

# Fair Asylum Procedures and Effective Remedy

Training Materials on Access to Justice for Migrants



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# **Fair Asylum Procedures and Effective Remedy**

Training Materials on Access to Justice  
for Migrants

International Commission of Jurists (ICJ)  
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# Fair asylum procedures and effective remedy

FAIR PLUS project - September 2021

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This training module is the first of a five-part series of training materials<sup>1</sup> on protecting the rights of migrants in Europe. This part provides an overview of the guiding principles on asylum procedural law.

## I. Legal Framework

### 1. International Legal Framework

#### Introduction

"The need for international protection arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them. Risks that give rise to a need for international protection classically include those of persecution, threats to life, freedom or physical integrity arising from armed conflict, serious public disorder, or different situations of violence. Other risks may stem from: famine linked to situations of armed conflict; natural or man-made disasters; as well as being stateless. Frequently, these elements are interlinked and are manifested in forced displacement."<sup>2</sup>

The foundation of any entitlement to international protection is "the right to seek and to enjoy in other countries asylum from persecution" in article 14(1) of the Universal Declaration of Human Rights. In turn, the cornerstone of any legal regime relating to refugees is the 1951 *Convention relating to the Status of Refugees*, as amended by the 1967 Protocol relating to the Status of Refugees.<sup>3</sup> In addition to the Refugee Convention, national and EU asylum law must be compliant with international human rights law, including obligations under UN human rights treaties, and, for Council of Europe Member States, the European Convention on Human Rights (ECHR). For EU Member States, it must comply with the EU Charter of Fundamental Rights and must be implemented in a manner consistent with other EU primary law.

#### a) *The 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the UN HCR's supervisory mandate*

The Geneva Refugee Convention is the cornerstone of refugee protection. The Refugee Convention object and purpose is to protect persons who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Pursuant to its 1950 Statute, the United Nations High Commissioner for Refugees (UNHCR) has a role in the supervision of the application of the Refugee Convention. The UNHCR is mandated by the UN General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees.<sup>4</sup> Its supervisory responsibility is also reflected in the preamble to and in article 35 of the 1951 Refugee Convention,<sup>5</sup> and article II of its 1967 Protocol.

In the exercise of its supervisory mandate, the UNHCR has published a Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.<sup>6</sup> The UNHCR Guidelines on International Protection complement and update the UNHCR Handbook and should be read in combination with it. They provide authoritative guidance on substance and procedure relating to the 1951 Convention.

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<sup>1</sup>These training materials on access to justice for migrants were developed as part of the FAIR PLUS (Fostering Access to Immigrant's Rights PLUS) project and include the following training modules:

- 0. Access to justice
- I. Fair asylum procedures and effective remedy
- II. Access to justice in detention
- III. Access to justice for economic, social and cultural rights
- IV. Access to justice in the protection of migrant's right to family life
- V. Access to justice for migrant children.

<sup>2</sup>See, UN High Commissioner for Refugees (UNHCR), *Persons in need of international protection*, June 2017, available at <http://www.refworld.org/docid/596787734.html>.

<sup>3</sup>The 1951 Convention Relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter: the Geneva Refugee Convention), as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (hereafter: the 1967 Protocol).

<sup>4</sup>UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Annex, paragraph 8(a).

<sup>5</sup>Article 35.1 reads: "The Contracting States undertake to cooperate 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."

<sup>6</sup>The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol, Reissued Geneva, December 2011, HCR/1P/4/ENG/REV. 3, (hereafter: the UNHCR Handbook).

*The Geneva Refugee Convention* contains: 1) a definition of who is a refugee for the purposes of the Refugee Convention, as amended by its 1967 Protocol, contained in article 1(A)(2) and 2) the individual rights of refugees under the Refugee Convention and the corresponding State obligations under the Convention. “The Refugee Convention accords a variety of treatments and a variety of rights to persons satisfying different criteria. The set of rights granted to a refugee by a State accrues with the level of factual attachment to the State and the level of legal recognition. Some rights apply as soon as a refugee comes under a State’s (de facto) authority, a second group of rights applies when the refugee enters the territory and falls under the effective jurisdiction of the State of refuge. A third group of rights applies once the refugee is lawfully in the territory of a State Party and a fourth group when the refugee lawfully stays or durably resides in the State’s territory.”<sup>7</sup>

States parties to the Refugee Convention are obliged to comply with their obligations under the Convention, and chiefly to accord individual rights, as set out in the Convention, to those who satisfy the refugee definition in article 1(A)(2) of the Convention.

States parties to the 1951 Refugee Convention and its 1967 Protocol are normally required to accept those who claim to be refugees or to examine their claim. The recognition of refugee status by a State party to the Refugee Convention is of a declaratory character. Often, however, it is necessary for refugees to be formally declared as such in order for them to be assured adequate international protection and their refugee rights as provided under the Convention. Very often, and certainly this is the case with Member States of the European Union, States parties to the Refugee Convention grant individuals their rights deriving from their status as refugees only if they have proceeded to a formal determination of that status.

Such determination concerns whether the person satisfies the relevant criteria in article 1(A) (2) of the Refugee Convention. During the procedure, refugees are in most cases physically present in the State party that is determining their claims and must enjoy procedural rights. The State of refuge is obliged to guarantee fairness and a minimum standard of substantial rights.<sup>8</sup>

UNHCR guidance prescribes that all requests for asylum be dealt with objectively and impartially, and that the confidential character of asylum requests should be respected. It stipulates that cases should be decided on the merits: failure to comply with formal requirements of the procedure, such as time limits, should not in itself lead to an asylum request being excluded from consideration.

#### *b) International Human rights law*

The universal framework of international human rights law, applicable to all human beings, is contained in the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *International Covenant on Civil and Political Rights* (ICCPR). These instruments are supplemented by regional human rights instruments: In the European context, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) and its Protocols and the *Revised European Social Charter* (ESC) in the Council of Europe system.

Other specific human rights treaties further elaborate the framework for the respect, protection, promotion and fulfillment of the human rights of specific categories of people or address specific human rights, many of which are of significant importance for some or all migrants. These include, at a global level, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW); the *Convention on the Rights of the Child* (CRC); the Convention on the Rights of Persons with Disabilities (CRPD); the *International Convention for the Elimination of All Forms of Racial Discrimination* (ICERD); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); the *International Convention on the Rights of Migrant workers* (CMW) and the *International Convention for the Protection of All Persons from Enforced Disappearance* (CED).

#### *c) Asylum as a general principle of international law*

International human rights law requires states to secure the rights of everyone in their jurisdiction, regardless of their nationality. For example, article 1 of the ECHR requires states to “secure” the Convention rights to “everyone within their jurisdiction”, including foreigners. In certain specific cases, the concept of jurisdiction can extend beyond the territory of a state.

The UN Human Rights Committee’s *General comment 31*, which addresses general obligations under the ICCPR states in para 10:

<sup>7</sup>James C. Hathaway, *The Rights of Refugees under International Law*, 2005

<sup>8</sup>see <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e866>

"10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party (...)."

The ECHR and its Protocols contain few provisions expressly mentioning foreigners or limiting certain rights to nationals or lawful residents (for example, articles 2, 3 and 4 of Protocol 4 to the ECHR and article 1 of Protocol 7). Migration issues have generated a vast body of case law from the ECtHR, mainly relating to articles 2, 3, 5, 8 and 13 of the ECHR.

Article 13 of the ECHR requires states to provide an effective remedy before a national authority to everyone who claims that their rights and freedoms under the Convention have been violated. In this context, effectiveness means either a remedy capable of "preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred" (*Kudła v. Poland*, Application no. 30210/96, Judgment of 26 October 2000, para. 158).

The principle of subsidiarity places the primary responsibility on states to ensure their compliance with obligations under the ECHR, leaving recourse to the ECtHR as a last resort. Indeed, as the ECtHR observed in *Kudła*, "the object of Article 13, as emerges from the travaux préparatoires ... is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court" (*Kudła*, para. 152).

## 2. EU legal framework

### a) EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights has the same legal force as the EU Treaties.<sup>9</sup> Its provisions "are addressed to the institutions, bodies, offices and agencies" of the EU "and to Member States only when they are implementing Union law".<sup>10</sup> According to the official explanations that accompany the Charter, its provisions are binding on the Member States "when they act in the scope of Union law".<sup>11</sup> As the EU has developed a comprehensive set of asylum instruments, asylum decisions taken by Member States<sup>12</sup> come within the scope of EU law.<sup>13</sup>

### EU Charter on Fundamental Rights

#### Article 1 Human dignity

Human dignity is inviolable. It must be respected and protected.

#### Article 18 Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

#### Article 19 Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

<sup>9</sup>TEU, article 6.1.

<sup>10</sup>Charter of Fundamental Rights of the EU, article 51.1.

<sup>11</sup>Explanations relating to the Charter of Fundamental Rights, *Official Journal of the European Union* 2007/C 303/32 (14 December 2007). The Explanations set out the sources of the provisions of the Charter, and "shall be given due regard by the courts of the Union and of the Member States"; Charter of Fundamental Rights of the EU, article 52(7).

<sup>12</sup>Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, para. 19: the requirements of the protection of the fundamental rights in the EU legal order are binding on the Member States when they implement EU rules. Also Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, para. 42.

<sup>13</sup>S. Peers, 'Human Rights in the EU Legal Order: Practical Relevance for EC Immigration and Asylum Law', in: S. Peers & N. Rogers (eds.), *EU Immigration and Asylum Law – Text and Commentary* (2006), p. 137, cited at: Laurens Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence', *Goettingen Journal of International Law* 4 (2012) 1, p. 202.



### The CJEU's preliminary reference procedure

A reference to the CJEU for preliminary ruling is a procedure open to all national judges of all Member States. If, in the context of a case over which judges in domestic proceedings are presiding, they consider that the application of a rule of European law raises a question the answer to which they do not know but need clarity on to be able to give judgment, they may stay the domestic case and refer the question to the CJEU, in order to clarify a point of interpretation of European law.<sup>14</sup> It is clear – and undisputed – that it is for the CJEU to interpret the content of the applicable EU law. Pursuant to the principle of *acte clair*, national courts of final instance are relieved of their obligation to refer a question of EU law to the CJEU if, in light of a previous CJEU judgment, the answer is “obvious”.<sup>15</sup> In respect of the discretion of the final national court as to whether a case is *acte clair*, in *Ferreira da Silva* the CJEU stated that a supreme court had breached its duty to make a preliminary reference under article 267.3 TFEU.<sup>16</sup> The triggering factor in *Ferreira da Silva* was the fact that there had been strong contradictions between the courts of different Member States that had resulted in preliminary references to the Court. The CJEU held that “in circumstances such as those of the case before the referring court, which are characterised both by conflicting lines of case-law at national level regarding the concept of a ‘transfer of a business’ within the meaning of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law.”<sup>17</sup>

The CJEU's approach to the referral procedure is facilitative: if it considers the questions posed by the domestic judges to be unclear, it may ask the referring court for clarification or it may decide to reformulate the referred questions itself before proceeding to answer them.<sup>18</sup> The referral procedure is not a form of recourse taken against a European or national act, but a mechanism aimed at enabling the domestic courts in the Member States to ensure uniform interpretation and application of EU law. The CJEU's decision on a reference has the force of *res judicata* and is binding on all of the domestic courts of the Member States.<sup>19</sup>

The CJEU has noted on a number of occasions the need for a uniform application of EU law and that its provisions must therefore be given an independent and uniform interpretation throughout the EU. This is the primary role of the CJEU. When the national authorities of an EU Member State apply national measures implementing a Directive in a manner that is at odds with the Directive's object and purpose, including, and a *fortiori*, as construed by CJEU's jurisprudence, Member states are bound to ensure the correct application of the relevant Directive. To this end, administrative bodies may even be required to re-open a decision based on a misapplication of EU law.<sup>20</sup>

Where the CJEU annuls a Union act or a particular provision thereof, it may allow the annulment to take effect only after expiry of an appropriate transition period to allow Member States to amend national implementing legislation.<sup>21</sup> Under the principle of legal certainty in EU law, retroactive measures shall not be taken except in legally justified circumstances.<sup>22</sup>

<sup>14</sup>Such questions can concern the interpretation of Treaties, and the interpretation and validity of the acts of the institutions, bodies, offices and agencies of the EU. Judges of courts against whose decision no appeal under national law is open must refer the question to the CJEU if one of the parties requests it, except when the Court has already interpreted the provision and given its interpretation, or when the correct application of EU law is so obvious that there is no scope for any reasonable doubt. (TFEU, Article 267; Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, Official Journal of the European Union C 338 (6 November 2012); Joined Cases 28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*; Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*).

<sup>15</sup>*Ibid.*

<sup>16</sup>Case C-160/14 *Ferreira da Silva e Britos v Estado Português*, Judgment of 9 September 2015, paras. 43-44.

<sup>17</sup>*Ibid.*, para. 44.

<sup>18</sup>See e.g., Case C-465/07 *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*; Case C-429/05 *Max Rampion and Marie-Jeanne Godard, née Rampion v. Franfinance SA and K par K SAS*.

<sup>19</sup>In the context of a reference for a preliminary ruling concerning validity, if the European instrument is declared invalid, all of the instruments adopted based on it are also invalid. It then falls to the competent European institutions to adopt a new instrument to rectify the situation.

<sup>20</sup>See e.g. Case-392/04 and 422/04 i-21 *Germany GmbH and Arcor AG & Co. KG v Bundesrepublik Deutschland*, paras. 51-52.

<sup>21</sup>Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL v Council*, paras 32-34.

<sup>22</sup>See Case T-357/02 *Freistaat Sachsen v Commission of the European Communities*, para. 98, where the Court stated that ‘provisions of Community law have no retroactive effect unless, exceptionally, it clearly follows from their terms or general scheme that such was the intention of the legislature, that the purpose to be achieved so demands and that the legitimate expectations of those concerned are duly respected’.

i. Fundamental rights in the Charter: The relationship with the European Convention on Human Rights

In respect of rights contained in the Charter that correspond to rights guaranteed by the ECHR, “the meaning and the scope of those rights shall be the same as those laid down by the said Convention”.<sup>23</sup> This provision effectively incorporates rights in the ECHR that are coterminous with their Charter equivalent into EU law.<sup>24</sup> In this context, it is also worth noting that the Charter’s preamble reaffirms the significance of the European Court of Human Rights’ case law. Article 52(3) of the Charter, especially read together with the preamble’s reaffirmation of the significance of the Strasbourg Court’s jurisprudence, compels an interpretation of those Charter provisions that are expressed in the same terms as those of the ECHR that takes account of, and complies with, the latter’s case-law.

The Charter sets a minimum baseline standard and does not preclude EU law granting wider protection. Article 52.3 of the Charter provides that the level of protection granted by a Charter right can never be lower than that guaranteed by its ECHR equivalent; at the same time it does not prevent Union law from offering more extensive protection.

Article 52.3:

*“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”.*

Article 53 - Level of protection

*“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”*

This provision is intended to maintain the level of protection currently afforded within their respective scope by EU law, national law and international law. Owing to its importance, mention is made of the ECHR.<sup>25</sup>

Some Charter Articles are drafted more broadly than their ECHR equivalents and thus potentially offer wider protection.

Article 47 of the CFR codified the EU acquis on effective judicial protection, bringing the right to an effective remedy (article 13 ECHR) and that to a fair trial (article 6.1 ECHR), under the same provision.

## EU Charter on Fundamental Rights

### Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

<sup>23</sup> Charter of Fundamental Rights of the EU, article 52(3). The ‘Explanations relating to the Charter’ (see FN 10) list the articles where both the meaning and the scope are the same as the corresponding articles of the ECHR, and those where the meaning is the same but where the scope is wider. As has been pointed out, both meaning and scope for some articles in the second list provided in the Explanations are in fact wider (Koen Lenaerts, ‘Exploring the limits of the EU Charter of Fundamental Rights’, *European Constitutional Law Review* 8(3) (2012), p. 395-396).

<sup>24</sup> From a combined reading of article 52(3) and article 53 of the Charter it emerges that if the European Court of Human Rights raises the level of protection or decides to expand the scope of application of a fundamental right so as to overtake the level of protection guaranteed by EU law, the autonomy of EU law may no longer exist. The CJEU will be obliged to reinterpret the Charter. See Koen Lenaerts, ‘Exploring the limits of the EU Charter of Fundamental Rights’, *European Constitutional Law Review* 8(3) (2012), p. 394.

<sup>25</sup> For further information visit: <http://fra.europa.eu/en/charterpedia/article/53-level-protection>

While article 47(1) CFR mirrors article 13 ECHR when it comes to the right to an effective remedy and should be applied in light of the relevant ECtHR jurisprudence, in Union law the protection is more extensive. The explanations to the CFR in relation to its article 47.2 make it expressly clear that the standards and requirements of article 6.1 ECHR apply in the interpretation of its provisions. In other words, article 47 CFR applies to matters of EU law, including migration and asylum, that are not governed by article 6 as a matter of ECHR law. It is clear that the explanations to the CFR explicitly extend the right to a 'fair and public hearing [...] within a reasonable time by an independent and impartial tribunal established by law' beyond "disputes relating to civil law rights and obligations", to the right to 'being advised, defended and represented' and the right to be granted legal aid in situations where the person concerned "lack[s] sufficient resources" and "in so far as [it] is necessary to ensure effective access to justice".

Some of the more broadly drafted Charter rights also specifically offer greater protection than that afforded by their ECHR equivalents. For example, the prohibition on slavery and forced labor in article 5 of the Charter, which is derived from article 4 ECHR, expressly prohibits trafficking in human beings.

Where the Charter replicates the wording of the corresponding ECHR Article exactly or with minor modifications, article 52.3 EU Charter implies that the EU Member States and CJEU should follow the jurisprudence of the ECtHR to ensure that the relevant Charter provisions be interpreted in such a way as to guarantee at least the same level of protection of their ECHR equivalents as articulated in the ECtHR's jurisprudence. In addition, article 19 CFR brings together prohibition of expulsions under article 3 and collective expulsions under article 4 Protocol 4 ECHR.

#### **Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms**

##### **Article 4 Prohibition of collective expulsion of aliens**

Collective expulsion of aliens is prohibited.

#### **Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>26</sup>**

##### **Article 1 Procedural safeguards relating to expulsion of aliens**

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
  - a) to submit reasons against his expulsion,
  - b) to have his case reviewed, and
  - c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

A combined reading of the Charter's recognition that "[h]uman dignity is inviolable. It must be respected and protected",<sup>27</sup> together with the other Charter provisions coterminous ECHR rights and the references to human rights in the preamble to the Refugee Convention, requires national authorities in charge of asylum determination, national courts, as well as the CJEU itself to interpret any EU asylum law in a manner that complies strictly with international human rights law.

#### ii. EU Charter: article 18

Under EU law, the EU Charter for Fundamental Rights guarantees the right to asylum (article 18) "with due respect for the rules of the Geneva [Refugee] Convention" and the 1967 Protocol and in accordance with the Treaties.<sup>28</sup> The use of the wording "with due respect for" the Refugee Convention can be explained by the fact that the Refugee Convention does not set out a right to asylum as such. The Charter in this respect goes even beyond the Universal Declaration of Human Rights.<sup>29</sup> Those who qualify for asylum have the right to have this status recognized.

<sup>26</sup> Germany, the Netherlands and the United Kingdom are not parties to Protocol 7 ECHR (as of 25 February 2018).

<sup>27</sup> Charter of Fundamental Rights of the European Union, Article 1.

<sup>28</sup> Some have argued that the right to asylum has become a subjective and enforceable right of individuals under the EU's legal order. See Maria-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', *Refugee Survey Quarterly* 27(3) (2008).

<sup>29</sup> UDHR, Article 14(1) reads: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

UNHCR has clarified that the right to asylum as understood under international law and as enshrined in article 18 of the EU Charter, in light of the 1951 Convention, contains the following elements: "(i) protection from *refoulement*, including non-rejection at the frontier; (ii) access to territories for the purpose of admission to fair and effective processes for determining status and international protection needs; (iii) assessment of an asylum claim in fair and efficient asylum processes (with qualified interpreters and trained responsible authorities and access to legal representation and other organizations providing information and support) and an effective remedy (with appropriate legal aid) in the receiving state; (iv) access to UNHCR (or its partner organizations); and (v) treatment in accordance with adequate reception conditions; (vi) the grant of refugee or subsidiary protection status when the criteria are met; (vii) ensuring refugees and asylum-seekers the exercise of fundamental rights and freedoms; and (viii) the attainment of a secure status."<sup>30</sup>

"In accordance with the article 18 of the EU Charter those recognized as refugees within the meaning of the term refugee in article 1 of the Refugee Convention, as amended by its 1967 Protocol, are entitled to have this status recognized. Once a first instance decision is taken, if the asylum seeker is recognised as a refugee, he or she should be informed accordingly and issued with documentation certifying his or her refugee status.<sup>31</sup> Articles 13 (refugee status) and 18 (subsidiary protection status for those who need international protection, but do not qualify for refugee status) of the Qualification Directive (2011/95/EU, Recast)<sup>32</sup> give an explicit right to be granted the status of refugee or subsidiary protection.

#### b) Asylum Procedures Directive (APD)

The Directive 2013/32/EU (Recast<sup>33</sup>) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter *Asylum Procedures Directive*, APD), referred to in these training materials, entered into force on 21 July 2013. It repealed Council Directive 2005/85/CE on minimum standards on procedures in Member States for granting and withdrawing refugee status (1 December 2005).

The APD sets out very detailed rules on common procedures for granting and withdrawing international protection. It establishes rules on the asylum claiming process, including: how to apply; how the application will be examined; what help the asylum seeker will be given; how to appeal or how to deal with repeated applications. The APD applies to all applications for international protection made in the territory of EU Member States bound by the Directive, including at borders, in territorial waters and in transit zones (article 3). EU Member States were under an obligation to transpose the APD and communicate their transposition measures by 20 July 2015, except for articles 31(3), (4) and (5) of the Directive for which the transposition deadline is 20 July 2018. Three EU countries, namely, Denmark, Ireland and the United Kingdom are not bound by the Directive.

On 13 July 2016 the Commission presented a proposal for a Common Asylum procedure Regulation,<sup>34</sup> which, if agreed by the co-legislators, will replace the APD. It was further altered by the EU Pact proposal in 2020.<sup>35</sup> It is currently under negotiations in the European Parliament and Council of the EU."

## II. General principles

To ensure that those entitled to international protection are granted protection, including effective protection against *refoulement*, international human rights law and international refugee law, provide for a range of practical, procedural safeguards, including providing asylum seekers with:

- information about the refugee (subsidiary protection) status determination procedure, how they may challenge any negative decision arising from the same and about their associated rights;
- interpretation, when necessary;

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<sup>30</sup> See, UNHCR Statement on the right to asylum, UNHCR's supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility. Issued in the context of a reference for a preliminary ruling addressed to CJEU by the Administrative Court of Sofia lodged on 18 October 2011 – *Zuheyr Freyeh Halaf v the Bulgarian State Agency for Refugees* (C-528/11), see: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5017fc202>, para. 2.2.9. UNHCR issued the above-mentioned statement in the context of the request by the Administrative Court of Sofia to the CJEU of a preliminary ruling concerning, inter alia, the content of the right to asylum under article 18 of the Charter of Fundamental Rights of the European Union.

<sup>31</sup> Conclusion No. 8, UNHCR, para. (e)(v); UNHCR Handbook, para. 192(v).

<sup>32</sup> It should be noted that Ireland and Denmark have opted out of the directive.

<sup>33</sup> It should be noted that Ireland and Denmark have opted out of the directive.

<sup>34</sup> *Proposal* for a Regulation of the European Parliament and the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU.

<sup>35</sup> Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2020/611 final

- medical services and assistance, including free of charge when necessary;
- legal advice and representation, including free of charge in certain circumstances;
- contact with the UN High Commissioner for Refugees (UNHCR).

For it to be effective and human rights compliant, a status determination procedure charged with the task of ascertaining whether applicants are entitled to international protection should:

- be established in national law;
- be accessible, including providing interpretation and information in a language or manner the individual understands, taking into account any circumstances that may have a bearing on the assessment, including disability, health, age, or gender, and any other elements indicative of vulnerability or risk;
- examine each case individually, through a personal, confidential interview by a qualified, competent and trained official;
- afford individuals an opportunity to submit evidence and arguments in support of their claim and allow sufficient time for the decision-maker to hear, review and evaluate the case;
- assess the risk, taking into account all relevant and up-to-date considerations, including the individual's personal circumstances;
- operate on a non-discriminatory basis, e.g., taking a gender-based approach by considering the contexts and ways in which women and girls are subject to or at risk of gender-based violence and the consequences thereof;
- deliver a reasoned decision in writing containing also information on how any negative decision can be appealed.

To comply with their international human rights and refugee law obligations, States are obliged to provide access to justice and to an effective remedy. This implies that asylum seekers must have a right to appeal a negative decision on their claim to a competent, independent, impartial judicial body. At a minimum appeals procedures must provide an opportunity for an independent, impartial and effective review before a competent court or tribunal of a decision refusing an international protection claim. Critical features of an appeal procedure include:

- accessibility;
- conducted by decision-makers who are competent, independent and impartial;
- timelines for lodging appeals are to be reasonable so as not to render the submission of an appeal impossible or excessively difficult;
- cases are to be considered and decisions delivered in a timely manner;
- due process rights are to be guaranteed, with a preference for an oral hearing;
- consider the merits of each appeal;
- have automatic suspensive effect, that is, the individuals concerned should be allowed to remain on the State's territory pending the outcome of their appeal; and
- the decision is to be shared with the individual concerned and, if it is a negative one, it should include the reasons.

#### *Access to information*

Providing accurate and relevant information to a in an accessible format and in a language they understand also helps streamline procedures, avoids complaints and delays, and reinforces the prohibition against *refoulement*. At the minimum, the following information should be provided:

- the basic elements of the process and the relevant procedures;
- its purpose/s;
- the possible consequences of non-compliance;
- a copy of the decision and its reasons;
- the rights people have, including to: access to information, interpretation, legal assistance and representation, consular assistance and/or access to UNHCR, and to appeal a negative decision.

#### *Access to interpretation*

Accurate oral interpretation and translation of critical documents are crucial to enable individuals to participate fully and effectively in the preparation of their case and during the proceedings, and for the authorities to be able to understand documents or testimony presented in another language.

#### *Access to legal advice and representation*

Providing access to competent legal advice and representation to asylum seekers is an important safeguard against *refoulement*; it enhances the quality of decision-making, while simultaneously reducing the scope for complaints and delays.

#### *Access to UNHCR and other organizations*

For non-nationals or dual nationals, particularly those held in detention, specific provisions entitle them to have access to officials of the Office of the UNHCR.

#### *Specific safeguards in special cases*

Specific, practical safeguards must also be guaranteed to ensure effective implementation of the right to seek and enjoy asylum from persecution, as well as more generally international protection, including, in particular, protection against *refoulement*, in particular cases, for example,

those involving unaccompanied or separated children; persons with mental or physical disabilities; as well as others who may face specific risks or be in circumstances of greater vulnerability, such as asylum-seekers, survivors of torture, human trafficking and/or gender-based violence.

## 1. Fair procedures in asylum claim determinations

Asylum seekers must have access to effective asylum procedures, including an effective remedy capable of suspending their removal during the appeals process. Indeed, by virtue of article 46(1) and (3) of the APD, applicants for international protection must have the right to 'an effective remedy before a court or tribunal' against, inter alia, decisions taken on their application. That remedy should provide for 'a full ... examination of both facts and points of law'.

UNHCR guidance prescribes that all requests for asylum be dealt with objectively and impartially, that the confidential character of asylum requests should be respected. It stipulates that cases should be decided on their merits: failure to comply with formal requirements of the procedure, such as time limits, should not in itself lead to an asylum request being excluded from consideration.<sup>35a</sup>

Applicants should receive necessary information and guidance on the refugee status determination procedure;<sup>36</sup> and should be informed of their right to legal advice and, where necessary, interpretation.<sup>37</sup> All facilities necessary for submitting the applicant's case to the authorities should be provided, including interpretation and the opportunity, of which applicants should be duly informed, to contact a representative of UNHCR.<sup>38</sup>

The applicant should be given a personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status.<sup>39</sup> A basic principle in the UNHCR guidance is that, whatever restrictive measures States might implement, for example to discourage abusive use of asylum procedures, these should not serve to defeat the purpose of the asylum procedure.<sup>40</sup>

The EU Directive 2011/95/EU sets out the minimum standards for the qualification and status (recast Qualification Directive).

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

**Article 4 Assessment of facts and circumstances**

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.
2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.
3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
  - a. all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

<sup>35a</sup> Conclusion No. 15 (XXX) *Refugees Without an Asylum Country*, ExCom, UNHCR, 30th Session, 1979, para. (i).

<sup>36</sup> Conclusion No. 8 (XXVIII) *Determination of Refugee Status*, ExCom, UNHCR, 28th Session, 1977, para. (e)(ii); UNHCR Handbook, para. 192(ii). See also, Concluding Observations on Croatia, CAT, UN Doc. CAT/C/CR/32/3, 11 June 2004, para. 9(i); *European Guidelines on accelerated asylum procedures*, CMCE, Guideline IV.1.c.

<sup>37</sup> Conclusion No. 8, UNHCR, para. (e)(ii); *European Guidelines on accelerated asylum procedures*, CMCE, Guidelines IV and VIII.3.

<sup>38</sup> Ibid., para. (e)(iv); UNHCR Handbook, para. 192(iv). See also, *European Guidelines on accelerated asylum procedures*, CMCE, Guideline XIV.

<sup>39</sup> Conclusion No. 30 (XXXIV) *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, ExCom, UNHCR, 34th Session, 1983, para. (e)(i); UNHCR Handbook, para. 190. See also, *European Guidelines on accelerated asylum procedures*, CMCE, Guideline IV.1.d; *Haitian Interdictions Case*, IACHR, para. 155.

<sup>40</sup> Conclusion No. 79, UNHCR, para. (l).

- b. the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
  - c. the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
  - d. whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;
  - e. whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.
4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.
  5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:
    - a. the applicant has made a genuine effort to substantiate his application;
    - b. all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
    - c. the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
    - d. the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
    - e. the general credibility of the applicant has been established.

The Asylum Procedures Directive also sets out safeguards regarding collection of information when examining individuals' cases.

### Article 30 Collection of information on individual cases

For the purposes of examining individual cases, Member States shall not:

- (a) disclose information regarding individual applications for international protection, or the fact that an application has been made, to the alleged actor(s) of persecution or serious harm;
- (b) obtain any information from the alleged actor(s) of persecution or serious harm 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 or his or her dependants, or the liberty and security of his or her family members still living in the country of origin.

## 2. Prohibition of refoulement

"The principle of *non-refoulement*, prohibiting States to transfer anyone to a country where he or she faces a real risk of persecution or serious violations of human rights, is a fundamental principle of international law and, one of the strongest limitations on the right of States to control entry into their territory and to expel aliens as an expression of their sovereignty.<sup>41</sup>

<sup>41</sup> ICJ, Practitioners Guide No.6 on Migration and International Human Rights Law, 2014

<sup>42</sup> See, article 1 ECHR, article 2 ICCPR, article 1 ACHPR, and article 1 ACHR. The Convention against Torture expressly provides for the principle of *non-refoulement* in its article 3.

<sup>43</sup> See, for example, *Soering v. United Kingdom*, ECtHR, Application No. 14038/88, Judgment of 7 July 1989, para. 87

It has its origin in international refugee law (article 33 Geneva Convention) and international regulations on extradition. In international human rights law, the legal basis of the principle of *non-refoulement* lies in the obligation of all States to recognize, secure and protect the human rights of all people present within their jurisdiction,<sup>42</sup> and in the requirement that a human rights treaty be interpreted and applied so as to make its safeguards practical and effective.<sup>43</sup> This principle is further embedded in article 3 ECHR and is of a non-derogatory nature.

Regarding refugees, whether a formal determination of refugee status has been made by the destination country, or whether they are still in the determination process, or intending to apply for asylum, article 33.1 of the Geneva Convention relating to the Status of Refugees of 1951 prohibits the State to “expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

With respect to this provision, in 1977 UNHCR clarified that “This provision constitutes one of the basic Articles of the 1951 Convention, to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I(1) of that instrument. Unlike various other provisions in the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State.”<sup>44</sup>

The refugee law principle of *non-refoulement* applies both to refugees present on the territory of the State and as well as at the border and it must be scrupulously observed in all situations of large-scale influx.<sup>45</sup>

The definition of *refoulement* of article 33.1 refers to risks arising in any country where the person concerned might be sent, and not necessarily in the country of origin or habitual residence. This includes third States, which might transfer the person to an unsafe country (*indirect refoulement*). The “threat to life or freedom” is also broader than, and includes, the refugee definition.

In addition, as UNHCR has clarified, “there is little doubt that the words “where his life or freedom would be threatened” must be construed to encompass the well-founded fear of persecution that is cardinal to the definition of “refugee” in article 1(A)(2) of the Convention. Article 33.1 thus prohibits *refoulement* to the frontiers of territories in respect of which a refugee has a well-founded fear of being persecuted.”<sup>46</sup>

Moreover, UNHCR has also stated that, to the extent that the concept of “refugee” has evolved to include circumstances where individuals are fleeing more generalized situations of violence, so also must have the scope of article 33.1. It has, indeed, been read as encompassing circumstances of generalised violence which pose a threat to the life or freedom of the person but which do not give rise to persecution.<sup>47</sup>

The principle of *non-refoulement* is well established in international human rights law, where it applies to all transfers of nationals or non-nationals, including migrants, whatever their status, as well as refugees. While there are limitations to the principle under the Geneva Refugee Convention, under international law the *non-refoulement* principle is of absolute nature. While only the Convention against Torture explicitly states the principle, it is implicit in the obligation of States to protect certain rights of people within their jurisdiction which will otherwise be violated in another jurisdiction.<sup>48</sup> For the principle of *non-refoulement* to apply, the risk faced on return must be real, i.e. be a foreseeable consequence of the transfer, and personal, i.e. it must concern the individual person claiming the *non-refoulement* protection.<sup>49</sup> The European Court of Human Rights has held that

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<sup>44</sup> See “Note on Non-Refoulement (Submitted by the High Commissioner) Note on Non-Refoulement (Submitted by the High Commissioner), EC/SCP/2, UNHCR, 23 August 1977, para. 4, available at <http://www.unhcr.org/afr/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>

<sup>45</sup> See *Conclusion No. 19 (XXXI) Temporary Refuge*, ExCom, UNHCR, 31st Session, 1980, para. (a); *Conclusion No. 22*, UNHCR, para. (II-A-2).

<sup>46</sup> See: Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, 20 June 2001, para 126.

<sup>47</sup> See UNHCR, *Note on Non-refoulement (Submitted by the High Commissioner)*, UN Doc. EC/SCP/2, 23 August 1977, para. 4; and, Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, 20 June 2001, pp. 124–125, paras. 128–133.

<sup>48</sup> See, for example, *Soering v. United Kingdom*, ECtHR, paras. 87 and 90. The European Court has derived the principle of non-refoulement from the obligation of States to “secure” human rights to all people subject to their jurisdiction (Article 1 ECHR). In particular, the Court considered the ECHR’s “special character as a treaty for the collective enforcement of human rights and fundamental freedoms”, the requirement that “that its provisions be interpreted and applied so as to make its safeguards practical and effective”.

<sup>49</sup> CCPR, *General Comment No. 31*, para. 12; *Na v. United Kingdom*, ECtHR, Application No. 25904/07, Judgment of 17 July 2008, paras. 109 and 113; *Saadi v. Italy*, ECtHR, Application No. 37201/06, Judgment of 28 February 2008, para. 125; *Nnyanzi v. United Kingdom*, ECtHR, Application No. 21878/06, Judgment of 8 April 2008, para. 51; *Cruz Varas and Others v. Sweden*, ECtHR, Application No. 15576/89, Judgment of 20 March 1991, para. 69; *Chahal v. United Kingdom*, ECtHR, op. cit., para. 74; *Soering v. United Kingdom*, ECtHR, op. cit., paras. 85-91.



*non-refoulement* protects “the fundamental values of democratic societies”<sup>50</sup> amongst which it has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to life,<sup>51</sup> and fundamental aspects of the rights to a fair trial<sup>52</sup> and to liberty.<sup>53</sup> Also, the CJEU recognises the principle of *non-refoulement* on the basis of article 4 of the EU Charter of Fundamental Rights<sup>54</sup> and the obligation not to subject persons to penal liability for seeking asylum.

Article 31 of the 1951 Convention Relating to the Status of Refugees provides as follows:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Entry in search of refuge and protection should not be considered an unlawful act; refugees ought not to be penalized solely by reason of such entry, or because, in need of refuge and protection, they remain “illegally” in a country. The power of the State to impose a restriction, including detention, must be related to a legitimate object or purpose, and there must be a reasonable relationship of proportionality between the end and the means.<sup>55</sup> Restrictions on movement must not be imposed unlawfully and arbitrarily, including discriminatorily, but should be necessary and proportionate and ought to be applied only on an individual basis on grounds prescribed by law and in accordance with international human rights law.<sup>56</sup>

UNHCR Guidelines note that:

In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation (...). They may, for example, be unable to obtain the necessary documentation in advance of their right because of their fear of persecution and/or the urgency of their departure. These factors, as well as the fact that asylum-seekers have often experienced traumatic events, need to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence.”<sup>57</sup>

Any detention should be limited to a period reasonably necessary to bring about the purpose for which the refugee or asylum seeker has been detained,<sup>58</sup> taking into account the State’s international legal obligations in regard to standards of treatment, including the prohibition on cruel, inhuman or degrading treatment,<sup>59</sup> the special protection due to the family and to children and the general recognition given to basic procedural rights and guarantees.<sup>60</sup>

### 3. Non-discrimination

Geneva Refugee Convention: article 3 non-discrimination:

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

<sup>50</sup> *Saadi v. Italy*, ECtHR, para. 127; *Chahal v. the United Kingdom*, ECtHR, para. 79.

<sup>51</sup> *Bader and Kanbor v. Sweden*, ECtHR, Application No. 13284/04, Judgment of 8 November 2005, para. 48 (finding that deportation of the applicant to face execution would violate article 2 ECHR as well as article 3 ECHR)

<sup>52</sup> See, *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, Application No. 8139/09, Judgment of 17 January 2012 ; *Al-Moayad v. Germany*, ECtHR, Application No.35865/03, Admissibility Decision of 20 February 2007, paras. 100-102.

<sup>53</sup> See, for example, *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, op. cit., Z and T v. United Kingdom, ECtHR, Application No. 27034/05, Admissibility Decision of 28 February 2006.

<sup>54</sup> CJEU, *Abubacarr Jawo v. Bundesrepublik Deutschland*, C-163/17, Judgment 19 March 2019 para. 85; CJEU, *N.S. v. Secretary of State for the Home Department*, C-411/10 & C-493/10, Judgment, 21 December 2011, para. 106.

<sup>55</sup> See also cfr. *Module II, section B.1 Information on reasons for detention*.

<sup>56</sup> Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, Cambridge University Press, June 2003.

<sup>57</sup> UNHCR guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, para. 11 <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>

<sup>58</sup> See also cfr. *Module II, section C. Duration of detention*.

<sup>59</sup> See also cfr. *Module II, section D. Detention conditions*.

<sup>60</sup> *Ibid*, see CJEU, *Al Chodor case*, C-528/15, Judgment 15 March 2017.

Both international refugee law (article 3 Geneva Refugee Convention) and international human rights law require that the procedure for status determination should not be discriminatory for asylum seekers and refugees, including the beneficiaries of subsidiary protection.

The EU Charter on Fundamental Rights also enshrines the principle of non-discrimination and equality before the law.

### EU Charter on Fundamental Rights

#### Article 20 Equality before the law

Everyone is equal before the law.

#### Article 21 Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

## 4. Vulnerable groups

In the refugee status determination context, some persons, such as unaccompanied or separated children;<sup>61</sup> persons with mental or physical disabilities; others who may face specific risks or be in "circumstances of greater vulnerability, such as survivors of torture, human trafficking and/or victims of sexual- or gender-based violence may need additional or specific safeguards and support to ensure they are able to apply for international protection.<sup>62</sup>

*The Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* recommend that vulnerabilities related to age, disability or experience of torture, sexual violence or trafficking should be taken into account in deciding whether to impose accelerated asylum procedures, and if they are applied, should condition the manner of their application. UNHCR Guidance states that in procedures for the determination of refugee status, asylum-seekers who may have suffered sexual violence must be treated with particular sensitivity.<sup>63</sup>

Procedures must be designed to take account of, and respond to, factors such as the sex, age, and circumstances of particular individuals. For example, as outlined in the *UNHCR Guidelines on Gender-Related Persecution*, particular safeguards must be put in place for women asylum seekers. These include among other things: separate interviews from family members; the ability to make separate claims for refugee status; the availability of female interviewers and staff; assurances of confidentiality; open-ended questioning that enables gender or sex-specific issues to emerge; gender-sensitive assessment of credibility and risk; recourse to external and objective expertise and evidence.<sup>64</sup>

The Recital 29 APD states that "Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken<sup>65</sup>. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection."

Recital 32 APD adds that "With a view to ensuring substantive equality between female and male

<sup>61</sup> See also cfr. Module V. *Access to justice for migrant children*.

<sup>62</sup> See UNHCR document "migrants in vulnerable situations" <http://www.refworld.org/pdfid/596787174.pdf>

<sup>63</sup> See: *European Guidelines on accelerated asylum procedures*, CMCE, Guideline III. Conclusion No. 73, UNHCR, para. (g).

<sup>64</sup> Similar recommendations have been made by the Committee on the Elimination of Discrimination Against Women in *Concluding Observations on Belgium*, CEDAW, UN Doc. CEDAW/C/BEL/CO/6, 7 November 2008, para. 37. CEDAW has underlined in its General Comment No. 30 that "female asylum seekers from conflict-affected areas can face gendered barriers to asylum, as their narrative may not fit the traditional patterns of persecution, which have been largely articulated from a male perspective", *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 56.

<sup>65</sup> Article 24.1 APD states that "Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees."

applicants, examination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution. The complexity of gender-related claims should be properly taken into account in procedures based on the concept of safe third country, the concept of safe country of origin or the notion of subsequent applications.”

Articles 24 and 25 APD specifically cover applicants in need of special procedural guarantees and guarantees for unaccompanied minors.”

#### **Article 24 Applicants in need of special procedural guarantees**

1. Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees.
2. The assessment referred to in paragraph 1 may be integrated into existing national procedures and/or into the assessment referred to in Article 22 of Directive 2013/33/EU and need not take the form of an administrative procedure.
3. Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

Where such adequate support cannot be provided within the framework of the procedures referred to in Article 31(8) and Article 43, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply, Article 31(8) and Article 43. Where Member States apply Article 46(6) to applicants to whom Article 31(8) and Article 43 cannot be applied pursuant to this subparagraph, Member States shall provide at least the guarantees provided for in Article 46(7).

4. Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.

#### **Article 25 Guarantees for unaccompanied minors**

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 14 to 17, Member States shall:
  - (a) take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of a representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end. The person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. The representative may also be the representative referred to in Directive 2013/33/EU;
  - (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 or herself for the personal interview. Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are present at that interview and have an opportunity 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 will in all likelihood reach the age of 18 before a decision at first instance is taken.
3. Member States shall ensure that:
  - (a) if an unaccompanied minor has a personal interview on his or her application for international protection as referred to in Articles 14 to 17 and 34, 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.
4. Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information as referred to in Article 19 also in the procedures for the withdrawal of international protection provided for in Chapter IV.
5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

- (a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably 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 international protection, 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 a medical examination being carried out to determine the age of the minors concerned; and
- (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

6. The best interests of the child shall be a primary consideration for Member States when implementing this Directive.

Where Member States, in the course of the asylum procedure, identify a person as an unaccompanied minor, they may:

- (a) apply or continue to apply Article 31(8) only if:
- (i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or
  - (ii) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or
  - (iii) the applicant may for serious reasons be considered 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 or public order under national law;
- (b) apply or continue to apply Article 43, in accordance with Articles 8 to 11 of Directive 2013/33/EU, only if:
- (i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or
  - (ii) the applicant has introduced a subsequent application; or
  - (iii) the applicant may for serious reasons be considered 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 or public order under national law; or
  - (iv) there are reasonable grounds to consider that a country which is not a Member State is a safe third country for the applicant, pursuant to Article 38; or
  - (v) the applicant has misled the authorities by presenting false documents; or
  - (vi) in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality.

Member States may apply points (v) and (vi) only in individual cases where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which

would likely lead to a negative decision and provided that the applicant has been given full opportunity, taking into account the special procedural needs of unaccompanied minors, to show good cause for the actions referred to in points (v) and (vi), including by consulting with his or her representative;

- (c) consider the application to be inadmissible in accordance with Article 33(2)(c) if a country which is not a Member State is considered as a safe third country for the applicant pursuant to Article 38, provided that to do so is in the minor's best interests;
- (d) apply the procedure referred to in Article 20(3) where the minor's representative has legal qualifications in accordance with national law.

Without prejudice to Article 41, in applying Article 46(6) to unaccompanied minors, Member States shall provide at least the guarantees provided for in Article 46(7) in all cases.

As far as children, and other vulnerable or at risk individuals, no decision that would adversely affect the individual should be taken without a detailed, individualized assessment with due procedural safeguards.

#### *Special guarantees for children*<sup>66</sup>

The Convention on the Rights of the Child (CRC) expressly addresses the measures necessary to ensure the protection of refugee children and of asylum-seeking children, whether unaccompanied or accompanied by their parents or by any other person. Under article 22 of the Convention, States must take particular measures to ensure that asylum procedures provide appropriate protection to children. The CRC recognises the principle of the best interests of the child (article 3), which must be a primary consideration in any actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Unaccompanied or separated children, in particular, are unlikely to spontaneously file an application for asylum, and procedures must therefore ensure that as soon as it becomes known that the child may have a well-founded fear of persecution, they are referred to an asylum procedure.

The unaccompanied or separated child will need the assistance of an appointed adult familiar with his or her background who is competent and able to represent the child's best interests (a guardian or legal representative). Unaccompanied or separated children should also be given access to a qualified legal representative free of charge.

#### **General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005**

36. In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.

#### **UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration**

96. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies.. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

#### **Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35), 16 December 2013**

40. As children are usually at a disadvantage in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty.

<sup>66</sup> For more information on children's rights cfr. Module V. Access to justice for migrant children.

**Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, PACE**

5.8 (...) All unaccompanied children in asylum proceedings must be represented by a lawyer in addition to a guardian, provided free of charge by the state and be able to challenge before a court decisions regarding their protection claims.

Applications by unaccompanied or separated children must be given priority and decisions must be rendered promptly and fairly.

The procedure must take into consideration the need of the child to express his or her views freely (article 12, CRC), and always keep as a primary consideration the best interests of the child (article 3). The Committee on the Rights of the Child has published a detailed General Comment on States' obligations towards unaccompanied or separated children.<sup>67</sup>

Article 25 of the APD includes special guarantees for unaccompanied minors, i.a. as soon as possible a representative should be appointed to represent and assist the child and there should be effective access to information.

See also:

- *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin*, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 66.
- *General Comment No. 14 on the right of the child to have his or her best interest taken as primary consideration*, CRC, UN Doc. CRC/C/GC/14, 29 May 2013
- *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017
- *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration*, 16 November 2017

### III. Access to the territory and to the asylum procedure

In order to access the asylum procedure within the EU, an applicant for international protection first needs to be able to access the territory of a Member State. This section will examine what Member States obligations are in terms of allowing an applicant access to their territory. It will then examine what safeguards are necessary for the applicant to have effective access to the asylum procedure.

#### 1. Access to the territory

Access to the territory is framed by the prohibition of *refoulement* (see above, article 33 Refugee Convention, article 3 ECHR), forbidden pushbacks (including rejections at the border, on the high seas when the individual falls within the jurisdiction of a State, or any form of transfer to another state, removal, return or deportation) and non-admission at the border, prohibition of collective expulsions (article 4 Protocol 4 ECHR) and a number of procedural safeguards, such as right to an effective remedy. States have a positive obligation to assess the risk irrespective of an asylum claim. The assessment of the particular circumstances must always be individualized.

Under the Asylum Procedures Directive (APD), asylum seekers should have access to the asylum procedure (see below) and are allowed to remain in an EU Member State until a decision is made on their application (article 9). Exceptions to the right to remain can be made in case of certain repeated applications (articles 9.2 and 41).

#### Asylum Procedures Directive

##### Article 9

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

<sup>67</sup> Treatment of unaccompanied and separated children outside their country of origin, aGeneral Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005

the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.

2. Member States may make an exception only where a person makes a subsequent application referred to in Article 41 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 (11) or otherwise, or to a third country or to international criminal courts or tribunals.
3. A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect refoulement in violation of the international and Union obligations of that Member State.

Failure to apply fair procedures in the consideration of an asylum application may lead to violations of the non-refoulement principle and the right to an effective remedy.

## 2. Access to the asylum procedure

Once on the territory of a Member State, a person wishing to apply for international protection should be able to access the asylum procedure. However, applicants may face difficulties in effectively accessing the asylum procedure, such as, for example, not being able to lodge an asylum claim or experience significant delays in the processing of their claim. This section will examine what Member States need to do to enable applicants to effectively access the asylum procedure.

First, it should be noted that there are rules which EU Member States will be responsible to respect and implement with each asylum application, contained in the [Dublin III Regulation \(604/2013, recast\)](#). The Regulation sets out rules at length that should be read carefully. To summarize, Chapter II of the regulation sets out the criteria to determine the State responsible for the asylum determination procedure. The Regulation also guarantees access to a procedure for examining an international protection application (art. 3).

1. When the applicant is an unaccompanied minor, the responsible Member State is the one where a family member or a relative is legally present (art. 8), provided it is in the best interests of the child.
2. The responsible Member State is the one where a family member finds himself (art. 9-11) if:
  - a. The family member benefits from international protection or has introduced an application for international protection.
  - b. The person expresses the desire to launch application in that Member State in writing.
3. Condition of entry criteria (art. 12-15): Based on this criteria, the responsible State for treating the asylum application will be:
  - a. The Member State where the asylum seeker has a right to stay (and where legal documents are still valid or visa has been issued).
  - b. The Member State where the asylum seeker irregularly crossed the external border of the EU.
  - c. The Member State that has waived the visa obligation of the asylum seeker entering its territory.
  - d. When the application is introduced in the transit area of an airport, the Member State of the airport is responsible.

Derogations from these criteria are possible in three circumstances: (1) when there are systemic flaws in the asylum procedure and in the reception conditions of the Member State;<sup>68</sup> (2) where there is a dependent family member (art. 16);<sup>69</sup> and (3) Member States have a discretion to not follow Dublin criteria (art. 17) and rather to proceed with the application.<sup>70</sup>

### ***M.S.S. v Belgium and Greece*, ECtHR, GC, Application No. 30696/09, Judgment of 21 January 2011**

350. Added to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the

<sup>68</sup> For more information see: *N.S. v. Secretary of State for the Home Department* (C-411/10; C-493/10), CJEU, 21 December 2011; *Germany v. Puid* (C-4/11), CJEU, 14 November 2013; *C.K. & others v. Slovenia* (C-578/16), CJEU, 16 February 2017; *M.S.S. v Belgium and Greece*, ECtHR, 21 January 2011; *Tarakhel v. Switzerland*, ECtHR, 4 November 2014; *Abdullah Elmi and Aways Abubakar v. Malta*, ECtHR, 22 November 2016.

<sup>69</sup> For more information see: *K. v. Bundesasylamt* (C-245/11), CJEU, 6 November 2012.

<sup>70</sup> For more information see: *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantiste pri Ministerskia savet* (C-528/11), CJEU, 30 May 2013.

texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum-seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum-seekers being sent back to member States unable to offer them a sufficient level of protection of their fundamental rights (see paragraphs 77-79 above).

351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece. The form the Aliens Office filled in contains no section for such comments (see paragraph 130 above).

352. In these conditions, the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.

359. (...) The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum-seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable (...)

360. Having regard to the above considerations, the Court finds that the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention.

Access to the asylum procedure is governed at EU level by the article 6 of the APD. The APD describes three separate steps of making, registering and lodging an application for international protection. It states that when a person makes an application for international protection to a competent authority, the application should be registered within 3 working days, unless the application is made to other state authorities - such as the police, border guards, immigration authorities and personnel of detention facilities - when the deadline for its registration is six working days. Those other relevant authorities which are likely to receive applications for international protection should have the relevant information and receive training.

The expression of a wish to apply for international protection equates to making an application, according to recital 27 of the APD. This is important as the right to remain in the State as an asylum seeker applies as of the moment of making the application. Adequate reception conditions are necessary in order to ensure that asylum seekers enjoy effective access to the procedures.<sup>71</sup> Material reception conditions must be made available to applicants "when they make their application for international protection", while the assessment of whether an applicant is a person with special reception needs must be initiated "within a reasonable period of time after the application for international protection is made".<sup>72</sup>

According to article 9 APD, "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."

Furthermore, article 6.2 APD requires Member States to ensure that a person who has made an application for international protection has an "effective opportunity to lodge it as soon as possible" and they may require that applications are lodged in person and/or at a designated place (article 6.3). The moment when an application is lodged is decisive to trigger certain obligations of Member States under the [Reception Conditions Directive](#) (2013/33/EU, 26 June 2013, hereinafter RCD), such as information to applicants on their rights and obligations with regard to reception conditions, the issuance of a document certifying the status of an asylum seeker or the their right to stay on the

<sup>71</sup> See *M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011.

<sup>72</sup> ECRE, Information Note on the Asylum Procedures Directive, 2014, <http://www.refworld.org/docid/54afd6444.html>



territory, schooling and education of minors and access to the labor market.<sup>73</sup>

Member States must ensure that, where use is being made of a form to be submitted by an applicant or a national report for the purpose of lodging the application as laid down in article 6.4, applicants are provided with the necessary assistance to enable them to fill out such forms, where necessary. If not, applicants cannot be considered to have been provided with an *effective* opportunity as soon as possible and non-compliance with article 6.4 should not be held against them.

Article 6.5 APD extends the time limits for registration of the asylum application laid down in article 6.1 to 10 working days in cases of simultaneous applications for international protection by a large number of third country nationals or stateless nationals.

Article 9(2) APD allows Member States to make an exception to the right to remain during the procedure at first instance where a person makes a subsequent application or where they will "surrender or extradite a person either to another Member State pursuant to obligations in accordance with the European arrest warrant or otherwise, or to a third country or to international courts or tribunals." If Member States make use of such possibility, they must in any case be satisfied that the surrender or extradition of the person concerned would not result in direct or indirect refoulement in violation of their international and Union obligations (see above).<sup>74</sup>

### **Jabari v. Turkey, ECtHR, Application No. 40035/98, Judgment of 11 July 2000**

**Facts:** The applicant was an Iranian national who had been arrested in Iran after being caught in public with a married man. She was released from detention with the help of her family, and entered Turkey illegally in November 1997. She claimed asylum in Turkey but her asylum application was dismissed automatically on the basis that it had been submitted out of time, and instead should have been registered within five days of her arrival in Turkey in compliance with the Asylum Regulation 1994. She lodged an application at the Ankara Administrative Court against her deportation, which was dismissed. She claimed that her removal to Iran would put her at a real risk of Article 3 ill-treatment, and that she had had no effective remedy to challenge the decision by which her asylum claim was rejected as being out of time.

**Analysis:** The Court considered that the automatic and mechanical application of the five-day registration requirement was contrary to the protection of the fundamental value enshrined in Article 3 ECHR. Given that her asylum claim had not been assessed by the domestic authorities, and that the dismissal of her claim was not an appealable decision, and given that a judicial review of that decision would not have had suspensive effect or have given her an opportunity to have the merits of her claim examined, the Court found that Article 13 ECHR had been violated.

49. *The Court reiterates that there was no assessment made by the domestic authorities of the applicant's claim to be at risk if removed to Iran. The refusal to consider her asylum request for non-respect of procedural requirements could not be taken on appeal. Admittedly the applicant was able to challenge the legality of her deportation in judicial review proceedings. However, this course of action entitled her neither to suspend its implementation nor to have an examination of the merits of her claim to be at risk. The Ankara Administrative Court considered that the applicant's deportation was fully in line with domestic law requirements. It would appear that, having reached that conclusion, the court felt it unnecessary to address the substance of the applicant's complaint, even though it was arguable on the merits in view of the UNHCR's decision to recognise her as a refugee within the meaning of the Geneva Convention.*
50. *In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, 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 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13.*

<sup>73</sup> Article 6 Reception Conditions Directive (RCD) requires Member States to provide asylum seekers with such a document "within three days of the lodging of an application for international protection", except when they are detained or in the context of a border procedure. According to article 14.2 of the RCD, access to the education system shall not be postponed for more than "three months from the date on which the application for international protection was lodged by or on behalf of the minor". According to article 15 RCD access to the labour market must be granted "no later than 9 months from the date when the application for international protection was lodged". See: ECRE, Information Note on the Asylum Procedures Directive, December 2014, p. 10.

<sup>74</sup> ECRE, op.cit., p. 16.

**Sharifi and others v. Italy and Greece**, ECtHR, Application No. 16643/09, Judgement of 21 October 2014.

**Facts:** Thirty-two applicants variously of Afghan, Sudanese and Eritrean nationality arrived in Italy from Greece. They were immediately sent back to Greece and feared that from there they would be transferred to their country of origin where they alleged they would face unlawful killing or ill-treatment. They alleged that they were subject to collective expulsion and were not provided with any access to court to plead their case, as it was impossible for them to contact interpreters or lawyers.

**Analysis:** The Court held that there was a violation and that access to effective remedy must be available in law and practice. Recalling the jurisprudence of *M.S.S. v. Belgium and Greece*, the Court highlighted that Greece had failed to provide for access to an asylum procedure and to provide information on the process of asylum. Considering that the applicants had legitimate claims to defend, it considered that Greece breached article 13. With regard to Italy, as the applicants had been directly handed over from the border authorities to the captains of ferry boats, no access to asylum procedure was provided.

175. *As to the question whether Article 13 has been complied with, the Court notes, first, that the shortcomings of the asylum procedure in Greece noted in M.S.S. v. Belgium and Greece, cited above (§§ 299-320) concerned in particular:*

- *access to the procedure for examining asylum applications;*
- *information for asylum seekers on the procedures to be followed;*
- *access to the buildings of the Attica police headquarters;*
- *the lack of a reliable communication system between the authorities and the interested parties;*
- *the shortage of interpreters and the lack of expertise of the staff to conduct individual interviews;*
- *the lack of legal aid, which in practice prevents asylum seekers from being accompanied by a lawyer;*
- *the excessive length of waiting time in obtaining a decision.*

177. *In the present case, the Court notes that, according to the observations of the Greek Government, the "information brochure concerning the rights of foreigners arrested with a view to their expulsion" (...) does not expressly indicate the right to seek asylum. In addition, the Government indicated that this brochure - which contained the essential information to challenge the deportation decision - was given to the applicants in Arabic, whereas the "identified" applicants who had received this brochure were of Afghan nationality and did not necessarily understand that language. In this regard, it is not without interest that in 2012, in the context of the execution of the judgment M.S.S. v. Belgium and Greece, cited above, the Greek authorities have indicated that the information leaflet for asylum seekers is now translated into fourteen languages (...), so that it is understandable to a wider audience of asylum seekers.*

181. *The Court concludes that there has been a violation of Article 13 (...) It follows that the applicants cannot be criticized for not having exhausted domestic remedies (...).*

**N.D. and N. T. v. Spain**, ECtHR, Application Nos. 8675/15 and 8697/15), Judgment 13 February 2020.

**Facts:** The applicants, from Mali and Côte d'Ivoire, tried to cross the Melilla enclave from Morocco to Spain. In August 2014, 600 migrants tried to cross the border and the applicants succeeded. They were handed over by the Spanish border authorities to the Moroccan authorities directly without any possibility to seek asylum. They claimed that they were not provided access to an effective remedy to challenge their return and were subject to collective expulsion.

**Analysis:** The case was sent to the Grand Chamber after a first ruling of the ECtHR. In opposition to the first Chamber, the Grand Chamber found no violation of article 13 and Article 4 of Protocol N°4 (collective expulsion). The Court recalled that States must comply with the principle of non-refoulement, but emphasized that when assessing protection granted under the Convention, the conduct of the applicant(s) is relevant. The Court asserted that the applicants could have crossed the border at crossing points and legally ask for asylum there following the Spanish procedures, placing themselves in an unlawful situation instead of using available legal procedures. The lack of individual expulsion decision stem from the applicants' conducts. Therefore, there was no breach of article 13 nor A4P4.

231. *In the light of these observations the Court considers that it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences*

on 13 August 2014, taking advantage of the group's large numbers and using force. They did not make use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen area's external borders (see paragraph 45 above). Consequently, in accordance with its settled case-law, the Court considers that the lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct (see references in paragraph 200 above). Accordingly, there has been no violation of Article 4 of Protocol No. 4.

232. *However, it should be specified that this finding does not call into question the broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect their borders – either their own borders or the external borders of the Schengen area, as the case may be – in a manner which complies with the Convention guarantees, and in particular with the obligation of non refoulement. In this regard the Court notes the efforts undertaken by Spain, in response to recent migratory flows at its borders, to increase the number of official border crossing points and enhance effective respect for the right to access them, and thus to render more effective, for the benefit of those in need of protection against refoulement, the possibility of gaining access to the procedures laid down for that purpose.*
242. *As it stated previously in examining the complaint under Article 4 of Protocol No. 4 (see paragraph 231 above), the Court considers that the applicants placed themselves in an unlawful situation by deliberately attempting to enter Spain by crossing the Melilla border protection structures on 13 August 2014 as part of a large group and at an unauthorised location. They thus chose not to use the legal procedures which existed in order to enter Spanish territory lawfully, thereby failing to abide by the relevant provisions of the Schengen Borders Code regarding the crossing of the external borders of the Schengen area (...) and the domestic legislation on the subject. In so far as the Court has found that the lack of an individualised procedure for their removal was the consequence of the applicants' own conduct in attempting to gain unauthorised entry at Melilla (...), it cannot hold the respondent State responsible for not making available there a legal remedy against that same removal.*
243. *It follows that the lack of a remedy in respect of the applicants' removal does not in itself constitute a violation of Article 13 of the Convention, in that the applicants' complaint regarding the risks they were liable to face in the destination country was dismissed at the outset of the procedure.*

## IV. The right to an effective remedy

The right to an effective remedy for violations of human rights is protected under international human rights law, including under article 13 ECHR, article 2.3 ICCPR, articles 32 and 33 Geneva Refugee Convention and articles 3 and 14 CAT. It is also reflected in the [UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#).

### European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

#### Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (...)
3. Everyone charged with a criminal offence has the following minimum rights: (...)
  - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (...)

### **Article 13 Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

## **International Covenant on Civil and Political Rights (ICCPR)**

### **Article 2**

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

## **Geneva Refugee Convention, 1951**

### **Article 32 Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order and in pursuance of a decision reached in accordance with the process of law.
2. Each refugee shall be entitled, in accordance with the established law and procedure of the country, to submit evidence to clear himself and to be represented before the competent authority.
3. The Contracting States shall allow such refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

The jurisprudence of the European Court of Human Rights is of critical importance since, according to article 52.3 EU Charter, it constitutes one of the main sources of interpretation of the Charter.

UNHCR guidance states that an appeal to an administrative or judicial authority of a refusal of refugee status should be available, that there should be adequate time to lodge such an appeal, and that the applicant should be permitted to remain in the country while the appeal is pending.<sup>75</sup> While a remedy with suspensive effect is always required in removal cases in respect of Article 13 in conjunction with Article 3, it is not true in respect of Article 13 in conjunction with Article 8. In *de Souza Ribeiro v. France*, a violation of Article 13 in conjunction with Article 8 was found based on the circumstances of the case, but the Grand Chamber was explicit that suspensive effect was not per se required in Article 8 removal cases (§ 83).<sup>76</sup>

Where there is an arguable complaint that a transfer will violate or subject the transferee to a real risk of violation of human rights, there must be an effective remedy that is independent, impartial, accessible and effective in practice as well as in law, and must not be hindered by the acts of State authorities. The remedy should be provided by a judicial body, but if it is not, it must be provided by an independent and impartial body, which has the competency to review and, if warranted, overturn the decision to expel.<sup>77</sup>

<sup>75</sup> Article 47 EU Charter requires a remedy by a tribunal; *UNHCR Handbook*, para. 192(vi) and (vii).

<sup>76</sup> *Jabari v. Turkey*, ECtHR, op. cit. para. 50; *Çonka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002, para. 79; *Gebremedhin v. France*, ECtHR, Application No. 25389/05, Judgment of 26 April 2007, paras. 58 and 66; *De Souza Ribeiro v. France*, ECtHR, Application No. 22689/07, Judgment of 13 December 2012, para. 82-83; *Hirsi Jamaa and Others v. Italy*, ECtHR, Application No. 27765/09, Judgment of 23 February 2012, para. 206.

<sup>77</sup> *Shamayev and Others v. Georgia and Russia*, ECtHR, Application No. 36378/02, Judgment of 12 April 2005, para. 460; *M.S.S. v. Belgium and Greece*, ECtHR, para. 293; *C.G. and Others v. Bulgaria*, ECtHR, Application No. 1365/07, Judgment of 24 April 2008, para. 56 (Right to a remedy where right to respect for family life under Article 8 ECHR was in issue); *Çonka v. Belgium*,

International human rights law requires that, to guarantee an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed.<sup>78</sup> Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy (article 46.5 APD).<sup>79</sup>

A system where stays of execution of the expulsion order are at the discretion of a court or other body are not sufficient to protect the right to an effective remedy, even where the risk that a stay will be refused is minimal.<sup>80</sup> If appealing against a decision is excessively complicated or expensive or has requirements that make it inaccessible, that renders the remedy theoretical and illusory.

International human rights treaties require States to ensure effective remedies for violations of rights. The remedy/remedies must be prompt, effective, accessible, enforceable, and lead to cessation of and reparation for the human rights violation concerned.<sup>81</sup>

The European Court of Human Rights has held that, in order to comply with the right to an effective remedy under article 13 of the ECHR, a person threatened with an expulsion that would arguably violate certain Convention rights including articles 2-9 ECHR, must have:

- Access to relevant documents and accessible information on the legal procedures to be followed in his or her case;
- Where necessary, access to translated material and interpretation;
- Effective access to legal advice, if necessary by provision of legal aid;<sup>82</sup>
- The right to participate in adversarial proceedings;
- Provision of the reasons for the decision to expel (a stereotyped decision that does not reflect the individual case will be unlikely to be sufficient) and a fair and reasonable opportunity to dispute the factual basis for the expulsion;<sup>83</sup>

#### **Gebremedhin v. France**, ECtHR, Application No. 25389/05, Judgment of 26 April 2007

**Facts:** The Applicant was an Eritrean national. Arrested in Eritrea on account of his professional activities (he worked as a reporter and photographer for an independent newspaper), he was subjected to ill treatment during his detention. He escaped from prison hospital and fled to Sudan, from there to South Africa and then France. A few years later he asked for asylum in France, and while waiting in the airport's waiting area, his application was rejected, as was his following urgent application to the Administrative Court.

**Analysis:** Given that The Applicant had no access to a remedy with automatic suspensive effect while in the waiting area of the airport, the Court found a violation of article 3 in conjunction with article 13.

66. (...) *the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention (...) In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises,*

ECtHR, op. cit. paras. 77-85 (right to a remedy in case of alleged collective expulsion under Article 4 Protocol 4 ECHR); *Alzery v. Sweden*, CCPR, Communication No. 1416/2005, Views of 10 November 2006, UN Doc. CCPR/C/88/D/1416/2005, para. 11.8; *Agiza v. Sweden*, CAT, Communication No. 233/2003, Views of 20 May 2005, UN Doc. CAT/C/34/D/233/2003, para. 13.7.

<sup>78</sup> See, full jurisprudence in ICJ, Practitioners Guide No.6 on Migration and International Human Rights Law, 2014, Chapter 3.III.2.

<sup>79</sup> See also Article 46.6 APD: "In the case of a decision:

- (a) considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h);
- (b) considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d);
- (c) rejecting the reopening of the applicant's case after it has been discontinued according to Article 28; or
- (d) not to examine or not to examine fully the application pursuant to Article 39,

A court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting ex officio, if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.

<sup>80</sup> *Conka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002, paras. 81-85.

<sup>81</sup> *International Commission of Jurists, The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, Geneva, December 2006 (ICJ Practitioners' Guide No. 2), pp. 46-54.

<sup>82</sup> *M.S.S. v. Belgium and Greece*, ECtHR, para. 301.

<sup>83</sup> *M.S.S. v. Belgium and Greece*, ECtHR, para. 302; *C.G. and Others v. Bulgaria*, ECtHR, paras. 56-65. *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, paras. 202-204.

*this finding obviously applies also to cases in which a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature: Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect.*

The right to an effective remedy is also guaranteed in EU law. The APD requires Member States to provide remedy against decision on international protection, the withdrawal of international protection and the refusal to review a second application (art. 46).

### **Abdoulaye Amadou Tall v. CPAS de Huy, CJEU, Judgment of 17 December 2015**

**Facts:** Abdoulaye Amadou Tall, a Senegalese national, contested the refusal to examine his second asylum application by the Belgian authorities, leading subsequently to the withdrawal of any social assistance. The Labour Court of Liege asked a preliminary question to the CJEU to assess whether or not the issue at stake was the obligation to ensure the right to an effective remedy according to article 39 of the APD and art. 47 of the EUCFR. In the present case, the appeal of Mr. Tall had no suspensive effect and the applicant would remain without the right to residence and material assistance.

**Analysis:** The Court stated that Member States should provide an appeal with suspensive effect when the decision of return could expose the person to inhuman or degrading treatment. Since it was not the case in the issue at stake, the CJEU was of the view that the Directive did not preclude national legislation not conferring appeal with suspensory effect against a decision like that in the present proceedings.

*58. In that regard, it follows from the case-law of the Court of Justice that, in any event, an appeal must necessarily have suspensory effect when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19(2) and 47 of the Charter are met in respect of that third-country national (see, to that effect, judgment in Abdida, C 562/13, EU:C:2014:2453, paragraphs 52 and 53).*

*59. It follows that the lack of a suspensory remedy against a decision such as the one at issue in the main proceedings, the enforcement of which is not likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 3 ECHR, does not constitute a breach of the right to effective judicial protection as provided for in Article 39 of Directive 2005/85, read in the light of Articles 19(2) and 47 of the Charter"*

## **V. Access to information**

Ensuring that asylum seekers are aware of, and have access to information about their rights and how to claim them and to obtain a remedy for alleged violations of them are key elements of every State's duty to ensure respect and protection of their rights.

Relevant information should be presented in ways and language(s) that asylum seekers understand. The right to translation and interpretation is an important element of the right to information.

### **EU Asylum Procedures Directive**

#### **Article 8**

#### **Information and counselling in detention facilities and at border crossing points**

1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

Article 12.1 APD entails that information should be provided "in a language which they [i.e. asylum seekers] understand or are reasonably supposed to understand".

## EU Asylum Procedures Directive

### Article 12 Guarantees for applicants

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees: (...)
  - (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 provide those services at least when the applicant is to be interviewed as referred to in Article 14 to 17 and 34 and appropriate communication cannot be ensured without such services. In that case and in other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds.

The requirement that information be given in a language that the applicant is “reasonably meant to understand”, as opposed to one that he or she actually understands, runs counter to the principle of international human rights law that rights must be protected in a way that is practical and effective as opposed to theoretical and illusory. In the European Court of Human Rights case of *Rahimi v. Greece*, where an unaccompanied child was given an information sheet in Arabic when all he spoke was Farsi, the Court found a violation of the child’s right to *habeas corpus* and an effective remedy (articles 5.4 and 13 ECHR) because of this lack of information. As the Strasbourg Court has highlighted in *M.S.S. v. Belgium and Greece* “the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures”.<sup>84</sup> (See more information on language of applicants in the next section.)

The formulation “reasonably supposed to understand” risks that a number of asylum seekers will not be able to access the information in a language which they actually understand and so they will be deprived of their rights within the asylum procedure.<sup>85</sup>

### **M.S.S. v Belgium and Greece**, ECtHR, GC, Application No. 30696/09, Judgment of 21 January 2011

**Facts:** M.S.S., an asylum-seeker from Afghanistan, had initially reached the EU via Greece and had eventually made his way to Belgium where he applied for asylum. However, the Belgian authorities decided to return him to Greece despite his objections based on the well-known evidence that Greece lacked a functioning asylum system and that he risked onward removal to Afghanistan. Once in Greece, the Greek authorities detained him twice in appalling conditions, and on release from detention, left him destitute and homeless on the streets to fend for himself.”

**Analysis:** The Court found that there was a violation of article 3 ECHR by the Greece Government because of the applicant’s conditions of detention, violation of article 3 ECHR by Greece concerning the applicant’s living conditions in Greece, violation of article 13 taken in conjunction with article 3 ECHR against Greece because of the deficiencies in the asylum procedure, including lack of access to information, followed in the applicant’s case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy. The Court also found in relation to Belgium that there was a violation of article 3 by sending the applicant back to Greece and exposing him to risks linked to the deficiencies in the asylum procedure in that State, also held against Belgium a violation of article 3 for sending him to Greece and exposing him to detention and living conditions there that were in breach of that ECHR article. The Court also found a violation of article 13 ECHR taking in conjunction with article 3 ECHR against Belgium.

304. *The Court notes in this connection that the applicant claims not to have received any information about the procedures to be followed. Without wishing to question the Government’s good faith concerning the principle of an information brochure being made available at the airport, the Court attaches more weight to the applicant’s version because it is corroborated by a very large number of accounts collected from other witnesses by the Council of Europe Commissioner for Human Rights, the UNHCR and various non-governmental organisations. In the Court’s opinion, the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures.*

<sup>84</sup> M.S.S. v. Belgium and Greece, ECtHR, op. cit. para. 304.

<sup>85</sup> Common Asylum Procedure Regulation, ICJ comments on the current proposal of the Regulation, April 2017, p.4. See: <https://www.icj.org/wp-content/uploads/2017/04/Europe-Common-Asylum-Procedure-Reg-Advocacy-Analysis-brief-2017-ENG.pdf>

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

**Facts:** *In the case Hirsi Jamaa and Others v. Italy* the Court considered the plight of 24 people from Somalia and Eritrea who were among more than 200 people intercepted at sea by Italian authorities in 2009 and forced to return to Libya, their point of departure. The practice violated international obligations to not return individuals to countries where they could be at risk of human rights abuses.

**Analysis:** The Court considered that by transferring collectively the Applicants to Libya, the Italian authorities had violated article 13 of the convention taken in conjunction with article 3 of the Convention and article 4 of Protocol No. 4.

204. *The Court has previously found that the lack of access to information is a major obstacle in accessing asylum procedures (see M.S.S. v. Belgium and Greece, cited above, § 304). It reiterates here the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.*

205. *Having regard to the circumstances of the instant case, the Court considers that the applicants were deprived of any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.*

## VI. Language of the interview and the right to a free and competent interpreter

Ensuring accurate interpretation is key to the fairness of proceedings and the effective delivery of legal assistance in legal proceedings. This is in particular the case in asylum and migration procedures, as asylum seekers or witnesses, in the vast majority of cases, do not speak or understand the language used by officials of the host country.

### International Covenant on Civil and Political Rights (ICCPR)

#### Article 14

(...) 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...  
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

### Human Rights Committee, **General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial**

13. ... The principle of equality between parties (, ... i) n exceptional cases, it ... might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.
32. ... In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase. ...
40. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings. This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.



It is important that interpretation is not only available to asylum seekers during meetings with the authorities but also for meetings between the asylum seekers and their legal advisor.<sup>86</sup>

Building trust and effectively informing the asylum seeker is crucial for legal advisors to be able to provide quality assistance and information. Interpretation will in many cases be indispensable to ensure effective communication between legal assistance providers and asylum seekers and other migrants.

Article 12(1)(b) APD states:

“With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees: (...) (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 provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. In that case and in other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds.”

Article 15(3)(c) APD states that Member States shall:

“(c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner.”

This not only is an important guarantee to ensure that applicants can fully and clearly express themselves during the interview, it obviously also is less time-consuming and avoids possible delays during the interview resulting from communicating in another language than the one the applicant is most comfortable with.

As highlighted by UNHCR, there is a fundamental difference between the ability to make oneself understood in a language and the ability to present often complex factual information in the framework of an often complex procedure that may have important repercussions for the individual.<sup>87</sup>

Access to interpretation services has been acknowledged by the European Court of Human Rights as an essential procedural safeguard in the context of an asylum procedure and absence of such services may lead to a violation of the right to an effective remedy as guaranteed under Article 13 ECHR (See: ECtHR, *I.M. v France*, Application No. 9152/09, Judgment of 2 February 2002 para. 145; *Hirsi Jamaa and Others v Italy*, op. cit. para. 202 and *M.S.S. v Belgium and Greece*, op. cit. para. 301).

Finally, insufficient qualifications, skills or disrespectful attitude of an interpreter, can undermine the quality of legal assistance provided and the respect for the person's rights. Interpreters need to receive specific training.

*For more information on the right to interpretation for children cfr. Module V, section III.7. Right to interpretation.*

## VII. The right to legal assistance, legal representation and legal aid

Access to legal assistance is a cornerstone of access to justice. Legal support is particularly important in asylum and return proceedings where language barriers may make it difficult for the persons concerned to understand the often complex or rapidly implemented procedures. Lawyers play a crucial role in ensuring respect for, protection of and access to rights of all persons. Availability of

<sup>86</sup> The UN Human Rights Committee affirmed that States should “ensure that all asylum-seekers have access to counsel, legal aid and an interpreter”: *Concluding Observations on Japan*, CCPR, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 25. For access to interpretation in the expulsion context see: *M.S.S. v. Belgium and Greece*, ECtHR, op. cit. para. 302; *C.G. and Others v. Bulgaria*, ECtHR, op. cit. paras. 56-65; and *Hirsi Jamaa and Others v. Italy*, ECtHR, op. cit. paras. 202-204.

<sup>87</sup> UNHCR, *Improving Asylum Procedures Comparative Analysis and Recommendations for Law and Practice De-tailed Research on Key Asylum Procedures Directive Provisions*.

legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.

**Report of the UN Special Rapporteur on the independence of judges and lawyers, Legal aid, UN Doc. A/HRC/23/43 (9 April 2013)**

3. "Legal aid is an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law. It is a foundation for the enjoyment of other rights, including the right to a fair trial and the right to an effective remedy, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the administration of justice."
20. Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice.

**The Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures, 1 July 2009**

**IV. Procedural guarantees**

1. When accelerated asylum procedures are applied, asylum seekers should enjoy the following minimum procedural guarantees: (...) (f) the right to access legal advice and assistance, it being understood that legal aid should be provided according to national law; and public trust in the administration of justice.

The right to a fair hearing under EU law applies to asylum and immigration cases. The inclusion of legal aid in article 47 of the EU Charter of Fundamental Rights reflects its historical and constitutional significance. Legal aid in asylum and immigration cases is an essential part of the need for an effective remedy and the need for a fair hearing.

In order to navigate their way through the procedures and to present their claims effectively, asylum seekers generally need access to information, advice and assistance. The provision of such advice and assistance obviously leads to a better quality of initial decision-making, which can prevent subsequent time-consuming and costly appeals. This serves the interests of the asylum seeker in seeking effective protection as well as the State's interest in conducting a proper examination of the claim making efficient use of human and financial resources.

Article 13 ECHR can be violated by the lack of legal assistance in asylum cases. In *M.S.S. v. Belgium and Greece*, the ECtHR held that the applicant lacked the practical means to pay a lawyer in Greece, where he had been returned; he had not received information concerning access to organizations offering legal advice and guidance. Compounded by the shortage of legal aid lawyers, this had rendered the Greek legal aid system as a whole ineffective in practice. The ECtHR concluded that there had been a violation of article 13 of the ECHR taken in conjunction with article 3.

Article 47 of the Charter provides that "[e]veryone shall have the possibility of being advised, defended and represented [...]" and that "[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice [...]"

In *M.S.S. v Belgium and Greece*, the ECtHR found a violation of article 13 right to an effective remedy for lack of access to procedural rights, legal aid included.

**M.S.S. v Belgium and Greece**, ECtHR, Application No. 30696/09, Judgment of 21 January 2011

*301. The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum (see paragraphs 173-88 above): insufficient information for asylum-seekers about the procedures to be followed; difficult access to the Attica police headquarters; no reliable system of communication between the authorities and the asylum-seekers; a shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews; a lack of legal aid effectively depriving the asylum-seekers of legal counsel; and excessively lengthy delays in receiving a decision. These shortcomings affect asylum-seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.*

...319. *In addition, although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system (see paragraphs 191 and 281 above), which renders the system ineffective in practice. Contrary to the Government's submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum-seekers are concerned.*

The CJEU explained in *DEB v. Germany* the principle of effective judicial protection in the EU Charter as entailing the obligation to grant legal aid so that access to courts is not hindered:

**DEB v. Germany**, CJEU C-279/09, Judgment of 22 December 2010

*The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.*

*In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.*

*In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the relevant law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.*

Article 22.1 of the Asylum Procedures Directive entitles applicants to consult with a legal adviser on matters relating to their application.

**Article 22 Right to legal assistance and representation at all stages of the procedure**

Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

Pursuant to article 20 of the directive, in the case of a negative decision by the administration, EU Member States shall ensure that free legal assistance and representation be granted to applicants in order to lodge an appeal as well as for the appeal hearing. Free legal assistance and/or representation may not be granted to those appeals that have no tangible prospects of success (article 20.3).

**Article 20 Free legal assistance and representation in appeals procedures**

3. Member States may provide that free legal assistance and representation not be granted where the applicant's appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision.

In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Free legal assistance and representation shall be subject to the conditions laid down in Article 21.

Member States may also impose monetary or time limits on the provision of free legal assistance and representation (article 21).

Article 23 of the directive also makes provision for the scope of legal assistance and representation, including allowing the legal adviser to access the applicant's file information, as well as practical access to the client if held or detained in closed areas, such as detention facilities and transit zones. Applicants are allowed to bring to the personal asylum interview a legal adviser or other counsellor admitted as such under national law.

Article 23.3 asserts the right of each asylum seeker to bring a legal adviser or other counsellor to the personal interview.

Legal aid should be preferably available during the administrative part of the procedure as well, should the denial of it mean lack of effective access to the procedure and to the applicants rights.

*For more information on the right to legal assistance and representation for children cfr. Module V, section III.4 Legal assistance and representation.*

## VIII. The right to a personal interview

The asylum applicant's right to a person interview is crucial for a fair asylum procedure, rooted in general principles of EU and international law, such as the principle of effectiveness<sup>88</sup> and the right to be heard.<sup>89</sup> The lack of access to a personal interview can result in a violation of the right to "asylum guaranteed by article 18 of the EU Charter of Fundamental Rights, of the non-refoulement principle, guaranteed by article 19.2 of the EU Charter, and in a violation of the prohibition of collective expulsions, set out in article 19.1 of the Charter.

The EU law right to be heard, which is recognized by the Court of Justice of the EU as a general principle of EU law, guarantees to every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to adversely affect her or his interests.<sup>90</sup>

According to UNHCR, even in cases deemed manifestly unfounded or abusive, a complete personal interview by a fully qualified official is required. Furthermore, UNHCR stated that basic information frequently given in the first instance by completing a standard questionnaire would normally not be sufficient to enable the examiner to reach a decision, and that one or more personal interviews would be required.<sup>91</sup>

Article 14 APD sets out the principle that, before a first instance decision on an international protection application be taken, the asylum seeker must be given the opportunity of a personal interview with a person who is competent to conduct such an interview.

The interview must take place in a confidential setting, normally without the presence of the applicant's family members. It must be carried out by a person who is competent to take into account the circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability (article 15.3(a)).

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<sup>88</sup> Principle of effectiveness, also commonly referred to as 'practical possibility' requires that national rules and procedures should not render the exercise of EU rights impossible in practice, see CJEU Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 16 December 1976, para. 5, CJEU Case C-13/01, *Safalero Srl v. Prefetto di Genova*, 11 September 2003, para. 49.

<sup>89</sup> The EU right to be heard requires a written report of the personal interview. This report should be made available to the applicant before the asylum decision is taken and in time in order to enable the applicant to make comments. See ECRE, *The application of EU Charter to Asylum procedural law*, p. 71.

<sup>90</sup> CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, paras. 85-89.

<sup>91</sup> EXCOM Conclusion no. 30 (XXXIV), 1983. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para. 199. See also Committee against Torture, Concluding Observations regarding France, 3 April 2006, CAT/C/FRA/CO/3, para. 6.

## EU Asylum Procedures Directive

### Article 15 Requirements for a personal interview

(...) 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: (...)

- (c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner

According to article 14.2 APD the requirement of a personal interview may only be waived in two circumstances: 1) "the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available without an interview" or 2) where the determining authority deems the applicant unfit or unable to be interviewed. In such case, the determining authority must consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature (article 14.2(b)). Given the critical importance of the personal interview in the asylum procedure, the determining authority should in any case seek the expert advice of a professional as soon as it is established that the person is unfit or unable to be interviewed.

Article 34.1 APD obliges Member States to conduct a personal interview on the admissibility of the application.

According to article 15.3(e) of the directive, interviews with children must be conducted in a child appropriate manner. Unaccompanied minors enjoy specific guarantees, including the right to a representative (article 25). The best interests of the child must be a primary consideration (article 25.6).<sup>92</sup>

*For more information on child-friendly communication cfr. Module V, section V. Child-friendly communication.*

Article 17 of the APD establishes three important principles that are essential to ensure the quality of decision-making at first instance and are central in a policy based on frontloading: (1) accurate recording of the applicant's statements during the personal interview; (2) the opportunity for applicants to correct mistakes or misrepresentations of what was said during the interview or to clarify misunderstandings before a first instance decision is taken and (3) the right of applicants, their advisers and counsellors to have access to the report, transcript or recording of the personal interview before a first instance decision is taken.<sup>93</sup>

The APD also sets out that applicants "shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;" see article 12.1.(c) and (d).

The right be heard can rely on the good administration principle, see the following CJEU case:

### CJEU - Joined cases C-141/12 Y.S v Minister voor Immigratie, Integratie en Asiel C-372/12 Minister voor Immigratie, Integratie en Asiel v M. and S.

66. *It should be noted from the outset that Article 41 of the Charter, 'Right to good administration', states in paragraph 1 that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the European Union. Article 41(2) specifies that that right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy*

<sup>92</sup> EU Handbook on asylum and migration law and borders.

<sup>93</sup> ECRE, Information Note on the Asylum Procedures Directive, 2014, p. 21

67. *It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, the judgment in Cicala, C-482/10, EU:C:2011:868, paragraph 28). Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application.*
68. *It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in HN, C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.*
69. *Consequently, the answer to the fourth question in Case C-141/12 and the third and fourth questions in Case C-372/12 is that Article 41(2)(b) of the Charter must be interpreted as meaning that the applicant for a residence permit cannot rely on that provision against the national authorities.*

## IX. Time-limits in the asylum procedure

The APD sets out the principle that the examination of an asylum application must be concluded within six months from the time of lodging. However, Member States may extend this time limit for another nine months or even 12 months.

### 1. Lengthy asylum procedures

Very lengthy procedures may result in a long period of uncertainty for applicants in relation to their legal position and could violate the EU principle of good administration and the right to a hearing within a reasonable time as guaranteed by article 47 of the Charter.

Article 31.2 of the APD provides that an asylum decision should, in principle, be taken within six months. The six month time-limit may be extended for a period not exceeding a further nine months, where: (1) complex issues of fact and/or law are involved; (2) a large number of third country nationals or stateless persons simultaneously request international protection, which makes it very difficult in practice to conclude the procedure within the six-month time-limit; (3) where the delay can clearly be attributed to the failure of the applicant to comply with his obligations under article 13 of the Directive (the duty to report to the authorities, to hand over documents, to inform the authorities of his address, to allow the authorities to take finger prints and photographs and to search his belongings).<sup>94</sup>

The EU good administration principle shall ensure that the entire procedure for considering an application for international protection does not exceed a reasonable period of time, which is a matter to be determined by the referring court.<sup>95</sup>

The right to an effective remedy (article 47 of the Charter) entails a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal.

The CJEU has referred to recital 11 of the 2005 Asylum Procedures Directive, which states that it is in the interest of the asylum applicant as well as the State that asylum procedures are concluded within a reasonable time.<sup>96</sup>

The ECtHR has taken into account the length of an asylum procedure in the context of its assessment of the effectiveness of the available remedies under article 13 ECHR. In *M.S.S. v. Belgium and Greece*, the ECtHR found a number of deficiencies in the first instance asylum procedure in Greece. With regard to the length of the appeal proceedings before the Greek Supreme Administrative Court, the ECtHR considered that "swift action is all the more necessary where (...) the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3". It stated that the information supplied by the Council of Europe Commissioner for Human

<sup>94</sup> See APD, See ECRE, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, 2014, pp. 99-100.

<sup>95</sup> CJEU - Joined cases C-141/12 *Y.S v Minister voor Immigratie, Integratie en Asiel* C-372/12 *Minister voor Immigratie, Integratie en Asiel v M. and S*, op. cit.

<sup>96</sup> CJEU, Case C-175/11, *H.I.D and B.A. v. Refugee Applications Commissioner and Others*, Judgment of 31 January 2013, para. 60; CJEU, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011, para. 30.

Rights concerning the length of proceedings illustrated that an appeal to the Supreme Administrative Court did not offset the lack of guarantees surrounding the examination of asylum applications on the merits.<sup>97</sup>

In *B.A.C. v. Greece*, concerning the failure of the Greek authorities to process the applicant's asylum claim and the effect of such a delay on the individual's right to family life, the ECtHR found that the competent authorities had failed to comply with their positive obligation under article 8 ECHR to provide an effective and accessible means of protecting the right to private life.<sup>98</sup> This should have been done through appropriate regulations ensuring that the applicant's asylum application was examined within a reasonable time in order to keep his state of uncertainty to a minimum. In addition, the Court held that there had been a violation of article 13 ECHR in conjunction with article 8 ECHR.

## 2. Time limits for appeals

The right to an effective remedy and the right to a fair trial include a right of access to a court or tribunal. This implies that access to the appeal should not be made impossible or very difficult as a result of national procedural rules.<sup>99</sup>

According to the APD, article 46.4, the right to an effective remedy explicitly sets that time limits on applications to challenge decisions must be of a reasonable length and not make the challenge impossible or excessively difficult.

The CJEU ruled specifically on the content of the right to appeal in connection with a time limit in the Diouf case.<sup>100</sup> The CJEU stressed that "the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action".

According to the ECtHR the exercise of the remedy in the meaning of article 13 ECHR must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. In *Čonka v. Belgium*, the ECtHR stated in the context of article 35 ECHR that "the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy".<sup>101</sup>

The ECtHR has held that time limits must not be applied in a way that prevents litigants from using an available remedy (*Zvolský and Zvolská v. the Czech Republic*)<sup>102</sup>. Practical and effective access to the appeal (*Souza Ribiero v. France*) must be ensured.<sup>103</sup>

These principles are also contained in the Council of Europe Committee of Ministers' Twenty Guidelines on Forced Return, which state that the time-limits to exercise the remedy shall not be unreasonably short; the remedy must be accessible, with the possibility of granting legal aid and legal representation.<sup>104</sup>

## 3. Short time-limits in first instance asylum procedures and in appeal procedures

In the case of *I.M. v. France*,<sup>105</sup> the European Court of Human Rights held that resort to an accelerated asylum procedure to examine the first application of an asylum seeker resulted in **excessively short time limits** for the asylum seeker to present his arguments, lack of access to legal and linguistic assistance, and a series of material and procedural difficulties, exacerbated by the asylum seeker's detention, which rendered the legal guarantees afforded to him merely theoretical, in breach of article 13 ECHR. While this case referred to an accelerated asylum procedure, the European Court of Human Rights considered it in terms of the effectiveness of the remedy against the risk of arbitrary *refoulement*, an issue central to Dublin procedures cases (see *MSS v. Belgium and Greece*).

The Council of Europe *Guidelines on human rights protection in the context of accelerated asylum procedures*, set out comprehensive standards that apply where both procedural and substantive rights are particularly likely to be jeopardised by fast-track procedures.<sup>106</sup> The Guidelines stipulate

<sup>97</sup> *M.S.S. v. Belgium and Greece*, para 320. See also *A.C. and others. v. Spain*, ECtHR, Application No. 6528/11, Judgment of 22 April 2014, para. 103.

<sup>98</sup> *B.A.C. v. Greece*, ECtHR, Application No. 11981/15, Judgment of 13 October 2016.

<sup>99</sup> ECRE, Information Note on the Asylum Procedures Directive, 2014, p. 141

<sup>100</sup> C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, para. 66

<sup>101</sup> ECtHR, *Čonka v. Belgium*, op. cit., para. 46.

<sup>102</sup> *Zvolský and Zvolská v. the Czech Republic*, ECtHR, Application no. 46129/99, Judgment of 12 February 2003, para. 51

<sup>103</sup> *Souza Ribiero v. France*, op. cit., para. 95

<sup>104</sup> *Twenty Guidelines on Forced Return*, Guideline 5.2.

<sup>105</sup> *I.M. v. France*, ECtHR, Application No. 9152/09, Judgment of 2 February 2012.

<sup>106</sup> *Guidelines on human rights protection in the context of accelerated asylum procedures*, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies (European Guidelines on accelerated asylum procedures).

that throughout the proceedings, decisions must be taken with due diligence (Guideline VIII) and provide that even in accelerated procedures, asylum seekers must have a reasonable time to lodge their application, and there must be sufficient time to allow for a full and fair examination of the case (Guideline IX).

*For more information on time limits in cases involving children cfr. Module V, section III.8 Reasonable time requirement.*

## X. The standard and burden of proof

Generally, in an asylum procedure, the burden of proof is shared among the applicant and the Government. The ECtHR established in its case-law (*Saadi v. Italy*, para. 129), that it was in principle for the applicant to adduce evidence capable of proving that there were substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to article 3; and **that where such evidence was adduced, it was for the Government to dispel any doubts raised by it.**

Also, the UNHCR has pointed out that, “while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.”<sup>107</sup>

Asylum applicants deserve “the benefit of the doubt” as emphasized in the [UNHCR Handbook](#):<sup>108</sup>

*After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements... [I]t is hardly possible for a refugee to ‘prove’ every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.*

The burden of proof on the applicant cannot be excessive (*MSS v Belgium and Greece*, paras. 352 and 389).

To establish “well-foundedness” of a fear of persecution, persecution must be proved to be reasonably possible.<sup>109</sup> The authorities should undertake an analysis of the situation in the country of origin in order to determine the well-foundedness of the fear of persecution. The UNHCR Excom considers that the situation must be assessed on an individual level, and that the use of “safe countries” lists must not be blind and automatic.<sup>110</sup>

The “General situation in another country, including the ability of its public authorities to provide protection, has to be established *proprio motu* by the (...) authorities”, (*J.K. and other v. Sweden*, Application No. 59166/12, Judgment of 23 August 2016, para. 98), especially “when information about such a [Article 3] risk is freely ascertainable from a wide number of sources” regardless of the applicant’s conduct (*F.G. v. Sweden*, Application No. 43611/11, Judgment of 23 March 2016, para. 126; *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 131-133 and *M.S.S. v. Belgium and Greece*, op. cit., para. 366.)

## XI. Safe country concepts

The safe third country concepts (see first country of asylum, article 35 APD, safe country of origin article 36 APD, and safe third country, article 38 APD) do not change the obligation on the State to assess each case individually through fair procedures.

The application of a safe country of origin concept undermines the purpose of the asylum procedure, which is the individual examination of the protection needs of the asylum seeker. Although the APD clearly defines the grounds on which the examination of asylum claims may be accelerated, a number of the grounds listed are open to wide interpretation and are not directly linked to the substance of the asylum application.

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<sup>107</sup> UNHCR Handbook, para. 196.

<sup>108</sup> Handbook and guidelines on procedures and criteria for determining refugee status, reissued December 2011, paras 203-204. See also Article 4 of the Qualification Directive - Recast (Annex II.)

<sup>109</sup> Ibid., paras. 16-17.

<sup>110</sup> Conclusion No. 87 (L) General, ExCom, UNHCR, 50th Session, 1999, para. (j).



The “safe country of origin” and “safe third country” concepts in the APD are currently optional, so Member states may choose whether to use them (See articles 36-39 and articles 25, 31 and 33).

Article 36 APD provides that the presumption that a country is safe may be used after “an individual examination of the application” and can be rebutted by the particular applicant.

The applicable criteria for considering countries as safe third countries are set in the APD as follows (article 38):

- a. life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b. there is no risk of serious harm as defined in Directive 2011/95/EU;
- c. the principle of non-refoulement in accordance with the Geneva Convention is respected;
- d. 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
- e. the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

The principle of non-refoulement applies both to transfers to a State where the person will be at risk (direct refoulement), and to transfers to States where there is a risk of further transfer to a third country where the person will be at risk (indirect refoulement). The Grand Chamber of the European Court of Human Rights, in *Hirsi Jamaa and Others v. Italy*,<sup>111</sup> clarified that the sending State must “ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced.”

The refugee definition and the notions of persecution and serious harm require an individualized assessment of specific personal characteristics which may place a person at risk of ill-treatment in his or her home country.

A return that exposes applicants to the risk of refoulement, and deprives them of rights guaranteed by international law, including full access to rights under the Refugee Convention (articles 2-34) and procedural guarantees violates Contracting States’ international obligations regardless of whether the third country is listed as a ‘safe third country’.

In addition, the “safe country” concept is discriminatory. The 1951 Refugee Convention lays in its Article 3 down a duty on states to treat refugees without discrimination based on their country of origin.<sup>112</sup>

**N.S. and M.E.**, CJEU, Cases Nos. C-411/10 and C-493/10, Judgment of 21 December 2011

**Facts:** The applicants in both cases were claiming asylum in countries (UK and Ireland) after travelling via Greece.

**Analysis:** EU law precludes the application of a conclusive presumption that the Member State indicated as responsible observes the fundamental rights of the European Union. The finding that it is impossible to transfer an applicant to the identified Member State entails that the Member State which should carry out that transfer must continue to examine which other Member State could be responsible for the examination of the asylum application.

94. *It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.*

**Ilias and Ahmed v. Hungary**, ECtHR, Application No. 47287/15, Judgment of 21 November 2019

**Facts:** The case concerned two Bangladeshi nationals who transited through Greece, the former Yugoslav Republic of Macedonia and Serbia before reaching Hungary, where they immediately

<sup>111</sup> *Hirsi Jamaa and Others v. Italy*, op. cit.

<sup>112</sup> United Nations Convention relating to the Status of Refugees, Geneva, 28 July 1951, UN Treaty Series vol. 189, 137, Article 3.

applied for asylum and were held in a transit zone for 23 days. They were then sent back to Serbia based on a [2015 Government Decree](#) listing Serbia as a "safe third country". The domestic authorities also held that the applicants had neither special needs that could not be met in the transit zone, nor any particular individual circumstances indicating that Serbia would not be a safe third country for them.

**Analysis:** The Grand Chamber unanimously found a procedural violation of Article 3, on the grounds that the Hungarian authorities had decided to return the applicants to Serbia without conducting a prior detailed individual assessment of their asylum claims and/or risk of ill-treatment in the country of return. The Court found that even if a Contracting Party chooses to rely on the safe country determinations and/or conduct admissibility procedures without in-merits consideration of the asylum claim, it is bound to carry out a rigorous assessment as to whether the person will in practice be able to access protection in the country concerned, and as a result protected against treatment incompatible with Art.3 ECHR.

134. *The Court would add that in all cases of removal of an asylum seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU Member State or not or whether it is a State Party to the Convention or not, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned.*
137. *Where a Contracting State removes asylum seekers to a third country without examining the merits of their asylum applications, however, it is important not to lose sight of the fact that in such a situation it cannot be known whether the persons to be expelled risk treatment contrary to Article 3 in their country of origin or are simply economic migrants. It is only by means of a legal procedure resulting in a legal decision that a finding on this issue can be made and relied upon. In the absence of such a finding, removal to a third country must be preceded by thorough examination of the question whether the receiving third country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3 of the Convention. [...] If it were otherwise, asylum-seekers facing deadly danger in their country of origin could be lawfully and summarily removed to "unsafe" third countries. Such an approach would in practice render meaningless the prohibition of ill-treatment in cases of expulsion of asylum seekers.*
152. *The Convention does not prevent Contracting States from establishing lists of countries which are presumed safe for asylum seekers. Member States of the EU do so, in particular, under the conditions laid down by Articles 38 and 39 of the Asylum Procedures Directive (...). The Court considers, however, that any presumption that a particular country is "safe", if it has been relied upon in decisions concerning an individual asylum seeker, must be sufficiently supported at the outset by an analysis of the relevant conditions in that country and, in particular, of its asylum system.*
154. *The Court notes, however, that in their submissions to the Court the respondent Government have not mentioned any facts demonstrating that the decision-making process leading to the adoption of the presumption in 2015 involved a thorough assessment of the risk of lack of effective access to asylum proceedings in Serbia, including the risk of refoulement.*
160. *In the Court's view the asylum authority and the national court made only passing references to the UNHCR report and other relevant information, without addressing in substance or in sufficient detail the concrete risks pinpointed there and, in particular, the risk of arbitrary removal in the two applicants' specific situation (...). Although the applicants were able to make detailed submissions in the domestic proceedings and were legally represented, the Court is not convinced that this meant that the national authorities had given sufficient attention to the risks of denial of access to an effective asylum procedure in Serbia.*
161. *It is significant, furthermore, that the risk of summary removal from Serbia to other countries could have been alleviated in this particular case if the Hungarian authorities had organised the applicants' return to Serbia in an orderly manner or through negotiations with the Serbian authorities. However, the applicants were not returned on the strength of an arrangement with the Serbian authorities but were made to cross the*

*border into Serbia without any effort to obtain guarantees (...). This exacerbated the risk of denial of access to an asylum procedure in Serbia and, therefore, of summary removal from that country to North Macedonia and then to Greece (...).*

163. *In sum, having regard, in particular, to the fact that there was an insufficient basis for the Government's decision to establish a general presumption concerning Serbia as a safe third country, that in the applicants' case the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece, and that the Hungarian authorities exacerbated the risks facing the applicants by inducing them to enter Serbia illegally instead of negotiating an orderly return, the Court finds that the respondent State failed to discharge its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before removing the applicants from Hungary.*

164. *These considerations are sufficient for the Court to find that there has been a violation of Article 3 of the Convention.*



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