to the foreseeable long duration of procedures and the limited capacity of the public reception system, to drastically limit the use of detention and reception state-run centres and to fully decentralise the reception system to local governments, as suggested by the Investigating Commission 2007 Report on State-run reception and detention centres for immigrants and asylum seekers.\footnote{See previous note.} Given the impending one-year-deadline for the directive transposition, the options were very limited. Possible modifications could be introduced later according to Article 1 (5) of the Parliament proxy to the Government (\textit{legge comunitaria}) in matter of correcting and completing the provisions of implementation decrees within eighteen months from the date of their entry into force. However, on the 24th of January 2008 the Government fell and the XV legislature ended before time. The Government decree for implementing Directive 2005/85 EC was enacted on 28 January and published on 16 February in the Official Gazette.


3.1 Scope of protection

A first salient feature distinguishes the Italian Implementation decree of Procedures Directive 2005/85/EC from the start with Article 1: the purpose of the decree is to establish the procedures for examining applications for international protection. All applications of asylum seekers lodged in Italy will be evaluated both under the lens of 1951 Convention relating to the status of refugees and that of subsidiary protection as defined by Article 1 of Legislative Decree 251/2007 giving transposition to Council Directive 2004/83/EC. Subsidiary protection evaluations are integrated at all levels of the procedure and concern:

> “a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in this Decree and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.\footnote{Government Legislative Decree no. 251 of 19 November 2007, “Implementation of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted”, \textit{Official Gazette of the Italian Republic}, 4 January 2008, no. 3. By recalling the same wording of Article 15 of Directive 2004/83, Article 14 of the Italian Legislative Decree 251/2007.}
Grafting the principles of the European Union directives on the Italian stock did not prove an easy operation and the result is not fully encouraging. On one hand, including subsidiary protection within the scope of the Procedure Directive has the important consequence to prevent the risk of deporting individuals whose applications for refugee status have been rejected before their need for subsidiary protection has been examined. It corresponds to the issues raised by many international organizations and is in accordance with Member States’ obligation under Articles 3 and 13 of the European Convention on Human Rights and meets the specific request for a single asylum procedure by the Italian Network of organizations for the right of asylum and of the Parliament.

On the other hand, the different forms of protection regulated by Italian law still lack coordination and prove hard to understand and achieve. While terms and responsible authorities are different, the relevant norms on different forms of protection are contained in various acts of law or in Courts’ judgement which are difficult to trace and correctly combine with each other, the result being an intricate briar. To illustrate: a general prohibition is set to deport foreigners to countries where they can be exposed to persecution for reasons related to race, sex, language, citizenship, religion, political opinions, personal or social position; other provisions define humanitarian protection either as a limit to the police authority’s denial of a residence permit in case of “serious grounds, in particular if for humanitarian reasons or deriving from constitutional or international obligations of the Italian State” or as protection granted by the Italian State upon decree of the President of the Council of Ministers when urged by conflicts, natural disasters or other severe events in non-EU Member States; the Italian Constitution numbers the constitutional right of asylum among its fundamental principles for any “[t]he foreigner who is denied in his own country the real exercise of the democratic liberties guaranteed by the Italian Constitution …, in accordance with the conditions established by law”. Although no law on constitutional asylum was ever enacted, the Court of Cassation maintained that this form of protection shall be applied before the Civil Tribunal only by challenging a first instance decision denying refugee status. We may wonder how this condition for accessing constitutional asylum can relate to the protection procedure as disciplined by the Italian Implementing decree of Directive 2005/85, if we consider that the former applies to all - not Italian nationals, including EU citizens, while the latter restricts the applicant definition to Third Country nationals and stateless persons.

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3.2 Responsible Authorities

While applications are received only by the police at the border and on State territory by the Police Province headquarters (Questure), the examination will continue to be carried out by a pool of “Territorial Commissions for the recognition of international protection” (Commissioni Territoriali per il riconoscimento della protezione internazionale) (Article 4). The many entreaties to guarantee the independence of these bodies from the executive have apparently not been taken into consideration by the Government. Each Commission is mainly composed by members belonging to administrative branches competent for securing public order and local governance: a Préfet from the Ministry of the Interior with the role of President and a prevailing vote on the others in case of parity of votes, a State Police officer, a local government representative, an UNHCR representative. An additional member from the Ministry of Foreign Affairs may be appointed occasionally, if more specific information or support is needed. The members of the prospective ten Territorial Commissions, being employed in the respective administrative offices, will not be paid for their job in the Commission, rather they will receive a fixed fee for every meeting attended.

Similar considerations apply to the National Commission for the Right of Asylum, a State body responsible for revoking and ending protection status, as well as coordinating Territorial Commissions and providing them with the necessary information (Article 5). The Commission members are appointed by the President of the Council of Ministers upon proposal of the Minister of the Interior and the Minister of the Foreign Affairs. It is composed by a director officer from the administration of the Presidency of the Council of Ministers, a diplomatic officer, a Préfet from the Ministry of Interior Department of Civil Liberties and Immigration, and a director officer from the Ministry of Interior Department of Public Security. The President of the National Commission is a Préfet. A representative of the Italian delegation of UNHCR takes part in the Commission’s meetings without a right to vote. The Ministry of Interior Department of Civil Liberties and Immigration provides the Commission with logistic and management support.

29 The Territorial Commissions currently active are seven, located in Gorizia, Milan, Rome, Foggia, Siracusa, Crotone, Trapani, according to Article 12 of Asylum procedure Regulation, President of the Republic decree no. 303 of 16 September 2004.

30 The Chamber of Deputies Advisory Opinion to Implementing Decree draft (see note 20) considered that “the composition of the Territorial Commissions under Articles 4 and 5 of the decree draft appear questionable as … they result in not bearing the requirement of full independence from the executive, a fundamental element in order to guarantee a free examination from any influence by the Executive”. Moreover, “in international law, the recognition of refugee status constitutes an humanitarian act and not a political one, therefore the risk of interferences is absolutely real, also taking into consideration that the Italian history of asylum was characterized by numerous situations in which the recognition of the right of asylum was strongly affected by contingent political evaluations, with regard to the commercial and diplomatic relations between Italy and the countries of origin…”

31 The current regulation expressly excludes any form of remuneration for Commissioners (Article 1 quater of Statute no. 39 of 28 February 1990).

32 Article 5 of the Implementing Decree.
The National Commission is also the body in charge of ensuring information and training support for Territorial Commissions (Articles 5 and 15), but we may argue that the mere provision of this duty can fully satisfy the requirements for examining applications and decision-making detailed in Articles 8 section 2 of the Directive, with regard to obligation of Member States to ensure that “precise and up-to-date information is obtained from various sources” and that “the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law”.  

Other bodies with administrative responsibilities regarding international protection applications are the Dublin Unit (part of the Ministry of Internal Affairs Department for Civil Liberties and Immigration), in charge for transfers under Council Regulation no. 343/2003 and the National Commission for the Right of Asylum, the authority responsible for revoking and ending protection status, as well as coordinating Territorial Commissions and providing them with the necessary information.

4. Basic Principles and Guarantees

Applications shall start and be processed on an individual basis. The only exception concerns minor age children whose application is submitted by their parents. The Implementing Decree makes no reference to dependent adults under Article 6 (3) of the Procedures Directive. The individual application principle, contained in Article 6 of the decree, is to be welcomed as it entitles every adult family members to apply for international protection and prevents from the risk that dependent adults may not be put in a position to substantiate their claim. This provision is particularly relevant as Article 12 (1) of the Directive does not require Member States to interview dependent adults. As a result, the position of spouses, namely of women as dependent family members in many cases, could not be duly evaluated and could result misrepresented by only taking into account the situation of the partner. By considering that the consequences may negatively affect the position of the dependent family member during the application process and afterwards, we may wonder if a dependent application may lead to acquiring a dependent residence permit that could be revoked in case the principal applicant would withdraw his/her application, leave the country, leave the spouse or decease.

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33 The Chamber of Deputies pointed out the need “for at least one qualified expert in matter of immigration and asylum law for each Territorial Commissions, independently chosen possibly by the University National Council among appointed lecturers or researchers or designated by the National Forensic Council among attorneys”, Advisory Opinion, note 20.

34 Article 12 (1) of the Italian Implementing decree provides that the adult family member interview may be omitted only in case the concerned person requires so with a motivated request.
4.1 Guarantees for Minor Age Applicants

The position of children is considered as dependent family members or as unaccompanied children. Unaccompanied minors are eligible for lodging an individual application according to Article 6 (3). Article 26 (5) of the Implementing decree, by following the pattern of the existing regulation, requires that their application is confirmed by a guardian appointed by the judicial authority for capacity matters (giudice tutelare), as requested by the Civil Code for any person under age whose parents have died or cannot exercise their authority for other reasons (Article 343). However, the practice shows that the appointment of a guardian to unaccompanied children may take more months instead of the twenty days provided by the Implementing decree. Moreover, the Government does not cope with the practical problem of the lack of informed and suitable guardians to be appointed and the widespread choice of judges to appoint mayors as a last resort, as the Civil Code allows if no other suitable person is available (Article 350).

On the other hand, mayors, or other delegated officers of the municipality, are not in a position to effectively exercise unaccompanied children’s guardianship. This situation is due to the fact that unaccompanied children can amount to a very considerable number for each mayor in several municipalities and, importantly, mayors are subject to a specific obligation to cooperate with the administrative authority in charge of repatriating unaccompanied children and may be influenced by the opportunity to favour their repatriation to their country of origin instead of confirming the minors’ applications for asylum in Italy, especially when considering that mayors are the authority responsible for the management of public funds needed for the accommodation and reception of the same unaccompanied minors.35

All safeguards detailed in Article 17 of the Directive are implemented in the existing regulation and in the Implementation decree, as well as in the legislation on medical examination for ascertaining the age of the applicant, with reference to the criminal procedure norms based on the presumption of minor age in case of doubt.36

Married applicants under the age of eighteen are not mentioned by the Implementing Decree, resulting in their apparent exclusion from access to international protection application. This regrettable pitfall is also to be found in the wording of Article 6, under 4 (c) of the Directive. Other norms of the Italian law system can be recalled in order to ensure access to the procedure in these cases, namely Articles 390 and 394 of the Italy Civil Code. According to these provisions, minor age persons become emancipated with marriage and can perform valid acts of ordinary

managements, whilst a judicial authorization is mandatory for extraordinary ones. Given the crucial importance of an international protection application for the life of a person, we must regard it as an act of extraordinary management to be handled by the competent judicial authority. As doubts remain, the provision should be interpreted in the light of the principles of 1989 UN Convention of the Right of the Child. In particular, the best interest of the child should prevail as well as the consideration that the marital status of a minor should not have a bearing on his/her maturity and consequent need for special treatment.

4.2 Right of the Applicant to Remain in the Country Pending a Decision

The Implementing Decree introduces the right for the asylum applicant to remain in the state territory until the second instance decision is taken (Articles 7 and 35 section 6). With reference to Article 7 (2) of the Directive, the Italian legislator opts for derogations from the right to remain where the applicant is subject to extradition to other Member States competent for examining the application according to Council Regulation no. 343/2003 or pursuant to obligations in accordance with a European arrest warrant or to international criminal courts or tribunals (Article 7).

After the twenty to thirty-five-days time of stay in a reception centre, a residence permit is granted for three months and can be renewed until the end of the procedure and during its challenge process, when suspension of the appealed decision applies (Article 20 section 3, 26 section 4, 35 section 7). The residence permit entitles applicants to work and to access professional training according to Articles 5 (7) and 11 of Implementing decree of EC Directive 2003/9 on minimum standards for the reception of asylum seekers.37

Important limits apply to the effective right to remain in those cases when a residence permit cannot be extended during the process, according to Government decree no. 140/2005 implementing the Qualification Directive as recalled by Article 7 of the Implementing Decree.38 In particular, the residence permit will not be extended after six months, if a first instance decision on the application is not yet taken, when the delay is due to the applicant. A conclusive presumption applies: the delay is due to the applicant not only in case he or she presented false documents, or refused to give information on his/her identity or nationality, but also when he or she failed to appear before the Territorial Commission after being summoned at the reception centre or at the last known address. If we consider that the reception system will have to be centralised in state-run centres for the majority if applicants, that the centres’ capacity is insufficient (see further, A Dual Reception System) and the reception time limits are short (twenty to thirty-five days), we may understand that it will not be easy for applicants to find accommodation and be reachable at any time, notwithstanding the possible length of the procedure duration. The legal presumption, being irrefutable, does not take into account that asy-

37 Government Legislative decree no. 140 of 30 May 2005, see note 8.
38 Article 11, see note 8.
lum seekers are often abandoned on the territory without an accommodation perspective and apparently puts all the burden of a lacking reception system on the applicants.

4.3 Information and Communication Guarantees

The further guarantees for applicants, as provided by the Directive, are recalled literally in the text of the Italian Implementing decree and at times interpreted in a restrictive way with reference to the requirements for the examination and for a decision of the applications, the applicant’s obligations.

The norms on the duty to inform applicants appear particularly lacking. The main measure provided in detail is a booklet (Article 10). The booklet, in the language of Article 10 “opuscolo” – from the Latin opusculum: “a little work” – proposes the introduction of the same measure that proved highly insufficient during the past years (and eventually abandoned in many police offices), yet foreseen by the existing regulation with the same wording. The new provision disposes the handing out of this information vehicle at the moment of presenting the asylum application and is translated into languages indicated by the applicant “or, if not possible, in English, French, Arab or Spanish”. It cannot but be regarded as too a little work with respect to the obligation of a State to give real access to the right of asylum, especially if we consider that the Ministry of Interior data on asylum applications show that asylum seekers mainly come from countries where other languages are mainly used: Afghanistan, Eritrea, Turkey, Iraq, Somalia, Ivory Coast.

The basic requirements and guarantees set out in the Directive will arguably find due accomplishment if we consider that the transposition decree does not mention the duty to ensure that interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner (Article 13 section 3 Directive). The Italian Implementation norms make no reference in point of ensuring that the interviewer is sufficiently competent and that communication is appropriate. Instead, we only can find a general reference to the importance of an adequate training of officers in the Italian Implementing decree of Council Directive 2004/83/EC (Article 36) and a provision establishing the duty of the National Commission for the Right of Asylum to train the ten Territorial Commissions. However, no mention is made on the point of taking the necessary steps and of finding the resources in order to ensure a sufficient level of competence in handling protection applications.

39 Articles 2 (6) and 9 (3) of Asylum Application Regulation no. 303 of 16 September 2004, see note 5.
41 See note 23.
42 Article 5 of the Implementing decree.
Far from guaranteeing the use of a language which the applicant may reasonably be supposed to understand and in which he or she is able to communicate, as required by Article 10 and 13 (3) of Directive 2005/85/EC, the transposition decree only requires that communications during the procedures shall be made to the applicant in the language he or she prefers only if that is possible. Alternatively, communications shall be made in English, French, Spanish or Arab. The assistance of an interpreter shall be guaranteed, if necessary, according to Article 10 (2) and 2 (1). But the decree does not set criteria to appreciate when it is considered “possible” to communicate in the language of the applicant or what makes the assistance of an interpreter “necessary”. As a result, much room is left to administrative authorities to exercise discretional power and adopt diverse practices through the country.

These norms not change the existing language guarantee standard as set in 1998 Aliens Act for the communication of all decisions concerning entry, residence and expulsion. These shall be “translated into a known language or, where not possible, into French, English or Spanish” (Article 13 section 7). The same applies according to wording of Article 4 of the Asylum Application Procedure Regulation no. 303/2004. The Court of Cassation affirmed that this provision shall be interpreted in a restrictive way and that the competent authorities have a duty to specify in written what circumstances make it impossible to translate the concerned decision into the language of the foreigner.

4.4 Other safeguards

The Italian legislator provides for the obligation of personal and individual interviews for all applicants with limited exceptions. These occur in case the Commission is able to take a positive decision on the basis of the evidence available or when a public health authority certifies that it is not possible for the applicant to attend the interview. Since the language of the norm does not specify that the impeding circumstances must be enduring, the provision leaves room to different interpretations and may clash with the following very similar conditions for delaying the interview (Article 12).

The interview report has to be undersigned by the applicant (Article 3). This important requirement, by providing the opportunity for the applicant to correct possible mistakes in the report, is also included in the Asylum Application Procedure Regulation currently in force at Article 2 (2).

Asylum seekers’ access to legal assistance at the State’s expenses, as generally granted to people lacking of sufficient resources is a years-long vexed question in Italy. For long time applicants have had difficulties and often have been excluded from this benefit because the law requires foreigners to provide for a confirm of

43 Article 10 section 4 of the Implementing decree.
45 See note 3.
their income statement by the Consulate of their State of origin, which cannot be required to people seeking protection from the same Authorities.\textsuperscript{46} Upon specific request of the Chamber of Deputies, the Government found a satisfying solution by expressly making reference to the applicant’s statement as a sufficient proof of his/her lacking resources as the main requirement for being admitted to this benefit (Article 16 section 2).\textsuperscript{47}

Article 25 of the Transposition decree stipulates a full prohibition of disclosing information on individual cases, although it is only explicitly referred to the Territorial Commissions and to the National Commission, among the different bodies in charge at the various stages of the procedure. On the other hand, a clear forbiddance to disclose information “in any case” results in a reinforced guarantee with respect to the corresponding Directive provision in Article 22, which limits prohibition to directly disclosing such information.

\section*{4.5 A dual reception system}

A good part of the discussion around asylum procedures and the implementation of the Directive in Italy referred to the detention of asylum applicants. The State choice to concentrate applicants in fourteen isolated centres in precarious conditions, often overcrowded and with very limited opportunity to exit was criticised by the Parliament and by the Investigating Commission appointed by the Minister of the Interior in 2006.\textsuperscript{48}

The Implementation decree declares that “the applicant cannot be detained for the sole reason of examining his/her protection request” (Article 20 section 1). On the other hand, the same provision gives the floor to a number of cases in which applicants must reside in state-run centres.

The Government decided to confirm the existing dual reception system for asylum applicants:

1. a reception and detention system in a few state-run centres for all undocumented applicants and those who violated administrative or criminal law (Reception Centres for Asylum Applicants – CARA, and Centres for Temporary Residence and Assistance - CPTA);
2. decentralised reception system managed by municipalities and coordinated by the National Association of Italian Municipalities (ANCI), called Protection System for Asylum Applicants and Refugees (SPRAR).

As for the first system, Article 20 and 21 of the Implementing Decree distinguish between the concepts of “hospitality” (ospitalità) and detention (trattenimento).

\textsuperscript{46} Article 79 (2) of President of the Republic decree no. 115 of 30 may 2002, \textit{Official Gazette of the Italian Republic}, no. 139 of 15 June 2002.

\textsuperscript{47} Chamber of Deputies Advisory Opinion, condition (b), see note 17.

Hospitality is defined in Article 20 as the mandatory residence of the applicant in Reception Centres for Asylum Applicants (CARA), for a twenty-days period, with the permission to leave only during day hours when:

"[I]t is necessary to ascertain his/her nationality or identity and the applicant does not dispose of travel or identity documents, or has submitted false or counterfeited documents when entering the State territory;
The concerned foreigner applied after having been stopped by authorities for avoiding border checks or immediately afterwards;
The concerned foreigner applied for international protection after being stopped by authorities for illegal residence;
The concerned foreigner applied after a deportation decision is adopted after 13 section 2, subsection a) and b) of 1998 Aliens Act, or the foreigner has been repelled at the border, also when already been interned in detention centres after Article 14 of the same Act."

This provision upgrades the condition of asylum applicants with respect to the existing regulation and practice. Until now, applicants in the listed situation have been detained in Identification Centres (CID) in the problematic conditions described by the Investigating Commission previously mentioned. On the other hand, we have to observe that the new centres (CARA) are deemed to concentrate again almost all asylum seekers, since most of them reach Italy by boat at unauthorised borders and are usually undocumented. Given the actual capacity of the existing reception centres is very limited (730 places) if compared to the number of applicants (11,819 in 2007), we may wonder if the Government intends to build many new reception centres and how she will cope with the coming applicants until the possible new centres will be ready.

Detention is the restriction of applicants in closed centres where foreigners to be deported are interned, without permission to leave at any time (Centres for Temporary Residence and Assistance, CPTA). Article 21 provides detention when:

a) there are serious reasons for considering that the applicant committed crimes as described in Article 1 paragraph F of the Geneva Convention relating to the status of refugees, or
b) the applicant has been convicted for a number of crimes listed in Article 380 sections 1 and 2 of the Italian Criminal Process Code or for any offence concerning drugs, sexual freedom, aiding illegal immigration to the Italian territory and from Italy to other states, or for crimes aimed at recruiting persons for prostitution, exploitation or minors to be employed in criminal activities, or

49 Administrative deportation, i.e. adopted for the reason of illegally entering the State territory or illegally residing.
50 Article 14 of 1998 Aliens Act provides the detention of foreigners when deportation cannot be carried out immediately.
51 Data from the Investigating Commission 2007 report (note 20) and to the National Commission for the Right of Asylum information (see note 39).
c) A deportation decision has been adopted for different reasons than mentioned in Article 20.

Time limits for hospitality are set for a period up to thirty-five days and for up to sixty days in case of detention. However, these limits may expand to more months in case of appeal against the decision on the application. In fact, in case the judge will grant a suspension of the impugned decision allowing the applicant to remain in the country during the trial (Article 35 section 8 of the transposition decree), the applicant will be hosted in centres under Article 20 (Article 36 section 3). The same applies to hosted applicants who lodged their application after a deportation decision had been adopted and to those previously repelled at the border, as provided at Article 20 subsection d (Article 38 section 8). By considering the time limits set to appeal judgements under Article 35, internment is to be prolonged of three months and of further three months in case of second degree appeal to the Court of Appeal, if the Court grants suspension of the impugned decision effects.

The second reception system provided by Italian Asylum norms (SPRAR) is headed by a governing body comprised of many institutions at various levels dealing with asylum issues. These institutions include the government, local and civil society international organisations working together to implement strategies and adopt protocols in the asylum process. Article 1-sexies of Statute no. 39/1990 (not abrogated by the Procedures Directive Implementation decree) stipulates that the protection system has to be made up of local authorities providing reception services and assistance for asylum seekers and refugees as well as for all non-nationals, who are granted other forms of humanitarian protection.52

The Italian municipalities and regions participate voluntarily in the protection system by offering reception and monitoring services to asylum seekers, refugees and persons granted humanitarian protection. Reception is ensured from the application to the final decision and beyond, until the concerned person has acquired an independent financial and legal position. These services, according to Article 1-septies of the same Statute, are financed by the National Fund for Asylum Policies and Services managed by the Ministry of the Interior and by funds allocated annually to refugees in Italy by the European Refugee Fund. Through this protection system, the local authorities ensure that they provide standardised services respecting local diversity, by meeting or even exceeding the criteria set by the European Council Directive 2003/9/EC laying down standards for the reception of asylum seekers. The Ministry of the Interior established a Central Service (Servizio Centrale) for information, consultation and monitoring, to coordinate the system.53

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52 See above note 1.
53 The protection system in Italy (SPRAR) is currently composed of 97 local authorities throughout Italy, which are responsible for 105 reception, assistance and integration programmes for asylum seekers, refugees and persons granted humanitarian protection. They work closely with more than one hundred guardianship associations. The reception system in Italy is presently able to accommodate 2,350 people at a time. In 2006 it the SPRAR assisted about 6,000 people out of a total of approximately 10,000 who requested asylum un the country. See http://www.serviziocentrAle.it/.
Unaccompanied minors cannot be hosted or detained in any case according to Article 26 (6) of the Implementing Decree. However, accompanied children follow their parents in the centres where they must reside. While the Implementing Decree remains silent on this point, the Asylum Procedure Regulation no. 303/2004 (Article 8 section 1) provides that “centres directors shall take into account the needs of families and of persons with specific conditions: minors, disabled, elderly, pregnant women, persons who suffered discrimination, abuses and sexual exploitation in the country of origin.” The current discipline is thus uncertain and children may continue to be concentrated in centres when accompanied, if their parents fall into the categories of applicants to be mandatory hosted in reception or detention centres.

5. Procedures at First Instance

5.1 Rules for examination

All first instance applications are processed according to a single procedure before the same authorities. A shorter handling time is provided for applications lodged by asylum seekers hosted in reception centres (CARA), those detained (in CPTA) and for the categories specified below. As a result, most applications are deemed to be handled in a shorter time than the ordinary process duration period of thirty-three days. 54

Reasons for prioritising the examination, as listed at Article 28, are the following:

a) The application is manifestly well-founded;

b) The applicant belongs to vulnerable categories as listed in Article 8 of European Council Directive 2003/9/EC transposition decree on minimum standards for the reception of asylum seekers; 55

c) The application is submitted by a foreigner hosted or detained following Articles 20 and 21, except for those interned for the reason of ascertaining the applicant’s identity.

If we compare this list with the recalled cases justifying hospitality and detention under Articles 20 and 21, we may notice that the transposition decree lacks correspondence with the categories numbered at Article 23 par. 4 of the Directive resulting in the unlawful application of accelerated examination to different cases than those provided by the Directive. While the Directive requires that the applicant is a danger to the national security or public order, the national decree makes mainly reference to past convictions, putting the evidence of the existence of danger on a

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54 Ordinary procedure time limits set by Article 27 of the Implementing Decree.
55 Reference is made to minors, disabled and elderly people, pregnant women, single parents with minor children, people for whom it is ascertained that they suffered torture, rape or other forms of serious psychological, physical or sexual violence, Article 8 of Government Legislative decree of May 30th, 2005, no. 140 (see note 7).
mere formal level (compare above mentioned Article 21 of the Implementing Decree and Article 23 par. 4, subsection m). Furthermore, the content of Article 20, as above recalled in Article 28 sub c) of the Decree, does not correspond to the language of Article 23 par. 4 subsections (j) or (l) of the Directive giving way to a contradictory national practice.

While the Implementing Decree sets very short time limits, prioritised examination will apply to the majority of cases in which applicants find themselves. Interviews shall be held within seven days instead of thirty and the competent authority, the Territorial Commission, shall take a decision in two days instead of three. Still, the procedure must be followed in accordance with the basic principles and guarantees set in Chapter II of the decree, as set in Chapter II of the Directive (Article 28 section 1 Transposition Decree, Article 23 par. 4 Directive).

Given the present experience of long processes, where procedures may last many months and interviews only a few minutes, we may wonder if the new norms, so similar to the existing process regulations and yet so optimistic, will enable Italian authorities to respect the law. The accelerated procedure rule under Article 28 entails achieving in nine days the ambitious goal of duly informing the applicant, performing a proper examination, obtaining precise and up-to-date information from various sources regarding the situation in the countries of origin and in those of transit, interviewing every applicant with competent officers, translators and take an individual, objective and impartial decision.

Moreover, we may argue that the basic requirements and guarantees set out in the Directive will find due accomplishment if we consider that the transposition decree does not mention the duty to ensure that interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner (Article 13 section 3 Directive). The text makes no reference in point of ensuring that the interviewer is sufficiently competent and that communication is appropriate. Instead, we can only find a general reference to the importance of an adequate training of officers in the Italian transposition decree of Council Directive 2004/83/EC (Article 36) and a provision establishing the duty of the National Commission for the Right of Asylum to train the ten Territorial Commissions. However, no mention is made on the point of taking the necessary steps and of finding the resources in order to ensure a sufficient level of competence in handling protection applications.

By adhering to the existing process norms, the Italian legislator did not opt for introducing accelerated procedures with regard to all the cases listed at Article 23 (4) of the Directive, nor for setting up preliminary examinations of applications or specific procedures under Article 24, 34, 35 36 of the Directive.

New measures on inadmissibility declaration were approved with reference to Article 25 of the Directive. The wording of the interested norm finds a poor transposition in Article 29 with the consequence to negatively the position of the applicant. Applications will be considered inadmissible and not further examined in two cases: a) another signatory State of the Geneva Convention has granted refugee

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56 See note 22.
57 Article 5 of the Implementing Decree.
status, in place of “another Member State”; b) the applicant has lodged an identical application after a first instance decision, instead of “after a final decision”.

5.2 Decisions

The Italian first instance procedure shall lead to the following possible decisions (Article 32):

a) Declaration of inadmissibility of the application following Article 23;
b) Declaration of process ending if another Member State is competent according to Council Regulation no. 343/2003;
c) Recognition of refugee status or subsidiary protection according to Articles 11 and 17 of Legislative Decree 251/2007 giving transposition to Directive 2004/83;
d) “Rejection if applicant does not qualify for refugee status or subsidiary protection according to Legislative Decree 251/2007 or if the reasons for ending or exclusion from international protection apply, according to the same Legislative Decree 251/2007, or if the applicant comes from a safe country of origin and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances. The Commission will not take a decision on the application before examination according to the principles and safeguards under Chapter II. Among serious grounds may be included discrimination and repression of the applicant’s conduct being prosecuted by the state of origin or provenance, but not amount to an offence according to the Italian legal system.”

Similarly to what suggested by the European Parliament in its proposal for amendments to the Procedures Directive, the principle for decision-making in the Italian implementation (as well as of the existing regulation) is that all applications be assessed on the basis of the definition of refugee contained in the Geneva Convention and, only if those criteria are not fulfilled, on the basis of the requirements for subsidiary protection.\(^\text{58}\)

The concepts of first country of asylum, of safe third country and of European safe third countries were not introduced. The Implementation decree defines a “safe country of origin” as “the country included in the minimum common list according Article 29 of Council Directive 2005/85/EC” (Article 2).

Notwithstanding the individual approach to decision-making that characterises the Italian procedure regulation, the Italian protection standard would be significantly diluted if a minimum common list of third countries was adopted by the European Union Council as provided by Article 29, given the obligation for Member States to observe the prospective common list (section 1) and to consider

the application unfounded following Article 31 provided that it is safe for the particular applicant and as requested by the Parliament proxy to the Government.\textsuperscript{59}

No specific norms provide for the case of subsequent applications. As a consequence, the general rules for administrative proceedings apply, according to which any application foreseen by a law norm must be examined and a written decision must be taken.\textsuperscript{60}

Examination is discontinued during the time necessary to determine what State is competent to process the application. As soon as another state is deemed competent after Dublin Regulation, Italian authorities shall end the procedure (Article 30). Taking back applicants under the same regulation would thus lead to reopening the procedure and not to regard the application as a “subsequent” one. Since an identical subsequent application would be regarded as inadmissible, this norm prevents application who have never been substantively considered from the risk of \textit{refoulement}.

6. Procedures for Withdrawal of Refugee Status

The guarantees for applicants undergoing a withdrawal procedure, detailed in Article 33, refer to the right to be informed in writing by the National Commission for the Right of Asylum and to be given the opportunity to submit either personally or in a written statement, the reasons as to why the applicant’s status, either refugee status or subsidiary protection, should not be withdrawn. The additional safeguards foreseen by the general rule for administrative proceedings apply, providing for a more comprehensive set of rights to information and participation of the applicant.\textsuperscript{61}

An application shall be regarded as withdrawn if stated so in written by the applicant, under Article 21 and the process shall lapse by law. No implicit withdrawal is considered by the Implementing Decree. In case of leaving a reception or detention centre without justified reason or if the residence permit expires and the concerned applicant does not request its renewal, the application will still be processed and the Commission will take a decision on the basis of the collected information (Articles 22 and 13 section 1).

7. Appeals

The most relevant modifications introduced by the Implementing Decree concern the right to an effective remedy to first instance decisions. Above all, the competence of the Civil Tribunal for examining appeals represents a first and extremely important reform, the extent of which will be clearly perceived if we consider that

\textsuperscript{59} See Article 12 of \textit{legge comunitaria}, note 16.


\textsuperscript{61} Act of Parliament no. 241/1990, note 60.
the only remedy provided by the existing procedure regulation against a decision of the Territorial Commission is to challenge that decision before…same Territorial Commission.62

The prospective remedy system consists of three degrees of judicial appeals against the following decisions:53
- Refugee status application rejection, withdrawal and cessation;
- Subsidiary protection recognition;
- Subsidiary protection application rejection, withdrawal and cessation;
- Application inadmissibility;64
- Decision in case of failure to appear on Article 22 (2).65

A first degree appeal must be lodged before the Civil Tribunal within thirty days from the date of the formal communication of the Commission decision.66 This time limit is reduced to fifteen days for applicants detained according to Article 21 in consideration of the time limits set to their detention.67 After that moment, the applicant will be escorted to the State border or, for those who have been previously granted a residence permit, formally invited to leave the country within fifteen days.68

The judgement is taken by the Civil Tribunal within three months and can be impugned (reclamo) within ten days before the Court of Appeal. This second degree judgement will also be taken in three months time. The Appeal judgement can be challenged before the Court of Cassation within thirty days.69

A second modification upgrades the existing procedures regulation by providing an automatic suspensive effect to first degree appeals against the rejection of protec-

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62 Article 1ter (6) of 1990 Aliens Act, see note no. 2. Soon this remedy took the popular name of “supplication”, by underlining its intrinsic lack of remedial nature.
63 Article 35 of the Transposition Decree.
64 It must be noted that Article 29 of the Italian Transposition Decree provision widely departs from that of Council Directive at Article 25, with the result to unlawfully increase the scope of inadmissibility to other cases: “The Territorial Commission declares the application inadmissible and does not conduct an examination in the following cases: a) the applicant has already been recognised refugee status by another signatory State of Geneva Convention relating to the status of refugees, b) the applicant has lodged an identical application after a decision is taken by the Commission, without introducing new information regarding his personal position or the situation of his country of origin”. We recall here the text of Directive Article 25: “a) another Member State has granted refugee status; (…) (f) the applicant has lodged an identical application after a final decision”.
65 Following Articles 22 and 13 of the Implementation Decree, in case of failure to go to a reception or detention centre without justified reason or if the residence permit expires and the concerned applicant does not request its renewal, the application will still be processed and the Commission will take a decision on the basis of the collected information.
66 While the implementing Decree draft provided that the appeal time-limit be set at fifteen days in all cases, the text was eventually amended after the Deputies of Chamber hearing of 17 October 2007 with reference to the Advisory Opinion condition (f), see note 17.
68 Article 32 section 4 of the Implementing Decree.
69 See note 62.
tion application and its withdrawal with the effect of allowing the applicant to remain in Italy pending its outcome. 70

The judge may also grant for serious grounds a stay of the first instance decision which:
- declare the application inadmissible (Article 25);
- declare the application unfounded after the applicant left the hospitality centre without a justified reason;
- reject the application when the applicant previously received a deportation decision or was repelled at the border, as provided in Article 20 subsection d.71

The procedures regulation currently in force provides a very restrictive regime for suspensive measures in order to prevent their abusive recourse. The Head of the local Police Headquarters may grant a stay of the Territorial Commission decision “for serious personal or health-related grounds requiring the presence of the concerned foreigner in the territory of the State”, provided the Préfet corresponding advice (Article 15 section 2 of Procedures Regulation no. 303/2004).

Similarly to what is provided by the existing procedure norms, the Implementing Decree measures on the right to remain in Italy pending the decision entails the applicant’s mandatory residence in a reception or in a detention centre in case the applicant was previously repelled at the border or deported (Article 35 section 8).

The aforementioned provision of Article 16 (2) significantly contributes to achieving the right to an effective remedy by clearing access to legal assistance on the State expenses for asylum seekers without sufficient financial means. The applicant’s statement concerning his/her resources will be considered a sufficient proof, whilst the confirmation by the Consulate of the State of origin required by the existing law will no longer be necessary.

8. Conclusions

After EC Directives 2005/85 Italian regulation of asylum procedures has certainly changed its face. More than the principles contained in these directives, the very fact of their introduction and the impending deadline for implementation gave a considerable impulse to the Italian debate through society, political representatives and the Government.

The modifications operated to the existing asylum procedures regulation that we can directly derive from the Procedures Directive are limited, and possibly reduced to the introduction of the “safe third country” concept as a reason to reject asylum applications according to Article 29 and 31 and the reasons for declaring applications inadmissible after Article 25 of the Directive. But more important reforms were made possible by the long and widespread discussion caused by the introduction of the Directive principles of freedom from detention, right to legal assistance, guarantees for applicants with specific needs, right to an effective remedy.

70 Article 35 section 6 of the Implementing Decree.
71 Article 35 sections 7 and 8 of the Implementing Decree.
It is a fact that, after the Implementing Decree of Procedures Directive will enter into force, reception centres will finally open their doors to applicants during daytime, the duration of mandatory reception and detention periods will be shorter, time limits for appeals will be extended from fifteen to thirty days, the competent authority for examining appeals will be a Tribunal, instead of the same Territorial Commission that examined the application in the first instance and legal assistance for appeals will be accessible free of charge to all asylum seekers without sufficient financial means.

We can take these events as a proof that even from the least courageous EU Directives we can derive significant improvements in the Members States regulations with respect to their obligations under international refugee and human rights law.

The Italian asylum system will continue to be based on a single procedure for the recognition of refugee status and of subsidiary protection, a strong individual approach at all steps of the process, a three steps appeals system and a dual reception regime. Along with the imperviousness of Italian implementation decrees’ language to the gender sensitive wording of European Union Directives, distinctive weak points remain. Features of concern are the dependent character of examining authorities from the executive, the limited guarantees for applicants to access general information and specific on their procedure in a known language and, particularly, the recourse to centralised reception system formula that already proved highly ineffective. These elements, along with the flaws in the law enforcement pointed out by the Investigation Commission on the Italian reception system in 2007, may undermine procedures to their foundations with the predictable consequence to limit the positive effect of the newly introduced safeguards. To illustrate: the automatic right to remain in the country until a second instance decision is taken is of limited impact if the reception system is insufficient and most applicants are dismissed and left to their wits through the country as the reception time ends, before any decision is taken on their application; more effective remedy measures may not help if a large number of applications will be decided without the participation of the applicant because he/she has no known residence; longer time-limits for challenging a decision on one’s application become meaningless if the applicant does not know about them.

Above all, the lack of a coordinated discipline of asylum Italy jeopardises the effective access to this right. The multi-layered structure of the law makes it complicated to achieve a correct and complete information on the norms in force, while it remains unclear which further procedural provisions apply to asylum processes: the Government stated that the existing Asylum Procedures Regulation no. 303/2004 will still be applicable “in so far as compatible” with the Implementing Decree no. 28/2008, until a new regulation will be enacted. As no provisions clarify how a compatibility evaluation should be made, it will lie in the discretion powers of administrative authorities and in the interpretation of lawyers to compare

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72 See note 4.
73 Article 38 of the Implementing Decree no 28/2008 sets a six months deadline for adopting a new Procedures Regulation, although past experience shows that regulations have been enacted after two years.
the new Implementation Decree norms and the previous procedure rules, in order to tell which provisions will be applicable and how. As a result, the practice of the access to the right of asylum takes a very uncertain path, possibly varying in different areas of the country and leading to the predictable consequence of a lacking implementation.

As lawyers, we were taught that “the fulfilment of a right lies in its procedure” (Il diritto è procedura). For this reason, the implementation process of Council Directive 2005/85/EC will be regarded as accomplished in so far as the prospected implementation rules will be adopted and we may argue that Italy actually respected the obligation to implement the Procedures Directive until now.
Annexes
Proposal for a

COUNCIL DIRECTIVE

on minimum standards on procedures in Member States for granting and withdrawing refugee status

(presented by the Commission)
EXPLANATORY MEMORANDUM

1. MINIMUM STANDARDS ON PROCEDURES IN MEMBER STATES FOR GRANTING AND WITHDRAWING REFUGEE STATUS: A FIRST MEASURE TO BUILD THE COMMON EUROPEAN ASYLUM SYSTEM

According to the Conclusions of the Presidency at the Tampere European Council in October 1999, a common European asylum system is to include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers and the approximation of rules on the recognition and content of the refugee status. This is to be supplemented with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. On 24 May 2000, the Commission adopted a proposal for a Council Directive on temporary protection in the event of a mass influx of displaced persons based on solidarity between Member States as a tool in the service of a common European asylum system.

The Commission is now, in the autumn of 2000, proposing a draft Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status as a means to establish a fair and efficient asylum procedure, as indicated in the scoreboard to review progress on the creation of an area for freedom, security and justice in the European Union, approved by the Council on 27 March 2000.

In March 1999, the Commission began work on asylum procedures with its working paper “Towards common standards for asylum procedures”. This document was discussed in the Council both at Ministerial level and among officials. Thirteen Member States subsequently submitted written comments. The European Parliament adopted Resolution A5-0123/2000 on the working document in the plenary session of 13 to 16 June 2000. In addition, the Commission specifically consulted the UNHCR, ECRE, Amnesty International and Save the Children on the working document. All four organisations submitted written comments, as did three other NGOs (the Refugee Legal Centre, the Medical Foundation for the Care of Victims of Torture and the Immigration Law Practitioners' Association). Following an analysis of these replies, the Commission has drafted its proposal, taking into account, where necessary, the existing soft law, principally the 1995 Council Resolution on minimum guarantees for asylum procedures, the 1992 London Council Resolutions on manifestly unfounded applications, host third countries and countries in which there is generally no serious risk of persecution and the 1997 Council Resolution on unaccompanied minors who are nationals of third countries.

The proposal takes into account the approach envisaged by the Conclusions of the Presidency at the Tampere European Council in October 1999 that a common European asylum system, while including in the short term the abovementioned measures on asylum 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 treaties, should lead, in the longer term, to a common asylum procedure and a uniform status for those granted asylum valid throughout the Union.
2. SCOPE OF THE PROPOSAL

As an essential first measure on asylum procedures for the purpose of achieving a common asylum policy on the basis of Title IV of the Treaty establishing the European Community, as amended by the Amsterdam Treaty, the proposal sets out the requisite measures for a simple and quick system for dealing with asylum applications. It focuses on all the legislative tools and mechanisms which Member States can use to operate a system that processes cases swiftly and correctly. Common standards and time-limits are set in order to dismiss quickly inadmissible and manifestly unfounded cases so that each national system can operate smoothly for the benefit of Geneva Convention refugees. Aligning national systems on the basis of these standards will enable Member States to build efficient asylum procedures for the future within the framework of a common European asylum system.

This measure will not require Member States to apply uniform procedures. Nor will it oblige them to adopt common concepts and practices which they do not wish to apply. For example, if a Member State does not wish to apply the safe third-country concept to reject asylum applications, the measure will not oblige this Member State to adopt the concept. Moreover, all standards for operating a fair and efficient procedure are laid down without prejudice to Member States’ discretionary power to prioritise cases on the basis of national policies.

The measure also allows Member States to derogate from certain rules if they so wish, as this is a first measure on asylum procedures. For instance, it is proposed that Member States should be able to derogate from the principle that appeal has suspensive effect in, *inter alia*, manifestly unfounded cases. The issue of suspensive effect is a complex one and Member States appear to hold very divergent views on the advantages and disadvantages of suspensive effect. The Commission would welcome Member States that choose to adopt these and other derogations permitted at this stage, to introduce additional safeguards, such as the adoption by law of the derogations or supplementary procedural guarantees in individual cases.

Moreover, the proposal is limited to the minimum standards necessary for granting and withdrawing refugee status. Consequently, it does not include minimum standards for determining whether persons qualify for protection under some other international instrument or are otherwise in need of protection. Nonetheless, if the Member States were to apply the standards in this proposal in deciding on applications for kinds of protection other than that emanating from the Geneva Convention, this would be welcomed by the Commission. Accordingly, the proposal provides that Member States may decide to apply the provisions of the Directive to these other procedures.

The proposal does not prejudge other measures on a common asylum policy as laid down in the Vienna Action Plan and the Scoreboard. Articles 63(1) and 63(2) provide for the adoption of measures on asylum regarding the criteria and mechanisms for determining which Member State is responsible for considering an asylum application, minimum standards on the reception of asylum applicants, minimum standards with respect to the qualification of nationals of third countries as refugees and measures for persons who otherwise need international protection. The
Commission will put forward proposals on these particular areas in accordance with the Scoreboard.

Neither does this particular proposal prejudge any measures that have not been envisaged in the Vienna Action Plan and the Scoreboard. Several other measures with respect to procedures for the admission of refugees by the Member States of the European Union could be considered within the scope of point (1)(d) of the first paragraph of Article 63 of the EC Treaty. For one thing, the present proposal confines itself to procedures for cases of spontaneous applicants at the border or on the territory of the Member States in Europe. It is therefore without prejudice to a possible measure on procedures for admitting to Member States third-country nationals who qualify as Geneva Convention refugees, but have not yet been able to reach the external frontiers of the European Union.

The Communication on common asylum procedures and a uniform status for those who are granted asylum valid throughout the Union will outline what measures may be taken next on asylum procedures for the purpose of achieving a common asylum policy on the basis of Title IV of the Treaty establishing the European Community, as amended by the Amsterdam Treaty, including those that could be taken on the basis of point (1)(d) of the first paragraph of Article 63.

3. THE OBJECTIVES OF THE PROPOSAL

With this proposal for a Directive, the Commission is pursuing the following aims:

1. implementing point (1)(d) of the first paragraph of Article 63 of the Treaty, paragraph 36(b)(iii) of the Vienna Action Plan, Conclusion 14 of the Tampere European Council and the first part of the paragraph on a fair and efficient asylum procedure of the Scoreboard presented to the Council and Parliament in March 2000;

2. providing for measures that are essential to the efficiency of Member States' procedures for granting and withdrawing refugee status;

3. laying down common definitions of, and common requirements for inadmissible and manifestly unfounded cases, including the safe country concepts in order to achieve a common approach among those Member States that apply these practices and concepts;

4. laying down time-limits for deciding in first instance and in appeal in these cases, empowering Member States to effectively process them as soon as possible;

5. enhancing thereby the ability of Member States to examine the asylum applications of persons that may be Geneva Convention refugees;

6. laying down a minimum level of procedural safeguards for asylum applicants in the procedures in Member States to ensure a common level of procedural fairness in the European Community;

7. laying down specific safeguards for fair procedures for persons with special needs;
8. setting minimum requirements for decisions and decision-making authorities with a view to reducing disparities in examination processes in Member States and ensuring a good standard of decision making throughout the European Community.

4. AN OVERVIEW OF THE STANDARDS IN THE PROPOSAL

The proposal basically consists of three different sets of provisions.

The first set deals with procedural guarantees for asylum applicants. These provisions relate to situations found throughout all stages of the asylum procedures and are designed to approximate notions of procedural fairness among Member States. Every applicant for asylum must:

- have the right to appeal against a decision in first instance, irrespective of the nature of the decision;
- be informed at decisive moments in the course of the procedure, in a language which he understands, of his legal position in order to be able to consider possible next steps. For instance, when receiving the decision in first instance, an applicant must be informed of its contents and of the possibility to appeal this decision.

In addition, specific guarantees are laid down for persons with special needs, such as (unaccompanied) minors.

A second set of provisions concerns minimum requirements regarding the decision-making process. While Member States may retain their national systems, decision making has to meet certain minimum requirements in the interests of developing a comprehensive common European asylum policy. It will generally suffice for Member States to have in place a three-tier system: an authority determining refugee status, an authority to hear administrative or judicial appeals and an Appellate Court. Furthermore, decision-making authorities should have access to information on country of origin and be able to seek expert advice whenever necessary. Personnel should have received the requisite initial training, decision making should follow certain investigative standards, decisions are to be taken individually, objectively and impartially, and full reasons should be stated for adverse decisions.

A final set of provisions concerns common standards for the application of certain concepts and practices. These concepts or practices (‘inadmissible applications’, ‘manifestly unfounded applications’, ‘safe country of origin’; ‘safe third country’) are already in place in many Member States, but application and interpretation vary significantly. With a view to limiting secondary movements between Member States, the Commission proposes that they be made subject to common standards. Each Member State may decide whether or not to apply a concept or practice, but if it does, its national application would have to follow the common framework for all Member States. Accordingly, while there is no obligation to apply an accelerated procedure to dismiss manifestly unfounded applications, Member States will have to abide by the common definitions and maximum time-limits if they do so. Similarly, where Member States wish to dismiss an application as inadmissible on the basis of the safe third-country concept, they must abide by the common principles for
designating a country as a safe third country as laid down in Annex I to the proposal as well as the common requirements for applying the concept in individual cases.

Member States will be able to dismiss applications as inadmissible if:

- another Member State is responsible for examining the application, according to the criteria and mechanisms for determining which Member State is responsible;
- a country is considered as a first country of asylum for the applicant;
- a country is considered as a safe third country for the applicant.

As a procedure to determine whether another Member State is responsible for examining an asylum application may take place in parallel with or in the context of a more comprehensive examination of the asylum application in Member States, the general procedural guarantees in the proposal will also apply to the former procedure. However, the only guarantee included in the proposal which is specifically related to the procedure for determining whether another Member State is responsible for examining an asylum application is one that is based upon a principle of procedural fairness at the heart of this proposal: the principle that an applicant is informed of his legal position at all decisive moments in the course of the procedure. The Commission will come forward with a proposal for a Community instrument on a clear and workable determination of the Member State responsible for the examination of an application for asylum at the beginning of 2001.

Member States will be able to dismiss applications as manifestly unfounded if:

- the applicant has, without reasonable cause, submitted a fraudulent application with respect to his identity or nationality;
- the applicant has produced no identity or travel document and has not provided the determining authority with sufficient or sufficiently convincing information to determine his identity or nationality, and there are serious reasons for considering that the applicant has in bad faith destroyed or disposed of an identity or travel document that would help determine his identity or nationality;
- an application is made at the last stage of a procedure to deport the person and could have been made earlier;
- in submitting and explaining his application, the applicant does not raise issues that justify international protection on the basis of the Geneva Convention or Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms;
- the applicant is from a safe country of origin;
- the applicant has submitted a new application raising no relevant new facts with respect to his particular circumstances or to the situation in his country of origin.

Finally, the proposal lays down a common approach for the concepts of both safe third country and safe country of origin on the basis of an analysis of the positions of the Member States, the Resolution of the European Parliament and the views expressed by the UNHCR and other relevant organisations. This approach consists of:
• the use of common principles to determine what these concepts should mean;

• national lists of safe countries for those Member States that so wish, subject to notification to the Commission;

• common requirements for applying the concepts in individual cases;

• regular exchanges of views among Member States on the designation of safe countries, national lists and the application of the concepts in individual cases under the umbrella of a Community procedure in a so-called Contact Committee (see below).

The Commission, for its part, envisages to introduce a Contact Committee. The Contact Committee will facilitate the transposition and the subsequent harmonised implementation of the Directive through regular consultations on all practical problems arising from its application. It will help avoid duplication of work where common standards are set, notably with respect to the situation in safe third countries and safe countries of origin. Secondly, the Committee will facilitate consultation between the Member States on more stringent or additional guarantees and obligations that they may lay down at national level. This would help prepare the ground for a common asylum procedure as envisaged by the Conclusions of the Presidency at the Tampere European Council in October 1999. Lastly, the Committee will advise the Commission, if necessary, on any supplements or amendments to be made to this Directive or on any adjustments deemed necessary.

5. THE CHOICE OF LEGAL BASIS

The choice of legal basis is consistent with the amendments made to the Treaty establishing the European Community by the Amsterdam Treaty, which entered into force on 1 May 1999. Point (1)(d) of the first paragraph of Article 63 of the EC Treaty provides that the Council shall adopt measures on asylum 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 within the area of minimum standards on procedures in Member States for granting or withdrawing refugee status. Article 63 is accordingly the proper legal basis for a proposal to establish minimum standards for procedures in Member States to grant and withdraw refugee status.

Title IV of the EC Treaty is not applicable to the United Kingdom and to Ireland, unless those Member States decide otherwise in accordance with the procedure laid down in the Protocol on the position of the United Kingdom and Ireland annexed to the Treaties. Title IV is likewise not applicable to Denmark, by virtue of the Protocol on the position of Denmark annexed to the Treaties.
6. SUBSIDIARITY AND PROPORTIONALITY: JUSTIFICATION AND VALUE ADDED

Subsidiarity

The insertion of the new Title IV (Visas, asylum, immigration and other policies related to free movement of persons) in the Treaty establishing the European Community demonstrates the will of the High Contracting Parties to confer powers in these matters on the European Community. But the European Community does not have exclusive powers here. Consequently, even with the political will to implement a common policy on asylum and immigration, it must act in accordance with Article 5 of the EC Treaty, i.e. the Community may only take action if, and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. The proposed Directive satisfies these criteria.

The establishment of an area of freedom, security and justice entails the adoption of measures relating to asylum. The specific objective of this initiative is to lay down minimum standards on procedures in Member States for granting and withdrawing refugee status. The standards laid down in this proposal must be capable of being applied through minimum measures in all the Member States. The situation regarding the procedural guarantees for asylum applicants, the requirements for decision making and the standards for applying concepts and practices such as accelerated procedures vary considerably from one Member State to another. Minimum Community standards have to be laid down by the kind of action proposed here. They will help to limit secondary movements of asylum applicants as resulting from disparities in procedures in Member States. Henceforth, applicants for asylum will decide on their country of destination less on the basis of the procedural rules and practices in place than before. The continued absence of standards on the procedures for granting and withdrawing refugee status would have a negative effect on the effectiveness of other instruments relating to asylum. Conversely, once minimum standards on asylum procedures are in place, the operation of, inter alia, an effective system for determining which Member State is responsible for considering an asylum application is fully justified.

Proportionality

The form taken by Community action must be the simplest form allowing the proposal to attain its objectives and to be implemented as efficiently as possible. In this spirit, the legal instrument chosen is a Directive, which allows minimum standards to be laid down, while leaving national authorities the choice of the most appropriate form and methods for implementing it in their national legal system and general context. The proposal concentrates on a set of minimum standards that are strictly necessary for the coherence of the planned action without laying down standards relating to other aspects of asylum.
COMMENTS ON ARTICLES

Chapter I: Scope and definitions

Article 1

This Article defines the purpose of the Directive. All asylum procedures in the Member States are subject to the minimum standards laid down in the Directive with the exception of the procedures referred to in Article 3.

Article 2

This Article contains definitions of the various concepts and terms used in the provisions of the proposal.

(a) Throughout this proposal, including the Annexes, the term “Geneva Convention” refers to the Convention relating to the status of refugees on 28 July 1951, as complemented by the New York Protocol of 31 January 1967. All Member States are parties to both without any temporal or geographical limitations.

(b) “Application for asylum” is defined with reference to the definition of a refugee in the Geneva Convention. Any request by a person for protection at the border or on the territory of the Member States shall be understood to fall within the terms of the Geneva Convention, unless the person explicitly requests another form of protection where the Member State has a separate procedure for that purpose.

(c) The situation of being an applicant for asylum is defined in relation to the process for reaching a final decision to determine refugee status.

(d) A “refugee status determining authority” (hereinafter referred to as “determining authority”) is any official body that is both responsible in first instance for examining the admissibility or substance of applications for asylum and competent to take decisions in first instance in these cases. The definition implies that not every authority in a Member State that is responsible for a particular measure of examination is necessarily a determining authority. Police officials who conduct a first interview with the applicant on his identity and travel documents and subsequently have to refer the case to another authority for a decision, are not considered to be a refugee-determining authority within the terms of this definition. Moreover, the definition does not preclude a Member State from having more than one determining authority (for instance if the decisions on the admissibility and on the substance are taken by different bodies). Nor does it preclude Member States from providing that a particular determining authority is wholly independent from the executive of the government. It is emphasized that the authorities responsible for controlling the entry into the territory cannot be considered as a determining authority for the purposes of this Directive.

(e) A “reviewing body” can be a higher administrative authority, a Refugee Board, a Commission with an interministerial composition or a court of law, as long as it is different from and independent of the determining authority. The definition does not preclude a Member State from having more than one reviewing body (for instance
making a distinction in relation to the nature of the procedure under which the asylum application been processed).

(f) An “Appellate Court” is a judicial body in a Member State responsible for further appeal against the decision of any of its reviewing bodies. The nature of further appeal will depend on the choice made by the Member States as regards the reviewing body. If the reviewing body is an administrative authority, the Appellate Court would be the first judicial body to rule on the case and further appeal should then be on both facts and points of law. If the reviewing body is a judicial body, further appeal may be limited to points of law. It follows from the definition that there can only be one Appellate Court in a Member State responsible for ensuring the uniformity of law in the area of asylum procedures.

(g) The term “decision” in the provisions of this Directive covers any (official) conclusion about an asylum application on either its admissibility or its substance by either a determining authority or a reviewing body of a Member State. As a result, all provisions on decisions apply to decisions of both types of authority. However, where appropriate, the term will be specifically related to one type of authority.

(h) A “refugee” is a person who fulfils the requirements of Article 1(A) of the Geneva Convention.

(i) Following the wording of Article 63(1)(d) of the EC Treaty, the term “refugee status” is understood to be the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of that Member State.

(j) The concept of “unaccompanied minor” is drawn from the definition in the Council Resolution of 26 July 1997 on unaccompanied minors who are nationals of third countries.

(k) “Detention” covers any confinement of an applicant for asylum by a Member State within a restricted area where the freedom of movement of the applicant is substantially curtailed.

(l) “Withdrawal of refugee status” for the purpose of this Directive is the decision by a determining authority in a Member State to withdraw the refugee status of a person on the basis of Article 1(C) of the Geneva Convention or Article 33(2) of the Geneva Convention.

(m) “Cancellation of refugee status” normally occurs if circumstances come to light that indicate that a person should never have been recognised as a refugee in the first place.

Article 3

1. By using the term “person” instead of alien, this paragraph makes clear that the provisions of the Directive apply to third-country nationals, stateless persons and EU nationals. With respect to the latter category, it is worth remembering that there is a Protocol on asylum for nationals of Member States of the European Union, annexed to the Treaty establishing the European Union.

Under this paragraph, the provisions of the Directive also apply when decisions are taken on the admissibility and/or substance of an asylum application in the context of a procedure to decide on the right of applicants to legally enter the territory of a Member State. So-called border procedures are therefore fully covered by this proposal.
2. The Directive does not apply to requests for diplomatic or territorial asylum submitted to the representations of Member States. Neither the granting of diplomatic asylum (usually in the asylum seeker's country of origin) nor the (preliminary) screening of territorial asylum (usually in a third country) when requests are submitted to representations in Member States need to be subject to minimum standards for procedures relating to applications for asylum at the border or on the territory of Member States.

3. Under this paragraph, Member States may also apply the provisions of the Directive to procedures for protection other than the procedure to grant or withdraw refugee status. At present, several Member States have in place separate procedures for other kinds of protection. The working document concluded that it seemed sensible at this stage to restrict the scope of the proposal for a Directive to claims for protection under the Geneva Convention, as a considerable amount of work would still have to be done on defining the cases covered by subsidiary protection. This work will start soon. Moreover, the issue of a single procedure will be dealt with in more detail in the Communication on a common asylum procedure and a uniform status for those who are granted asylum valid throughout the European Union. In the present proposal, no minimum standard is set, but Member States may decide to apply the provisions of the Directive to any other existing procedure they might have for determining the need for protection for other reasons.

**Chapter II: Basic principles and guarantees**

**Article 4**

1. This paragraph prohibits the use of time-limits for requesting protection for the purpose of denying access to the asylum procedure. This means, first, that applicants for asylum should not be required to make their request upon arrival or within a certain time-limit after entry. Secondly, failure to comply with this formality should not lead to an asylum application being excluded from examination. The provision does not preclude Member States from applying Article 31 of the Geneva Convention. Moreover, as it concerns prior formalities only, the provision does not render it impossible for Member States to draw consequences for the examination of the asylum application from a refusal by the applicant to fulfil formalities during the procedure.

2. Asylum applicants should have access to the asylum procedure as soon as possible. Rules on asylum procedures do not make sense if persons who wish protection from a Member State effectively fail to gain access to its asylum procedure or are left stranded in the territory of the Member State for an unnecessarily long time because authorities do not recognise these requests as asylum applications. Any statement signaling a person’s wish to obtain protection from persecution, or any manifestation or expression of the person indicating that he fears to be returned to his country, should therefore be treated as an application for asylum. While Member States may require persons who arrive at the border or in the territory of a Member State and wish to ask for protection from that Member State to lodge (officially file) their asylum application at a specific location or with a specific authority, once a person has made known his request, the relevant authorities that have been addressed are bound to make arrangements to enable this person to reach the appropriate place within a reasonable time (“effective opportunity to lodge their application as soon as possible”). Thus, any authority that is likely to be addressed by these persons at the border or in the territory of a Member State, should have
instructions to be able to further subsequent implementation of this obligation. To this end, Member States should provide these authorities with instructions that make clear what they should and should not do when encountering persons who wish to ask for protection, and in particular, which authorities they should contact to take the matter in hand.

3. This paragraph lays down an obligation on Member States to ensure that the authorities responsible for controlling entry to its territory forward applications made at the border to the competent authority for examination as soon as possible. This could be a police official who conducts a first interview with the applicant on his identity and travel documents as a first measure of examination and subsequently has to refer the case to the competent determining authority or it could already be the competent determining authority, either present at the border or elsewhere in the country.

4. In some Member States, asylum applications can be filed on behalf of dependants. This paragraph introduces a minimum standard with regard to their treatment. Dependants who are considered adults for the purpose of filing an application for asylum according to the legislation of Member States should be given the opportunity to express themselves in private on the issue of a separate and independent application.

**Article 5**

To effectively ensure the principle of non-refoulement, this Article lays down the right of each asylum applicant to remain at the border or on the territory of the Member State as long as his application has not been decided on.

**Article 6**

This Article sets out minimum requirements for decision making. Decisions on applications for asylum are to be taken individually, objectively and impartially. In this context, “individually” is understood to mean on the basis of an individual assessment that precludes instructions to reject the case outright. “Objectively” means on the basis of the facts of the case. This should be evident in the grounds for the decision. Lastly, “impartially” is understood to mean without discriminating between similar cases for, *inter alia*, political reasons.

**Article 7**

This Article sets out procedural guarantees for every asylum applicant. No differentiation is made on the basis of the nature of the procedure (admissibility, regular or accelerated procedure), the stage of the procedure (first or second instance, guarantees referred to in points (b) and (c) for the final instance) or the way the application is processed (procedure prior to legal entry or not).

(a) Member States must inform each applicant, prior to examination of his asylum application, of the procedure to be followed, and of his rights and obligations during the procedure, in a language which he understands. This could be done for example by giving the applicant a standard document about the procedure in a language he can read and to give him time to read it or by explaining the procedure to him in a film in a language he understands. It could also be done orally by the authorities or by organisations assigned this task.
According to this point, applicants must be given the services of an interpreter, whenever necessary, for submitting their case to the competent authorities. These services must be paid for out of public funds, if the interpreter is called upon by the competent authorities.

This point lays down the obligation of Member States to enable the applicant to write, phone, fax or e-mail a representative of the Office of the UNHCR or other organisations that are working on behalf of the UNHCR.

This point lays down rules for decisions on applications for asylum. Every decision must be communicated to the applicant in writing. The decision must at least contain a short summary of the facts at issue, a reference to the legal ground(s) for rejection and an explanation how the facts have led to this conclusion. Moreover, any adverse decision should include information on appeal. “Where applicable” refers to the possibility of automatic review (Article 36).

Points (e) and (f) ensure that an applicant for asylum is informed of the purport of the decision concerning him and what could or should happen next, either on receiving the decision or a short while afterwards, in a language which he understands. This is an additional safeguard to help applicants, who mostly do not understand the language decisions are written in, to quickly grasp the essentials of the decision so that they will be able to consider the possible next steps without undue delay. To implement this obligation, Member States could in most cases, for instance, attach a (standard) information leaflet to the decision in the language the particular applicant understands.

In the event of a positive decision, an applicant must be informed in a language he understands of any next steps he must take. A mandatory step could be the obligation to go to the authorities to provide information or material for an identity card or to obtain this card.

**Article 8**

Article 8 concerns procedural guarantees for the personal interview. It does not concern other interviews during examination, as described earlier under the comments on Articles 2(e) and 4(4). Depending on the stage and nature of the procedure in first instance, Article 8 refers either to the personal interview on the admissibility and/or the substance, or to the personal interview on the substance.

1. This paragraph lays down the procedural guarantee that every applicant is entitled to a personal interview with a competent official under national law before a decision in first instance is taken, unless he declines the opportunity, e.g. by explicit statement or through his action (i.e. he has disappeared). This official does not have to work for the
determining authority but must have received training for this purpose in accordance with Articles 14(1)(b) and (d) and, where necessary, (c).

2. This paragraph provides that if the applicant is requested to agree with the description of his statements made during a personal interview, a transcript should be read out to him as a minimum procedural guarantee.

3. Paragraphs 3 and 4 concern the issue of family members and dependants. Minimum standards should be that every family member has a right to be interviewed separately, even if (s)he is a dependant within the meaning of Article 4(4). Exceptions can be made in cases falling within the terms of paragraph 5.

4. The term “normally” is meant to convey that, only in situations where the interviewing official believes it to be conducive to the result and the respective family members all separately give consent, a personal interview is conducted in the presence of family members.

5. Paragraph 5 describes two specific situations in which Member States may refrain from conducting a personal interview. It refers to persons and not applicants for asylum as it may also concern dependants.

6. Paragraph 6 sets out the right of an applicant for asylum whose application is processed in a regular procedure to consult the transcript of his own personal interview.

7. The last paragraph provides for a minimum standard on an appropriate course of action in situations where there are reasons to believe that an interviewee has inhibitions in presenting the grounds for the asylum application in a comprehensive manner. The Article refers to persons and not asylum applicants as it may also concern dependants. It is applicable to the situation of any applicant or person, male or female, minor or adult, who has been a victim of torture or sexual abuse and finds it difficult to present the grounds for the application owing to these experiences, unless an interviewer and an interpreter of the sex chosen by the interviewee are assigned to conducting the personal interview.

**Article 9**

This Article sets out the procedural guarantees relating to legal assistance during the asylum procedure. Legal assistance is understood to be any form of assistance by any person relating to the examination of the asylum application. It may be given by a legal adviser or counsellor, i.e. a person who has been chosen by the applicant to represent him for this purpose.

1. This paragraph lays down the general rule that every applicant must have the opportunity to contact organisations or persons that provide legal assistance at all stages of the procedure.

2. Paragraph 2 recognises the interest of Member States to regulate the access to closed areas designated for the examination of applications for asylum. These areas could be in-land centres or centres linked to airport transit zones, ports of entry, etc. The examination in these areas could, but need not, take place in the context of a border procedure (Article 3(2)). The Directive proposes that Member States may only control access for two specific purposes: quality of legal assistance and efficient examination of applications for asylum. In order to ensure quality of legal assistance in these areas,
Member States can choose to limit the access of (representatives of) organisations to these areas to those that meet the necessary professional qualifications. Qualified lawyers could not be denied access on the basis of this provision. In order to ensure efficient examination of asylum applications in these areas, including compliance with time-limits for decision making laid down in national laws or regulations, Member States can choose to set rules for the timing and the duration of access to clients. The measures taken by Member States should be strictly necessary for the purposes described in this paragraph and should never result in the effective annulment of the right to have access to legal assistance.

3. This paragraph defines the minimum standard with regard to the presence of a legal adviser or counsellor at personal interviews. At least in the regular procedure, where more difficult issues are often at stake, the legal counsellor or adviser must have the opportunity to be present at the personal interview on the substance of his client's asylum application. Another minimum standard is the existence of national rules clarifying the legal position of legal counsellors or advisers in interviews under other procedures than the regular procedure.

4. The last paragraph of this Article requires Member States to ensure that the applicant is given legal assistance free of charge after an adverse decision by the determining authority, if he has no adequate means to pay for it.

Article 10

This Article introduces the necessary additional procedural guarantees for unaccompanied minors following the December 1998 Vienna Action Plan and the March 2000 Scoreboard.

1. Paragraph 1 specifies the procedural guarantees to be provided to all unaccompanied minors, irrespective of the nature of the procedure used to process their application.

(a) The minimum standard is assistance in the procedure by a legal guardian or adviser. The term “adviser” is designed to include a representative from an organisation which is responsible for the care and well-being of the minor or from any other organisation competent for these matters.

(b) This point explains that appointing a legal guardian or adviser “as soon as possible” means that this person must be able to help the unaccompanied minor he represents prepare for the personal interview on the admissibility and/or substance of the asylum application. In the course of this action, a legal guardian or adviser could, where appropriate, discuss with the unaccompanied minor the need to continue the procedure where other options appear to be available. Furthermore, this paragraph lays down the minimum standard that the legal guardian or adviser has the opportunity to be present at the personal interview of the unaccompanied minor he represents and (like the interviewer) ask him questions and make comments (to be included in the transcript of the interview). General national rules on presence at the personal interview pursuant to Article 9(3) are set aside by the “best interests” principle of the child.

2. Paragraph 2 lays down the minimum standard that the personal interview on the admissibility and/or the substance of the asylum application of an unaccompanied minor must be conducted by an official trained with regard to the special needs of minors in accordance with Article 14(1)(c).
3. Paragraph 3 lays down two minimum standards with respect to medical examinations to determine the age of unaccompanied minors: (a) the methods should be safe and respect human dignity and (b) an unaccompanied minor that is to undergo this examination should be properly informed about it in a language he understands.

Article 11

1. Paragraph 1 of this Article sets a minimum framework for assessing the legitimacy of cases of detention which are based on the need for an efficient and adequate examination of an asylum application. On the one hand, a basic standard should be that an applicant must not, as a rule, be detained for the sole reason that he is an applicant. On the other hand, the needs of Member States to detain certain of these applicants for the purpose of determining identity and facts are recognised. The description of cases falling within this purpose is drawn from EXCOM Conclusion 44 (XXXVII). The Article does not, in any way whatsoever, interfere with national policies on detention of aliens for other purposes nor with the treatment of detainees in general.

2. Paragraph 2 provides that Member States must provide by law for the possibility of an initial review and subsequent regular reviews of the detention order in the cases described under the first paragraph.

Article 12

This Article requires Member States to take appropriate measures to ensure that all competent authorities (determining authorities, reviewing bodies and the Appellate Court) are adequately provided with staff and equipment so that they can discharge their duties as laid down in this Directive.

Article 13

1. Paragraph 1 requires each Member State to ensure that its determining authorities have specialised staff at their disposal, access to information and a right to ask for advice.

2. Paragraph 2 is designed to ensure that, as far as possible, reviewing bodies receive the same treatment as determining authorities with respect to information concerning the situation prevailing in the countries of origin of asylum applicants and in transit countries.

Article 14

1. This Article spells out minimum requirements for the training of personnel responsible for the implementation of duties laid down in the Directive. In principle, for the purposes of implementing the Directive, an initial training course is considered sufficient. Member States may of course provide for further training at suitable intervals. To ensure accuracy, types of personnel are listed according to the nature of the duties performed.

(a) This point concerns the personnel responsible for the duties laid down in Article 4;
(b) This point concerns the personnel responsible for conducting personal interviews, as mentioned, *inter alia*, in Article 8, and other interviews that fall within the terms of the examination of an asylum application as described in the Directive;

(c) This is a specific form of training related to the duty laid down in Article 10(2);

(d) This kind of training is to be given to both the personnel mentioned in point (b) and the personnel of determining authorities responsible for taking decisions on the admissibility and/or on the substance of applications for asylum. Both types of personnel need to be acquainted with all (legal) questions that may arise when examining an asylum application in order to implement their tasks properly.

(e) This point relates to the personnel responsible for the duties laid down in Article 11.

2. This paragraph is designed to ensure that the relevant personnel of reviewing bodies receive the same treatment as determining authorities with respect to training necessary to perform their duties. The training under point (c) of paragraph 1 may need to be extended to personnel of reviewing bodies if unaccompanied minors are granted a hearing on appeal. The training under point (d) is considered basic training for the purpose of taking decisions and should therefore be logically extended to the personnel of reviewing bodies that perform these tasks.

**Article 15**

This Article requires Member States to take the appropriate measures to ensure confidentiality of information regarding individual applications for asylum. These measures should take into account the specific rules of paragraphs 2 and 3 on the exchange of information with the country of origin and the role of the UNHCR as underlined in paragraph 4.

1. Appropriate measures could include any rules necessary to ensure a safe exchange of information between different government departments in the Member State responsible for the examination of the asylum applications, rules for the exchange of information between these departments and any other governmental bodies, rules for allowing certain independent institutions (for instance an Ombudsman) access to investigate the exchange of information among these parts of the government, or rules for allowing access for study and research by third parties.

2. Information regarding an individual asylum application must not be shared with the applicant's country of origin.

3. Member States may, however, need to obtain certain information in countries of origin in order to decide on applications. Under this paragraph, they must ensure that the methods used do not lead to the cases of applicants becoming known to the authorities in the country of origin. Authorities responsible for examination of applications may, for instance, request the relevant department of the Ministry of Foreign Affairs to conduct or initiate investigations in the applicant's country of origin which, where necessary, may include the consultation of official records of certain authorities of the country of origin. However, great care must be taken to avoid that, as a result of these investigations, the fact that this person has applied for asylum becomes known to any person connected in any manner whatsoever with the authorities of the country of origin.

4. Any rules relating to this matter should take into account the UNHCR’s specific mandate under the Geneva Convention as set out in Article 17 of this proposal.
Article 16

This Article concerns the closure of the file where the applicant has voluntarily withdrawn his asylum application or has disappeared. To lay down a standard approach to this issue in all Member States, while not obliging Member States to take an official decision in such cases, the Article proposes that, at least, a notice discontinuing the examination should be posted in the file of the determining authority in order to end the procedure from an administrative and legal angle. It would serve as the closing date of the procedure. It would enable Member States to retrieve the necessary information in situations where the applicant resurfaces in the same or another Member State and an issue of responsibility for examining a new application might arise. The third paragraph enables Member States to treat such an application as one that may be dismissed as a manifestly unfounded application in accordance with Article 28(1)(d), when no relevant facts with respect to the particular situation or to the situation in the country of origin of the applicant have been submitted.

Article 17

This Article sets out three different areas of responsibility of the UNHCR: access to asylum applicants (point (a)); access to information regarding individual asylum applications (point (b)) and the power to make representations in asylum procedures (point (c)), given its mandate under Article 35 of the Geneva Convention.

Chapter III: Admissibility

Article 18

Article 18 lists the cases in which Member States may dismiss an asylum application as inadmissible. In the working document it was proposed that a clear distinction be drawn between a decision not to consider the substance of an asylum application because the applicant could be returned to a third country, and a decision to refuse an asylum application on the substance. Accordingly, the concept of admissibility in the working document was restricted to determining whether the Member State in question should consider the substance of the application, or whether the applicant should be sent to a third country. Two types of safe third country concept are distinguished following EXCOM Conclusions No 15 (XXX) of 1979 and 58 (XL) of 1989. Consequently, Article 18 states that Member States may dismiss a particular asylum application as inadmissible if:

(a) Another Member State is responsible for examining the application according to the criteria and mechanisms for determining which Member State is responsible for considering an asylum application. This concerns the application of the Dublin Convention as well as any Community legal instrument based on point (1)(a) of the first paragraph of Article 63 of the EC Treaty. For the conditions of application reference can be made to either the Dublin Convention or this future instrument.

(b) A country is considered as a first country of asylum for the applicant. This country cannot be a Member State as such a rule would pre-empt the Dublin Convention or its successor-instrument. Other conditions of application are found in Article 20.
A country is considered as a safe third country for the applicant. Here, too, this country cannot be a Member State as such a rule would pre-empt the Dublin Convention or its successor-instrument. Other conditions of application are found in Articles 21 and 22 and the Annex referred to in Article 21(1).

**Article 19**

Article 19 provides for a specific procedural guarantee where a Member State is examining the application of the Dublin Convention or in due time its successor-instrument. When a request is put forward by a Member State to another Member State to take the responsibility for examining an asylum application, the requesting Member State must inform the applicant in question as soon as possible of this request, its content and the relevant time-limits in a language which he understands. This specific procedural guarantee is in keeping with the general approach in this proposal to provide, where necessary, guarantees for the applicant to keep abreast of the state of play regarding his application: see Articles 7(1) (a), (e) and (f), which equally apply to decisions of reviewing bodies, and Article 24(4).

**Article 20**

This Article defines a country as a first country of asylum for an asylum applicant if this particular applicant has been admitted to the said country as a refugee or for other reasons justifying the granting of protection and can still avail himself of this protection. This definition is in accordance with paragraph (k) of the EXCOM Conclusion No 15 (XXX) of 1979 requesting States to give favourable consideration to an asylum application where the applicant advances that he has compelling reasons for leaving the first country of asylum due to fear of persecution.

**Article 21**

Under Article 21(1) Member States can use the safe third-country concept to dismiss applications as inadmissible if the designation of a country as a safe third country is in accordance with the principles laid down in Annex I. These principles consist of two parts. The first part sets out the material requirements for designation. A country has to observe certain standards before it can be considered as a safe third country. The second part sets out the designation procedure. In summary, any designation should be based on public information. These principles apply regardless of the existence of a national list designating countries as safe third countries per se. Consequently, if a Member State wishes to dismiss a specific individual application for asylum as inadmissible because the applicant has been in one particular third country and there has so far been no precedent with respect to the safety of this country for an applicant of his nationality, the first step of the determining authority of the said Member State would have to be to investigate whether these general principles apply to this specific third country for persons with the nationality and other main characteristics of the applicant. This part of the individual investigation need not be carried out if the said Member State has already successfully designated the third country as a safe third country in earlier cases in accordance with the principles in Annex I or has issued a policy statement to that end, for instance by putting the country on its list of safe third countries. For the purpose of avoiding duplication in these investigations, it is suggested that use be made of the Contact Committee.

**Article 22**

This Article lays down the requirements for dismissing an application as inadmissible on the
basis of the safe third country concept. The first requirement is that the third country is in fact ‘a safe third country’, that is a country considered as a safe third country in accordance with the principles of Annex I. The second requirement is that this safe third country can be considered as a safe third country for the individual applicant. This is the case only if, notwithstanding any list, the three conditions set out in points (a), (b) and (c) are met in his particular case.

(a) The applicant should have a certain link with the third country. Asylum should not be refused solely on the ground that it could be sought from another State. EXCOM Conclusion No 15 (XXX) of 1979 refers to a connection (e.g. a visa issued, previous stay) and close links (e.g. presence of family members). A link would also be a previous stay which would have enabled him to avail himself of the protection of the authorities. This should be assessed individually by each Member State in accordance with its national case-law, presumably taking into account *inter alia* the duration and nature of the stay.

(b) There are grounds for considering that the applicant will be re-admitted to the third country. While no explicit assurance of (re-)admittance for the individual applicant is imposed in this proposal, any examination into the application of the safe third-country concept should take into account how the authorities of the third country will respond to the arrival of the applicant. This should also be assessed individually by each Member State on the basis of all relevant evidence relating *inter alia* to past experiences, information from the UNHCR and other Member States and the existence of re-admission agreements. Again, exchanges of views and experiences in the Contact Committee would help Member States to keep informed of the latest developments on this and to avoid unnecessary duplication of investigations.

(c) Lastly, the decision would have to show that the determining authority has considered and assessed information that the applicant might have provided indicating that the safe third country would not be a safe third country in his particular circumstances. It is possible that, although fellow countrymen of his are in general treated well in that country, the applicant would suffer a different fate given his particular background. This is the rebuttable presumption underlying any application of the safe third-country concept.

Article 23

Article 23 sets out time-limits for examining first country of asylum and safe third-country cases. They have been aligned on the time-limits for examination of manifestly unfounded applications. For the reasons behind the length of the time-limits, see the comments on Article 29. Time-limits for this kind of case are proposed first of all as a procedural guarantee for applicants. A deadline for an admissibility procedure ensures that the applicant cannot be kept in suspense for an unduly long period of time as to whether or not the determining authorities will admit his case in the substantive determination procedure. Secondly, a deadline serves as a minimum requirement for decision making. As, logically, any investigation into inadmissibility precedes any other form of examination, it should not take long to take a decision.
Chapter IV: Substantive determination procedures

Section 1: The regular procedure

Article 24

Article 24 provides for minimum standards concerning the examination of applications for asylum in the regular procedure. Its main aim is to introduce fair and efficient mechanisms to overcome lacunae or rigidities in the system.

1. Paragraph 1 underlines the freedom of Member States to determine the time-limits in this kind of case but requires them to be reasonable. Time-limits must not extend beyond what is general practice for difficult cases.

2. Paragraph 2 is designed to enable an applicant for asylum who does not receive a decision on time, to remind the competent authorities of the obligation set by their government and request a decision soon. Member States must determine by law whether the decisions of the reviewing body on this kind of request shall be on the merits of the case – determining refugee status instead of the determining authority – or set a time-limit for a decision by the determining authority. A decision on the merits of the case would help prevent delay in the procedure but would require powers on the part of the reviewing body to determine refugee status.

3. It is conceivable that there may be legitimate reasons for the determining authority not to take decisions on time. Therefore, the third paragraph allows for an extension of the time-limit for a maximum of six months if, inter alia, the determining authority is awaiting clarification by the reviewing body or the Appellate Court on an issue that could affect the nature of the decision on the application.

   In order to be able to effectively extend the time-limit in the circumstances described in an individual case, the determining authority must properly inform the applicant in question of the situation.

Article 25

This Article lays down investigative standards for examining regular cases. It provides that Member States must take appropriate measures to ensure that applicants are given the opportunity to cooperate with the competent authorities for this purpose (paragraph 1), sets out what constitutes sufficient cooperation by an applicant (paragraph 2) and lays down the subsequent obligations of the determining authorities to examine the facts of the case (paragraph 3). The last paragraph describes the consequences where a coherent and plausible case does not run counter to generally known facts: application of the principle of the benefit of the doubt to the applicant.

Article 26

This Article deals with the issue of withdrawal of refugee status within the meaning of point (1)(d) of the first paragraph of Article 63 of the EC Treaty. Cancellation of refugee status has been included.
1. A credible system for examining applications for asylum must also be able to remedy previous mistakes. This paragraph lays down the requirement that the competent determining authority must be able to start an examination to withdraw or cancel the refugee status of a particular person as soon as information comes to light indicating that there are reasons to reconsider the validity of his refugee status.

2. Cancellation or withdrawal of refugee status might have very serious consequences for the person in question. The decisions need to be carefully prepared and the person in question should be confronted in a personal interview with the information that has come to light indicating that there are reasons to reconsider the validity of his refugee status. Moreover, he should be able to reflect on the information and express his views following the personal interview as the information and the views of the determining authority might not wholly correspond to the situation of the applicant in reality. These procedural guarantees point towards a regular procedure, given the guarantee laid down in Article 8(6) of this Directive. While the proposal thus sets out that each cancellation or withdrawal of refugee status must be examined in the regular procedure, it does not preclude Member States from prioritising these cases.

3. The last paragraph of this Article provides that, in these cases, Member States may derogate from Articles 7 (guarantees to be informed, to have the decision explained in a language he understands) and 8 (right to a personal interview) of this Directive when these are impossible to implement. This is the case when the person in question has voluntarily re-established himself in the country where persecution was feared. Then these guarantees appear unnecessary and are in fact impossible to carry out.

Section 2: The accelerated procedure

Article 27

Article 27 provides that Member States may adopt or retain an accelerated procedure for the purpose of processing applications which are suspected to be manifestly unfounded in accordance with the definitions found in the proposal.

Article 28

1. The wording of Articles 28(1)(a) and(b) draws on EXCOM Conclusion No 30 (XXXIV) of 1983, which defines manifestly unfounded applications as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Geneva Convention. Four other definitions are added following practices in some Member States. All the definitions have in common that they describe reasons for not investigating an application more thoroughly because clear and evident facts render this unnecessary.

(a) The first point describes the situation of applications containing false information with respect to identity and nationality. The claim of an applicant need not be investigated further if, without reasonable cause, false information is provided about his identity or nationality, something that will fundamentally undermine the credibility of a claim. This is not necessarily the case for untrue statements or false information about the experiences of the applicant in his country of origin or the general situation in this country. The latter inconsistencies or contradictions should be examined in the light of all the circumstances of the case.
This point describes the situation of an undocumented applicant who has provided the determining authority with some information on his identity or nationality but the information has not been sufficient or sufficiently convincing to determine fully his identity or nationality. This is the case if the claim is not plausible and the information provided about identity and travel routes shows inconsistencies. In these cases, the application can be dismissed as manifestly unfounded if, in addition, there are serious reasons for considering that he has in bad faith destroyed or disposed of an identity or travel document that would otherwise help determine his identity or nationality.

The third point is designed to avoid abuse of the asylum procedure by a person who is on the point of being deported.

The fourth point covers cases in which an applicant has submitted reasons that do not justify protection or, when explaining his claim, has described facts that do not justify protection. This definition would cover two situations: (1) the grounds of the application are outside the scope of the Geneva Convention; the applicant has put forward reasons such as the search for a job or better living conditions; (2) the application is totally lacking in substance as the applicant provides no indications that he would be exposed to fear of persecution or his story contains no circumstantial or personal details.

The fifth point provides for the possibility to dismiss an application as manifestly unfounded if the applicant is from a safe country of origin in accordance with Articles 30 and 31.

The final point provides for the possibility to dismiss an application as manifestly unfounded if the applicant has submitted a new application raising no new relevant facts with respect to his particular circumstances or to the situation in his country of origin. For the purpose of this paragraph, new applications could be second or multiple applications (“repeat applications”) that are submitted before or after a final decision in an asylum procedure has been taken, applications made for facts that occurred after the applicant had left his country of origin (“refugees sur place”) or applications requesting the re-opening of a final decision on the grounds that new facts have subsequently emerged which would shed another light on that decision.

2. Following the suggestions in the working document, Article 28(2) explicitly excludes any application that may be rejected on the basis of Article 1(F) of the Geneva Convention or on the basis of an internal flight alternative from being considered as manifestly unfounded.

Article 29

This Article lays down time-limits as an inherent part of the common framework for the accelerated procedure. Two time-limits are introduced. The first one requires the personal interview to be conducted within 40 working days after the application has been made (paragraph 1). The second one requires a decision on a personal interview within 25 working days (paragraph 2). The general reason for a deadline for accelerated procedures is that examination of an application that is manifestly unfounded should not require a lot of time. The 1992 Resolution on manifestly unfounded applications stated that initial decisions would
have to be taken as soon as possible and at the latest within a month. This deadline has been perceived as too ambitious. Hence, a less stringent limit has been set. Two time-limits are introduced for reasons of fairness and efficiency. First, it is not reasonable that an applicant for asylum is interviewed after a considerable time and yet receives a decision that has been taken in a so-called accelerated procedure. Hence a time-limit is proposed for the personal interview. Secondly, it is not reasonable that a determining authority decides to dismiss an application as manifestly unfounded after having spent considerable time examining the result of a personal interview. The determining authorities must have already started the examination of the case before the personal interview, while from the point of view of the applicant, the personal interview raises expectations that his case is being examined and that he will receive a decision soon. In cases where no personal interview has taken place, the sum of these time-limits, i.e. 65 working days, shall be the time-limit to take a decision for the purposes of this Article.

**Article 30**

Articles 30, 31 and 41 jointly lay down the proposed common approach towards safe countries of origin. The approach is identical to the one for the safe third countries as described above in the comments on Article 21.

**Article 31**

This Article lays down the requirements for dismissing an application as manifestly unfounded on the grounds that the country of origin is safe. The first requirement is that the country of origin of the applicant is in fact “a safe country of origin” in accordance with the principles of the relevant Annex. The second requirement is that the country can be considered as a safe country of origin for the individual applicant. This is the case only if (a) he has the nationality of this country or, if he is a stateless person, it is his country of former habitual residence and (b) there are no grounds for considering the country not to be a safe country of origin in his particular circumstances. This last element is in fact the rebuttable presumption underlying any application of the safe country-of-origin concept.

**Chapter V: Appeal procedures**

**Article 32**

The first paragraph of this Article lays down the right to appeal; the second contains a provision about the scope of that right. The Article applies to decisions on inadmissible and manifestly unfounded applications and to decisions taken in the regular procedure.

The first paragraph states that applicants for asylum have the right to appeal against each decision taken on the admissibility or the substance of their application.

The second paragraph states that appeal can but need not be on both facts and points of law. The reviewing body cannot limit itself to points of law, unless there is no dispute between the parties about the facts.

Where this Article, or other Articles in this Chapter, refers to inadmissible cases, it includes the cases dismissed as inadmissible on the basis of the Dublin Convention or its successor-instrument. The successor-instrument to the Dublin Convention may provide for rules on appeal and further appeal, superseding the Articles in this Chapter for those particular cases.

**Article 33**
This Article lays down rules on suspensive effect for all cases in appeal. The Commission proposes that appeal should have suspensive effect, except in a limited number of cases. The Article applies both to decisions on inadmissible and manifestly unfounded applications and to decisions taken in the regular procedure.

1. Paragraph 1 states that appeal shall have suspensive effect and that the consequence of this is that the applicant may remain in the territory or at the border of the Member State concerned awaiting the outcome of the decision of the reviewing body.

2. Paragraph 2 allows Member States to derogate from the general rule that appeal has suspensive effect in safe third-country cases, manifestly unfounded cases and in the case of issues of public order and national security. As regards to the last case, these terms are taken from the Geneva Convention. Article 32 of which states that the Contracting States must not expel a refugee lawfully in their territory save on grounds of national security or public order in pursuance of a decision reached in accordance with due process of law.

3. Paragraph 3 lays down the minimum standard that in each case where suspensive effect is denied, the applicant has the right to apply to the competent authority for leave to remain in the territory or at the border of the Member State during the procedure in review or appeal. No expulsion may take place until a decision has been taken by the competent authority on this request, except in safe third-country cases.

4. Paragraph 4 requires the competent authority to process the request as soon as possible.

Article 34

This Article concerns the general framework for taking decisions on appeal in all cases. The first four paragraphs apply to both decisions on inadmissible and manifestly unfounded applications and decisions taken in the regular procedure.

1. Under this paragraph, Member States shall lay down by law or regulation reasonable time-limits for giving notice on appeal and for filing the grounds of appeal. While time-limits may vary considerably, it is considered reasonable that in general time-limits for appeal in inadmissible or manifestly unfounded cases are shorter than those in regular cases. It is only proposed that the time-limit for filing the grounds of appeal in regular cases must not be shorter than 20 working days. The Commission would envisage discussions in the Contact Committee on what constitute reasonable time-limits.

2. Under this paragraph, Member States shall lay down all other necessary rules for filing appeal, including rules on extending the time-limit for filing the grounds of appeal for a reasonable cause.

3. In this paragraph, the proposal introduces two possibilities for decision making on appeal. Member States will decide that the reviewing body either has the power to confirm or nullify the decision of the determining authority or that it must take a decision on the merits of the case.

4. If Member States have decided that the reviewing body has the power either to confirm or nullify the decision of the determining authority, the reviewing body must as a consequence remit the case to that authority, where it nullifies a decision.
5. The last paragraph enables Member States that operate border procedures as described in Article 3(2) to provide for a very rapid decision on appeal in these cases.

Article 35

An accelerated procedure would not really be of any practical use if the decision of a reviewing body in an accelerated case took (nearly) as long as in a regular case. This Article therefore lays down a time-limit for decisions by the reviewing bodies in inadmissible and manifestly unfounded cases. Paragraph 1 states that a decision of a reviewing body in an inadmissible or manifestly unfounded case should be taken within 65 working days after notice for appeal is given. Paragraph 2 suggests that Member States could lay down time-limits in other cases. This would help increase the legal certainty about the duration of the procedure from the point of view of applicants. Following the suggestion in Article 38(3), it could also enable applicants to make reviewing bodies accountable for delays by way of a procedure similar to Article 24(2). Paragraph 3 concerns minimum standards similar to the standards laid down in Article 24(3).

Article 36

This Article allows Member States to introduce a procedure for automatic review of decisions by determining authorities in inadmissible and manifestly unfounded cases instead of appeal. Automatic review takes place in certain Member States. The system is described in the 1995 Council Resolution on minimum guarantees as an alternative to appeal. Automatic review avoids the need to wait for the applicant to give notice for appeal. The reviewing body is immediately requested to confirm or nullify the decision taken by the determining authority and this may enable the Member State to implement an adverse decision rapidly when it is not nullified.

1. This paragraph gives Member States the option of introducing automatic review in inadmissible and manifestly unfounded cases.

2. Paragraph 2 requires those Member States which introduce such a procedure to provide for reasonable time-limits for the applicant to submit written comments. Thus, these procedures include a guarantee that applicants for asylum can put forward their objections to an adverse decision as in an ordinary appeals procedure. Given the nature of automatic review as an additional safeguard for decision-making taken up by the authorities themselves, this time-limit can be short.

3. Paragraph 3 is designed to ensure that automatic review is subject to the same minimum standards for decision making as appeal, except for the standards on time-limits.

Article 37

This provision introduces the possibility of introducing accelerated appeal (Article 35) or automatic review (Article 36) to some regular cases. Accelerated appeal would ensure that the reviewing body prioritises its decision making in these cases. Alternatively, it may be felt by Member States that certain regular cases are of a sensitive nature and, irrespective of the applicant's wish for an appeal, call for a review. Certain principles of law could be at stake.
The government might feel more confident if backed by the reviewing body when implementing an adverse decision. As with inadmissible and manifestly unfounded cases, application of automatic review could thus be seen as an additional safeguard within the decision-making process of the authorities.

(a) The first ground is that the applicant has, without reasonable cause and in bad faith, withheld information in an early stage of the procedure which would have resulted in the application being dismissed as inadmissible or manifestly unfounded. The determining authority may wish to prioritise these fraudulent cases and request the reviewing body to take a similar approach.

(b) The second ground is that the applicant has committed a serious offence in the territory of the Member State or of another Member State. Accelerated appeal or automatic review in these cases and the cases described at points (c), (d) and (e) underlines the willingness of determining authorities to ensure a rapid decision.

(c) The third ground is that there are manifestly serious reasons for considering that the grounds of Article 1(F) of the Geneva Convention apply with respect to the applicant. Not all Article 1(F) cases would merit this treatment, given the complexity of the issue of exclusion.

(d) The fourth ground is that there are reasonable grounds for regarding the applicant as a danger to the security of the Member State in which he is located. This ground is based on Article 33(2) of the Geneva Convention.

(e) The applicant, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the Member State in which he is located. This ground is also based on Article 33(2) of the Geneva Convention.

(f) The final ground is that the applicant is held in detention. This could be the kind of case to prioritise under all circumstances.

Article 38

This Article lays down the right to further appeal and provides the general framework within which rulings take place.

1. This paragraph lays down that, in all cases, applicants for asylum have a right to further appeal against decisions of reviewing bodies.

2. This paragraph lays down that the Appellate Court has the power to examine decisions on both facts and points of law, unless there has already been a judicial examination on both facts and points of law. Thus, where the reviewing body is a judicial body, Member States may limit the examination by the Appellate Court to points of law.

3. This paragraph lays down that, in inadmissible and manifestly unfounded cases, Member States may empower the Appellate Court to refuse leave to appeal, and that, in cases where leave to appeal is granted, it may examine the pertinent points of law in an abbreviated or accelerated procedure. An abbreviated procedure could be a procedure without a hearing. A reason to refuse leave to appeal could be that a point of law is raised which, given existing caselaw, would not invalidate the decision.
4. This paragraph enables Member States that so wish to introduce the right for applicants and/or the determining authorities to request a decision from the Appellate Court in cases in which the reviewing bodies have not taken a decision on time. The Appellate Court would be requested to take a decision setting a time-limit for a decision by the reviewing body.

5. This paragraph sets minimum standards for further appeal that are similar to those set in Article 35(1) for appeal.

6. In the final paragraph, minimum standards for further appeal are set that are similar to those in Article 35(2).

Article 39

This Article sets minimum standards relating to suspensive effect of further appeal.

1. Under paragraph 1, Member States must lay down rules by law about suspensive effect pending the ruling of the Appellate Court. Member States may choose not to provide for suspensive effect as the general rule.

2. Paragraph 2 lays down the minimum standard that, in each case where suspensive effect of further appeal is denied, the applicant has the right to apply to the Appellate Court for leave to remain in the territory or at the border of the Member State during the procedure in further appeal. No expulsion may take place until a decision has been taken by the Appellate Court on this request.

3. Paragraph 3 provides that Member States may decide that the Appellate Court shall take a decision as soon as possible.

4. Paragraph 4 enables Member States that operate border procedures as described in Article 3(2) to provide for a very rapid decision in further appeal in these cases.

Article 40

Under this Article, Member States may decide that the right to further appeal in regular cases and the right to apply for further appeal in inadmissible and manifestly unfounded cases can also be extended to the determining authorities. Member States may want to make use of this option if they have decided in accordance with Article 34(3) or Article 36(3) that the reviewing bodies are required to take a decision on the merits of the case.

Chapter VI: General and final provisions

Article 41

A standard provision about non-discrimination is introduced. The wording is based on Article 3 of the Geneva Convention and Article 13 of the EC Treaty.

Article 42

This Article is a standard provision in Community law, providing for effective, proportionate and dissuasive penalties. It leaves Member States with the discretionary power to lay down penalties for infringements of the national provisions adopted pursuant to this Directive.
Article 43

The Commission is instructed to draw up a report on the Member States’ application of the Directive, in accordance with its role of ensuring the application of provisions adopted by the institutions pursuant to the Treaty. It is also given the task of proposing possible amendments to the Directive. A first report must be submitted no later than two years after the deadline for transpositional Directive in the Member States. After this first report, the Commission must draw up a report on the application of the Directive at least every five years.

Article 44

The Member States are required to transpose the Directive by 31 December 2002. This is the same deadline as in the draft Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. The Member States must inform the Commission of the amendments they make to their laws, regulations or administrative provisions and include a reference to the Directive when adopting the measures.

Article 45

This Article lays down the date when the Directive enters into force.

Article 46

The Directive is addressed only to the Member States.

Annex I

Annex I contains the principles with respect to the designation of safe third countries.

Annex II

Annex II contains the principles with respect to the designation of safe countries of origin.
Proposal for a

COUNCIL DIRECTIVE

on minimum standards on procedures in Member States for granting and withdrawing refugee status

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(d) of the first paragraph of Article 63 thereof,

Having regard to the proposal from the Commission\(^1\), Having regard to the opinion of the European Parliament\(^2\),

Having regard to the opinion of the Economic and Social Committee\(^3\), Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union’s objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as complemented by the New York Protocol of 31 January 1967, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.

(3) The Tampere Conclusions provide that a Common European Asylum System should include in the short term common standards for fair and efficient asylum procedures in the Member States and in the longer term Community rules leading to a common asylum procedure in the Community.

(4) Minimum standards on procedures in Member States for granting or withdrawing refugee status are therefore a first measure on asylum procedures without prejudice to any other measures to be taken for the purpose of implementing point (1)(d) of the first paragraph of Article 63 of the Treaty and the objective of a common asylum procedure agreed on in the Tampere Conclusions.

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\(^1\) OJ C
\(^2\) OJ C
\(^3\) OJ C
Asylum procedures should not be so long and drawn out that persons in need of protection have to go through a long period of uncertainty before their cases are decided, and persons who have no need of protection but wish to remain on the territory of the Member States see an application for asylum as a means of prolonging their stay by several years. At the same time, asylum procedures should contain the necessary safeguards to ensure that those in need of protection are correctly identified.

The minimum standards laid down in this Directive should therefore enable Member States to operate a simple and quick system that swiftly and correctly processes applications for asylum in accordance with the international obligations and constitutions of the Member States.

A simple and quick system for procedures in Member States could, provided the necessary safeguards are in place, consist of an initial review of the decision and the possibility of further appeal.

The necessary safeguards should include that, in the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1(A) of the Geneva Convention, every applicant has effective access to procedures, the opportunity to cooperate with the competent authorities to present the relevant facts of his case and sufficient procedural guarantees to pursue his case at and throughout all stages of the procedure.

On the other hand, in the interests of a system of swift recognition of those applicants in need of protection as refugees within the meaning of Article 1(A) of the Geneva Convention, provision should be made for Member States to operate specific procedures for processing applications for which it is not necessary to consider the substance and those that are suspected to be manifestly unfounded.

Member States are at liberty to decide whether or not to operate these procedures for inadmissible and manifestly unfounded cases, but if they do, they should abide by the common standards laid down in this Directive as regards the definition of these cases and the other requirements to apply the procedures, including time-limits for the decision-making process.

It is essential that these procedures contain the necessary safeguards to ensure that earlier doubts can be set aside so that those who are in need of protection can still be correctly identified. In so far as is possible, they should therefore contain, in principle, the same minimum procedural guarantees and requirements regarding the decision-making process as regular procedures. However, given the nature of the cases involved, decision making can and should be prioritised in both instances and further appeal may be restricted.

As minimum procedural guarantees for all applicants in all procedures should be considered, inter alia, the right to a personal interview before a decision is taken, the opportunity to communicate with the UNHCR, the opportunity to contact organisations or persons that provide legal assistance, the right to a written decision within the time-limits laid down and the right of the applicant to be informed at decisive moments in the course of his procedure, in a language he understands, of his legal position in order to be able to consider possible next steps.
In addition, specific procedural guarantees for persons with special needs, such as unaccompanied minors, should be laid down.

Minimum requirements regarding the decision-making process in all procedures should include that decisions are taken by authorities qualified in the field of asylum and refugee matters, that personnel responsible for examination of applications for asylum receives appropriate training, that decisions are taken individually, objectively and impartially, and that negative decisions state the reasons for the decision in fact and in law.

In order to enable every applicant to effectively pursue his case with the competent authorities of the Member States, the right to appeal should entail for all applicants in all procedures the opportunity for a review on both facts and points of law and should as a rule suspend enforcement of an adverse decision.

It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention.

In this spirit, Member States are also invited to apply the provisions of this Directive to procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for persons who are found not to be refugees.

The Member States should provide for penalties in the event of infringement of the national provisions adopted pursuant to this Directive.

The implementation of this Directive should be evaluated at regular intervals.

In accordance with the principles of subsidiarity and proportionality, as set out in Article 5 of the Treaty, the objectives of the proposed action, namely to establish minimum standards on procedures in Member States for granting or withdrawing refugee status cannot be attained by the Member States and, by reason of the scale and effects of the proposed action can therefore only be achieved by the Community. This Directive confines itself to the minimum required to achieve those objectives and does not go beyond what is necessary for that purpose.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

Scope and definitions

Article 1

The purpose of this Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

Article 2
For the purposes of this Directive:

(a) “Geneva Convention” means the Convention relating to the status of refugees done at Geneva on 28 July 1951, as complemented by the New York Protocol of 31 January 1967;

(b) “Application for asylum” means a request whereby a person asks for protection from a Member State and which can be understood to be on the grounds that he is a refugee within the meaning of Article 1(A) of the Geneva Convention. Any application for protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

(c) “Applicant” or “applicant for asylum” means a person who has made an application for asylum in respect of which a final decision has not yet been taken. A final decision is a decision in respect of which all possible remedies under this Directive have been exhausted;

(d) “Determining authority” means any judicial, quasi-judicial or administrative body in a Member State responsible for examining the admissibility and/or substance of applications for asylum and competent to take decisions in first instance in these cases. Any authority responsible for controlling the entry into the territory cannot be considered as a determining authority;

(e) “Reviewing body” means any judicial, quasi-judicial or administrative body in a Member State which is independent of and different from the relevant determining authority in that Member State and responsible for review of the decisions of this determining authority on facts and points of law;

(f) “Appellate Court” means a judicial body in a Member State independent of the government of the Member State in question and responsible for further appeal against the decision of any reviewing body;

(g) “Decision” means a decision by a determining authority or reviewing body in a Member State on the admissibility or substance of an application for asylum;

(h) “Refugee” means a person who fulfils the requirements of Article 1(A) of the Geneva Convention;

(i) “Refugee Status” means the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of that Member State;

(j) “Unaccompanied minor” means a person below the age of eighteen who arrives on the territory of the Member States unaccompanied by an adult responsible for him whether by law or by custom, and for as long as he is not effectively taken into the care of such an adult;

(k) “Detention” means confinement of an applicant for asylum by a Member State within a restricted area, such as prisons, detention facilities or airport transit zones, where his freedom of movement is substantially curtailed;

(l) “Withdrawal of refugee status” means the decision by a determining authority to withdraw the refugee status of a person on the basis of Article 1(C) of the Geneva Convention or Article 33(2) of the Geneva Convention;
“Cancellation of refugee status” means the decision by a determining authority to cancel the refugee status of a person on the grounds that circumstances have come to light that indicate that this person should never have been recognised as a refugee in the first place.

Article 3

1. This Directive shall apply to all persons who make an application for asylum at the border or on the territory of Member States without prejudice to the Protocol on asylum for nationals of Member States of the European Union.

The provisions of this Directive shall also apply where examination of an application for asylum takes place within the context of a procedure to decide on the right of the applicant legally to enter the territory of a Member State.

2. This Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States.

3. Member States may decide to apply the provisions of this Directive to procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for persons who are found not to be refugees.

CHAPTER II

Basic principles and guarantees

Article 4

1. The filing of an application for asylum shall not be subject to any prior formality.

2. Member States shall ensure that the applicant for asylum has an effective opportunity to lodge an application as early as possible.

3. Member States shall ensure that all authorities likely to be addressed by the applicant at the border or on the territory of the Member State have instructions for dealing with applications for asylum, including the instruction to forward the applications to the competent authority for examination, together with all relevant information.

4. Where a person has made an application for asylum also on behalf of his dependants, each adult among these persons shall be informed in private of his right to make a separate application for asylum.
Article 5

Applicants for asylum shall be allowed to remain at the border or on the territory of the Member State in which the application for asylum has been made or is being examined as long as it has not been decided on.

Article 6

Member States shall ensure that decisions on applications for asylum are taken individually, objectively and impartially.

Article 7

With respect to all procedures provided for in this Directive, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

(a) They must be informed, prior to examination of their application for asylum, of the procedure to be followed and of their rights and obligations during the procedure, in a language which they understand.

(b) They must be given the services of an interpreter, whenever necessary, for submitting their case to the competent authorities. These services must be paid for out of public funds, if the interpreter is called upon by the competent authorities.

(c) They must be given the opportunity to communicate with the United Nations High Commissioner for Refugees (UNHCR) or with other organisations that are working on behalf of the UNHCR at all stages of the procedure.

(d) They must be communicated decisions on applications for asylum in writing. If an application is rejected, the reasons for the decision in fact and in law shall be stated and information given on the possibility for review of the decision and, where applicable, on how to file an appeal and the relevant time-limits.

(e) In the event of an adverse decision, they must be informed of the main purport of the decision and the possibility for review of the decision and, where applicable, of how to request an appeal and the relevant time-limits, in a language which they understand.

(f) In the event of a positive decision, they must be informed of the decision and of any mandatory steps, if any, they should take as a result of this decision, in a language which they understand.

Article 8

1. Before a decision is taken by the determining authority, the applicant for asylum must be given the opportunity of a personal interview on the admissibility and/or substance of his application for asylum with an official competent under national law.

2. At the end of a personal interview as referred to in paragraph 1, the official must at least read out a transcript to the interviewee in order to be able to request his agreement with its contents.
3. Where a person has made an application for asylum also on behalf of his dependants, each adult among these persons must be given the opportunity to express his opinion in private and to be interviewed on the admissibility and/or substance of the application.

4. A personal interview on the substance of the application for asylum shall normally take place without the presence of family members.

5. Member States may permit the competent authorities to refrain from conducting a personal interview on the substance of the application for asylum in the case of persons who are not capable of attending this interview for psychological or medical reasons and minors below an age stipulated by national law or regulation, as long as this does not negatively affect the decision by the determining authority. In these cases, each person must be given the opportunity to be represented by a legal guardian, counsellor or adviser as appropriate.

6. In the regular procedure referred to in Articles 24, 25 and 26, hereinafter “the regular procedure”, each applicant for asylum must be given an opportunity, within a reasonable time-limit, to consult the transcript of a personal interview on the substance of his application for asylum and to make comments on it.

7. Member States shall ensure that an official and an interpreter of a sex chosen by the interviewee is involved in the personal interview on the substance of the application for asylum if there are reasons to believe that the person concerned finds it otherwise difficult to present the grounds for his application in a comprehensive manner owing to the experiences he has undergone or to his cultural origin.

Article 9

1. Member States shall ensure that all applicants for asylum have the opportunity to contact in an effective manner organisations or persons that provide legal assistance at all stages of the procedure.

2. In closed areas designated for the examination of applications for asylum, Member States may regulate the access of organisations providing legal assistance, provided such rules either serve the legitimate purpose of ensuring the quality of legal assistance or are objectively necessary to ensure an efficient examination in accordance with the national rules pertaining to the procedure in these areas and do not render access impossible.

3. In the regular procedure, the applicant’s legal adviser or counsellor shall have the opportunity to be present during the personal interview on the substance of the application for asylum. Member States shall provide for rules on the presence of legal advisers or counsellors at all other interviews in the asylum procedure, without prejudice to this paragraph and Articles 8(5) and 10(1)(b).

4. Member States shall ensure that all applicants for asylum have the right to a legal adviser or counsellor to assist them after an adverse decision by a determining authority. The assistance must be given free of charge at this stage of the procedure if the applicant has no adequate means to pay for it himself.
**Article 10**

1. With respect to all procedures provided for in this Directive, Member States shall ensure that all unaccompanied minors enjoy the following guarantees:

   (a) A legal guardian or adviser must be appointed as soon as possible to assist and represent them with respect to the examination of the application;

   (b) The appointed legal guardian or adviser must be given the opportunity to help prepare them for the personal interview on the admissibility and/or the substance of the application for asylum. Member States shall allow the legal guardian or adviser of an unaccompanied minor to be present at the personal interview and to ask questions or make comments.

2. Member States shall ensure that the personal interview on the admissibility and/or the substance of the application for asylum of an unaccompanied minor is conducted by an official trained with regard to the special needs of unaccompanied minors.

3. Member States shall ensure that:

   (a) The competent organisations that carry out medical examinations to determine the age of unaccompanied minors shall use methods that are safe and respect human dignity;

   (b) Unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they understand, about the possibility of age determination by a medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, including the consequences of refusal on the part of the unaccompanied minor to undergo the examination.

**Article 11**

1. Member States shall not hold an applicant for asylum in detention for the sole reason that his application for asylum needs to be examined. However, Member States may hold an applicant for asylum in detention for the purpose of taking a decision in the following cases, in accordance with a procedure prescribed by national law and only for as long as is necessary:

   (a) to ascertain or verify his identity or nationality;

   (b) to determine his identity or nationality when he has destroyed or disposed of his travel and/or identity documents or used fraudulent documents upon arrival in the Member State in order to mislead the authorities;

   (c) to determine the elements on which his application for asylum is based which in other circumstances could be lost;

   (d) in the context of a procedure, to decide on his right to enter the territory.
2. Member States shall provide by law for the possibility of an initial review and subsequent regular reviews of the order for detention of applicants for asylum detained pursuant to paragraph 1.

**Article 12**

Member States shall take appropriate measures to ensure that all competent authorities are adequately provided with staff and equipment so that they can discharge their duties as laid down in this Directive.

**Article 13**

1. Member States shall take appropriate measures to ensure that determining authorities are fully qualified in the field of asylum and refugee matters. To that end, each Member State shall ensure that its determining authorities have:

   (a) at their disposal specialised personnel with the necessary knowledge and experience in the field of asylum and refugee matters;

   (b) access to precise and up-to-date information from various sources, including information from the UNHCR, concerning the situation prevailing in the countries of origin of asylum applicants for asylum and in transit countries;

   (c) the right to ask advice, whenever necessary, from experts on particular issues, for example, a medical or cultural issue.

2. Upon request of their reviewing bodies, Member States shall grant them the same treatment as determining authorities with respect to access to the part of the information mentioned at paragraph 1(b) that is considered public information. Member States may decide to grant them access to the part of the information mentioned at paragraph 1(b) that is considered confidential information, if they abide by the same rules as the determining authorities with respect to the confidentiality of this information.

**Article 14**

1. Member States shall ensure that:

   (a) personnel likely to come into contact with persons at the stage where they may make an application for asylum, such as border officials and immigration officers, have received the necessary basic training to recognise an application for asylum and how to proceed further in accordance with the instructions referred to in Article 4(3);

   (b) personnel interviewing applicants for asylum have received the necessary basic training for this purpose;

   (c) personnel interviewing persons in a particularly vulnerable position and minors have received the necessary basic training with regard to the special needs of these persons;
(d) Personnel examining applications for asylum have received the necessary basic training with respect to international refugee law, national asylum law, relevant international human rights law, this Directive and the assessment of applications for asylum from persons with special needs, including unaccompanied minors;

(e) Personnel responsible for orders of detention have received the necessary basic training with respect to national asylum law, relevant international human rights law, this Directive and national rules for detention.

2. Upon request of their reviewing bodies, Member States shall grant their personnel the same treatment as the personnel of determining authorities with respect to the training mentioned at paragraph 1(c), where necessary, and (d).

**Article 15**

1. Member States shall take appropriate measures to ensure that information regarding individual applications for asylum is kept confidential.

2. Member States shall not disclose or share the information referred to in paragraph 1 with the authorities of the country of origin of the applicant for asylum.

3. Member States shall take appropriate measures to ensure that no information for the purpose of examining the case of an individual applicant shall be obtained from the authorities of his country of origin in a manner that would result in the fact of his having applied for asylum becoming known to those authorities.

4. This Article does not affect the UNHCR’s access to information in the exercise of its mandate under the Geneva Convention in accordance with Article 17 of this Directive.

**Article 16**

1. In the event of a voluntary withdrawal of the application for asylum by the applicant, the determining authority shall enter a notice in the file discontinuing the examination of the application.

2. If an applicant for asylum has disappeared, the determining authority may discontinue the examination of the application if, without reasonable cause, the applicant has not complied with reporting duties or requests to provide information or to appear for an personal interview for at least 30 working days.

3. If the applicant places himself at the disposal of the authorities for the purpose of the examination of his application for asylum after the examination of the application has been discontinued pursuant to paragraphs 1 or 2, his request may be considered a new application for asylum.
**Article 17**

Member States shall take appropriate measures to enable the UNHCR or other organisations that are working on behalf of the UNHCR:

(a) to have access to applicants for asylum, including those in detention and in airport transit zones;

(b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees;

(c) to be able to make representations, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

**CHAPTER III**

**Admissibility**

**Article 18**

Member States may dismiss a particular application for asylum as inadmissible if:

(a) another Member State is responsible for examining the application, according to the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country or stateless person in one of the Member States;

(b) pursuant to Article 20, a third country is considered as a first country of asylum for the applicant;

(c) pursuant to Articles 21 and 22, a third country is considered as a safe third country for the applicant.

**Article 19**

When a Member State requests another Member State to take the responsibility for examining a particular application for asylum, the requesting Member State shall inform the applicant as soon as possible of the request, its content and the relevant time-limits in a language which he understands.

**Article 20**

A country can be considered as a first country of asylum for an applicant for asylum if he has been admitted to that country as a refugee or for other reasons justifying the granting of protection, and can still avail himself of this protection.
**Article 21**

1. Member States may consider that a third country is a safe third country for the purpose of examining applications for asylum only in accordance with the principles set out in Annex I.

2. Member States may retain or introduce legislation that allows for the designation by law or regulation of safe third countries. This legislation shall be without prejudice to Article 22.

3. Member States which, at the date of entry into force of this Directive, have in force laws or regulations designating countries as safe third countries and wish to retain these laws or regulations, shall notify them to the Commission within six months of the adoption of this Directive and notify as soon as possible any subsequent relevant amendments.

Member States shall notify to the Commission as soon as possible any introduction of laws or regulations designating countries as safe third countries after the adoption of this Directive, as well as any subsequent relevant amendments.

**Article 22**

A country that is a safe third country in accordance with the principles set out in Annex I can only be considered as a safe third country for a particular applicant for asylum if, notwithstanding any list:

(a) the applicant has a connection or close links with the country or has had the opportunity during a previous stay in that country to avail himself of the protection of its authorities;

(b) there are grounds for considering that this particular applicant will be re-admitted to its territory; and

(c) there are no grounds for considering that the country is not a safe third country in his particular circumstances.

**Article 23**

1. If a personal interview on the admissibility of the application for asylum with regard to Article 18(b) or (c) is conducted with an applicant, Member States shall ensure that the competent authorities conduct this personal interview within 40 working days after the application of the person concerned has been made.

2. Member States shall ensure that the determining authority takes a decision dismissing an application for asylum as inadmissible by virtue of Article 18(b) or (c) within 25 working days following the personal interview.

3. If no personal interview with the applicant has been conducted, the time-limit for taking a decision shall be 65 working days.

4. Non-compliance with the time-limits in this Article shall result in the application for asylum being processed under the regular procedure.
5. When implementing a decision based on Article 22, Member States may provide the applicant with a document in the language of the third country informing the authorities of that country that the application has not been examined in substance.

CHAPTER IV

Substantive determination procedures Section 1. The regular procedure

Article 24

1. Member States shall adopt by law or regulation a reasonable time-limit for examination of applications for asylum by the determining authority.

2. In cases in which the determining authority has not taken a decision within the time-limit referred to in paragraph 1, applicants shall have the right to request a decision from the reviewing body. Member States shall determine by law whether the decision of the reviewing body on this request is to be on the merits of the case or be a decision setting a time-limit for a decision by the determining authority. The Member States shall ensure that the reviewing body takes a decision in these cases as soon as possible.

3. The time-limit in paragraph 1 can be extended for six months if there is reasonable cause. Reasonable cause is, \textit{inter alia}, assumed if the determining authority is awaiting clarification by the reviewing body or the Appellate Court on an issue that could affect the nature of the decision on the application.

If the time-limit is extended, the determining authority must serve written notice on the applicant. An extension of the time-limit in a particular case is not valid unless notice is served on the applicant.

Article 25

1. Member States shall take appropriate measures to ensure that an applicant for asylum is given the opportunity to cooperate with the competent authorities in order to present the relevant facts of his case as completely as possible and with all available evidence.

2. An applicant for asylum shall be considered to have sufficiently put forward the relevant facts of his case if he has provided statements on his age, background, identity, nationality, travel routes, identity and travel documents and the reasons justifying his need for protection with a view to helping the competent authorities to determine the elements on which his application for asylum is based.

3. After the applicant has made an effort to support his statements concerning the relevant facts by any available evidence and has given a satisfactory explanation for any lack of evidence, the determining authority must assess the applicant’s credibility and evaluate the evidence.
4. Member States shall ensure that if the applicant has made a genuine effort to substantiate his claim and the examiner finds the applicant’s statements to be coherent and plausible, while not running counter to generally known facts, the determining authority gives the applicant the benefit of the doubt, despite a possible lack of evidence for some of the applicant’s statements.

Article 26

1. Member States shall ensure that the determining authority may start an examination to withdraw or cancel the refugee status of a particular person as soon as information comes to light indicating that there are reasons to reconsider the validity of his refugee status.

2. Each cancellation or withdrawal of refugee status shall be examined under the regular procedure in accordance with the provisions of this Directive.

3. Member States may provide for derogation from Articles 7 and 8 in cases where it is impossible for the determining authority to comply with the provisions for reasons specifically relating to the grounds for withdrawal or cancellation.

Section 2. The accelerated procedure

Article 27

Member States may adopt or retain an accelerated procedure for the purpose of processing applications that are suspected to be manifestly unfounded pursuant to Article 28.

Article 28

1. Member States may dismiss applications for asylum as manifestly unfounded if:

   (a) the applicant has submitted, without reasonable cause, an application containing false information with respect to his identity or nationality;

   (b) the applicant has produced no identity or travel document and has not provided sufficient or sufficiently convincing information to determine his identity or nationality, and there are serious reasons for considering that the applicant has in bad faith destroyed or disposed of an identity or travel document that would help determine his identity or nationality;

   (c) a person has made an application for asylum at the last stage of a procedure to deport him and could have made it earlier;

   (d) in submitting and explaining his application, the applicant does not raise issues that justify protection on the basis of the Geneva Convention or Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms;

   (e) the applicant is from a safe country of origin within the meaning of Articles 30 and 31 of this Directive;
(f) the applicant has submitted a new application raising no relevant new facts with respect to his particular circumstances or to the situation in his country of origin.

2. Member States shall not consider the following to be grounds for the dismissal of applications for asylum as manifestly unfounded:

   (a) the applicant has not sought refuge in a part of his country of origin or, if he is a stateless person, in a part of the country of former habitual residence, in which he can reasonably be expected not to be persecuted in the sense of the Geneva Convention;

   (b) there are serious reasons for considering that the grounds of Article 1(F) of the Geneva Convention apply with respect to the applicant.

Article 29

1. If a personal interview on the substance of the application for asylum is conducted with an applicant, Member States shall ensure that the competent authorities conduct this personal interview within 40 working days after the application of the person concerned has been made.

2. Member States shall ensure that the determining authority takes a decision dismissing an application for asylum as manifestly unfounded in accordance with Article 28 within 25 working days following the personal interview with the applicant.

3. If no personal interview with the applicant has been conducted, the time-limit for taking a decision shall be 65 working days.

4. Non-compliance with the time-limits in this Article shall result in the application for asylum being processed under the regular procedure.

Article 30

1. Member States may consider a country as a safe country of origin for the purpose of examining applications for asylum only in accordance with the principles set out in Annex II.

2. Member States may retain or introduce legislation that allows for the designation by law or regulation of safe countries of origin. This legislation shall be without prejudice to Article 31.

3. Member States which, at the date of entry into force of this Directive, have in force laws or regulations designating countries as safe countries of origin and wish to retain these laws or regulations, shall notify them to the Commission within six months of the adoption of this Directive and notify as soon as possible any subsequent relevant amendments.

Member States shall notify to the Commission as soon as possible any introduction of laws or regulation designating countries as safe countries of origin after the adoption of this Directive, as well as any subsequent relevant amendments.
Article 31

A country that is a safe country of origin in accordance with the principles set out in Annex II can only be considered as a safe country of origin for a particular applicant for asylum if he has the nationality of that country or, if he is a stateless person, it is his country of former habitual residence, and if there are no grounds for considering the country not to be a safe country of origin in his particular circumstances.

CHAPTER V

Appeals procedures

Article 32

Applicants for asylum have the right to appeal against any decision taken on the admissibility or the substance of their application for asylum.

Appeal may be on both facts and points of law.

Article 33

1. Appeal shall have suspensive effect. The applicant may remain in the territory or at the border of the Member State concerned awaiting the outcome of the decision of the reviewing body.

2. Member States may derogate from this rule:

   (a) in cases where a country which is not a Member State is considered as a safe third country for the applicant pursuant to Articles 21 and 22;

   (b) in cases that are dismissed as manifestly unfounded pursuant to Article 28;

   (c) in cases where there are grounds of national security or public order.

3. If the suspensive effect of appeal is denied, the applicant shall have the right to apply to the competent authority for leave to remain on the territory or at the border of the Member State during the appeals procedure. No expulsion may take place until the competent authority has taken a decision on this request, except in cases where a country which is not a Member State is considered as a safe third country for the applicant pursuant to Articles 21 and 22.

4. Member States shall ensure that the competent authority processes the request as soon as possible.

Article 34

1. Member States shall lay down by law or regulation reasonable time-limits for giving notice of appeal and for filing the grounds of appeal. The time-limit for filing the grounds of appeal in regular cases shall in no case be less than 20 working days.
2. Member States shall lay down all other necessary rules for lodging appeal, including rules to extend the time-limit for filing the grounds of appeal for a reasonable cause.

3. Member States shall decide that the reviewing body either has the power to confirm or nullify the decision of the determining authority or that it must take a decision on the merits of the case.

4. Member States shall ensure that, if the reviewing body nullifies a decision, it remits the case to the determining authority for a new decision.

5. For the purposes of an expeditious procedure for legal entry to the territory in accordance with Article 3(2), Member States may provide for the reviewing body to take a decision on appeal within seven working days.

Article 35

1. Member States shall ensure that, in cases where an application has been found to be inadmissible or manifestly unfounded, the reviewing body takes a decision within 65 working days after notice of appeal has been given in accordance with Article 34(1).

2. Member States may adopt by law or regulation time-limits for examination by the reviewing body in other cases.

3. A time-limit in paragraph 1 or 2 may be extended if there is reasonable cause. Reasonable cause is, inter alia, assumed if the reviewing body is awaiting clarification by the Appellate Court on a point of law that could affect the nature of its decision.

   If the time-limit is extended, the reviewing body must serve written notice on the applicant. An extension of the time-limit in a particular case is not valid unless notice is served on the applicant.

Article 36

1. Member States may introduce a procedure that provides for automatic review by a reviewing body of decisions by determining authorities finding cases to be in inadmissible or manifestly unfounded.

2. If a Member State chooses to introduce such a procedure, it shall provide for reasonable time-limits for the applicant to submit written comments.

3. In a procedure providing for automatic review, the provisions of Articles 32(2), 33 and 34(3), (4) and (5) shall apply.
Article 37

Member States may provide that the reviewing body shall decide a case in accordance with the procedure in Article 35 or Article 36 if:

(a) the applicant has, without reasonable cause and in bad faith, withheld information at an early stage of the procedure which would have resulted in the application of Articles 18 or 28;

(b) the applicant has committed a serious offence on the territory of the Community;

(c) there are manifestly serious reasons for considering that the grounds of Article 1(F) of the Geneva Convention apply with respect to the applicant;

(d) there are reasonable grounds for regarding the applicant as a danger to the security of the Member State in which he is located;

(e) the applicant, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the Member State in which he is located;

(f) the applicant is held in detention.

Article 38

1. Member States shall ensure that in all cases applicants for asylum have a right to further appeal to the Appellate Court.

2. If the reviewing body is an administrative or quasi-judicial body, Member States shall ensure that the Appellate Court has the power to examine decisions on both facts and points of law. If the reviewing body is a judicial body, Member States may decide that the Appellate Court has to limit its examination of decisions to points of law.

3. Member States may provide that in cases where an application has been found to be inadmissible or manifestly unfounded, the Appellate Court is able to decide whether or not to give leave to appeal and, in cases in respect of which leave to appeal is granted, to examine the decisions in an abbreviated or accelerated procedure.

4. Member States may provide that in cases in which the reviewing body has not taken a decision within the time-limits provided for in Article 35(1) or (2), applicants and/or determining authorities shall have the right to request a decision from the Appellate Court setting a time-limit for a decision by the reviewing body. Member States may provide for a decision to be taken by the Appellate Court in these cases as soon as possible.

5. Member States shall lay down by law or regulation reasonable time-limits for giving notice of further appeal and for filing the grounds of further appeal. The time-limit for filing the grounds of further appeal shall in no case be less than 30 working days.
6. Member States shall lay down all other necessary rules for filing further appeals, including rules extending the time-limit for filing the grounds of further appeal for a reasonable cause.

Article 39

1. Member States shall lay down rules by law on suspensive effect pending the ruling of the Appellate Court.

2. In all cases in which suspensive effect is denied, the applicant for asylum shall have the right to apply to the Appellate Court for leave to remain on the territory or at the border of the Member State during further appeal. No expulsion may take place until a decision has been taken by the Appellate Court on this request.

3. Member States may provide for a decision to be taken by the Appellate Court in the cases referred to in paragraph 2 as soon as possible.

4. For the purposes of an expeditious procedure for legal entry to the territory in accordance with Article 3(2), Member States may require the Appellate Court to rule on the request pursuant to paragraph 2 within seven working days.

Article 40

Member States may decide that determining authorities also have the right to further appeal.

CHAPTER VI

General and final provisions

Article 41

Member States shall apply the provisions of this Directive to applicants for asylum without discrimination as to sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation or country of origin.

Article 42

The Member States shall lay down the penalties for infringements of the national provisions adopted pursuant to this Directive and shall take all the measures necessary to ensure that they are enforced. The penalties laid down must be effective, proportionate and dissuasive. The Member States shall notify the Commission of these provisions by no later than the date specified in Article 44(1) and without delay of any subsequent amendments affecting them.
Article 43

No later than two years after the date specified in Article 44(1), the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. The Member States shall send the Commission all the information that is appropriate for drawing up this report not later than eighteen months after the date specified in Article 44(1).

After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every five years.

Article 44

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2002 at the latest. They shall forthwith inform the Commission thereof.

When the Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 45

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 46

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President
ANNEX I

PRINCIPLES WITH RESPECT TO THE DESIGNATION OF SAFE THIRD COUNTRIES

I. Requirements for designation

A country is considered as a safe third country if it fulfils, with respect to those foreign nationals or stateless persons to which the designation would apply, the following two requirements:

A. it generally observes the standards laid down in international law for the protection of refugees;

B. it generally observes basic standards laid down in international human rights law from which there may be no derogation in time of war or other public emergency threatening the life of the nation.

A. The standards laid down in international law for the protection of refugees

1. A safe third country is any country that has ratified the Geneva Convention, observes the provisions of that Convention with respect to the rights of persons who are recognised and admitted as refugees and has in place with respect to persons who wish to be recognised and admitted as refugees an asylum procedure in accordance with the following principles:

- The asylum procedure is prescribed by law.
- Decisions on applications for asylum are taken objectively and impartially.
- Applicants for asylum are allowed to remain at the border or on the territory of the country as long as the decision on their application for asylum has not been decided on.
- Applicants for asylum have the right to a personal interview, where necessary with the assistance of an interpreter.
- Applicants for asylum are given the opportunity to communicate with the UNHCR or other organisations that are working on behalf of the UNHCR.
- There is provision for appeal to a higher administrative authority or to a court of law against the decision on each application for asylum or there is an effective possibility to have the decision reviewed.
- The UNHCR or other organisations working on behalf of the UNHCR have, in general, access to asylum applicants and to the authorities to request information regarding individual applications, the course of the procedure and the decisions taken and, in the exercise of their supervisory responsibilities under Article 35 of the Geneva Convention, can make representations to these authorities regarding individual applications for asylum.
2. Notwithstanding the above, a country that has not ratified the Geneva Convention may still be considered a safe third country if:

- it generally observes the principle of non-refoulement as laid down in the OAU Convention governing the specific aspects of refugee problems in Africa of 10 September 1969 and has in place with respect to the persons who request asylum for this purpose a procedure that is in accordance with the abovementioned principles; or

- it has followed the conclusions of the 19–22 November 1984 Cartagena Declaration of Refugees to ensure that national laws and regulations reflect the principles and criteria of the Geneva Convention and that a minimum standard of treatment for refugees is established; or

- it nonetheless generally observes in practice the standards laid down in the Geneva Convention with respect to the rights of persons in need of international protection within the meaning of this Convention and has in place with respect to the persons who wish to be so protected a procedure which is in accordance with the abovementioned principles; or

- it complies in any other manner whatsoever with the need for international protection of these persons, either through cooperation with the Office of UNHCR or other organisations which may be working on behalf of the UNHCR or by other means deemed in general to be adequate for that purpose as evinced by the Office of the UNHCR.

B. The basic standards laid down in international human rights law

1. Any country that has ratified either the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “European Convention”) or both the 1966 International Covenant on Civil and Political Rights (hereinafter referred to as the “International Covenant”) and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the “Convention against Torture”), and generally observes the standards laid down therein with respect to the right to life, freedom from torture and cruel, inhuman or degrading treatment, freedom from slavery and servitude, the prohibition of retroactive criminal laws, the right to recognition as a person before the law, freedom from being imprisoned merely on the ground of inability to fulfil a contractual obligation and the right to freedom of thought, conscience and religion.

2. Observance of the standards for the purpose of designating a country as a safe third country also includes provision by that country of effective remedies that guarantee these foreign nationals or stateless persons from being removed in breach of Article 3 of the European Convention or Article 7 of the International Covenant and Article 3 of the Convention against Torture.
II. Procedure for designation

Every general assessment of the observance of these standards for the purpose of designating a country as a safe third country in general or with respect to certain foreign nationals or stateless persons in particular must be based on a range of sources of information, which may include reports from diplomatic missions, international and non-governmental organisations and press reports. Member States may in particular take into consideration information from the UNHCR.

The report of the general assessment shall be in the public domain.
ANNEX II

PRINCIPLES WITH RESPECT TO THE DESIGNATION OF SAFE COUNTRIES OF ORIGIN

I. Requirements for designation

A country is considered as a safe country of origin if it generally observes the basic standards laid down in international human rights law from which there may be no derogation in time of war or other public emergency threatening the life of the nation, and it:

A. has democratic institutions and the following rights are generally observed there: the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of peaceful assembly, the right to freedom of associations with others, including the right to form and join trade unions and the right to take part in government directly or through freely chosen representatives;

B. allows monitoring by international organisations and NGOs of its observance of human rights;

C. is governed by the rule of law and the following rights are generally observed there: the right to liberty and security of person, the right to recognition as a person before the law and equality before the law;

D. provides for generally effective remedies against violations of these civil and political rights and, where necessary, for extraordinary remedies;

E. is a stable country.

II. Procedure for designation

Every general assessment of the observance of these standards for the purpose of a designating a country as a safe country of origin must be based on a range of sources of information, which may include reports from diplomatic missions, international and non-governmental organisations and press reports. Member States may in particular take into consideration information from the UNHCR.

The report of the general assessment shall be in the public domain.
1. **TITLE OF OPERATION**

   Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

2. **BUDGET HEADING(S) INVOLVED**

   A – 7030.

3. **LEGAL BASIS**

   Point (1)(d) of the first paragraph of Article 63 of the EC Treaty.

4. **DESCRIPTION OF OPERATION:**

   **4.1 General objective**

   The aim of the Directive is to establish minimum standards at Community level for asylum procedures in Member States in which refugee status is granted or withdrawn.

   The proposal is the first Community initiative on asylum procedures for the purpose of achieving a common European asylum system. As Conclusion 15 of the Presidency at the Tampere European Council in October 1999 states that in the long term Community rules should lead to a common asylum procedure in the European Union, the minimum standards for procedures in Member States are only a first step towards further harmonisation on procedural rules. A Communication on this particular issue will be presented in November.

   With respect to this Directive, the Commission intends to establish a Contact Committee. The reasons to establish this Committee are the following. First, the Committee is to help the Member States implement the minimum standards laid down in this Directive in a forward-looking and coordinating spirit. Secondly, it is to be the forum for Member States that wish to go jointly beyond the minimum standards at this stage of the harmonisation process, notably with respect to coordinating the designation of safe third countries and safe countries of origin. Thirdly, it is to set aside the impediments for a common asylum procedure and create the necessary conditions for achieving the objective set by the European Council in Tampere. Thus, the Committee could promote further approximation of asylum policy in the future and it could pave the way forward from minimum standards on procedures to a common procedure.

   In the period before 31 December 2002 the Contact Committee would meet three times a year to prepare transposal of the Directive and henceforth two or three times a year to facilitate consultation between Member States on additional standards, etc.

4. **Period covered and arrangements for renewal or extension**

   Indeterminate.

5. **CLASSIFICATION OF EXPENDITURE OR REVENUE**
5.1 Non-compulsory expenditure.
5.2 Non-differentiated appropriations.
5.3 Type of revenue involved Not applicable.

6. **TYPE OF EXPENDITURE OR REVENUE**
Not applicable.

7. **FINANCIAL IMPACT**
Administrative measures as a result of the introduction of the Contact Committee.

8. **FRAUD PREVENTION MEASURES**
Not applicable.

9. **ELEMENTS OF COST-EFFECTIVENESS ANALYSIS**

9.1 Specific and quantified objectives; target population
Not applicable.

9.2 Grounds for the operation
Not applicable.

9.3 Monitoring and evaluation of the operation
Not applicable.

10. **ADMINISTRATIVE EXPENDITURE (PART A OF SECTION III OF THE GENERAL BUDGET)**
The administrative resources actually mobilised will be determined in the Commission's annual decision on the allocation of resources, taking into account the additional staff and appropriations granted by the budgetary authority.

10.1 Impact on the number of posts
None.

10.2 Overall financial impact of additional human resources
None.
### 10.3 Increase in administrative expenditure arising from the adoption of the Directive

<table>
<thead>
<tr>
<th>Budget heading</th>
<th>Amount</th>
<th>Method of calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td>A-7030</td>
<td></td>
<td>Contact Committee meeting three times a year as of the adoption of the Directive</td>
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<tr>
<td></td>
<td></td>
<td>One-day meetings with all national experts of Member States</td>
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<tr>
<td></td>
<td></td>
<td>Average cost per meeting: EUR 650</td>
</tr>
<tr>
<td></td>
<td></td>
<td>EUR 650 x 15 representatives = EUR 9,750</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Three times a year = EUR 29,250</td>
</tr>
<tr>
<td>Total</td>
<td>EUR 29,250</td>
<td></td>
</tr>
</tbody>
</table>

The expenditure relating to Title A7, set out at point 10.3, will be covered by appropriations from DG JAI's overall allocation.
COUNCIL DIRECTIVE 2005/85/EC
of 1 December 2005

on minimum standards on procedures in Member States for granting and withdrawing refugee status

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(d) of the first paragraph of Article 63 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the European Economic and Social Committee (3),

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union’s objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967 (Geneva Convention), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures in the Member States and, in the longer term, Community rules leading to a common asylum procedure in the European Community.

(4) The minimum standards laid down in this Directive on procedures in Member States for granting or withdrawing refugee status are therefore a first measure on asylum procedures.

(5) The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.

(6) The approximation of rules on the procedures for granting and withdrawing refugee status should help to limit the secondary movements of applicants for asylum between Member States, where such movement would be caused by differences in legal frameworks.

(7) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention.

(8) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(9) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(10) It is essential that decisions on all applications for asylum be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or receives the necessary training in the field of asylum and refugee matters.

(11) It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive.

(2) OJ C 77, 28.3.2002, p. 94.
The notion of public order may cover a conviction for committing a serious crime.

In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, every applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure. Moreover, the procedure in which an application for asylum is examined should normally provide an applicant at least with the right to stay pending a decision by the determining authority, access to the services of an interpreter for submitting his/her case if interviewed by the authorities, the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) or with any organisation working on its behalf, the right to appropriate notification of a decision, a motivation of that decision in fact and in law, the opportunity to consult a legal adviser or other counsellor, and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.

In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States.

Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant.

Many asylum applications are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to keep existing procedures adapted to the specific situation of these applicants at the border. Common rules should be defined on possible exceptions made in these circumstances to the guarantees normally enjoyed by applicants. Border procedures should mainly apply to those applicants who do not meet the conditions for entry into the territory of the Member States.

A key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.

Given the level of harmonisation achieved on the qualification of third country nationals and stateless persons as refugees, common criteria for designating third countries as safe countries of origin should be established.

Where the Council has satisfied itself that those criteria are met in relation to a particular country of origin, and has consequently included it in the minimum common list of safe countries of origin to be adopted pursuant to this Directive, Member States should be obliged to consider applications of persons with the nationality of that country, or of stateless persons formerly habitually resident in that country, on the basis of the rebuttable presumption of the safety of that country. In the light of the political importance of the designation of safe countries of origin, in particular in view of the implications of an assessment of the human rights situation in a country of origin and its implications for the policies of the European Union in the field of external relations, the Council should take any decisions on the establishment or amendment of the list, after consultation of the European Parliament.

It results from the status of Bulgaria and Romania as candidate countries for accession to the European Union and the progress made by these countries towards membership that they should be regarded as constituting safe countries of origin for the purposes of this Directive until the date of their accession to the European Union.

The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her.
(2) Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies as a refugee in accordance with Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (\(^{1}\)), except where the present Directive provides otherwise, in particular where it can be reasonably assumed that another country would do the examination or provide sufficient protection. In particular, Member States should not be obliged to assess the substance of an asylum application where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country.

(22) point of view before the authorities can take a motivated decision to withdraw their status. However, dispensing with these guarantees should be allowed where the reasons for the cessation of the refugee status is not related to a change of the conditions on which the recognition was based.

(23) Member States should also not be obliged to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country. Member States should only proceed on this basis where this particular applicant would be safe in the third country concerned. In order to avoid secondary movements of applicants, common principles for the consideration or designation by Member States of third countries as safe should be established.

(24) Furthermore, with respect to certain European third countries, which observe particularly high human rights and refugee protection standards, Member States should be allowed to not carry out, or not to carry out full examination of asylum applications regarding applicants who enter their territory from such European third countries. Given the potential consequences for the applicant of a restricted or omitted examination, this application of the safe third country concept should be restricted to cases involving third countries with respect to which the Council has satisfied itself that the high standards for the safety of the third country concerned, as set out in this Directive, are fulfilled. The Council should take decisions in this matter after consultation of the European Parliament.

(25) It follows from the nature of the common standards concerning both safe third country concepts as set out in this Directive, that the practical effect of the concepts depends on whether the third country in question permits the applicant in question to enter its territory.

(26) With respect to the withdrawal of refugee status, Member States should ensure that persons benefiting from refugee status are duly informed of a possible reconsideration of their status and have the opportunity to submit their

(27) It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.

(28) In accordance with Article 64 of the Treaty, this Directive does not affect the exercise of the responsibilities incumbent upon Member States with regard to the main-tenance of law and order and the safeguarding of internal security.

(29) This Directive does not deal with procedures governed by Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (\(^{1}\)).

(30) The implementation of this Directive should be evaluated at regular intervals not exceeding two years.

(31) Since the objective of this Directive, namely to establish minimum standards on procedures in Member States for granting and withdrawing refugee status cannot be sufficiently attained by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective.

(32) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 24 January 2001, its wish to take part in the adoption and application of this Directive.


(\(^{2}\) OJ L 50, 25.2.2003, p. 1.)
In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified, by letter of 14 February 2001, its wish to take part in the adoption and application of this Directive.

In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

Article 2

Definitions

For the purposes of this Directive:

(a) 'Geneva Convention' means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

(b) 'application' or 'application for asylum' means an application made by a third country national or stateless person which can be understood as a request for international protection from a Member State under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

(c) 'applicant' or 'applicant for asylum' means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

(d) 'final decision' means a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive;

(e) 'determining authority' means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I;

(f) 'refugee' means a third country national or a stateless person who fulfils the requirements of Article 1 of the Geneva Convention as set out in Directive 2004/83/EC;

(g) 'refugee status' means the recognition by a Member State of a third country national or stateless person as a refugee;

(h) 'unaccompanied minor' means a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States;

(i) 'representative' means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests;

(j) 'withdrawal of refugee status' means the decision by a competent authority to revoke, end or refuse to renew the refugee status of a person in accordance with Directive 2004/83/EC;

(k) 'remain in the Member State' means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for asylum has been made or is being examined.

Article 3

Scope

1. This Directive shall apply to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status.

2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.
3. Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention and as applications for other kinds of international protection given under the circumstances defined by Article 15 of Directive 2004/83/EC, they shall apply this Directive throughout their procedure.

4. Moreover, Member States may decide to apply this Directive in procedures for deciding on applications for any kind of international protection.

**Article 4**

**Responsible authorities**

1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive, in particular Articles 8(2) and 9.

2. However, Member States may provide that another authority is responsible for the purposes of:

   (a) processing cases in which it is considered to transfer the applicant to another State according to the rules establishing criteria and mechanisms for determining which State is responsible for considering an application for asylum, until the transfer takes place or the requested State has refused to take charge of or take back the applicant;

   (b) taking a decision on the application in the light of national security provisions, provided the determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee by virtue of Directive 2004/83/EC;

   (c) conducting a preliminary examination pursuant to Article 32, provided this authority has access to the applicant’s file regarding the previous application;

   (d) processing cases in the framework of the procedures provided for in Article 35(1);

   (e) refusing permission to enter in the framework of the procedure provided for in Article 35(2) to (5), subject to the conditions and as set out therein;

   (f) establishing that an applicant is seeking to enter or has entered into the Member State from a safe third country pursuant to Article 36, subject to the conditions and as set out in that Article.

3. Where authorities are designated in accordance with paragraph 2, Member States shall ensure that the personnel of such authorities have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive.

**Article 5**

**More favourable provisions**

Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive.

**CHAPTER II**

**BASIC PRINCIPLES AND GUARANTEES**

**Article 6**

**Access to the procedure**

1. Member States may require that applications for asylum be made in person and/or at a designated place.

2. Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.

3. Member States may provide that an application may be made by an applicant on behalf of his/her dependants. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

   Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependant adult is conducted.

4. Member States may determine in national legislation:

   (a) the cases in which a minor can make an application on his/her own behalf;

   (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 17(1)(a);
(c) the cases in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor.

5. Member States shall ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority.

Article 7
Right to remain in the Member State pending the examination of the application

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant (1) or otherwise, or to a third country, or to international criminal courts or tribunals.

Article 8
Requirements for the examination of applications

1. Without prejudice to Article 23(4)(i), Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially;

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

3. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 2(b), necessary for the fulfilment of their task.

4. Member States may provide for rules concerning the translation of documents relevant for the examination of applications.

Article 9
Requirements for a decision by the determining authority

1. Member States shall ensure that decisions on applications for asylum are given in writing.

2. Member States shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

Member States need not state the reasons for not granting refugee status in a decision where the applicant is granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC. In these cases, Member States shall ensure that the reasons for not granting refugee status are stated in the applicant’s file and that the applicant has, upon request, access to his/her file.

Moreover, Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with this information at an earlier stage either in writing or by electronic means accessible to the applicant.

3. For the purposes of Article 6(3), and whenever the application is based on the same grounds, Member States may take one single decision, covering all dependants.
Article 10
Guarantees for applicants for asylum

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

(a) they shall be informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, as well as the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2004/83/EC. This information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 11;

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to give these services at least when the determining authority calls upon the applicant to be interviewed as referred to in Articles 12 and 13 and appropriate communication cannot be ensured without such services. In this case and in other cases where the competent authorities call upon the applicant, these services shall be paid for out of public funds;

(c) they shall not be denied the opportunity to communicate with the UNHCR or with any other organisation working on behalf of the UNHCR in the territory of the Member State pursuant to an agreement with that Member State;

(d) they shall be given notice in reasonable time of the decision by the determining authority on their application for asylum. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant for asylum;

(e) they shall be informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 9(2).

2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones referred to in paragraph 1(b), (c) and (d) of this Article.

Article 11
Obligations of the applicants for asylum

1. Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities in so far as these obligations are necessary for the processing of the application.

2. In particular, Member States may provide that:

(a) applicants for asylum are required to report to the competent authorities or to appear before them in person, either without delay or at a specified time;

(b) applicants for asylum have to hand over documents in their possession relevant to the examination of the application, such as their passports;

(c) applicants for asylum are required to inform the competent authorities of their current place of residence or address and of any changes thereof as soon as possible. Member States may provide that the applicant shall have to accept any communication at the most recent place of residence or address which he/she indicated accordingly;

(d) the competent authorities may search the applicant and the items he/she carries with him/her;

(e) the competent authorities may take a photograph of the applicant; and

(f) the competent authorities may record the applicant’s oral statements, provided he/she has previously been informed thereof.

Article 12
Personal interview

1. Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.

Member States may also give the opportunity of a personal interview to each dependant adult referred to in Article 6(3).

Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.
2. The personal interview may be omitted where:

(a) the determining authority is able to take a positive decision on the basis of evidence available; or

(b) the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4(2) of Directive 2004/83/EC; or

(c) the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded in cases where the circumstances mentioned in Article 23(4)(a), (c), (g), (h) and (j) apply.

3. The personal interview may also be omitted where it is not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control. When in doubt, Member States may require a medical or psychological certificate.

Where the Member State does not provide the applicant with the opportunity for a personal interview pursuant to this paragraph, or where applicable, to the dependant, reasonable efforts shall be made to allow the applicant or the dependant to submit further information.

4. The absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for asylum.

5. This Article is also applicable to the meeting referred to in Article 12(2)(b).

Article 13

Requirements for a personal interview

1. A personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present.

2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability, insofar as it is possible to do so; and

(b) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate.

4. Member States may provide for rules concerning the presence of third parties at a personal interview.

5. Member States may request the applicant’s approval of the contents of the report of the personal interview.

Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant’s file.
The refusal of an applicant to approve the contents of the report shall not prevent the determining authority from taking a decision on his/her application.

4. This Article is also applicable to the meeting referred to in Article 12(2)(b).

Article 15
Right to legal assistance and representation

1. Member States shall allow applicants for asylum the opportunity, at their own cost, to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications.

2. In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request, subject to the provisions of paragraph 3.

3. Member States may provide in their national legislation that free legal assistance and/or representation is granted:

(a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or

(b) only to those who lack sufficient resources; and/or

(c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or

(d) only if the appeal or review is likely to succeed.

Member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted.

4. Rules concerning the modalities for filing and processing requests for legal assistance and/or representation may be provided by Member States.

5. Member States may also:

(a) impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

6. Member States may demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.

Article 16
Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, and who assists or represents an applicant for asylum under the terms of national law, shall enjoy access to such information in the applicant's file as is liable to be examined by the authorities referred to in Chapter V, insofar as the information is relevant to the examination of the application.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question shall be available to the authorities referred to in Chapter V, except where such access is precluded in cases of national security.

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant. Member States may only limit the possibility of visiting applicants in closed areas where such limitation is, by virtue of national legislation, objectively necessary for the security, public order or administrative management of the area, or in order to ensure an efficient examination of the application, provided that access by the legal adviser or other counsellor is not thereby severely limited or rendered impossible.

3. Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure, without prejudice to this Article or to Article 17(1)(b).

4. Member States may provide that the applicant is allowed to bring with him/her to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.
Member States may require the presence of the applicant at the personal interview, even if he/she is represented under the terms of national law by such a legal adviser or counsellor, and may require the applicant to respond in person to the questions asked.

The absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting the personal interview with the applicant.

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**Article 17**

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:

   (a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (1);

   (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview.

Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor:

   (a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or

   (b) can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above to the representative; or

   (c) is married or has been married.

3. Member States may, in accordance with the laws and regulations in force on 1 December 2005, also refrain from appointing a representative where the unaccompanied minor is 16 years old or older, unless he/she is unable to pursue his/her application without a representative.

4. Member States shall ensure that:

   (a) if an unaccompanied minor has a personal interview on his/her application for asylum as referred to in Articles 12, 13 and 14, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;

   (b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum.

   In cases where medical examinations are used, Member States shall ensure that:

   (a) unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

   (b) unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned; and

   (c) the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.

6. The best interests of the child shall be a primary consideration for Member States when implementing this Article.

Article 18
Detention

1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.

Article 19
Procedure in case of withdrawal of the application

1. Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law, when an applicant for asylum explicitly withdraws his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application.

2. Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority enters a notice in the applicant’s file.

Article 20
Procedure in the case of implicit withdrawal or abandonment of the application

1. When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC.

Member States may assume that the applicant has implicitly withdrawn or abandoned his/her application for asylum in particular when it is ascertained that:

(a) the applicant demonstrates within a reasonable time that his/her failure was due to circumstances beyond his control;

(b) he/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time, or he/she has not within a reasonable time complied with reporting duties or other obligations to communicate.

For the purposes of implementing these provisions, Member States may lay down time-limits or guidelines.

2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34.

Member States may provide for a time-limit after which the applicant’s case can no longer be re-opened.

Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage where it was discontinued.

Article 21
The role of UNHCR

1. Member States shall allow the UNHCR:

(a) to have access to applicants for asylum, including those in detention and in airport or port transit zones;

(b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto;

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

Member States may assume that the applicant has implicitly withdrawn or abandoned his/her application for asylum in particular when it is ascertained that:

(a) he/she has failed to respond to requests to provide information essential to his/her application in terms of Article 4 of Directive 2004/83/EC or has not appeared for a personal interview as provided for in Articles 12, 13 and 14, unless...
Article 22

Collection of information on individual cases

For the purposes of examining individual cases, Member States shall not:

(a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;

(b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

CHAPTER III

PROCEDURES AT FIRST INSTANCE

SECTION I

Article 23

Examination procedure

1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:

(a) be informed of the delay; or

(b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.

4. Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:

(a) the applicant, in submitting his/her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC; or

(b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83/EC; or

(c) the application for asylum is considered to be unfounded:

(i) because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31, or

(ii) because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28(1); or

(d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision; or

(e) the applicant has filed another application for asylum stating other personal data; or

(f) the applicant has not produced information establishing with a reasonable degree of certainty his/her identity or nationality, or it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or

(g) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC; or

(h) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or

(i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or
(j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or

(k) the applicant has failed without good reason to comply with obligations referred to in Article 4(1) and (2) of Directive 2004/83/EC or in Articles 11(2)(a) and (b) and 20(1) of this Directive; or

(l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry; or

(m) the applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law; or

(n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or

(o) the application was made by an unmarried minor to whom Article 6(4)(c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.

Article 24

Specific procedures

1. Member States may provide for the following specific procedures derogating from the basic principles and guarantees of Chapter II:

(a) a preliminary examination for the purposes of processing cases considered within the framework set out in Section IV;

(b) procedures for the purposes of processing cases considered within the framework set out in Section V.

2. Member States may also provide a derogation in respect of Section VI.

SECTION II

Article 25

Inadmissible applications

1. In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this Article.

2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;

(d) the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC;

(e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d);

(f) the applicant has lodged an identical application after a final decision;

(g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant’s situation, which justify a separate application.

Article 26

The concept of first country of asylum

A country can be considered to be a first country of asylum for a particular applicant for asylum if:

(a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or
(b) he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement; provided that he/she will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27(1).

**Article 27**

The safe third country concept

1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

   (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

   (b) the principle of non-refoulement in accordance with the Geneva Convention is respected;

   (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

   (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

   (a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

   (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

   (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

3. When implementing a decision solely based on this Article, Member States shall:

   (a) inform the applicant accordingly; and

   (b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

**SECTION III**

**Article 28**

Unfounded applications

1. Without prejudice to Articles 19 and 20, Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to Directive 2004/83/EC.

2. In the cases mentioned in Article 23(4)(b) and in cases of unfounded applications for asylum in which any of the circumstances listed in Article 23(4)(a) to (o) apply, Member States may also consider an application as manifestly unfounded, where it is defined as such in the national legislation.

**Article 29**

Minimum common list of third countries regarded as safe countries of origin

1. The Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries which shall be regarded by Member States as safe countries of origin in accordance with Annex II.
2. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with Annex II. The Commission shall examine any request made by the Council or by a Member State to submit a proposal to amend the minimum common list.

3. When making its proposal under paragraphs 1 or 2, the Commission shall make use of information from the Member States, its own information and, where necessary, information from UNHCR, the Council of Europe and other relevant international organisations.

4. Where the Council requests the Commission to submit a proposal for removing a third country from the minimum common list, the obligation of Member States pursuant to Article 31(2) shall be suspended with regard to this third country as of the day following the Council decision requesting such a submission.

5. Where a Member State requests the Commission to submit a proposal to the Council for removing a third country from the minimum common list, that Member State shall notify the Council in writing of the request made to the Commission. The obligation of this Member State pursuant to Article 31(2) shall be suspended with regard to the third country as of the day following the notification to the Council.

6. The European Parliament shall be informed of the suspensions under paragraphs 4 and 5.

7. The suspensions under paragraphs 4 and 5 shall end after three months, unless the Commission makes a proposal before the end of this period, to withdraw the third country from the minimum common list. The suspensions shall in any case end where the Council rejects a proposal by the Commission to withdraw the third country from the list.

8. Upon request by the Council, the Commission shall report to the European Parliament and the Council on whether the situation of a country on the minimum common list is still in conformity with Annex II. When presenting its report, the Commission may make such recommendations or proposals as it deems appropriate.

Article 30
National designation of third countries as safe countries of origin

1. Without prejudice to Article 29, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum. This may include designation of part of a country as safe where the conditions in Annex II are fulfilled in relation to that part.

2. By derogation from paragraph 1, Member States may retain legislation in force on 1 December 2005 that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum where they are satisfied that persons in the third countries concerned are generally neither subject to:

(a) persecution as defined in Article 9 of Directive 2004/83/EC; nor

(b) torture or inhuman or degrading treatment or punishment.

3. Member States may also retain legislation in force on 1 December 2005 that allows for the national designation of part of a country as safe, or a country or part of a country as safe for a specified group of persons in that country, where the conditions in paragraph 2 are fulfilled in relation to that part or group.

4. In assessing whether a country is a safe country of origin in accordance with paragraphs 2 and 3, Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned.

5. The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations.

6. Member States shall notify to the Commission the countries that are designated as safe countries of origin in accordance with this Article.

Article 31
The safe country of origin concept

1. A third country designated as a safe country of origin in accordance with either Article 29 or 30 may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if:

(a) he/she has the nationality of that country; or
(b) he/she is a stateless person and was formerly habitually resident in that country;

and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC.

2. Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Article 29.

3. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.

SECTION IV

Article 32

Subsequent application

1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.

2. Moreover, Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum:

(a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20;

(b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.

3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.

4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II.

5. Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons why a procedure has to be re-opened.

6. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 of this Article in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 39.

7. The procedure referred to in this Article may also be applicable in the case of a dependant who lodges an application after he/she has, in accordance with Article 6(3), consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination referred to in paragraph 3 of this Article will consist of examining whether there are facts relating to the dependant’s situation which justify a separate application.

Article 33

Failure to appear

Member States may retain or adopt the procedure provided for in Article 32 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or appear before the competent authorities at a specified time.

Article 34

Procedural rules

1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 32 enjoy the guarantees provided for in Article 10(1).

2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 32. Those rules may, inter alia:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;

(b) require submission of the new information by the applicant concerned within a time-limit after he/she obtained such information;
(c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

The conditions shall not render impossible the access of applicants for asylum to a new procedure or result in the effective annulment or severe curtailment of such access.

3. Member States shall ensure that:

(a) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons for this and the possibilities for seeking an appeal or review of the decision;

(b) if one of the situations referred to in Article 32(2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

SECTION V

Article 35

Border procedures

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on applications made at such locations.

2. However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force on 1 December 2005, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide at the border or in transit zones as to whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter their territory.

3. The procedures referred to in paragraph 2 shall ensure in particular that the persons concerned:

(a) are allowed to remain at the border or transit zones of the Member State, without prejudice to Article 7;

(b) are immediately informed of their rights and obligations, as described in Article 10(1)(a);

(c) have access, if necessary, to the services of an interpreter, as described in Article 10(1)(b);

(d) are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 12, 13 and 14;

(e) can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 15(1); and

(f) have a representative appointed in the case of unaccompanied minors, as described in Article 17(1), unless Article 17(2) or (3) applies.

Moreover, in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why the application for asylum is considered as unfounded or as inadmissible.

4. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.

5. In the event of particular types of arrivals, or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, which makes it practically impossible to apply there the provisions of paragraph 1 or the specific procedure set out in paragraphs 2 and 3, those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

SECTION VI

Article 36

The European safe third countries concept

1. Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.

2. A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;
(b) it has in place an asylum procedure prescribed by law;

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and

(d) it has been so designated by the Council in accordance with paragraph 3.

3. The Council shall, acting by qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt or amend a common list of third countries that shall be regarded as safe third countries for the purposes of paragraph 1.

4. The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-refoulement under the Geneva Convention, including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law.

5. When implementing a decision solely based on this Article, the Member States concerned shall:

(a) inform the applicant accordingly; and

(b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

6. Where the safe third country does not re-admit the applicant for asylum, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

7. Member States which have designated third countries as safe countries in accordance with national legislation in force on 1 December 2005 and on the basis of the criteria in paragraph 2(a), (b) and (c), may apply paragraph 1 to these third countries until the Council has adopted the common list pursuant to paragraph 3.

CHAPTER IV

PROCEDURES FOR THE WITHDRAWAL OF REFUGEE STATUS

Article 37

Withdrawal of refugee status

Member States shall ensure that an examination to withdraw the refugee status of a particular person may commence when new elements or findings arise indicating that there are reasons to reconsider the validity of his/her refugee status.

Article 38

Procedural rules

1. Member States shall ensure that, where the competent authority is considering withdrawing the refugee status of a third country national or stateless person in accordance with Article 14 of Directive 2004/83/EC, the person concerned shall enjoy the following guarantees:

(a) to be informed in writing that the competent authority is reconsidering his or her qualification for refugee status and the reasons for such a reconsideration; and

(b) to be given the opportunity to submit, in a personal interview in accordance with Article 10(1)(b) and Articles 12, 13 and 14 or in a written statement, reasons as to why his/her refugee status should not be withdrawn.

In addition, Member States shall ensure that within the framework of such a procedure:

(c) the competent authority is able to obtain precise and up-to-date information from various sources, such as, where appropriate, from the UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned; and

(d) where information on an individual case is collected for the purposes of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee whose status is under reconsideration, nor jeopardise the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.
2. Member States shall ensure that the decision of the competent authority to withdraw the refugee status is given in writing. The reasons in fact and in law shall be stated in the decision and information on how to challenge the decision shall be given in writing.

3. Once the competent authority has taken the decision to withdraw the refugee status, Article 15, paragraph 2, Article 16, paragraph 1 and Article 21 are equally applicable.

4. By derogation to paragraphs 1, 2 and 3 of this Article, Member States may decide that the refugee status shall lapse by law in case of cessation in accordance with Article 11(1)(a) to (d) of Directive 2004/83/EC or if the refugee has unequivocally renounced his/her recognition as a refugee.

CHAPTER V
APPEALS PROCEDURES

Article 39
The right to an effective remedy

1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for asylum, including a decision:

(i) to consider an application inadmissible pursuant to Article 25(2),

(ii) taken at the border or in the transit zones of a Member State as described in Article 35(1),

(iii) not to conduct an examination pursuant to Article 36;

(b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;

(d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);

(e) a decision to withdraw of refugee status pursuant to Article 38.

2. Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.

3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;

(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and

(c) the grounds for challenging a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).

4. Member States may lay down time-limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

5. Where an applicant has been granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC, the applicant may be considered as having an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.

6. Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.
CHAPTER VI
GENERAL AND FINAL PROVISIONS

Article 40
Challenge by public authorities

This Directive does not affect the possibility for public authorities of challenging the administrative and/or judicial decisions as provided for in national legislation.

Article 41
Confidentiality

Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work.

Article 42
Report

No later than 1 December 2009, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. Member States shall send the Commission all the information that is appropriate for drawing up this report. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every two years.

Article 43
Transposition

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 December 2007. Concerning Article 15, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 December 2008. They shall forthwith inform the Commission thereof. When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 44
Transition

Member States shall apply the laws, regulations and administrative provisions set out in Article 43 to applications for asylum lodged after 1 December 2007 and to procedures for the withdrawal of refugee status started after 1 December 2007.

Article 45
Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 46
Addressees

This Directive is addressed to the Member States in conformity with the Treaty establishing the European Community.

Done at Brussels, 1 December 2005.

For the Council
The President
Ashton of UPHOLLAND
ANNEX I

Definition of ‘determining authority’

When implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17(1) of the Refugee Act 1996 (as amended) continue to apply, consider that:

— ‘determining authority’ provided for in Article 2(e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, mean the Office of the Refugee Applications Commissioner; and

— ‘decisions at first instance’ provided for in Article 2(e) of this Directive shall include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee.

Ireland will notify the Commission of any amendments to the provisions of section 17(1) of the Refugee Act 1996 (as amended).

ANNEX II

Designation of safe countries of origin for the purposes of Articles 29 and 30(1)

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

(a) the relevant laws and regulations of the country and the manner in which they are applied;

(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;

(c) respect of the non-refoulement principle according to the Geneva Convention;

(d) provision for a system of effective remedies against violations of these rights and freedoms.
ANNEX III

Definition of ‘applicant’ or ‘applicant for asylum’

When implementing the provisions of this Directive Spain may, insofar as the provisions of ‘Ley 30/1992 de Régimen jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común’ of 26 November 1992 and ‘Ley 29/1998 reguladora de la Jurisdicción Contencioso-Administrativa’ of 13 July 1998 continue to apply, consider that, for the purposes of Chapter V, the definition of ‘applicant’ or ‘applicant for asylum’ in Article 2(c) of this Directive shall include ‘recurrente’ as established in the abovementioned Acts.

A ‘recurrente’ shall be entitled to the same guarantees as an ‘applicant’ or an ‘applicant for asylum’ as set out in this Directive for the purposes of exercising his/her right to an effective remedy in Chapter V.

Spain will notify the Commission of any relevant amendments to the abovementioned Act.